PARTIES:	DENNIS WILLIAM HART AND: ANDREW WRENN AND: AUSTRALIAN BROADCASTING CORPORATION
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE NO:	727 of 1990
DELIVERED:	19 January 1995
JUDGMENT OF:	Mildren J

CATCHWORDS:

Defamation - Justification - Defence of Qualified Privilege - Whether common law extended to allow media to publish in good faith apparently reliable information from a person with an apparent duty or interest to disclose it to general public - Whether an occasion of Qualified Privilege existed - Whether first and second defendant had social or moral duty to reveal defamatory material to general public

Cases

Adam v Ward [1917] AC 309, considered
Guise v Kouvelis (1947) 74 CLR 102, considered
Baird v Wallace-James [1916] 85 LJPC, mentioned
Theophanous v Herald and Weekly Times Ltd (1994) 124 ALR 1, explained
Stephens v West Australian Newspapers Ltd (1994) 124 ALR 80, explained
Toogood v Spyring (1834) 1 CM & R 181; 149 ER 1044, considered
Stuart v Bell (1891) 2 QB 341, considered
London Association for Protection of Trade v Greenlands Ltd [1916] 2 AC 15, considered
Toyne v Everingham (1993) 91 NTR 1, explained, distinguished

Pervan v North Queensland Newspaper Co Ltd (1993) 178 CLR 309, considered
Allbut v The General Council of Medical Education and Registration (1889) 23 QBD 400, distinguished
Dunford Publicity v News Media Ownership Ltd and Gordon [1971] NZLR 961, distinguished
Australian Broadcasting Corporation v Comalco Ltd (1986) 68 ALR 259, considered

REPRESENTATION:

Counsel:

Plaintiff:	Mr Reeves with Mr Silvester
First Defendant:	Mr Lynch with Mr Southwood
Second Defendant:	self represented

Solicitors:

Plaintiff:	Messrs Mildrens
First Defendant:	Messrs Waters James McCormack
Second Defendant:	self represented

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No 727 of 1990

BETWEEN:
DENNIS WILLIAM HART
Plaintiff

AND:
ANDREW WRENN
First Defendant

AND:
AUSTRALIAN BROADCASTING
CORPORATION
Second Defendant

CORAM: MILDREN J

REASONS FOR RULING
(Published 19 January 1995)

Both defendants have raised the defence of qualified privilege. It is my function to determine, as a matter of law, whether the occasion is privileged based upon the undisputed facts. If the facts are in dispute, those facts must be resolved by the jury. If the occasion is privileged, the question of whether or not the defendants have abused the privilege is a question for the jury. (see: Adam v Ward [1917] AC 309 at 318; Guise v Kouvelis (1947) 74 CLR 102).

In Guise v Kouvelis, Dixon J, at 117 quoted with approval the following passage from the speech of Lord Loreburn in Baird v Wallace-James (196) 85 L.J.P.C. 193 at 198:

> "In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty"

A similar view was accepted by Latham C.J. (with whom McTiernan and Williams JJ agreed) at 110.

The test to be applied, according to the common law before the decisions of the High Court in Theophanous v Herald and Weekly Times Ltd (1994) 124 ALR 1, and in Stephens v Western Australian Newspapers Ltd (1994) 124 ALR 80, was taken from the well-known and off-cited passage from the judgment of Parke B in Toogood v Spyring (1834) 1 CM & R 181 at 193; 149 E.R. 1044 at 1049-1050 of which Brennan J, in Stephens said at 96:

> "The material enquiry in a case where qualified privilege is pleaded is whether, to take the words of Parke B in Toogood v Spyring, the defamatory matter was published "in the discharge of some public or private duty, whether legal or moral, or in the conduct of [the publisher's] own affairs, in matters where his interest is concerned."

