SUPREME COURT OF QUEENSLAND

CITATION:	*Jackson-Knaggs v Queensland Building Services Authority and Anor* [2004] QSC 289
PARTIES:	**MARK ANDREW JACKSON-KNAGGS** (applicant) **v** **QUEENSLAND BUILDING SERVICES AUTHORITY** (first respondent) **and** **QUEENSLAND NEWSPAPERS PTY LTD** **(ACN 009 661 778)** (second respondent)
FILE NO/S:	BS 10119 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	10 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2004
JUDGE:	Fryberg J
ORDER:	To be determined
CATCHWORDS:	DEFAMATION – Absolute privilege – Qualified privilege – Fair comment – Report of judicial proceedings – Tribunal – Whether a "court of justice" within ss 11, 13, 14 of the *Defamation Act 1889* *Defamation Act 1889*, ss 11, 13, 14 *Queensland Building Tribunal Act 2000*, s 112 *Allbut v General Council of Medical Education and Registration* (1889) 23 QBD 400, referred to *Barratt v Kearns* [1905] 1 KB 504, referred to *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405, referred to *Dawkins v Lord Rokeby* (1873) LR 8 QB 255; (1875) LR 7 HL 744, considered *Mann v O'Neill* (1997) 191 CLR 204, referred to *O'Connor v Waldron* [1935] AC 76, referred to *Royal Aquarium and Summer and Winter Gardens Society Limited v Parkinson* [1892] 1 QB 431, considered *Wason v Walter* (1868) LR 4 QB 73, referred to

COUNSEL: The applicant appeared on his own behalf
S T Farrell for the first respondent
D C Spence for the second respondent

SOLICITORS: The applicant appeared on his own behalf
Barry & Nilsson for the first respondent
Thynne & Macartney for the second respondent

[1] The application before the court sought orders of two types: orders for answers to interrogatories and orders striking out parts of the defences. I dealt with the former ex tempore. These reasons deal with the latter.

The parties and the facts

[2] At all material times the first defendant ("the authority") was a body corporate established by s 5 of the *Queensland Building Services Authority Act 1991*. It consisted of the Queensland Building Services Board, its general manager and his organisational unit. Its principal functions seem to have been to operate a licensing scheme and an insurance scheme for builders and to procure rectification of faulty building work performed by builders for consumers. In particular it had power to apply to the Queensland Building Tribunal to conduct a public examination that investigated certain matters specified under the *Queensland Building Tribunal Act 2000*.[1] At all material times the second defendant ("the Courier Mail") was a newspaper publishing company which published the *Courier Mail* in Brisbane.

[3] The plaintiff has sued the defendants for defamation. So far as is presently relevant, he alleges that the authority defamed him in an article published on 21 May 2001 and subsequently posted on its website, and in a newsletter published in June 2001. He further alleges that the Courier Mail defamed him in an article published on 25 April 2001. Both defendants admit publication of the respective articles and raise a number of defences. Those the subject of the present application are protection under s 13(1)(c) of the *Defamation Act 1889* (both defendants) and protection under s 14(1)(a) and s 14(1)(d) (the authority). To make good those defences the defendants plead that the publications were reports of or comments respecting public proceedings before the Queensland Building Tribunal. At least for the purposes of the application the plaintiff accepts that this was so.

The issues

[4] The common question which arises in relation to all of the defences challenged, and the only point argued, is whether that Tribunal was a "court of justice" within the meaning of that phrase in ss 13 and 14. If it was not the application succeeds.

[5] Section 13(1) provides:

> "**13 Protection—reports of matters of public interest**
> **(1)** It is lawful—
> …
> (c) to publish in good faith for the information of the public a fair report of the public proceedings of any court of justice, whether such

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1 *Queensland Building Tribunal Act 2000*, s 112.

> proceedings are preliminary or interlocutory or final, or of the result of any such proceedings, unless, in the case of proceedings which are not final, the publication has been prohibited by the court, or unless the matter published is blasphemous or obscene".

[6] Section 14(1) provides:

> **"14 Protection—fair comment**
> **(1)** It is lawful—
> (a) to publish a fair comment respecting any of the matters with respect to which the publication of a fair report in good faith for the information of the public is by section 13 declared to be lawful;
> …
> (d) to publish a fair comment respecting the merits of any case, civil or criminal, which has been decided by any court of justice, or respecting the conduct of any person as a judge, party, witness, counsel, solicitor, or officer of the court, in any such case, or respecting the character of any such person, so far as the person's character appears in that conduct."

