SUPREME COURT OF QUEENSLAND

CITATION:	*Mizikovsky v Queensland Television Ltd & Ors (No 4)* [2013] QSC 132
PARTIES:	**LEV MIZIKOVSKY** (plaintiff) **v** **QUEENSLAND TELEVISION LIMITED (ACN 009 674 373)** (first defendant) and **TCN CHANNEL NINE PTY LTD (ACN 001 549 560)** (second defendant) and **GENERAL TELEVISION CORPORATION PTY LTD (ACN 004 330 036)** (third defendant) ~~and~~ ~~**SOUTHERN CROSS BROADCASTING (AUSTRALIA) LTD (ACN 006 186 974)**~~ ~~(fourth defendant)~~ and **SWAN TELEVISION AND RADIO BROADCASTER PTY LTD (ACN 008 689 745)** (fifth defendant) and **NINE NETWORK AUSTRALIA PTY LTD (ACN 008 685 407)** (sixth defendant)
FILE NO/S:	BS 8404 of 2008
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2013
JUDGE:	Dalton J
ORDER:	**Application dismissed**

CATCHWORDS: PROCEDURE – JUDGMENTS AND ORDERS – CIVIL JURY – DEFAMATION – where, after a jury verdict, judgment was entered for the defendants – where a decision on qualified privilege was reserved in the event the plaintiff appealed – where the qualified privilege decision was not delivered – whether the judge is *functus offiico* and so unable to deal with the qualified privilege defence

Defamation Act 2005 (Qld), s 22

ABC v Reading [2004] NSWCA 411
Belbin & Ors v Lower Murray Urban and Rural Water Corporation [2012] VSC 473; [2012] VSC 535
Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231
John Fairfax Publications v Gacic (2007) 230 CLR 291
Mizikovsky v Queensland Television Ltd & Ors [2013] QCA 068
Mizikovsky v Queensland Television Ltd & Ors (No 3) [2011] QSC 375
O'Hara v Sims [2008] QSC 301; [2009] QCA 186; [2010] HCASL 77
Pezzimenti v Seamer [1995] 2 VR 32

COUNSEL: T K Tobin QC with M D Martin for the plaintiff
B R McClintock SC with P J McCafferty for the defendants

SOLICITORS: Mills Oakley for the plaintiff
Thynne & Macartney for the defendants

[1] This was a defamation proceeding which occupied 21 days of trial time, with a jury, in October and November 2011. On 21 November 2011 the jury returned with the answers to the questions which had been settled for them. The answers which they gave compelled a verdict for the defendants because, by their answer to question 6, they found that the defence of contextual truth had been made out. The jury also made answers to various questions designed to elicit factual findings which would form the basis for a determination of whether or not there was a defence of qualified privilege. I discharged the jury and counsel for the defendants asked for judgment for the defendants. Counsel for the plaintiff did not oppose this, and I entered judgment for the defendants against the plaintiff in the proceeding and made a costs order.

[2] I then raised with counsel whether I should deal with the defence of qualified privilege, a matter which had not been determined by the jury verdict. With hindsight, I believe that approach on my part to have been erroneous. My reasoning is recorded in the transcript of that day. In settling the questions for the jury, and in giving them directions on the defence of contextual truth, I had decided matters which had previously not been decided under the *Defamation Act* 2005 (Qld).[1] It seemed a pragmatic approach, and efficient use of Court resources in circumstances

[1] I later gave reasons for my rulings in *Mizikovsky v Queensland Television Ltd & Ors (No 3)* [2011] QSC 375.

where it was at least possible that the plaintiff would appeal the matters of law underlying the contextual truth finding, for me to make a finding on the qualified privilege issue as well. If that were done, all matters could be dealt with on appeal and, perhaps time saved in the trial division if the verdict based on contextual truth was overturned, but not a judgment (assuming it went in the defendants' favour) based on qualified privilege. I thus made orders that if the plaintiff appealed the judgment in the proceeding, he, and then the defendants, should file submissions on the qualified privilege point and, on that basis, I reserved a decision on that defence.

[3] The plaintiff did appeal, and took appeal points that the questions asked of the jury, and the summing-up in relation to the contextual truth defence, were incorrect in law. I was advised by the Court of Appeal that the appeal had been lodged, and I received submissions on the qualified privilege point from both parties.

[4] On 1 March 2012 I received a letter from the Deputy Registrar of the Court of Appeal entitled, "In the matter of Mizikovsky v Queensland Television Ltd and Ors CA – 9953/11". The letter told me that the parties had reached agreement in relation to the matter and had filed the appropriate documentation in the registry. A copy of a notice of agreement to dismissal of appeal signed by the plaintiff was attached. I mistakenly thought that this letter related to the appeal by the plaintiff against judgment in the matter. In fact it was in relation to an appeal against my decision some weeks prior to the commencement of the trial, refusing leave to amend the statement of claim. Had I recalled the existence of this earlier appeal I could have ascertained which appeal the letter related to. However, I had forgotten the existence of the earlier appeal. I thus proceeded on the basis that I need not deliver a decision and reasons as I had discussed with counsel on 21 November 2011, that having become otiose because the appeal had been resolved.

