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:	18 October 1994, 18 October 1994, 24 October 1994, 24 October 1994, 1 November 1994, 15 November 1994, 21 November 1994, 2 December 1994, 19 January 1995, 19 January 1995, 15 March 1995, 20 March 1995, 24 March 1995, 2 October 1995
HEARING DATES:	24 October 1994 - 13 December 1994 13 March 1995 - 31 March 1995
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Ruling 1

Catchwords

Practice - NT **-** Application by second defendant to amend Defence to plead further particulars of justification - Likelihood of adjournment of trial if amendment granted - No reasonable excuse for second defendant's delay - Inconvenience to the Court - Prejudice to plaintiff of additional trauma if trial adjourned - Doubtful whether second defendants would be able to support its contention by evidence - Application refused -

Cases

Associated Leisure Limited (Phonographic Equipment Co Ltd) & Ors v Associated Newspapers Ltd (1970) 2 Q.B. 450 at 456, considered.
Sali v SPC Limited & Anor (1993) 67 ALJR 841, mentioned.
State Pollution Control Commission v Australian Iron and Steel Pty Limited No 2, (1992) 29 NSWLR 487; 75 LGRA 327, mentioned.

NAALAS v Liddle (unreported Judgment, Court of Appeal 8 September 1994), mentioned.
Minister v Tweed/Byron Aboriginal Land Council (1990) 71 LGRA 201 at 203-4, considered.
Lackersteen v Jones (1988) 92 FLR 6, mentioned.

Ruling 2

Catchwords
Jury - NT **-** Application by second defendant for civil trial by jury - Onus on applicant to establish a special reason - Whether ends of justice better served - Issues of ''hard swearing'' constitute special reason for granting application -

Cases

Nationwide News Pty Ltd (t/as) Centralian Advocate and Others v Bradshaw and Another (1986) 41 NTR 1, applied.
Ford v Blurton (1922) TLR 801, at 803, mentioned.
Snell v Sanders (1994) 122 ALR 520 at 525, considered.
Ward v James (1966) 1 QB 273, at 295, considered.

Ruling 3

Catchwords
Jury - NT **-** Civil jury trial - Mode of selection of jury - Number of challenges to be shared between first and second defendants - Juries Act 1962 (NT) s 39(4) -

Legislation

Juries Act 1962 (NT) s 39(4)

Ruling 4

Catchwords
Defamation - Statements amounting to Defamation - Whether certain imputations pleaded in Statement of Claim should be left to jury - Alternatively, whether jury should decide whether words complained of conveyed imputations pleaded prior to leading of further evidence - Whether appropriate to deal with application at early stage of trial -

Cases

Roux v The Australian Broadcasting Corporation (1992) 2 VR 577 at 580, approved.
TCN Channel 9 Pty Ltd v Mahoney (1993) 32 NSWLR 397, not followed.

Ruling 5

Catchwords
Evidence - Admissibility and relevance - Evidence sought to be elicited from plaintiff in cross-examination - Evidence regarding plaintiff's forcible retirement from the police force - Such evidence not to be elicited with respect to plaintiff's claim for hurt to feelings or general damages but permissible with respect to plaintiff's credit -

Legislation

Supreme Court Rules rr13.07(1)(b), 13.12(4)
Evidence Act s 15(a), (b), (c)

Cases

Scott v Sampson (1881-1882) 8 Q.B. 491, considered.
Plato Films Ltd & Others v Speidel (1961) AC 1090 at 1140, considered.
NAALAS v Liddle (unreported Judgment, Court of Appeal 8 September 1994), approved.
Christie v Bridgestone Australia Pty Limited (1983) 33 SASR 377 at 389, considered.
Bickel v John Fairfax & Sons Ltd and Another [1981] 2 NSWLR 474 at 494-495, approved.

Ruling 6

Catchwords
Evidence - Admissibility and relevance - Conversation between alleged co-conspirators as an exception to hearsay rule - Evidence sought to be led by first defendant of conversations he had between his former wife and mother-in-law - All evidence not before the Court - Evidence admitted - Ruling on admissibility deferred until close of defendants' cases -

Cases

Ahern v The Queen (1988) 165 CLR 87 @ 100 and 103, mentioned.
The Queen v Rogerson (1992) 174 CLR 268, mentioned.
Browne v Dunn (1894) 6 R.67 (H.L.), applied.
Reid v Kerr (1974) 9 SASR 367 @ p373-4, approved.

Ruling 7

Catchwords
Practice - NT **-** Application to discharge civil jury - Trial Judge's power to continue to hear trial without jury - Whether interests of justice require judge to proceed - Juries Act 1962 (NT) ss7, 47, 49 -
Legislation

Juries Act 1962 (NT) s 7(1), (2), (3), (4), 47, 49

Cases

Patton v Buchanan Borehole Collieries Pty Ltd (1993) 178 CLR 14, applied.

Ruling 8

Catchwords
Defamation - Justification - Leave sought to call evidence in reply - Whether plaintiff splitting case - Onus of proof of justification on defendants - Unfair to require plaintiff to meet defence of justification in advance -

Cases

Protean (Holdings) Ltd (Receivers and Managers Appointed) and Others v American Home Assurance Co [1985] VR 187, approved.
McLaren & Sons v Davis (1890) 6 T.L.R. 372, mentioned.
Jerome v Anderson (1964) 44 D.L.R. (2d) 516, mentioned.

Ruling 9

Catchwords
Evidence - Witnesses - Vulnerable witnesses - Former wife of first defendant - Whether risk to witness's mental health if forced to give evidence in open court and be cross-examined by first defendant - Whether each defendant should be permitted to cross-examine witness - Discretion in the judge to ensure fair trial - Order that witness give evidence by means of closed circuit television, without cross-examination by first defendant -

Legislation

Evidence Act 1939 (NT) s21A

Cases

Phillips v Phillips (1966) 83 WN (Pt1) (NSW) 445, mentioned.
Eva v Charles Davis Ltd (1982) VR 515, mentioned.
GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd (No.3) (1990) 20 NSWLR 15, mentioned.
Chippendale v Mason (1815) 4 Camp 174, mentioned.
Doe v Rowe (1809) 2 Camp 280, mentioned.

Ruling 10

Catchwords
Defamation - Justification - Defence of "contextual truth" pleaded - No common law defence of contextual truth in Australia - Pleading struck out as bad in law -

Defamation - Justification - "Common sting" - Pleading not capable of meeting sting of defamatory allegations in present form - Leave granted to amend pleading -
Defamation - Justification - Whether sufficient evidence for jury to find plaintiff "corrupt" and/or "dishonest" - Jury should decide what imputations the broadcast conveyed -
Defamation - Publication - Whether sufficient evidence for jury to find first defendant responsible as a source of defamatory information to second defendant -

Legislation

Defamation Act 1938 (NT)
Defamation Act 1974 (NSW) s16

Cases

Plato Films Ltd and Others v Speidel [1961] AC 1090, considered.
Sutherland and Others v Stopes [1925] AC 47 at 78-79, mentioned.
Potts v Moran (1976) 16 SASR 284, approved.
Polly Peck (Holdings) PLC and Others v Trelford and Others [1986] 1 QB 1000; [1986] 2 WLR 845 at 868-869; [1986] 2 All ER 84 at 102, considered.
Stonor v Daily Telegraph Ltd (decided on 19 July 1976), mentioned.
Khashoggi v IPC Magazines Ltd and Another [1986] 3 All E.R. 577, considered.
Jackson v John Fairfax & Sons Ltd (1981) 1 NSWLR 36, considered.
Becker v Smith's Newspapers Ltd [1929] SASR 469 @ 471, mentioned.
Ratcliffe v Evans [1892] 2 Q.B. 524 at 528, mentioned.
Hepburn v TCN Channel Nine Pty Ltd [1984] 1 NSWLR 386, 396-397, considered.
Woodger v Federal Capital Press of Australia Pty Ltd (1992) 107 ACTR 1, doubted.
T.W.T. Ltd v Moore (Higgins J, 31 September 1991, Supreme Court of ACT, unreported), doubted.
Cohen v Mirror Newspapers Ltd (1971) 1 NSWLR 623, mentioned.
Parkes v Prescott (1869) 4 L.R. Exch. 169 at 178-179, mentioned.
Cooke v The South Australian Trotting Association (1920) S.A.S.R. 166 at 168-169, mentioned.
Webb v Bloch (1928) 41 CLR 331, mentioned.
Edwards v The Queen (1993) 178 CLR 193, applied.

Ruling 11

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 at 318, mentioned.
Baird v Wallace-James [1916] 85 L.J.P.C. 193 at 198, mentioned.
Guise v Kouvelis (1947) 74 CLR 102, considered.
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 at 193; 149 E.R. 1044 at 94, 1049-1050, considered.
Stuart v Bell [1891] 2 Q.B. 341 at 350, considered.
London Association for Protection of Trade v Greenlands Ltd [1916] 2 AC 15 at 23, considered.
Toyne v Everingham (1993) 91 NTR 1 at 14, explained, distinguished.
Pervan v North Queensland Newspaper Co Ltd (1993) 178 CLR 309, considered.
Lackersteen v Jones (1988) 92 FLR 6 at 46, mentioned.
Attorney-General v Times Newspapers Ltd, [1974] AC 273 at 315, mentioned.
Loveday v Sun Newspapers Limited and Another (1937-1938) 59 CLR 503, mentioned.
Cavenagh v Northern Territory News Services Limited (1989) 96 FLR 268, mentioned.
Allbutt v General Council of Medical Education and Registration (1889) 23 QBD 400, mentioned.
Dunford Publicity v News Media Studio Limited Ownership Limited and Gordon: Dunford v News Media Ownership and Gordon [1971] NZLR 961, mentioned.
The Globe and Mail Ltd v Boland (1960) 22 DLR (2d) 277, 280, mentioned.
Australian Broadcasting Corporation v Comalco Ltd (1986) 68 ALR 259 at 342, considered.

Ruling 12

Catchwords
Evidence - Witnesses - Leave sought to be excused from non-compliance with subpoena - Witness bears the onus of proof - Whether witness unfit to give evidence due to psychiatric condition - Psychiatrist's diagnosis based on privileged information - Diagnosis not able to be properly tested - Witness unable to discharge onus of proof -

Legislation

Supreme Court Rules r42.07

Ruling 13

Catchwords
Evidence - Witnesses - Non-Appearance in answer to subpoena - Application for warrant of arrest - Whether no reasonable excuse for non-appearance - Onus of proof on party calling witness - Medical advice not to attend constitutes reasonable excuse -

Legislation

Evidence Act s21(1)(b)
Ruling 14

Catchwords
Defamation - Damages - Permissible to refer jury to personal injury awards for the purpose of assessing general damages - Reference to defamation awards not permitted and of no assistance in any event -

Cases

Carson v John Fairfax and Sons Limited [1993] 178 CLR 44, considered, explained.
Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 118, considered.

Ruling 15

Catchwords
Defamation - Privilege - Defence of Qualified Privilege - Proof of malice against first defendant does not destroy privilege of second defendant -

Cases

Webb v Bloch (1928) 41 CLR 331, considered.
Smith v Streatfeild (1913) 3 K.B. 764, considered.
Thiess v TCN Channel 9 Pty Ltd (No.5) (1994) 1 Qd R 156, considered.
Stephens v West Australian Newspapers Ltd (1994) 124 ALR 80, considered.
Bryanston Finance Limited v de Vries [1975] QB 703 at 727, considered.
Dougherty v Chandler (1946) 46 SR(NSW) 370, considered.
Egger v Viscount Chelmsford & Ors (1964) 3 All ER 406, considered.
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985), 155 CLR 448, considered.
Broome v Cassell & Co Ltd [1972] AC 1027, explained.
Wah Tat Bank Limited v Chan Cheng Kum [1975] AC 507, mentioned.
Brinsmead v Harrison (1871) LR 7 CP 547, mentioned.

Ruling 16

Catchwords
Courts and Judges - Judges - Civil jury trial for defamation - Application that trial judge disqualify himself - Whether a reasonable apprehension of bias - Statements made by judge's associate regarding judge's displeasure with tactics of parties to the litigation - Matters raised could not remotely disclose reasonable apprehension of bias - Application dismissed -

Evidence - Civil jury trial for defamation - Prohibition of publication of evidence - Application that judge disqualify himself for bias rejected - Consent order made suppressing publication until jurys' verdict - Application by interested third party to lift suppression order - Whether orders do no more than necessary to achieve the proper administration of justice -

Whether there must be a significant likelihood of serious prejudice which outweighs prejudice to legitimate public comment - Whether fundamental questions raised concerning the administration of justice -

Legislation

Supreme Court Act ss17, 26(1)
Supreme Court Rules r.50.01, 50.04
Evidence Act ss57, 58

Cases

Jones v Dunkel [1958-59] 101 CLR 298, mentioned.
Re Morling; ex parte Australasian Meat Industry Employees Union and Others (1985) 66 ALR 608, at 611, applied.
Livesey v New South Wales Bar Association (1983) 151 CLR 288; 47 ALR 45, mentioned.
R v Watson; Ex Parte Armstrong (1976) 136 CLR 248; 9 ALR 551, mentioned.
R v Simpson ex parte Morrison (1984) 154 CLR 101 at 104; 52 ALJR 648, mentioned.
Reg v Magistrates' Court at Lilydale; ex parte Ciccone [1973] VR 122, considered.
Re J.R.L; ex parte C.J.L. (1986) 161 CLR 342, mentioned.
Kaycliff Pty Ltd v Australian Broadcasting Tribunal (1989) 90 ALR 310, considered.
R v Australian Stevedoring Industry Board: Ex Parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100, considered.
G v The Queen [1984] 35 SASR 349, approved.
The Queen v Lennon [1984] 38 SASR 356, approved.
R v Bara Bara (1992) 87 NTR 1, mentioned.
Quinn v Given (1980) 29 ALR 88 at 95-6, mentioned.
John Fairfax and Sons Ltd v Police Tribunal of New Souths Wales (1986) 5 NSWLR 465, considered.
John Fairfax Group Pty Ltd (Receivers and Managers Appointed) and Another v Local Court of New South Wales and Others (1992) 26 NSWLR 131, distinguished.
Hinch v Attorney General for the State of Victoria (1987) 164 CLR 15, mentioned.
Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25, mentioned.
National Mutual Life Association of Australasia Ltd v General Television Corp Pty Ltd (1988) 62 ALJR 553, mentioned.
Australian Broadcasting Commission v Parish (1979-80) 29 ALR 228, mentioned.
Attorney-General v Leveller Magazine Ltd (1979) AC 440 at 450, mentioned.
John Fairfax & Sons v Police Tribunal (1986) 5 NSWLR at 476-477, mentioned.

REPRESENTATION:

Counsel:

Plaintiff:	Mr J Reeves and Mr A H Silvester
First Defendant:	Self represented.
Second Defendant:	Mr M Lynch and Mr S Southwood

Solicitor:

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

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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 RULINGS

ONE

INTERLOCUTORY APPLICATION by the second defendant to amend its defence.

J. Reeves, for the plaintiff.
S. Southwood for the Defendant.

The following ex tempore ruling was delivered on 18 October 1994.

MILDREN J:

This is an application by the second defendant to further amend its defence to plead further particulars of justification which are set out in paragraph 8 of the proposed amended defence at some considerable length, in particular paragraphs B, C, D and E. Those matters, as pleaded, take up from the beginning of page 3 to the end of page 16 of the proposed amended defence.

Now the background to this matter is this. This is an application for damages for libel. The trial is due to commence next Monday. The original defence did not raise justification, and that matter was first raised by way of amended pleading only a matter of a few weeks ago.

This matter is a case-managed matter. It has been a category C matter under my control for some considerable time. The matter was listed for trial, I think in April or thereabouts - the precise date doesn't matter - but in any event the matter has now had a trial date, originally to start at the beginning of last week, for approximately six months.

The second defendant did not brief counsel, according to the evidence of Ms Elliott, until relatively recently. She said that junior counsel, Mr Southwood, was first briefed in this matter on 8 August, and that was in relation, at that stage, to an interlocutory matter. She said that she briefed Mr Southwood for the trial of this matter about 10 August. Senior counsel for the second defendant was not briefed until 19 September.

There has been no formal written advice on evidence, although advice in the nature of advice on evidence has been received from Mr Southwood in the form of correspondence and, presumably, other memoranda.

Now, one thing is clear. The nature of the allegations are such, and the number of witnesses which would be involved in the matter are such, that it seems inevitable that if this amendment were to be granted, an adjournment of the trial would follow.

The only hesitation I have is Mr Reeves's suggestion in his submissions to me that, possibly, as a condition of allowing the amendments, the trial could start if the plaintiff were to proceed to call his evidence in his case as pleaded, on condition that there be no cross-examination of the plaintiff - or, presumably, any of the plaintiff's witnesses - on the allegations that are contained in the proposed amendments until such time as the second defendant, having called its evidence in relation to the matter, the plaintiff calls evidence in rebuttal on those issues.

Mr Southwood has indicated that would not be an appropriate course to adopt and, frankly, I agree with him. I think that it would be extremely difficult to run the case along those lines for a variety of reasons. First, the allegations which are alleged go to the question of whether or not the plaintiff is in fact corrupt. It seems to me that all of the material allegations that go to the question of justification, cannot properly be split in such a manner as to due fairness to both parties. That is a course that I do not think I should encourage.

That being the case, the question is then whether - bearing in mind that I consider that Mr Reeves has made a very strong case, indeed, I consider an unassailable case, for the granting of an adjournment if the amendments were to be permitted - the amendments ought to be permitted at this stage, with the consequence of an adjournment.

I say an unassailable case. I have heard the evidence of Mr Walker. In his affidavit he has dealt with, in paragraph 6, the matters that would have to be done in order to prepare the matter for trial, and I accept what Mr Reeves has said about the need to properly proof the plaintiff so that he may be prepared for cross-examination on these matters at an early time at the trial.

That means that the relevant inquiries from the plaintiff, as well as the relevant documents which the plaintiff would have knowledge of would all have to be obtained before next Monday. It is now late on Tuesday, 18 October. In addition to that, the plaintiff, in order to properly be apprised of his case, is entitled to know what his advisers may think about the state of the case generally, and the extent to which other material needed to properly promote his interests has been sought, and that information ought to be made available, to him as soon as possible and, certainly, not something that might only come out in full during the course of the trial.

It is quite proper, in my view, to consider the whole of the time that is available and perhaps ought reasonably to have been available since the plaintiff was first put on notice that these

allegations are sought to be made, to investigate those matters. It is clear that the inquiries needed would be, in my view, extensive. The matters that are alleged all occurred many years ago, in 1985.

Despite the limited nature of the number of witnesses identified by Mr Walker and by Ms Elliott, I think it is likely that there are a number of other potential witnesses whom they have not mentioned. Some of these were referred to by Mr Reeves in his address. Therefore, I consider that to properly investigate matters of this kind, it cannot reasonably be expected to be done in less than something in the order of three or four weeks.

The question then is whether or not I ought to grant the defendant liberty to amend its defence, knowing that the consequence of so doing will be that an adjournment must be granted, and being aware that the second defendant does not oppose an order for costs thrown away on an indemnity basis. Mr Southwood submits that the fact that the plaintiff is able to be compensated for any costs is a weighty matter that I ought to take into account, bearing in mind, as he put it, that these allegations were critical to the second defendant's proper defence of the claim.

Now, obviously, if the allegations that are set out in paragraph 8 are made out, they would seriously undermine any possibility of the plaintiff succeeding, so I have to treat them as being of quite considerable significance to the defendant's defence, and therefore give them perhaps more weight than I would if the amendments were not of such a character.

Mr Southwood submits that the amendments are properly pleaded and particularised and that, therefore, the plaintiff is on proper notice of what the nature of the allegations are that are alleged against him and, further, that the evidence of Ms Elliott, before me, establishes that there was a sufficient basis for those matters to have been pleaded.

Before going into that, I should mention one other matter and that is this: that the decision to plead justification only a few weeks ago has in itself resulted in, so far, the trial being

postponed by a week, and it has resulted in a very tight rescheduling of all of the interlocutory processes that were needed to be done by both sides in order to have this matter ready for trial by next Monday. So it is against that background that I have to consider this application.

I should also mention that a couple of weeks ago or thereabouts - I do not have the exact date readily to hand - Mr Southwood's client sought to raise in the further amended defence at that time what I might loosely call the allegations concerning the loan to Mr Boyd. Those allegations at that time were struck out as I did not consider that they, even if proved, would have established any defence of the kind alleged, and Mr Southwood indicated at that stage that it was likely that he would be making a further application once he had further information.

Now it seems to me that it is important in this matter to bear in mind that according to Ms Elliott, and it seems to be the fact, none of the witnesses that the second defendant intends to call to support the allegations contained in the proposed amendment have yet been proofed. It appears that some of them have been spoken to by Mr Southwood, and Mr Southwood candidly told me that he had made notes of what his conversations were with some of these witnesses, but they were not in a form in which statements could be drafted.

In a case such as this, the words of Lord Denning M.R., in Associated Leisure Limited (Phonographic Equipment Co Ltd) & Ors v Associated Newspapers Ltd (1970) 2 Q.B. 450 at 456 are very much to the point. His Lordship read a passage from `Gatley on Libel and Slander' to this effect: `A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages.'

His Lordship then continued:

> I've always understood such to be the duty of counsel. Like a charge of fraud, he must not put a plea of justification on the record unless he has clear

> and sufficient evidence to support it. The defendants in their case have observed that duty. In their affidavits the defendants say that, from the very beginning, they took the advice of counsel. When the defence was first delivered on January 14, 1969, counsel said: "We cannot put it on now." They then set to work making inquiries all over the world: in France and Italy, and especially in the United States of America. It was not until March of this year that counsel was able to say: "Well, at last there is evidence on which I feel justified in placing a plea of justification on the record." As soon as it was obtained, they applied for leave to amend. That was, I think, the proper course for counsel to adopt.
>
> But when the defendant seeks to plead justification at a late stage, his conduct will be closely inquired into. The court will expect him to have shown due diligence in making his inquiries and investigations. The court may well refuse him application if he has been guilty of delay or not making proper enquiries earlier."

It seems to me plain beyond doubt that what has happened in this case is that the decision to plead justification came so late only because it was not until a very late time that counsel was briefed by the second defendant. And even then, it is also apparent that at the time when that decision was made, the matters upon which the second defendant now seeks to rely were not available to it; at least, not in a form upon which a pleading could be prepared.

It is apparent though that at least the two people who were employees or former employees of the second defendant and who are journalists knew of the substance of these matters quite some time ago. That much appears from the affidavit of Mr Walker and the transcripts of the second defendant's ABC Radio 8DDD reports which are set out as annexures A, B, C, D, E, F, G and H to Mr Walker's affidavit.

It also appears that both Mr Schneider and Ms Elliott had some knowledge of these matters quite some time ago. So much appears from the evidence of Ms Elliott; Mr Schneider, being the former solicitor who was handling this matter on behalf of the second defendant.

It seems to me that no real reason has been advanced as to why these matters were not pleaded at a much earlier time, as to why there were no enquiries or investigations made at a much earlier time and as to why the decision to plead justification was left so late.

That, I think, is a weighty matter that I have to take into account because the court does expect solicitors to exercise due diligence in making enquiries and investigations and in preparing their client's matters for trial, and as Lord Denning says, the court may well refuse an application of this nature if there has been delay or no proper enquiries made earlier when they should have been made. It seems to me those enquires should have been made at an earlier time and they were not, and that no real explanation has been offered as to why that is so.

Another matter that obviously the court must take into account is the fact that this case is subject to case-flow management. There are now a number of authorities which deal with the relevance of this and I have been referred to the decision of the High Court in Sali v SPC Limited & Anor (1993) 67 ALJR 841; State Pollution Control Commission v Australian Iron and Steel Pty Limited No 2, (a decision of Court of Criminal Appeal of New Souths Wales) (1992) 29 NSWLR 487; 75 LGRA 327, as well as other authorities, including the judgment of the Court of Appeal in NAALAS v Liddle delivered on 8 September 1994, and in particular the reasons for judgment of the Chief Justice, with whom I concurred.

Having regard to those authorities I have to bear in mind the following. That, first, three weeks have been set down for trial for this matter and, if I adjourn this matter, the state of the lists is such, and my workload is such, that, it is likely that the best part of those three weeks will be lost, and there is little likelihood or opportunity for me to do other work in the meantime. I should say that I have no reserve judgments to work on at the moment, nor do I have any holidays due to me that I care to take at this stage. So it will mean a loss of court time, valuable court time.

At the moment the court has only five judges. The court has been without its normal sixth judge now for about a year and a half. The fact is that the Northern Territory government had been aware of the need to find a replacement judge for the former Chief Justice for about two years. The fact is that, for whatever reason, no replacement judge has been found and, as far as I know, there is no information which enables me to be assured that he will be replaced in the near future or that an acting judge will be appointed in the near future. I, therefore, have to work on the assumption that for the foreseeable future there will still only be five judges.

