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## Gossip We Can Trust: Defamation Law and Non-Fiction

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## GOSSIP WE CAN TRUST: DEFAMATION LAW AND NON-FICTION

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### ABSTRACT

[37] Drawing on two case studies, this article considers the allegation of a disgruntled author: 'Defamation was framed to protect the reputations of 19th-century gentlemen hypocrites'. The first case study considers the litigation over Bob Ellis' unreliable political memoir, *Goodbye Jerusalem*, published by Random House. The second case study focuses upon the litigation over the allegation by *Media Watch* that Richard Carleton had plagiarised a documentary entitled, *Cry From The Grave*. The article considers the meaning of defamatory imputations, the range of defences, and the available remedies. It highlights the competing arguments over the protection of reputation and privacy, artistic expression, and the freedom of speech. This article concludes that defamation law should foster 'gossip we can trust'.

In a recent opinion piece, the gonzo journalist John Birmingham complained that the abuse of defamation law was depriving Australia of legitimate social criticism:

It's the defamation industry. Defamation was framed to protect the reputations of 19<sup>th</sup> century gentlemen hypocrites. It does very well at protecting the reputations of new millennium hypocrites, as well. I'm getting to the point where I don't know if I can keep banging my head against the wall.<sup>2</sup>

Birmingham argued that defamation law was having a pernicious impact upon a number of genres of non-fiction — including biography, journalism, and history. He maintained that there is a need to reform defamation law to promote legitimate social comment and artistic expression.

This article considers the impact of defamation law upon a number of genres of non-fiction in Australia. It provides two contrasting case studies, framing the tension between the protection of reputation, and the need for social and artistic expression.

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<sup>2</sup> John Birmingham, 'He Wrote With A Joint In His Hand', *The Sydney Morning Herald* (Sydney), 26 April 2003; Malcolm Knox, 'Defamation Abuse Has Stifled Criticism: Author', *The Sydney Morning Herald* (Sydney), 26 April 2003.

[38] The first case study considers the infamous ACT Supreme Court case of *Abbott and Costello v Random House Australia Pty Ltd*.<sup>3</sup> The matter concerned Bob Ellis' unreliable political memoir, *Goodbye Jerusalem*, published by Random House. The study centres on Higgins J's observation that Bob Ellis and Random House laboured under the misapprehension that 'the current norms, likely to be applied by this court, are now those of 19th century ale houses'.<sup>4</sup> This study examines the judicial interpretation of defamatory imputations against the backdrop of 'middle-class morality'.<sup>5</sup> It focuses upon the direct and indirect impact that defamation law had upon a number of works of non-fiction published after the litigation.

The second case study focuses upon a subsequent case that took place in the same court — *Richard Carleton v The Australian Broadcasting Corporation*.<sup>6</sup> The decision has important ramifications for the daily work of journalists in print, radio, and television. This study analyses the allegation by *Media Watch* that Richard Carleton had plagiarised a documentary entitled, *Cry From The Grave*, about the ethnic cleansing and genocide which took place in Srebrenica. It examines the arguments of Channel Nine that the accusations of 'plagiarism' and 'lazy journalism' made in the program *Media Watch* were defamatory. This study reviews the defences of truth, qualified privilege and fair comment, which were raised by the Australian Broadcasting Corporation (ABC). It also considers the costs awarded in this decision, and new remedies available under the *Defamation Act 2001* (ACT).

This article considers the defamation cases within the theoretical framework of the 'law and literature' movement.<sup>7</sup> In particular, it relies upon the work of Anthony Julius, an English lawyer, writer and lecturer who has written extensively about the

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<sup>3</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1; *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224.

<sup>4</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 40.

<sup>5</sup> *Ibid* 40.

<sup>6</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127.

<sup>7</sup> Michael Freeman and Andrew Lewis (eds), *Law and Literature: Current Legal Issues* (1999) vol 2, 499.

relationship between law and culture.<sup>8</sup> In ‘Art Crimes’, Julius suggestively discusses the proclivity of artists to rely upon an ‘aesthetic alibi’ in litigation. He observes:

In prosecutions/civil actions, artist-defendants invariably wish to argue that the criminal/tortious nature of their art work is trumped either by its artistic status and/or its artistic value. These are two versions — relating to ontology and value — of a defence which has been termed ‘the aesthetic alibi’. According to Martin Jay the alibi is deployed to make otherwise objectionable conduct acceptable when part of an aesthetic project. It transforms the proscribed into the permitted: ‘what would be libellous or offensive in everyday life is granted a special dispensation, if it is understood to take place within the protective shield of an aesthetic frame’.<sup>9</sup>