In addition to these statements of general principle, there are a number of other relevant factors. The occasion of privilege depends on the subject and circumstances of the publication, not on the state of mind of the defendant: Stephen, at 93, per Brennan J. As to moral or social duty, the judge is to be guided by the dictum of Lindley L.J. in Stuart v Bell (1891) 2 Q.B. 341 at 350:

> "I take moral and social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."

That statement has to be adjusted to read 'Australian people' rather than English people, and to recognize that in a multicultural society "in such matters conceptions of social duty or of interest and of propriety are not uniform:" Guise v Kouvelis, per Dixon J, at 120. The judgment must distinguish between matter which would show

whether or not the occasion was privileged and matter which would be solely evidence of malice: London Association for Protection of Trade v Greenlands Ltd [1916] 2 AC 15 per Lord Buckmaster L.C. at 23. It is generally necessary that not only the person who makes the communication has the relevant duty or interest, but that the recipient of the information has a corresponding interest to receive it: Adam v Ward (1917) A.C. 309 at 334 per Lord Atkinson; although the privilege is not necessarily lost simply because the publication has been read, see or heard by persons having no such legitimate interest: Stephens, at 113 per McHugh J; Toyne v Everingham (1993) 91 NTR 1 at 14, per Angel J. The defence of qualified privilege is not subject to rigid categories, (Fleming, The Law of Torts, 7th Ed., p538), and the law has not restricted the right to make such communications as attract the privilege within any narrow limits: Toogood v Spyring, supra: Toyne v Everingham, at 13; Stephens at 114; but the burden of establishing the facts upon which the Judge may find the occasion to be privileged rests upon the defendants: Toyne v Everingham, at 12.

However, since Theophanous and Stephens, there now seems to be recognised by a majority of the judges of the High Court that, as a consequence of the implied constitutional freedom to publish material discussing government and political matters, of and concerning members of the Parliaments of the Commonwealth and of the States and the internal Territories, which relate to the performance by such members of their duties as members of Parliament or parliamentary committees, or in relation to the suitability of persons for office as members of Parliament, discussion of “political matters” is an occasion of qualified privilege and there is no requirement for the defendant to allege or prove any reciprocal duty or interest to publish the matter or receive the matter complained of, if it is discussion of ‘political matters’: Theophanous, at 25-26 per Mason CJ, Toohey and Guadron JJ; Stephens, at 90, per Mason CJ, Toohey and

Gaudron JJ and at 109 per Deane J. I say this with some hesitation because it may be suggested that the position of Deane J is not entirely clear; but as he Honour concurred in the answer to question (b) in the case stated given by the majority in Stepens, one may presume he was prepared to accept the reason given by the other members of the majority for that answer as well, notwithstanding that the reason given did not go as far as his own views would indicate.

At first blush, the passage in the judgment of Mason CJ, Toohey and Gaudron JJ in Theophanous, at 25-26, concerning qualified privilege, gave me the impression that their Honours had decided that whenever there was discussion of political matters, (as that expression is to be understood having regard to the discussion of it earlier in their Honours' joint judgment) the matter would be an occasion of qualified privilege irrespective of the subject matter; but on further consideration I have reached the conclusion that their Honours were confining their observations to those occasions when the implied constitutional freedom would exist - in other words, the necessary reciprocal interest and duty must arise whenever there was material published discussing political matters of an concerning serving politicians or political candidates, but not necessarily otherwise. It is only in this sense that it would have been necessary for their Honours to review the defence of qualified privilege in the light of the implied constitutional freedom. There are a number of other aspects of their Honours' observations on this topic in both Theophanous and Stephens which I have found to be puzzling, but it is no necessary for me to discuss them, because in this case, the plaintiff is neither a serving politician nor a political candidate and therefore it cannot be presumed that there is reciprocity of interest in the broadcast. The majority view does not otherwise, in my opinion, affect the common law. Indeed it was not submitted otherwise by any of the parties in this case.