The fact that the court has only five judges has placed the court under considerable pressure. It has not been possible to deal with all of the work of the court in an orderly and proper manner without calling upon the services of judges from other courts, or retired judges, such as Morling J, and furthermore, it has been necessary for me, and I think other judges as well, to sit well outside of court hours to keep up with the workload. It is likely, therefore, that this stage of affairs will continue for quite some considerable time.

Another matter that I have to bear in mind is when it is likely that this matter could be re-listed. If it were to be re-listed it would not be able to be re-listed, before me for at least six months and I do not think before any other judge, judging by the current state of the lists, and it may well be longer.

I bear in mind also that the nature of the allegations and the number of witnesses likely to be called will almost certainly expand the length of the trial, currently expected to be three weeks, to some longer period; I expect probably in the nature of four weeks. This would mean that other litigants who are currently waiting to have their matters listed and heard might have to wait longer to have their own matters dealt with.

I have to take into account also the natural anxiety and loss of expectation to the plaintiff who, at the last minute, would be told that his trial is off. In this case there is evidence before me from a psychologist, Ms Isherwood-Hicks, whose report is annexed to the

affidavit of Mr Walker, which shows, if I may quote, that he has an anxiety state and depression, and at the second page of her report dated 3 September 1994 she says:

> "The protracted delays in waiting for his case to be heard have contributed to Mr Hart's anxiety state and his depression. It is as if his life has, qualitatively, been put on hold until all Court proceedings are completed, and he then can get on with making plans for the rest of his life.
>
> In summary, whilst it is my opinion that Mr Hart's current high anxiety state will attenuate and his depression will begin to resolve once all litigation is concluded, Mr Hart now will always be vulnerable to further episodes of anxiety and depression."

So if I were to grant the adjournment, there is evidence of some `irremedial' prejudice to Mr Hart - which can only be compensated for ultimately, perhaps, in damages, if he succeeds - in the additional psychological trauma that he may be called upon to suffer, and I think that is a matter that I am bound to give some weight to. I am aware that is a matter perhaps of some contention, that the second defendant does not necessarily accept that is so, but, at least on the evidence before me at this stage, I think I am bound to give it some weight.

Next, I take into account the nature of the allegations themselves. These are serious allegations; they allege unlawful conspiracy and the like. They are, of their nature, somewhat sensational, and therefore they fall well within the category of matters that are referred to in the judgment of Supreme Court of New South Wales Court of Appeal, in Minister v Tweed/Byron Aboriginal Land Council (1990) 71 LGRA 201 at 203-4:

> "In the pleading of fraud, some requirements of the law are clear beyond argument. These requirements are not only rules of pleading and practice established by decisions of the courts. They are rules of ethical conduct binding on members of the legal profession. It is a serious matter to allege fraud against a party in pleadings to which attach the privileges incidental to court proceedings. Reports of such allegations may be recounted in the community and through the public media. They may do great harm to a party before a word of evidence has been offered and submitted to the searching scrutiny of cross-examination or to rebuttal. It is for this reason, amongst others, that legal practitioners must take care to have specific instructions and an appropriate evidentiary foundation, direct or inferred, for alleging and pleading fraud. We say inferred, because it will sometimes be impossible to

> prove fraud by direct evidence. The tribunal of fact may be invited to draw an irresistible inference of fraud from the facts proved. Of its nature, fraud is often perpetrated covertly. The perpetrators of fraud will often take pains to cover their tracks.
>
> Professional discipline may follow if allegations of fraud are made where the foregoing conditions are not satisfied. By such means, courts protect their process from the abuse which would follow from the too ready assertion of fraud against a party, in circumstances where it could not be proved to the high standard required of such allegations: cf Briginshaw v Briginshaw (1938) 60 CLR 336 at 362 and Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co (1875) 10 Ch App 515 at 530."

Now, as I have said, whilst it may be doubtful that this is technically a case of fraud, it is clear that those principles apply to the plea of justification, for the reason given by Lord Denning in Associated Leisure Limited, and the kind of harm that can be done to the plaintiff to which the New South Wales Court of Appeal refers to in the passage quoted from, above could well be suffered here. Consequently, it is necessary, in my view, to very carefully scrutinise not only the allegations and the particulars, but the very basis upon which they are made.

Let us deal firstly with the basis. What do I have to support them? First, I am told by the solicitor handling the matter that she herself has not spoken to any of the relevant witnesses. That the relevant witnesses that have been spoken to have been spoken to by counsel. I am told also that there is no proof of evidence from any of these persons, signed, or unsigned. None of the evidence upon which the defendant seeks to rely has been put before the court in the form of affidavit from any of the proposed witnesses.

The point is, the second defendant, either because it cannot do this, or because it will not provide the evidence to the court on which the proposed amendments rely, has placed me in a position, and the plaintiff in the position, where the evidence upon which the supposed allegations in the statement of claim have been drafted cannot be scrutinised. I am left

therefore to draw such inferences as I can about the substance of these allegations from other sources.

One of the sources, of course, is the amendment itself. And the proposed amendment has been subject to quite severe criticism by Mr Reeves. Mr Reeves, in his submissions, has submitted that the pleading is not specific, and nor is it properly particularised. Indeed, I consider that the criticisms that Mr Reeves has made of the pleading to be well founded. I am not going to deal with them all, but suffice it to say that there are allegations which are not only pleaded in the alternative, but in some cases the alternatives are even pleaded in the alternative as well.
His Honour then discussed certain of the proposed pleadings and continued.

It is unnecessary to go into the defectiveness of the particulars provided. They have been adequately covered by Mr Reeves, and I accept what he has put to me. Clearly, on a number of occasions throughout these pleadings further and better particulars of the various allegations would not only be required but would be ordered to be given.

In all of the circumstances, I do not have a great deal of confidence that these matters have been pleaded in accordance with the general rule that applies to pleadings of this kind, and whilst I am not prepared at this stage to go so far as to call them spurious, I have very grave doubts as to just how likely it is that the defendant will have admissible evidence to support these sorts of allegations.

One person that the defendant has placed some reliance upon, I am told, is a Mr Jones, and, as Mr Reeves has pointed out, he is a person who this court has previously refused to believe, in the case of Lackersteen v Jones (1988) 92 FLR 6, and what Mr Reeves had to say about that, I think is correct.

All-in-all, it seems to me, that bearing in mind the prejudice to the second defendant if I do not grant this application and the prejudice to the plaintiff if I do, the nature of the allegations

that are made, the basis upon which they are made and the evidence available to me to see how well they are supported, the very lateness of the application, lack of any diligence by the second defendant to inquire into these matters at an earlier time when they should have done so, the effect on the due administration of justice that affects not only the litigants in this case but other litigants who are waiting for their maters to be dealt with, and the system of case management control, the application must be refused.

TWO

INTERLOCUTORY APPLICATION by the second defendant that the mode of trial be by jury.

J. Reeves for the plaintiff.
S. Southwood for the second defendant.
The following ex tempore judgment was delivered on 18 October 1994.

MILDREN J: This is an application by the second defendant for the mode of trial to be by jury. The application is supported by the first defendant, but is opposed by the plaintiff. The first defendant is unrepresented and his support has been indicated by means of an affidavit which is filed. He is not present at the application today and has indicated he cannot be here. So he has made no formal submissions but he is supportive of the application.

The relevant principles which are binding on me are contained in the judgment of the Court of Appeal in Nationwide News Pty Ltd (t/as) Centralian Advocate and Others v Bradshaw and Another (1986) 41 NTR 1. Those principles establish that there is an onus on the plaintiff to establish a special reason why it is that a trial by jury ought to be ordered. The normal mode of trial in civil cases is trial by judge alone. Consequently the onus, albeit not a heavy one, is on the plaintiff.

This particular case is a libel case in which the defendants have raised the plea of justification and it has been submitted that this is a case where special circumstances exist because the issues raised as between the plaintiff and the defendants are matters which might be said to involve the kind of `hard swearing' that is referred to in the judgment of Banks LJ, in Ford v Blurton (1922) TLR 801, at 803.

The particular passage that is referred to has been also referred to in the judgment of Wilcox J in Snell v Sanders (1994) 122 ALR 520 at 525. And the passage is this:

> "The standard of much that is valuable in the life of the community has been set by juries in civil cases. They have proved themselves in the past to be a great safeguard against many forms of wrongs and oppression. They are essentially a good tribunal to decide cases in which there is hard swearing on either side, or a direct conflict of evidence on matters of fact, or in which the amount of the damage is at large and has to be assessed."

Of course, it seems to me that all those factors are present here.

In the judgment of Wilcox J he refers, at page 525, to the observations of Lord Denning in Ward v James (1966) 1 QB 273, at 295, where His Lordship said:

> "Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal."

So it seems to me that a special reason does exit, but that is not the end of the matter because I have to consider not only whether there is a special reason but whether it is in the interests of justice overall that I ought to accede to the application. As Wilcox J put it, I have to be satisfied that the second defendant has established that, having regard to the whole of the circumstances, the ends of justice will be better served by trial with a jury than trial by judge alone.

Another matter that has been put as being a matter of special circumstances in this case is the desirability of involving the public in actions against public instrumentalities, and it has been suggested by Mr Southwood that the plaintiff, who is a former head of the drug unit of the police is, in effect, in the position of being a public instrumentality.

I am not sure that that is entirely an apt analogy because this is not a case against a public instrumentality, it is a case being brought by Mr Hart in his private capacity, although he admittedly occupied an important office apparently in the recent past and was certainly a member of the police force and an important one at the time when these allegations were made about him.

The third matter that was pressed was the matter of public importance. It was suggested by Mr Southwood that the evidence will canvass issues that have been dealt with in the course of the Mulholland Enquiry, that there has been public debate ongoing about those matters and a jury ought to be involved. Mr Reeves submits that there are reasons in this case why those questions are not of importance, and if anything, they might tell against the granting of the application.

In the first place, Mr Reeves refers to the criticisms made of juries of four, by Wilcox J at page 527 of the judgment, and I bear those criticisms in mind. Like Wilcox J, I think it is much more difficult to be confident that a jury of four will reflect community standards than what might be the case with a jury of twelve.

Therefore it seems to me that the main question of special circumstances which the plaintiff has established really depends upon the fact that this is a case involving, as I put it, hard-swearing, strong issues of fact, allegations of lies which will have to be put, and the fact that damages are at large.

Now, as I said before, I have to consider all of the circumstances of the case. Mr Reeves points to a number of matters that I should take into account. First he referred to the possibility of the lengthening of the trial. The fact is that trial by jury would require probably some additional time over and above that which trial by judge alone would require. The additional time is impossible to judge, I think, in this case. Unlike the situation in Snell v Sanders, where Wilcox J was able to make an estimate of the additional time required, I do not think I am in the same position. I think some additional time will be involved in selecting the jury, some additional time will be involved in instructing it. I am not satisfied that the addresses are likely to be longer. In this case there is no likelihood that the evidence in chief will be made any shorter.

There are, on the other hand, exhibits that are going to have to be tendered, and presumably, put to the witnesses, although, of course, that is not an uncommon thing in lots of litigation. On the whole, I do not think that the length of trial is a consideration which would cause me to not grant the application.

It was put also that the size of the community in Darwin is such that a number of people will have views. Indeed, I think it was suggested by Mr Reeves that the nature of the allegations were such, that some of the mud was going to stick, that many people are likely to have views and that this could prejudice the fair trial of the case. I think, myself, that that is very unlikely.

The allegations concern broadcasts which were made quite some time ago, and I think more than sufficient time has passed for any member of the jury to remember anything about the broadcast itself which took place on 26 April 1990. So far as the Mulholland Enquiry is concerned, the results of that inquiry have not, as far as I am aware, been made public. Some of the findings of the Mulholland Enquiry, I understand, have been tabled in Parliament. How accessible that document is to the public, I do not know, but, if it is anything like the kind of document which I envisage it is, I imagine very few members of the public will have read it. There has, of course, been speculation in articles in the newspapers

concerning the inquiry but, once again, that now is a fair while ago, and I would doubt that jurors would have any recollection, or any adequate recollection, of those matters to such an extent that it would be likely to affect their ability to fairly judge this matter.

Another matter that has been put by Mr Reeves is that the application is late, that it ought to have been made at an earlier time and that because of the lateness of the application his client will not have sufficient time to adequately prepare for its challenges for cause. I think that is a matter yet to be proven.

I accept what Mr Reeves has to say about the weight of matters that are now in train, and the fact is that it is now late on Tuesday 18 October; but in any event there will be at least five days between now and the start of the trial during which the jury list will be available to the plaintiff and his advisers.

I know, from what Mr Reeves has said, that the plaintiff himself is somebody who, as a police officer, is likely to know the criminal background of any persons who are still on the jury panel, notwithstanding the strict requirements of the Act and notwithstanding that there are people who, for one reason or another, are not exempted by the Act from jury service but who nevertheless may have criminal convictions.

I think it is not a matter that I can properly consider at this stage, although it is a matter that I might well need to consider in relation to any application for an adjournment at the appropriate time. Therefore I put that matter to one side at this stage. I think I have dealt with all of the main points that were raised by Mr Reeves, except one, and that is that I have got an unrepresented litigant to concern myself about.

Thinking about the matter myself, I think it would be better, where there is an unrepresented litigant, to have a trial by jury, if all other things are equal. As the trial judge I will have to attempt to assist an unrepresented litigant within certain well-defined limits to run his case, to adequately put his case. There is always a chance that the unrepresented litigant may be

misled by feeling that he has got me on his side, that he has not got to argue his case well or demonstrate it properly; but if he knows that it is a jury that he has to persuade, he knows that any assistance that he gets from me will only be of a machinery kind. To the extent that a jury may think that because of the role I will be called upon to play to assist an unrepresented litigant I am somehow favouring him, of course that can be covered by an adequate direction.

In all the circumstances I exercise my discretion in this case by ordering that there be trial by jury, subject to the requirements of the Act that the second defendant pay the relevant fees which are required under the Act.

THREE

RULING on mode of selection of Jury.
J. Reeves and A.H. Silvester for the Plaintiff.
The First Defendant in person.
M. Lynch and S. Southwood for the Second Defendant.

The following ruling was given on 24 October 1994.

MILDREN J:
Just before you bring the panel in I will explain the procedure that I intend to adopt so that you will know what will happen. The jury panel will be brought into court. I will ask counsel to announce their appearances and Mr Wrenn to announce his appearance. I will then ask you all to give an estimate of the length of the trial in the presence of the panel.

I will then read the names of the parties to the jury panel and tell them, essentially, what the case is about, according to the present state of the pleadings. I will then invite counsel, if they wish to, to read out their witness lists to the panel, and I will then explain to the panel

why this information is being put to them: it is to assist them to make any applications for exemption and so forth.

The potential jurors will then be invited to make application to be excused and having dealt with those applications I will then explain to the panel that 12 names will be selected from the barrel and as each name is called the person whose name it is will be invited to stand and to remain standing until the next name is called. When the next name is called the person will resume his seat and another person will stand.

The purpose of that is to enable you to have a good look at the twelve persons whose names have been called. If there are any challenges, they are to be dealt with at that time.

After that has occurred, the strike list will be prepared and will be delivered first to the plaintiff's counsel, Mr Reeves, who will be invited to strike off up to four names. When he has finished, the list will be returned to the Sheriff who will then deliver it to the defendants, who between them will be invited to strike off four names.

Now, how do you propose to go about this, Mr Lynch and Mr Wrenn? Have you discussed this between you?

MR LYNCH: We have not, Your Honour. It would be our application that because Mr Wrenn's interests are substantially different, at least in some respects, to ours, that we should have the same number of challenges as the plaintiff.

HIS HONOUR: I can not do that, because the Act says that only 12 names are to be selected the plaintiff has the right to strike four names off and the defendant the right to strike four names off. If you were to each exercise those rights, there being only one plaintiff and one defendant, there would be four names left over, and the Act says, if that happens, that is the jury. But if you each had the right to strike four off, well, then you might end up with nought.

It is clear that the intention of the Parliament was that you would share the right if there is more than one defendant.

MR LYNCH: I hear what Your Honour says and I appreciate that the legislation appears not to countenance the common position where there is more than one defendant, but section 39(4) provides, `Upon the list being completed, the list shall be delivered by the Sheriff successively to the plaintiff and to the defendant, each of whom may strike out four names from the list.'

HIS HONOUR: Yes.

MR LYNCH: That is really the basis of the application which we make, and I appreciate the potentially anomalous situation that Your Honour foreshadows, which may occur. If it does, then a fresh panel would be required to be established, in my submission.

HIS HONOUR: Do you have authority for that?

MR LYNCH: I do not, Your Honour, no.

HIS HONOUR: It seems to me that the word `defendant' in the section, in accordance with the Acts Interpretation Act, where it says `The singular includes the plural and vice versa', must be interpreted to mean `defendants'.

MR LYNCH: I have got nothing further to put to Your Honour in relation to the matter.

HIS HONOUR: Well, it seems to me that the first-named defendant gets the first "bite of the cherry." If you cannot agree upon it, then the strike list will be given to Mr Wrenn first, who may strike off up to two names, and then it will go to the second defendants who may strike off up to two names. But you might care to work together.

MR LYNCH: Yes, Your Honour.

HIS HONOUR: And between you, decide on four names.

FOUR

APPLICATIONS by the defendants to rule on whether certain imputations pleaded in the Statement of Claim should be left to the jury; alternatively to seek verdicts from the jury as to whether the words conveyed the imputations pleaded prior to the leading of further evidence.

J. Reeves and A.H. Silvester for the plaintiff.
The first defendant in person.
M. Lynch and S. Southwood for the second defendant.

The following ex tempore ruling was delivered on 24 October 1994.

MILDREN J: The first application that I have been asked to rule upon is whether, as a matter of law, I should now deal with the defendants' contention that the imputations contained in paragraphs 6(c), (d) and in a limited sense (e), (h), (i) in a limited sense, (m), (n) and (o) ought not to be left to the jury. I will entertain that application now.

My reason for adopting that course is, that the nature of the imputations in this case is that the ordinary meaning of the words is relied upon. To use Byrne J's approach in Roux v The Australian Broadcasting Corporation (1992) 2 VR 577 at 580 there is no need to go beyond the text of the material complained of. It is not a case of a meaning, as I understand it, which depends on extrinsic facts outside of the statement itself, other than presumably the allegations in paragraph 1 of the statement of claim and the allegation that the broadcast was made of and concerning the plaintiff. So on those limited assumptions it is possible to deal with those questions now.

As to whether or not it is desirable to do so, I have considered the submissions put to me by Mr Reeves. Although this is a case-flow managed matter, this issue could not have been dealt with at an earlier time than now. The normal time for the judge to rule on such matters is after all the evidence is in, but there is no basis upon which I could have done anything until the trial commenced, so I do not see how there can be any complaint of delay.

Whilst it is the case in the Northern Territory, as it appears to be in Victoria, that I am not obliged to leave the imputations to the jury as separate questions, serious problems can arise if the plaintiff at trial contends for an imputation substantially different from that pleaded or if a dispute arises as to the meaning pursuant to which each pleaded imputation itself is to be understood. The form of the imputations pleaded, amongst other things, bear on the case that the defendant has to make in relation to its justification defence.

Of course it may be that, after hearing argument, some amendment may be appropriate and if that amendment does turn out to be appropriate, it is far better that it be dealt with now rather than later. For those reasons, I think it is appropriate to deal with that question now.

I am far from persuaded, however, that I ought to take the course suggested in TCN Channel 9 Pty Ltd v Mahoney (1993) 32 NSWLR 397 at this time for a number of reasons. The first being that, as yet, the exact text of the offending material is not admitted. I am going to

have to assume that the text, at least for my rulings, to be proven will be that set out in the amended statement of claim. But so far as the jury itself being asked to deal with the matter as a preliminary question of fact, is concerned, I note the text is not admitted.

Secondly, the question of whether or not the matter is of and concerning the plaintiff is still in issue. Although there are the advantages which are mentioned in the judgment of Kirby P in taking the course suggested, which I have considered, it seems to me, having regard to the matter pleaded and the innuendos themselves and the likelihood that the whole of the innuendos are not going to be left to the jury, the possible saving in time and cost to the parties, as against the normal practice of having a free-flowing trial uninterrupted by the trial of separate issues, it would be inappropriate to accede to the defendants second suggestion, namely, that I ask the jury to rule on those matters as separate questions at the beginning of the trial. So I do not grant that application.

[His Honour then heard submissions and made rulings on the imputations pleaded.]

FIVE

RULING on the admissibility of evidence sought to be elicited in cross-examination of the plaintiff delivered ex tempore on 1 November 1994.

MILDREN J:

On the 28th of October 1994 the plaintiff in the course of cross-examination by counsel for the second defendant was asked certain questions about the reasons for his retirement from the Northern Territory Police Force. The following exchange occurred:

> "Mr Wrenn was retired from the police involuntarily, wasn't he?---yes.

> And you were retired from the police force involuntarily, weren't you?---yes.
>
> You've challenged your involuntary retirement, haven't you?---yes.
>
> Because you believe that you were forcibly retired on inappropriate grounds, don't you?---yes.
>
> What were the grounds upon which you were retired?---I showed poor judgment and - and alternatively, or alternatively, incompetent.
>
> Alternatively what?---incompetent.
>
> Poor judgment and incompetence?---or alternatively.
> Poor judgment or incompetence---alternatively - or alternatively incompetent.
>
> Upon what, to your knowledge was the decision based? What was the alleged incompetence or alternatively poor judgment?---It related to a - an incident in 1985.
>
> What was that incident?'

It was at that point that objection was taken by counsel for the plaintiff.

I then heard argument in the absence of the jury after which I ruled that counsel for the second defendant was entitled to ask that question. Counsel for the second defendant sought to justify the question on three grounds: first, it was suggested that the question was relevant to the plaintiff's claim for hurt to feelings; secondly, the general question of damages; and thirdly, credit.

I did not provide reasons for my ruling at that time. I indicated however, that the question was at least relevant to credit and it may well be relevant to the other issues as well.

At the recommencement of the hearing on 31 October 1995 counsel for the plaintiff asked me to review my ruling. I then heard extensive argument which occupied the whole of Monday 31 October. That argument took place in the absence of the jury.

The issue of the plaintiff's retirement was referred to in counsel for the plaintiff's opening address to the jury as follows:-

> "But in September last year, he'll tell you that he was retired from the police force by the Police Commissioner because of something he did relating back to 1985, and he'll tell you it was an error of judgment that the Police Commissioner relied upon to retire him. He'll tell you that that decision of the Police Commissioner is presently under appeal to the Police Promotions Appeal Board and it is yet to be determined. He'll tell you that he is certainly pursuing it with vigour and he's confident that he will succeed in those proceedings.
>
> Now all the indications are that the defendants are going to use that matter to try and attack the plaintiff's reputation. When they do, you're entitled to watch them and see how they go about it and, if in the process they worsen the harm that they've done to the plaintiff's reputation by the way in which they conduct this trial, you're entitled to take that into account to award Mr Hart more damages."

In evidence-in-chief the plaintiff said that on the Sunday following the broadcast he went to Bali and then to Lombok on a pre-arranged holiday. After his return he was interviewed by Commanders Charlewood and McDowell who wanted to talk to him about the alleged relationship with one Tumminello. They also wanted to do a financial analysis and speak to him about other allegations that had been raised in the 7:30 Report. The plaintiff was asked the following questions in examination-in-chief:

> "Did you provide them with details of your financial affairs?---I did. I volunteered them.
>
> Covering what period?---I think it went back to either `79 or `76. It was somewhere around that - that - late 70s anyway.
>
> And what form did those records take?---Well, it necessitated me going to the - the Westpac Bank where I'd been a client of theirs for - since I've been at Darwin, anyway, and also in New Zealand I was in the Bank of New South Wales over there. I had to go into there and - and find bank accounts, cheques, etcetera., for the - for the investigators and invariably every time I went in there you were fronted with a different person so you'd have to go

> through the whole saga again to explain to them that it was the investigation that was taking place and the reason why you want this material that dated back to - to 1970-odd, and you could probably realise how hard it is for them to - to get that sort of material."

There is a background to counsel for the second defendant's attempts to cross-examine on this topic which has come to the court's attention when dealing with other applications by both defendants to amend their pleadings. Shortly, put, the defendants wish to establish that the plaintiff in 1985 lent an amount of $17,500.00 to one Boyd whose son was then facing certain charges in relation to an armed robbery. The defendants seek to establish by cross-examination of the plaintiff that the loan to Mr Boyd senior was made secretly, that is to say without the knowledge of the plaintiff's superiors; that during the subsequent Mulholland investigation the plaintiff did not reveal the existence of the loan to the investigation team in 1992; and these were the matters relied upon by the Commissioner for forcibly retiring the plaintiff.

Mr Lynch, who appears for the second defendant, submitted that the issues which the second defendant wishes to raise by way of cross-examination are relevant to a number of matters, the most important being in relation to the plea of justification which the second defendant has raised in its defence.

