17/05; [2005] VSC 171

SUPREME COURT OF VICTORIA

TANKARD v CHAFER

Gillard J

12, 13, 20 May 2005

CIVIL PROCEEDINGS – DEFAMATION – THREE LETTERS SENT BY RATEPAYER TO LOCAL LAWS MANAGER OF SHIRE – FINDING BY MAGISTRATE THAT LETTERS WERE DEFAMATORY – DEFENCES DISMISSED – MANAGER AWARDED ONE LUMP SUM FOR DAMAGES PLUS INTEREST AND COSTS – WHETHER MAGISTRATE IN ERROR IN NOT AWARDING DAMAGES IN RESPECT OF EACH LETTER – DEFENCE OF QUALIFIED PRIVILEGE – MALICE – MAGISTRATE IN ERROR IN NOT CONSIDERING THE DEFENCE IN RESPECT OF EACH LETTER – QUALIFIED PRIVILEGE IN RELATION TO THE CONDUCT OF PUBLIC OFFICIALS – MATTER NOT CONSIDERED BY MAGISTRATE – INTEREST ON JUDGMENT – INTEREST CALCULATED FROM DATE OF FIRST LETTER – WHETHER MAGISTRATE IN ERROR – COSTS – AWARDED IN EXCESS OF SCALE FEES – WHETHER MAGISTRATE IN ERROR.

T., a ratepayer wrote three letters to persons at the local Shire offices complaining about the conduct of C., the Local Laws Manager of the Shire. The thrust of the letters was that C. was not a fit and proper person to hold the position of Local Laws Manager. C. issued proceedings against T. claiming damages together with interest and costs. At the hearing the Magistrate found that the letters were the subject of qualified privilege however, the defence was defeated because malice on T.'s part was established. The Magistrate awarded C. one amount for compensatory and aggravated damages and fixed interest from the date of the first letter. Further, on the question of costs, the Magistrate allowed for Counsel's fees a sum in excess of the Scale of Costs. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted for further hearing by another Magistrate.

1. The publication of each letter constituted a separate cause of action. The Magistrate should have awarded damages in respect of each publication and have stated in his reasons the amount awarded for each head of compensatory damages in respect of each defamatory publication. The Magistrate should not have dealt with the defences in a composite way but should have considered the defences in respect to each cause of action, i.e. each letter.

2. Because it was conceded that each letter was published on a privileged occasion, it was necessary to determine in respect of each letter whether at the time of publication T. was actuated by malice. This involved a consideration of the nature and purpose of the privilege, the contents of the letter and all the surrounding circumstances before and after publication which bore on T.'s motive at the time of publication. The qualified privilege defence and the reply of malice required a two step consideration and determination in respect of each cause of action. First, in respect of each communication, was it made on an occasion of qualified privilege? This is a question of law and the burden is on the defendant. The second step is, assuming the communication was made on an occasion of qualified privilege, was the defence defeated by proof of actual malice? This is a question of fact. The burden is on the plaintiff.

3. When the purpose of the occasion which is protected by qualified privilege is properly defined, it cannot be said that to question the conduct of a public official, and to raise doubts about his suitability for office raising the question whether he should continue to be employed in that office, is not a purpose or motive foreign to the duty or interest that protects the making of the statement. The Magistrate misdirected himself on the question of malice and his finding must be set aside. It is clear that the Magistrate placed great weight on what he described as evidence of "an improper motive". In the circumstances his other findings of evidence of malice cannot support his finding, especially as he did not consider malice in respect of each of the separate causes of action.

4. The jurisdiction to award damages in the nature of interest on an order made for damages in the Magistrates' Court is given by s33 of the *Supreme Court Act* 1986. The section provides that the rules of law enacted in Part 5 of that Act apply to inferior courts and accordingly ss58-60 of the *Supreme Court Act* apply to the Magistrates' Court. Section 60(1) requires the Court to award damages in the nature of interest from the commencement of the proceeding until judgment. Interest is awarded from the commencement of the proceeding, and the Court must fix the rate of interest, which must not exceed the rate fixed from time to time under the *Penalty Interest Rates Act* 1983. Accordingly, the Magistrate was in error in ordering T. to pay interest on the damages awarded from the date of the first letter. Interest should have been calculated from the date the proceeding was commenced.

5. There is power under Rule 26.02(2) of the *Magistrates' Court Civil Procedure Rules* for the court if it thinks "that any item in the scale is inadequate or excessive", to allow a greater or lesser sum than the scale provides. An item in the scale may be inadequate taking into account the complexity of the case. The complexity may arise because of the law or the facts or both. The magistrate must make some assessment of the time that would be involved by counsel in preparing the brief for hearing. But the brief fee includes the preparation by counsel. Counsel as a general rule should not be paid more for learning the law which he or she should know. As a general rule, the Magistrates' Court should be slow to increase the scale fees because the court thinks the item is inadequate. The scale costs and fees should be the norm. The Magistrates' Court is the court in this state dealing with claims of lesser monetary value than in the higher courts, and the costs should not be at a level which deters litigants. Further, defendants defend proceedings in the expectation that the costs will be determined in accordance with the scale of costs. It is difficult to accept that it was reasonable in this proceeding for the Magistrate to order that T. should have been ordered to pay the sum of $4,011 brief fee and a daily fee thereafter of $3,572.

GILLARD J:

1. This is an appeal by an unsuccessful defendant in a proceeding brought against him in the Magistrates' Court alleging that he had defamed the plaintiff. The Magistrate held that the plaintiff had proven that the words complained of, written in three letters, were defamatory of him, found against the defendant's defences and awarded the plaintiff the sum of $40,000 together with interest, and ordered the defendant to pay the costs. The defendant appeals the orders made.

Parties

2. The defendant/appellant, Ian Douglas Tankard ("Mr Tankard") is a retired farmer who at all relevant times resided in Creamery Road, Toolern Vale which is in the Shire of Melton.

3. The plaintiff/respondent, John Forest Chafer ("Mr Chafer") was at all relevant times the Local Laws Manager of the Shire of Melton.

Proceeding in Magistrates' Court

4. On 30 April 2003, Mr Chafer issued a complaint against Mr Tankard in the Magistrates' Court sitting at Sunshine seeking damages in the sum of $40,000 which included claims for aggravated and exemplary damages, for defamation arising out of three letters sent by Mr Tankard.

The three letters were –

(i) a letter dated 8 October 1998 addressed to the then Commissioners of the Shire of Melton;

(ii) a letter dated 2 December 2001 addressed to Emma Healey, General Manager of the Shire of Melton; and

(iii) a letter addressed to Neville Smith, Chief Executive Officer of the Shire of Melton dated 23 June 2002.

5. In his statement of claim Mr Chafer alleged that some of the words in each letter were defamatory of him, and pleaded a number of defamatory imputations. The imputations were based on the natural and ordinary meaning of the words complained of. The publication of each letter was a separate cause of action.

6. In his defence, Mr Tankard denied that the words were defamatory, and alleged defences of justification, qualified privilege and fair comment. Mr Chafer in his reply alleged that the defamatory words were published by Mr Tankard with actual malice, and hence the defences of qualified privilege and fair comment were defeated.