Mr Lynch, counsel for the second defendant, and Mr Wrenn both based their submissions on obiter dicta in the dissenting judgment of McHugh J in Stephens which, it is trite to say that I am no bound to follow. Nevertheless it was submitted that I ought to follow the views expressed by McHugh J, and it is to that question which I now must turn.

McHugh J found that there was no implied constitutional freedom which would render the defendant immune from suit in an action for defamation. He also found in Stephens, at 111, that because the defamatory matter consisted of comment and not fact, and that the comment was not published in the course of publishing facts the defence of qualified privilege did not arise in that case; and that if the matter was protected at all, it was protected by the defences of fair comment or justification, not qualified privilege. Dawson J was of the same opinion: Stephens, at 109. No authorities were cited for these propositions.

The reason for this seems to have rested upon the discussion in Pervan v North Queensland Newspaper Co Ltd (1993) 178 CLR 309 of the distinction between those occasions where comment is the subject only of the defence of fair comment and those where comment may itself be privileged. In Stephens at 116, McHugh J said:

> It is true that, if a comment is published in respect of a subject of public interest, a defence of fair comment is open even though the publication does not set out the facts upon which the comment is based. As long as the subject matter of the comment is indicated with sufficient clarity, the defendant may establish the fairness of the comment by proving any fact which would justify its fairness. Furthermore, in many situations, the existing categories of qualified privilege protect bare defamatory comment. But if the doctrine of qualified privilege at common law was extended beyond the existing categories

> to cover the publication to the general public of bare defamatory comment made by a person with a special knowledge of a subject of public interest, it would render the defence of fair comment in such a situation largely, if not entirely, superfluous. If the defence of fair comment or the existing categories of qualified privilege do not protect the publication of a bare defamatory comment, it is difficult to see how the public interest is served by extending the defence of qualified privilege to protect that comment. In such a case, the public is not given the facts that are the basis of the comment and the public is not in a position to make any judgment about the fairness of a comment which, by hypothesis, is unfair and defamatory." (emphasis mine)

In this case, it is not contented that the statements made by the defendants in the broadcast were bare defamatory comment, and no submissions were made by the plaintiff even to the effect that some of the allegations made were bare comment. If such a submission had been made, it may have become necessary for me to hear submissions concerning whether the issue of what is fact or what is comment ought to be left to the jury, or whether I could decide that question for myself: Pervan, at 317; and to further consider whether the consequence of a finding that some of the allegations were bare comment had the result that they were not protected and furnished possible evidence of actual malice in relation to that which fell within the privilege: see Adam v Ward, at 340 per Lord Atkinson. The plaintiff's broad submission was that the opinion of McHugh J in the critical passages upon which the defendants relied was obiter dicta in a dissenting judgment, did not reflect the present law, and was not in accordance with the views of the majority of the judges on this point. The plaintiff's second submission was that even if the critical passages of the judgment of McHugh J did reflect the present law the correct conclusion was that the occasion was not privileged.

There is much to be said in favour of the first of these submissions. Clearly the majority of the court did not intend to alter the existing law on the question of qualified privilege except to the extent that I have already discussed. Brennan J., who was also in the minority, expressed the view that where a person, not having the status of public body, makes a defamatory statement of an individual in circumstances including the discussion and formulation of judgments relating to government, government institutions and political matters, or in relation to the conduct of government and governmental institutions, the occasion will be subject to qualified privilege if (a) the subject matter of the defamatory statement is a matter of relevant public interest, (b) the report of the third party's defamatory statement who is reasonably believed to have particular knowledge is fair and accurate, and (c) the publisher publishes any reasonable response which the party defamed wishes to make: (see pps 103-105). It is clear on the facts of this case that the second defendant has not established facts sufficient to meet each of these criteria. There is for example no evidence of (c) above, the only evidence being the uncontroverted evidence of the plaintiff who said he was not contacted by the second defendant before the program was broadcast. There is no evidence that the second defendant attempted to contact the plaintiff to seek his response after the program was broadcast.