Before dealing with that I should record some other background matters. The first is that the plea of justification was first raised only a few weeks before trial. At that time an attempt was made to raise the fact that a loan had been made by the plaintiff to Mr Boyd senior by the second defendant in its plea of justification. On the plaintiff's application I struck out that allegation from the second defendant's defence.

Subsequently the second defendant sought to further amend its defence to raise the loan to Mr Boyd senior once again - this time, very much more extensive allegations were made, occupying approximately some thirteen pages of the proposed amended defence, and on 18 October 1994 I refused leave to the second defendant to raise any of those matters.

At the commencement of the trial I had to deal with a number of applications, including an application by the first defendant to amend his defence to plead that between August and October 1985 the plaintiff breached Northern Territory Police General Order E8, paragraphs 6 and 7, in that the plaintiff made a loan to Nick Boyd of $17,500.00 at a time when he had the conduct or participated in a criminal investigation into Victor Tylo Boyd, Nick Boyd's son, and further failed to report such a loan. On 25 October 1994 I refused Mr Wrenn's application to plead that matter for reasons which I then gave.

The reasons I gave for the various rulings I made had a number of components. One reason I gave was that the applications by the defendants to amend their defences were very late, and would require the granting by me of an adjournment of the trial of the action to enable the plaintiff to met these allegations. In the circumstances, for the reasons which I then gave and will not repeat, I considered that I ought not to make amendments which if allowed would necessitate an adjournment of the trial of the action.
As to Mr Wrenn's application, in dealing with that application I said at pages 105 and 106 of the transcript, on 25 October 1994;

> "When I first looked at the application it appeared to me to be raising a relatively narrow issue, namely, that there was a breach of a police general order in certain circumstances, but, as Mr Reeves has pointed out, it is in the circumstances that the breach is alleged and those circumstances raise, in effect, the question of whether or not there was a conflict of interest, and consequently, even the amendment in its very much abbreviated form, would raise a number of significant factual issues concerning the circumstances of the alleged loan and concerning the circumstances of the investigation.
>
> Mr Reeves submits that if the application were to be allowed it would be necessary for him to make an application to adjourn the trial, that a number of witnesses would be necessary to be called in order to fairly enable the plaintiff to deal with subparagraph (b) …
>
> Now, the first defendant does not cavil with the plaintiff's assertion that there would be a necessity for the plaintiff to make enquiries and prepare itself in order to meet these matters, and, whilst he is not wishing to adjourn the trial

himself, for very obvious reasons, he has made it clear that he wouldn't oppose an application to adjourn the trial if the application were to succeed."

I should also recall that the plaintiff at the same time applied to amend the statement of claim to omit two innuendos which were pleaded, the first of which appeared in paragraph 6(p) namely that the plaintiff cannot be trusted by the public or fellow officers of the Northern Territory Police Force; and the second of which was in paragraph 6(q) namely that the plaintiff is not a fit nor proper person to be a member of the Northern Territory Police Force.

Mr Reeves explained that the reason for removing those items from the statement of claim was so as to exclude matters related to the plaintiff's retirement as issues in the trial. Mr Reeves said at pages 92 to 93 of the transcript

"... The reason we did it, as I have told Your Honour in closed court, and I'll say it again in open court so everyone hears, is not because we don't believe that Mr Hart is a fit and proper person now to be a Northern Territory Police Officer, but because if those issues are ventilated in these proceedings, then we will, firstly, probably have to give evidence about them.

The evidence that we give here may effect the evidence that might otherwise be given in the other proceedings that are on foot, depending upon the way in which the matter is dealt with these proceedings, we might end up bearing some onus that we don't bear in other proceedings, and, more importantly, in proceedings that are not directly related to the question of whether the commissioner was right in retiring Mr Hart, we may end up with a finding which may affect our position before the Police Promotions Appeal Board.

We are most concerned to avoid any of those things happening; that is, in those issues being ventilated in these proceedings then affecting, in a material way, the other proceedings that are proceeding before the Police Promotions Appeal Board."

The defendants' response to the plaintiff's application was to seek to amend their defences again so as to raise this allegation in paragraph 11 of the defendants' amended defence by adding to this paragraph, subparagraph (d). Thus paragraph 11 was amended to read as follows:

> "Further and in the alternative, the second defendant says that the common meaning of the words and pictures complained of and/or of the meanings pleaded in subparagraphs 6(a)-(q) of the amended statement of claim is that the plaintiff has so conducted himself as a member of the Northern Territory Police Force and or office in charge of the Drug Squad of the said force as to: (a) bring serious dishonour upon the image of the said force; (b) cause the Northern Territory Government to conduct an inquiry by Mr R Mulholland of Queens' Counsel into allegations of corruption against the plaintiff; and (c) to course serious internal strife within the Northern Territory Police Force; (d) demonstrated that he is not a fit nor a proper person to be a member of the Northern Territory Police Force."

Mr Reeves for the plaintiff complained that no particulars have been given of paragraph 11 of the amended defences although particulars have been sought. Mr Lynch replied that the particulars would be the same particulars as the Commissioner of Police relied upon to compulsorily retire the plaintiff in his memo of 21 September 1993 (a copy of which was provided to me) and that the factual circumstances surrounding the Commissioner's decision were those contained in a letter written to the Commissioner of Police by the plaintiff's solicitors dated 27 November 1992 which would not be in issue save perhaps as to some matters of inference or submission which the writer had drawn from the facts as set out therein.

Mr Reeves continued to complain that, what I may now loosely call the Boyd loan, and the plaintiff's failure to disclose the loan to the Mulholland investigators ought not be raised in order to support, in any sense, the plea of justification, for the same reasons as I have refused to permit it to be raised previously. Significant questions of fact, according to Mr Reeves, would be necessary to be litigated. Included in those matters would be whether or not the plaintiff was, in any event, bound to disclose that material to his superiors; whether or not he ought to have made any disclosure of it to the Mulholland Enquiry; what other police knew of the loan; and whether or not the plaintiff had taken any legal advice in relation to these matters.

It was not my intention at the time of permitting the defendants to amend paragraph 11 to give them carte blanche to raise in another way the Boyd allegations or the nature of the Mulholland investigators' inquiries into the loans. So far as I am concerned the position has not changed. To the extent that the defendants wish to raise those matters by way of justification in support of paragraph 11 of the further amended defences, those matters must be specially pleaded in order to comply at the very least with Rule 13.07(1)(b) of the Supreme Court Rules which require a party in a pleading subsequent to a statement of claim to plead specifically a fact or matter, which, if not pleaded specifically, might take the opposite party by surprise.

Mr Lynch submitted that there would be no surprise to the plaintiff if these matters were now to be raised. The plaintiff is well aware of the matters and is well aware that the defendants have been attempting to raise them for some time. However, the word "surprise" in the rules is not meant in that sense. It is meant in the sense of giving formal notice to the other side of the matters that are going to be raised, so that the other side has warning of them, and can prepare their case accordingly by making sure that the appropriate witnesses are proofed and are ready to give evidence at the trial. The days when a party in civil litigation could be ambushed at the trial have long gone. Until now, the plaintiff had no reason to suppose that these matters would be needed to be canvassed by the calling of evidence - except perhaps to the limited extent that the defendants may attempt to use this material as going to the plaintiff's credit as a witness. That, of course, is another matter. The ordinary rule is that where material is put to the witness as going solely to his credit, nether party may call evidence about it, as it is a collateral issue, and the cross-examiner is bound by the answer which the witness gives. There are certain limited exceptions to this general rule but none of those exceptions appear to be relevant here.

To the extent therefore that the defendants wish to rely upon this material as being in any way relevant to the plea of justification, I will not permit it at this late stage for the same reasons that I have refused to permit it previously.

The next basis submitted by Mr Lynch for reliance upon this material is that the second defendant wishes to show that the plaintiff's feelings were not hurt by the broadcast, as he alleges, and consequently his depression and anxiety were not due to the broadcast at all, but they were due entirely to the fact that he had made a secret loan which, to his knowledge, was bound to come out once the Mulholland Enquiry was announced, and that announcement was made immediately preceding the broadcast. Consequently, so the defendants say, it is relevant to the issue as to what caused his distress and anxiety.

Mr Lynch's submission is that the plaintiff, having been permitted to amend, only a matter of weeks before the trial, his statement of claim to allege that the plaintiff has suffered injury to his feelings in the form of mental anxiety depression and psychological distress, the defendant ought now be able to show that that stress was not caused by the broadcast at all, but was caused by the plaintiff's guilty knowledge that he had made a secret loan to Mr Boyd senior, and that the fact that he made this loan was likely to come out in the Mulholland Enquiry which had just been announced.

Further Mr Lynch relied upon Rule 13.12(4) of the Supreme Court Rules which provides that an allegation that a party has suffered damage and an allegation as to the amount of damages shall be taken to be denied unless specifically admitted. Consequently, Mr Lynch submitted that there was no need to specifically plead to the allegations upon which the plaintiff relies in paragraph 7 of the amended statement of claim.

On the other hand Mr Reeves relied upon the rule in Scott v Sampson (1881-1882) 8 Q.B. 491. In that case the defendant, who had pleaded justification, sought to cross-examine the plaintiff's witnesses with a view towards showing, amongst other things, that the plaintiff was a person of bad character in the sense that he did not have a good reputation. The court held that the evidence was rightly rejected because, even if the facts which were alleged were material, they were not stated or referred to in the pleadings. In Plato Films Ltd and Others v Speidel (1961) A.C. 1090, Lord Denning at 1140 said:

> "In the year following Scott v Sampson, 8 Q.B.D. 491, Order 36, r.37, was made. (I interpolate that this rule is the same as Order 40 r.10 of the Northern Territory's Supreme Court rules). It is confined to cases where justification is not pleaded. This looks as if someone thought that the evidence receivable in mitigation of damages was different according as justification was pleaded or not (sic): just as Chambre J. did in 1811. But this is not true. There is no difference in principle between the two cases. I prefer, however, to think that the makers of the rule thought that, when justification was pleaded, as it was in Scott v Sampson 8 Q.B.D. 491 that case made it clear that, if the defendant intended to give evidence in mitigation of damages, he had to include the material facts in his defence. See what Matthew J said 8 Q.B.D. 494-495 and Cave J 8 Q.B.D. 507. Then in order to cover cases where justification was not pleaded, Order 36, r.37, was passed so as to require the defendant to give particulars. The rule did not enlarge the matters of which he could give evidence. So far as evidence of "character" was concerned, the defendant could still only give in chief general evidence of bad character and not particular instances: see Mangena v Wright [1909] 2 K.B. 958, 979 but henceforward he had to give notice to the plaintiff of his intention in that behalf at least seven days before the trial. These particulars may or may not be included in the pleadings. But in either case the court has, I think, power to strike them out if, and in so far as, they consider specific instances which would be likely to embarrass the fair trial of the action."

In my view, it is not competent for the defendants to raise an issue of causation of loss based upon facts which are not otherwise pleaded by the plaintiff or the defendant unless notice is given in appropriate time to the plaintiff to enable it to meet the case which is being sought to be made against him. That is the purpose of the "surprise rule" contained in rule 13.07(1)(b) and 13.07(1)(c); and this is so even if the matters sought to be raised only go to the question of quantum of damages. That issue was touched upon by the Court of Appeal in North Australian Aboriginal Legal Aid Service Incorporated v Michael Liddle (unreported Judgment, Court of Appeal 8 September 1994) in the judgment of the Chief Justice, with which I agreed. His Honour said at page 17:

> "A "pleading" denotes a document in which a party to the proceedings in a court of first instance is required by law to formulate in writing his case, or part of his case, in preparation for the hearing (Halsbury's Laws of England 3rd Ed, 1958, Vol 30, at p2; 4th Ed, 1976, Vol 36, at p3). The non-exhaustive definition in r1.09 of the Supreme Court Rules does not

> change that. Rule 13.07 places upon a defendant an obligation to specifically plead a fact or matter which, inter alia, if not pleaded specifically might take the plaintiff by surprise, and r13.02 requires that a pleading shall, inter alia, "where a claim, defence, or answer of the party arises by or under an Act identify the specific provision relied on;". Rule 14.04 requires that in a proceeding commenced by writ a defendant who files an appearance shall serve a "defence". That word is not defined, but given the contents of the general rules as to pleading, it is clear that such a document ought not to be limited to admissions or denials, but must include every ground upon which the defendant wishes to rely to defeat or partially defeat the plaintiff's claim."

Those comments were made in relation to a case in which the defendant wished to raise contributory negligence in order to reduce the damages which the plaintiff was seeking to have assessed, interlocutory judgment having already been entered in favour of the plaintiff. To some extent, the decision in the case rested upon the historical basis upon which the courts have viewed a plea of contributory negligence. But also I think the view of the Chief Justice was that, in any case where the defendant sought to rely upon facts which might take the plaintiff by surprise in order to reduce the damages, the defendant ought to raise them in his pleading, and or give notice thereof to the other side in an informal manner in order to prevent surprise. At page 18 of His Honour's judgment the Chief Justice said:

> "... That is not to deny that there may be occasions when the parties by free and open exchange between themselves prior to trial are able to achieve the desired ends without resort to the Rules, but, at least when the trial commences, the trial Judge should be immediately put in the position of understanding what the issues are between the parties, if it has not already been done, by enabling a defence (or amended defence as the case may be) and any necessary subsequent pleading in response, to be filed. Absent such a formal record, difficulties may arise upon appeal as to the issues which were really before the trial Judge."

Angel J did not think it was necessary to plead contributory negligence but generally agreed with the dissenting judgment of White J in Christie v Bridgestone Australia Pty Limited (1983) 33 SASR 377 at 389 where His Honour referred to the need for counsel for the

plaintiff to be on notice that contributory negligence is a live issue so as to prevent injustice to him.

In this particular case, the plaintiff intends to call the evidence of experts and, in accordance with the rules, has delivered copies of the necessary expert reports upon which he intends to rely. The second defendant has had the plaintiff medically examined and the second defendant announced to the jury panel when the jury was being selected that the second defendant intended to call Professor Jones, a psychiatrist. I do not know whether the second defendant has provided the plaintiff with a copy of Professor Jones's report but I expect that they have already provided that report.

I do not know whether Professor Jones, in his report, has reached a conclusion that the plaintiff's distress and anxiety is not due to the broadcast but is due to the matters about which the second defendant wishes to cross-examine. No suggestion of that kind was made by Mr Lynch. If there was, in Professor Jones's report, an opinion of that kind based on those sort of matters, that would be one thing. The plaintiff raised the issue of having suffered injury to his feelings in the form of mental anxiety, depression and psychological distress at a relatively late time. It was necessary for the plaintiff to obtain an extension of time in order to deliver the reports upon which the plaintiff intends to rely. That extension of time was granted although it is fair to record that the extension required was only a very short one. Nevertheless, that issue was not raised until late and the second defendant was not in a position to arrange for the plaintiff to be medically examined until the weekend immediately proceeding the commencement of the trial. If the disputed factual matters are relied upon by Professor Jones and are referred to in his report, I do not think that the plaintiff can now be heard to complain too much about them. Those matters would be dealt with in Professor Jones's report and the bases for his opinion should be apparent from the report itself. Presumably the material upon which Professor Jones relied would be material supplied to him by the plaintiff himself.

If, on the other hand, there is nothing in Professor Jones's report about this matter or these matters, then it seems to me that the matter is a very different one. The second defendant is seeking to agitate, by raising facts of which it has not given prior warning, a matter which goes to causation of loss. That is a matter of which I think the second defendant ought to have given prior notice in order to prevent surprise. It has not done so. I do not think that the second defendant should be permitted to rove into that area without appropriate notice. The question is then whether it is now too late for appropriate notice to be given. The questions which the defendants seek to explore are the impact of the events in 1985 and 1992, coupled with the announcement of the Mulholland Enquiry, upon the plaintiff's mental state. It is difficult to judge in the absence of particulars the extent to which these allegations need to be explored in cross-examination of the plaintiff. Mr Lynch has submitted that he does not intend to raise any factual matters other than those factual matters which are contained in the letter from the plaintiff's solicitors to the Commissioner of Police dated 27 November 1992. Mr Lynch's position was that, as that material was provided to the Commissioner upon the plaintiff's instructions, it is unlikely, in the extreme, to give rise to any factual dispute about which the plaintiff would have a need to call any further evidence. It was not proposed, in other words, that the second defendant would seek to challenge any of the factual matters set out in that letter either in cross-examination of the plaintiff or by calling evidence. In a way I was being invited to treat the letter of 27 November 1992 as providing the particulars needed to be given. I do not think that I can so treat that letter. Mr Lynch put it that his case was that it was the plaintiff's previous knowledge about these matters which created the concern and anxiety on his part; that is, he was submitting that there was something in the nature of fear or concern which the plaintiff had arising from those matters which he was afraid would reflect adversely upon him should they become known - hence his anxiety. An alternative position may be that the second defendant does not wish to assert guilty knowledge but merely a fear that the plaintiff might be criticised without actually suggesting that he had done anything wrong. I think I am in the difficult position at this stage of not having enough information by way of particulars to know precisely how it is that the second defendant proposes to use this material. Accordingly I am

not in a position to judge (and nor are the plaintiff's advisers) to the extent to which this area may cause embarrassment.

The ruling I give at this stage is that in the absence of particulars the defendants will not be permitted to pursue this line of enquiry for the purposes of showing that the plaintiff's loss was caused by these matters. However, I am prepared to review that ruling once particulars have been supplied.

The third basis upon which Mr Lynch sought to justify this line of enquiry is that it goes to questions as to the plaintiff's credit as a witness. On the issue of the reasons for the plaintiff's retirement, it is relevant to recall what Mr Reeves had to say about the reasons for the plaintiff's retirement and the passages and evidence-in-chief of the plaintiff to which I have referred previously. I think that the defendants are quite entitled to cross-examine the plaintiff as to his credit on those matters. There is also the evidence that the plaintiff gave at pages 203 and 204 of the transcript that he volunteered financial information to the Mulholland Enquiry concerning his financial affairs. In Bickel v John Fairfax & Sons Ltd and Another [1981] 2 NSWLR 474 at 494 Hunt J said:

> "The purpose of cross-examination as to credit is to show that a witness ought not to be believed on his oath. If authority be needed for that proposition, it is to be found in R v Sweet-Escott (1971) 55 Cr App R 316, at p320 ... the conduct or character of a witness cannot, in my view, be used to attack his credit unless that conduct or character is of such a nature as to tend logically and rationally to weaken confidence in his veracity or in his trustworthiness as a witness of truth."

In Plato Films Ltd v Speidel Lord Denning said at page 1143:

> "The only legitimate purpose of cross-examination to credit is to damage or destroy the plaintiff's credibility: but, as often as not, the plaintiff will have said nothing to warrant it. The plaintiff cannot speak as to his own character and reputation because he does not know what other people think of him, or, at any rate, he cannot give evidence as to what they think of him. And if the purpose of the cross-examination is to introduce illegitimately specific instances of misconduct - which cannot be legitimately put in evidence - then it should be discouraged. It is not good for the law that a judge admit a

> "roving" cross-examination to credit and then go on to tell the jury to ignore it when they come to assess damages, knowing that it is an impossible thing to ask them to do. Better not to have it introduced at all. Better to keep to general evidence of bad character which, when given by people who know the plaintiff and can judge his worth, is worth more than many instances and does not embarrass the trial as they would do."

However in this particular case the defendants seek by way of justification to prove certain specific matters. I will not set out the details of them; they are well known to the parties. Those matters are the subject of specific allegations made by the first defendant in the program complained of. Clearly those matters are going to be ultimately resolved by the jury by reference to who, the plaintiff or the first defendant, is in their opinion, telling the truth about those matters. Consequently the plaintiff's credit is very material in this case.

I consider that questions as to matters of credit, which the defendants' have foreshadowed, might tend logically and rationally to weaken confidence in the plaintiff's veracity or in his trustworthiness as a witness of truth. The question which I then have to consider is whether I ought not allow them because of the provisions of section 15 of the Evidence Act. The first matter to be considered is that a question is proper if it is of such a nature that the truth of the imputation conveyed by it would seriously effect the opinion of the court as to the credibility of the witness on a matter to which he testifies. The second is that the question is improper if the imputation which it conveys relates to matters so remote in time or is of such a character that the truth of the imputation would not effect, or would effect in a slight degree, the opinion of the court as to the credibility of the witness on a matter to which he testifies; and that the question is improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

In considering those matters I think it is proper to bear in mind whether or not the real purpose of the questioning is to prejudice the jury against the plaintiff as a person: see also Bickel v John Fairfax & Sons Ltd and Another at pages 494-495.

It may be conceded that the loan to Boyd was a fair while ago (some 9 years) but the matter of the revealing of the circumstances of the loan to the Mulholland Enquiry was not so long ago. And of course, if the plaintiff has given a misleading answer to his counsel in these proceedings as to the causes for his forced retirement, that is even less remote in time.

In conclusion I consider the line of enquiry which the second defendant's counsel wishes to pursue in relation to the plaintiff's credit is a matter which falls within section 15(a) of the Evidence Act but does not fall within sections 15(b) or (c) of the Evidence Act, and therefore, the second defendant's counsel should be permitted to cross-examine the plaintiff on those issues as going to the plaintiff's credit as a witness. I do not think that the purpose of the questions is merely to prejudice the plaintiff in the eyes of the jury. I therefore maintain the ruling which I gave last Friday, that the question which Mr Lynch asked was a proper one as it went to the question of the plaintiff's credit. Just how far Mr Lynch will be permitted to pursue the question of credit will depend upon the questions themselves and the imputations which they are designed to convey. I do not intend to give Mr Lynch absolute carte blanche to ask whatever question he may choose to ask on the matters which he seeks to raise. Until I have heard the question I do not think that I am in a position to rule whether a particular question ought to be allowed or disallowed. Nevertheless, in general, it seems to me that cross-examination about the matters which Mr Lynch has foreshadowed is likely to be admissible as going to the plaintiff's credit in so far as the purpose of the questioning is to demonstrate that the plaintiff mislead the Mulholland Enquiry into thinking that he made full disclosure as to his financial affairs when in fact he had not, or mislead the present jury into thinking that he had made full disclosure to them of the reasons for his forced retirement.

Mr Reeves has referred to the general discretion which I have to permit the plaintiff to call evidence about matters put in cross-examination which goes solely to credit and has asked for an opportunity to be further heard in relation to that if it is necessary for him to so do. I note that that is Mr Reeves's application and if he chooses to make that application I will rule on it in due course. However, I do not think that I can rule upon it in advance as it will depend upon the testimony which has been given by the plaintiff.

Mr Reeves also submitted that I should direct the jury in advance as to why this evidence is being admitted. I have considered that matter. I think it is proper that a suitable direction be given, but I think it is far better to leave that until my summing up at which time I will be able to identify with precision precisely what evidence has been admitted as going solely to credit. At this stage I could only foreshadow it in a general way and I do not think it is desirable that I attempt to do that when I have not as yet heard the questions myself.

I should say in fairness to Mr Wrenn that I have taken into account the general submissions which he made and in particular his submission that cross-examination should be permitted as going to credit. I have already dealt with that topic thoroughly and I do not think it is necessary to say any more about it at this time.

However I should indicate that at the moment I am not persuaded that it would be a proper use of the material to attempt to show that, as reflecting upon the plaintiff's credit, the Commissioner was justified in reaching the conclusions he reached to have the plaintiff compulsorily retired. That is obviously a debatable matter and I think it does not go so much to the plaintiff's credit as to his character and therefore ought not be permitted. The distinction between matters which reflect upon the plaintiff's character, and those which reflect upon his credit as a witness, is an important one. Questions designed to show that the plaintiff is a person of bad character will not be allowed, as evidence of bad character is admissible only if notice of the evidence has been given: see, for example, Scott v Sampson, and Plato Films Ltd v Speidel.

SIX

APPLICATION by the first defendant to lead evidence concerning conversations he had with his former wife and mother-in-law in the absence of the plaintiff as an exception to the hearsay rule.

The following ex tempore ruling was delivered on 15 November 1994.

The First Defendant now seeks to give evidence concerning certain conversations he had with his former wife, Judy Wrenn, and I gather with Yvonne de Jong. These conversations are inadmissible unless the defendants can rely upon the rule that permits evidence of conversations made with an alleged co-conspirator to be admitted against the other alleged co-conspirator; in this case, the Plaintiff.

Objection to this evidence is taken on a number of grounds. The first objection is that particulars of the alleged conspiracies having been sought and given, the plaintiff objected to the defendants relying upon the particulars. I should record that the particulars supplied were those given by the second defendant. The first defendant has not supplied particulars, but says he would do so, if asked, and that the particulars would be the same as those provided by the second defendant. There are several limbs to this objection: first, that it is now alleged for the first time, that Judy Wrenn is a conspirator. Previous particulars supplied did not identify her as a conspirator. (p84 of pleadings book). This allegation is made very late, well into the trial. Mr Wrenn indicates that his wife said to him that Hart told her that he was arrested to teach him a lesson. I do not know what else there is to implicate Mrs Wrenn in the alleged conspiracy directly, apart from what might emerge from what Mrs de Jong allegedly told Mr Wrenn. Mr Wrenn did not put to Hart in cross-examination that he said anything of the kind alleged to Mrs Wrenn.

