13/3

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. 268/80

176

BETWEEN DESMOND JAMES MONAGHAN of Wellington, Broadcaster

Plaintiff

A N D ROBERT DAVID MULDOON of Lower Hutt, Prime Minister of New Zealand

Defendant

Hearing: 13 and 14 October and 4 November 1983

Counsel: C.B. Atkinson, Q.C., with M.A. Bungay for plaintiff
J.D. Dalgety with A.D. Ford for defendant

Judgment: 9/3/84

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

The plaintiff in these proceedings, Desmond James Monaghan, is the Controller of Programming for Television New Zealand. It is a very senior position in the Broadcasting Corporation of New Zealand. In 1980 between April and July there had been some public discussion in New Zealand about a television film called "Death of a Princess" which related to the death of a Saudi Arabian princess in somewhat mysterious circumstances. The question of whether it should be shown on New Zealand television had been much canvassed. On the 8th day of July 1980 the Board of the Broadcasting Corporation issued a statement to the news media that the film would not be shown and gave the reasons for its decision. On the same

day and subsequent to the issue of the press statement the defendant, Robert David Muldoon, the Prime Minister, was interviewed by a television journalist. Mr Muldoon's comments in that interview were later broadcast by television and radio and were published in numerous newspapers throughout New Zealand. The plaintiff sued the defendant alleging that what the defendant had said concerning him in that interview was defamatory of him and sought $40,000 damages.

The action was tried before me and a jury. The hearing lasted nine sitting days. One juror became ill during the trial and was excused further attendance. The trial continued with 11 jurors. In passing I record that during the course of the hearing the film "Death of a Princess" was shown to the jury. Six issues were put to the jury, the first of which was in the following terms:

> "Was the defendant's statement defamatory of the plaintiff?"

The jury answered that issue "No". The defendant accordingly applied for judgment which I directed be entered in his favour, but I reserved leave to the plaintiff pursuant to R 281(c) to apply to set aside the judgment within 28 days. I ordered that costs be reserved. The plaintiff duly moved to set aside the judgment and, in particular, the jury's verdict in which it answered the first issue put to it and sought an order that there be a new trial. The motion was based on the single ground that the verdict and answer of the jury to issue number one were against the weight of

evidence. The motion also sought an order that the costs of the trial and the motion be reserved for determination after the new trial. The defendant then indicated that it was his wish to have another matter which I had earlier reserved dealt with on the hearing of the motion. This was the question of whether the occasion on which the words were used was one of qualified privilege for the defendant. Three matters accordingly were raised at the hearing. First, whether the jury's answer to the first issue was against the weight of evidence; second, whether the occasion was one to which qualified privilege applied; and, third, the matter of costs. Before dealing with these matters, however, it is necessary to say a little more about the facts.

The plaintiff, as Controller of Programming for Television New Zealand, plainly has, in the ordinary course of events, a very considerable influence upon decisions taken in relation to what material is shown on television and what is not shown. The question of whether "Death of a Princess" should be shown or not had, as I have already noted, been the subject of some considerable public discussion. The Government view was that it should not be shown because it considered its showing would cause offence and resentment to Saudi Arabia and thus do harm to New Zealand's diplomatic and trade relations with that country. Its showing on British television had led to considerable stress between Britain and Saudi Arabia. New Zealand imports a good deal of oil from Saudi Arabia and sells meat and other products to that country and it was important therefore in the national interest that our trade and diplomatic relations with Saudi Arabia should

not be harmed, which it was thought they would be, by the showing of the film on televison. As I have already noted, the Board of the Corporation on the 8th of July issued a statement saying that it had decided that the film was not acceptable for screening and giving its reasons for the decision. The defendant as Prime Minister was asked to comment upon this decision of the Corporation and in the course of his comments he said, among other things, the following:

> He was disturbed that the Network Director-General Mr Alan Morris and the Controller of Programming Mr Des Monaghan took the view that the film should be shown. He says that makes their judgment suspect, suggests their interest is simply in entertainment and that they are quite irresponsible in the wider aspects of their jobs.