The passages in the judgment of McHugh J upon which the defendants relied are to be found at pps 114-115. His Honour concluded that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. It was not submitted that as the plaintiff was a sergeant to police and at the time the officer in charge of the drug squad, the broadcast concerned the exercise of his functions and powers, for example in relation to the investigation of offences, to arrest, (with or without warrant), of search and seizure etc., such as

might have fallen within the relevant legitimate interest. Assuming the plaintiff was an official, little of the broadcast is concerned with those matters. The broadcast is mainly, albeit not exclusively, concerned with the plaintiff's private conduct, in allegedly smoking cannabis in the drug squad office when no-one else was present; allegedly growing cannabis at home; allegedly deliberately damaging the property of a citizen against whom allegedly held he a grudge, albeit whilst on duty; allegedly stealing or not properly accounting for drugs in the drug squad office; allegedly "blowing the cover" of a police informer and risking her life; allegedly "tipping off" a businessman whose premises were to be raided; allegedly conspiring to arrest the first defendant on false charges; and allegedly threatening the life of a police informer. In each of those instances the plaintiff's acts, if true, fell outside his duty as a police officer, and were not instances of his carrying out his duty, albeit improperly: c.f. Lackersteen v Jones (1988) 92 FLR 6 at 46.

McHugh J at pp114-115 said:

> “Accordingly, it is now appropriate for the common law to declare that it is for "the common convenience and welfare" of Australian society that the existing categories of qualified privilege be extended to protect communications made to the general public by persons with special knowledge concerning the exercise of public functions or powers or the performance of their duties by public representatives or officials invested with those functions and powers. The scientist who discovers that lack of governmental action is threatening the environment, the "whistleblower" who observes the bureaucratic or ministerial "cover up", and the investigative journalist who finds that grants of public money have been distributed contrary to the public interest are examples of persons who have special knowledge of matters affecting the exercise of public functions or powers or the performance of duties by public

representatives or officials. If such persons, acting honestly, inform the general public of what they know about such matters, their publications will be made on an occasion of qualified privilege. The defence of qualified privilege will be available even if the information is subsequently proved to be incorrect. Thus, the occasion will still be privileged even if the "whistleblower" mistakenly but honestly publishes information which defames another person or the scientist or journalist honestly overlooks some fact which undermines the thesis of his or her claim. The publication of erroneous information may be evidence of malice in some cases. But by itself an error in the published information will not destroy the occasion of privilege.

No doubt in some exceptional cases the information published may be so unrelated to the kind of powers or functions invested in the person defamed that a defence of qualified privilege could not be upheld. But, speaking generally, the occasion will be privileged whenever a person with the requisite special knowledge honestly publishes information about the functions or powers or the performance of duties by public representatives or officials for the purpose of informing the public about such matters. The officiousness of the person publishing the information can never be decisive against the existence of an occasion of qualified privilege, although it may be relevant in determining whether there was a duty to publish to the world at large.

Moreover, if the information is to reach the general public, it will often be necessary for the person wishing to convey that information to use a media outlet of wide circulation. In *Attorney-General v Times Newspapers Ltd*, [1974] AC 273 at 315 Lord Simon of Glaisdale pointed out that:

> People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be

> conducted vicariously, the public press being a principal instrument.
>
> I see no difficulty, having regard to the case law, in holding that the media has an ancillary privilege to publish in good faith apparently reliable information obtained from a person who has an apparent duty or interest in making the information available to the public. However, where the media outlet relies on an ancillary privilege derived from the privilege of the person making the statement, the outlet's claim for qualified privilege will be lost if the privilege of the original holder is lost."