7. The proceeding commenced before a magistrate on 12 November 2003. Mr Tankard represented himself and Mr Chafer was represented by Mr J Kewley of counsel. The Magistrate heard the proceeding over eight days and on 15 December 2003 reserved his decision. On 19 December 2003, the Magistrate orally delivered his reasons. The reasons were not recorded, however, the Magistrate has provided a type-written version. He found that the words Mr Chafer complained of in respect to each letter were defamatory, and that Mr Tankard had failed to prove the defences of justification and fair comment. He held that the defamatory words were published on an occasion of qualified privilege but Mr Tankard was actuated by malice. Accordingly the defence of qualified privilege was defeated. The Magistrate awarded both compensatory and aggravated damages which he fixed at $40,000 which was the then limit of the court's jurisdiction.

He rejected the claim for exemplary damages.

8. The Magistrate awarded $40,000 as one sum for compensatory and aggravated damages in respect of the defamatory words contained in three separate letters. In my opinion, the Magistrate was wrong. The publication of each letter constituted a separate cause of action. The case was so pleaded. The Magistrate should have awarded damages in respect to each publication. He should, in my opinion, have stated in his reasons the amount awarded for each head of compensatory damages in respect of each defamatory publication. Mr Tankard has not appealed the error and accordingly it is unnecessary to say anything more about it. However, the Magistrate also dealt with the defences in a composite way. He should have considered the defences in respect to each cause of action, i.e. each letter.

9. The Magistrate also awarded damages in the nature of interest in the amount of $22,819.70 and ordered Mr Tankard to pay $52,855.73 costs. These two orders are the subject of this appeal.

Appeal to this Court

10. Mr Tankard appeals to this Court pursuant to s109 of the *Magistrates' Court Act* 1989. The jurisdiction of this Court to entertain an appeal is limited to an appeal on a question of law from a final order of a Magistrates' Court. Section 109(2)(a) obliges an unsuccessful party to institute an appeal not later than 30 days "after the day on which the order complained of was made". This Court does have power to extend time.[1] An appeal must be brought in accordance with the Rules of the Court. Part 3 of Order 58 deals with an appeal to this Court from a Magistrates' Court. The Rules have recently been amended.[2] An appeal is now instituted by filing a notice of appeal.[3] The notice must state the questions of law and the grounds of appeal. The appellant is required within seven days after filing the notice of appeal to file an affidavit setting out the matters required by Rule 58.09. After this is done the appellant must apply to a Master for directions.

11. Mr Tankard failed to institute his appeal within time. On 29 September 2004 he issued an originating motion seeking an extension of time to appeal against the decision made by the Magistrates' Court. As the new Rules came into operation on 1 October 2004 the present appeal has proceeded under the old Rules, resulting in an order of the Master stating the points of law. In an affidavit filed the same day, Mr Tankard stated that he had had trouble obtaining the reasons for judgment and that he had received the reasons on 24 September 2004. At that stage Mr Tankard was appearing for himself. On 6 October 2004 his present solicitors filed a document stating they were acting for him.

12. On 7 October 2004, Mr Tankard filed an originating motion seeking prerogative relief and judicial review of the Magistrate's orders.[4] On 8 December 2004, Master Wheeler by order extended the time to appeal to 10 December 2004. The originating motion seeking judicial review was adjourned to be heard at the appeal. The Master made the usual order under Rule 58.09 of the old rules and stated the questions of law.

13. The parties came before the Court on 21 December 2004 and the Court ordered by consent that the judicial review proceeding be discontinued with no order as to costs. Apparently the parties had agreed that the issues raised in the judicial review proceeding save for one issue be determined as questions of law in this appeal. One of the points of law was set aside by agreement.

14. The four remaining questions of law for consideration and determination are:

(a) If the occasion of qualified privilege is communication by a rate payer to a municipality concerning land use matters, is seeking to have the respondent sacked from his land use job at the municipality a purpose foreign to that occasion so that the protection of the privilege is lost through malice?

(b) Whether the Magistrate erred in awarding damages in the nature of interest calculated on the basis of a period commencing before the commencement of the Magistrates' Court proceeding?

(c) Whether the appellant was denied procedural fairness in that he was not given the opportunity to be heard in respect of the interest order?

(d) Whether the appellant was denied procedural fairness in that he was not given an opportunity to be heard in respect of the Magistrate's order that he pay the respondent's costs in the amount of $52,855.73?

15. On 13 April 2005, Master Kings made orders by consent in relation to this appeal. Paragraph 1 of those orders required the parties to file an agreed summary of facts "which summarises the history of and issues in the proceeding."

16. The Court received what was described as an agreed summary on 11 May 2005. The parties have assured me that the summary of facts accords with the evidence placed before the Magistrate. In order to understand and make sense of the agreed summary of facts, it is necessary to briefly state the circumstances leading to the forwarding of the three letters. In August 1996, Mr Tankard's residence caught fire and was badly burnt. Thereafter the Shire of Melton ("the Shire") took steps to have the house demolished. Mr Tankard objected to the actions of the Shire. In August 1998 a complaint was received by the Shire as to the state of Mr Tankard's property and on 13 August 1998 Mr Chafer, as the authorised officer, signed a notice requiring Mr Tankard to clean up his property. On 8 October 1998, Mr Tankard wrote a very long letter to the three Commissioners of the Shire in which he dealt with the matters referred to in the notice and raised matters which reflected upon Mr Chafer and in particular whether he was properly carrying out his duties as an authorised officer of the Shire. This letter constituted the first cause of action in defamation. Thereafter, there were court proceedings involving the Shire and Mr Tankard which went from the Magistrates' Court to this Court and the Court of Appeal. Mr Tankard had some success in that litigation. In November 2001, the Shire served a Fire Prevention Notice on Mr and Mrs Slater, neighbours of Mr Tankard, and with the authority of Mr and Mrs Slater he wrote a letter to the manager of the Shire in which he dealt with the notice served on Mr and Mrs Slater. In the letter he made some observations about Mr Chafer and raised questions as to whether he was a fit and proper person to be employed by the Shire. In early 2002 the Shire engaged in consultation with rate payers in respect to proposed changes to the local law. On 23 June 2002 Mr Tankard wrote another letter addressed to the CEO of the Shire in response to the proposed amendments. In that letter he made a concerted attack upon Mr Chafer and his suitability to be an officer and his mental state. Each of the three letters was the subject matter of a cause of action in defamation.