The plaintiff claimed in his statement of claim that these words meant and were understood to mean:

> "(a) The Plaintiff lacked professional judgment; and/or
>
> (b) The Plaintiff was irresponsible in the manner within which he carried out his duties as Controller of Programming for Television New Zealand; and/or
>
> (c) The Plaintiff lacked the necessary skill and judgment to satisfactorily carry out his duties as Controller of Programming for Television New Zealand; and/or
>
> (d) The Plaintiff lacked integrity."

The first issue that was put to the jury is set out earlier

in this judgment and merely asked if the defendant's statement was defamatory of the plaintiff. It drew no distinction between the natural and ordinary meaning of the words or a meaning drawn by an innuendo. The jury answered the issue "No".

Mr Atkinson in his submissions on the first of the three matters to be considered accepted that the Court would only interfere with a jury's verdict in a plain case where no jury, properly directed, could have reached the verdict that it did. He did not contend that there had been any misdirection; on the contrary, he said he relied on the summing up to support his submissions. He referred to Gwynne & Small v Wairarapa Times-Age Company Ltd [1972] NZLR 586, which was a case in which the jury had held that the words used were not defamatory. Roper J. had refused to set aside the jury's verdict but Mr Atkinson accepted his exposition of the principles applicable. Mr Dalgety in his very full and careful argument canvassed a good many authorities, including the more recent cases of Broome v Cassell & Co. Ltd [1972] AC 1027 and Blackshaw v Lord [1938] 2 AER 311, but I do not think that he differed substantially in his argument as to the principles to apply, though he expanded somewhat upon the exposition of them in Gwynne & Small v Wairarapa Times-Age Co. Ltd. It appears to me clear that the Court should not set aside the jury's verdict on the ground that it is against the weight of evidence unless it is so unreasonable that no reasonable jury could have reached such a verdict. Where, however, the words are incapable of any but a defamatory meaning, the Court should set aside the verdict as perverse and unreasonable, but the

Court must keep in the forefront of its mind that the jury is, in the words of Lord Hailsham in Broome v Cassell & Co. Ltd [1972] AC 1027 at 1065, "the only legal and constitutional tribunal for deciding libel cases", and certainly it should not set the verdict aside merely because it would have reached a different conclusion from that reached by the jury.

Mr Atkinson submitted, in effect, that the plain meaning of the words was such they would tend to lower the plaintiff in the estimation of right-thinking members of society generally. They were not used in a context which would affect that plain meaning and therefore they must be given that plain meaning. He then referred to my summing up. He relied upon the following passages:

> "Now the plaintiff is the Controller, as you have heard, of Programming for Television New Zealand so his voice, his views, his judgment, affect to a considerable degree what we see on television, and that undoubtedly affects the quality of our lives and may in the long run have an impact and affect the course that society follows. It is important that men who hold such offices should have the confidence of the community. Their reputation is of the greatest importance to them and to us."

> "Now the second matter is this. The law relating to defamation is an important branch of law. Its purpose is to protect each one of us from unjustified attacks upon our reputation but at the same time to ensure that necessary discussion

and criticism of social, legal and public issues can go on; but a person's good name and good reputation are of great importance to him or her, both in personal terms and very often also in economic terms, in money. A good name and a good reputation cannot be built up quickly. As a rule it takes a long time, many years, to achieve it, and it can be destroyed overnight. Well, that is what we are concerned with here, a man's reputation and its importance to him. For a professional man such as the plaintiff his professional reputation is of crucial importance to him both in personal terms and so far as his prospects of advancement or promotion are concerned. So it is a very important matter."

"The crucial question is: what does defamatory mean? Words are defamatory if they would tend to lower a person in the estimation of right-thinking members of society generally; and 'right-thinking members' means no more or less than reasonable people generally. And you, the jury, drawn, as I have said, at random from the community, are particularly well equipped, by the exercise of your collective experience and common sense, to say what reasonable people generally would think. I would add what one eminent judge said about the meaning of defamatory in relation to a trader or a businessman or a professional man - and we, you will remember, are dealing with a professional man,

a professional broadcaster - he said:

> 'Words are defamatory of such a person if they impute a lack of qualification, of knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity';"

