SUPREME COURT OF QUEENSLAND

CITATION:	*Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2017] QSC 222
PARTIES:	**DENIS WAGNER** (first plaintiff) and **JOHN WAGNER** (second plaintiff) and **NEILL WAGNER** (third plaintiff) and **JOE WAGNER** (fourth plaintiff) **v** **HARBOUR RADIO PTY LTD (ACN 010 853 317)** (first defendant) and **ALAN BELFORD JONES** (second defendant) and **RADIO 4BC BRISBANE PTY LTD (ACN 009 662 784)** (third defendant) and **NICHOLAS CHARLES CATER** (fourth defendant)
FILE NO:	10830 of 2015
DIVISION:	Trial Division
PROCEEDING:	Claim for defamation
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	10 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2017
JUDGE:	Applegarth J
ORDER:	**The application that the proceeding be tried without a jury is granted.**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – TRIAL – TRIAL BY JURY – FUNCTIONS OF JUDGE AND JURY – GENERALLY – where the plaintiffs brought an application to dispense with a jury for the trial of the

proceeding – where the plaintiffs submit that there is a substantial risk that the tasks expected of the jury are too large and too complex for the jury to complete – whether the features of this action justify the exercise of a discretion to displace the defendants' election for trial by jury

Defamation Act 2005 (Qld) s 21, s 26, s 31
Jury Act 1995 (Qld) s 58, s 65A

Beta Construction Ltd v Channel Four Television Co Ltd [1990] 1 WLR 1042, cited
Born Brands Pty Ltd v Nine Network Australia Pty Ltd (2014) 88 NSWLR 421, cited
Channel Seven Sydney Pty Ltd v Fierravanti-Wells (2011) 81 NSWLR 315, cited
Chel v Fairfax Media Publications (No 6) [2017] NSWSC 230, cited
Evans v Davies [1991] 2 Qd R 489, cited
French v Herald and Weekly Times Pty Ltd (2010) 27 VR 140, cited
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478, cited
Goldsmith v Pressdram Ltd [1988] 1 WLR 64, cited
Gunns Ltd v Marr (No 5) [2009] VSC 284, cited
Kencian v Watney [2015] QCA 212, cited
McBride v John Fairfax Publications Pty Ltd [2009] NSWSC 10, cited
Mizikovsky v Queensland Television Ltd & Ors [2011] QSC 205, cited
Mizikovsky v Queensland Television Ltd & Ors [2014] 1 Qd R 197; [2013] QCA 68, cited
Pambula District Hospital v Herriman (1988) 14 NSWLR 387, cited
Ra v Nationwide News Pty Ltd (2009) 182 FCR 148, cited
Smit v Chan [2003] 2 Qd R 431, cited
Syddall v National Mutual Life Association of Australasia Limited [2008] QSC 101, cited
Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156, cited

COUNSEL: T D Blackburn SC with P J McCafferty for the plaintiffs
R J Anderson QC with R E de Luchi for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiffs
Bennett & Philp Lawyers for the defendants

[1] The plaintiffs sue in defamation over 32 publications. Each publication constitutes a separate cause of action, and the plaintiffs plead a total of 98 imputations. The defendants deny that each publication conveyed the meanings alleged by the plaintiffs, and also deny that any such meaning was defamatory. With two exceptions, they deny that the

publications identified the plaintiffs. In addition, they plead a raft of defences: truth, honest opinion, fair comment at common law, statutory qualified privilege, common law qualified privilege and fair report. They have yet to plead, but have advised the plaintiffs of their intention to plead, a defence of contextual truth under s 16 of the *Defamation Act* 2005. The defendants have elected trial by jury.

[2] A jury will be burdened with an enormous task, not simply in considering many weeks of lay and expert evidence about the Grantham floods, as well as evidence about the construction of an airport and alleged conspiracies and cover-ups. It will be required to answer hundreds of questions. The parties cannot point to a case in which a civil jury has faced such a task.

[3] The plaintiffs seek an order that the trial be conducted without a jury. The number of matters complained of and the number of jury issues raised by the pleadings in relation to each matter mean that, on the plaintiffs' estimate (which is not contested), a jury would be required to answer almost 800 questions before defences are even considered, and then hundreds more questions relating to defences. In considering truth and other defences a jury will be required to assess issues which will be the subject of technical expert evidence from hydrologists.

[4] According to the plaintiffs, there is a substantial risk that a jury, despite its best efforts, will be unable to complete its enormous task. The plaintiffs do not rely simply on the number of questions which the jury will be required to answer in the course of its lengthy deliberations. They also point to the complexity of the defences. Overall, the enormous task expected of a jury is said to be too complex to permit the proceeding to go to trial with a jury.

[5] The defendants submit that the plaintiffs' arguments fail to precisely identify why the jury's task may be beyond it, and that to simply say that the jury has an enormous task and that this is an extensive and complex case is not enough to dispense with a jury. According to the defendants, the only unique feature of this case is that there are so many matters complained of. Merely to say that it has the potential to be complicated and require the jury to answer many more questions than if the plaintiffs complained about three or four publications does not create a problem of such gravity that the jury should be dispensed with. The fact that the trial will involve 32 broadcasts and many defences may take it into "unique territory". However, according to the defendants, that fact and the need to understand complex expert evidence about hydrology are not enough to discharge the onus in an application of this kind.

The issue

[6] Do the features of this action, as distinct from features which make jury trials in defamation actions generally longer and more costly than trial by judge alone, justify the exercise of a discretion to displace the defendants' election for trial by jury?

Relevant principles

[7] A general discretionary power exists to order that a defamation proceeding not be tried by jury, despite the election by a party for a jury trial. Its source is s 21(1) of the *Defamation Act* 2005 (Qld). An additional discretionary power exists to order a civil trial without a jury if the trial:

(a) requires a prolonged examination of records; or

(b) involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

This power is conferred by s 21(3) of the *Defamation Act*, and that conferral does not limit the general power contained in s 21(1) to displace a party's election for the proceeding to be tried by jury. A similarly-worded provision to s 21(3) applies in all civil proceedings by virtue of s 65A of the *Jury Act* 1995 (Qld), which uses the same words as the now repealed r 474 of the *Uniform Civil Procedure Rules* 1999.