[7] On analysis it is apparent that the application really raises two questions: whether the Queensland Building Tribunal could ever be a court of justice within the meaning of those sections; and if so, whether it was a court of justice when conducting the public examination of the plaintiff under s 112 of the *Queensland Building Tribunal Act 2000* (although the defendants submitted that this formulation expressed the second question too narrowly). The former question focuses attention on the *Defamation Act 1889*. The latter focuses on the nature of the Tribunal. On the defendants' submissions it raises questions of fact.

Construction of the *Defamation Act 1889*

[8] Counsel for the defendants[2] informed me that they had been unable to unearth any authority on the meaning of 'court of justice' in the *Defamation Act 1889*. I have been no more successful than they. The expression occurs not only in the paragraphs involved in this application but also in s 11, which deals with absolute protection. Even when the analogue of the Act was in force in New South Wales it seems to have been considered judicially only once, and that was in relation to the question whether it included foreign courts.[3]

[9] The expression is to be found in other Queensland statutes. It appears a number of times in the *Oaths Act 1867*[4] in contexts which suggest an intention to refer to the courts in the ordinary civil or criminal hierarchy. That is perhaps hardly surprising; I suppose there would have been few other bodies authorised to administer an oath in 1867. It is also used in some sections of that Act which have a more recent origin, but probably for the sake of conformity. It is used in the *Metropolitan Water Supply and Sewerage Act 1909* in relation to proceedings for a civil remedy or for the recovery or enforcement of a penalty[5]. It occurs in the definition of "legal

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2 The plaintiff was unrepresented.

3 *Thompson v Australian Consolidated Press Ltd* [1968] 3 NSWLR 642. See also *The Bell Group Ltd (In Liquidation) v Westpac Banking Corporation (4)* [2004] WASC 162.

4 See ss 8, 19, 35 (formerly 28) and 37 (formerly 17).

5 Section 145A(3).

proceedings" in the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942*[6], where the further reference to "other duly constituted authority under any other Act or law having like or similar powers and functions" suggests a confined meaning. Its use in the *Registration of Births, Deaths and Marriages Act 1962* is neutral[7]; so, probably, is its use in the *Property Law Act 1974*, the most recent usage I have found[8]. Finally, in the *Supreme Court Act 1995*, it appears to refer to all courts of whatever description[9]; but in 1876 when that provision was originally enacted, I hypothesise that the only courts in existence would have been those in the ordinary hierarchy of courts. Those provisions tend to confirm the slightly dated sound which the expression has to modern Australian ears[10]. Beyond that, I find little assistance in looking at its usage in other Acts.

[10] There can be no doubt that the *Defamation Act 1889* is substantially a code.[11] Its short title is "An act to declare and amend the law relating to defamation". It is true that as originally enacted, s 45 provided, "Nothing in this act shall be construed to limit or abridge any protection or privilege now by law existing." That section was an afterthought, inserted during the committee stage in the Legislative Assembly out of an abundance of caution.[12] It was repealed in 1899.[13] In 1966, in a case involving the New South Wales analogue of the Act, Windeyer J said:

> "But it is necessary to remember always that in New South Wales (as elsewhere in Australia except in Victoria and South Australia) much of the law of defamation has been codified. The code, although to a large extent it reproduces the common law, and in fact can only be interpreted and applied by having regard to the common law, also makes some very important departures from it."[14]

[11] It is nonetheless important to bear in mind that the purpose of the task at hand is the interpretation of the Act, not the development of the common law. The significance of that distinction was stated by Gummow J in *Brennan v Comcare*[15]:

> "The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the

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6 Section 2.

7 Section 18.

8 Section 249.

9 Section 240 (reenacting the preamble to the former *Judicature Act 1876*).

10 The Royal Courts of Justice is the correct name for the complex of law courts, opened in 1882, in The Strand in London. The courts there located are the Court of Appeal, the High Court and the Crown Court. For an example of contemporary English usage, see the *Practice Statement* of the Lord Chief Justice, 22 April 1998 at http://www.courtservice.gov.uk/cms/7578.htm.

11 See *Clines v Australian Consolidated Press Ltd* (1966) 67 SR (NSW) 364.

12 "The HON SIR S W GRIFFITH said it had occurred to him also that it would be just as well that nothing in the Act should be construed to limit any protection now by law existing. He believed that the Bill embodied all existing privileges, but he might be mistaken, and he therefore moved the following new clause …": *Queensland, Official Record of Debates* (Hansard), Legislative Assembly, Vol 58 at p 1436.

13 *Criminal Code Act 1899*, sch 3.