"Well, the first matter you have to decide is: what do the words mean? They are not limited, the meaning is not limited, to the literal meaning but includes any meaning which can reasonably be inferred or implied. The plaintiff in his pleadings, these are the formal court documents that start the case, said what he contended the words meant and he said - you will find this in paragraph 4 of the statement of claim; I do not think you have the document there but when you retire to consider you can have it if you wish - he said that the words meant, and were understood to mean, that he lacked professional judgment, that he was irresponsible in the manner in which he carried out his duties as Controller of Programming for Television New Zealand, that he lacked the necessary skill and judgment to satisfactorily carry out his duties as Controller of Programming for Television New Zealand, that he lacked integrity. Now in order to succeed in this claim he must satisfy you that the ordinary reasonable person would understand the words that Mr Muldoon used to mean what he said they mean; and if you are satisfied of that then you consider, well, are they defamatory of him? It is a matter

for you; but I suggest that if you are satisfied that the words mean what Mr Monaghan contends they mean you will not have very much difficulty in deciding whether they are defamatory. To say of a person holding the position Mr Monaghan holds, and held at the time, that he lacked professional judgment, was irresponsible in the way he carried out his duties, and so on, could scarcely do other than tend to lower him in the estimation of right-thinking members of society; and I do not think that Mr Dalgety in his final address to you yesterday really contested that. If you look at the issues you will find that that matter with which I have been dealing is question 1."

Mr Dalgety submitted that the jury's verdict could not be said to be unreasonable. It was open to them on the evidence to find that the meanings alleged by the plaintiff were not proved, to find that they bore other meanings, or to find that in any case the defendant's words had no tendency to lower the plaintiff's reputation generally or by way of his occupation. He submitted that far from being perverse the verdict represented a common-sense judgment and he referred to five matters in support of this submission. They were:

1. the plaintiff's pleadings as to defamatory meanings of the words
2. the way in which the plaintiff presented his case
3. the plaintiff's evidence
4. the application of the law as given to the jury by me in my summing up

5. other evidence

I propose to deal briefly with each, starting with the first.

The plaintiff in his statement of claim alleged four meanings that the words had, and were understood to have, and Mr Dalgety contended that for the Court to interfere with the verdict it would have to be satisfied that one or other of the meanings alleged was the only meaning the words could have. He submitted that none of the meanings alleged was the natural meaning of the words. He further submitted that the Court would have to be satisfied that the words would have lowered the plaintiff in the minds of right-thinking members of the community. Mr Dalgety then analysed the defendant's comments in relation to the plaintiff. He submitted that they were in the form of a statement which contained three separate phrases which all related back to the introductory words, that the plaintiff "took the view that the film should be shown". The three phrases were "He says that makes their judgment suspect", "suggests their interest is simply in entertainment" and "that they are quite irresponsible in the wider aspects of their jobs". He then, in a series of careful and detailed submissions, argued that the words could well have other meanings than those ascribed to them in the plaintiff's pleadings. I do not accept this approach. In my view, the defendant's statement must be read and understood as a whole to arrive at the meaning or meanings that it would convey to ordinary men and women. It is not a proper approach to apply some method of legal construction or analysis because that is not how ordinary men and women would approach it. In my view, it was not necessary that the jury should be satisfied

that one or other of the precise meanings alleged in the statement of claim was the only meaning that the statement could have. Those meanings were plainly injurious defamatory meanings. The Court, to interfere in the verdict, would have to be satisfied, however, that the only meaning the statement could bear was one of those alleged or something of a lesser yet injurious defamatory meaning, provided it was not entirely different in nature from the meanings alleged: Slim v Daily Telegraph Ltd [1968] 2 QB 157 and in particular per Diplock LJ at 175 and Salmon LJ at p 185. See also 28 Halsbury's Laws of England paras 172 and 174.

I add on this particular point that in my view Mr Dalgety's submission is an artificial one in the sense that it is more concerned with form than substance. Both counsel in fact addressed the jury on the question of whether the words were defamatory or not defamatory in a broad way. The actual pleadings, both counsel accepted, never went to the jury, though I informed them during my summing up - as is noted in one of the passages quoted earlier - that they could see them if they wished. Mr Dalgety in his submissions on this motion helpfully gave me the text of what he had said on the point. It is in two parts and is short so I set it out in full:

> "The first is directed to whether the words were defamatory.
>
> The burden of proof on this is on the plaintiff.
>
> If you answer that issue no, that is the end of the matter.
>
> If you answer yes, you move on to Issue 2."