Secondly, there is an allegation in the particulars, pages 7 to 8, that "the plaintiff was reckless as to whether the allegations were true or false". That allegation has now been withdrawn. It was submitted that nothing was put to Mr Hart in cross-examination concerning his being a participant in either of the alleged conspiracies. I will return to this later.

Further, the plaintiff alleges there is no evidence, (let alone any "reasonable evidence") independent of what the alleged other conspirators said to Mr Wrenn, that Hart joined in the conspiracies. Therefore, it was submitted that I ought to rule the evidence of Mr Wrenn as to what the other alleged conspirators told him is inadmissible: see Ahern v The Queen (1988) 165 CLR 87 @ 100 and 103.

So far as the conspiracy to pervert the course of justice is concerned, the same particulars are relied upon in support of that conspiracy as the conspiracy to arrest on false charges. The defendants might rely upon police investigations being diverted, if the intent is to prevent some anticipated proceedings from being brought, see The Queen v Rogerson (1992) 174 CLR 268, but that is not alleged in the particulars.

In argument, when pressed by me, Mr Southwood finally submitted that the conspiracy to pervert the course of justice involved an agreement to arrest Wrenn on false charges with the intention or purpose of deflecting an investigation by police into Sergeant Milner's alleged sexual abuse of a person "N". The particulars supplied so far do not reveal any basis for such an allegation.

In order to prove a conspiracy to pervert the course of justice, there must be at least four elements:

(a) that Hart entered into an agreement with others to do an unlawful act, or to do a lawful act by unlawful means. The agreement need not be express. It may be inferred from conduct. It is not necessary for Hart to be in direct communication with each of the other conspirators, so long as he is aware of the common design and agreed with at least one of the conspirators to be involved, either in a "wheel" type conspiracy or a "chain-type" conspiracy. The unlawful act is the perversion of the course of justice, and to prove this, the defendant would need to show the following additional elements:

(b) that the conspirators, including Hart, agreed to arrest Wrenn (on false charges) with the intention of deflecting a prosecution of Sergeant Milner apprehended by Hart and the others.

(c) that the conspirators and Hart believed that an investigation into Sergeant Milner's conduct could have lead to the prosecution of him for sexually abusing "N", unless the police were deflected from that course.

Leaving aside the falsity of the charges for a moment, it would not be enough to allege simply that the intention was to deflect an investigation into Sergeant Milner's conduct. The alleged conspirators might believe such an investigation might be embarrassing, for example. But that is not enough. They must believe that the investigation could lead to his prosecution, and they must agree to take their alleged course, to deflect that apprehended prosecution: see The Queen v Rogerson especially at page 278 per Mason CJ and at page 284 per Brennan and Toohey JJ. No cross-examination has been properly directed to Hart to show that Hart had any such intention or any such belief. The nearest the cross-examination comes to this is at page 383 when it was suggested that Hart's motive in arresting Wrenn was to prevent an investigation into Milner.

On the other hand, there is no reason why a conspiracy to lay false charges or for that matter a conspiracy to arrest on false charges, should not also be a conspiracy to pervert the course of justice. Brennan and Toohey JJ expressly recognised the former in Rogerson at page 281, and the latter is not significantly different from the former.

I conclude, therefore, that so far as the conspiracy to pervert the course of justice is concerned:

(a) the particulars could support such a conspiracy if they support a conspiracy to arrest on false charges;

(b) the particulars do not support a conspiracy based upon deflecting the police from an apprehended investigation into Milner, assuming the charges laid were not false; and

(c) such an apprehended investigation is not enough to support such a conspiracy in any event.

So far as the conspiracy to arrest you on false charges is concerned the defendants would be required to show:

(1) that Hart and the others intended to do an unlawful act, i.e. arrest Wrenn or cause Wrenn to be arrested on false charges;

(2) that Hart and the others knew Wrenn to be innocent of those charges; and

(3) that Hart and the others agreed to carry out the unlawful act.

It was not put to Hart that he knew Wrenn to be innocent of the charges. What was specifically put was:

(1) that Hart knew that the de Jong family had a motive for lying about the charges; (Tr 283-284).

(2) that Hart "conspired with others to have Wrenn arrested" (p749) and continued (later) to conspire to `get' Wrenn (p771). These very general allegations do not go to the heart of the issue.

The particulars supplied do not specifically allege a conspiracy to have Wrenn falsely charged. Paragraph 12 alleges a conspiracy to threaten to falsely complain and a conspiracy to cause Wrenn to be falsely arrested, but not an allegation that he was to be arrested on false charges. This gives rise to a potential for confusion. An arrest may be false, even though the police officer conducting the arrest believes the arrest to be lawful. The nub of the defendant's case is not a mere false arrest; it is an arrest on false charges. The particulars should be amended.

I consider that the tenor of the cross-examination of Mr Hart was directed to show that Hart did not have reasonable grounds to suspect that Wrenn had committed any offence for which he might be arrested without a warrant. (cf Police Administration Act, s123(1)) and that consequently Wrenn was falsely arrested. (Tr.p344-345, p348, p358 and p359). That is a different question from whether or not Hart held an honest belief that Wrenn had committed an offence or, to put it in another way, that Hart knew the allegations to be untrue. The former involves an objective test; the latter subjective. Nevertheless, Hart did say in cross-examination that he did not doubt the credibility of Yvonne de Jong and Margaret Milner (XXN p344 and p366). Therefore, Hart has in effect denied the allegations now sought to be made against him. However, the failure of the cross-examiners to properly put to Hart their case of a conspiracy to arrest on false charges means that the rule in Browne v Dunn (1894) 6 R.67 (H.L.) has not been properly observed: see the observations of Wells J in Reid v Kerr (1974) 9 SASR 367 @ p373-4, [quoted in Cross on Evidence at p17 and p197]. I do not think fair warning has been given by the cross-examiner of the essential allegation that Hart knew the allegations against Wrenn were false. The remedy for this is to allow the plaintiff to call evidence in reply, and/or to allow Hart to be recalled for further cross-examination. As Hart is to be recalled in any event, there is no prejudice in allowing that allegation to be put to him.

Mr Reeves is allowed to call evidence in reply if he chooses to do so, on the topic of the alleged conspiracy to arrest on false charges. I note also that this was not an issue on the pleadings until the 11th day of the trial (after Hart's cross-examination had been completed),

when the defendants were given leave to amend their defences to plead justification in relation to imputation 6(c) (Tr p823).

The final point is whether or not there is reasonable evidence, independent of what the other alleged conspirators said to Wrenn, that Hart joined in the alleged conspiracy. Mr Southwood submits there is such reasonable evidence but that in any event, not all the evidence is yet in, and I should postpone my ruling until later in the trial in accordance with the observations of the High Court in Ahern at p104. The evidence which Mr Southwood relies upon is circumstantial evidence. It is the kind of circumstantial evidence that is like strands in a cable. He submits that not all the strands are in place, in that Hart's interview of Milner is not yet before me; nor have I been invited to consider it in the absence of the jury. Assuming that this interview was so incompetently conducted as to lead to an inference that Hart was trying to tip off Milner that he was to be investigated, this may throw additional light on Hart's motives and on whether Hart was a part of the alleged conspiracy, and until I see that material, I cannot say one way or the other. For whatever reason, the precise form of this interview was not put to Mr Hart in cross-examination so I am not in a position to even guess as to its utility. However, even without that material my preliminary view is that there is reasonable evidence from which it may be inferred that Hart knew the charges to be false and knew that the de Jong family planned to lay false charges. That evidence consists inter alia in the fact that Hart was forewarned; the weakness of the case against Wrenn objectively, for various reasons; the denials of the forewarning made by Hart to Inspectors Green and Bullock; the circumstances surrounding exhibit D3 and the different copy of that document which Hart had when he was spoken to by Inspectors Charlwood and McDowell and the explanation he gave for that to the jury; the fact that the complainants were members of Wrenn's own family and the complaints were late in coming, as Hart well knew; and the failure to tell Commander Baker of Wrenn's forewarning. Of course, there are other possible explanations for these things, and in the end the inference may not be drawn, but my preliminary view is that there is a prima facie case, or reasonable evidence, that, if there was a conspiracy, Hart joined in it. The evidence as to whether or not there was a conspiracy at all, is not all in; nor is all the evidence on whether or not Hart joined the conspiracy and it

may be that in the end, this preliminary ruling will prove incorrect. I therefore consider it best to follow the course foreshadowed in Aherne at p104 and admit Mr Wrenn's evidence of his conversation with the alleged co-conspirators at this stage, and defer my ruling on the admissibility of this evidence until the end of the defendants' respective cases.

SEVEN

APPLICATION by the defendants to have the jury discharged.
In the course of ruling on the matter, the following ruling was given ex tempore on 21 November 1994 on the power of the trial judge to continue the trial alone, if the jury is discharged.

HIS HONOUR: I consider that I do have the power, in the absence of the consent of the parties, to continue this trial without a jury if the jury is discharged. I think the correct answer to the question is to be found in the Act itself.

Section 7(1) of the Juries Act, provides that `The trial of a civil issue or a question of fact in a civil issue shall be by the Court without a jury unless the Court orders otherwise in accordance with this section.' Subsection (2) provides that `A party to a civil issue may make application to the Court for an order that the issue or a question of fact in the issue be tried by the Court with a jury.'

Subsection (3) provides that `Whether or not such an application has been made the Court may, if it appears just, order that a civil issue of a question of fact in civil issue be tried by the court with a jury. Subsection (4) provides: `Where the Court so orders, the jury shall consist of four jurors chosen and returned in accordance with this Act.' Rule 47 more or less reflects the same concepts but in slightly different language.

It seems to me that an order that is made under section 7 may in fact be revoked. The trial judge of a civil action has complete power subject to the Rules of Court and the dictates of justice to deal with the procedural aspects of a trial in such a manner as he, in his discretion, considers to be just. Neither the Juries Act nor the Rules specifically provide for what is to occur if the jury is discharged, except in the case of the jury not being able to reach a decision.

Section 49 of the Juries Act provides, in subsection (2):

> "(2) Where, upon the trial of a civil issue -
> (a) the jury has remained for 12 hours or more in deliberation; and
> (b) it is not possible to enter a verdict in accordance with sub-section (1),
>
> the Court shall discharge the jury and the cause may without new process be again set down for trial, either at the same or any subsequent sittings as the Court may order."

Neither the Juries Act nor the Rules provide for the discharge of the jury in any other way or in any other circumstances, and accordingly the Court would only discharge the jury upon the application of a party if it thought it right to do so in the interests of justice.

In such a case, the Court would, if it thought that the interests of justice required it having regard to the state of the trial, how much expense would be caused to the parties in having to re-litigate it again, as well as other matters, then be called upon to make a decision as to whether or not the Court, constituted by the Judge sitting alone, ought to order that the evidence that has already been heard be treated as the evidence before him and then proceed with the trial.

That, it seems to me, is in conformity with the spirit of the decision in Patton v Buchanan Borehole Collieries Pty Ltd (1993) 178 CLR 14 and, in particular, the passage in the judgment of Mason CJ, Deane and Dawson JJ at p18, where reference is made to the

artificiality that would occur in interpreting provisions in the legislation without regard to considerations of time and convenience and the desirability of avoiding unnecessary expense.

I refer also to page 19 where their Honours observed that:

> ... "the discharge of the jury is not an end itself but merely an incident in the trial process precisely because it is contemplated that the trial will continue before the judge alone."

There are similar observations in the judgment of Gaudron J at page 23:

> "Moreover, a power vested in a court should not be construed as subject to a limitation not revealed by the ordinary meaning of the words by which that power is conferred. A court must exercise its powers judicially and, in the case of discretionary powers, in accordance with those general principles which govern the exercise of judicial discretion. A general discretionary power which, if exercised one way rather than another, might, in certain circumstances, involve an injustice, should not be approached on the basis that Parliament intended that it not extend to any circumstances in which injustice might, conceivably, occur. Rather, it should be approached on the basis that it was intended that it be exercised for the ends of justice and in accordance with legal principle."

Support for that approach can be found also in the judgment of McHugh J, and I bear in mind that there the court was dealing with perhaps a position which is rather weaker, if anything, than the position that we have here.

The position in the District Court was that, so it would appear from the sections that are referred to in the judgment, one where prime facie the trial was to be with a jury but that the court may order that any questions of fact be tried without a jury.
Here, the prime facie position is the reverse. The ordinary rule is that it will be by judge alone unless the judge make an order that there shall be a trial with a jury. It seems to me that trial by jury having been ordered is not an order which the judge himself, having made it, could not revoke if the circumstances so warranted it.

EIGHT

APPLICATION by the plaintiff to call evidence in reply.
On 30 November 1994 the following ex tempore ruling was made.

MILDREN J:
I consider that the question whether a plaintiff in the position of this plaintiff is entitled to call evidence in relation to a matter of justification by way of reply to the defendant's case is not one of right but it is one of practice.

Mr Lynch does not dispute that. What Mr Lynch puts is that having ventured into the question of truth the plaintiff cannot now split his case. The plaintiff says that he did not, in fact, venture into the issue of the truth of the allegations as such. What he did was call evidence on another issue which was the issue of falsity which went to the question of aggravated damages.

Now, this is a bit of fine distinction because, of the course, the question of falsity is another way of saying that the allegations are untrue. But nevertheless the plaintiff's counsel made it plain, right from his opening, that that is what he was going to do and, likewise, the defendants made it plain, right from the beginning that they would take objection to that course.

What really should have been done, I think, is to have sought a ruling on this issue at a much earlier stage of the trial than now; perhaps before the plaintiff called any evidence at all.

It is interesting to note that Marks J, in his ruling in Protean (Holdings) Ltd (Receivers and Managers Appointed) and Others v American Home Assurance Co [1985] VR 187, dealt

with the problem which is going to inevitably arise in cases like this where a particular piece of evidence is relevant to more than one issue. At page 192 of the report he concludes by saying:

> "Accordingly, I rule as follows: The plaintiffs may choose not to call evidence in relation to any issue on which the defendant has the burden of proof until after the defendant has closed its case on it.
>
> The plaintiffs must begin in respect to the issues on which it has the burden of proof. However, the plaintiffs cannot split their case on any issue. Once embarked on evidence in relation to an issue, they must call all the evidence on which they wish to rely in relation thereto.
>
> This means that if they call any evidence before the defendant, which is directed solely at an issue on which the defendant has the burden of proof, they will not, without good reason, be permitted to call further evidence after the defendant's evidence in relation to that issue."

Now, it was interesting to see the way Marks J expressed his ruling, because of course, a piece of evidence might be directed towards more than one issue, and it might be directed towards issues upon which the plaintiff has an onus of proof, as well as upon issues on which the defendant has an onus of proof.

Now, the plaintiff has an onus of proof in relation to aggravated damages, and the plaintiff's intention was quite clear right from the start, that he did not intend to call evidence going to anything else other than the question of falsity. Consequently, he limited the evidence of the plaintiff to what are essentially no more than denials of the allegations.

There is the question of the convenience of proving a negative, a matter dealt with by Marks J at page 191:

> "Accordingly, I am minded for the purposes here, to consider that there is left in the Court a discretion in the matter. All authorities refer to the rule being one of practice and not law, and that is consistent with an exercise of discretion being involved in a ruling as to the order of presentation of evidence. But it ought I think, to take place against the background of the practice.

> In the exercise of my discretion in this case, I place some importance on what was said in McLaren & Sons v Davis (1890) 6 T.L.R. 372 by Cave J. as a member of a bench of three Judges in the Queen's Bench Division, at p.373: "It was never convenient to prove a negative. When the defendant had set up something affirmative then was the time to dispose of it. The learned Baron [a reference to Huddleston B. who sat with the jury at first instance] had exercised an erroneous discretion in refusing to allow the rebutting evidence."
>
> Further, in Jerome v Anderson (1964) 44 D.L.R. (2d) 516, Cartwright J. at p.531, observed: "In view of the nature of the particulars of the plea of justification delivered in this action, it would, I think, have been highly inconvenient to call upon the plaintiff to prove the negative of that issue before having heard the evidence offered by the defendants in support of it."
>
> In each case, emphasis was laid on the burden which the plaintiff is likely to have of proving a negative if he is to go first in relation to issues on which the defendant has the burden of proof.
>
> In the exercise of a discretion, I think it is proper to take into account the extent to which this so-called proof of a negative would be placed on a plaintiff. This aspect in this case, I think, is highly pertinent and of considerable weight.
>
> Here it would be not only inconvenient but quite unfair and contrary to the interests of justice if the plaintiffs are called upon to adduce all their evidence in disproof of a case with respect to which they have heard no evidence."

Now, it seems to me that the true conduct of the plaintiff's counsel was not to attempt to meet the defences of justification by the way he conducted the plaintiff's case. The plaintiff's counsel did not, in my view, seek to do that, and it would have been unfair, had I been asked to make a ruling, to have caused him to take that course, given the nature of the allegations that have been made against the plaintiff, even in the light of the particulars that have been delivered, for a number of reasons.

First, there are a number of different allegations, some going back over some years, some going back to now some 16 years, and also there are allegations of conspiracy which in their nature would be difficult for him to have met, except by way of reply. I have already given the plaintiff leave to call that evidence; I do not have to go over that again.

What is proposed now is to call what, essentially, amounts to one, and perhaps a bit of evidence from another witness, about a couple of fairly discrete issues. It is not as though I am being asked to exercise my discretion to give the plaintiff an unlimited right to call a great deal of evidence right at the end of a trial.

Although the principle would be the same regardless of which course he was adopting, the fact that the plaintiff has limited his application to only one and a "bit" witnesses makes me feel less unhappy about granting his application. I have to take into account fairness to all the parties here.

It would have been open to the defendants, upon whom the burden rested and upon whom it rests throughout, to call whatever evidence was available to them to prove the matters going to justification and, if there had been a question in their minds as to whether or not at a late time the plaintiffs would be given leave which might have prejudiced them, then they could have raised that matter themselves.

Mr Lynch suggested that there was some prejudice to his case but, frankly, I am unable to see it. Accordingly, in the exercise of my discretion, I grant leave to Mr Reeves to call the additional evidence that he proposes to call.

NINE

APPLICATION by the plaintiff that a witness be declared vulnerable pursuant to s21A(1) of the Evidence Act and not be cross-examined by the first defendant.

The following ex tempore ruling was given on 2 December 1994.

MILDREN J: This is an application by the plaintiff pursuant to section 21A of the Evidence Act to have a witness, Judith de Jong, or Judy de Jong, the former wife of the first defendant, Mr Wrenn, to be declared a vulnerable witness pursuant to section 21A(1) of the Evidence Act. The Act defines a vulnerable witness, inter alia, to be: `A person who is, in the opinion of the Court, under a special disability because of the circumstances of the case or the circumstances of the witness.'

The plaintiff submits that on the evidence which has been led before me in this voir dire hearing, I ought to find that the witness is a person under such a special disability. The evidence upon which I am called upon to rely is that of a Doctor Beaumont, a general practitioner who first treated the witness on 4 July 1991.

At that time she had come to consult Dr Beaumont because she had collapsed, and a diagnosis was made that she had a stress-related condition with acute anxiety. She was referred, later, to a psychiatrist, after having urine tests done to see if she was pregnant, to establish whether or not she was stable enough to carry her pregnancy, or whether she ought to have an abortion. She was treated by a psychiatrist, Dr Joan Ridley, after Dr Beaumont had a third consultation with her on 12 August 1991.

The diagnosis made by Dr Ridley, according to Dr Beaumont who received a report from her, and who was permitted to refer to that report, was that the witness was suffering from acute anxiety, the cause of which were alleged threatening letters and assaults, and amongst other things, a previous sexual assault upon her as a child, and on her children, and blame for those matters which the patient felt was being foisted on her by her husband in not reporting it.

According to Dr Beaumont, she considered also that she had a stress related condition, and that was a part of the reason for referring the patient to Dr Ridley. She did say that she took a history from the patient in which the patient attributed, at least in part, the cause of her complaints as being related to the conduct of the first defendant.

I have heard the evidence of Mr Wrenn who says that he has known this particular witness since 1974. He has said in other evidence that they were married and that he ceased to have any relationship with her in January or February of 1989.

He also said that he was aware that in a period extending for quite some time prior to 1989 this witness had visions, delusions and he had himself seen her lying on the bed in a non-responsive position; and that he had on a number of occasions heard her complaining of seeing little men, and these matters occurred over a long period of time prior to 1989.

Mr Wrenn said that he left the Northern Territory in 1989 and again in 1991 and, apart from a couple of short periods to do with this case, has not returned. He said that he has not corresponded with her, and he gave evidence of an incident in March 1989 when he was residing at his mother's residence at Palmerston when in the early hours of the morning the witness turned up at his house naked. There was some sort of dispute between them; it is not necessary to go into it.

In any event, he asked her to leave the house but she refused until they had spoken about various matters that were between them. The witness refused to go and he forced her out and closed the door. At that stage she made complaints of breaking her arm, which he ignored, and which he regarded as, essentially, figments of her imagination. He said that he saw her wearing a sling for some three days after that, but following that she was no longer wearing a sling.

Part of the matters which Doctor Beaumont was asked to consider in relation to her opinion as to the present state of health of the particular witness involved, amongst other things, complaints of assaults by Mr Wrenn, including hitting her on the head, breaking her arm, hassling her after the separation and so on.

In the absence of any evidence from Mrs Wrenn, I am unable to find that those matters did in fact occur particularly, given the fact that Mr Wrenn has sworn on his oath, and I have no reason to disbelieve him, that in fact they did not occur.

But it seems to me that she did in the past have a serious stress-related condition and that, rightly or wrongly, she attributed much of her symptomatology to the conduct of the first defendant and it is, I think, understandable that she would have had at that stage a great deal of anxiety which related to, amongst other things, the traumatic child molestation matters that came up in 1988 and the fact that the relationship between her and the first defendant came to an end in a short time thereafter.

Doctor Beaumont's evidence is that she saw her next on 30 November 1994. She was told that, having been treated by Doctor Ridley, the matter that she was then complaining of had settled so that there was no on-going anxiety. It seems that when she saw her again on 30 November, this was probably in response to a request that had been made to the witness to attend these proceedings to give evidence.

I draw no inferences one way or the other as to her motives in going to see Doctor Beaumont. Doctor Beaumont said that on that occasion the witness was anxious and complained of headaches and an inability to concentrate. As a consequence of that consultation, she wrote a letter addressed to the Magistrate, Supreme Court, Darwin, who I take to be me even though I am not a magistrate, dated 30 November 1994, in which she said, inter alia, that in 1991 her psychiatric condition deteriorated markedly and she became quite unstable mentally. This deterioration was attributed to the stress of an impending court case involving Andrew Wrenn, and it was at that stage that Judy consulted a psychiatrist and it took about six months for her to become well again. Doctor Beaumont went on to say that she was concerned that using Judy as a witness in this current court case could again destabilise her mentally.

Her evidence was that, however, if she were able to give evidence by closed-circuit TV and was cross-examined only by counsel and not by Mr Wrenn personally, she felt that there was no significant risk in her being able to give her evidence in that manner. She did say that there will be anxiety to her whatever role she has to play, but hopefully, in those circumstances which I have just outlined, the anxiety will not be anything more than that, and the 1991 symptoms probably would not be precipitated - I am paraphrasing her evidence and not using perhaps the same words that she said, but that was the sense of it.

It is put that for a number of reasons I ought not to give much weight to her evidence: first because there was little in the way of history taken; secondly, that Doctor Beaumont is not a psychiatrist but only a general practitioner. As to that, I should note that Doctor Beaumont's evidence was that she treated a lot of patients with what she regarded to be pure psychiatric or psychological conditions. Indeed, she said that she treated such patients at least once a day, or more often, and that some 60 percent of her patients had some sort of psychological problems.

It has not been shown to me that she is not qualified in the way in which most general practitioners are qualified to diagnose anxiety states, and I think that I should accept her evidence, despite the criticisms that have been made of it by Mr Southwood and by Mr Wrenn. It was put that she had not taken a detailed history but I formed the impression from her evidence that she took the kind of history that could be expected of the average general practitioner. Certainly it is not the sort of detailed history that expert witnesses would take where they had not seen a patient previously, but this after all was a patient whom she had seen before on at least 3 occasions, and in relation to whom she had a report from a specialist psychiatrist.

I find on the facts that there is a risk, a risk which I do not think could be described as being a minimal one, that if this witness is called to give evidence in this case she may be destabilised mentally to the extent where she needs to seek psychiatric assistance again.