14 *Australian Consolidated Press Ltd v Uren* (1966) CLR 117 at p 204.

15 (1994) 50 FCR 555 at p 572.

ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.

The distinction is usefully expressed in the following passage from RA Posner's work, *The Problems of Jurisprudence*, (1990), p 248:

> ‘Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.
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> Statutory law differs in that the statutory text - the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision making - is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute - that is, interpret the statute. (There is a sense in which common law judges "interpret" common law, but it is the sense in which "interpretation" means "understanding".)’

Further, in a legal system which involves the separation of powers, it is particularly significant that the source of the common law is decisions of the judges, whereas statutory law is an expression of "the will of the legislature", supplemented in many cases by that of the executive in the making of delegated legislation.”

[12] In this situation it is not the common law as it stands today to which regard must be had. It is the common law as it stood at the date of enactment of the defamation code:

> “Statutory construction has often been described as a search for the intention of Parliament but Lord Reid's description in *Black-Clawson Ltd. v. Papierwerke AG* [1975] AC 591, at p 613, is more accurate:
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> > "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."
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> However, as Lord Simon of Glaisdale explained in that case (at pp 645-646):
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> > "if the draftsman uses the tools of his trade correctly, the meaning of his words should actually represent what their promulgator meant to say. And the court of construction, retracing the same path in the opposite direction, should arrive, via the meaning of what was said, at what the promulgator meant to say. ... In order to understand the meaning of the words which the draftsman has used to

> convey what Parliament meant to say, the court must so far retrace the path of the draftsman as actually to put itself in his position and that of Parliament. The expositio must be both contemporanea and eodem loco."
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> …
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> The alteration of the law … evokes an application of the rule contemporanea expositio est optima et fortissima in lege - the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up: *Broom's Legal Maxims*, 10th ed. (1939), p 463. And so, the answer to our first question is that the Code should be construed in the light of the law as it stood when the Code came into force … unless there be something in the Code which is inconsistent with the operation that would thus be attributed to the Code."[16]

What was the position regarding privilege and comment at common law in 1889?

The common law

[13] As noted above the Act uses the expression "court of justice" in three different contexts. All of the parties accepted that the expression was used consistently. At common law the three contexts were respectively covered by the defences of absolute privilege, qualified privilege and fair comment. Fair comment was permissible on any matter of public interest, and this included "all political, legal, and ecclesiastical matters"[17]. There was no reason for a distinction to be drawn between courts and tribunals in this context. It was otherwise in relation to privilege. The existence of court proceedings was a factor used in the identification of occasions of both absolute and qualified privilege. The defendants submitted that the cases on absolute privilege were relevant in deciding the present matter. By the late nineteenth century it had been settled that no action lay for defamatory statements made in the course of a judicial proceeding before any court of competent jurisdiction; such statements attracted absolute privilege. That was said to have been established in *R v Skinner*[18] over 100 years earlier. In parallel with this a series of cases had established that a fair and accurate report of any proceeding in a court of law was privileged unless the court had prohibited the publication or the subject matter was obscene or blasphemous.[19] However it should be noted that not until 1892 was it unequivocally established that qualified privilege was an available defence in respect of reports of proceedings before magistrates.[20] Until then, the ambit of the defence had been beset by technicalities.

[14] The nineteenth century was, in short, a period of evolutionary growth of the common law of libel. Cockburn CJ said in 1868:

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16 *Corporate Affairs Commission (NSW) v. Yuill* (1991) 172 CLR 319 at pp 321-23 per Brennan J.

17 Odgers, WB: *A Digest of the Law of Libel and Slander*, Stevens and Sons, London (1881) at p 41. This was then a new doctrine: see *Wason v Walter* (1868) LR 4 QB 73 at pp 93-4.

18 (1772) Lofft. 55, 98 ER 529; cf *Cutler v Dixon* (1585) 4 Co. Rep. 14b, 76 ER 886. Whether Lord Mansefield's tentative opinion, expressed in the course of argument, could really be said to have established the proposition may be doubted; but even by the late nineteenth century it was much too late for that argument. See also *Jamieson and Brugmans v The Queen* (1993) 177 CLR 574.

19 See the cases cited in Odgers, WB, *op cit*, 4th ed (1905) at p 291.

20 *Kimber v The Press Association Ltd* [1893] 1 QB 65.

> "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law."[21]

That evolution continued throughout the balance of the century.