It is my opinion that this passage extends the common law further than has ever previously been recognised and is not consistent with the authorities which discuss the limited circumstances under which a communication to the public at large is warranted, and is inconsistant with the majority views in Stephens itself. Further, even if I am wrong in this conclusion I do not consider that the defendants have established facts upon which I am able to find as a matter of law that the occasion was privileged. The defendants contended that Mr Wrenn was a whistleblower, that he was a person with special knowledge of the exercise by an official of his powers and functions, and that the occasion was therefore privileged. The facts upon which this contention rests are that on 8 January 1989 Wrenn, after his arrest in December 1988, gave to the Commissioner of Police a statement (Ext P22) concerning his arrest, expecting it to be investigated. This statement details the circumstances of his arrest. It does not allege a conspiracy. It purports to be a purely factual account of the circumstances. In December 1989, he decided, having found out more information in the meantime, to take his complaints to Mr Conran, then the Secretary of the Department of Law. On 20 December 1989 he had an interview with Mr Conran, which was taped, in which he made a number of allegations about the plaintiff which were subsequently repeated on the program, together with some further allegations. The government decided to

establish an Oversight Committee to ensure that these allegations would be properly investigated by the police. The members of the Oversight Committee included a representative from the Ombudsman's office, a representative of the police force and a representative from Mr Conran's office. Wrenn was assured that an "independent inquiry" into his complaints would be conducted, although it was not clear precisely what was meant by that. Obviously the intention was that the allegations would be investigated by the police under the supervision of the Oversight Committee. There is no evidence to suggest that anything more than that was promised to Wrenn. That Committee met Mr Wrenn in January 1990 when he was asked to put his allegations into writing so that they might be investigated. Wrenn submitted a formal complaint dated 4 January 1990 to the Police (Ext p23). At this time Mr Wrenn was still a Sergeant of Police in the Northern Territory Police Force, and still on duty. In February 1990, he was asked by Det. Superintendent Green on two occasions to finish his statement, but was unable to do so. Towards the end of March 1990, Green ordered Wrenn to have his statement completed within a short time. Wrenn complied, but on the same day as he gave his statement to Green, he gave a copy of it to the second defendant. Indeed he had been to see the second defendant as early as February about this matter. Wrenn said that Green ordered him to give his statement to Det. Superintendent Bullock whom he claimed was in the chain of command at the time of his arrest, and, he believed, involved in surveillance of him after his arrest. Wrenn had been the subject of an investigation by the Bureau of Criminal Intelligence in 1989 covering his involvement in drugs. This investigation was code named "Operation Banana". Wrenn knew at that time that he was the subject of surveillance. He also claimed that "Rhonda" acted as an agent provocateur for the police and in that capacity tried to sell him cannabis. There is no evidence that "Rhonda" did act as an agent provocateur in relation to Wren, although there is evidence that suggests she may have supplied information to the police about Wrenn and there is

also evidence that she tried to interest Wrenn into buying cannabis.

The police began to investigate the allegations soon after receiving Wrenn's statement. The investigations were into three areas; the conduct of the plaintiff; the circumstances concerning a large cannabis plantation at Fergusson River involving two serving police and two former police officers and the investigation by police of that matter (which at that time had not come on for trial); and the circumstances surrounding the relationship of another police officer with "Rhonda". The plaintiff was not involved in the Fergusson River matter, except peripherally. On 30 March 1990, before the broadcast, Green had already interviewed the plaintiff once. Precisely what other enquiries had been made at this stage does not appear from the evidence, but there is evidence that Green had interviewed some other police officers before the broadcast (see Ext p32 and p33). In early April 1990, the police decided that it was necessary to engage the services of Mr Robert Mulholland QC, who had been one of the counsel involved in the Fitzgerald Enquiry, to oversee and co-ordinate the police enquiries, and a submission was made to the relevant minister, who approved Mr Mulholland's appointment. Hearing that the second defendant was about to publish a programme about the matter, the government decided to announce Mr Mulholland's appointment publicly. This announcement was made at or about noon on 20 April 1990. The second defendant's broadcast was made at 7:30pm that same evening. It occupied the whole of the "7:30 Report" program, and immediately followed news items published by Channel 8, Darwin at 6:30pm and by ABC News on its own station at 7:00pm, concerning the investigation and Mr Mulholland QC's appointment. In neither of these news broadcasts were details given of Mr Wrenn's allegations, although the subject matter of the enquiry was made public in broad general terms, and on the Channel 8 news the plaintiff was identified as one of the persons to be investigated both by being named and by pictures of him.