Now that having been said, it was submitted that in those circumstances she was not a person under a special disability because at this time she had no particular condition other than the normal anxiety of any person who is asked to come along and give evidence. In my opinion where a witness has a particular vulnerability to giving evidence which could cause her injury of a mental kind by having to give evidence as a witness in the case, then that person is a witness who has a special disability because, although all witnesses - or, nearly all witnesses that are expected to give evidence will be anxious, it is not every witness who has a latent disability or vulnerability to be caused what might be said to be a fairly serious problem of a medical kind if that anxiety is converted into a medical condition.

I find that in this case Judy de Jong is a witness under a special disability because of her circumstances and because of the circumstances of the case, in that her condition, her mental condition, is related to her previous relationship with the first defendant. Whether her views of that are right or wrong, nevertheless that is her perception.

The next matter is this. I have been asked by Mr Reeves to make an order pursuant to section 21A that her evidence be given at a place outside the courtroom and transmitted to the courtroom by means of closed-circuit television; and that in addition I make an order that the witness be cross-examined only by counsel for the second defendant and not by Mr Wrenn personally.

Throughout this trial I have adopted a course of permitting Mr Wrenn, who was unrepresented, to cross-examine all the witnesses provided that his cross-examination did not traverse the same matters which have already been traversed by counsel for the second defendant.

I have not always been too strict about that either because there have been occasions when he has been permitted to cross-examine witnesses on areas which have already been covered by counsel for the second defendant, but it seemed to me that it was necessary for him to do so

in order to make a point that had not been made by counsel for the second defendant. That is the way the case has been run so far.

My initial reaction to Mr Reeves' submission that I ought to prohibit Mr Wrenn from cross-examining this witness entirely was one that I had no power to do; that the basic principles of natural justice required that I ought to allow Mr Wrenn to cross-examine each witness save for the exception which I have mentioned.

I have been referred to a number of authorities including Phillips v Phillips (1966) 83 WN (Pt1) (NSW) 445; Eva v Charles Davis Ltd (1982) VR 515 and GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd (No.3) (1990) 20 NSWLR 15 as well as two old English authorities, Chippendale v Mason (1815) 4 Camp 174 and Doe v Rowe (1809) 2 Camp 280 which show that the basic rule is that whether or not there are two parties, or one only, one counsel only should be permitted to cross-examine a witness called by the other party unless there is special reason for it. That basic rule where there are two separate parties applies only, of course, where the two separate parties have the same interest.

This particular witness has been called in the plaintiff's case by way of reply to rebut the suggestion that the plaintiff has been involved in, or become a party to, a conspiracy with, amongst other persons, Judy Wrenn herself. One of the pieces of evidence to be put and which has already been permitted to be put before the jury are alleged conversations between Mr Wrenn and his wife which, if accepted, would show that the plaintiff was involved in some sort of conspiracy - or at least it might be suggested that that is what they show.

From the point of view of the plaintiff this witness is an important witness; no doubt the witness is an important witness from the point of view of the defendants as well.

Mr Southwood, on behalf of the second defendant, has submitted that the rules to which I have referred are rules which apply only to counsel, because each of the cases are based

upon the premises that the parties are represented by counsel and do not specifically deal with the position which I have to deal with where one of the parties is not represented at all.

But it seems to me that the basic reason for the rule is the same, whether or not the parties are represented by counsel or whether they are self represented, and that I should apply the general rule in the circumstances of this particular witness unless there are special reasons determining that I should not.

Now I think, therefore, I have a discretion in the matter. The extent of that discretion is discussed at some length in the judgment of Young J in the case of GPI Leisure Corporation Limited v Herdsman Investments Pty Limited (No.3) at pages 23 to 24. It seems to me that my main function is to ensure that each of the parties have a fair trial.

If the witness cannot be called without some risk to her health, except by the methods which have been suggested by Doctor Beaumont in her evidence and urged upon me by Mr Reeves for the plaintiff, I have to weigh that against any disadvantage or prejudice which may accrue to the defendants, and, in particular, any prejudice which might accrue to Mr Wrenn by not permitting him to cross-examine.

So far as general prejudice is concerned, the sort of inferences that the jury might draw by the very fact that the witness is giving her testimony in a particular way, I consider that, not only do I have a duty to instruct the jury in accordance with section 21A(3), but that I should as a matter of fairness in any event make sure that the jury are told in no uncertain terms that they are not to draw any adverse inference against any of the parties by the fact that the witness is giving her evidence by this procedure.

I therefore think that any prejudices of this kind can be overcome. Of course there is bound to be some prejudice because of a lack of eye contact which will occur between Mr Wrenn and the witness. That on the other hand has to be balanced against whatever reaction that

may have to the witness, affecting her health, and the prejudice to the plaintiff if the witness is not called.

The witness, it seems to me, is potentially an essential witness, and it seems to me that in the interests of justice, the right thing to do in this case is to make orders permitting the witness to give her evidence by means of her going to a place outside of the courtroom and transmitting her evidence to the courtroom by means of closed-circuit television, and I so order. I also order that the first defendant is not to have a right to cross-examine this witness, and that the witness will be cross-examined only by counsel for the second defendant.

In order to enable the second defendant to properly get the sort of instructions that will be needed to enable the second defendant's counsel to adequately cross-examine her, I am prepared to grant to the second defendant such adjournment as they require, if necessary, overnight, to enable that to be done.

One of the other matters that I also think should be done in this particular case is that the cameras be adjusted in such a way that the witness, when she gives her evidence in the room, will not be able to see Mr Wrenn, but that Mr Wrenn is able to see her.

I indicate to Mr Wrenn that if there is any need for him to give instructions to either Mr Lynch or Mr Southwood during the course of the cross-examination of this witness, he may immediately stand up and ask for an adjournment, if it is necessary to do so. That is to say, if he cannot quietly go and whisper in counsel's ear some matter that he wants put.

If a situation arises where Mr Wrenn insists upon a particular line of questioning being put to the witness, and counsel who is conducting the cross-examination declines to put that cross-examination, well then I will hear submissions in the absence of the witness and in the absence of jury, as to what, if anything, should be done about it.

TEN

APPLICATION for rulings relating to the availability of the defences of contextual truth and common sting.

On 19 January 1995 the following written rulings were published.

MILDREN J:

On 9 December 1994, I made the following rulings:

1. The so-called defence of contextual truth pleaded in paragraph 9 of both defences is not available as a matter of law in the Northern Territory. Paragraph 9 of both defences is accordingly struck out.

2. Paragraph 11 of the Defences, as presently pleaded, does not properly raise a common sting defence and should be struck out. However, this may be cured by the proposed amendments to paragraph 11 of the defences foreshadowed by Mr Lynch for the second defendant and by Mr Wrenn. Leave will be granted to amend paragraph 11 accordingly. As paragraphs (a), (b) and (c) of paragraph 11 are to be abandoned, they are struck out. Paragraph 11 does not clearly seek to justify the truth of the common sting, although that is clearly its purpose. This ought to be remedied.

3. As to the defence of justification pleaded to paragraphs 6(a) and 6(e) of the Statement of Claim by paragraphs 8(i) and 8(iii) of the defences, I consider that it would be open to the jury to find these defences were established upon the evidence. I am not prepared to strike out these paragraphs of the defences.

4. As to Mr Wrenn's applications-

(i) I am satisfied that there is no evidence fit to go to the jury that Mr Wrenn is responsible for the publication of the allegations made by Rhonda in the broadcast complained of which are the imputations pleaded in paragraphs 6(n) and 6(o) of the Statement of Claim.

(ii) As to paragraphs 6(a), (e), (k), (l) and (m) of the Statement of Claim I am satisfied that there is evidence fit to go to the jury that Mr Wrenn is responsible for the publication of the allegations which are the basis for these imputations.

I said that I would later publish written reasons for my decision. I do so now.

CONTEXTUAL TRUTH

Paragraph 9 of the defendants' defences (as amended) is as follows:

> ''If, which is denied, the words and pictures broadcast by the second defendant do bear the meanings pleaded in paragraph 6 or some of them and are defamatory of the plaintiff, [the defendants] say that by virtue of the truth of the meanings pleaded in paragraph 6(a), (c), (d), (e), (f), (g), (h), (i) and (j), or some of them, the publication of the meanings pleaded in paragraphs 6(b), (k), (l), (m), (n) and (o) did not further injure the reputation of the plaintiff.''

The plaintiff had pleaded that the broadcast contained 15 imputations which were defamatory of him. The defendants pleaded justification in relation to 9 of those imputations. The purpose of paragraph 9 is to provide a complete defence to those imputations to which justification has not been pleaded.

The law of defamation in the Northern Territory is primarily the common law, save for a few exceptions effected by the Defamation Act (N.T). At common law, truth or justification, is a complete defence: it is not necessary for the defendants to prove also that it was for the benefit of the public that the imputations were published.

For the defendants to succeed, they must establish the truth of the precise charges brought against the plaintiff. If the broadcast contains two or more separate and distinct allegations, the plaintiff is entitled to select some one or more of them for complaint, and the defendants are not entitled to assert the truth of the others by way of justification: see for example Plato Films Ltd and Others v Speidel [1961] AC 1090. But the apparent rigour of this requirement has been relaxed in a number of ways. First, the defendants may raise partial justification in mitigation of damages: see for example Plato Films Ltd and Others v Speidel [1961] AC 1090 at 1141-2 per Lord Denning. Secondly, the defendants are entitled to succeed if they can justify the "sting" of the libel: see for example Sutherland and Others v Stopes [1925] AC 47 at 78-79 per Lord Shaw of Dumfermline. However, this concept cannot be taken too far. As was pointed out in Potts v Moran (1976) 16 SASR 284 at 305-306 per Bray C.J.:

> "There are two ways, however, in which what has been called "the sting of the libel" can be justified so as to be a complete answer. One is where all the defamatory allegations of fact are proved to be true and all that remains are general rhetorical expressions of disapproval or denunciation which do not contain in themselves any additional allegations of fact. So in *Morrison v. Harmer* (1837) 3 Bing. (N.C.) 759 (132 E.R. 603), where the defendant had referred to the wholesale system of poisoning pursued by certain sellers of medicines and had described them as scamps and rascals, it was held that by proving that the plaintiff's medicines had indeed killed two people, as a result of which they had been convicted of manslaughter, the defendants had justified the libel and that they did not have to prove more specifically that the plaintiffs were scamps or rascals. It was said by Tindal C.J. that:

> "If these terms of invective and reproach contain any ground of charge or imputation against the Plaintiffs, substantially distinct in its nature or character, from that which forms the main charge, or gist, of the libel, and the truth of which has been justified by the plea, the consequence above contended for on the part of the Plaintiffs [that the plea was bad] would justly follow;--for the plea, upon that supposition, would not contain an answer to so much of the declaration, as by the commencement of the plea it expressly undertakes to justify." (1837) 3 Bing (N.C.), at p.766 (132 E.R., at p.606).

> The second is that slight inaccuracies of detail which do not affect the substance of the charge will not prevent the success of the plea. Thus it was held a sufficient answer to a charge of libel in stating that the plaintiff had been convicted of riding in a train without an appropriate ticket and fined £1 or three weeks' imprisonment in default to prove that he had been so fined £1 but only sentenced to fourteen days imprisonment in default; *Alexander v. North Eastern Railway Co.* (1865) 6 B & S 340; (122 E.R. 1221)."

Thirdly, the defendants may dispute the meanings which the plaintiff asserts the words and pictures bear, and assert that the words and pictures bear a different meaning when looked at in the context of the whole broadcast, and seek to justify that different meaning: see, for example, Polly Peck (Holdings) PLC and Others v Trelford and Others [1986] 1 QB 1000 at 1032; [1986] 2 WLR 845 at 868-869; [1986] 2 All ER 84 at 102. Fourthly, if there are several defamatory allegations in the broadcast which, in context have a "common sting" to them, the allegations are not to be treated as separate and distinct, and the defendants are entitled to justify the common sting: Polly Peck (Holdings) PLC and Others v Trelford and Others, *supra*. This arises where the sting lies in the totality of the allegations made: see Polly Peck (Holdings) PLC and Others v Trelford and Others [1986] 1 QB especially at 1029-1030 where O'Connor LJ cites with approval a passage from the unreported judgment of Bridge LJ in Stonor v Daily Telegraph Ltd, decided on 19 July 1976. But it is not enough merely that a common meaning (or several common meanings) may be spelt out. The common meanings must meet the sting (hence the use of the expression "common sting") in the same way as the defendants must meet the sting of several and distinct imputations if the

defence of justification is to succeed. Thus, in Khashoggi v IPC Magazines Ltd and Another [1986] 3 All E.R. 577, the plaintiff sued the proprietors of a magazine in which it was alleged that she had had affairs with a number of different men including a certain foreign head of State. The plaintiff complained only of the alleged affair with the foreign head of State. The defendants claimed that the common sting of the article was that the plaintiff was generally promiscuous, and sought to justify the sting, although they could not prove the affair with the head of State. Sir John Donaldson MR said, at 580-581, after referring to Polly Peck (Holdings) PLC and Others v Trelford and Others and the passage in the judgment of O'Connor LJ dealing with the justification of a common sting which I have cited above:

> "What is said here is that that principle can be applied and the sting of the article is promiscuity generally. It is submitted that it would be very difficult for the plaintiff, when her statement of claim comes to be prepared, to make any complaint about this particular allegation which could not equally be made about the other allegations contained in the same article. In those circumstances the *Polly Peck* principle applies and, notwithstanding that the defendants may not be able to prove the particular affair complained of, they will be able to adduce evidence which will justify the sting of the article and the sting of that statement on the footing, I suppose, that it is not more defamatory to have an extra-marital affair with one person rather than another in the circumstances of this case."

In other words the allegations concerning the foreign head of State could be treated as "slight inaccuracy of detail not affecting the substance of the charge", to adopt the words of Bray CJ in Potts v Moran, *supra* p.306; but it would obviously be otherwise if the particular head of State had been an anti-semitical genocidal maniac. In such a case the common sting would not merely be promiscuity generally because the article would have also conveyed the imputation that the plaintiff was prepared to associate herself intimately with an anti-semitical genocidal maniac.

In New South Wales, s16 of the Defamation Act substantially altered the common law to introduce what is called a defence of "contextual truth". The section is in the following terms:

"**16** (1) Where an imputation complained of is made by the publication of any report, article, letter, note, picture, oral utterance or other thing and another imputation is made by the same publication, the latter imputation is, for the purposes of this section, contextual to the imputation complained of.

(2) It is a defence to any imputation complained of that

(a) the imputation relates to a matter of public interest or is published under qualified privilege;

(b) one or more imputations contextual to the imputation complained of -

(i) relate to a matter of public interest or are published under qualified privilege; and

(ii) are matters of substantial truth; and

(c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff."

In Jackson v John Fairfax & Sons Ltd [1981] 1 NSWLR 36 at 39, Hunt J described this defence as follows:

> "The defence of contextual truth accepts that the matter complained of conveys the imputation pleaded by the plaintiff and that no other defence has been established in relation to that imputation; it asserts that the imputation pleaded by the defendant is also conveyed by the matter complained of (such imputation being called the contextual imputation); the defence then asserts that, even though the plaintiff's imputation is otherwise indefensible, such is the effect of the substantial truth of the defendant's contextual imputation upon the plaintiff's reputation that the publication of the imputation of which he complains did not further injure his reputation."

It is clear that this statutory defence does significantly alter the common law. First, it abrogates entirely the rule that prohibits a defendant from pleading justification to a separate and several imputation of which the plaintiff does not complain as a defence to another imputation in the same broadcast of which the plaintiff does complain: see Becker v Smith's Newspapers Ltd [1929] SASR 469 @ 471. Secondly, it establishes a new exception to the principle that where the defendant has published a libel, damage to the plaintiff's reputation is presumed and the plaintiff's cause of action is complete: see Ratcliffe v Evans [1892] 2 Q.B. 524 at 528 per Bowen L.J. In Potts v Moran, supra at p308 Wells J rejected a submission based on the same general idea. See also Bray CJ, (with whom Sangster J concurred), at p305.

In Hepburn v TCN Channel Nine Pty Ltd [1984] 1 NSWLR 386, Hunt J accepted (at 396-397) (with one qualification) that where more than one contextual imputation has been pleaded, the section required the jury to consider the combined effect of all the defendant's contextual imputations when considering whether, by reason of their substantial truth, the plaintiff's imputation (s?) to which truth has not been established has/have further injured his reputation. The qualification he placed upon this statement was that it would not always be appropriate to combine contextual imputations; and if the contextual imputations were contradictory or but different gradations of seriousness of the same basic assertion, it would be inappropriate to so combine them: see pps 397-398. Further, Hunt J held, at 405, that the phrase "does not further injure the reputation of the plaintiff" in s16(2)(c) should be construed in the sense of "does not cause additional injury to the reputation of the plaintiff."

At 399 of the judgment, Hunt J said that a defendant is entitled to plead one or more of the plaintiff's own imputations as contextual imputations to other imputations pleaded by the plaintiff, which must, by definition, differ in substance from that which the defendant has adopted as his contextual reputation or imputations. The defendants relied upon this passage to support the wording of the plea in paragraph 9 of their defences and which I have set out above. Counsel for the plaintiff, Mr Reeves, did not accept that the passage referred to did

support the wording of the pleas, but I do not have to decide that issue. I mention it only to show how it is that the defendants put this defence.

So far, the defence would seem to be based on a statutory provision not available in this jurisdiction; but the defendants assert that the defence has now been recognised by the common law. The mainstay of this submission is the judgment of Miles CJ in Woodger v Federal Capital Press of Australia Pty Ltd (1992) 107 ACTR 1. In that case, the learned Chief Justice held, at 24, that the defence applied in the Australian Capital Territory. Mr Reeves submitted that that decision was wrongly decided. But there is also at least one other decision of the Supreme Court of the Australian Capital Territory which appears to support the same view, viz T.W.T. Ltd v Moore (Higgins J. 31/10/91, unreported). Mr Reeves submitted that that case was also wrongly decided.

In T.W.T. Ltd v Moore, the defendant had, it would appear, broadcast on television a news program in both the Australian Capital Territory and in New South Wales. The defendant sought leave to amend its defence to insert a new paragraph 7. Paragraph 7(a) dealt with the publication in the A.C.T., and paragraph 7(b) dealt with the publication in N.S.W. Paragraph 7(a) raised a "common sting" plea which the defendant sought to justify. Paragraph 7(b) raised contextual truth based on s16 of the N.S.W. Defamation Act. The Master had refused leave to amend, and the defendant unsuccessfully appealed. Higgins J described the "common sting" defence in these terms:

> "(i) The `Polly Peck' defence: Proposed para 7(a) seeks to invoke the defence that was acknowledged to exist at common law in Polly Peck (Holdings) PLC and Others v Trelford and Others [1986] 1 QB 1000. That defence will arise if, apart from the imputations alleged by the plaintiff to arise from the matter complained of, another substantially different but at least equally damaging imputation arises therefrom so that the plaintiff's reputation is not further damaged by reason of the imputation of which the plaintiff justifiably complains.
>
> The need for a least an equal `sting' in the proposed contextual imputation was acknowledged in Kelly v Special Broadcasting Service (1990) VR 69.

> It is not enough to preclude such a defence that some of the imputations contended for by the plaintiff will not be over-reached or equalled by the sting of the contextual imputation. The defendant may contend that the pleaded imputations more serious than the contextual imputations do not arise leaving only lesser imputations that are then equalled or over-reached by the contextual imputations. Justification of the contextual imputations could then be a defence.
>
> As Murphy J pointed out in *Kelly (supra)* at p74, a defendant who seeks by amendment to raise such a plea must satisfy the court that the proposed amendment is not demurrable.
>
> It is, therefore, necessary to enquire whether the meaning contended for by the defendant is capable of being conveyed by the matter complained of and, if so, whether that meaning is defamatory. A further question will then arise as to whether it is capable of over-reaching or equalling the defamatory sting of those imputations which are found to, or are conceded to, arise from the matter complained of. If it does not, the existence of a contextual imputation not relied on by the plaintiff with a lesser `sting' may go to damages but will provide no defence."

I respectfully differ from Higgins J as to the effect of the decision in *Polly Peck*, if what His Honour there said is to be taken literally; in particular, I am unable to find anything in the judgment of O'Connor LJ which is similar to the second sentence of the passage I have quoted above. The nub of the decision in *Polly Peck* is the need for a common sting to be found in the several defamatory allegations in their context which are then to be treated as no longer separate and distinct allegations. That is quite a different thing from another substantially different imputation but equally damaging imputation, (which is the process envisaged by s16 of the N.S.W. Act) where no common sting is required at all.

It is clear also, from my reading of the judgment in that case, that Higgins J did not consider that the common sting defence and the defence of contextual truth established by s16 of the N.S.W. Act were to all intents and purposes identical.

In *Woodger*, Miles CJ was unable to see any difference in principle between the defence of contextual truth in New South Wales and the principles that lie behind *Polly Peck* (see 107

ACTR at 23) and thought Higgins J to be of the same opinion. I have tried to demonstrate those differences in legal theory, but there are also considerable practical differences, not the least of which is that because contextual truth enables the defendant to prove the truth of a severable assertion of which the plaintiff does not complain, longer (and more expensive) litigation is the inevitable result. As Miles CJ himself recognized, this defence is

> "capable of converting a modest and narrow claim by a plaintiff into a wide-ranging expansive and expensive inquiry, the limits of which are set by the defendant's capacity to pay for it." (p21).

Given that the defendants most likely to be sued have deeper pockets than most plaintiffs are likely to have, I would question the justice of introducing via the "development" of the common law that which parliament has so far not sought fit to introduce in this Territory despite recent legislative attention to the Defamation Act (NT), and despite the fact that the so-called defence of contextual truth has been legislated for in a number of other jurisdictions.

The other reasons mentioned by Miles CJ as justifying the development of the defence of "contextual truth" in the A.C.T. have no parallel in this Territory. In *Woodger*, at 23, Miles CJ referred to "English rules of practice which inhibit a defendant pleading or calling evidence on the truth of the publication which do not apply in the Australian Capital Territory" and that because of this he was unable to see any objection to the defendant raising the same matters that are permitted to be raised in N.S.W. by s16 of the Defamation Act. Apparently in the A.C.T., where truth alone is not a defence unless public benefit is also established, a defendant may plead truth in mitigation of damages, (despite it would appear, the judgment of the N.S.W. Court of Appeal to the contrary in Cohen v Mirror Newspaper Ltd (1971) 1 NSWLR 623 at 629, 636): see Woodger, at p21. In the Northern Territory, no such considerations arise: truth may be pleaded either as a partial defence going to damages (a situation which arises where the defendant seeks to justify some, but not all, of a number of separate and distinct defamatory imputations) or as a complete defence. In no common law jurisdiction of which I am aware may a defendant plead to an imputation

that it is true unless he also asserts that it is true in substance and in fact (which encompasses the idea that the sting of the libel is true). The defendant cannot plead that a particular imputation is partly true.

Be that as it may, I do not consider that it is appropriate to develop the common law, which is supposed to be uniform throughout Australia, by reference to legislative changes or matters of practice and procedure, where those changes or matters are of a purely local character.

Finally, so far as "contextual truth" is concerned, none of the leading Australian text book writers suggest that it is a defence at common law: see for example Fleming, Law of Torts, 8th Edition, p555; Balkin & Davis, Law of Torts, p583-4.

Accordingly the pleas contained in paragraph 9 of the defences are bad in law and are struck out.

COMMON STING

The defendants conceded that the common meanings pleaded in paragraph 11, of the defences, as presently framed, did not, and could not on any view of the facts, meet the sting of the defamatory allegations contained in the broadcasts. Accordingly they sought to amend paragraph 11 to raise a further common meaning which did, or at least arguably could, meet the sting of the defamatory allegations. Mr Reeves did not dispute that the further common meanings arguably could meet the sting of the defamatory allegations. Accordingly, I consider that the defendants should be permitted to amend paragraph 11 of the defences to raise the new common meaning, but that so much of paragraph 11 as originally pleaded other common meanings should be struck out. Further, the plea of justification to that common meaning was poorly drafted, and I indicated that paragraph 11 of the pleadings should be further amended so as to properly raise that plea.

JUSTIFICATION

Mr Reeves submitted that there was no evidence fit to go to the jury to support the pleas of justification in relation to paragraphs 6(a) and 6(e) of the Statement of Claim. The imputation pleaded in paragraph 6(a) is that the plaintiff was corrupt: the imputation in paragraph 6(e) is that the plaintiff was dishonest.

Mr Lynch submitted that there was evidence fit to go to the jury for two reasons. First, both paragraphs 6(a) and 6(e) were inferences to be drawn from certain incidents referred to in the broadcast the truth of which incidents the defendants had sought to justify. Secondly, Mr Lynch submitted that the incidents referred to in the broadcast, if true, demonstrated that the plaintiff was a hypocrite, and it was open to the jury to find that this was a form of dishonesty. Thirdly, Mr Lynch submitted that the imputations which the plaintiff alleged in paragraph 6(c) and 6(d) and which the defendants had sought to justify, viz., that the plaintiff had conspired to arrest the first defendant on false charges, and had conspired to pervert the course of justice, arguably demonstrated that the plaintiff was corrupt in the sense of lacking in integrity. Mr Lynch submitted that it was for the jury to decide the sense in which the plaintiff established the imputations pleaded in paragraphs 6(a) and 6(e) (if at all), and that it was open to the jury to find that the sense in which the plaintiff was corrupt and dishonest was in the senses of lacking in integrity and in his being a hypocrite.