Agreed Summary of Facts

1979	Mr Tankard acquires his property at Creamery Road, Toolern Vale and moves in.
1-2 August 1996	Tankard's house catches fire and is three quarters burnt down.
5 August 1996	Shire issues Emergency Building Order pursuant to Section 102 of the Building Act 1993 requiring demolition of the remains of Tankard's house.
21 October 1996	Melton Shire obtains three quotes for demolition of Tankard's house, and Court Demolition Order of the house by Tankard within 7 days, payment into Court of the anticipated costs of the demolition in the sum of $5,700.00 plus costs of the proceeding.
29 October 1996	Magistrates' Court conviction against Tankard for failing to comply with Demolition Order.
30 October 1996	Melton Shire letter to Tankard advising of intention to demolish remainder of his house.
6 November 1996	Melton Shire engages Demolition Contractor and remainder of Tankard's house is demolished.
5 December 1996	Melton Shire invoices Tankard for the cost of the demolition. Tankard refuses to pay.
7 January 1997	Complaint issued by Melton Shire against Tankard for $5,700.00 costs of demolition.
11 March 1997	Melton Shire obtains Court order in the Magistrates' Court at Broadmeadows for payment by Tankard of the costs of the demolition.
8 April 1998	Tankard pays the amount referred to in the Court Order.
10 August 1998	Melton Shire receives complaint from neighbour regarding state of Tankard's property.
8 Sept 1998	Council obtains a quotation from "CRB Cleen" in respect of "Land Clearance at Creamery Road".
13 August 1998	Chafer acting in his capacity as the Shire's Local Laws Manager conducts inspection of Tankard's property and serves Tankard with a Notice to Comply under Clause 706 of Melton Shire Council Local Law 1, requiring the property be cleared of allegedly unsightly material.
13 Sept 1998	Tankard fails to comply with the Notice to Comply.
16 Sept 1998	Tankard writes to Melton Shire regarding Notice to Comply.
18 Sept 1998	Melton Shire letter to Tankard stating that matters are being investigated.
29 Sept 1998	Melton Shire writes to Tankard agreeing to extend the time for complying with the Notice to Comply.
8 October 1998	First Tankard letter addressed to "the 3 Commissioners of the Shire of Melton".
9 October 1998	First Tankard letter received at Shire Office.
20 October 1998	A Notice to Comply is served on Tankard's neighbours, Mr and Mrs Slater, requiring them to remove various items from their property.
2 November 1998	Melton Shire issues Complaint against Tankard re $3,195.00 cost of tidying up his

property referable to the Notice to Comply.
18 Dec 1998 Tankard files a Defence and Counterclaim to the Magistrates' Court Complaint.
17 June 1999 Melton Shire's Complaint dismissed. Tankard's Counterclaim not pursued.
22 Nov 1999 Melton Shire appeals the Magistrate's decision to Supreme Court. The appeal is dismissed by Mandie J on the basis the Notice to Comply was not valid.
25 June 2001 Shire of Melton's further appeal to the Court of Appeal is dismissed on the basis the Notice to Comply was not valid.
20 Nov 2001 Melton Shire serves a Fire Prevention Notice on Mr and Mrs Slater.
2 December 2001 Second Tankard letter addressed to "The Manager of the Shire of Melton", written on behalf of Mr and Mrs Slater in relation to the Fire Prevention Notice, handed to the Shire receptionist.
Early 2002 Melton Shire engages in public consultation in respect of proposed changes to the Local Law.
23 June 2002 Third Tankard letter addressed to "Neville Smith CEO Shire of Melton" in response in the proposed amendments to the Local Law handed to the Melton Shire receptionist.
9 August 2002 Mr Smith of Melton Shire responds to Third Tankard letter objecting to what Tankard said about Chafer.

17. Mr Chafer instituted his proceeding in the Magistrates' Court on 30 April 2003. The orders the subject of this appeal were made by the Magistrate on 19 December 2003. Mr Chafer's solicitors have sought to enforce the orders made by a warrant of seizure and sale which was registered in this Court, resulting in the sheriff taking steps to sell Mr Tankard's property. Mr Tankard has taken steps to stay the warrant and at present the sale has not taken place.

18. It can be seen from the above agreed facts that this Court does not have the evidence of any witness. Nor does the Court have the reasons for judgment.

Qualified Privilege and Malice

19. The learned Magistrate referred to the High Court decision of *Roberts v Bass*[5] and the Court of Appeal decision of *The Herald and Weekly Times Limited & Bolt v Popovic*.[6]

20. In *Roberts v Bass*, in the joint judgment of Gaudron, McHugh and Gummow JJ, their Honours referred to a general definition of qualified privilege.[7] The Magistrate referred to what their Honours said. Under the heading of "Malice" their Honours exhaustively considered the principles of law that apply to the issue of malice.[8] The Magistrate made reference to observations made by their Honours.

21. The Magistrate then dealt with the defence of qualified privilege and the issue of malice. It is clear from submissions put to the Magistrate by counsel on behalf of Mr Chafer that there was no contest that each letter was published on an occasion of qualified privilege.

22. The submission provided:

> "The plaintiff concedes that in so far as the relevant letters of the defendant purported to complain about or comment on Shire matters they are *prima facie* the subject of qualified privilege."

23. The description of the occasion is different to what the Magistrate found. Both the submission and the description by the Magistrate overlooked a well established category of qualified privilege, namely, communications concerning the conduct of public officials.[9]

24. The Magistrate said:[10]

> "In relation to the defence of qualified privilege I accept that the nature of the duty or interest that gives rise to the privilege is the right of rate payers to publish to the Shire matters relating to land use. I note Mr Tankard's frank acknowledgement in evidence that he sought the sacking of Mr Chafer by his correspondence. In my opinion such evidence constitutes an improper motive. The advocating of the termination of Mr Chafer was a purpose foreign to the occasion that gave the publication the protection of qualified privilege. The personal attack on Mr Chafer in the third letter which was purportedly dealing with local law reform proposals, was also evidence of improper motive. In my opinion the use by Mr Tankard of the words complained of is reckless, in that there was no evidence as to the accuracy and that Mr Tankard was indifferent to their possible harmful consequences to Mr Chafer's reputation. When taken in combination with the evidence of Mr Tankard that the purpose of the correspondence was the sacking of Mr Chafer, in my opinion, malice is established and the defence of qualified privilege defeated."

25. It is observed that the Magistrate has dealt with the defence of qualified privilege and the issue of malice in respect of the three letters. In my opinion his approach was wrong. He was bound to consider the defence in respect to each letter as each letter constituted a separate cause of action, and more importantly, because it was conceded that each letter was published on a privileged occasion, it was necessary to determine in respect to each letter whether at the time of publication Mr Tankard was actuated by malice. This involved a consideration of the nature and purpose of the privilege, the contents of the letter and all the surrounding circumstances before and after publication which bore on Mr Tankard's motive at the time of publication. This involves Mr Tankard's state of mind at the relevant time, being the date of publication of the particular letter.

26. His Honour's reasoning can be summarised –

(i) There was a common interest or a duty existing between a rate payer and the Shire concerning land use and hence the communications were published on occasions protected by qualified privilege.
(ii) Mr Tankard's statement that he sought the sacking of Mr Chafer by his correspondence showed that the communication was for an improper motive.
(iii) The advocating of termination of his employment was a purpose foreign to the occasion.
(iv) The personal attack in the third letter purportedly dealing with local law reforms was also evidence of improper motive.
(v) Mr Tankard's use of the words complained of was reckless, there was no evidence as to the accuracy of what he stated, he was indifferent to the possible harmful consequences to Mr Chafer's reputation and when taken in combination the purpose of the correspondence was to have Mr Chafer sacked, malice had been established and the defence of qualified privilege defeated.

27. The qualified privilege defence and the reply of malice required a two step consideration and determination in respect to each cause of action. First, in respect of each communication, was it made on an occasion of qualified privilege? This is a question of law and the burden is on the defendant.