The discretion conferred by s 21(1)

[8] The unfettered discretion which s 21(1) confers is not confined to circumstances of the kind specifically addressed by s 21(3). However, the broad discretion must be exercised according to the subject matter and purpose of the provision.[1] Its exercise arises in the context of provisions which enable one or both parties to elect trial by jury. But a party's "right" in that regard is not absolute. It is subject to the power conferred on the Court to control its own processes in the interests of justice.[2] The entitlement to elect trial by jury should not be lightly displaced, given the historic and enduring role of juries in defamation proceedings.

[9] The authorities recognise the role the jury has long played in defamation actions.[3] Jurors are thought to be better placed than judicial officers to assess how ordinary reasonable people understand mass media publications.[4] The benefits of having jurors decide questions of fact are not limited to issues of defamatory meaning, including whether a publication would be likely to injure the reputation of the plaintiff, having regard to the moral and social standards of the community. The collective judgment of jurors on other issues is also important in assessing the conduct of parties, their beliefs and motivations. In some defamation cases a jury may be required to pass judgment on public officials or other public figures who are plaintiffs, as well as the conduct and reasonableness of defendants who may wield great power. In preserving an important role for the jury in defamation actions, the legislature has provided for the vindication of reputation to depend upon a jury deciding justification and other defences and, in doing so, apply the views of citizens drawn from the general community. The historic role played by juries

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1 *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* (2011) 81 NSWLR 315 at 327 [43] ("*Channel Seven Sydney*").

2 *Kencian v Watney* [2015] QCA 212 at [20].

3 *Channel Seven Sydney* at 331 [69] – 333 [79].

4 *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148 at 153 [19], cited with approval in *Channel Seven Sydney* at 332 [74].

in defamation actions as well as the ability of jurors to better assess how ordinary reasonable people understand mass media publications are reasons why the power to dispense with a jury in a defamation action should not be too readily exercised.

[10] The authorities establish that the onus is on the party seeking the exercise of the discretion in favour of dispensing with trial by jury.[5] It is unnecessary to decide whether the power conferred by s 21(1) may be exercised by the Court of its own motion in a case in which both parties elect trial by jury. *Kencian v Watney* might be taken to suggest as much.[6] The New South Wales Court of Appeal in *Channel Seven Sydney* concluded in the context of New South Wales rules governing civil procedure that s 21 does not empower the Court to act of its own motion to dispense with a jury. Here, an application is brought by a party and so the issue does not arise.

[11] The power to dispense with a jury in civil cases was considered in *Smit v Chan*[7]. In that medical negligence case Mullins J considered the application of r 474 and concluded that significant weight should attach to the preservation of the plaintiff's right to elect for a jury trial.[8] After considering New South Wales authorities and the fact that the law provided for trial by jury in such a case, her Honour stated:

> "That means that, even though trial by jury is generally accepted as involving greater expense and a longer trial for the parties, trial by jury is maintained by the *UCPR* as a mode of trial. Recourse to r. 5(1) cannot detract from or displace the continued existence of that mode of trial as one means for the resolution of civil proceedings."[9]

[12] An entitlement to elect trial by jury should not be displaced simply because of "universal characteristics of jury trials"[10] such as the general proposition that jury trials take longer and therefore cost more than a trial without a jury. If the risk that a jury might be unable to reach a verdict was sufficient to discharge the onus, then the entitlement to elect a jury would be illusory. The same may be said of the risk that a jury might return a perverse verdict. The risk of a jury being unable to reach a verdict and the risk of a jury reaching a perverse verdict are characteristics of jury trials in general.

[13] The fact that, in general, defamation trials with juries take longer to try than if those trials had been conducted without a jury is not sufficient to displace an entitlement to trial by jury. The particular circumstances of an individual case may warrant, however, the exercise of the discretion.[11] The discretion is conferred as a means of achieving the just resolution of the issues in dispute in a particular case.

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5 *Mizikovsky v Queensland Television Ltd & Ors* [2011] QSC 205 at [8]; *McBride v John Fairfax Publications Pty Ltd* [2009] NSWSC 10 at [9]; *Channel 7 Sydney* at 334 [83].

6 [2015] QCA 212 at [20].

7 [2003] 2 Qd R 431.

8 At 438 [36].

9 At 437 [31].

10 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 402, 404, 412-413 ("*Pambula*"). The majority of the High Court in *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 486 [14] found it unnecessary to consider the principles in *Pambula*.

11 *Pambula* at 403B, 413E.

[14] If the discretion under s 21(1) is exercised due to the particular circumstances of the case, this may result in a shorter and less expensive trial, being one which can be more easily accommodated by the Court and given an earlier hearing date than otherwise would have occurred. However, these are incidental consequences that flow from a discretionary judgment that the interests of justice warrant exercise of the discretion. The fact that dispensing with a jury will save time and money is not the justification. There must be some compelling reason in the circumstances of the particular case to warrant the discretion being exercised. Relevant matters may include the complexity of the factual matters or the legal issues that the jury will need to consider, particularly when the claim involves the consideration of multiple causes of action.[12]

[15] *French v Herald and Weekly Times Pty Ltd*[13] illustrates such a case. The plaintiff sued over two newspaper articles. The defendant denied that it had defamed the plaintiff and pleaded a variety of defences, including a *Polly Peck* defence. Beach J concluded that the *Polly Peck* defences presented the jury with a difficult and complex task in the case at hand. His Honour concluded:

> "In my view, the course taken by the defendant of denying the plaintiff's meanings in this case, denying that the articles are defamatory, contending for alternative defamatory meanings (if the articles are found to be defamatory) and pleading only the truth of those alternatives (or permissible variants of them) make the jury's task in this case too complex to permit this proceeding to go forward as a jury."[14]

[16] In addition to those complexities, fair comment and qualified privilege defences presented additional difficulties. While, on their own, either of those defences might not have led Beach J to exercise his discretion to dispense with a jury, the fact that the defences were persisted with added to what would already be a very difficult task for the jury. Overall, the defences relied upon by the defendant made the case too complex to be heard by a jury.