In addition to the aesthetic alibi, Julius notes that plaintiffs are fond invoking arguments about freedom of speech: “‘Art speech’, it was argued, is as much entitled to constitutional protection as “political speech” or “commercial speech””.<sup>10</sup> He also emphasized that art was defended on a number of other grounds — such as estrangement, formalism, and inclusion in a canon. In the *Abbott and Costello Case*, Ellis sought to rely upon this ‘aesthetic alibi’, but to no great avail. The author did not attempt to establish whether his allegations were genuine. In the *Carleton* case, there was a greater emphasis upon the freedom of speech rather than artistic integrity.

[39] This article argues that there is a need to ensure that defamation law can only lightly regulate genres of non-fiction such as biography, journalism, and history. The interplay between law and art is a complex relationship. Given such considerations, defamation law must be carefully applied in the field of artistic practice.<sup>11</sup> David Marr comments:

Gossip is a matter of ethics. I believe there is such a thing as ethical gossip; we call it ‘good gossip’ day to day. Good gossip is accurate. What gives gossip a bad name, I think, is not the betrayal of privacy so much as lies and inaccuracy. One definition, I

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<sup>8</sup> Anthony Julius, *TS Eliot, Anti-Semitism, And The Jewish Form* (1999); Anthony Julius, ‘Art Crimes’ in Michael Freeman and Andrew Lewis (eds), *Law and Literature: Current Legal Issues* (1999) vol 2; Anthony Julius, *Idolizing Pictures: Idolatry, Iconoclasm, and Jewish Art* (2000); and Anthony Julius, *Transgressions: The Offences Of Art* (2002).

<sup>9</sup> Julius, ‘Art Crimes’, *ibid* 499.

<sup>10</sup> Julius, *Transgressions: The Offences Of Art*, above n 8, 26.

<sup>11</sup> Andrew Kenyon, ‘Defamation, Artistic Criticism and Fair Comment’ (1996) 18 *Sydney Law Review* 193.

think, of great biography is gossip we can trust. But biography, contemporary history and gossip are all doing the same thing: trading in privacy.<sup>12</sup>

There is therefore a need to ensure that defamation law can only lightly regulate history and biography. On the one hand, defamation law should not be draconian and harm artistic practice by being too broad and indiscriminate in its application.<sup>13</sup> On the other hand, defamation law should not be so permissive that it allows for the circulation of hate speech. It must play a positive role in guaranteeing the integrity of historical scholarship. A happy medium must be found in which fiction and non-fiction can flourish. To quote David Marr, defamation law must foster 'gossip we can trust'.<sup>14</sup>

### ***Goodbye Jerusalem: Defamatory Law and Biography***

In March 1997, Bob Ellis published a book entitled *Goodbye Jerusalem: Night Thoughts Of A Labor Outsider*. The pen portrait on the dustcover described the author:

He has written and broadcast in all media, and as a film, theatre and television critic, political correspondent, song lyricist, after-dinner speaker, and political candidate against Bronwyn Bishop has achieved in Australian folklore a perhaps enduring name.<sup>15</sup>

The journalist Martin Flanagan provides an insightful portrait of Bob Ellis as a writer:

Bob Ellis writes like a dream. There are no ordinary moments in his writing, no lulls, no excursions into the void, no Waiting for Godot. For Ellis, each moment extends from here to eternity in glorious panavision with Bob Ellis cast within it as the doleful witness, playing, typically, a sort of Nick Carraway to Gough Whitlam's shimmering Gatsby.<sup>16</sup>

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<sup>12</sup> David Marr, 'Only What's Private Matters' (1997) 7(1) *Voices* 36.

<sup>13</sup> Peter Alexander, 'F(l)ame and Glory' (National Biography Award, State Library of New South Wales, 23 March 2002) available at <<http://www.slsw.gov.au/awards/pdf/sess2.pdf>>.

<sup>14</sup> Marr, above n 12, 36.

<sup>15</sup> Bob Ellis, *Goodbye Jerusalem: Night Thoughts Of A Labor Outsider* (1997).

<sup>16</sup> Martin Flanagan, *One Of The Crowd* (1990) 143–5.