28. The second step is, assuming the communication was made on an occasion of qualified privilege, was the defence defeated by proof of actual malice? This is a question of fact. The burden is on the plaintiff.

29. As already noted, the Magistrate did not deal with each cause of action separately. However, this error is not the subject of a question of law. The first question of law accepts that the occasion of each publication was the subject of qualified privilege and raises the issue whether Mr Tankard's statement in evidence that he wished to have Mr Chafer sacked was evidence of malice which defeated the defence in respect to each publication. Although the parties informed the Court that it was their belief that Mr Tankard had expressed in his letters the wish to have Mr Chafer dismissed, a careful consideration of each of the letters did not bear this out. It is clear that Mr Tankard in each letter was critical of Mr Chafer, and did raise questions as to his suitability to perform his job as Local Laws Manager. In the first letter, which was in response to an earlier Shire letter, and in the context of saying Mr Chafer "and those who incite him" did not have a legal basis to act, Mr Tankard went on to write:

> "You mention 'accusations and ill-founded statements', thus already exhibiting a defensive bias to protect those who deserve dismissal. The total spill of councils leading to your appointment was for the purpose of reorganising the municipal structure."

30. I interpolate to note that the letter was sent to one of the Commissioners of the Shire. There was no statement in any of the letters that he demanded the dismissal of Mr Chafer, but he did raise issues of whether Mr Chafer should be the Local Laws Manager.

31. However, the Magistrate relied upon what Mr Tankard said in evidence to that effect.

Points of Law

32. At the outset, it is necessary to briefly summarise the letters.

33. The first letter, dated 8 October 1998, was addressed to the three Commissioners of the Shire of Melton. At that time the three Commissioners were in charge of the Shire. It is alleged in the particulars of claim that there were three portions of the letter which were defamatory of the plaintiff.

34. The first letter was written shortly after Mr Tankard had received the Notice to Comply. The Notice to Comply was signed by Mr Chafer. He was the authorised officer and expressed his opinion that Mr Tankard had committed a breach of Local Laws by occupying unsightly and dangerous premises. The notice required Mr Tankard within 30 days to perform a number of tasks including removing stock piles of glass bottles, unregistered motor vehicles and other rubbish. The letter was a reply to a letter written by one of the Commissioners dated 29 September 1998. The latter letter is not before the Court, but according to the agreed facts that letter agreed to extend time for Mr Tankard to comply with the notice to remove the rubbish et cetera. Mr Tankard's letter was handwritten and comprised 68 pages. It covered a number of topics, but in the main dealt with the issue of whether Mr Tankard was required to comply with the notice, raised the questions of its legality, and questioned the opinion of Mr Chafer as to whether the state of Mr Tankard's premises was a breach of the Shire's Local Law. The front sheet to the letter contained a photostat copy of an extract from a local paper where it was said:

> "Melton Shire rate payers can now expect the highest standards of customer service in all areas of council operations. Council recently adopted a series of customer service charters guaranteeing a professional, efficient and responsive service."

35. Mr Tankard noted next to the photostat the following:
"CONGRATULATIONS on establishing the largest industry in Melton yet
THE CUSTOMER COMPLAINTS SERVICE".

36. On the first page Mr Tankard made clear the purpose of his letter. He wrote:

> "An individualist like myself is not going to be an Aunt Sally to municipal bigotry that does not have a legal basis. Because Mr Chafer, and those who incite him, don't have legal basis for their demands, I am not required to act. As a mature adult, I decide my priorities and values that don't harm others. You mention, 'accusations and ill-found statements', thus already exhibiting a defensive bias to protect those who deserve dismissal. The total spill of councils leading to your appointment was for the purpose of reorganising the municipal structure."

37. He then, on the following pages, set out what he described as "abstract of its contents" which was an index of the topics he discussed in the letter. In my opinion, the index and the contents of the letter show Mr Tankard is a person who was concerned about the demands made upon him by the Notice to Comply. He raised questions as to its legality, and also raised questions as to what he described as the "illegalities and injustices inflicted on me". He dealt specifically with drainage and weed problems allegedly created by council action and inaction, and raised the failure of the Shire and its officers to perform their public duties. In addition to criticising Mr Chafer, Mr Tankard also criticised other officers of the Shire. He did, in my opinion, raise the question of their suitability for office and whether they deserved dismissal. He made the point that since he was a rate payer he had the right "like a shareholder (to) possess the right to applaud or deride or go beyond." He then observed:

> "You as Commissioners are not being blasted from A to Z, but chiefly as to not keeping your staff accountable for their often untrained and unprincipled actions."

38. He criticised Mr Chafer not only in respect of the Notice to Comply but also because he had failed to take certain steps in relation to the cutting of the grass outside his premises, which he asserted was a matter for the Shire.

39. The letter was long, rambling, in parts was offensive, ridiculing and critical, but nevertheless was a letter by a rate payer to the Commissioners of the Shire raising matters which clearly were relevant to the Commissioners' role and raising questions of the suitability of certain Shire employees, including Mr Chafer. In my view, on a fair reading the document does raise the question whether or not the Commissioners should determine whether the officers should be dismissed.

40. Mr Tankard concluded his letter by asking a series of questions under the heading: "SALIENT ISSUES NEEDING ADDRESSING". The first question under the heading "LOCAL LAW 1 – NOTICE TO COMPLY" was as follows:

> "Q.1 How can you justify the employment of Mr Chafer in the general role of harassing, prosecuting and threatening seizures and destructions of property – when the man is a bully in approach and an ignoramus at law?"

41. Although that was expressed as a question, much of what preceded the question did identify factual matters alleging that Mr Chafer adopted a certain approach and that he was ignorant of the law. It is noted that Mr Tankard also raised questions in relation to other employees. He also raised the question as to whether the Commissioners "maintain spot checks of staff in relation to their knowledge of the laws that control their performances?"

42. On a proper reading, Mr Tankard raised questions as to Mr Chafer's understanding of his duties of office, alleged that he had been derelict in the performance of his duties, alleged that he was a man of questionable character and did seriously raise the question whether he was a fit and proper person to hold the position of Local Laws Manager. The thrust of the letter leads to the conclusion that Mr Tankard was raising the serious question for the Commissioners of whether Mr Chafer should have been permitted to remain in his office.

43. The second cause of action was alleged to have arisen out of a letter written by Mr Tankard, dated 2 December 2001, some three years after the first letter and sent to the General Manager of the Shire of Melton. Six parts of the letter were identified in the particulars of claim as being defamatory.

44. This letter has to be considered in its setting. There had been a long and drawn out battle involving the Notice to Comply. Mr Tankard had had some success. The Shire issued a complaint against Mr Tankard to recover the cost of cleaning up his property, and it was dismissed. The Shire appealed to the Supreme Court and the appeal was dismissed by Mandie J on the basis the notice was not valid. The Shire further appealed to the Court of Appeal and the appeal was dismissed for the same reason; the notice was not valid. This letter was written by Mr Tankard on behalf of a Mr and Mrs J. Slater who authorised the letter. It was addressed to the Manager of the Shire of Melton. It was a letter written in response to the service of a Fire Prevention Notice on Mr and Mrs Slater dated 20 November 2001. Mr and Mrs Slater are aged in their eighties, have limited education and both are frail. Both signed each page of the letter. A further fact must be noted.