The separate discretions under s 21(3) and s 65A of the Jury Act

[17] The terms of s 21(3) and the identical words of s 65A of the *Jury Act* have been interpreted. The reference to an issue that "cannot be conveniently considered and resolved by a jury" uses the term "conveniently" as meaning convenient for the effective and efficient administration of justice.[15] In *Syddall v National Mutual Life Association of Australasia Limited*, Daubney J considered authorities in which the word "conveniently" had been considered in such a context. These included *Beta Construction Ltd v Channel Four Television Co Ltd*[16] in which the English Court of Appeal cited earlier authority[17] which noted that "conveniently" means "without substantial difficulty in comparison with carrying out the same process with a judge alone". In *Beta Construction,*

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12 *Gunns Ltd v Marr (No 5)* [2009] VSC 284 at [9].
13 (2010) 27 VR 140.
14 At 145 [18].
15 *Syddall v National Mutual Life Association of Australasia Limited* [2008] QSC 101 at [17]; *Mizikovsky v Queensland Television Ltd & Ors* [2011] QSC 205 at [9].
16 [1990] 1 WLR 1042 ("*Beta*").
17 *Goldsmith v Pressdram Ltd* [1988] 1 WLR 64 at 74.

Stuart-Smith LJ, with whom Ralph Gibson LJ agreed, considered the question of prolongation of the trial and observed:

> "But where the prolongation is likely to become substantial because of the number and complexity of the documents the administration of justice is affected. If a judge does not understand a document or follow a point made upon it, he can say so and the matter is clarified. Furthermore, he will often study the documents out of court. The jury are unable to do this. Counsel have no means of knowing whether the documents or points made on them are really understood; they must therefore go on what they believe, perhaps quite mistakenly, to be the pace of the slowest jurors. And until they retire to consider their verdict jurors have no chance to study the papers in out of court hours. By no means all jurors can be expected to understand accounts and complex commercial documents. Substantial prolongation of the trial not only uses scarce resources in court and judge time, so that they are not available for other litigants, but it adds significantly to the burden of costs to be borne by the parties."[18]

[18] The Court of Appeal also considered the risk that the jury might not sufficiently understand complex issues in order to resolve them correctly. Stuart-Smith LJ stated:

> "The judge may also misunderstand them; but he has to give a reasoned judgment and if he is in error, it can be corrected in this Court. Not so with a jury; no-one can ever know upon what grounds they reached their verdict. Where the documents which require prolonged examination are such that the average jury man cannot be expected to be familiar with them, such as accounts and commercial documents, this risk is enhanced."[19]

[19] In *Syddall*, Daubney J was considering the application of r 474(b) in a case which involved medical and accounting issues. In applying r 474(b) (which was in identical terms to s 65A(b) of the *Jury Act*) his Honour was required to consider whether it was convenient for the effective and efficient administration of justice to order a trial without a jury. In that context his Honour stated:

> "Accordingly, it seems to me to be proper to say that, at least when considering the effective and efficient administration of justice in the context of the issues of 'convenience' under Rule 474(b), it is appropriate for the Court to have regard, in the exercise of its discretion, but not as a fetter thereon, to the philosophy and objectives of the *UCPR* enshrined in Rule 5(1) and (2)."[20]

The exercise of the discretion

[20] The fact that the requirements of a provision such as s 21(3) of the *Defamation Act* or s 65A of the *Jury Act* are satisfied gives rise to a discretion. It does not require the discretion to be exercised. In exercising the specific statutory discretion, and in

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[18] *Beta* at 1048. See also Neill LH at 1055 – 1056.
[19] At 1049.
[20] *Syddall* at [20].

exercising the broader discretion conferred by s 21(1), the Court must weigh a variety of factors in deciding whether the applicant has discharged the onus.

The litigation

[21] I shall identify some of the issues to be decided by a jury before turning to the expected duration of the trial.

Identification

[22] It is unnecessary on this application to closely analyse each of the 32 matters complained of. They refer in different contexts to the "Wagners", to "the Toowoomba based Wagners", to "Wagner" and to "Mr Wagner". The plaintiffs rely upon extensive particulars of identification to allege that each matter complained of referred to each of the plaintiffs, who are known in the community as brothers, as members of the Wagner family and as being involved in a family business known as "Wagners". With two possible exceptions,[21] the defendants deny that any of the matters complained of were "of and concerning each plaintiff". As a result, the jury will be required to determine whether each plaintiff was identified by each broadcast.

Meaning

[23] Whilst it is possible to group many of the 98 contested imputations, and there are a number of similarities in the matters complained of, the jury will be required to consider arguments in relation to each matter about whether it conveyed the imputations pleaded by the plaintiffs. This will require attention to the terms and context of the words complained of, whilst following directions from the trial judge about the need to avoid close textual analysis and to consider the meaning which would have been conveyed to an ordinary reasonable listener. The task requires separate consideration of each broadcast, with answers being given in respect of each plaintiff in respect of each imputation which the plaintiffs plead in respect of each broadcast.

Defamatory quality

[24] The defendants deny that the pleaded imputations, if conveyed, were defamatory. As a result, the jury will be required to consider whether or not each imputation which it finds to have been conveyed was defamatory of the relevant plaintiff. The arguments which the defendants intend to advance as to why such an imputation was not defamatory (assuming identification) are not apparent to me. However, the matter being contested, the jury will have to consider the arguments and answer many questions about defamatory quality, even if their deliberations on that issue may be less time-consuming than the issue of meaning in respect of each publication.

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[21] The exceptions concern the sixteenth and twenty-sixth matters complained of, which relate to the second plaintiff, and identification of him may not be an issue.