[15] The question whether privilege extended to any body which was not a court in the strict sense seems to have first attracted consideration in depth in the celebrated case of *Dawkins v Lord Rokeby*. Lieutenant-Colonel Dawkins of the First Battalion, the Coldstream Guards, sued Lieutenant-General Lord Rokeby, his brigade commander, for libel. The libel was contained in statements made orally, and substantially repeated in a document handed by the defendant, to a military court of inquiry convened to investigate allegations previously made by the plaintiff against his superior officers. The regulations governing the assembly of such a court provided that its function was to assist the convening officer in arriving at a correct conclusion on any subject; that it had no relevant power to administer an oath nor to compel the attendance of non-military witnesses; and that "a court of inquiry is not to be considered in any light as a judicial body." The defendant had attended and given evidence under military compulsion, but had handed the document to the inquiry on his own initiative. The plaintiff alleged express malice.

[16] At first instance Blackburn J directed the jury to return a verdict for the defendant on the ground that

> "as a matter of law, the action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military inquiry in relation to the conduct of the plaintiff being a military man, and with reference to the subject of that inquiry, even though the plaintiff should prove that the defendant had acted malâ fide and with actual malice and without any reasonable and probable cause, and with a knowledge that the statements so made and handed in by him were false."[22]

[17] The appeal to the Court of Exchequer Chamber was decided by Kelly CB, Martin, Bramwell, Channell, Piggott and Cleasby BB, and Byles, Keating, Brett and Grove

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21 *Wason v Walter* (1868) LR 4 QB 73 at 93.

22 (1873) LR 8 QB 255 at p 259.

JJ. They unanimously dismissed the appeal. Three grounds were advanced for reaching that decision: first, that a witness at a court of inquiry was protected by absolute privilege to the same extent as if he were a witness in any of the ordinary courts; second, that the entire proceeding before the court of inquiry attracted Crown privilege and could not be produced or read in evidence at any trial at law; and third, that the whole question involved matters of military discipline and military duty alone and was not therefore cognisable in a court of law. In the course of dealing with the first ground, Kelly CB wrote (for all the court):

> "The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses parties, for words written or spoken in the ordinary course of any proceeding before any court *or tribunal* recognised by law."[23]

It was said that the principle which pervaded and governed "the numberless decisions" to that effect had been established by cases to which reference was made. In fact, none of the cases referred to mentioned the position of a tribunal. After discussing the plaintiff's argument that a court of inquiry was not a court of justice, the court observed:

> "There is, therefore, no sound reason or principle upon which such a witness, called upon to give evidence in such a court, should not be entitled to the same protection and immunity as any other witness in any of the courts of law or equity in Westminster Hall."

[18] Colonel Dawkins appealed to the House of Lords. In a procedure which seems extraordinary to modern eyes, the House summoned a number of judges. Those recorded in the authorised report as attending the appeal were Kelly CB, Pollock B and Mellor, Brett and Grove JJ[24], three of whom had sat in the court below. Asked by the House whether the ruling at first instance was right in law, the judges unsurprisingly answered in the affirmative. They said:

> "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. … The authorities, as regards witnesses in the ordinary Courts of Justice, are numerous and uniform. In the present case, it appears in the bill of exceptions that the words and writing complained of were published by the Defendant, a military man, bound to appear and give testimony before a Court of Inquiry. All that he said and wrote had reference to that inquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary Court of Justice."[25]

It will be observed that that opinion does not refer to the position of a tribunal and relates existing decisions only to witnesses before "a court of justice". The extension of privilege to witnesses before a court of inquiry is justified only by public policy.

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23 *Ibid* at p 263 (emphasis added).

24 The unauthorised reports unanimously reported that Blackburn J also attended: 45 LJ QB 8; 33 LT 196; 40 JP 20; 23 WR 931; [1874-80] All ER 994.

25 (1875) LR 7 HL 744 at pp 752-3.

[19] The House of Lords unanimously dismissed the appeal. Lord Cairns LC gave the leading speech, with which all others participating agreed. After referring in some detail to the reasons given at first instance (particularly the passages quoted above focusing on the position of the parties as military men), he said:

> "My Lords, I think it is of great importance that your Lordships should bear in mind these precise expressions which I have now read, because I feel sure that your Lordships would not desire your decision upon the present occasion to go farther than the circumstances of this particular case would warrant. The leading facts which are put in prominence by the learned Judge are these: The statements were made by the Defendant, who was a military man, the inquiry was a military inquiry, the statements were made in relation to the conduct of the Plaintiff as a military man, and were made with reference to the subject of that inquiry."[26]

Adopting "the expressions of the learned Judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings" he held that

> "upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a Court of Inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army."