45. Back in October 1998 a Notice to Comply was served on Mr and Mrs Slater, who resided near Mr Tankard, requiring them to remove various items from their property. The Shire took steps to clean up their property. The Slaters were subsequently sued and a judgment in the sum of about $86,000 was entered against them. This was subsequently set aside by consent. The purpose of the letter appeared on page 1 and was expressed to be:

> "The reason for writing to you, is that you are responsible for the control and supervision of staff/ contractors below you to ensure they obey the law."

46. The letter set out in some detail the legal encounters involving the Slaters and the Shire, which also involved Mr Chafer. The letter then went on to deal with the Fire Prevention Notice which had been served upon the Slaters. Mr Tankard, on behalf of the Slaters, argued that the notice was invalid and criticised Mr Chafer for his carelessness. Mr Tankard referred to a variety of statutes and laws and raised the question of Mr Chafer's suitability as Local Laws Manager. He again raised matters which allegedly related to Mr Chafer failing to do certain things concerning a number of horses that appeared to be needing attention. It is clear from the words under the heading "IN RETROSPECT" that the letter on behalf of the Slaters was fuelled to some extent by the history of the earlier dispute between the Slaters and the Shire concerning the Notice to Comply. Under the heading of "Abuse of the process" Mr Tankard wrote:

> "By targeting Mr Slater, and failing to control Mr Chafer, apparently all your fire prevention notices are invalid, which is a pity, because surely some are deserved. However Mr Chafer doesn't create any inspiration by his roadside activities and blockheadedness to the rights of others. An encouraging smile achieves far more than a savage bark."

47. Mr Tankard then attached to the letter an index and a number of documents. He also attached photostat copies of portions of Regulations and an Act.

48. The letter comprised some 25 pages, including the attachments, and the handwritten portion comprised 14 pages. Like the first letter, it rambled to some extent, and at times the wording was offensive, challenging and extremely critical. But the letter did raise queries on

behalf of the Slaters about the validity of the Fire Prevention Notice, queries about Mr Chafer's suitability for office, questions as to the legality of certain steps taken by Mr Chafer and others, and exhorted the addressee as a person being responsible for the control and supervision of staff to ensure they obeyed the law.

49. The third cause of action is based upon a letter dated 6 June 2002, sent by Mr Tankard to the Chief Executive Officer of the Shire. Six parts of the letter are relied upon as being defamatory of Mr Chafer. This letter was sent after the Shire, in early 2002, engaged in public consultation in respect to proposed changes to the Local Law. That was made clear by the first sentence of the letter which read under the heading "SUBJECT" as follows:

> "A sustained objection to the proposed amendments to Local Law 1 (4 Clauses) on the bases of – ".

50. The first basis was expressed to be:

> "(a) its prior operation against the lawful well-being on myself and Mr Jim Slater."

51. The bases included the observation that "the amendments being just so superficial, so as to retain all the flaws" and also a challenge that there had been a failure to pay heed to Mr Tankard's arguments on law and administration in his 1998 long letter to the Commissioners. Other objections were:

> "(m) the retention of the expression 'Opinion of an Authorised Officer' that brings a solo predominant grotesque image".
>
> (n) The obliviousness of yourself, management and councillors that in my opinion this person has a serious psychopathic disorder, to an extent for it to be observable by lay persons – this matter was addressed in the 80 page letter ...".

52. The references were clearly to Mr Chafer. One other subject of the objection was "the non-curbing – or rather re-endorsement and encouragement of the repetition of the 1998 spree of a single man unleashed upon chosen victims without regard to law, delegation, ethics or morals". On page 3 Mr Tankard stated that the letter was not an attack upon the present Councillors or Managers but was a serious article to educate them as to the concerns, and it challenged the CEO to study the court cases which, it was asserted, were "caused by the opinion of a single man". Mr Tankard then dealt with the legal aspects of the four amendments, made criticisms of them and returned to criticising Mr Chafer's actions against him and Mr Slater. He tabulated the court cases and noted that the origin of the cases was based upon the opinion of Mr John Chafer. In the following pages Mr Tankard attacked the activities and non-activities of Mr Chafer, the costs involved and then, over seven closely written pages, did an analysis of Mr Chafer and asserted, "Mr Chafer suffers from a psychopathic infliction known as narcissism, which is basically is excessive craving for ego satisfaction, or an obsession for centrafacation of attention." Mr Tankard then referred to the conduct of Mr Chafer and also to a chapter of a textbook on character formation and self-development.

53. Mr Tankard on the last page concluded in summary form the purpose of the letter. He noted that he had attacked the "flimsy bandaid amendments" and noted that they did not overcome the flaws "the worst of which is leaving anything to the opinion of Mr Chafer". He further criticised the administration and asserted that the letter was not written with hostility "but with the concern and seriousness of somebody who has experienced and survived as yet, a sequence of municipal assaults."

54. The letter, like the other two, was written in a hard hitting, critical style, at times was offensive and challenging, and spent considerable time criticising Mr Chafer. The criticisms of Mr Chafer are substantial and serious. On a fair reading Mr Tankard alleges that Mr Chafer acts with improper motives in the performance of his office, that he is ignorant of his duties, derelict, incompetent, is not a fit and proper person to hold the position as Local Laws Manager, and suffers from a mental illness.

55. The letter set out to respond to proposed amendments to the local laws, and it sought to expose weaknesses but spent considerable time attacking Mr Chafer's alleged mental state.

56. In my opinion, each of the letters was written on an occasion of qualified privilege. This was conceded by Mr Chafer's counsel and so found by the Magistrate.

57. The Magistrate, dealing with the three letters together, held that the privileged occasion was "the right of rate payers to publish to the Shire matters relating to land use". Construed liberally it would embrace any matters relating to land use, which would include questions and criticisms concerning officials performing public duties in respect to land matters, raised with the Shire which employed them. This is a well-recognised category of qualified privilege. However, it is clear from the context that the Magistrate confined the privilege to "matters relating to land use" which did not include raising issues as to the competence and suitability of the Shire's staff in relation to land use, and whether they should be dismissed. This, in my opinion, led the Magistrate into error. Having made that observation he then considered the issue of malice. "An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and actuates the making of a statement is called express malice."[11]

58. The Magistrate said that to call for the sacking of Mr Chafer was evidence of an improper motive. He re-asserted that by noting that the advocating of the dismissal was a purpose foreign to the occasion. Further, he held that the personal attack on Mr Chafer in the third letter was evidence of improper motive. These observations were central to the Magistrate finding that the defence had been defeated by malice. When the purpose of the occasion which is protected by qualified privilege is properly defined, it cannot be said that to question the conduct of a public official, and to raise doubts about his suitability for office raising the question whether he should continue to be employed in that office, is not a purpose or motive foreign to the duty or interest that protects the making of the statement. In my opinion, the Magistrate misdirected himself on the question of malice and his finding must be set aside. The Magistrate also relied upon other evidence of malice, namely, that Mr Tankard was reckless in the use of the words "complained of", that there was no evidence as to their accuracy, and that he was indifferent to the possible harmful consequences to Mr Chafer's reputation. Nevertheless it is clear that the Magistrate placed great weight on what he described as evidence of "an improper motive". In the circumstances his other findings of evidence of malice cannot support his finding, especially as he did not consider malice in respect to each of the separate causes of action.