"I now turn to the first issue.
As I said in my opening the meaning of the words in this is for you.
In determining whether the words were defamatory, you apply the test as to whether they lower the plaintiff in the eyes of right thinking members of the community.
You know the words complained of and you have now heard all the evidence. The onus of proof on this first issue is on the plaintiff, Mr Monaghan. If he has not satisfied you that the words are defamatory, in other words that they have lowered him in the eyes of his fellow citizens, then that is the end of it and you answer 'No' to the first issue.

I leave this matter to you."

There was another point Mr Dalgety made under this first heading. He submitted that it was open to the jury to take the view that what the defendant had said was but a rebuke to the plaintiff that related solely to that particular occasion and not to the way he generally performed his job and that it did not impugn his general reputation as a broadcaster. I do not think that such an interpretation of the words used is open. In my view it is quite clear that what the defendant said applied, and was intended to apply, to the plaintiff generally. The very words used make this clear: "He says that makes their judgment suspect, suggests their interest is simply in entertainment, and that they're quite irresponsible in the wider aspects of their jobs".

Mr Dalgety's second matter was the way in which the plaintiff presented his case. The matter being urged here is that Mr Atkinson in his opening referred to the position held by the plaintiff in the Broadcasting Corporation's hierachy and said that the essence of the plaintiff's case was that in a few short sentences the defendant as Prime Minister went close to destroying that and had seriously and permanently jeopardised his future, while it was plain from the jury's verdict, said Mr Dalgety, that they saw the case quite differently. Mr Atkinson submitted that the point related to damages but not to the question of whether the words were defamatory or not defamatory. I do not wholly follow either Mr Dalgety's submission or Mr Atkinson's reply. The matter is put forward by Mr Dalgety as a factor supporting his submission that the defamatory meanings alleged by the plaintiff are not the only meanings that could be put on the words used. I do not see how the fact that the plaintiff chose to open his case in a way that in the event was rejected by the jury bears upon the question of what the words meant.

The third matter related to some evidence given by the plaintiff and the defendant which Mr Dalgety submitted showed that the jury rejected the view that what the defendant said was intended to imply that the plaintiff was unfit to hold his position. I do not think this point assists in determining the meaning to be attributed to the words which must be taken from the words themselves and the circumstances and setting in which they were used.

Mr Dalgety's fourth matter related to my summing up and to some aspects of the jury's role. He submitted that in terms of my summing up, which was not challenged by the

plaintiff, I directed the jury that the meaning of the words was for them but that if the words were only capable of one or more of the meanings asserted by the plaintiff then it would have been incumbent on me to direct the jury to find that the words were defamatory, though he accepted I would nevertheless have had to leave the matter to them because it is not a matter of law for the Judge but is a question for the jury. Mr Dalgety also made various points in relation to the length of the trial, the time the jury spent in deliberation and the possible consequences of the Court disturbing their verdict and ordering a new trial. I do not think it was incumbent upon me to give the jury a direction of the kind Mr Dalgety submitted I should have done. In Gatley on Libel and Slander, 8th edn, para 1491, it is said that the Judge is not bound to, but he may, express to the jury his own view of the meaning of the words, provided he makes it quite clear that the ultimate decision rests with them. I add that in my view I did make my own view of the meaning of the words fairly clear to the jury and I refer to the last passage quoted from my summing up given earlier in this judgment. I do not think this fourth point assists Mr Dalgety's argument very much.

The fifth matter involved a consideration of the effect of various pieces of evidence and was directed to the argument earlier discussed that the defendant's words could have been understood to amount to a rebuke in respect of a particular occasion and not amount to impugning his general fitness for his position or his reputation as a broadcaster. I have already earlier in this judgment rejected that argument.

In my view, the statement made by the defendant,when

considered as a whole, in the setting and circumstances in which it was made, is plainly defamatory. I think, as I in effect said to the jury, the words are incapable of any but a defamatory meaning. To say of a person holding the position Mr Monaghan holds, and held at the time, that his judgment is suspect, that his interest is simply in entertainment and that he is quite irresponsible in the wider aspects of his job is plainly defamatory. The jury's verdict that it was not defamatory is perverse and unreasonable. The verdict is accordingly set aside and I order a new trial.