He did not refer to tribunals, nor did he approve the reference to them in the judgment of Kelly CB in Court of Exchequer Chamber. The judgment of that court was upheld, but with respect, I cannot agree that Kelly CB's opinion was, at least in this respect, affirmed,[27] nor that the decision of the House of Lords established the proposition that absolute privilege applied to evidence given to tribunals which, although not courts of justice, act in a manner similar to that in which courts of justice act.[28] That simply was not part of the ratio decidendi of the decision of the Court of Exchequer Chamber[29]. No dictum to that effect was approved.

[20] Almost a year later a similar conclusion was reached by a Full Court of the Supreme Court of New South Wales.[30] The reasoning of that court referred only to the military status of the parties. It did not suggest that it was applying some wider doctrine, nor did it refer to the position of tribunals generally.

[21] To lawyers of the late nineteenth century it must have seemed that *Dawkins v Lord Rokeby* had created a limited and very special extension of what amounted to a privileged occasion. The leading author of the day did not see it as having any application outside the military context in which it was set[31], an analysis which was unchanged as late as 1906.[32] As will appear, that was subsequently the analysis of a number of judges. So, in my view, it must have seemed to Sir Samuel Griffith in

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26 *Ibid* at p 754.
27 Compare *Mann v O'Neill* (1997) 191 CLR 204 at pp 260-1 per Kirby J.
28 Compare *Trapp v Mackie* [1979] 1 WLR 377 at pp 378-9.
29 *Gibbons v Duffell* (1932) 47 CLR 520 at p 525 per Gavan Duffy CJ, Rich and Dixon JJ.
30 *Bamford v Clarke* (1876) 14 SCR (NSW) 303.
31 Odgers, WB: *op cit* (1881).
32 Odgers, WB: *op cit*, 4th ed (1905).

1889 when he introduced *The Defamation Law of Queensland* in Parliament. It is legitimate to refer to his second reading speech both as an historical source[33] and as an aid to the interpretation of an ambiguous or obscure provision[34]. That speech makes it clear that ss 11, 13(1)(c) and 14(1)(d) were, subject to an irrelevant exception, intended to reflect the existing law.[35] It provides no foundation for interpreting "court of justice" to refer to anything other than one of the ordinary courts of the judicature.

[22] When Sir Samuel Griffith made his second reading speech he was, I assume, unaware of the judgment of the English Court of Appeal in *Allbut v General Council of Medical Education and Registration*[36], delivered only 13 days earlier. There the Court of Appeal held that the publication of the minutes of the defendant containing a statement that the plaintiff's name had been removed from the register of medical practitioners on the ground that he had been guilty of infamous conduct in a professional respect attracted qualified privilege. Characterising the minutes as a report, the court wrote:

> "It would be stating the rule to broadly, in our opinion, if it was held, that, to justify the publication of proceedings such as these, the proceedings must be directly judicial, or had in a court of justice. We can find the law nowhere so broadly stated, nor do we think that in these days it would be so laid down. The court must adapt the law to the necessary condition of society, and must from time to time apply, as best it can, what it thinks is the good sense of rules which exist to cases which have not been positively decided to come within them."

There was no mention of *Dawkins v Lord Rokeby*, even by analogy, which suggests it was not perceived as anything other than a case dealing with the special position of military courts of inquiry.

[23] The subsequent development of the law relating to absolute privilege provides a case study in the common law method. *Royal Aquarium and Summer and Winter Gardens Society Limited v Parkinson*[37] was decided in 1892. Relying on *Dawkins v Lord Rokeby*, the defendant submitted he was "entitled to absolute immunity from action in respect of anything said by him while performing his duty as a member of the county council at a meeting for considering applications for licences [for music and dancing]." Not surprisingly, the Court of Appeal unanimously rejected that submission. What is perhaps surprising is that the judges focused on the dictum of Kelly CB in the Court of Exchequer Chamber[38], rather than the speeches in the House of Lords. It will be recalled that the reference in that dictum to tribunals was not repeated in the judges' advice tendered by Kelly CB to their Lordships, nor in their Lordships' speeches. Lord Esher MR wrote:

> "It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an

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33 *Bjelke-Petersen v Burns* [1988] 2 Qd R 129 at p 137 per McPherson J.

34 *Acts Interpretation Act 1954*, s 14B.

35 *Queensland, Official Record of Debates* (Hansard), Legislative Assembly, Vol 57 at pp 735-6.

36 (1889) 23 QBD 400.

37 [1892] 1 QB 431.