A shortened version of the program was also broadcast by the second defendant throughout the rest of mainland Australia. The plaintiff was not named in the program; nor was his face shown. He has been identified only by those who knew extrinsic facts. In Darwin, this included some persons who watched both the Channel 8 News and the 7:30 Report. However the evidence leads to the conclusion that he was identified by a large number of serving police officers in the Northern Territory Police Force in Darwin.

Wrenn claimed that he felt he had a social and moral obligation to make the circumstances known to him public, and that is why he went to the second defendant and provided it with the information the subject of the 7:30 Report broadcast. However, as previously noted, Wrenn's motives are not relevant; the question of whether or not the occasion was privileged depends upon the subject and circumstances of the publication.

There is no evidence that the police enquiry into the plaintiff's conduct carried out or to be carried out under the supervision of the oversight committee and or Mr Mulholland QC was likely to be other than a fair and proper investigation. Wrenn's objections related to certain particular police officers being involved in the inquiry, viz., Green and Bullock. There is some evidence it may have been more appropriate if Bullock was not involved so as to ensure that there was an appearance of lack of bias by the investigators: see the evidence of former Assistant Commissioner Grant tr.p 1010. However, the program was not concerned with the question of whether or not the enquiry would be fairly conducted, nor with questions related to the ability of those conducting it to arrive at the truth. The program concentrated on the alleged misconduct of the plaintiff which was to be but one part of the subject matter of the enquiry.

In these circumstances, there is nothing to suggest that

Wrenn, in revealing what he knew or thought he knew to the second defendant or to the public, was a whistleblower with special knowledge observing a bureaucratic cover-up, who was under a moral or social duty to reveal this information to the general public.

I should add that the grounds above upon which the defendants ultimately relied to establish qualified privilege were not those pleaded in the Defences, which are as follows:

> "12. Further the said words and pictures were published on an occasion of qualified privilege.
>
> PARTICULARS
>
> (i) Members of the Australian and/or Northern Territory public have an interest in the absence and/or presence of corruption and impropriety within the Northern Territory Police Force and in relation to each of its members including X and in particular an interest in the following subjects:
>
> (a) The Northern Territory Police Force had a reputation for being free of corruption.
>
> (b) The Northern Territory Police Force had a reputation as not having internal problems as bad as those perceived to exist within Police Forces in other States.
>
> (c) Allegations of sex, drugs, corruption and cover up had been made to the Northern Territory Government, by persons including a serving Police Sergeant, a prostitute and a Police Informer.
>
> (d) The allegations referred to in (c) above included allegations concerning X.
>
> (e) On 26 April, 1990 the Northern Territory Government announced that it had appointed Mr Bob Mulholland QC from Brisbane to oversee three sensitive Police enquiries into corruption within the Police Force. His brief was wide ranging.
>
> (f) Mr Mulholland was Counsel assisting the

Fitzgerald Inquiry into inter alia possible corruption within the Queensland Police Force.

(g) The First Defendant was arrested and charged in December, 1988 in relation to allegations that he had possessed and used marijuana.

(h) At all times the First Defendant claimed that he was arrested on false information.

(i) The charges against the First Defendant were withdrawn some three weeks after they were laid.

(j) Subsequent to and as a result of the bringing of the charges, the First Defendant's career within the Northern Territory Police Force was adversely affected.

(k) X participated in the conversations and events and uttered words to the effect of those referred to in paragraph 4 of the Statement of Claim at pages 3 and 5 Amended 10 to 11.