Mr Reeves submitted that the plaintiff relies upon other matters in the broadcast to support paragraphs 6(a) and 6(e) which the defendants had not sought to justify; but I consider that it is open to the jury to find that the matters upon which the defendants seek to rely, if proven, could meet the sting of the imputations pleaded in paragraphs 6(a) and 6(e). Mr Reeves submitted that "corrupt" implied abuse of power for personal gain, and "dishonest" implied a disposition to cheat, lie or steal for self gain. It is for the jury to find what imputations the broadcast conveyed and I consider that it is open to the jury to find that the meanings did not imply more than that which the defendants assert.

THE FIRST DEFENDANT'S SUBMISSIONS

Mr Wrenn submitted that was no evidence fit to go to the jury that he was responsible for the publication of so much of the broadcast as supported the imputations pleaded in paragraphs 6(a), (e), (k), (l), (m), (n) and (o) of the Statement of Claim. Mr Wrenn, who appeared in the broadcast, submitted that as he did not say anything in the broadcast which supported these imputations, he could not be held responsible for them.

The plaintiff's particulars of the imputations in each of the paragraphs of the Statement of Claim indicate as follows:

(1) imputation 6(a) does rely in part on words which the first defendant spoke in the program. It also relies upon words spoken in the program by a reporter and by words spoken by another person known by the pseudonym "Rhonda". However, I consider that the words spoken by the first defendant are sufficient for this issue to be left to the jury;

(2) imputation 6(e) relies in part on words spoken by the first defendant in the program. I consider that the words spoken by the first defendant are also sufficient for this issue to be left to the jury.

It is true that in neither instance did the first defendant say, in so many words, that the plaintiff was corrupt or dishonest. The plaintiff submits that these meanings are inferences to be drawn from what the first defendant did say. I consider that these inferences are open to be drawn. An inference to be drawn from the words used is part of the natural and ordinary meaning of the words: Gatley in Libel and Slander, 8th Edition, paragraphs 93 and 97;

(3) imputation 6(k) (that the plaintiff had a corrupt relationship with a Darwin night club owner) relies in part upon words actually spoken by the first defendant in the program. Once again I consider that the words spoken by the first defendant in the program may give rise to this inference;

(4) imputation 6(e) (that the plaintiff tipped off suspects of planned drug searches) is in the same position as imputation 6(k).

I should add that both imputations 6(k) and 6(l) also rely upon statements made by the reporter, the source of which he attributed to Wrenn, in the program itself. That reporter has not given evidence. Mr Wrenn was not cross examined upon, and nor did he give direct evidence of, all of the information he passed on to the second defendant's reporter. The context of the program suggests that much of what the reporter said on this topic in the program was said in the first defendant's presence at the time that part of the program was recorded and, as Mr Wrenn did not correct the reporter, it would be open to the jury to infer that he was indeed the source;

(5) imputation 6(m) (that the plaintiff conspired with others to unlawfully grow and sell a prohibited drug) depends upon what the reporter says in the program was information he received from the first defendant who in turn obtained it from a Dean Richardson in the form of a taped interview. There is evidence that the first defendant gave to the second defendant a copy of a statement he made to the police (Ext D15). This statement refers to a statement from Mr Richardson. Mr Richardson's statement was not tendered, and the first defendant said, in cross-examination, that the statement contained no information as to that allegation (Tr.1839). It is not clear whether or not the first defendant gave the second defendant a copy of Richardson's statement. Whether or not the first defendant passed on the Richardson statement, and whether or not the statement did contain this information, it is a reasonable inference that the information must have been given to the second defendant by Wrenn.

I consider therefore that there is evidence fit to go to the jury on this issue. The first defendant is responsible for the publication of whatever information he gave to the second defendant if he authorised the publication of that information either expressly or impliedly, and it is not necessary that the plaintiff prove that the second defendant

published the first defendant's precise words, so long as the sense of what was published was not altered: see Parkes v Prescott (1869) 4 L.R. Exch. 169 at 178-179; Cooke v The South Australian Trotting Association (1920) S.A.S.R. 166 at 168-169; Webb v Bloch (1928) 41 CLR 331 at 364-365 per Isaacs J. I consider that there is ample evidence from which the jury might infer that Wrenn authorised the second defendant to publish whatever information be passed on to them: see Tr pps 1872-1873;

(6) imputations 6(n) and 6(o) are, respectively, that the plaintiff placed the life of a police informer in danger, and threatened the life of a police informer. The informer was a person known by the pseudonym "Rhonda", and the segments of the program relied upon by the plaintiff do not involve the first defendant, but are taken from an interview with "Rhonda", and also a reconstruction, using actors to play the roles of the plaintiff, "Rhonda" and other police (except Wrenn). Although Wrenn knew "Rhonda" (and there are other allegations made concerning the plaintiff involving Wrenn and "Rhonda") there is nothing in the program to suggest that Wrenn was the source of these particular allegations. Mr Reeves submitted that it could be inferred from the evidence that Wrenn gave about his association with "Rhonda" and meetings he had with her before the broadcast, that Wrenn knew of "Rhonda's" allegations and passed that information onto the second defendant's reporters, but I do not think that there is any evidence capable of supporting either inference. There is no evidence that Wrenn had any discussions with "Rhonda" about these matters: nor does the evidence go so far as to make such a possibility more than mere speculation. There is no evidence as to what Wrenn told the second defendant about "Rhonda", if anything. Mr Reeves submitted that the inference could be drawn from lies told by Mr Wrenn to the jury under cross-examination, but I reject this submission. It was not put to Mr Wrenn in cross-examination that he was the source of these imputations so Mr Wrenn was not given any opportunity to admit or deny that allegation, let alone lie about it. It could not be suggested that he lied about any matter central to this issue. Even if the jury were to find that Mr Wrenn had lied about other matters,

(a matter concerning which I make no comment), that would not form a proper basis for concluding that, because of those lies, an inference could be drawn he was the source of this information: see Edwards v The Queen (1993) 178 CLR 193 at pps 208-209; 210-211.

Accordingly, it is my opinion that there is no evidence fit to go to the jury that Wrenn authorised the publication of those imputations.

ELEVEN

APPLICATION by the plaintiff for a ruling as to whether, as a matter of law, the occasion was privileged.
The following written ruling was published on 19 January 1995.

MILDREN J:

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 [1916] 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 West 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 94:

> "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: Stephens, 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) AC 309 at 334 per Lord Atkinson; although the privilege is not necessarily lost simply because the publication has been read, seen 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 Gaudron 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 his Honour

concurred in the answer to question (b) in the case stated given by the majority in Stephens, 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 and 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 not 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 not 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 contended 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 pps114-115. 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 inconsistent 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 & p33). In early April 1990, the police decided that it was necessary to engage the services of Mr Robert Mulholland Q.C., 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 Q.C.'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 Q.C. 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 Newspapers Limited and Another (1937-1938) 59 CLR 503; Cavenagh v Northern Territory News Services Limited (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 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 material 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.

TWELVE

APPLICATION by a witness to be excused from complying with a subpoena, and by the plaintiff that a warrant be issued for the witness' arrest.

B.L. Johns, for the witness.
J. Reeves for the plaintiff.
The first defendant in person.
S. Southwood for the second defendant.
The following ex tempore rulings were given on 15 March 1995.

MILDREN J:
This is an application made by Mrs B to be excused from complying with a subpoena which has been admittedly served upon her to attend and give evidence in this court. No objection is taken to the lack of any conduct money, or to any other matters relating to the service. Mrs B is represented by counsel who concedes that service has properly been effected.

The application, I think, is in truth an application to set aside a subpoena under Order 42 Rule 7. The application is made on the basis that the witness, if compelled to attend, would be likely to be adversely affected in her health. There is sworn evidence before me that she is medically unfit to give evidence because of her psychiatric condition. She has been prescribed medication and she has been provided with counselling. The evidence of Doctor Marinovich, a psychiatrist, is that if she were to attend to give evidence, her health is likely to be gravely affected.

The question however is whether she is competent to give evidence or not, because of her psychiatric condition. Because it is the applicant who makes this application, the burden of proof is on her. The burden is only on the balance of probabilities.

The nature of the application was outlined initially by Mr Johns in these words - I am quoting from page 3031 of the transcript: `This is an application by Mrs B to be excused from compliance with a subpoena on medical grounds.

I was not dealing at that stage with any application under section 21 of the Evidence Act. There is in fact no application before me at the moment under that section, and I do not therefore consider the provisions of section 21 of the Evidence Act to be relevant.

In support of the application, the witness has called, as I mentioned before, an experienced psychiatrist whose opinion has been given in the form of exhibits A and B and who has also been examined and cross-examined in the witness box.

The defendants challenge the psychiatrist's opinion on a number of grounds. They challenge his opinion on the basis of his credibility as a witness. They challenge his credibility on a number of bases dealing with, amongst other things, his demeanour in the witness box, and matters said to go to differences between his evidence and matters referred to in his report. As to those matters, my view is that I considered his demeanour as a witness did nothing to shake my faith in his credibility, and as to the different foundation argument, I can understand, given the difficult circumstances in which the witness was in, that he would make no reference to that matter in the report.

The report refers to a number of factors in the history and the specialist's diagnosis depends on symptoms as described by the patient. One of the criteria, however, for his diagnosis, is a maladaptive reaction to an identifiable psychological stressor within a short time of the outset of the stressor. On the evidence of the psychiatrist, the stressor in this case is the problem of having to give evidence in this case and that stressor was brought about by the service of a subpoena on the witness.

There are, according to him, factors which are relevant to this case which are likely to be distressing and I find that there are a number of factors likely to be distressing, such as the presence of Mr Wrenn in these proceedings, who is related to the witness. I note her attitude to him, as expressed in the past history taken on 8 March 1991 and contained in the exhibit F, the medical file from the Tamarind Centre and referred to also in the evidence of Doctor Marinovich.

There are other matters which are obviously likely to be distressing for her if she attends and gives evidence in these proceedings, such as her own history of sexual abuse, the history of sexual abuse to her children, discovered in 1988, and it seems likely - indeed I think I have been told by Mr Southwood that it will be inevitable - that these matters will be raised again, if not directly at least peripherally, in these proceedings.

Now, an examination of the Tamarind Centre file indicates that a diagnosis was made in 1991 of a post-traumatic stress disorder with anxiety and depressive features. The triggering episode on that occasion seems to have occurred shortly after a stressful visit to the witness's parents at which time there had been a deferral of a case of aggravated assault against Mr Wrenn, and upon her return to Oenpelli, certain remarks were made to her by her employer about her then inability to do her work, which triggered the depressive episode on that occasion.

The Tamarind Centre file indicates, according to the dates, that she was seen again on 5, 6 and 7 March 1993, but I query whether those dates are correct, and whether in fact the dates should in fact be 1991. That matter was not explored, but the dates do not appear to be consistent. I am therefore in some doubt as to whether she was seen again in 1993 or not. I do not think I am in a position to make a finding about that.

Doctor Marinovich says that the witness's attitude to Mr Wrenn has everything to do with her ability to give evidence in this case, and he concedes that whilst there are problems with

her own sexual assault and the assaults on her children, which would be stressful for her, his opinion is that this is not the primary stressor upon which he relies.

It was also put that the history, upon which he relied in order to form his opinion, was not reliable in various respects. These matters were put to Doctor Marinovich and I refer especially to the interviews in 1990 at which time, the evidence is, she was not then severely distressed. This did not appear to alter the opinion of Doctor Marinovich.

I am not going to deal with the other matters going to his credit. I am not persuaded that his credit was in any way sufficiently attacked for me to discount any of his evidence on that basis. I consider him to have been a careful witness who was doing his best to assist the Court. I accept that he genuinely believes that the witness has this condition.
I accept also that he is a very experienced psychiatrist who is eminently qualified to form the opinion that he does, and I do not hold it against him that he did not mention in his report that there were privileged matters upon which he relied. I think it is possible it might have been better had he mentioned them, but I can understand why he would not mention them at all.

But merely because a professional expert goes into a witness box and gives evidence, I am not bound to accept such an opinion where it is challenged. I note that there is no challenge to his experience and qualifications; the challenge is really on three bases: firstly, his credit as a witness, and I have already dealt with that; secondly, the factual basis for his diagnosis; thirdly, the logic of the thought processes upon which that diagnosis is formed.

The problem with the factual basis and the logic of the thought processes, is that they cannot properly be tested because the witness has given Doctor Marinovich instructions to keep certain information confidential and this information is crucial to an understanding of the reasoning upon which the opinion is based.

An opportunity was given to counsel for the witness and for Doctor Marinovich to seek a waiver of those privileged matters, and, following a short adjournment during which telephone contact was apparently made with the witness, Doctor Marinovich returned to the witness stand and it was apparent that he had not been able to obtain a waiver of privilege at that stage.

He said that the witness, at the time he was speaking to her, was in a considerable state of distress and: "I felt under some duress by the system such that I would not be happy to accept any instructions she gave me in that state of mind". So there is that. He also said that the witness was not sure what she should do; whether she should or should not waive her right to privilege.

This led to the question of whether at a short future time she may be in a position to properly consider the matter and give a waiver to the doctor upon which he would be satisfied to rely. He said, at page 3096, in relation to a question as to whether or not he thought it was likely that he would be able to get coherent instructions as to what to do, he said:

> "Well, I cannot exactly anticipate what she might do. I know I cannot get there this afternoon, my practice is already on hold for today's proceeding. I think in light of that question, perhaps some time for her to, cool down and think about it and perhaps with Mr Crane [the witness' solicitor] and I meeting her on another occasion we might arrive at some conclusion, yes, but not today."

And then he said that it was unlikely that things were going

to change and that if Mr Crane and he had a session with her:

> "It is still possible that she would give an answer, but my opinion is that it is unlikely because the factors on which that answer is based are not going to change..."

And he said that he based that opinion on "the information that I have, which is not going to go away."

It was clear that the information about which he was there referring was the privileged information.

So the situation is this. The doctor's evidence is that she has a psychiatric condition, which he describes, "as a result of which she is unfit to be called as a witness, on medical grounds". That is the first proposition. Secondly, "I cannot tell you why she cannot handle the giving of the evidence, because that is privileged." Third proposition: "I'm not satisfied that she can give me a waiver which as her doctor I can act on at the moment". Fourth proposition: "I think it is unlikely that this will change in the future". Fifth proposition: "The reason for my opinion that I think it is unlikely that it will change depends upon the privileged information".

So the end result of it all is that the very basis upon which his opinion rests, cannot be tested. By that I mean the opinion that she suffers from depression and cannot give evidence. In my view, accepting Doctor Marinovich's opinion, in those circumstances would, in the circumstances, be no more than an act of faith on my part.

In those circumstances I am not able to say whether or not the witness is competent to give evidence. The burden of proof being on the witness, I am not satisfied that that burden has been discharged and therefore the application to set aside the subpoena is rejected.

[After hearing further submissions, his Honour continued.]

THIRTEEN

This is an application by the plaintiff for an order made pursuant to section 21(1)(b) of the Evidence Act, that a warrant of arrest be issued to the witness Mrs B to bring her before the court to give evidence. There is proof that the subpoena has been duly served upon her and that there is a probability that she would be able to give material evidence.

The question is whether or not there is also proof that her non-appearance is, so far as can be ascertained, without just cause or reasonable excuse. The wording of section 21(1)(b) requires proof that non-attendance, so far as can be ascertained, without just cause or reasonable excuse be made by the plaintiff, Mr Reeves.

The whole of the evidence that I heard on the earlier voir dire proceedings on Mr Johns' application for his client to be excused from complying with the subpoena is put before me and, to the extent that those submissions are relevant to the present application, I have taken into account everything that counsel had said on the previous occasion and I have taken into account all of the evidence.

The first matter which was put to me by Mr Southwood was that I am functus on this issue as I have already ruled. I do not agree with that. All I have previously done was found that I ought not set aside the subpoena under Order 42 Rule 7, on the basis that the application has a medical condition because I was not satisfied that the applicant had proved that.

The burden in that case is on the witness but the burden of proof on showing that there is no reasonable excuse for non-attendance is not on the witness, it is on the plaintiff, and the fact is that there is evidence - admittedly evidence of a kind which can not properly be tested - that the witness has a psychiatric disorder of a severe nature and that, if she was to attend, she would be placed in some jeopardy in her health.

Now, whether or not the doctor's opinion is correct, I do not think is to the point. What is to the point is that he has expressed that opinion and having expressed it - and I think honestly expressed it - the question is, in my mind, whether that would provide a reasonable

excuse for the witness not to attend. In my view it does provide a reasonable excuse for a witness who says: `Look, I am advised on medical grounds that if I were to attend in these circumstances it would be deleterious to my health and I'm not going to come. And to show that I have received this advice, I am going to arrange for my psychiatrist to come along and give that evidence.'

It seemed to me to flow from whatever might be said about Doctor Marinovich's evidence, it would be most unusual for a patient who had confidence in the doctor who is treating her to say: `Well, I'm going to fly in the face of the view of the doctor who is treating me and attend.' It seems to me that that does amount to a reasonable excuse, unless I was of the view that the witness and the doctor had collaborated in some way to avoid answering the subpoena for an improper purpose. Because if that were the case, then there would be no reasonable excuse at all.

In other words, if I was satisfied, the burden being on the plaintiff, that the witness cooked up her story for the sole purpose of avoiding having to come here and did not have any condition at all and knew it, or if I was satisfied on the balance of probabilities that she had just a fear, did not want to come, wanted to avoid being brought there and went off with a purpose of seeing a doctor and trying to persuade him that there is something wrong with her, in other words that she was malingering, then of course that would be a different matter.

Now Mr Southwood in his earlier submissions put that scenario to me and what he put to me in support of it was some evidence to the effect given by Doctor Marinovich that she did not want to come. But I think that that evidence is equally consistent with the view that he expressed that the reason why she did not want to come was because of her underlying fear of this particular litigation, as he understood it, and her reaction to it. So I do not know that I can be satisfied that that answer by itself proves anything.

There is the curious problem of the witness keeping some of the material confidential, but, without knowing more about that, I do not think I can draw an inference adversely to her

because of this. The background to this case strongly suggests there are sexual matters in her earlier life, a case of sexual interference in 1988. Clearly she has been involved, in what I know of the case, at least inferentially, in her husband being involved in allegations of sexual impropriety, and to my way of thinking it is just not enough to point one way or the other as to whether or not she genuinely has a problem or whether she does not. I am just not in a position to say one way or the other.

Certainly, Doctor Marinovich is of the opinion that she does have a genuine problem. He is a very experienced psychiatrist and there is this much to be said about it, that in 1991 she had an episode that required her to seek psychiatric help at the Tamarind Centre, at a time when there does not appear to have been any need for her to avoid being called to give evidence or to answer questions. It seems to have related to a time shortly after her visiting her parents when there were proceedings involving Mr Wrenn, and I think that indicates or points to the strong possibility that there may well be a genuine factor at work here.

If there had been no history at all, other than the fact that whenever she was approached in relation to this case she went into a spin, I think that might have led me to think otherwise, but because of this 1991 incident and the treatment that she got at that stage, I am not going to draw that inference on the materials that are before me.

In the whole of the circumstances, I am not satisfied, on the balance of probabilities, that she has no just cause or reasonable excuse for not attending and I therefore decline to issue a warrant.

FOURTEEN

RULING on whether or not counsel would be permitted to indicate to the jury by reference to previous cases a permissible range for general damages for hurt to feelings and injury to reputation.

The following ex tempore ruling was made on 20 March 1995.

MILDREN J:

The ruling I am asked to make in this matter is whether or not counsel may not only address the jury in relation to providing them with an indication of the ordinary level of general damages components of personal injury awards for comparative purposes but whether I ought to permit - indeed, whether I have a power to permit - a comparison to be made with other awards for damages for the tort of libel.

I appreciate that what is proposed is intended to be in the spirit of Carson v John Fairfax and Sons Limited [1993] 178 CLR 44 in that what is proposed is to indicate a range which might be considered appropriate, not to attempt anything more than that.

The defendants oppose this course. They say that, in essence, the rule in Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 118 has not been changed by Carson v John Fairfax and Sons Limited except to the limited extent indicated by that judgment. They say that all that Carson does is permit counsel and the trial judge to provide to the jury an indication of the ordinary level of the general damages component of personal injury awards for comparative purposes and for the counsel to be permitted to make a similar reference although the general rule in Planet Fisheries v La Rosa has not changed.

On the other hand, Mr Reeves submits that it would be inconsistent for it to be appropriate for comparisons to be made between the general damages component of personal injury awards, on the one hand, if reference could not equally be made to general damages awards for the tort of defamation and he points to the words appearing on page 59 of the report in Carson which indicate that, at least so far as the trial judge is concerned, the trial judge may offer guidance on damages by even indicating a range of damages which may be considered appropriate.

I do not consider that the case of Carson v John Fairfax and Sons Limited does change the rule in Planet Fisheries any more than to permit counsel to do what is indicated in the joint judgment of the High Court in Carson's case, at page 59, namely to provide the jury an indication of the ordinary level of the general damages component of personal injury awards for comparative purposes. That, I think, is a matter which counsel are entitled to do, in the light of Carson's case, and also something which the trial judge may do.

I do not think, in any event, that references to awards in other jurisdictions, either by single judges or by juries, in relation to defamation cases would be particularly helpful, particularly if the material which is known about those matters is very limited. As Mr Lynch submitted, there are many factors which can affect an award of damages for hurt to feelings, vindication and so on which may vary widely from one case to another, and without knowing a lot more than is provided by the work to which I was referred by Mr Reeves, I would not think that that source was an appropriate one from which to make reference, in any event.

I appreciate that the purpose of reference to that source was, to look at cases in which injury to reputation, et cetera, resulted from allegations similar to the kind of allegations made in this case and to refer the jury perhaps to some of the matters at the top of the range and those at the bottom as a means or guide to a range.

I have thought about that, but it seems to me that, given that much of the information there is so exiguous that I am not satisfied that the cases which are at the top of the scale are a proper indication of what might be considered to be the range. I am not in a position to make any comment about those at the bottom. I suppose in a proper case a jury might even award the traditional halfpenny or one cent damages. I do not know.

So the ruling I make, gentlemen, is this. Counsel may refer the jury, by way of comparison, to awards of the ordinary level of general damages components for personal injury awards for comparative purposes. I do not think that it is necessarily restricted to the Northern Territory for that purpose. I appreciate the force of what Mr Lynch was putting as to awards

in other jurisdictions in relation to defamation, but the same considerations do not apply, it seems to me, to awards of general damages for personal injuries where the common law has not been significantly altered in most other jurisdictions.

As far as I am aware, there are no statutory provisions which would affect common law awards in any jurisdiction. Either there is the power to award general damages or there is not, and the sort of matters that might affect differences in awards from one jurisdiction to another, at least in this country, do not seem to me to apply so readily to personal injuries actions as they, or as they might well do, to defamation cases.

FIFTEEN

RULING given ex tempore on 24 March 1995 as to whether proof of malice by one defendant establishes malice on the part of the other defendant.

MILDREN J:

I have been asked by the plaintiff to rule as to whether proof of malice on the part of the second defendant would require a ruling that question 8, so far as the ABC is concerned, should be answered `yes'. By malice what is intended as I understand it, is actual malice.

The plaintiff relies upon the judgment of the High Court in Webb v Bloch (1928) 41 CLR 331. That was an appeal from Starke J who tried the action at first instance. It is clear that His Honour took the view that despite the case of Smith v Streatfeild (1913) 3 K.B. 764, the

malice of the defendant, Norman, would not have destroyed a privilege of the defendants who were not guilty of malice. At p343, Starke J said:

> "They merely authorized the publication by Norman of a specific circular which they honestly believed to be true and necessary for the common interest of scrip-holders in the Harvest Scheme. It was their privilege to publish the circular and any improper motive on Norman's part unknown to the defendants would not, in my opinion, have infected the occasion and destroyed their privilege."

On appeal the majority of the High Court allowed the appeal and on the question of privilege the majority found that the occasion, whilst it was privileged, the privilege was lost because there was express malice proven against at least one or more of the defendants.

The reason why the privilege was lost was expressed by Knox CJ, at page 359, relying on the case of Smith v Streatfield to which I have just referred on the basis that the malice of one or more of the joint tortfeasors defeated the privilege of all.

Isaacs J's view appears to have not rested on that proposition but rested on a different view of it. At page 368 he said:

> "In my opinion this defence fails utterly. It fails because Norman, the defendant's agent to compose the circular for publication, on the evidence as it stands, did not believe what he caused to be published in collaboration with the defendants, and because Bloch, with the information before him that he undoubtedly had, did not believe the statements. They must both of them have known the statements were grossly misleading. If the facts support that position as to either Norman or Bloch, the defendants in my opinion are liable. I may say at once that I am not prepared to assent, without fuller consideration, to the contention that there is nothing foreign or irrelevant to the privileged occasion which common interest undoubtedly created. If necessary, I should have to make up my mind whether some of the imputations were not, having regard to all the circumstances, outside all fair limits of the occasion."