[5] It was only after the appeal against the judgment had been heard in the Court of Appeal that I became aware of its subject matter. It then seemed to me that there was no value in my delivering a decision about qualified privilege: the whole point had been to ensure that, if there were to be an appeal, all possible points could be raised before the Court of Appeal. The parties did not call on me to deliver my decision, either before or after the hearing of the appeal. The appeal was dismissed.[2]

[6] The plaintiff wishes to appeal to the High Court. He asked for the matter to be mentioned before me, which it was on 17 May 2013. On that the plaintiff asked that I deliver a decision and reasons on the qualified privilege point. The plaintiff did not file an application, but I treat him as having made an oral application to this effect. The plaintiff explained that it was feared that special leave to appeal to the High Court might be refused on the basis that the qualified privilege point was still outstanding in this Court and, until it was determined, any question raised by the special leave application might be considered by the High Court as hypothetical, or otherwise unsuitable for the grant of leave. The defendants opposed the application. Neither party argued that I was *functus officio*. I reserved my decision, and invited the parties to make further submissions on whether or not I was *functus officio.* Both the plaintiff and the defendants then submitted that I was *functus officio* - hearing 29 May 2013.

---

2 [2013] QCA 068.

[7] It seems to me that the pragmatic considerations which motivated my direction as to the exchange of argument on the qualified privilege point and my reserving that point at the end of the jury trial have been overtaken by events. My thinking then was that both points could be considered in the Court of Appeal at once, if there were to be an appeal. That time has passed.

[8] More fundamentally, it seems to me that I was wrong in reserving a question for further determination after entering judgment in the matter based on the jury verdict. When I accepted and recorded the jury's verdict, the jury was *functus officio*.[3] I was not; I at least had jurisdiction to deal "with such matters as costs and the release of exhibits".[4] However, I have come to the conclusion that I have no power to do what the plaintiff requests. On 21 November 2011 I entered judgment in this matter and made a costs order. That judgment has been the subject of appeal and determination in the Court of Appeal. The Court of Appeal decision is now the subject of a special leave application in the High Court.

[9] Judgment has been entered in favour of the defendants. No opinion about qualified privilege which I express can affect that judgment. No person's rights can be affected by anything I say on the topic of qualified privilege. If I were to publish anything about the matter it could not result in another judgment. Anything I published, not being a judgment, could not be the subject of an appeal. In my view I lack the power to do anything further in this proceeding; I am *functus officio.*[5] On 21 November 2011, no party opposed the course I proposed. In due course, both sides provided written submissions on the qualified privilege point. But the consent of the parties cannot give me power I do not have.

[10] Section 22 of the *Defamation Act* 2005 (Qld) provides for separate curial proceedings[6] in which the jury determines whether or not there is defamation and any defence to that defamation – s 22(2) – and the judge determines the amount of damages – s 22(3). Further, as far as I am aware, s 22(5)(b) is interpreted in practice as requiring the judge to determine the existence or otherwise of a qualified privilege defence.[7] Nonetheless, if judgment is entered for one of the parties in a proceeding, that is the end of the matter. I cannot see that the Court can properly go on to determine, on some hypothetical basis, issues which may have arisen if the jury's verdict had been different. Section 22(3) of the *Defamation Act* 2005 makes this clear in relation to damages: it is only if the jury findings are that there has been defamation and there is no defence established that the judge proceeds to determine the amount of damages. Otherwise, there would be judgment for the defendant.

[11] On 17 May 2013, Mr Tobin QC for the plaintiff submitted that it was the practice of judges hearing defamation trials with juries to go on and give determinations and reasons in circumstances similar to the present case. Perhaps supporting that, is the

---

3 *ABC v Reading* [2004] NSWCA 411 [40] and the cases cited there.

4 *Pezzimenti v Seamer* [1995] 2 VR 32, 38.

5 Neither party raised the notion of my power to deliver a determination on the qualified privilege point when the matter was argued. Both parties were invited to provide written submissions (or oral if they wished) on this point by email sent on 22 May 2013.

6 cf *John Fairfax Publications v Gacic* (2007) 230 CLR 291 [35]-[41]; *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 [118], [142], [181].