38 See the dictum at para [17] .

> action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins v. Lord Rokeby* the doctrine was extended to a military Court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act."[39]

The expression "court of justice" seems clearly to refer to the ordinary courts and to be contrasted with tribunals.

[24] Fry LJ took a different view:

> "The largest statement of this immunity is that contained in the judgment of the Exchequer Chamber in *Dawkins v. Lord Rokeby*, where it is said that 'the authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.' I accept that proposition with this qualification. I doubt whether the word 'tribunal' does not really rather embarrass the matter; because that word has not, like the word 'court,' an ascertainable meaning in English law. Moreover, the judgment of the Exchequer Chamber appears to me to proceed upon the hypothesis that the word is really equivalent to the word 'court,' because it proceeds to inquire into the nature of the particular Court there in question, and comes to the conclusion that a military Court of inquiry, 'though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted and recognised in the articles of war and many Acts of Parliament'."

[25] Lopes LJ expressed a view similar to that of Fry LJ:

> "This 'absolute privilege' has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them. It is, however, a privilege which ought not to be extended. It belongs, in my opinion, to Courts recognised by law, and to such Courts only. It was contended that the so confining the absolute privilege was contrary to the decision of *Dawkins v. Lord Rokeby*. That contention cannot be supported. The foundation of the decision is that the Court of inquiry in that case was a tribunal

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39 [1892] 1 QB at p 442.

> constituted, sanctioned, and recognised by law. Kelly, C.B., says: 'A Court of inquiry, though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted, and recognised in the Articles of War and many Acts of Parliament.' *Dawkins v. Lord Rokeby*, therefore, forms no exception to the general rule which I have stated."

In those passages both the Master of the Rolls and Lopes LJ used the expression "court of justice" to refer to the traditional courts, not to tribunals.

[26] Although the Master of the Rolls was in a minority on the question of the extension of privilege to tribunals, it was not long before his view prevailed. The passage quoted above was cited by Collins MR in *Barratt v Kearns* as sufficient to justify a conclusion that a tribunal constituted by a statutory commission issued by a bishop to inquire into the conduct of a vicar attracted absolute privilege[40]. He approached the question by examining the relevant statute and deciding whether the particular tribunal answered Lord Esher's test. Cozens-Hardy LJ reached the same conclusion in reliance on *Dawkins v Lord Rokeby*. By 1918 the matter was regarded as settled. In a case involving the question whether statements made before a local military tribunal constituted under wartime regulations were absolutely privileged, Sankey J said:

> "A number of cases have been cited, but in my opinion there cannot be any controversy upon the principle of law which is applicable to the present case. That principle I conceive to be this, that where a tribunal is a Court of justice, or a body acting in a manner similar to that in which a Court of justice acts, any statement made by a member thereof is absolutely privileged and no action can be brought thereon."[41]

He referred to *Dawkins v Lord Rokeby*, but only to the judgment of Kelly CB in the Court of Exchequer Chamber.

[27] The common law position has continued to be developed gradually[42] in a long series of cases since that time. At least in part the floodgates predictions advanced by Fry LJ in *Royal Aquarium and Summer and Winter Gardens Society v Parkinson*[43] have come to pass[44]. It is unnecessary to refer to the cases. They are material to the second question posed above[45], but not to the question presently under consideration. Today, even administrative tribunals may attract absolute privilege under common law, provided they have a duty to act quasi-judicially.[46] It is in my opinion clear that the application of the defences of privilege to tribunals was an extension of the common law, and that it occurred after 1889. In 1934 Lord Atkin said:[47]

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40 [1905] 1 KB 504 at pp 510-11.

41 *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405 at p 408.

42 *Macdougall v Knight* (1886) 17 QBD 636 at pp 640-1 per Bowen LJ.

43 [1892] 1 QB 431 at p 447.

44 *Lincoln v Daniels* [1962] 1 QB 237: *Gatley on Libel and Slander*, 10th ed (2004), p 350.

45 Paragraph [7].

46 *Bretherton v Kaye and Winneke* [1971] VR 111 at p 126. In New Zealand it has even been held that a hearing before the town planning committee of a local authority in relation to a proposed planning scheme has absolute privilege: *Atkins v Mays* [1974] 2 NZLR 459.

47 *O'Connor v Waldron* [1935] AC 76 at p 81.

> "The law as to judicial privilege has in process of time developed. Originally it was intended for the protection of judges sitting in recognized courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doctrine has been extended to tribunals exercising functions equivalent to those of an established court of justice. In their Lordships' opinion the law on the subject was accurately stated by Lord Esher in [part of the passage quoted above][48]."