Questions before defences are considered

[25] The plaintiffs have prepared a draft of the questions which they anticipate the jury will be required to answer arising from contested issues of identification, meaning and defamatory quality. The defendants do not contest the plaintiffs' arithmetic to the effect that there will be in the order of:

(a) 98 questions on the issue of whether the alleged meanings were conveyed about the first plaintiff;

(b) 98 questions on the issue of whether the alleged meanings were conveyed about the second plaintiff;

(c) 98 questions on the issue of whether the alleged meanings were conveyed about the third plaintiff; and

(d) 98 questions on the issue of whether the alleged meanings were conveyed about the fourth plaintiff.

If account is taken of two matters complained of in which identification may not be in issue, there will be almost 400 questions. The jury will then be asked in respect of those imputations which are found to have been conveyed in respect of each plaintiff whether each imputation was defamatory.

[26] The defendants do not contend that there is any simple way of structuring the list of questions for the jury on issues of identification, meaning and defamatory quality. The result is that the jury will be required to respond to almost 800 questions before defences are considered.

[27] Both parties proceed on the basis that the trial will be conducted in accordance with the usual practice of asking specific questions of the jury. No party shows any appetite for a general verdict. In a case in which the defendants seek to prove the truth of 77 out of the 98 imputations complained of, it makes sense to take answers from the jury about the specific imputations which were conveyed by each matter and whether those imputations are substantially true. By any reckoning the jury will take a substantial time in its deliberations to work through the hundreds of questions which will be asked about identification, meaning and defamatory quality.

Truth defences

[28] The defendants seek to defend 24 out of the 32 matters complained of on the grounds that the imputations, if conveyed, were substantially true. This will require the jury to separately consider the truth of 77 out of the 98 imputations.

[29] Mr Burke, a very experienced practitioner in defamation law, who acts on behalf of the defendants, notes that there is a very real prospect that there will be some level of grouping in relation to meanings. For example, a number of imputations can be grouped as conveying imputations to the general effect that the quarry embankment caused the death of 12 people. However, as I remarked in my earlier reasons in relation to expert

evidence,[22] there are subtle differences between imputations in this category. Some refer to a "surge" in the floodwaters. Another refers to "lethal waves of millions of tons of water". Another refers to "a tsunami". Therefore, even if the defendants prove that the quarry embankment caused some small increase or even a surge in the floodwaters at the locations at which people died, this would not necessarily prove the truth of an imputation about "a tsunami". Although there may be substantial economies of scale as the jury comes to consider the truth of imputations in the same category, the jury will have to consider the truth of each imputation, according to its terms. This will require it to consider potentially a further 77 questions in respect of each plaintiff. Unless there is some convenient process by which the questions to the jury can be structured so as to avoid posing individual questions in respect of individual imputations in respect of each plaintiff, the jury will be required to answer up to 308 questions for the truth defences.

[30] Incidentally, the plaintiffs have pleaded the substantial truth of such of the plaintiffs' imputations as are proved to be true, and the facts, matters and circumstances proven by them in support of their truth defences, in mitigation of damages. The assessment of damages will be a matter for the trial judge.

Contextual truth

[31] The defendants' solicitors have placed the plaintiffs on notice that in the event their defences of truth are not entirely successful in respect of any matter complained of, their clients intend to rely at trial upon so many of the plaintiffs' pleaded imputations as are found to be substantially true for the purpose of a defence of contextual truth. They rely in this regard upon a view of the law adopted in *Chel v Fairfax Media Publications (No 6)*.[23] Different views which have been expressed about the application of s 26(b) of the Act. It is sufficient to note the view expressed in *Mizikovsky v Queensland Television Ltd*[24] and the different approach suggested by Basten JA in *Born Brands Pty Ltd v Nine Network Australia Pty Ltd.*[25] It will be for the trial judge to consider these matters of law closer to the date of trial. Before then the High Court or intermediate courts of appeal may resolve the issue of statutory interpretation. If *Chel* is correct then, contrary to *Mizikovsky*, a defendant may rely in a defence of contextual truth upon imputations complained of by the plaintiff which the jury has found to be substantially true. The defendants have not applied for leave to amend their defence to reflect their intended reliance upon *Chel*. However, if they are permitted to raise such a defence there will be many additional questions for the jury to the following effect:

> "Have the defendants established that the following defamatory imputations do not further harm the reputation of the first plaintiff:
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> > *[the imputations will be those of the plaintiffs' imputations found to be conveyed, and defamatory, but not substantially true]*
>
> because of the substantial truth of the following contextual imputations:
>
> > *[the contextual imputations will be those of the plaintiffs' imputations which the jury find to be substantially true]*."

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22 [2017] QSC 177 at [27].
23 [2017] NSWSC 230 at [18] – [44].
24 [2014] 1 Qd R 197; [2013] QCA 68.
25 (2014) 88 NSWLR 421 at 438-9 [73] – [74].

[32] I should not assume at this stage that the defence will be amended so as to generate such a large number of questions based upon a view of the law which is inconsistent with the interpretation adopted some years ago by the Queensland Court of Appeal. However, this possibility exists, and if contextual truth defences of the kind previewed go to the jury then the jury will face a complex task. The jurors will have to answer questions about which of the plaintiffs' imputations are true. Having done so they may be further addressed by counsel on the defence of contextual truth, having regard to those imputations that they have found to be true and whether each plaintiff's reputation (or the plaintiffs' reputations more generally) were not further harmed by reason of the imputations not found to be true.

[33] Even in a simple case, applying the law of contextual truth and answering questions based upon s 26 can create difficulties. In this case, if defences of contextual truth arise then there is the prospect of the jury, having spent many days and possibly weeks deliberating, will return to be addressed about the defence of contextual truth and then retire to further deliberate about those defences.

Honest opinion/fair comment

[34] The defence of honest opinion under s 31 of the Act and the defence of fair comment at common law are subtly different. However, for present purposes it is convenient to deal with them together. In general terms, the jury will be required to consider the following issues:

(a) whether each of the matters complained of were expressions of opinion or statements of fact;

(b) whether the facts on which the defendants allege the opinions were based were substantially true;

(c) if those facts were true, whether the opinions were ones which an honest or fair-minded person, even if biased or prejudiced and with obstinate or exaggerated views, might hold on the basis of those facts;

(d) whether the defendants (or more precisely the relevant commentator) honestly held the opinions at the time each of the matters complained of was published;

(e) to the extent that not all the facts the defendants wish to rely on are found to be true, whether the opinions were ones that could be held by a reasonable person, having regard to the facts that have been proved true, pursuant to s 31(6) of the *Defamation Act*.