59. Mr Tankard had the burden of proving that the occasion of publication was protected by qualified privilege. He established the defence in respect to each publication. Whether or not an occasion is one of qualified privilege is a question of law. The principles have been developed by the common law based upon a broad general principle that the common convenience and welfare of society or a general interest of society demands that certain communications should be protected. The circumstances that may constitute a privileged occasion cannot be catalogued. Reference to the well-known text books shows categories of occasions of privileged communication, but the categories are not closed. See *Perera v Peiris*.[12] The classic statement of the law concerning qualified privilege was stated by Parke B in *Toogood v Spyring*.[13]

60. There are three broad categories of qualified privilege at common law, namely:

> (i) where there is a duty, legal, social or moral, resting on the publisher to publish the defamatory words to a publishee who has an interest or a duty in receiving them;
>
> (ii) where the publisher in legitimate defence of his own interest publishes the defamatory words to a publishee who has an interest or duty in receiving them;
>
> (iii) where the publisher has an interest which corresponds with the interest of the publishee – that is community of interest.

61. It is essential to establish the necessary reciprocity between the publisher and the publishee. Whether a publisher is under a duty was stated by Lindley LJ in *Stuart v Bell*[14] where his Lordship said:

> "Would the great mass of right-minded men in the position of the defendant have considered it their duty under the circumstances to make the communication?"

62. Higgins J in *Howe v Lees*[15] defined interest as:[16]

> "It is used in the broadest popular sense, as when we say that a man is interested in knowing a fact – not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news."

63. As I have stated, reference to the well-known text books illustrates categories of occasions where qualified privilege has been established. I have referred to them above.[17] An example of a communication concerning a public official is *Mann v O'Neill*[18] where it was accepted that letters to the Federal Attorney-General and Minister of Justice complaining that the plaintiff as special magistrate was suffering from senile dementia were the subject of qualified privilege. The public official category is described in the 5th edition of *Odgers on Libel and Slander* as follows:[19]

> "Every communication made with a view to obtain redress for some injury received, or to prevent some public abuse, is privileged, if it be published only to persons who had jurisdiction to entertain the complaint, or power to redress the grievance, or some duty or interest in connection with it."

64. The learned author notes[20] that it is the duty of all who witness any misconduct on the part of, amongst others, any public officer, to bring such misconduct to the notice of those whose duty it is to enquire into it and if necessary take steps. It is also noted that if the publisher is a person who has been immediately affected by the alleged misconduct, privilege can also be claimed on an occasion where publication is made to explain the effect upon the publisher. In other words, it is accepted that the publisher is acting in self-defence of his own interest. The learned author gives examples of complaints made which were privileged.[21] By way of example, a letter sent to the Post Master General complaining of the misconduct of a post master is privileged if it was written as a *bona fide* complaint to obtain redress for a grievance that the publisher really believed he had suffered. It was observed in the cases that the particular expressions are not to be too strictly scrutinised if the intention of the defendant was *bona fide*.[22] In *Proctor v Webster*[23] the publisher addressed a letter to the body responsible, alleging that a sanitary inspector was corrupt and guilty of misconduct in his office, and it was held that no action lay without proof of malice. In *Harrison v Bush*[24] the defendant petitioned the Home Secretary stating that a magistrate had made speeches inciting a breach of the peace, requesting an inquiry and that the Home Secretary should remove the plaintiff. It was held the petition was privileged. There are other cases which clearly demonstrate the well-established category of qualified privilege where complaints are made to the proper authority about public officials, persons carrying out statutory powers, persons with responsibilities towards the public and the right of a citizen who is the subject of action by a public official to take steps to defend himself by communicating to the person responsible for the public official.

65. In my opinion, it was these categories of qualified privilege which protected each of the communications by Mr Tankard. By narrowly confining the privileged occasion as the Magistrate did, he fell into error by concluding that calling for Mr Chafer's dismissal was irrelevant to the occasion and hence was evidence of improper motive. The fitness of Mr Chafer for office as Local Laws Manager was clearly germane and relevant to the privileged occasion when properly defined.

66. The Magistrate placed reliance upon his finding that the avowed acknowledgment that Mr Tankard sought Mr Chafer's dismissal constituted improper motive. This raises the question of the communication of what appears to be an irrelevant matter on an occasion of qualified privilege. In *Adam v Ward*[25] it was held that the publication of something which was irrelevant to the subject matter of the privileged occasion was not covered by the privilege. But it is necessary to approach that rule with caution. Whether something is relevant or irrelevant to the privileged occasion is a matter that should not be weighed in nice scales. In *Horrocks v Lowe*,[26] Lord Diplock stated the test as follows:[27]

> "As regards the irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, by believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive."

67. As the High Court said in *Bellino v ABC*[28] the qualified privilege only attaches to that part

which is relevant to the privileged occasion. However, the inclusion of an irrelevant part may provide some evidence of malice.

68. It can be seen that there may be a fine line between what is germane to the subject matter and what is completely irrelevant. However, if there is real doubt as to relevancy, it is clear that the use of an occasion to introduce what appears to be irrelevant matters to the subject of the privileged occasion can amount to evidence of malice. In my opinion, the attack upon Mr Chafer in each communication seemed to be germane to the subject matter of each communication. On the other hand it would be open to Mr Chafer to argue on the question of malice that some of the observations made in the last letter were tenuous at best to the relevant subject matter of the communication and amounted to some evidence of malice.

69. In considering the question of malice, the first step in the consideration is to determine the nature and extent of the privilege on the occasion of the publication. Malice is to be determined as at the date of publication. This is the real issue in the proceeding and is a matter that must now be determined.

70. The law concerning malice has been exhaustively summarised in *Roberts v Bass* in the judgment of Gaudron, McHugh and Gummow JJ.[29] These principles will guide the Court when determining whether or not Mr Chafer has proven malice to defeat the defence of qualified privilege.

71. At this point, it is appropriate to make a number of observations. First, it is necessary to identify the nature and extent of privileged occasion so that the court can determine what is relevant and germane to the occasion. Secondly, the court must consider the question of malice at the date of publication of each letter. Accordingly, the court could reach the conclusion that malice has been established with respect to the third letter but not the first two letters. Thirdly, the cases show that malice is not easy to establish. The facts in the cases of *Horrocks v Lowe*,[30] *Caldwell v Ipec*[31] and *Duane v Granrott*[32] are examples suggesting actual malice yet the court or the jury held that there was no malice.