However, Flanagan notes that Ellis has not been dutiful to the truth as a journalist. He suggests that the writer is a misapplied talent:

The charitable viewpoint is that Ellis is not a journalist, that in other countries he would not have had to work as one. He is a dramatist: he has a grand design, a sense of two competing forces, Good and Bad, and the single prize in their contest being humankind's collective salvation.<sup>17</sup>

[40] In particular, there has much debate about the accuracy of a number of political memoirs by Bob Ellis — including *Goodbye Jerusalem* and *Goodbye Babylon*. The genre of such work is unstable. As Alex Buzo observes: 'Ellis writes "plessays", dramatic prose pieces that are part-play, part-essay, and specializes in funerals, elections, and conferences'.<sup>18</sup>

At the launch of the book *Goodbye Jerusalem* in March 1997, the former Premier of New South Wales, Neville Wran, said that the book occasionally surprised him with paragraphs that libel lawyers 'might with more wisdom not let through'. Ellis was forced to read out an apology to the ABC journalist, David Spicer, in relation to a misattributed anecdote about Bob Carr hiring Kerry Packer's plane. The apology alerted Christopher Pearson, journalist, editor of the *Adelaide Review* and sometime speechwriter to the Prime Minister John Howard. He found that there was a section in the book which defamed the Federal Treasurer Peter Costello, his wife Tanya, the Liberal politician Tony Abbott and his wife Margaret. Ellis had written the following offending paragraph:

'Abbott and Costello', said Rodney Cavalier, pacing up and down his baronial mansion after serving me for dinner as was his custom bread and water, 'they're both in the Right Wing of the Labor Party till the one woman fucked both of them and married one of them and inducted them into the Young Liberals.'<sup>19</sup>

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<sup>17</sup> Ibid.

<sup>18</sup> Alex Buzo, 'So It Goes, From Gabfest To Grave', *Sydney Morning Herald, Spectrum* (Sydney), 26–27 October 2002, 11.

<sup>19</sup> Ellis, above n 15.

In response, the Costellos and the Abbotts launched a defamation action against the publisher Random House. The trial proceeded on the basis that the anecdote was false — indeed, Rodney Cavalier denied ever having told such a story to Ellis. Justice Higgins of the Supreme Court of the ACT found that the passage contained defamatory imputations, and awarded damages to the Costellos and Abbotts.<sup>20</sup> The Full Court of the Federal Court upheld the judgment, and dismissed an appeal.<sup>21</sup> The most interesting gloss on the trial in the Full Court came from Miles J. Random House was ordered to pay \$277,500 damages to the two couples, as well as substantial legal fees.

The defamation trial became a *cause celebre*, which held the legal system up to fierce comment in the media. David Marr remarked that the case had become a comic spectacle:

What a week of laughter the nation has had over the Ellis case... The wit was terrific — Ellis's one-liners, Bill Hayden's deadpan in the box and Gough Whitlam's cameo appearance to skewer the former governor-general: 'The clowns gave evidence yesterday.' What theatre could command a cast like this? And these famous faces weren't even the main players — the lawyers. Very funny men.<sup>22</sup>

The *Abbott and Costello Case* raised fundamental questions about the meaning of imputations, the award of damages, and the choice of law. It also highlighted policy issues about the protection of reputation, the sanctity of privacy, and freedom of speech. The matter also emphasized what, if any, allowance should be made for aesthetic arguments in this field of law.

### ***Middle Class Morality***

In the trial at first instance, Higgins J relied upon the old adage that 'you can tell a book by its cover' and stressed the circumstances of the publication and promotion of

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<sup>20</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1.

<sup>21</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224.

<sup>22</sup> David Marr, 'The Price Of Honour', *Sydney Morning Herald* (Sydney), 24 October 1998, 35.

the book. His Honour denies that the work has aesthetic merit. In his view, Bob Ellis had no claim to artistic license in relation to a work of non-fiction:

[41] It is also relevant to note that the publisher does not suggest that the work is one of fiction. It is presented as a work of interest, as ‘a portrait of the heart of the True Believers’. It is not presented, therefore, as a serious history of the Labor movement. Nevertheless, the personal anecdotes, the factual accounts of events, though a montage rather than an ordered story, would still be thought by the ordinary reasonable reader, to be essentially true.<sup>23</sup>

Higgins J also maintains that Ellis cannot hide under the mantle of scholarship, noting that *Goodbye Jerusalem* is not ‘a serious history of the Labor Movement’.<sup>24</sup> He also doubts whether the book can yield any more reliability by reason of popular acclaim alone. His Honour gives short shrift to the argument that Ellis is protected by an ‘aesthetic alibi’ — that his offensive words can be excused by his literary endeavour.