He then goes on to deal with those issues. Now, Gavan Duffy J dissented simply stating, without giving any reasons, that he was of the opinion that the appeal should be dismissed. One can perhaps draw from that that he supported the view of Starke J.

In Thiess v TCN Channel 9 Pty Ltd (No.5) (1994) 1 Qd R 156 there are some observations by the Full Court of the Supreme Court of Queensland in the court's joint judgment at pages 196-197:

> "The defence of qualified protection has thus lost all practical relevance in the overall context of the plaintiff's action. It is consequently not altogether easy to see why on this appeal Thiess should persist in challenging findings that relate only to that unsuccessful defence (Specific grounds of appeal 4, 5 and 6). The explanation lies at least partly in the appellant's wish to rely on some of those findings in order to demonstrate that the jury's answers were perverse or inconsistent; and also at least partly in the appellant's hope of reversing the jury's finding that TCN 9 was not actuated by malice, ill-will or other improper motive toward the plaintiff. The underlying thesis at this point is that, if Woodham were shown to be a co-publisher with TCN 9, the malice or ill-will which the jury found him to have harboured against Thiess would be imputed to TCN 9: see Specific ground of appeal no.6.
>
> The foundation for this contention is, once again, the decision in Webb v Bloch (1928) 41 C.L.R. 331, where, accepting the decision in Smith v Streatfield [1913] 3 K.B. 764, Knox C.J. held that the malice of one joint publisher defeated the privilege of all those responsible in law for the publication (41 C.L.R. 331, 359, per Knox C.J.). As Isaacs J. saw it, the principals as publishers were identified as "a composite entity", so as to infect one with the state of mind of the other (41 C.L.R. 331, 365-366). It was on this point that Starke J. had adopted a different view in that case (41 C.L.R. 331, 341, 343), with which Gavan Duffy J. agreed.
>
> To the extent that the approach adopted by Isaacs J. may rest on the proposition that, in the case of principal and agent, it is enough that they possess between them the requisite elements of guilty knowledge (S. Pearson & Son Ltd v Dublin Corporation [1907] A.C. 351, 354, 359), the conclusion is one that may some day merit reconsideration by the High Court in the light of the later decision of the Court of Appeal in Armstrong v Strain [1952] 1 K.B. 232. Here it is enough to say that the first obstacle in the path of the appellant is the finding against him that Woodham was not a co-publisher or joint tortfeasor. Having failed to displace that finding on appeal, it is not

> possible for the plaintiff to succeed in his further object of imputing the proved ill-will of the defendant Woodham to the defendant TCN 9."

I should say that none of the submissions that are put to me have suggested that the defendants were not joint tortfeasors.

The submission by the plaintiff also rested in part upon the alternative basis that seems to have derived from the judgment of McHugh J in Stephens v West Australian Newspapers Ltd (1994) 124 ALR 80, and in particular in the passage at page 115 where His Honour says this:

> "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."

Earlier in His Honour's judgment, at p112, His Honour referred to a passage from the case of Bryanston Finance Limited v de Vries [1975] QB 703 at 727 for support for the proposition that:

> "The privilege of the publisher is not an 'original' privilege but one 'ancillary' to, and dependent on, the existence of a privilege for the publication of the defamatory contents" to the general public."

The judgment of McHugh J was a dissenting judgment and His Honour's observations are obiter dicta. It may be that some limited support for His Honour's views is to be found in the dissenting judgment of Dawson J at page 109.

The passage referred to by McHugh J in Bryanston Finance v de Vries at p.727 comes from the dissenting judgment of Diplock LJ. There is nothing in the passage to which His Honour

refers which discussed the question of whether or not proof of malice by the typist of the letter which was being discussed in that case or for that matter, by the person who was the original writer of the letter, would have destroyed the privilege of the other.

I was referred by Mr Lynch to two other authorities: Dougherty v Chandler (1946) 46 SR(NSW) 370 and in particular, to a passage in the judgment of Jordan CJ commencing at pages 375 to 376 where the Chief Justice said this:

> "Where several defendants are charged with joint defamation, and express malice is established against one only, it has been said that the express malice of the one is fatal to the success of a plea of privileged occasion or fair comment by all or any: Smith v Streatfield; Webb v Bloch; Musgrave v The Commonwealth; Gatley on Libel and Slander, 3rd ed., 630, 661. This may be true enough where the others are, on general principles, vicariously liable for the acts of the one: cf. Brain v Commonwealth Life Assurance Society Ltd; Smith v Commonwealth Life Assurance Society Ltd. But, except in this class of case, I think, with all respect, that, as a matter of principle, where, to defeat a plea of several defendants sued jointly, it is necessary for the plaintiff to prove express malice, he must fail as against any defendant to whom he is unable to sheet home express malice. The statement that express malice of one must, in relation to liability, be regarded as express malice of all appears to depend upon Smith v Streatfield, a decision of a single Judge, which was doubted by the Court of Appeal in Crozier v Wishart Books Ltd, and was described as "a tottering authority" by Uthwatt J. in Smith v National Meter Co Ltd. But, however this may be, I am of opinion that, in a case of joint libel, nothing can be awarded in respect of additional exemplary damages for aggravating circumstances unless it is established either that all the defendants who are found guilty participated in the aggravating circumstances, or that those who did not are, for some reason, vicariously liable for the conduct of those who did: Robertson v Wylde; Dawson v M'Clelland; Mutch v Sleeman; Chapman v Lord Ellesmere. Applying these principles, I am of opinion that the portion of the summing up which was objected to cannot be supported."

His Honour's judgment was concurred in by Maxell J and the point does not appear to have been discussed particularly by Owen J.

The other case to which I was referred was a judgment of the Court of Appeal, England, in Egger v Viscount Chelmsford & Ors (1964) 3 All ER 406. The decision of the Court of Appeal as expressed in the headnote was that each of the three members of the committee who was innocent of malice was entitled severally to the protection of qualified privilege and therefore was not liable to the plaintiff for libel.

Lord Denning M.R. dealt with the relevant authorities at pages 408 to 411 of the report, including Smith v Streatfield and the High Court's decision in Webb v Bloch.

His Lordship disagreed with Smith v Streatfield, which he said was quite contrary to justice. At page 408 of the report he said: "It is quite contrary to justice that the printers who were entirely innocent should have been held jointly liable with the canon." He then refers to the judgment of Bankes J in that case at page 409 and he quotes: "The finding of the jury establishes the fact that the defendant, Cannon Streatfield, was a tortfeasor as regards this publication. It necessarily follows, in my opinion, that the *printers are joint tortfeasors* with him." He says of that conclusion that all he could say of it is that the conclusion does not follow from the premises.

The second reason that Bankes J gave, is quoted by Lord Denning, at p409:

> Qualified privilege in one sense may be said to be the privilege of the individual, in that it arises out of the circumstances in which the individual is placed, but as a defence *it is attached to the publication*. Where, therefore, as here, the plaintiff is complaining of a joint publication, if the defence of privilege as to that publication fails because of the proof of express malice, it fails in my opinion altogether."

His Lordship then goes on to say:

> "All I would say is that the defence of qualified privilege is a defence for *the individual* who is sued, and not a defence for the publication. It is quite erroneous to say that it is attached to the publication as distinct from the individual."

The other matter to which I should briefly refer is the recent decision of the High Court in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985), 155 CLR 448. That case examined the question of whether or not an award of exemplary damages could be made against one of two joint defendants who were sued. The question arose because the theory behind the decision of the House of Lords in Broome v Cassell & Co Ltd [1972] AC 1027 was that only one award of damages was possible in the case of joint tortfeasors. So unless there were findings warranting exemplary damages against both defendants, the House of Lords had found that the only damages which could be awarded were the lesser of the two amounts.

The problem with that particular case was that the House of Lords had not been referred to the English Law Reform Miscellaneous Provisions Act provisions, and at a later time the Privy Council in the case of Wah Tat Bank Limited v Chan Cheng Kum [1975] AC 507 declined to follow the reasoning of the House of Lords. That case dealt with the question of whether the rule in Brinsmead v Harrison (1871) LR 7 CP 547 that a judgment against one tortfeasor was a bar to an action against other joint tortfeasors had survived the Law Reform Miscellaneous Provisions Act.

Those authorities were considered by the High Court in the XL Petroleum case and the court came to the view that the rule in Brinsmead v Harrison had been displaced by the Law Reform Miscellaneous Provisions Act and that consequently once the basis for the rule had been displaced, there remained no foundation any longer for the old rule that only one award in damages could be given.

This suggests that the distinctions and consequences of joint liability which previously had underpinned some of the technical rules of the common law relating to joint tortfeasors had been swept away.

The view I hold is this, there being no binding authority on me, that first there ought to be no rule, simply because the defendants are joint tortfeasors, that one joint tortfeasor is, required to suffer the consequences of the malice of the other joint tortfeasor. There seems to me to be nothing in principle or justice requiring that consequence. Accordingly, I prefer the views of Lord Denning and the views of Jordan CJ, to which I have referred, on that particular issue.

As to the submission which Mr Reeves put to me that the publisher's privilege was an ancillary privilege, even if that is so, it does not follow that of necessity the destruction of the privilege of Mr Wrenn would carry with it the consequence that the ABC's privilege was also destroyed. Whilst that might sound fine in theory one only has to consider the facts discussed in Egger v Vicount Chelmford to see how unjust that would be. Presumably, the communication by the author of the letter to his secretary, which was said to be a privileged communication for the purpose of enabling the secretary to type the letter, would have the result, if Mr Reeves' submission is correct, that not only the author of the letter but also the secretary who typed it would lose the privilege if the original author of the letter was actuated by malice. That seems to me be to a very unjust result and, as I am not bound by any particular authority on the topic, it seems to me that the better course is to follow those cases that confine the effect of proving malice to those where either direct malice is proved against each defendant or it is shown that the defendants are vicariously liable for the publication or are otherwise, in the words of Isaacs J in Webb v Bloch, "acting as a composite entity".

That being the case I would rule that in the absence of any special pleading or special facts, and there appears to be none upon which the plaintiff can rely, proof of malice against Mr Wrenn would not as a matter of law infect the ABC.

SIXTEEN

13, 14, 16, 24 and 28 MARCH 1995; 2 OCTOBER 1995

APPLICATION by the plaintiff to the trial judge to disqualify himself for apparent bias; and application by Nationwide News Pty Ltd to set aside suppression orders made.

J. Reeves and A.H. Silvester for the plaintiff.

The first defendant appeared in person.

M. Lynch and S. Southwood for the second defendant until 28 March 1995.

A. Wyvill for Nationwide News Pty Ltd on 16 and 24 March 1995.

T. Riley QC for Nationwide News Pty Ltd on 28 March 1995.

J. Waters for the second defendant, M. Lynch, S. Southwood and D. Elliott on 28 March 1995.

The following written reasons were published on 2 October 1995.

The action in this case was for damages for defamation. The trial was by a civil jury. The plaintiff sought aggravated and punitive damages. The trial began on 24 October 1994. It was expected to last 3 weeks. The defendants raised a number of defences, the most important being justification and qualified privilege. After seven weeks, the trial had still not finished. For various reasons the trial could not be concluded in December 1994, and on 13 December 1994 it was adjourned until 13 March 1995. By that time the only defence left was partial justification, but the defendants had also put the plaintiff to proof on publication and identification as to the meaning of the innuendoes which could be proven from the broadcast. The trial had been hotly contested on all sides. The defendant Wrenn appeared in person. There was an atmosphere of considerable hostility and acrimony between counsel and solicitors involved in the case, and I had had, on more than one occasion, to urge the parties' legal representatives to co-operate with one another. This case was also bedevilled by almost every conceivable problem likely to cause the trial to become drawn out. There were numerous applications to amend the defences. Some of these applications were refused. Even so, the defences were still amended on five occasions during the trial. Tactics were being employed with a view to embarrassing the other side with the rule in Jones v

Dunkel [1958-59] 101 CLR 298. There were tactical battles being fought on numerous other fronts. Some of these tactical battles resulted in a not inconsiderable waste of the Court's time. There were applications to discharge the jury. I will not record every single application made to me in the absence of the jury. Suffice it to say that they were numerous and that they occupied in all a very considerable part of the hearing time. Most of these applications were justified; some were frivolous and a waste of time; others were made prematurely or unnecessarily. Often these applications were made with little or no notice to the other parties or their legal representatives, or to me. On other occasions arrangements were made between the solicitors for the plaintiff and the second defendant without apparently informing their counsel of what had been decided. It was not uncommon for the first defendant to complain that he had not been informed by one party or the other as to what was being proposed. I do not intend to single out any individual. The trial placed a lot of pressure on all involved. As the trial judge I had the responsibility to ensure that the trial was fairly conducted. The combination of factors to which I have briefly eluded made my task difficult. Before the trial resumed in March I had resolved to take whatever steps were necessary to reduce the personal animosity between the parties' legal representatives, to avoid further time wasting tactics being employed, and to bring about a proper conclusion to this litigation the costs of which had already vastly exceeded any amount that the jury were ever likely to have awarded if the plaintiff was successful.

During the week before the resumption of the trial, my associate, who is also my wife, was admitted to the bar. My new associate was due to start during the first week of resumption of the trial, and it was arranged that my associate would stay on, as is the custom, for an extra week to ensure a smooth handover. In order to celebrate her admission a party was held at my home on the evening of Saturday 11 March 1995. Invitations were sent out to a large number of persons, mainly members of the local legal profession. Included amongst those invited were the lawyers and partners of the firm of solicitors representing the plaintiff, where my former associate had been articled, as well as counsel involved in this case, and a solicitor from the firm representing the second defendants. Initially acceptances were received from some persons on both sides. Later, a fax was received by my associate from

one of the junior solicitors employed in the plaintiff's solicitors' firm to the effect that he would not be coming because there might be a reasonable apprehension of bias if he did attend. No other information was received until sometime later, when a note of congratulations addressed to my associate was delivered to our home, together with a bottle of champagne. The note was signed by counsel for the second defendant and one of the solicitors from the firm representing the second defendant, and explained that they would not be attending the party because objection had been taken by the plaintiff to their doing so. A copy of a letter to this effect from the plaintiff's solicitors to the second defendant's solicitors was also sent. When this came to my attention on the evening of 10 March, I rang leading counsel for the plaintiff, told him what had happened, and asked him to see if the problem (whatever it was) could not be resolved. I heard nothing further about the matter. None of the parties' representatives attended the party. I intended to raise these matters with counsel before the case resumed the following Monday and brought to court the letter concerned.

On the morning of the Monday 13 March 1995 I was informed that counsel wished to see me in my Chambers. I assumed this may be to discuss the letter earlier referred to. At the last minute a message was relayed to me through my associate that the matter would be raised in open court. When court resumed, counsel for the plaintiff made an application that I disqualify myself. The plaintiff's application was based on three affidavits. The affidavits were sought to be filed in Court. The defendants had only just been served with copies of them within the hour. It was explained to me by counsel for the plaintiff that he had proposed to give me notice of the application in chambers but this course was opposed. In my view notice of the application ought to have been given to me, and it was discourteous not to have done so. It appears likely that the media had been made aware of the application. Present in court were a large number of journalists. The case had attracted some media attention when it had begun, but the media had not been present for most of the hearing. After the affidavits had been formally filed, a short adjournment was granted to the defendants to enable them to prepare for the application. When court resumed some documents were tendered by counsel for the second defendant, and I informed all parties about the circumstances as known to me, and the matter was further adjourned briefly to

enable counsel for the second defendant to seek further instructions. After court resumed, I made a short announcement of some other matters I had forgotten to mention earlier, and the matter was then stood over until later in the day to hear further submissions.

The affidavits raised the following matters. The affidavit of the plaintiff complained of certain alleged conduct by my associate during the course of the hearing in 1994. I will not repeat those matters. The allegations lacked precision as to time, or circumstances, and were expressed in vague terms. None of the matters complained of, even if true, were of the slightest relevance to the plaintiff's application, or in any way founded the slightest ground upon which an inference might be drawn of a reasonable apprehension of bias on my part. Further, counsel for the plaintiff conceded that these matters had been drawn to his attention by his client at the time, that he had decided to do nothing about them, and that any possible objection based upon them had been waived. He nevertheless pressed them as part of the ''background'' to his application. One purpose of this material, was to show that my associate had shown apparent partisanship to the first defendant and lack of sympathy to the plaintiff's case. No reasonable person would have reached such a conclusion from this material, but even if I am wrong about that, there was nothing to connect me, as the trial judge, with these alleged matters of complaint except by an argument along the lines that because my associate was my wife, whatever she did was a reflection of my views. I rejected this argument. I do not think any reasonable person would think such a thing in this day and age.

Another purpose was to show that these matters provided the basis for the plaintiff's decision to instruct his solicitors to object to the second defendant's representatives attending the party. One of Mr Reeves' submissions was that the second defendant's representatives ought not to have revealed that the plaintiff had objected to their coming to the party. I think it would have been wiser had the second defendant's representatives not given this explanation for their non-attendance. However, some explanation was probably felt necessary in view of the circumstances of their earlier acceptance of the invitation, and it is difficult to be critical if the explanation offered happens to be the truth. Further, the matter was not advanced by

the plaintiff explaining in his affidavit not only that he objected but why he objected. The reasons for the plaintiff's objection were not relevant. There are not infrequently all sorts of reasons why a party may object to his advisers or the advisers of another party having social contact with the trial judge at a gathering such as this. I do not think that the plaintiff's reasons ought to have been revealed. This affidavit was objected to, in part, by counsel for the second defendant. In my opinion the whole of this affidavit was inadmissible.

The second affidavit referred to the note and the champagne sent by the second defendants' legal representatives and was unobjectionable. The third affidavit dealt with certain alleged conversations between my associate and a junior solicitor in the employ of the plaintiff's solicitors on the morning of Friday 10 March. The first conversation allegedly took place in the foyer of the Supreme Court building and concerned, inter alia, the topic of the plaintiff's solicitors not attending the party and my reaction to that, and a request for access to an exhibit. The second conversation related to locating the exhibit and the arrangements for inspection. The third conversation allegedly took place a little later in the foyer and is concerned with the same topic, and a statement by my associate allegedly to the effect that if the litigant's (or their representatives) continue to behave as they had done during the trial so far, I would ''come down on them like a ton of bricks.'' This affidavit did not set out the conversations in full, but annexed notes of the conversations made by the deponent. The notes did not purport to be a full account of the whole of the conversations, and lacked context. Notes made of a conversation made may be referred to by a witness to refresh memory in certain circumstances, but save in exceptional circumstances, are not admissible in evidence. The affidavit should have set out the alleged conversations in full, using direct speech where possible. The notes should not have been annexed. The lack of detail as to the whole of the conversations placed the court and the defendants at an obvious disadvantage. This affidavit ought not to have been admitted, but as no objection was taken to it, I admitted it into evidence and permitted it to be read.

I had been told by my associate on 10 March about her version of these conversations (which I considered to be innocuous) and which differed materially from the notes contained in this affidavit. Consequently, when this affidavit was read, the matters deposed to came as a surprise to me. I informed counsel that what my associate had told me was not anything like the version contained in this affidavit, that I felt that I would not be able to adjudicate a factual issue as to which was the true version, and that, subject to whatever submissions were made to me, I felt that there was no alternative but to determine the plaintiff's application on the assumption of the truth of the assertions.

The defendants were given an opportunity over the adjournments which followed to consider this problem, and in the end chose to defend the application without cross-examining the deponent or calling my associate as a witness. I may have, by those remarks, discouraged the defendants from cross examining the deponent or from calling my associate if that is what they had hear minded to do. I now regret making those remarks. it would have been much better if I had not said anything at all. In hindsight, it would have been better if my associate had been called. I am in no doubt that counsel for the second defendant was aware that he had the right to fully explore those matters if he had wanted to do so. No matter how embarrassing and difficult the task, it would have been my duty to have resolved any questions of fact; moreover, given the court's interest in the result of the application, if it had been necessary to do so, I think I may well have had to cross-examine the deponent myself and to have called my associate on my own motion if the defendants had been unwilling to do so, and there were no other means to resolve the matter. Although I did not avert to this at the time, a more satisfactory solution to this dilemma may have been to have referred that question to the Master pursuant to s26(1) of the Supreme Court Act and Rules 50.01 and 50.04 of the Supreme Court Rules. However, neither of those courses were taken and I decided the plaintiff's application on the basis that the evidence before me was assumed to be true, although I made no finding that that evidence was in fact true.

After hearing submissions, I reserved my decision until the following morning.

Immediately after reserving my decision, counsel for the second defendant applied for suppression orders in respect of the application until I announced my decision the following morning, on the basis that if I rejected the application, the matters agitated before me might have a tendency to influence the jury in an inappropriate way. This application was supported by the other parties. After hearing submissions I made the orders sought, and delivered short oral reasons.

The following morning I announced my decision concerning the plaintiff's application for disqualification. I dismissed the application, and said I would publish reasons at a later date. I do so now.

It is not necessary to refer to the numerous authorities on this topic. As Dawson J said in Re Morling; ex parte Australasian Meat Industry Employees Union and Others (1985) 66 ALR 608, at 611:

> ''The test to be applied in considering a case such as this is now clearly laid down. It is whether the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matters before him: see Livesey v New South Wales Bar Association (1983) 151 CLR 288; 47 ALR 45; R v Watson; Ex Parte Armstrong (1976) 136 CLR 248; 9 ALR 551. If so, then the judge ought not to proceed to hear those matters. Of course, as Gibbs CJ pointed out in R v Simpson ex parte Morrison (1984) 154 CLR 101 at 104; 52 ALJR 648, the mere expression of an apprehension of bias does not establish that it is reasonably held; that is a matter which must be determined objectively.''

As I have said already, none of the matters referred to in the plaintiff's affidavit, if true, could even remotely raise a reasonable apprehension of bias on my part and had in any event been waived. As to the matter concerning the letter and bottle of champagne sent to my associate, it was not suggested that the gift of the champagne raised a reasonable apprehension of bias on my part. The gift was not made to me, but to my associate to celebrate her admission. [Judicial ethics would have required me to request her to return the champagne (see Thomas Judicial Ethics in Australia, pps 113-114) but the champagne was in

fact returned by my associate on her own initiative and with my concurrence a few days later.] The communication of the fact that the plaintiff objected to the second defendant's legal advisers attending the party, was not in the circumstances improper, even though it might reasonably be supposed, as was in fact the case, that the second defendant's advisers' letter would come to my attention. Notwithstanding what was said in Reg v Magistrates' Court at Lilydale; ex parte Ciccone [1973] VR 122 at 127, not every communication by a party or his legal advisers to a judicial officer, made in the absence of the other party, results in a reasonable apprehension of bias. It is not unusual for communications to occur. Indeed in a small city the size of Darwin it is unavoidable unless the judges are expected to live hermetically, and this has not been suggested. Usually if a communication is connected somehow with a case the judge is trying it is made to the judge via his associate, (as indeed happened in this case, when the plaintiff's legal advisers sought to inspect the exhibits). Of course the judge may not entertain representations in private concerning the case itself, (see Re J.R.L; ex parte C.J.L. (1986) 161 CLR 342), but this is not what occurred here, and the circumstances of the letter and the gift were made known to the plaintiff's counsel by me immediately. No complaint was made that I personally spoke to the plaintiff's counsel about that, although on reflection I think it would have been wiser had I asked my associate to deal with that matter. In the circumstances I did not consider that a party or a member of the public might entertain a reasonable apprehension of bias on my part arising out of those circumstances.

The final matter is the question of what inferences would reasonably be open based upon the alleged communications between my associate and the plaintiff's solicitor. The principle complaint was that the plaintiff or a reasonable member of the public might infer that I was threatening revenge upon the plaintiff or his advisers for the stand taken in relation to the objection raised to the attendance of the parties' legal advisers to the party. Of course, that was not in fact the case, but that is not the question. As I said in open Court, I was disappointed that the invitations to the party had been declined, but not angry about that. But, on reflection, this was not a complete explanation. I was angered by the prospect that this incident was likely to aggravate the animosity that had existed between the parties, and

make my task more difficult; and I thought the manner in which the non-acceptances was brought to my attention ought to have been more sensitively handled. In my view it would not have been open for a reasonable person to draw from this that I was threatening revenge, i.e. that I would allow my allegedly outraged personal feelings to colour my judgment and decide issues against the plaintiff with that purpose in mind. I thought that the worst possible construction which could be put on the alleged conversations, assuming that they can be attributed to me, was that I was ''angry'' or ''furious'' with the plaintiff's solicitors because they apparently took it upon themselves to raise an objection to attending the party after one at least had initially accepted the invitation, that I considered this behaviour objectionable, and that if there were any further instances of objectionable behaviour by any of the litigants or their advisers in the future, I would take firm action. This implies that I had formed an opinion, adverse to the plaintiff's legal advisers, about their conduct, but not that I was proposing to do anything about it, except to take firm action in respect of any future misbehaviour by any party, be it the plaintiff or either of the defendants, or their respective advisers.

