IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 352/82

BETWEEN DUFFY of Wellington, Sickness Beneficiary

Plaintiff

A N D THE ATTORNEY-GENERAL (sued in respect of acts of the Police appointed under the Police Act 1958)

Defendant

Hearing: 27 and 28 September 1983

Counsel: J.V.B. McLinden for plaintiff in support
J. Smith for defendant to oppose

Judgment: 11/4/84

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

There were four motions before me. In respect of two, orders were made by consent. They were motions for further discovery and for production of documents which were included in the first part of the first schedule of the affidavit of discovery. The other two motions were contested. They were, first, a motion seeking an order for production and inspection of documents included in the second part of the first schedule in the affidavit of discovery and, second, a motion seeking leave to deliver interrogatories. On the hearing of these two motions Mr McLinden cross-examined the deponent of the affidavit filed by the defendant and Mr Smith called a further police officer to give additional evidence for the defendant. The proper course may, perhaps, have been for a

further affidavit to have been filed on behalf of the defendant but both counsel appeared to be content with the course followed. Counsel then made fairly lengthy submissions on the two motions; Mr McLinden's were in writing and consisted of 38 typed pages on one motion and 12 on the other, and in addition he made some oral submissions.

This action arose out of events that occurred on 13 November 1981. In her statement of claim the plaintiff alleged she was walking across The Terrace, Wellington, at about 10.45 p.m. when she was confronted by two police constables who arrested her without lawful justification. She further alleged that by the manner of the arrest and by the way in which they kept her in custody after the arrest they committed various acts which aggravated the wrongfulness of the original arrest. The statement of defence, while admitting some of the matters alleged, denied others, but it is not necessary for the purposes of this judgment to canvass the various admissions and denials. It is, however, appropriate to refer to one incident alleged in the statement of claim. The plaintiff alleged that after her arrest she was placed in the back of the police van and driven around the city for approximately 45 minutes before being taken to the Central Police Station. During the time she was driven around the city two men were placed in the van with the plaintiff and she alleged their actions and attitude towards her were so disgusting, threatening and demeaning that she asked the constables to allow her into the front seat of the van with them but they refused.

I turn now to consider the motion for production and inspection of the documents included in the second part of the first schedule in the affidavit of discovery. The

defendant had objected to producing the documents in the second part of the first schedule, the objection being taken in the affidavit of documents. The deponent was Stephen John Brown, a Senior Sergeant of Police who is also a barrister and solicitor and a member of the Legal Section of the New Zealand Police at the Police National Headquarters. The ground of the objection stated in the affidavit was that the documents in the second part of the first schedule consisted of, first, communications between members of the Legal Section of the Police, Crown Counsel and the Crown Solicitor and, second, documents obtained for, or as part of, the preparation of the defence of the action. This ground is thus one of legal professional privilege. At the hearing, however, Mr Smith advanced a second ground of objection, namely, that of public interest. The second part of the first schedule contains separate items numbered 29 to 80 inclusive but counsel filed a memorandum stating that production and inspection was sought only of items 30 to 36 inclusive, 53 and 67. Indeed, it should be added that in respect of item 67 it was only part of the document.

Legal professional privilege applies, stating it broadly, to two categories of documents:

(i) Communications between a client and his legal adviser where information is conveyed in confidence and for the purpose of obtaining legal advice and

(ii) documents obtained or prepared for the use of legal advisers in respect of existing litigation or when those who obtain them or prepare them act in the bona fide belief or under a reasonable apprehension that litigation may ensue.

The test of whether privilege attaches, in respect of the

latter category, is whether a substantial or appreciable purpose for the obtaining or preparation of the documents is that they are to be used in litigation then commenced or reasonably anticipated: Konia v Morley & Anor [1976] 1 NZLR 455. See also the full discussion of the principles by Jeffries J. in Hill v Attorney-General (High Court, Wellington, A 55/82, 20 September 1983). It should be noted, too, that in Konia v Morley at p 459 it was pointed out that in considering claims for privilege the Court may in certain circumstances examine the actual documents. Counsel were agreed that I should examine the documents in this case and it was for this reason that counsel nominated the actual items, which I have already enumerated and which have been produced to me, as the ones in respect of which production and inspection was sought. Privilege based on public interest, again stating it broadly, is allowed when the public interest in preserving the confidentiality of the document exceeds the public interest in disclosing it in the administration of justice. The Court must therefore balance the two facets of public interest in the light of the various factors supporting non-disclosure and those supporting disclosure in the particular case. The weight to be attached to the various factors will vary from case to case: Konia v Morley (supra). I propose therefore to commence by considering legal professional privilege in relation to the circumstances of this case.