Higgins J sketches a vivid contrast between the author Bob Ellis, self-described in his book as ‘methyated’,<sup>25</sup> and the churchgoing Costellos and Abbotts. His Honour observes: ‘The parties were as far apart in their frame of moral reference as the customers of a nineteenth century East End London ale house with the membership of the Anglican Synod of the same era’.<sup>26</sup> His Honour observes: ‘Somehow the author and the defendant have managed to beguile the defendant’s legal advisers into believing that the current norms, likely to be applied by this court, are now those of nineteenth century ale houses’.<sup>27</sup> Although ‘times have changed’, Higgins J observed that those accused of sexual intercourse outside marriage or changing political allegiances would still be regarded less well by ‘right-thinking’ members of society.<sup>28</sup> Higgins J reiterates his argument:

Even given the Labor bias likely among readers of the author’s works, there is every reason to suppose that such persons would predominantly adhere to what Mr Alfred

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<sup>23</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 4–5.

<sup>24</sup> *Ibid* 5.

<sup>25</sup> *Ibid* 31.

<sup>26</sup> *Ibid* 40.

<sup>27</sup> *Ibid* 40.

<sup>28</sup> *Ibid* 40.



Doolittle in *My Fair Lady* (a film based on the play, *Pygmalion*, by George Bernard Shaw) described as 'middle class morality'.<sup>29</sup>

His Honour relies upon such literary notions of 'community', and 'morality' in his determination of whether the imputations in the text were defamatory.<sup>30</sup>

On appeal, Random House was critical of the florid, literary language of Higgins J, maintaining that it was not grounded in law.<sup>31</sup> Bruce McClintock QC complained on behalf of the publishers that the judge was a writer *manque* who indulged in literary flourishes, which had no legal foundation. McClintock argued that the comment of George Bernard Shaw in *Pygmalion* was intended to be ironic. He cites Doolittle's complaint that he could not get cash for handing his daughter over for elocution lessons, 'Middle-class morality means nothing for me'.<sup>32</sup> McClintock observed: 'And middle-class morality doesn't provide a touchstone of morality. The test is not middle-class morality but the hypothetical morality of ordinary members of Australian society'.<sup>33</sup>

There was also academic criticism of the reasoning of Higgins J. Julie Eisenberg observed:

[42] The graphic way in which sexuality is displayed and accepted in advertising, cinema, and literature suggests that late twentieth century approaches to 'chastity' or proper moral behaviour no longer have much in common with Alfred Doolittle-style perceptions.<sup>34</sup>

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<sup>29</sup> Ibid 17.

<sup>30</sup> For a wider discussion of community, decency and defamation, see Lawrence McNamara, 'Bigotry, Community And The (In)visibility Of Moral Exclusion: Homosexuality And The Capacity To Defame' (2001) 6(4) *Media and Arts Law Review* 271.

<sup>31</sup> David Marr, 'Little People and Big Questions', *Sydney Morning Herald* (Sydney), 31 August 1999, 4.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Julie Eisenberg, 'Sex, Satire and "Middle-class Morality": Reflections On Some Recent Defamation Cases' (1999) 92 *Media International Australia, Incorporating Culture And Policy* 19–31.

In the appeal, Miles J considers whether an ‘ordinary reader’ could be expected to have taken the offending passage seriously. He offered his legal opinion and literary criticism of *Goodbye Jerusalem*:

The book as a whole, as its subtitle suggests, is an almost structureless series of musings, recollections, anecdotes and the like, in which it appears to be the author’s intention to challenge the reader to distinguish between fact and fiction, reality and dreams, history and myth. The ordinary reader is likely to come away not knowing what to believe. The prurient reader who would read only the matter complained of might be prepared not to disbelieve some of it. In the classic language of defamation law the mud would stick, and the suspicion lurk, and for this the plaintiffs are entitled to damages.<sup>35</sup>

In a striking slippage, the judge shifts his focus from the ‘ordinary reader’ to the ‘prurient reader’. Miles J maintains that the author cannot be shielded by an ‘aesthetic alibi’. The unstable genre of the book, in his view, does nothing to dispel the suspicions on the part of the reader.

Miles J expressed some reservations about the ‘strong language’ and ‘colourful terminology’ used by Higgins J — in particular, in relation to criticisms of the appellant as betraying ‘a disappointing moral bankruptcy’ and lacking ‘the ideals of honesty and accuracy’.<sup>36</sup> However, the appellate judge defended the decision of Higgins J that ‘the author and the defendant have managed to beguile the defendant’s legal advisers into believing that the current norms to be applied by this court, are now those of nineteenth century ale houses’:

It was submitted that there was no evidence to support these and similar epithets and conclusions. That may well be, but it does not follow that his Honour was wrong in deciding that the conduct of the appellant and its advisers, taken in conjunction with the graphic evidence of the plaintiffs as to their relation to that conduct, entitled them to aggravated damages.<sup>37</sup>

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<sup>35</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224, 247.