[35] Several questions along these lines will be considered in relation to each of the 32 matters complained of, resulting in a large additional number of questions.

[36] Again, and having regard to certain groupings and similarities between certain broadcasts, there may be some economies of scale in respect of these defences. Also, a broad alignment may exist between the matters relied upon by the defendants in the context of their truth defences with the matters which they rely upon as founding the material upon which the alleged opinions were based. However, close attention will be required as to the relevant factual foundation for any alleged opinion in respect of individual

publications. Issues will arise as to whether the facts upon which any comment is alleged to have been based were stated or referred to in the relevant broadcast or were notorious, so as to allow a listener to agree or disagree with the expressed opinion.

[37] The potential complexities of the honest opinion/fair comment defences should not be underestimated. The defendants have not particularised the facts upon which the alleged opinion/comment was based, being facts which the defendants must prove were substantially true. Therefore, it should not be assumed that any answer which the jury gives in connection with the substantial truth of a particular imputation will match the truth issue which will fall for its determination in the separate context of honest opinion and fair comment defences. Presently the parties cannot say how many further questions will be required to be put to the jury if the defendants' currently pleaded defences of honest opinion and fair comment are allowed to go to the jury. There will be many. The plaintiffs rely not simply on the number of questions but the complexity of the task.

Disputed questions of fact relevant to qualified privilege defences

[38] The traditional view, adopted in the context of statutory qualified privilege defences subject to specific statutory modification, is that the question of whether a publication was made on an occasion of qualified privilege is a question for the judge, not the jury, subject to the jury resolving any disputed questions of fact. Based on this view it would be an error for a trial judge to allow the jury to determine the question of qualified privilege.[26] It is unnecessary for the purpose of this application to decide the manner in which factual issues relevant to the question of "reasonableness" under s 30 (defence of statutory qualified privilege) will be determined. I should assume for present purposes that the defences of qualified privilege may require the jury to decide a number of disputed questions of fact touching upon the statutory requirement of reasonableness, including specific issues in relation to certain defendants' state of information and belief at different times. The number of questions which the jury may be required to answer in this context is simply uncertain.

Malice

[39] The jury will be required to consider in different legal contexts, including statutory and common law qualified privilege defences, the issue of malice and how, for example, the malice of a particular defendant may affect the position of the corporate defendants.

Fair report

[40] The defendants defend several of the matters complained of on the basis that they were a fair report of the proceedings of the Grantham Flood Commission of Inquiry which commenced public hearings on 20 July 2015. The plaintiffs reply that a defence under s 29 of the Act is not available because the items were not "fair reports" within the meaning of the section, or the defamatory matters were not published "honestly for the

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[26] See *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321 and also *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 in the context of the *Defamation Act* 1958 (NSW) and the *Defamation Act* 1974 (NSW).

information of the public or the advancement of education". The fair report defence is likely to generate a number of questions for the jury.

Offer of amends defence

[41] The plaintiffs dispute that an offer of amends defence is available under s 18 of the Act because the offer did not include an offer to publish, or join in publishing, a reasonable correction of the matters complained of, or to take reasonable steps to tell listeners that the matters were or may be defamatory of the plaintiffs. They deny that the offer was reasonable in all the circumstances. The issues that arise in the context of this defence are unlikely to cause the jury much difficulty.

The expected conduct and length of the trial

[42] I have made directions about the filing of summaries of evidence from lay witnesses, and I have also requested that parties develop a basic trial plan.

[43] At different times between June and August 2017 the plaintiffs filed summaries of evidence from each of the four plaintiffs and 14 summaries of evidence going to reputation and damages. All of the witnesses called by the plaintiffs going to reputation and damages will be able to complete their evidence in a few days.

[44] In August 2017 the defendants served 57 witness summaries. Of them, 35 of the proposed witnesses gave statements of evidence to the Grantham Flood Commission of Inquiry and 17 of them gave oral evidence before that inquiry. No provision had been made to date for statements in reply, and the question of whether the plaintiffs seek to "split" their case is a matter which has not been raised with me or with the trial judge, Flanagan J. In some cases such as *Thiess v TCN Channel Nine Pty Ltd (No 5)*,[27] such a course is followed. Presently I shall assume that the plaintiffs will give most of their evidence in one bracket and be cross-examined about matters going to the truth of the imputations at that stage, but with possible provision to give evidence in reply.

[45] The trial plan submitted on behalf of the plaintiffs anticipates that the first two days of any jury trial would be occupied by empanelling the jury, reading the statement to the jury, the plaintiffs' case being opened and the plaintiffs' evidence commencing. The plaintiffs' evidence and the evidence of their 14 reputation witnesses would then not conclude until the middle of the third week. The plaintiffs' trial plan also anticipates the second and fourth defendants giving evidence over a number of days and for expert evidence to occupy three days. They then estimate that the defendants' remaining lay witnesses would take a minimum of 10 days. On this basis, the evidence would occupy seven weeks of the trial. Legal argument and closing addresses would then follow. The plaintiffs' trial plan anticipates that the addresses of both counsel would occupy less than three days in total and that the summing up would take just over two days.

[46] Given the issues that would need to be addressed in any summing up and the number of issues which the jury would be required to consider, I consider that a summing up is likely

[27] [1994] 1 Qd R 156.

to take more than two days, closing addresses would likely take at least a few days. In any event, the plaintiffs' trial estimate has the summing up concluding at the start of the ninth week following which the jury would begin its deliberations.

[47] The plaintiffs' provisional trial plan as submitted on 17 August 2017 contemplated considerable savings of time if there was no jury, with the evidence concluding in five weeks.