7 The parties in this case asked that I proceed in this way, and see *O'Hara v Sims* [2008] QSC 301 [1]-[4] and on appeal at [2009] QCA 186 [6] and [73].

course adopted by Chesterman J in *O'Hara v Sims*.[8] His ruling on the defence of qualified privilege commences as follows:

> "[1] At the conclusion of the evidence I heard submissions from the parties on the availability of the defences of justification, honest opinion and qualified privilege. I ruled that there was insufficient evidence to support the first two defences which were accordingly withdrawn from the jury's consideration. I reserved my ruling on the question of qualified privilege until after the jury had delivered its verdict with respect to the only matters left to them: whether the defendant's publication carried the imputations alleged by the plaintiff and, if so, whether they were defamatory.
>
> [2] The jury's answers were that two of the imputations were conveyed by the letter but that neither of those was defamatory. Accordingly, I gave judgment for the defendant.
>
> [3] At the invitation of counsel for the plaintiff I gave my ruling on qualified privilege. It was appropriate to make the ruling notwithstanding the jury's verdict because should a successful appeal be brought from the verdict the question of qualified privilege will determine the result of the trial.
>
> [4] Accordingly I indicated my ruling which was that the defendant's publication was privileged and for that reason too, gave judgment for the defendant.
>
> [5] I told the parties I would deliver written reasons for my ruling. These are my reasons."

He concluded his reasons for decision with the paragraph:

> "[67] This recital of the circumstances of the publication are enough to establish its reasonableness. The particular objections of the plaintiff are without substance. Accordingly I rule that the publication of the defendant's letter of October 2007 attracts the defence of qualified privilege pursuant to s 30 of the *Defamation Act*."

[12] *O'Hara v Sims* went to the Court of Appeal where Keane JA said:

> "[5] The jury concluded that imputation (a) was not conveyed by the letter. The jury concluded that imputations (b) and (c) were conveyed by the letter but that they were not defamatory of Mr O'Hara. Upon these findings the learned trial judge entered judgment in the action for Mr Sims.
>
> [6] With the consent of the parties, the learned trial judge then determined the issue as to qualified privilege. That determination was in favour of Mr Sims. For that reason too his Honour gave judgment for Mr Sims.
>
> [7] Mr O'Hara appeals to this Court, contending that each of the jury's findings was one which no reasonable jury could reach and that the learned trial judge erred in upholding the defence of qualified privilege under s 30 of the Act in that the publication of the letter was unreasonable in the circumstances." (footnotes omitted).

---

8 Above.

[13] See also Fraser JA at paragraphs [74] and [75] of the Court of Appeal judgment:

> "[74] The jury found that the letter did not convey imputation 1, that imputations 2 and 3 were conveyed, but that imputations 2 and 3 were not defamatory. The trial judge then ruled that if (notwithstanding the jury's verdict) the letter conveyed all three imputations and each was defamatory of the plaintiff, the defendant had a defence of qualified privilege under s 30 of the Act. Judgment was therefore entered for the defendant.
>
> [75] The appellant contended in this appeal that the jury's decision that the matter complained of did not convey imputation l should be set aside and replaced by a finding that the imputation was conveyed and was defamatory of him. He contended that the jury's decision that neither imputation 2 or 3 was defamatory should be set aside and replaced by a finding that each of those imputations was defamatory of him. He contended that the trial judge's decision upholding the defence of statutory qualified privilege under s 30 of the *Defamation Act* 2005 (Qld) should be set aside." (footnotes omitted).

[14] The Court of Appeal judgment contains no discussion of the propriety of the course taken by Chesterman J, and the Court of Appeal proceeds on the basis that his decision about qualified privilege was one which was appellable. Indeed the majority of the Court, Muir JA and Fraser JA, base their judgment in the Court of Appeal on the correctness of the trial judge's views as to qualified privilege. The matter with which I am concerned was not mentioned in the High Court when special leave was refused.[9]

[15] For pragmatic reasons, which I expressed in argument on 21 November 2011, and Chesterman J expressed at paragraph [3] of his reasons in *O'Hara,* extracted above, it may often be sensible for a trial judge to determine the issue of qualified privilege after a jury returns its verdict. It seems to me that this would be possible if, after the jury delivered its verdict, judgment was not entered but the matter was adjourned so as to allow argument on the qualified privilege point and then a judgment were delivered and entered which dealt with both the jury's verdict and the qualified privilege point.[10] Of course the parties may not both consent to such a course but, I need not concern myself with what further difficulties might then arise.

[16] Here, both counsel agreed with my entering judgment for the defendants when the jury returned its verdict. Whether or not that judgment was then beyond recall, I do not decide. In my view it is now. I dismiss the application because I do not have power now to deal with the qualified privilege defence, and record my view that any utility in my doing so has long since passed.

---

9 *O'Hara v Sims* [2010] HCASL 77.

10 In fact, this seems to have been what Kaye J did in the matter of *Belbin & Ors v Lower Murray Urban and Rural Water Corporation* [2012] VSC 473, [5]-[6], and at [2012] VSC 535, [56]-[58].