(l) X had a close association with a Darwin Night Club owner who was a suspected drug dealer.

(m) The First Defendant believed that X had frustrated attempts to conduct raids on premises owned by the said Darwin Night Club owner.

(n) Dean Richardson had told the First Defendant that marijuana had been grown on the station and available at the Club referred to at page 6.1 of paragraph 4 of the Statement of Claim.

(o) Police raids on the Night Club revealed nothing.

(p) The First Defendant followed up leads from information given to him by Dean Richardson.

(q) X attempted to compromise the first Defendant with assistance of a prostitute referred to as "Rhonda".

(r) X discovered a relationship between Rhonda and another detective.

(s) Rhonda claimed that X arranged for drug

dealers and others to be advised that Rhonda was a Police informant.

(t) Rhonda attempted to sell marijuana to the First Defendant.

(u) Heroin worth more than $40,000,000.00 (40 million) was seized in Darwin the week before 26 April, 1990.

(v) X and another detective arranged for the tape recording of a conversation between Rhonda and her detective boyfriend.

(w) X took the said tape recording to her superiors.

(x) Rhonda was encouraged by Senior Police Officers to leave Darwin.

(y) Some Police wanted Rhonda to speak to the member of Government who was a friend of Rhonda's detective boyfriend.

(z) Rhonda believed her life was at risk as a result of it being known she was a Police informer.

(aa) The First Defendant believed that Senior Police were getting misleading information as a result of hearsay and rumour designed to discredit him.

(ab) The identity of X, so called, prominent businessman accused of dealing in drugs and a member of government could not be published.

(ac) The Second Defendant was aware of the identities of the persons referred to in (ab) above.

(ad) As a result of the broadcast, Rhonda may get some Police protection in return for the information she supplied to Police.

(ae) The Northern Territory Government and Police Force were aware of the allegations of the First Defendant and Rhonda for some weeks prior to the broadcast.

(af) Mr R Mulholland QC was given the widest possible brief to analyse all files to satisfy himself of the need or otherwise for continuing investigations.

(ag) X was a Public Servant and a detective in the Northern Territory Police Force.

(ii) The Second Defendant owed a social and moral duty to inform members of the Australian and/or Northern Territory public about the possibility of corruption and impropriety within the Northern Territory Police Force and in relation to its members including X.

(iii) the said words and pictures were published in pursuance of a social and moral duty to persons who had a corresponding duty or interest to receive them.

(iv) The said words and pictures were published in the protection of a common interest to persons sharing the said interest."

Leaving aside the developments in Theophanous and Stephens, the authorities on qualified privilege show that historically the courts have only rarely concluded that members of the mass media have any general duty to its reading or viewing audience to communicate matters of public interest. The occasions where the mass media have succeeded in this defence have generally been concerned with publications in reply to attacks on the plaintiff or some other person which had been published to the world at large e.g. Adam v Ward, supra; Loveday v Sun Newspaper Limited and Another (1937-1938) 59 CLR 503; Cavenagh v Northern Territory News Services Limited (1988-1989) 96 FLR 268 (Rice J). The rarity of occasions where the privilege has succeeded in other situations may be illustrated by the fact that McHugh J in Stephens at 113 referred to but two such instances, viz Allbutt v The General Council of Medical Education and Registration (1889) 23 QBD 400 and Dunford Publicity v News Media Studio Limited Ownership Limited and Gordon: Dunford v News Media Ownership and Gordon [1971] NZLR 961, both of which were cases where the information came from an official or quasi-official source. In Allbutt, the General Council of Medical Education and Registration had a statutory duty to maintain the registrar of medical practitioners and the power to strike off medical practitioners guilty of infamous conduct. Having struck off

the plaintiff, the Council issued a statement to this effect and the grounds of its decision. The Court of Appeal held that the occasion was privileged, and that the public at large had an interest in the proceedings. In Dunford a government Minister, who had responsibility for the organisation of a road-safety contest, having been misled by the organisers, requested a newspaper to publish a ministerial statement, which the newspaper did. Macarthur J upheld the claim for privilege, at 968:

> "Here, the Minister was misled by the organisers of the road safety contest. It was the duty of the Minister to ensure, and it was in the interests of the public, that his statement on the matter be given wide circulation. The wide circulation afforded by publication in a newspaper was proper. The matter was undoubtedly a matter of public interest. The Minister requested Truth to publish his statement. I bear in mind the necessity for distinguishing between "the right which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest with a duty of the sort which gives rise to an occasion of qualified privilege" see The Globe and Mail Ltd v Boland (1960) 22 DLR (2d) 277, 280. In all the circumstances of the present case, however, I think it may properly be said that Truth was under a duty to publish the Minister's statement together with any factual information necessary to identify the road safety competition referred to in that statement."

In both of these cases, the statement published was from an official a quasi-official source. As Pincus J observed in Australian Broadcasting Corporation v Comalco Ltd (1986) 68 ALR 259 at 342:

> "One can see that where there is a current national, or even local, crisis, publication of aterial designed to inform the public, or a section of it, of matter which it is reasonably thought to be essential that they know may well be held protected by privilege. Beyond that,

> however, there is scant direct authority, in favour of protection of privilege under the broad grounds set out above, save where the source is official or quasi-official."

An exceptional case is Toyne v Everingham (1993) 3 NTLR 1, a decision of this court (Angel J). In that case, the defendant was a former Chief Minister and at the time the Territory's sole representative in the House of Representatives. The plaintiff Toyne was a legal adviser to the Mutitjulu Community near Uluru (Ayers Rock). In the lead up to the handover and lease back of the Uluru National Park, after an unsuccessful land claim hearing and report under the Aboriginal Land Rights (NT) Act, the defendant, in writing and in broadcasts on radio, expressed strong opposition to the handover in the course of which he referred to the plaintiffs as "white advisers" - in effect manipulating events for their own political purposes. Angel J upheld the defence of qualified privilege, primarily because Toyne was a public and controversial figure who had taken a prominent public position on proposals to do with Ayers Rock, whose actions were a source of hostility in the community, who opposed the position taken by the defendant, and who was a skilled lobbyist. The question of the future of Ayers Rock was a matter of considerable local and national public interest - indeed the defendant, as Chief Minister, and as a candidate for the Federal Government had previously run successful election campaigns on lands rights issues. Angel J thought that reciprocity of interest was not required in the circumstances of that case, but in any event held that the necessary interest existed given the nature of the controversy in the political arena concerning the handover of Uluru (seen as an "icon") as a national park secured and controlled by a discrete group of Aboriginals whose land claim had been unsuccessful. There is no similarity between the circumstances of that case and this case.

I am satisfied that Wrenn did not have a duty to reveal what he believed about the plaintiff to the public at large, even if he did have such a duty to Mr Conran, the members of the Oversight Committee, the police investigators and Mr Mulholland QC. Nor did the second defendant. If neither had said anything about these matters to the general public it could not have been said that they breached any duty, legal, social, or moral. I bear in mind that the plaintiff was not named in the broadcast but given the circumstances of the Channel 8 News broadcast shortly before the programme the likelihood was that the plaintiff would be identified by those who saw both programs. Further the nature of the allegations was such that a large number of persons especially within law enforcement agencies, were likely to identify the plaintiff, and in a small community such as Darwin this is soon likely to become common knowledge to a not insignificant degree in the general community. The defendant did not even have a duty to those members of the public who worked with or within law enforcement agencies to make public to them the allegations contained in the broadcast and nor did the latter have a sufficient reciprocal interest to learn of those allegations. Accordingly, the claim of the defendants that the occasion was privileged fails.