The issue that has to be determined in respect of the claim for legal professional privilege is whether an appreciable purpose for which the documents were made or obtained was to submit them to legal advisers for use in litigation that was then reasonably anticipated. It is quite

clear that at the time the documents were made or obtained this litigation had not actually been commenced. The affidavits and other evidence show that on 20 November 1981 the plaintiff's solicitor wrote to the Commissioner of Police stating plainly that a writ was to be issued claiming damages for wrongful arrest and imprisonment. The documents now in issue were all made well after that date, being in fact made during the first 10 days of December. The Police, as a force or organisation, obviously would therefore reasonably anticipate litigation. Mr Smith submitted that once the letter of 20 November was sent an appreciable purpose of the police investigation was to prepare a defence to anticipated legal proceedings. I do not accept that. The Police force is made up of several thousand individual police officers. I do not think that the knowledge one has is always to be treated as something known to all policemen. Sometimes that may be an appropriate assumption; sometimes not. I do not think it right to hold that two police officers who had no actual knowledge of Mr Surridge's letter of 20 November should have that knowledge imputed to them merely because the Commissioner and the Police Legal Section had it. The real question, in my view, is whether a substantial or appreciable purpose for the obtaining or preparation of the documents by the police officers actually responsible for their obtaining or preparation was in fact for their use in litigation then reasonably anticipated by those police officers. To decide this question it is necessary to refer to some of the affidavit and oral evidence.

The plaintiff's solicitor's letter of 20 November to the Commissioner mentioned earlier was in due course referred

by the Police Legal Section to the Wellington District Commander by a memorandum dated 27 November. The letter was stated to be attached to the memorandum and the memorandum itself said that the solicitor, Mr Surridge, made vague accusations regarding the arrest of the plaintiff for drunkenness. It was stated that the letter had been acknowledged and a request made for more details. The memorandum went on to request that the circumstance of the arrest be investigated. That memorandum eventually reached Chief Inspector C.R. Cotterell, who was then relieving as the Wellington City Division Commander, and was minuted by him on 3 December to Inspector G.C. Hill. Chief Inspector Cotterell and Inspector Hill had, however, become aware of the matter before this memorandum of 27 November and its accompanying letter from Mr Surridge had reached Chief Inspector Cotterell. Inspector Hill had been the officer in charge of prosecutions at Wellington and he had had some discussions with Mr Surridge over the charge against the plaintiff of being found drunk in a public place. The charge had been called in the District Court at Wellington and had subsequently been withdrawn on 1 December. Chief Inspector Cotterell had become aware of the matter from the police prosecutor on that date and had been advised that a Medical Certificate had been produced to the Court. There had also been considerable publicity in the press over the case and Chief Inspector Cotterell said that he instructed Inspector Hill to make enquiries, ascertain the facts of the matter and report back to him. He did this either on the evening of 1 December or the early morning of 2 December. He was able to give those two times, on one of which he spoke to Inspector Hill, because at approximately 10.20 a.m. on

2 December he held a conference in his office with representatives of the press over the case and he had given his instructions to Inspector Hill before that conference. A transcript of what occurred at that conference was produced and it is quite clear from it, and from what Chief Inspector Cotterell said in evidence, that at this stage he had not received the Police Legal Section memorandum of 27 November with its attached letter from Mr Surridge dated 20 November and he was not aware of any actual indication that a claim was to be made by the plaintiff.