That extension occurred after 1889.

[28] The subsequent enthusiasm for Kelly CB's dictum is best explained by the desire of subsequent judges to keep the common law in line with social conditions, particularly the multiplicity of tribunals created by statute. It has sometimes been suggested that the dictum is entitled to particular weight because of the number and identity of the judges who joined in the reasons. Any force which that suggestion might hold is however dispelled when it is realised that in another important respect, the decision has met with disfavour. It will be recalled that the third ground for the decision of the Court of Exchequer Chamber was that the whole question involved matters of military discipline and military duty alone and was not therefore cognisable in a court of law. The correctness of that ground, described by Kelly CB as "another and a higher ground" than the others, has been left open by the House of Lords[49] and rejected by the High Court of Australia[50].

[29] In my judgment the expression "court of justice" was understood in 1889 in the context of the law of defamation to mean only a court in the ordinary hierarchy of courts in the judicature. That is the sense in which it is used in the *Defamation Act 1889*.

[30] Further support for this view, albeit slight, is to be found in the enactment by the Parliament of specific provisions conferring protection upon tribunals which would, if the defendants' arguments were correct, attract protection under s 11 of the Act. Five provisions in particular are worth noting: the *Misconduct Tribunals Act 1997*, s 30; the *Health Practitioners (Professional Standards) Act 1999*, s 387; the *Industrial Relations Act 1999*, s 337; the *Mental Health Act 2000*, ss 418 and 477; and, of particular relevance in the present case, ss 19 and 82 of the *Queensland Building Tribunal Act 2000*. For reasons which are not immediately obvious, all but the last of these Acts adopt the language of the common law by conferring on nominated persons in cases to which they apply "a defence of absolute privilege" in a proceeding for defamation. There are other acts in which similar language is used without limitation to proceedings for defamation so perhaps the intention was to attract the wider concept of absolute immunity referred to by Gummow J in *Mann v O'Neill*[51].

[31] I hold that the Queensland Building Tribunal is incapable of being a "court of justice" within the meaning of ss 11, 13 and 14 of the *Defamation Act* 1889.

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48 Paragraph [23].

49 *Fraser v Balfour* (1918) 87 LJ KB 1116.

50 *Groves v Commonwealth* (1982) 150 CLR 113.

51 (1997) 191 CLR 204 at pp 238-9; see also *Belbin v McLean* [2004] QCA 181.

The consequences

[32] Paragraphs 2 and 5 of the application respectively sought to strike out the whole or part of para 30(a) of the authority's defence and para 10(a) of the Courier Mail's defence. Each of those paragraphs raises a claim to protection under s 13(1)(d) as well as under s 13(1)(c) but it is clear from the plaintiff's written outline of argument, as well as his oral submissions, that to this extent they were not attacked. Consequently, only the words and numbers "13(1)(c) and/or" should be struck out in each defence.

[33] Paragraph 3 of the application attacked para 30(b) of the authority's defence. Counsel for the authority conceded that this paragraph was defective in that it attacked all of the publications complained of by the plaintiff rather than the two relevant ones (May and June 2001). The application was argued on the basis that it would be amended if it survived the application. Paragraph 30(b) invokes s 14(1)(a) of the Act. That section is cross-referenced to s 13 of the Act. Counsel for the authority informed me that the only parts of s 13 upon which the authority relied were those referred to in para 30(a) of the defence, i.e. sub-ss 13(1)(c) and (d). I have held that it cannot rely on the former of those provisions. The defence should be further amended to make it clear that s 14(1)(a) is relied upon only to the extent that it refers to s 13(1)(d). Otherwise it must be struck out.

[34] Paragraph 4 of the application sought the striking out of para 30(c) of the authority's defence. That paragraph pleads s 14(1)(d) of the Act. It follows from my reasons that it must be struck out.

[35] It also follows that it is unnecessary for me to consider the second question referred to above.[52] Nonetheless I would observe in passing that if this question arose, there would be considerable force in the defendants' argument that issues of both fact and law were involved which ought to be left to the trial judge. The question is not to be determined simply by having regard to the name of the Tribunal.[53] The extent to which the procedural provisions of the *Queensland Building Tribunal Act 2000* apply to proceedings by way of public examination under s 112 is unclear, and the Tribunal has no statutory rules. There is some evidence before me to suggest that the Tribunal might have formulated a Practice Direction relating to such examinations. The matter might depend upon what happened during the hearing – only short extracts from the transcript were tendered. It would also be material to take into account the impact of ss 19 and 82 of the Act, which were matters not addressed in argument.[54]

Conclusion

[36] It might be thought that this outcome is unfortunate. It may mean that the proceedings of some tribunals and reports of and comment upon those proceedings create liability for defamation in circumstances where such liability "would impede inquiry as to the truth and justice of the matter and jeopardise the 'safe administration of justice'"[55]; and where the public has every right to know about

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52 Paragraph [7].