72. Fourthly, evidence of malice is divided into two categories. They are intrinsic evidence and extrinsic evidence. The intrinsic evidence is found in the language used by the publisher and may provide evidence that at the relevant time he was actuated by malice. However, a wide latitude is allowed in the choice of words used. "At common law it has been repeatedly said that a court should not be quick to find evidence of malice in the terms of defamatory material published on a privileged occasion <u>because so to do would restrict considerably, if not defeat, the protection which the law confers on privileged occasions</u>. It has been said where the words are utterly disproportionate to the facts, this amounts to evidence of malice, presumably on the footing that the extremity and exaggeration of language is explicable only by reference to the existence of ill-will in the defendant, <u>but it does not suggest a defendant is confined to saying what is strictly necessary to the occasion</u> … Nonetheless it is impossible to formulate a precise and illuminating criterion which will separate those publications which furnish extrinsic evidence of ill-will from those which do not".[33] (Emphases added).

73. One has to be careful to not infer malice because the words used are exaggerated, hard hitting, spiteful or harsh. "In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of a private injury."[34]

74. Finally, extrinsic evidence is any evidence as to the state of mind of the publisher showing that he was actuated by express malice at the time of publication.

75. The evidence would include circumstances of the publication, evidence of the publisher's conduct on other occasions, the conduct of the publisher during the period of the litigation and any evidence of improper motive or lack of honest belief.

76. Because the Magistrate misdirected himself on the issue of malice, the orders must be set aside. Before I state what should be done in this appeal, I wish to make brief comments on the other two points of law raised.

Interest on judgment

77. The Magistrate ordered Mr Tankard to pay $22,819.70 interest on the damages awarded. It appears from the calculation sheets handed to Mr Tankard that interest was calculated from the date of the first letter. It appears that Mr Chafer's counsel claimed that interest was to be awarded from the date of publication of the defamatory matter until the date of judgment. Reference was made to *David Syme & Co Ltd v Mather*[35] and *John Fairfax v Kelly*.[36] The first case makes no mention of such a principle and the second case was based upon a New South Wales Act which provided for interest from the date when the cause of action accrued. That is not the law in this State. Section 100(7) of the *Magistrates' Court Act* deals with interest on the judgment debt from the time the order was made but not before. The jurisdiction to award damages in the nature of interest on an order made for damages in the Magistrates' Court is given by s33 of the *Supreme Court Act* 1986. The section provides that the rules of law enacted in Part 5 of that Act apply to inferior courts and accordingly ss58-60 of the *Supreme Court Act* apply to the Magistrates' Court. Section 60(1) requires the Court to award damages in the nature of interest from the commencement of the proceeding until judgment. Interest is awarded from the commencement of the proceeding, and the Court must fix the rate of interest, which must not exceed the rate fixed from time to time under the *Penalty Interest Rates Act* 1983. It is noted that there is a penalty component which in most cases is applied but there may be exceptions where it would be unjust to impose the penalty. The purpose of the penalty is to encourage settlement. The order made was wrong. Interest should have been calculated from the date the proceeding was commenced.

Costs

78. Mr Tankard has alleged that he was denied natural justice on the question of costs. It is unnecessary for the Court to answer this point of law. However, I wish to make some observations about the costs order. It appears that when the reasons were given, counsel for Mr Chafer asked for costs. A number of sheets of calculations were handed to Mr Tankard and the Court. The calculations set out the items and the amounts claimed in accordance with the *Magistrates' Court Civil Procedure Scale*. Item 21 dealt with counsel's brief fee which in respect to the scale up to $40,000 was $1,311. The brief fee covered the first six hours of hearing. The costs scale fixed the sum of $872 for every six hours at court thereafter. The sheets then sought the following:

> "Add loadings in accordance with Supreme Court and County Court practice:
> Counsel's fees at $2,700 per day X 10 = $27,000.

79. Evidently the Magistrate in his discretion acceded to that submission and awarded the sum of $2,700 a day but also allowed the original brief fee of $1,311 and $872 for each day. It followed that the brief fee was allowed at $4,011 plus refreshers of $3,572. The point of law does not attack the costs order made but raises the question of the denial of natural justice. Evidence was placed before this Court which makes it extremely difficult to determine what happened which led to these costs orders for counsel's fees. It was asserted from the Bar table that there was an offer of compromise made by Mr Chafer but that was not placed before this Court. There is no evidence that the Magistrate pointed out to Mr Tankard that the application to order counsel's fees, in effect nearly four times the scale costs, was an unusual application and the Magistrate would have been assisted by Mr Tankard making submissions. Because there is inadequate material I do not wish to say anything more about the question. However, I wish to make a number of general observations about the fees. Order 26 of the *Magistrates' Court Rules* requires the court to fix the costs of any complaint on the day the complaint is heard and determined.[37] Rule 26.02(1) requires the court to fix the costs in accordance with the scale of costs being Appendix A to the Rules. That paragraph lays down the general rule that must be complied with. The scale costs are determined and fixed, and when parties go to court a plaintiff expects to recover those costs if successful and an unsuccessful defendant expects that the costs will be fixed in accordance with the scale. There is power under Rule 26.02(2) for the court if it thinks "that any item in the scale is inadequate or excessive", to allow a greater or lesser sum than the scale provides. Counsels' fees are fixed in the Rules as a proper remuneration to counsel for preparation and appearance which is involved in the brief fee and the subsequent refresher fee. If a party wishes to engage counsel who charges above the scale fee, that is a right that the party has but the exercise of that right does not impose an obligation upon the unsuccessful party to pay that barrister's fee. An item in the scale may be inadequate taking into account the complexity of the case. The complexity may arise because of the law or the facts or both.[38] The magistrate must make some assessment of the time that would be involved by counsel in preparing the brief for hearing. But the brief

fee includes the preparation by counsel. Counsel as a general rule should not be paid more for learning the law which he or she should know. As a general rule, the Magistrates' Court should be slow to increase the scale fees because the court thinks the item is inadequate. The scale costs and fees should be the norm. To counsel unfamiliar with the law of defamation, a defamation proceeding will require more time to prepare. On the other hand, experienced counsel in the field would spend less time. But it is not a basis for increasing the inexperienced counsel's fee because he or she had to spend more time researching the law and preparing the case. The Magistrates' Court is the court in this state dealing with claims of lesser monetary value than in the higher courts, and the costs should not be at a level which deters litigants. Further, defendants defend proceedings in the expectation that the costs will be determined in accordance with the scale of costs. I have difficulty in accepting that it was reasonable in this proceeding for the Magistrate to order that Mr Tankard should pay Mr Chafer's counsel the sum of $4,011 brief fee and a daily fee thereafter of $3,572. The proceeding was not heard in the County Court or the Supreme Court. The fees were incurred in a Magistrates' Court proceeding. I should add that if there was an offer of compromise by Mr Chafer which was less than the amount ordered, it is still difficult to accept that the order for counsel's fees was a proper order.

Remit to Magistrates' Court

80. On an appeal from a decision of the Magistrates' Court, this Court has wide powers as to the outcome of the appeal.[39] This Court may make "such order as it thinks appropriate". In my opinion, the Court should strive on a successful appeal to finalise the proceeding as expeditiously and as inexpensively as can be achieved, consistent with the dictates of justice. The effect of setting aside the orders for damages, interest and costs, leaves the questions of malice defeating the defence of qualified privilege in respect of each communication, and if Mr Chafer is successful, the assessment of damages in respect of each cause of action which has succeeded, to be determined. As the Magistrate did not deal with each cause of action separately, it is impossible to say what amount of damages was attributable to each communication. In addition, the Magistrate awarded aggravated damages but did not specify what proportion of the damages was increased by aggravation. In the course of this appeal, the Court raised with counsel the possibility of the parties agreeing on the amount of damages in relation to each cause of action.