I turn now to the second matter in respect of which counsel offered argument, namely whether the statement made by the defendant on which these proceedings were based was in the circumstances one to which the defence of qualified privilege applied. I noted earlier that I had reserved this question, which is, of course, a matter of law for the Judge, for later consideration, and it was in terms of that order that the defendant sought a ruling. I propose to discuss the matter in broad terms but for reasons which will become apparent do not intend to make a ruling upon it.

Mr Ford in detailed and careful submissions argued that the occasion on which the defendant made the remarks was one of qualified privilege. In this submission Mr Ford canvassed fully the principles on which the question of whether qualified privilege exists or not is to be determined and I did not understand Mr Atkinson to disagree with Mr Ford's exposition of them. Stated very shortly, a privileged occasion is:

"... an occasion where the person who makes a

> communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

Adam v Ward [1917] AC 309 per Lord Atkinson at p 334.

The question of whether in the particular circumstances there is a duty is a matter for the Judge and can be a difficult one. If it is asserted to be a legal duty, the Judge should be able to determine it in accordance with principles applicable to any question of law, but if it is asserted to be a moral or social duty the position is rather different and he must decide it as best he can for himself. In Stuart v Bell [1891] 2 QB 341 at 350 Lindley LJ said:

> "I take moral duty to mean a duty recognised 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. My own conviction is that all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances ..."

The Court, in reaching a decision on the question,

> "... 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 rise to a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy."

James v Baird [1916] SC (HC) 158 per Lord Loreburn at p 163. It is also quite clear that the Judge must determine the question in the light of the standards and attitudes of society at the particular time. See Allbutt v General Council of Medical Education and Registration (1889) 23 QBD 400 at 410 and Watt v Longsdon [1930] 1 KB 130 at p 139 per Scrutton LJ. In effect the question is: would the right-thinking New Zealander in 1980 have thought it the duty of the defendant as Prime Minister to comment in the circumstances on this issue, and was there a corresponding interest on the part of the public at large to receive and know his views on the matter?

Mr Ford then submitted that all the defendant had said on the particular occasion was within the privileged category as being comment upon a grave matter affecting the public at large. He went on to submit that if, as the plaintiff contended, what the defendant had said had included irrelevant, defamatory matter, by which I conclude he meant matter that would not ordinarily be covered by qualified privilege, the proper approach was not to sever the statement and say that part of it was privileged and part was not but to treat the irrelevant matter as simply one of the factors to be taken into account in considering whether the defendant had been actuated by malice, which would, of course, destroy the defence of qualified privilege. Mr Ford relied on the recent case in the House of Lords of Horrocks v Lowe [1975] AC 135 for this proposition. In that case Lord Diplock said at p 151:

> "The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the

particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in Adam v. Ward [1917] A.C. 309, 326-327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference."

Mr Ford, however, went on to accept that if the extraneous matter complained of was wholly irrelevant then it would not come within the protection afforded the privileged occasion. He referred to several authorities where the terminology used to describe the extraneous matter was varied and included such descriptions as "wholly irrelevant and improper", and "quite unconnected with and irrelevant". He also referred to Perera v Peiris [1949] AC 1, where what had been contended was extraneous was held by the Privy Council to be germane and appropriate to the occasion, and accordingly held that it was privileged.

Mr Atkinson accepted that it was what he described as legitimate for the Board of the Corporation to publish its decision and reasons for showing or not showing "Death of a Princess". He accepted that it would also be legitimate for the appropriate Minister of the Crown to comment on this but he submitted strongly that there was no need for the Minister to go on to criticise the plaintiff or, for that matter, Mr Morris. He accepted that if they had themselves chosen to speak publicly so as to urge a point of view about the showing of the film it would have been proper for a Minister to speak in the way the defendant had spoken as a response to what they had said, but in this case neither the plaintiff nor Mr Morris had spoken out. He went on to accept, if, perhaps, somewhat reluctantly, that by convention the Prime Minister is justified in commenting on any matter which comes within the functions of any Minister, and I took it from that that he accepted that the defendant quite properly commented upon the Board's decision in deciding to refuse to permit the showing of "Death of a Princess" and that his comment on