Counsel for the second defendant referred me to Kaycliff Pty Ltd v Australian Broadcasting Tribunal (1989) 90 ALR 310 a decision of the Full Federal Court. In that case the complaint was that the chairman of the Tribunal criticized one of the parties during the course of the enquiry and before final submissions. The Court decided the case on the basis that the chairman, in a provisional way, implied a view adverse to that party's interests, and which, if adhered to, might contribute to a rejection of the application before it by that party. The Court, Lockhart, Pincus and Gummow JJ, having reviewed a number of the leading authorities said, at p317:

> ''.... we decide this case on the basis that the weight of authority supports the conclusion that parties such as the appellants must raise quite a substantial case in order to succeed; only in unusual cases will an expression of opinion about an issue, given before the end of the hearing, be held to disqualify''.

The behaviour of the plaintiff or his advisers was not in issue in this case, but nevertheless, to the extent that the situation is analogous, the mere expression of a pre-conceived view

does not necessarily give rise to a reasonable apprehension of bias. As was said in R v Australian Stevedoring Industry Board: Ex Parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 at 116, per Dixon CJ, Williams, Webb and Fullagar JJ:

> ''But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be ''real''. The officer must so have conducted himself that a high degree of probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even expressions of such opinions, for it does not follow that the evidence will be disregarded' …''

This was a jury trial. Analogously, it did not follow, that even if I had formed an unfavourable and preconceived view of the plaintiff's behaviour or the plaintiff's legal advisers' behaviour, that I would decide any issue which remained for me to decide adversely to the plaintiff, nor that I would have failed in my duty to properly put the plaintiff's case to the jury. Consequently I rejected the plaintiff's application.

On 14 March 1995, after I had given my ruling, the first defendant applied for the suppression order to be continued until the completion of the trial. Neither counsel for the plaintiff, nor the second defendant opposed the application. I made an order continuing the suppression orders until after the jury's verdict had been announced. I then proceeded to deal with other matters in the absence of the jury until the morning of 16 March 1995 when an urgent application by Nationwide News Pty Ltd was made by summons in the action to set aside the suppression orders made on 14 March, and pending the hearing of that application, for an order for access to the relevant evidence, affidavits, orders, transcript and exhibits relating to the plaintiff's application for me to disqualify myself. I made an order granting Nationwide News Pty Ltd access to the material on terms, and listed the hearing of the summons for 5pm that day. Shortly thereafter addresses to the jury were made by the parties on certain of the issues to be decided by the jury, and I began my summing up to the

jury on those issues, but had not completed this when I began hearing Nationwide News' application at 5pm. After hearing the applicant's submissions, I adjourned the application at the request of the defendants until the next available time, 11am on Saturday 18 March. Unfortunately I was not able, for personal reasons, to sit again at that time, and the applications were adjourned to a date to be fixed.

Nothing further was heard from Nationwide News for some days, and the hearing of the application was not resumed until late on Friday evening, 24 March 1995. The application was not concluded that evening and was again adjourned. In the meantime the trial had proceeded and by 4.30pm on Tuesday 28 March 1995, I was in the middle of my final summing up to the jury. At 4.45pm I resumed hearing Nationwide News' application. At the conclusion of those submissions I reserved briefly before announcing my decision to refuse the application. I said then I would publish my reasons at a later time. I now do so.

This court has both statutory and inherent powers to prohibit or restrain the publication of material placed before it. Section 57 of the Evidence Act empowers the court, inter alia, to prohibit the publication of the name of a party, intended party, witness, or intended witness to a proceeding where it appears to the court that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit that publication. Section 58 empowers the court, where in the course of any proceeding, witnesses are ordered out of court, and it appears to the court that, for the furtherance or otherwise in the interests of the administration of justice, it is desirable to prohibit for any period the publication of any evidence given or used in the proceeding, to forbid, for such period as it thinks fit, the publication of the evidence or any specified part thereof. In addition, although not relevant to this case, s21A(2)(d) empowers the court to be closed whilst evidence is being given by a vulnerable witness. The ordinary rule is that all proceedings are to be held in open court, although s17 of the Supreme Court Act grants the court an unfettered discretion to exclude the public or persons specified by the Court from a sitting or part of a sitting. It should be noted that at all times the proceedings before me concerning the plaintiff's disqualification

application were heard in open court, but in the absence of the jury. Present in court at the time of the original orders were representatives of the media, including the applicant.

Before discussing this matter further, it is necessary to recall the precise orders made on 13 March 1995 and continued by me on 14 March 1995 until the jury's verdicts became known. These were expressed by me as follows:

> ''I think in the circumstances that the proper order that I should make is that I suppress publication of any evidence given in these proceedings today. I suppress the names of the parties to this matter, and the names of any witnesses whose evidence is before me in the form of affidavit and, as well, I suppress the submissions that have been made to me by counsel, until further order, but I indicate now that I will review that decision in the morning after I have published both my decision and my reasons.''

It is clear that the power to make the order suppressing the publication of the evidence rested upon s58 of the Evidence Act, and in my short oral reasons, that is clearly the power relied upon. The power to suppress the names of the parties and the witnesses rested upon s57 of the Evidence Act. The power to suppress the submissions of counsel was not made in reliance upon either section. In my short oral reasons I said:

> ''The problem with s58 is that it does not, in terms, deal with the submissions made by counsel upon the evidence and here the - although it may be that an order suppressing the publication of the evidence would include or be held to include submissions from the Bar table in relation to that evidence, the matter is by no means free from doubt.''

Although I was not very clear in my short reasons, I relied upon the court's inherent power in order to support the order suppressing counsel's submissions.

The width of the discretion given by sections 57 and 58 of the Evidence Act has been discussed in G v The Queen [1984] 35 SASR 349 and The Queen v Lennon [1984] 38 SASR 356 both Full Court decisions of the Supreme Court of South Australia dealing with virtually identical provisions in the Evidence Act (SA). In G v The Queen at 351, King CJ said, in relation to the expression 'the interests of the administration of justice':

> ''The width of this expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the courts the widest of discretions. The phrase is apt to encompass, in addition to wider considerations pertaining to the administration of justice, many situations which are more suitably considered under the ground of undue prejudice or undue hardship.''

In The Queen v Lennon at 359-360. King CJ said:

> ''As was indicated in G v The Queen there is no presumption one way or the other as to whether an order should be made under s69. The section confers a discretion on the presiding Judge which must be exercised for the purposes for which it is conferred. The discretion comes into existence if there is material upon which it can reasonably be considered that it is desirable to make the order sought in the interests of the administration of justice or in order to prevent undue prejudice or undue hardship to any person. When those conditions exist, the presiding Judge or Magistrate has a discretion which he must exercise according to his own judgment...''

It was submitted by counsel for Nationwide News that s57(1) was inapplicable because the conditions of subparagraph (a) and (b) were not satisfied. I accepted that s57(1)(a) was not applicable, but I did not accept that the conditions of s57(1)(b) were not satisfied, as that section permits prohibition of the publication of the names of the parties and witnesses and intended witnesses in a proceeding. The section is not confined to criminal proceedings, and the South Australian decisions provide guidance to both civil and criminal proceedings.

I considered that the deponent to an affidavit is a ''witness'' within the meaning of the section once the affidavit is read in court. I did not see why the word ''witness'' should be narrowly confined to witnesses who give evidence in the witness box. The ordinary meaning of the word is a person who testifies on oath or affirmation in a proceeding: see Shorter Oxford Dictionary. Testimony is usually given by the witness appearing in court in person but the Supreme Court Rules permit testimony to be given upon affidavit (and by other means such as video-conferencing). Once the affidavit is read, it becomes evidence in the proceeding: *c.f.* R v Bara Bara (1992) 87 NTR 1; Quinn v Given (1980) 29 ALR 88 at 95-6.

Counsel for Nationwide News also submitted that s58 did not apply because it concerned the exclusion of witnesses. It is true that an order for witnesses to leave the Court is a precondition for the making of such an order, but such an order had been previously made earlier in the proceedings. (Tr.p.79).

Counsel for Nationwide News submitted that the court has no power to prohibit publication of its proceedings at large, as this was an exercise of legislative and not judicial power. There is support for this proposition in the judgment of McHugh JA (as he then was) in John Fairfax and Sons Ltd v Police Tribunal of New Souths Wales (1986) 5 NSWLR 465 at 476-477:

> ''The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient. When the court is an inferior court, the order must do no more than is ''necessary to enable it to act effectively within'' its jurisdiction. Courts have no general authority, however, to make orders binding people in their conduct outside the courtroom. Judicial power is concerned with the determination of disputes and the making of orders concerning existing rights, duties and liabilities of persons involved in proceedings before the courts. An order made in court is no doubt binding on the parties, the witnesses and other persons in the courtroom. But an order purporting to operate as a common rule and to bind people generally is an exercise of legislative - not judicial power. Nevertheless, conduct outside the courtroom which deliberately frustrates the effect of an order made to enable a court to act effectively within its jurisdiction may constitute a contempt of court. But the conduct will be a contempt because the person involved has intentionally interfered with the proper administration of justice and not because he was bound by the order

> itself. I think that the above statement of the applicable principles is in accordance with the way in which this branch of the law has developed.''

Notwithstanding that at the time of the making of both orders, a senior political journalist from Nationwide News was present in court at the time, it was submitted that the orders were not binding on the applicant, and this founded the applicant's right to apply to set aside the orders. I accepted that the applicant had a right to make that application, and this was not contested by any of the parties.

Next the applicant submitted that the orders made would be effective as against the parties and those present in the courtroom and as the applicant had notice of the orders, publication may constitute a contempt of court. The orders would be construed as restraining orders. It was submitted that the power at common law to make orders of the kind made was a limited one, to be exercised only in exceptional circumstances. Reliance was placed on the observations of Kirby P in John Fairfax Group Pty Ltd (Receivers and Managers Appointed) and Another v Local Court of New South Wales and Others (1992) 26 NSWLR 131 at 141. That case, however, was concerned with the powers of a statutory court with limited powers, and, as his Honour observed at 149.

> ''... considerations which apply in the Supreme Court, with the large inherent powers referred to in Grassby, [Grassby v The Queen (1989) 168 CLR 1] are quite different. The decision in this case involves no determination of the scope of the inherent power of a Supreme Court Judge to adopt the expedient or to make orders suppressing the publication of evidence based upon the inherent power. I reserve that question for the future.''

I was also provided with part only of the judgment of the Court of Appeal, Queensland, in J. v L & A Services Pty Ltd, an unreported decision delivered 15 February 1993. Reliance was placed upon p32 of that document. However the passage concerned was merely a quotation from the judgment of Kirby P in John Fairfax Groups Pty Ltd v The Local Court of New South Wales, (supra), and was of no assistance to me at the time. It was not proper for counsel to provide part only of an unreported judgment. The court has no easy access to

such judgments, and may be mislead. I have, since I began to prepare these reasons, had the opportunity to read the whole of that judgment. The judgment of the majority, Fitzgerald P and Lee J contains an exhaustive review of the relevant authorities. At pps45-47 their Honours state in summary form their conclusions as to the principles to be applied by a Supreme Court, subject to any statutory provision to the contrary in particular circumstances. For present purposes, it is sufficient to refer to a passage at p47:

> ''A limited exclusion or restraint is permissible if necessary to ensure that a proceeding is fair; for example, witnesses may be required to absent themselves from hearings, parts of jury trials may take place in the absence of the jury and limited or temporary restrictions on publicity may be imposed during the course of jury proceedings.''

My orders were within this category.

Of more assistance was the decision of the Court of Appeal in John Fairfax & Sons Ltd v Police Tribunal of New South Wales and Another (1986) 5 NSWLR 465. That case dealt with the power of a statutory tribunal to prohibit publication of evidence in the absence of specific statutory authority, and therefore is distinguishable. However, the members of the court (Glass, Mahoney and McHugh J JA) discussed the cases dealing with the powers of the Superior Courts to make such orders. Mahoney JA said at 471-2:

> ''A superior court has the power, and the duty, to secure that justice is done according to the law in respect of those seeking the exercise of its jurisdiction: see Scott v Scott [1913] AC 417 at 437 per Viscount Haldane LC. In so far as it may be necessary for this purpose, it may make orders for the protection of those relevantly involved in proceedings before it. The protection of such persons has been recognised as something which, in a judicial system, must be undertaken. Thus, a person who punishes a witness in court proceedings because he has given evidence, or who, by threat of punishment, attempts to deter him from giving evidence, may be punished for contempt of court. An attempt, by threat of a detriment, to deter a person from enforcing a right which he has likewise may, in

appropriate circumstances, be so punished: see generally, Fraser v The Queen [1984] 3 NSWLR 212 and the cases there referred to.

The protection which a court may give is not limited to persons who are parties or witnesses in the proceedings before it. Thus, the identity of an informer may be protected by appropriate orders where that identity would be disclosed in, for example, the cross-examination of a witness before the court: see Cain v Glass (No.2) (1985) 3 NSWLR 230 at 246 et seq. The purpose of protecting an informer, such as "X" was suggested to be, would in my opinion be within the power of the court to achieve.

The power of a court to achieve such a purpose is not, I think, narrowly circumscribed. What it may do is conditioned upon the necessity of the case, not upon matters of mere convenience: Scott v Scott (at 438). It may, in my opinion, direct that the name be not disclosed to the court; it may direct that it be disclosed to the court but no other; and it may, in relation to the order which has been made, make such order or give such direction as may be necessary to secure that its purpose be achieved by, for example, directing that no publication be made of the name or of information which would disclose the identity of the person in relation to his involvement in the proceedings before the court. The relationship which must exist between the proceedings and the necessity of the case on the one hand and the order made will depend upon the circumstances of the case. But, as was said, by Earl Loreburn in Scott v Scott (at 477-488):

> "... Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully goes. The authority of the Court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the court. But what is the degree and duration of secrecy which the Court can impose?

> Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the Court available for the enforcement of rights or the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over.''

The relevant authorities were also reviewed by McHugh JA at pps477-479. I have previously referred to the conclusions his Honour reached at pps14-15 of these reasons.

That authority is support for the proposition that the orders made, in so far as they relied upon this court's inherent power, could only be properly made if really necessary to secure the proper administration of justice in these proceedings, and if they did no more than was necessary to achieve the due administration of justice.

It was submitted by counsel for the applicant that the right of the public to be informed of events in open court will only give way to the private right of a litigant where a sufficient likelihood of serious prejudice is established and that prejudice is shown to outweigh the prejudice to legitimate public comment, public discussion and public debate which would flow from the order. Reliance was placed upon a number of authorities, including Hinch v Attorney General for the State of Victoria (1987) 164 CLR 15; Victoria v Australian Building Construction Employees' and Builders Labourers' Federation [1982] 152 CLR 25; and National Mutual Life Association of Australasia Ltd v General Television Corp Pty Ltd [1988] 62 ALJR 553. There are all cases dealing with the power of a superior court to restrain a threatened contempt of court. It was not argued by any of the parties that principles upon which the courts will restrain a threatened contempt of court were inappropriate to the circumstances under which I should have exercised my discretion. I therefore approached this matter on the assumption that that contention is correct, or at least that the tests to be applied are analogous, although I have made no finding that this is so, and it may be that this court's power is not quite so constrained: *c.f.* Australian Broadcasting Commission v Parish (1979-80) 29 ALR 228 at 233-4; J v L & A Services Pty Ltd *(supra)*.

I observe however that counsel for Nationwide News submitted that these principles applied to the Court's inherent powers. It does not necessarily follow that the same principles apply to the Court's Statutory powers.
I turn now to consider the facts, and how I applied them to the principles stated above.

To begin with, there was the material before the court concerning the actions taken by the second defendant's legal advisers to which I have previously referred. There seemed to me to be a significant possibility that if the material came to the jurys' attention, the second defendant could be seriously prejudiced. The plaintiff's counsel had told the jury in his address that this was a case where the jury might be invited to consider the conduct of the second defendant's counsel when it came to assessing damages in this case. The case was now at the stage where closing addresses were about to be made, and I anticipated that counsel for the plaintiff would be making a significant submission to the jury along those lines. Although the second defendant's advisers had not, in my view, acted improperly, and their conduct relating to the party was in any event irrelevant to the issues, and I could have so instructed the jury, my own perceived conduct had been called into question by the plaintiff, and any direction I gave may have been weakened. Further, it would have been difficult to have given a direction without at the same time dealing with the other problems raised as they affected the other parties. My initial view was fortified by the nature of some of the submissions later put by counsel for the applicant; i.e. that their conduct might be seen to be calculated to improperly influence me as the trial judge, and that I was so influenced. Of course I was satisfied that this was not intended, and I was satisfied no reasonable person would apprehend I would be so influenced, but prejudice by its nature is not reasonable, and acts upon both the conscious and subconscious mind. Although I believe that in most cases juries are capable of putting aside prejudice when it comes to deciding cases on the evidence, the issues in this case were not all easily resolvable by the processes of deductive reasoning. Much depended upon impressions the jury formed of the witnesses. The plaintiff's credit and the credit of the first defendant was seriously being called into question. There were allegations of conspiracy to pervert the course of justice, corruption, and other offences alleged to have been committed by the plaintiff, which the defendants sought to justify.

Further, not all of the issues agitated before me by the applicant, had been agitated before me by the plaintiff. The second defendant's legal advisers were not called upon to justify their conduct at the time of the disqualification application (although by the time of the hearing of the applicant's application they found it necessary to be represented by counsel). I had made no findings of improper conduct on their part. I considered that in these circumstances the interests of administration of justice required that the evidence, as it related to them, be suppressed both in order to ensure that their client's interests were not prejudiced, and because publication of the material evidence concerning them would be unfair in so far as it may be thought to reflect upon them professionally, they had had no opportunity to defend themselves, and publication would have been distractive to them at this stage of the trial.

I did not consider at the time of the orders that Mr Wrenn's interests would be affected by the jury coming to know of these matters, except in so far as I might be called upon to discharge the jury in that event. I considered that there was a real possibility of such an application, and a real possibility that it might succeed. If it did, the courses then open to me would have been to abandon the trial, or to continue with the trial without the jury. I had previously decided that I had the power to try the action alone if I had had to discharge the jury. I felt that it was not in the interests of the administration of justice that this should occur in circumstances where, through no fault of Mr Wrenn, and no fault on the part of the jury, Mr Wrenn had been deprived of the opportunity of having his case decided by a jury, my having previously held that this was a proper case for trial by a civil jury.

I considered also the position of my associate. As I endeavoured to make clear at the time, I understood her position to be that she disputed the allegations. That dispute was not resolved, and in accordance with well established practice, I had made it clear that I made no findings adverse to her interests, and I decided the plaintiff's application on the basis of the assumed facts for the purposes of that application. I thought at the time that she would not be personally prejudiced by release of the evidence given the basis upon which the matter was proceeding.

By the time I heard the applicant's application, I was convinced that that assessment of her position was wrong, and that publication at that stage would have been grossly unfair to her as she was not in a position to answer the allegations, but as it was common ground between the parties and the applicant that I should decide the application on the basis of the state of affairs as they existed at the time I made the orders and not at the time I decided the applicant's application, I was not able to, and did not take this into account.

Finally I considered the position of the plaintiff. It was in my view a weak application, and the fact that it was not directed at anything I personally did, would have made it difficult for the jury to comprehend. As it came at such a late stage of the trial, I considered that the application by the plaintiff to have me disqualify myself would be highly prejudicial to the plaintiff if it came to the jury's attention and the facts and argument upon which the application was based made known to them. I considered that there were dangers in trying to explain the application to the jury, and that a short instruction to disregard the application as irrelevant would not have removed the prejudice adequately.

For these reasons I considered that it was necessary in the interests of the administration of justice that the orders sought, prima facie, ought to be made, subject to the balancing of the competing interests of open justice, and the need to go no further than the interests of justice required. As to the latter, I considered that an order suppressing the names of the parties and the witnesses would not go far enough. This was the first civil trial in the Northern Territory for many years. It would not have required any deep thought for the jury to have deduced which matter was involved and which party had made the application. Similarly I considered that an order suppressing the evidence may not be enough either if the jury were able to learn what the nature of the submissions based on the evidence amounted to. It was not clear whether an order to suppress the evidence would have been effective to prevent discussion about the submissions. For example, it may still have been open to report the fact that an application had been made to disqualify myself on the grounds of apprehended bias, and the inferences which the plaintiff asserted could be drawn from the evidence. That it seemed to me would have been just as prejudicial to the plaintiff, and probably also to the

defendants. I considered also that as I was not being asked to make a permanent order, but only until the jurys' verdict was known, the order went no further than the interests of the due administration of justice required. The verdict was then expected to be available in about two weeks' time.

Finally, I took into account the public interest in knowing through the media (and other sources) what had occurred in open court, and the prejudice to legitimate public comment, public debate and discussion which would flow from the orders. In this respect I confined my considerations in the first place to fair and accurate reports of the proceedings: see Attorney-General v Leveller Magazine Ltd (1979) AC 440 at 450 per Lord Diplock. Notwithstanding some of the more imaginative submissions made by junior counsel for the applicant, I did not consider that there was a serious risk that the applicant would be likely to publish comment on the proceedings relating to the plaintiff's application which was not fair, or would fail to publish a fair and accurate report of those proceedings. Consequently, I did not accept submissions to the effect that the evidence, if published, could give rise to the inferences, by reasonable persons, which the applicant's counsel sought to draw (see paragraph 3 of Mr Wyvill's second written outline of submissions).

Although these submissions were later redrafted by senior counsel for the applicant, (see paragraph 3 of the applicant's Amended Submission) paragraph 3(c) of those submissions had never been urged upon me by the plaintiff at the time of the original application for disqualification, and I considered that a report, containing that material, would not be fair comment or a fair and accurate report of those proceedings.

It was submitted by counsel for the applicant that the suppressed material raised ''fundamental questions about the administration of justice by this court (not only in this case but generally) and, further, the capacity and integrity of your Honour, your Honour's associate and those acting for the second defendant.'' I rejected this submission. The suppressed material raised no ''fundamental questions'' about the administration of justice. Applications to judges to disqualify themselves for perceived bias, (as opposed to actual bias)

have become very common in this country. The material in support of the application was unusual, in that the facts upon which the plaintiff relied did not involve anything I had done personally, but relied upon what had been done by others, and it may have raised, (but did not, as it was unnecessary for me to resolve these questions) the extent of my own responsibility for those actions to a reasonable member of the public or to a reasonable party. Even assuming that such a reasonable person was entitled to infer from the assumed facts that I was so responsible, the evidence did not display a reasonable apprehension of bias on my part, for the reasons explained. The plaintiff's application did not raise any matters relating to my integrity, nor that of my associate. No submission of that kind had been made by counsel for the plaintiff. ''Integrity'' means, according to the Shorter Oxford Dictionary, ''soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity.'' Whilst a gift to a judge by a party would be most improper, the gift of a bottle of champagne to my wife to celebrate her admission is, in the circumstances of this case, of quite a different character. I did not consider that the evidence would raise in the minds of reasonable people an attempt by the second defendant's advisers to influence me, and it in fact did nothing of the sort; and no submissions of this kind was made by the plaintiff. The plaintiff's complaint was that the reason for the plaintiff's advisers not attending the party had been revealed, as part of the evidence leading to the inferences to be drawn from the later conversations between my associate and one of the plaintiff's solicitors from which the plaintiff attempted to show that a reasonable observer might think that I had formed an adverse opinion of the plaintiff and his advisers and threatened to take revenge. It is necessary to repeat that the plaintiff's counsel expressly disavowed any actual bias on my part; i.e. the plaintiff did not submit that such was in fact the case, only that a reasonable observer might think it so.

All matters before the court are of public importance because of the value that we, as a society, place upon the principle of open justice: see the observations of Kirby P in John Fairfax Groups v Local Court of New South Wales at 140-141, the remarks of McHugh JA in John Fairfax & Sons v Police Tribunal (1986) 5 NSWLR at 476-477 quoted above at pps14-15 of these reasons. None more so than the administration of justice itself, when the

integrity of the court, its officers, or those appearing before it, are called into question. That was not the case here, but nevertheless an application to a judge to disqualify himself, for perceived bias, even of a routine nature, is a matter of such seriousness and public importance that it would not be suppressed, except in an exceptional case, and even then, only for a limited time. In my opinion this was such a case for the reasons given. The possibility of prejudice, or of a mistrial with the possibility of consequential heavy loss of costs to all parties, could not be ignored. The true facts would soon be released to the public. To the extent that those facts raised questions of public interest, they could then be debated. The alternative not only led to the possibility of a mistrial, but had a strong potential to distract counsel, and the court at a crucial stage of the trial.

Accordingly, I refused the application.