[48] The defendants did not advance a trial plan of their own, but responded to inquiries made by me via my Associate about the expected length of the trial. They did not advance detailed reasons to support a significantly different trial plan, but noted the notorious difficulty of estimating the length of trials. As at 25 August 2017 they estimated that the matter would be lengthy, irrespective of whether a jury was dispensed with. They submitted that they believed that the evidence in the case was unlikely to finish in less than five weeks, and thought the case was capable of completion with a jury in the range of seven to eight weeks. However, they did not think that the plaintiffs' estimate of nine weeks with a jury was "necessarily an impossibility". Mr Burke's affidavit sworn 12 September 2017 additionally assists with estimates, and holds out some hope that a jury trial could conclude within the seven week period for which the trial has been listed. Mr Burke thought that was a sufficient time with appropriate time management directions in relation to openings, witness time and closing addresses.

[49] A particular point of disagreement between the plaintiffs' solicitor, Mr Micallef, who is very experienced in defamation litigation, and Mr Burke is the length of time that the jury will be required to deliberate. Mr Micallef ventured the opinion that a jury performing its task in accordance with its obligations will take up to two weeks to return with answers to the many hundreds of questions asked of it. This was based upon his experience in which a jury in a defamation trial considering only one matter can take up to two to three days to consider the evidence and return with its answers. Mr Burke disagreed with Mr Micallef's estimate. He believes that the jury, properly instructed, could complete the task assigned to them within one week, due to the similarities in the matters complained of and in the factual matters to be resolved.

[50] The conduct of the Grantham Flood Commission of Inquiry is not necessarily a good guide to the time which will be taken by lay witnesses giving evidence about the Grantham floods or the time that will be taken by expert hydrologists. I apprehend that there were many parties represented at that inquiry. The manner in which lay and expert evidence is presented to a commissioner may differ to the speed and form in which it is presented to a jury. In any event, the Grantham Flood Commission of Inquiry occupied 18 hearing days, in which a total of 41 witnesses gave evidence during public hearings, including five expert witnesses and 21 eye witnesses. Four of the five experts were expert hydrologists, some of whom prepared reports for the Commission, with another expert having provided a report to the earlier Queensland Floods Commission of Inquiry. It seems that the hydrologists were in general agreement. The report of the Grantham Flood Commission of Inquiry noted that no party submitted that the relevant experts were wrong. In this matter I apprehend that the plaintiffs will be relying upon similar expert reports, and that the defendants will say that they are wrong.

[51] It remains to be seen what expert evidence the defendants will call, a matter which I have required the parties to address. It would be extraordinary if the defendants pleaded the defences of truth which they have without first securing expert evidence in writing from a suitably qualified, well-informed expert. Although I have not seen such a report, I assume one has been written. At a pending review by the trial judge directions will be made in relation to the completion of expert reports, meetings of experts in the same field and the presentation of evidence at the trial. I remark about these matters, but not because I consider that the present absence of disclosed expert evidence from the defendants to support their case makes the present application premature. I do so simply to observe that I anticipate that, if they persist with the truth defences, the defendants will rely on expert evidence and strongly contest the evidence of the expert or experts called by the plaintiffs.

[52] The expert reports provided by three of the experts before the Grantham Flood Commission of Inquiry are exhibited to another affidavit of Mr Micallef and for the purpose of this application, I have not been required to read them in detail. Issues of hydrology are complex and if, as anticipated, the experts to be called at the trial disagree either on issues of methodology or any other matter, the jury will have to give close attention to the material, information and assumptions upon which any expert opinion is based, and the experts' process of reasoning. It remains to be decided whether the expert reports in full will be made available to the jurors and the process by which individual jurors will read and absorb the expert reports in the course of the trial. It may be possible for the experts to agree on many matters and to distil in some convenient form their points of agreement and disagreement. However, I cannot assume that a high degree of agreement and I must assume, given the defences, that the defendants have reliable expert opinion which contradicts the expert evidence given at, and accepted at, two commissions of inquiry. If that is the case then the jury will be required to consider some complex technical issues and, quite possibly, a substantial body of documents in relation to hydrological issues.

Summing up and deliberations

[53] Both parties accept that the jury will be required to answer hundreds of questions. No precise estimate can be given but the number is likely to substantially exceed 800, and the number of draft questions prepared by the plaintiffs were not contested by the defendants for the purpose of this application.

[54] The parties and the trial judge will assist the jury in the enormous task of working through so many questions. In my experience, in some civil jury trials, counsel are permitted to provide documents which record the manner in which they suggest the jury answer questions. These might be styled as "how to vote" cards.

[55] The task confronting the trial judge in assisting the jury to answer so many questions in such a complex case should not be underestimated. The trial judge may assist the jury as to a possible course of deliberations. However, the trial judge cannot dictate the process by which the jury undertakes its deliberations and the sequence in which it proceeds to answer the several hundred questions which will be asked of it.

[56] It will be for the jury to decide whether it works through the questions in the sequence proposed in the plaintiffs' draft questions, by which it starts with the first publication and answers a number of questions, including questions about defences, which are specific to that particular publication. A jury might decide to adopt a different process of deliberation whereby it concentrates first on issues of identification in respect of each publication and, having addressed the issue of identification in respect of each of the publications, then moves to the meanings pleaded in respect of each and their defamatory quality. A trial judge may have to assist the jury by identifying possible courses of deliberation. However, it will be for the jury to decide whether it undertakes extensive deliberations on matters relevant to a variety of defences before turning to the task of answering the specific questions asked of it or whether, having considered certain matters, it promptly embarks upon the task by answering question 1 on the first of several hundred pages of questions.

[57] Although a number of the imputations can be grouped so as to facilitate addresses of counsel, the summing up and jury deliberations being directed to several discrete topics, the subject matter of the imputations extend beyond the quarry embankment and the cause of the 12 deaths and issues relating to the construction of the airport. They extend to issues concerning alleged conspiracies, high level cover-ups, the construction of the embankment, alleged bullying, political influence and alleged intimidation. Imputations about the airport vary to some extent, relating to its approval and construction and issues concerning the Oakey army base. There are also issues of alleged corruption in connection with the airport.