Mr Surridge, in his affidavit, said that he had a discussion with Inspector Hill in which the Inspector indicated that the Police were concerned about the nature of the allegations that had been made and wanted to make an investigation independent of the criminal proceedings into what had happened. He had indicated that he wished to see the plaintiff for that purpose. Mr Surridge said he had advised the Inspector that he was only too happy to assist the Police in such an investigation and he would make the appropriate arrangements, which he subsequently did. In fact Inspector Hill interviewed her at her place of residence on 3 December and she gave him a copy of a statement which she had made with her solicitor which set out the events of the episode. Inspector Hill also interviewed at the same time a Mr Chiles, a friend of the plaintiff. Mr Surridge went on to say he regarded the inspector's investigation as being in the nature of an investigation into a complaint about Police conduct. He had advised the plaintiff to co-operate with the Police and to make herself, and any material witnesses whom she might have, available to the Police. In result the Police, he contended, had had access

to most of the plaintiff's evidence but there had been no reciprocity and the police had made nothing available to the plaintiff.

In his evidence Chief Inspector Cotterell, who it will be apparent from the above put in motion Inspector Hill's enquiries, said that there were three equal reasons for the investigation he had launched. They were, first, to ascertain the facts generally, so as to be able to answer any enquiries from his superiors and to ascertain if his staff were acting correctly; second, to answer any enquiry from an Ombudsman; and, third, to prepare for any civil claim that might be made. In circumstances such as existed here following the press publicity all three reasons were, he said, applicable. Mr McLinden, however, submitted that when the evidence of the circumstances was looked at overall, and in conjunction with a consideration of the actual documents, it would be plain that the documents were not obtained or prepared for the primary purpose of obtaining evidence for civil proceedings, nor was it an appreciable purpose, but rather it was to deal "departmentally", as he put it, with the question of Police misconduct in the course of the plaintiff's arrest and detention. He relied on Konia v Morley.

I think it follows from the evidence of Inspector Hill that he did not consider that his enquiries nor the statements he obtained nor the other documents he prepared were obtained or prepared for use in litigation then reasonably anticipated; nor did he appear to consider that such a purpose was an appreciable purpose for obtaining or preparing them. On the other hand I accept that Chief Inspector Cotterell did so consider and, as already noted, he was the police officer who initiated the enquiries which led to the documents being

prepared. Though he was not aware of Mr Surridge's letter, he was well aware of the matters raised by the news media publicity in relation to the case. In my view a senior police officer, and certainly one who was acting as the Wellington City Division Commander, should have had the three factors referred to by Chief Inspector Cotterell in mind when initiating enquiries. It would appear that Chief Inspector Cotterell considered that Inspector Hill should likewise have done so, for he said in evidence that though he did not expressly mention civil proceedings to Inspector Hill there was no need for him to do so. The position here is thus rather different from that in Konia v Morley, where McCarthy P. said, at p 462:

> "Having examined the documents I am left in no doubt about the claim for legal professional privilege. It cannot be sustained. Whilst I am prepared to accept that at the time these documents were brought into existence the possibility of a civil claim occurred to the police authorities, I cannot hold that the existence of such a possibility was an appreciable reason for the documents. They were intended for and used in connection with the disciplinary proceedings ordered by the commissioner against Detective Morley, and I see nothing in them which has the flavour of an investigation into civil liability."

In that case the documents were plainly prepared for the disciplinary proceedings that had been ordered by the commissioner. In this case no question of disciplinary proceedings had at that stage arisen. No doubt disciplinary proceedings might follow as a result of the enquiries Chief Inspector Cotterell had ordered but in the meantime there could well have been an enquiry from the Ombudsman and

the institution of a civil action for damages.

Mr McLinden also relied on Neilson v Laugharne [1981] 1 AER 829 and referred in particular to page 837, where he submitted Oliver LJ had dealt with a somewhat similar situation. In that case, however, the position was that the police officer responsible had written a letter which clearly indicated that the purpose of the enquiries to be made was for an investigation being made into alleged Police misconduct. There was no question at that stage of preparing a defence to anticipated civil proceedings. Here, while Inspector Hill may have left Mr Surridge with that impression, it was not the intention of Chief Inspector Cotterell who had initiated the enquiries. It should be added that Mr Surridge thought that Inspector Hill was aware of his letter of 20 November in which he had said the writ was to be issued, for Mr Surridge says so in his affidavit, and so, while one can understand Mr Surridge having some feeling of unfairness about the matter, I think he should have expected the Police to be making enquiries in relation to the claim which he had said he was proposing to make on behalf of the plaintiff as well as investigating the question of possible Police misconduct. In result I think it is established that an appreciable purpose for the preparation of the documents was for use in reasonably anticipated legal proceedings. I note in passing that the test stated in Neilson v Laugharne is that the purpose must be the "dominant" purpose, whereas in New Zealand the test is "an appreciable" purpose. The distinction between the two tests is discussed by Jeffries J. in Hill v Attorney-General (supra). It follows that I must hold that the documents are privileged.