81. This Court cannot determine the issues of malice, and if successful, the amount of damages. The proceeding was heard over nine days and the Magistrate heard from a number of witnesses. There is no transcript of that evidence before this Court. Even taking into account the findings made by the Magistrate, it is impossible for this Court to determine the issue of actual malice in relation to each publication. Accordingly, it is necessary to remit the proceeding back to the Magistrates' Court. This proceeding to date has resulted in substantial legal costs, and the Court should strive to minimise any further court proceedings consistent with the dictates of justice. However, the matter has to be remitted for further consideration by a magistrate. The Court has requested the parties to agree on the amount of damages in respect to each cause of action. If that cannot be agreed, then it will be necessary for the Magistrates' Court to determine the question of malice and, if Mr Chafer is successful in respect to any cause of action, the assessment of the damages.

82. The Court discussed with counsel the question of remitting the matter back to the Magistrate who heard the proceeding. Counsel for Mr Chafer submitted that the Court should do this in order to avoid a further protracted hearing, whereas counsel for Mr Tankard opposed the course. A number of issues arose. The first and most pressing is whether the Magistrate would be in a position, based upon memory, his notes (if he has retained them), the exhibits, and his reasons, to be able to make a determination in accordance with the law after hearing submissions from the parties. In order to determine whether the Magistrate could discharge his duty the Court requested the Magistrate to furnish a report pursuant to Rule 58.14 of the Rules of this Court. The Magistrate furnished a report and he informed the Court that he was not confident that his memory or notes were "sufficiently reliable to consider the issue of malice on the evidence that has already been given." My provisional view is that the proceeding should be remitted to another magistrate, but I will give the parties the opportunity to further address me on the topic. If that outcome is adopted it avoids the Court grappling with the difficult question of remitting the proceeding to the Magistrate and whether this is fair in the circumstances. The perception of justice is as important as justice actually being done. There was an argument that because the Magistrate had awarded interest which was contrary to the law and arguably awarded far

too much for counsels' fees with a real probability that he mistakenly doubled up the fee, there was the perception that Mr Tankard may not have received a fair go. I am not for one minute suggesting that that be so, but it is the perception which is the important element rather than the reality when deciding what course to follow.

83. It therefore follows that subject to further argument the proceeding will have to be remitted back to a different magistrate to decide whether or not at the relevant time Mr Tankard was actuated by malice in respect to each cause of action. Each side will be at liberty to place evidence before the Court on the question. I would encourage them to agree on the evidence which has been given to date on the issue and the findings of the Magistrate which are relevant. An order will be made that the proceeding be remitted to the Magistrates' Court to decide the outstanding issues in accordance with the reasons for judgment. I will hear the parties on the form of order. Hopefully the parties can agree on the question of damages so that the issue is confined to the question of malice. Further, I will hear the parties on the question of costs of the appeal and the costs of the earlier proceeding.

84. Subject to any submissions I propose to make the following orders on this appeal:

(i) That the appeal be allowed.
(ii) That the orders made by Magistrate Barrett on 19 December 2003 of $40,000 damages, damages in the nature of interest and costs, be set aside.
(iii) That the proceeding be remitted to the Magistrates' Court for further hearing by a different magistrate to determine the outstanding issues as a result of the appeal, namely the issues of malice and damages.
(iv) That the plaintiff-respondent pay the appellant-defendant's costs of this appeal including reserved costs.
(v) That the costs of the proceeding before Magistrate Barrett in November/December 2003 be costs to be determined by the magistrate hearing the remitted proceeding.
(vi) That the respondent to the appeal be granted an indemnity certificate pursuant to s4(1) of the *Appeal Costs Act* 1998.

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[1] See s109(4) and (5).
[2] See S.R. No. 100/2004.
[3] See Rule 58.07.
[4] See proceeding No. 8475 of 2004.
[5] [2002] HCA 57; (2002) 212 CLR 1; (2003) 194 ALR 161; (2002) 77 ALJR 292; [2003] Aust Torts Reports 81-683.
[6] [2003] VSCA 161; (2003) 9 VR 1.
[7] At p26.
[8] At pp30 *et seq*.
[9] See *Gatley on Libel and Slander*, 10th ed. at paragraphs 14.57 – 14.60 and *Odgers on Libel and Slander*, 5th ed. at pages 276 – 280.
[10] At paragraph 63.
[11] Per Gaudron, McHugh and Gummow JJ in *Roberts v Bass*, *supra*, at p30.
[12] [1949] AC 1 at 20.
[13] [1834] EngR 363; (1834) 1 CM and R 181; 149 ER 1044 at 1049.
[14] [1891] 2 QB 341 at 350; (1891) 7 TLR 502.
[15] [1910] HCA 67; (1910) 11 CLR 361; 16 ALR 605; 8 ATR 1.
[16] At 398.
[17] See paragraph 23.
[18] [1997] HCA 28; (1997) 191 CLR 204; (1997) 145 ALR 682; (1997) 71 ALJR 903; [1997] Aust Torts Reports 81-436; (1997) 12 Leg Rep 21.
[19] At p277.
[20] At p276.
[21] At pp277-80
[22] See *Woodward v Lander* [1834] EngR 931; 6 C and P 548; 172 ER 1358.
[23] (1885) 16 QBD 112.
[24] [1855] EngR 41; 5 E and B 344, 119 ER 509.
[25] [1917] AC 309; [1916-17] All ER 157; 86 LJKB 849.
[26] [1975] AC 135.
[27] At p151.
[28] [1996] HCA 47; (1996) 185 CLR 183 at p228; 135 ALR 368; 70 ALJR 387; [1996] Aust Torts Reports 81-377.
[29] *Supra* at pp30 *et seq*.
[30] [1975] AC 135.

[31] [1975] HCA 47; (1975) 135 CLR 321; (1975) 7 ALR 553; 50 ALJR 152.
[32] [1982] VicRp 76; [1982] VR 767 at p788.
[33] per Mason J in *Calwell's case*, *supra* at 332. See also *Pinniger v John Fairfax* 26 ALR 55; (1979) 53 ALJR 691 at 693-4.
[34] Per Willes J in *Huntley v Ward* [1859] EngR 589; (1859) 6 CBNS 514; 144 ER 557.
[35] [1977] VicRp 58; [1977] VR 516.
[36] (1987) 8 NSWLR 131 at 143; [1987] Aust Torts Reports 80-091.
[37] See Rule 26.01.
[38] See *Nicholson v Colonial Mutual Insurance Coy* [1887] VicLawRp 15; (1887) 13 VLR 58 at 64-5.
[39] See s109(6) of the *Magistrates' Court Act* 1989.

APPEARANCES: For the appellant Tankard: Mr C Maxwell QC with Dr K Emerton, counsel. Arnold Bloch Leibler, solicitors. For the respondent Chafer: Mr J Kewley with Mr DC Harrison, counsel. Robert D Taylor and Associates, solicitors.