[58] To the extent that imputations and defences to them may be grouped, the resolution of certain factual issues by the jury may permit the answering of questions to be expedited. However, even if it is assumed that the jury will reach a unanimous view on a large number of issues which are contested by the parties, the process of answering so many questions, with many subtle differences, will be enormously time-consuming and demand careful attention to detail.

[59] Assuming as I must that there will be heavily contested issues between the experts, the judge will be required to assist the jury in a summing up about those issues and their possible resolution. This may require careful instruction about the assumed factual foundation for expert opinions and the extent to which those assumptions are supported by admissible evidence.

[60] The summing up should be no longer than it has to be. However, the complexity and number of the issues which the jury will be required to consider, and the expected highly technical nature of the expert evidence, make it inevitable that the summing up will be very substantial. The present relevance of that concerns the time which will be occupied with any summing up and how many hours each day the jury can reasonably be expected to absorb such a summing up. My concern is not with the enormous burden which will be placed upon a trial judge to draft such a summing up and discuss its contents with counsel either before it is delivered or over the course of the summing up or when any redirections are requested. On any view, the task will be significant and it is unnecessary presently to compare it with the different task which the trial judge will have if there is no jury. However, if the matter proceeds without a jury the trial judge will still have to organise issues for determination in advance of, or in the course of, hearing submissions

from counsel, and then embark upon writing a lengthy judgment. In a trial without a jury there would be scope for counsel to prepare written submissions to which counsel then address oral submissions. There would be time for this to be done after the evidence concluded.

[61] By contrast, with a jury, substantial time will need to be spent by counsel and the judge after the evidence concludes in addressing the issues that will be put to the jury and in addressing the proposed contents of what, on any view, will be a very lengthy summing up. The jury could be required to wait some days while the summing up is being drafted and refined in the light of submissions.

[62] Consideration will also need to be given to written aids to the jury, but as I have indicated, the trial judge cannot dictate the path the jury takes in its deliberations. The jury may be assisted by grouping certain issues such as the truth of certain categories of imputations and the honesty and belief and alleged malice of certain defendants. However, whilst some grouping will be possible in relation to some issues, the summing up by the trial judge will be lengthy, as will be the jury's deliberations. It would be remarkable if the jury could complete the tasks assigned to it conscientiously in less than two weeks.

Is there an unacceptable risk that the jury, despite its best efforts, will be unable to complete its task?

[63] In answering this question, I assume that the jury will be competent and conscientious, follow the directions given to it and seek suitable assistance in the course of what inevitably will be lengthy deliberations. Juries in criminal cases often are required to hear evidence which takes several weeks or to understand technical and scientific evidence given by experts.

[64] As presently advised, the expert evidence is likely to be complex and require the jury in the course of the trial to follow both the oral evidence given by experts and the substantial materials and reports upon which their evidence is based. Following such evidence is likely to be very demanding. Unlike a commissioner on a commission of inquiry or a trial judge, jurors cannot be expected to take expert reports home with them and read them on nights and weekends. Appropriate time would need to be given to the jurors to absorb the expert evidence as it is given, including reading time. I shall assume that with professional experts and the assistance of the parties, the expert evidence will be able to be given in a manner which is capable of being comprehended by the jurors, rather than leaving bewildered jurors to make a simple choice about which expert seemed more competent or more believable. One should not readily assume that expert reports and the oral evidence of witnesses will be jargon-free or that the four persons on the jury will have the skill and experience to follow and understand the evidence of the hydrologists. For the purpose of this application I should not assume that the task necessarily will be beyond the jury. However, having followed the expert evidence, whether given concurrently, consecutively or at different stages of the trial, the jury will be required to return to it in the course of their lengthy deliberations. Unless the issues which divide the experts are capable of easy resolution, (and neither party presently suggests that is the case) the jury is likely to be required to deliberate for a substantial time about the expert evidence. This may require them to delve into extensive expert reports in order to resolve complex issues raised by the hydrological evidence.

[65] There is a substantial risk that the jury will reach a state of confusion or fundamental disagreement in relation to the resolution of the expert evidence.

[66] Even if this risk is not as high as I apprehend or is regarded as an inevitable risk in undertaking any jury trial in which contentious expert evidence is given, there is a very substantial risk that the jury will be unable to complete the huge task expected of it. This does not depend simply upon the sheer number of questions which it will be required to dutifully answer. It concerns the complexity of many of the issues embedded within those questions. For example, the task of determining the various elements of an honest opinion/fair comment defence is significant. It would be a very significant task if the jury had to determine separate honest opinion/fair comment defences in respect of several different publications. In this case, the jury are expected to apply and determine the several elements of a fair comment defence to each of the 32 publications.

[67] Given the number and complexity of the questions, there is a very real risk that a jury will be unable to agree upon, and therefore answer, a large number of questions. The very real risk of their being unable to agree upon unanimous answers to a substantial percentage of the hundreds of questions which will be asked of them calls into question the utility of a jury trial in this case.

[68] The defendants correctly state that the complexity of the present proceeding and the expected duration of the trial is a function of the plaintiffs' choice to sue over 32 separate publications.[28] However, the entitlement of the plaintiffs to sue over multiple publications is not questioned. The defendants have not applied for a separate trial in relation to a few publications as a means of conducting, in effect, a "test case" which would then have practical or agreed consequences for the further conduct of the remainder of the case.

[69] In my view, there is a very real risk in the particular circumstances of this case that the jury will be unable to return unanimous answers to the hundreds of questions which will relate to issues of identification, meaning and defamatory quality. With so many questions there must be a substantial risk that the jury will be unable to agree on many of those issues. I cannot assume that both parties would consent to take a majority verdict on those or any other issues after the expiry of the period after which a majority verdict may be taken by agreement.[29] However, whatever risk exists of the jury being unable to complete its task in answering questions about identification, meaning and defamatory quality, there is, in my opinion, an additional and greater risk of it being unable to unanimously resolve the numerous issues in respect of the defences which are advanced in respect of each publication. Even assuming in the defendants' favour that the jury will be able to agree on important issues concerning the truth of important imputations about the quarry embankment and the cause of the deaths in Grantham, the jury will then be required to answer numerous questions, with sub-parts in relation to other defences which will require careful analysis in the context of each publication of matters such as the belief at a specific time of a particular commentator in the matter complained of and, whether the alleged opinions were ones which an honest person might hold on the basis of certain facts. To conscientiously perform its task the jury must apply the law as directed in

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[28] The original proceeding complained about 34 publications but interlocutory rulings meant that these were reduced to 32.