I add, however, a general comment about the matter. The

main documents that the plaintiff seeks to see are the statements made by three constables involved in the arrest of the plaintiff together with statements made by two other persons, M.S. Chiles and A.D. Faulkner. Mr Chiles is already known to the plaintiff and I do not think that there is any obvious unfairness in the Police not disclosing to the plaintiff the contents of the statement that he made to them. He is a friend of the plaintiff and I assume has already furnished her advisers with a statement of what he can say; so presumably she wants now to see what he said then in order to be forearmed against possible cross-examination. I do not think the refusal to disclose the statement creates any injustice to her in those circumstances. The Police, however, have seen her statement and it might well be felt that it is somewhat unfair that in those circumstances the Police should refuse to disclose to her what it is that the constables have said. The Police might care to give consideration to whether it might not be appropriate voluntarily to disclose that information to her legal advisers. It might also be thought fair to disclose the address of Mr Faulkner so that if she wishes her solicitors can interview him. I understand that such information as the Police have as to the two men who were placed in the van on that evening has already been supplied to her solicitors. However, it is a matter for the Police and their advisers to determine, my ruling being, as already noted, that these documents are protected by privilege. The motion is accordingly dismissed.

As to the motion for interrogatories, Mr Smith indicated that there were only three to which objection was taken, being numbers 5, 9 and 10. I record, before turning to consider these three interrogatories, that counsel were agreed that

interrogatory number 4 be amended by adding the words "and see" after the words "talk to". I order that interrogatory number 4 be amended accordingly.

Mr Smith submitted that interrogatory number 5 was objectionable in form as being a question as to the evidence the defendant's witnesses might give rather than being directed to ascertaining a fact or facts. I think this objection is well founded but can be remedied by amending the form of the interrogatory. I direct that it be amended so as to read:

> "5. In relation to the defendant's denials in para 9 of the statement of defence of the plaintiff's allegations in paras 10-12 of the statement of claim,
>
> (a) were the arresting constables unable for any reason to hear or see
>
> (i) any communication from the plaintiff in the back of the van, if she had made any, or
>
> (ii) any commotion or unusual behaviour in the back of the van, if there had been any,
>
> (b) if the answer to (a) is yes, what was the reason."

Turning next to interrogatory 9, Mr Smith indicated no objection was taken to paras (a) and (d) but he did object to paras (b) and (c). The objection to these two paragraphs was on the basis that they amounted to evidence of facts rather than being matters of fact themselves. I do not think that applies to para "b" but para "c" is, I think, objectionable on the ground that it merely seeks a witness's name rather than asks a question about a material fact or some matter relevant to a material fact. I therefore delete para "c" and in result the present para "d" becomes the new para "c".

In all other respects interrogatory 9 remains.

Finally I turn to interrogatory number 10. Mr Smith submitted that all three paragraphs of it were objectionable as being directed merely to evidence of facts rather than facts themselves and further that para (b) was a clear example of a fishing interrogatory and for that reason oppressive. In my view the objection is unfounded in respect of paras (a) and (c) which relate to facts which are material, but I accept that para (b) is objectionable on the ground of oppressiveness. It is, in my view, a fishing interrogatory of an unacceptable sort.

In result there will be an order on the motion allowing all the interrogatories subject to the amendments and deletions referred to above.

Costs were sought on these motions. In view of the fact that two orders were made by consent in favour of the plaintiff and she succeeded on one motion and failed on the other, the major one, there will be no order for costs to either party.

Solicitor for plaintiff: P.H. Surridge (Wellington)

Solicitor for defendant: Crown Solicitor (Wellington)