53 *Attorney General v British Broadcasting Corporation* [1981] AC 303 at p 358 per Lord Scarman.

54 Some weight was given to analogous provisions in *Douglass v Lewis* (1982) 30 SASR 50.

55 *Mann v O'Neill* (1997) 191 CLR 204 at p 213 per Brennan CJ.

and to consider commentary upon public events. The outcome is the result of embodying the law in a code and not keeping it under review in the light of developments in common law jurisdictions. Social and legal changes can make aspects of a code inappropriate to contemporary conditions:

> "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."[56]

In the case of Queensland's defamation code, the warning implicit in that passage has not been heeded. As Kirby J has said[57], "It is always open to the legislature, where it thinks fit, to afford such immunity in a particular case. It has often done so."[58]

[37] On the other hand, the position reached at common law is far from satisfactory. The test for the existence of absolute privilege and its theoretical basis are uncertain:

> "In the way of the common law, the occasions attracting absolute privilege (or immunity) from proceedings in defamation have developed as separate categories without a clear unifying concept to explain what it is about each of them (if anything) that justifies attaching to them such an exceptional and complete immunity."[59]

As the New Zealand Court of Appeal observed, "No clear line can be drawn between those Court-like bodies or situations that are protected by absolute privilege and those that are not."[60] Lord Atkin restated the test in the Privy Council in 1934: "The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which such courts act?"[61] The defendants submitted that this and Lord Esher's test are to be understood disjunctively[62]; but Lord Diplock has said that "or" in Lord Atkin's reformulation is not to be read as a disjunctive and has proposed yet another reformulation.[63] In many cases there must be uncertainty as to whether a particular

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56 *Wason v Walter* (1868) LR 4 QB 73 at p 93.

57 *Mann v O'Neill* (1997) 191 CLR 204 at p 264.

58 Examples of intervention by the Parliament of Queensland, in addition to those referred to in para [30], can be found in the *Whistleblower's Protection Act 1994*, s 39; the *Crime and Misconduct Act 2001*, s 335; the *Commission for Children and Young People Act 2000*, s 162; the *Guardianship and Administration Act 2000*, s 247; the *Drug Rehabilitation (Court Diversion) Act 2000*, s 39; the *Education (Accreditation of Non-state Schools) Act 2001*, s 171; the *Medical Practitioners Registration Act 2001*, ss 176 and 272; the *Medical Radiation Technologists Registration Act 2001*, s 225; the *Psychologists Registration Act 2001*, s 226; the *Transport Operations (Road Use Management) Act 1995*, s 142; the *Education (Teacher Registration) Act 1988*, s 44A; the *Education (General Provisions) Act 1989*, s 146B; the *Financial Intermediaries Act 1996*, s 162; the *Cooperatives Act 1997*, ss 6 and 235, and sch 4 cl 17; the *Industrial Relations Act 1999*, s 564; and the *Motor Accident Insurance Act 1994*, s 71. See also the *Wrongs Act 1958* (Vic), s 4.

59 *Mann v O'Neill* (1997) 191 CLR 204 at p 257 per Kirby J.

60 *Tertiary Institutes Allied Staff Association Inc v Tahana* [1998] 1 NZLR 41 at p 47.

61 *O'Connor v Waldron* [1935] AC 76 at p 81.

62 Relying on *Keenan v Auckland Harbour Board* [1946] NZLR 97. Mitchell J refused to follow this decision in *Douglass v Lewis* (1982) 30 SASR 50.

63 *Trapp v Mackie* [1979] 1 WLR 377 at p 379.

tribunal attracts the privilege. As to qualified privilege, the position in the United Kingdom is now substantially regulated by statute.[64]

[38] In Queensland the immediate problem could be solved if ss 13 and 14 of the *Defamation Act 1889* were amended by inserting "or tribunal" after "court of justice" and a provision were included in the statute constituting each tribunal deserving of absolute protection specifying that s 11 should apply to it as if it were a court of justice.

Order

[39] I shall hear the parties on the form of the order and on costs.

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64 *Defamation Act 1996*, sch 1.