[29] *Jury Act* 1995 (Qld) s 58.

relation to those defences to the specific facts of a particular publication, rather than adopt some broad brush approach.

[70] In my view, the concerns raised by the plaintiffs about the jury being unable, despite its best efforts, to complete the enormous tasks required of it are not answered by saying that the jury's task is essentially the same as if the plaintiffs were only suing over three or four publications. A champion weightlifter might be expected to lift a heavy weight four times, but no-one would expect him to lift the same weight 32 times at the one event.

[71] If the only issues in the proceeding concerned identification, meaning and defamatory quality then one might contemplate a jury working through 32 publications, despite the relatively high risk of certain disagreements and an unsatisfactory outcome because of the sheer number of publications. However, in this case the jury must decide many more issues in relation to each publication than identification, meaning and defamatory quality, and these multiple issues come with their complexities.

[72] The issue is not simply the number of publications sued over and the consequential size of the jury's task. The matter of concern is both the size of the jury's task and its complexity. The fact that this will be a long trial is not enough to dispense with a jury. The fact that it involves 32 publications, being an unprecedented number of publications sued over, may not, in itself, justify dispensing with a jury. However, when each publication generates as many issues as are raised by the pleadings and when those issues have the complexity which they do, the problem becomes more than a one about size.

[73] In my view, the size and complexity of the jury's enormous task presents an unacceptably high risk that it will be unable to perform its task, despite its best efforts and despite the assistance of the trial judge in providing redirections and further assistance. The scale and complexity of the issues the jury will be required to determine creates a high risk that the jury will be unable to agree on many issues and that any agreement reached may be insufficient to avoid a retrial. Even a competent and conscientious jury, faced with such a complex task, may find it beyond its ability to properly work through the hundreds of questions it will be required to answer. The result will be a disagreement with no verdict or, worse, compromised verdicts.

Other cases

[74] I have had regard to applications in other cases including *Mizikovsky v Queensland Television Ltd*[30] in which Boddice J declined to dispense with a jury. That matter went to trial and the result may be said to have vindicated the view taken by Boddice J. It was far less complicated than this case. The celebrated trial of *Thiess v TCN Channel Nine Pty Ltd (No 5)*[31] is perhaps the high water mark in this State of a jury working through many questions. However, that case concerned four broadcasts, and 69 separate answers to specific questions. This case concerns 32 broadcasts. While cases like *Thiess* tend to confirm one's confidence in the ability of a jury in a civil case to address many questions, each case depends upon its own facts. Examples can be found in which juries have been

[30] [2011] QSC 205.
[31] [1994] 1 Qd R 156.

incapable of answering very simple questions and have returned perverse verdicts.[32] The heroic triumphs and dismal failures of juries in other cases may be the extremities of a bell curve. Most jurors in most cases may be expected to conscientiously undertake their task, attempt to reach a unanimous view whilst adhering to their individual oaths and diligently address issues, including technical issues, beyond their ordinary experience. However, the confidence which I and other judges place in juries to do their job does not mean that a civil jury can be expected to do every job. The discretion to dispense with a jury exists for cases in which there is an unacceptable risk that the jury, despite its best efforts, will be unable to properly complete its task. This is such a case.

Conclusion

[75] The present application is not brought simply because a jury trial in this matter will take longer and be more expensive than a trial without a jury. If that was the argument then the application would be bound to fail.[33] Instead, the application is founded upon the multiplicity and complexity of the issues in the proceeding. Ultimately, I am required to consider whether the interests of justice are served by exercising the discretion so as to displace the defendants' election.

[76] Factors which favour dismissal of the application include the view that jurors are better placed than judicial officers to assess how ordinary, reasonable people understand mass media publications.[34] Another consideration which favours retention of the jury is the fact that dispensing with a jury would not remove the need to determine multiple and complex issues. Instead, the burden of deciding those issues would shift to the judge. While the trial judge would be relieved of the substantial burden of preparing and delivering a lengthy summing up, the judge would be required to decide issues that would be decided by the jury. In addition, and unlike a jury, the judge would be required to give reasons, not simply answers. Any judgment may take many months to write and deliver.

[77] Given the importance placed upon the ability of a party to a defamation proceeding to elect trial by jury and the virtue of having a jury try issues of meaning, defamatory capacity and substantial factual issues, the defendants' election for trial by jury should not be lightly displaced. Defamation actions in which the right to elect for a jury is preserved often consider multiple issues of meaning and alternative defences. Generally a civil jury is expected to be able to consider complex factual issues, including technical issues to which expert evidence is directed. That said, the power to dispense with a jury exists because the Parliament has recognised that there are some cases in which the interests of justice are such as to displace a party's entitlement to elect trial by jury. In some cases the multiplicity and complexity of the issues outweighs a party's right to elect.[35] In my view, this is such a case.

[78] There are powerful reasons why a party's election for trial by jury in a defamation action should not be lightly displaced. In considering whether to exercise the discretion under s 21 of the Act I have considered whether the multiplicity and complexity of the issues

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[32] See, for example, *Evans v Davies* [1991] 2 Qd R 489; *Watney v Kencian* [2017] QCA 116.
[33] *Smit v Chan* [2003] 2 Qd R 431.
[34] *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148 at [19]; cited in *Channel Seven Sydney* at [74].
[35] See, for example, *Smit v Chan* at [43]*; French v Herald and Weekly Times* (2010) 27 VR 140.

the jury will be required to address and the enormous task which will confront it in the unique circumstances of this case outweigh the features of the case which favour a jury and the defendants' "right" to elect a jury trial. I conclude that the plaintiffs have discharged the onus because it is in the interests of justice for the matter to proceed to trial without a jury. The application is granted.