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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. 43/85

**NOT
RECOMMENDED**

BETWEEN

FETU-OLE-MOANA-ELISARA of
Wellington, Civil Servant

Plaintiff

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A N D

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

Defendant

Hearing: 19 May 1986

Counsel: J.V.B. McLinden for Plaintiff to Oppose
J.H.C. Larsen for Defendant in Support

Judgment:

28/5/86

JUDGMENT OF ONGLEY J.

The substantive action between the above parties involves a claim by the plaintiff for damages for unlawful arrest and assault by Police Officers arising out of events which took place in Manners Mall, Wellington, at about 9.00 p.m. on 16 May 1984. The Writ of Summons was issued on 28 February 1985 and an order for discovery by the plaintiff was made on 23 October 1985 to which she responded by an affidavit of documents sworn and filed on 5 November 1985.

The plaintiff disclosed two documents in the second part of the first schedule to her affidavit, therein numbered 45 and 46 and described as follows:

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| "45 | undated | O | File notes of interviews of Vinepa Aiono, Rangī Hotai Folole Toema, Louise Heath, Tack Murray Daniel, Suzanne Morton, Philip James Royle and Puni Aiono |
| 46 | undated | O | Typewritten briefs of witness referred to in item (45), together with letter sent to witnesses. |

The plaintiff objects to produce these documents upon the ground that they are the subject of legal professional privilege, in that they were prepared for the dominant purpose of the conduct of the plaintiff's action against the Police. The Attorney-General contests the claim of privilege and has applied for an order for inspection of the documents.

In her affidavit of documents the plaintiff referred in some detail to the basis of her claim of privilege in respect of these documents. The parts of the affidavit which are most relevant to this application are the following:

"3. I object to produce the said documents set forth in the second part of the First Schedule hereto on the grounds that they are the subject of legal professional privilege. From the moment this incident occurred and I was taken into Police custody I wanted to sue the Police. Just prior to my being released I made a complaint about the way in which I had been treated by them. I was of the view that the Police had made a grave mistake in their treatment of me. I went to see my solicitor, Mr Williams, the following

day. I told him that I wanted to not only defend the charges against me but also to bring a civil action against the Police for their maltreatment of me.

5. I gave the names of the witnesses to the incident, who would support my claim, to Mr Williams at the time I saw him. I asked him to make arrangements to interview those witnesses so that evidence for both my claim and the defence of the criminal charges against me could be obtained."

The Attorney-General does not contest that at the time the communications by the named persons were made to the plaintiff's solicitor legal proceedings of the nature of those which were subsequently issued by her were in contemplation. He contends however that the communications were made for a dual purpose namely, for the defence of anticipated criminal proceedings by the Police against the plaintiff and in support of the plaintiff's contemplated civil claim against the Police. Of these, he submits the circumstances show that the defence of the criminal proceedings was the dominant purpose.

Charges under the Summary Proceedings Act 1981 were laid against the plaintiff on 22 May 1984; she was remanded without plea to 29 May and then again to 5 June when she entered a plea of not guilty and was further remanded to 29 October 1984. On that date, after a defended hearing, the charges against her were dismissed.

The plaintiff's solicitor, Brent Charles Williams, has sworn an affidavit in opposition to the application for an

order for inspection of the documents upon which he has been cross-examined. He supports the plaintiff's claim of privilege. He deposes that he has acted for her since the day after her arrest when she was very upset about the Police behaviour towards her and was showing visible evidence of injury to her person. He immediately started to obtain evidence to support her claim and within the next two weeks interviewed most of the witnesses whose briefs of evidence are the subject of the claim of privilege. He avers that he was not then aware of the precise nature of the criminal charges to be brought against his client and though he was aware that some of the evidence which he was gathering would be relevant to those charges his inquiries at that point were almost solely for the purpose of obtaining evidence for a claim against the Police. In cross-examination Mr Williams conceded that he appreciated that it would be necessary for the plaintiff to be acquitted on the criminal charges if she was to have any reasonable chance of success in the civil action and that he explained that aspect of the matter to the plaintiff when she consulted him on the day after the incident which led to her arrest. He said, however, that the "full weight" of that factor did not really become apparent to him until he had consulted counsel, by which time he had taken some of the briefs of evidence. I have some difficulty in appreciating what the "full weight" of this knowledge would have amounted to. If he knew, as he says he did, that there would be little chance of success in a civil suit unless his client was

acquitted of the criminal charges and explained that to her, there does not seem to be much more that he or the plaintiff needed to know on that aspect of the matter.

I take it to be only common sense in such a situation for a solicitor to set about getting briefs of evidence which would support the plaintiff's case in both the civil and criminal proceedings. The two were likely to be so interlocked that eye witness accounts which bore out the plaintiff's version of the relevant events would serve the purpose of one case as much as the other. In the event, not all the witnesses whose evidence had been briefed by Mr Willams testified in the District Court but that may have been due to any of a number of causes and throws no light on the question of the purpose for which the communications were made.

The onus is on the plaintiff to establish her right to refuse disclosure of the documents. To do that she must show that the dominant purpose of obtaining the communications was to support her civil action. Undoubtedly there was a dual purpose but I am not satisfied that one purpose was of greater weight than the other. The documents are not therefore protected against disclosure.

There will be an order in terms of the motion.

Costs are reserved.

J. D. Williams J