that matter would be covered by qualified privilege. He went on to argue strongly, however, that,though comment upon the decision of the Corporation was in the public interest, comment upon the personal views of senior servants of the Corporation was not. Their views, he accepted, might be of public interest but, he argued, they were not matters the disclosure of which was in the public interest, and therefore the defendant had no duty to comment upon them, nor had the public an interest to hear his views. He then submitted that the part of the statement to which he accepted qualified privilege attached should be severed from the part he contended was unprivileged. He referred to Brooks v Muldoon [1973] NZLR 1 and submitted that in that case Haslam J. had in effect followed precisely that course. Haslam J. had held that, to use the language of Perera's case, what had been said about the plaintiff was not "germane and appropriate" to the occasion and had accordingly held it was not privileged. Mr Atkinson went on to argue that Adam v Ward (supra) was direct authority for the view that the Court should sever. In dealing with the extract given above from Horrocks v Lowe, Mr Atkinson submitted that the three other Law Lords who had agreed with the judgment given by Lord Diplock were directing their agreement to the question of malice and not severance. I must record that I did not follow where the justification for that submission is to be found.

It appears to me that the first question that requires to be resolved is the one already postulated, namely, would the right-thinking New Zealand in 1980 have thought it the duty of the defendant as Prime Minister to comment on the position of the Broadcasting Corporation not to permit the

film to be shown and did the public at large have a corresponding interest to receive and know his views on the matter? The second question, assuming that it was his duty to comment upon the matter and that the public had an interest to receive his views, is: were his additional comments in relation to the plaintiff "wholly irrelevant and improper", "quite unconnected and irrelevant" or not "germane and appropriate" to the matter which created the occasion of qualified privilege, or were they within the principle expressed by Lord Diplock in Horrocks v Lowe? These two questions, though matters of law for the Judge, are essentially dependent for determination upon the facts established by the evidence at the trial. In the particular circumstances, and in view of what Mr Atkinson said, it might be accepted that the answer to the first question was, and is likely to be in any new trial, "yes". But the answer to the second question is plainly dependent upon contentious factual matters. I might add that it also raises difficult questions of law and, in particular, the question of the application of Horrocks v Lowe in the light of the earlier cases. It follows, in my view, that because the determination of the questions is essentially dependent upon the evidence given, and to be given at the new trial, I should not attempt to give a formal answer in this judgment. The position is plain that because of my earlier decision that there should be a new trial the question of whether the defence of qualified privilege can be sustained will be a matter for the Judge who presides at that new trial. Anything that I say on that issue now could well be an embarrassment to the Judge at the new trial and misleading to the parties, because the evidence

at the new trial may not be the same as the evidence that was given on this trial.

This aspect of the matter was not raised before me by counsel and I had substantially prepared a judgment upon the question of qualified privilege before I realised the undesirability of my making a finding. It occurred to me that it might be suggested that it would be helpful to the parties to have a ruling at this stage as no doubt the defendant will give consideration to appealing against my judgment ordering a new trial. In that event, if the Court of Appeal were to allow the appeal and order that the verdict of the jury be restored, there would be no point in having a ruling on the matter of qualified privilege; and on the other hand, if the appeal were to be dismissed and there was a new trial, then any finding that I made now would be undesirable for the reasons I have already given.

The third and final matter to be dealt with is the matter of costs. The motion with which I am dealing asked that the question of costs be reserved for determination after the new trial sought. Mr Dalgety for the defendant, on the other hand, submitted that I should make a special award of costs under R 568. In view of the fact that I have ordered a new trial, I think the proper course is to reserve the matter for determination after the new trial. Any view that I might express on the question now in relation to costs generally might prove to be inhibiting to the Judge who presides at the new trial; but on the other hand, if there is an appeal and it were to be allowed, the matter of costs can, if necessary, be referred to me for determination. I propose, however, to make one comment which might be helpful to the Judge who presides at the new trial, if there

be one. In my view the two witnesses from Britain called by the defendant were not necessary witnesses, though both were effective and impressive as witnesses. I accept Mr Atkinson's submission that what Mr Eddy, the "Sunday Times" journalist, had to say was not really necessary at all and that what Mr Gray, a senior official from the Foreign Office, had to say could have been proved by New Zealand witnesses. In result the question of costs is reserved for determination after the next trial.

Solicitors for plaintiff: Bungay, Greig & Co. (Wellington)

Solicitors for defendant: Bell, Gully & Co. (Wellington)