<sup>36</sup> *Ibid* 249.

<sup>37</sup> *Ibid*.

Miles J concludes that Higgins J was clear in distinguishing between conduct that gave rise to aggravated damages and conduct which warranted an award of exemplary damages.

### ***Backbiting and Calumny***

Drawing upon the precedent of *Reader's Digest Services Proprietary Limited v Lamb*,<sup>38</sup> Higgins J articulates the test to determine the meaning of defamatory imputations:

The test for determining the meaning of the publication is an objective one. Evidence of the meaning others — whether the plaintiffs themselves, journalists, friends, acquaintances, colleagues or mere bystanders — have attributed to the publication is not admissible for the purpose of determining the meaning actually conveyed.<sup>39</sup>

[43] His Honour applies this formula to the comments that were published in *Goodbye Jerusalem* about the Costellos and the Abbotts.

In relation to Mrs Costello and Mrs Abbott, a number of defamatory imputations were pleaded in respect of the text of *Goodbye Jerusalem*. Higgins J found that the story carried a suggestion about the women in terms of 'unchastity' in light of old precedent.<sup>40</sup> Higgins J observes:

There seems implicit in the defendant's approach to the editing of the author's work, a view that no cause of action lies in defamation for an imputation of unchastity in a woman (or a man for that matter). It seems to have been assumed that such an imputation was defamatory only if it also conveyed either adultery, promiscuity or, at least, moral hypocrisy. Although the term used in this imputation is 'promiscuous', it only refers to two episodes of premarital sex. I have no difficulty in accepting that as an allegation of unchastity.<sup>41</sup>

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<sup>38</sup> *Reader's Digest Services Proprietary Limited v Lamb* (1982) 150 CLR 500.

<sup>39</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224.

<sup>40</sup> *Speight v Gosnay* (1891) 60 LJQB 231.

<sup>41</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 10.

His Honour considered the case of *Cairns and Morosi v John Fairfax & Sons Limited*,<sup>42</sup> in which Hutley JA made the strange observations:

The imputation of an improper adulterous relationship would be harder to justify as not being defamatory, but the reputations of Anthony (sic) and Cleopatra have not been lowered in the eyes of the public by their romance, and, in other days, the title of the King's Mistress was one of Honour.<sup>43</sup>

Such analysis reveals the problems of determining the meaning of imputations. Julie Eisenberg comments:

Justice Higgins' judgment provides a fascinating analysis of the sometimes tortuous process involved in extracting and distinguishing several layers of meaning from a publication and the fine distinctions between what is and is not damaging.<sup>44</sup>

Undeniably, the legal case of Mrs Costello and Mrs Abbott against Random House was a strong and powerful one — especially given the nature of the comments in the book. Given the strength of the case, it is unsatisfactory that defamation law could only protect the reputation and honour of the women in such anachronistic terms as 'immorality' and 'unchastity'. Defamation law has proven to be quite poor at dealing with group interests — such as reputation attacks based on gender.<sup>45</sup> Arguably, sexual anti-discrimination and harassment legislation have been much more adaptable and flexible at dealing with such complaints than defamation law.

In relation to Mr Abbott and Mr Costello, a number of defamatory imputations were alleged to arise in the text *Goodbye Jerusalem*, which suggested that politicians were weak and unreliable characters who lacked political integrity and commitment. There were arguments about the extent to which politicians should expect to be sheltered

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<sup>42</sup> *Cairns and Morosi v John Fairfax & Sons Limited* [1983] 2 NSWLR 708.

<sup>43</sup> *Ibid.*

<sup>44</sup> Eisenberg, above n 34, 19–31.

<sup>45</sup> Diane L Borden, 'Invisible Plaintiffs: A Feminist Critique On The Rights Of Private Individuals In The Wake Of Hustler Magazine v Falwell' (2000) 35(3) *Gonzaga Law Review* 291–317; and Diane L Borden, 'Patterns Of Harm: An Analysis Of Gender And Defamation' (1997) 2(1) *Communication Law and Policy* 105.

from political polemic and gossipy accounts of recent political history, no matter how lively or even inaccurate. Relying upon a number of authorities,<sup>46</sup> Higgins J said:

[44] A politician depends very much on the popular perception of his or her reputation. Damage to it can lead to lack of political advancement within his or her party or support groups. It can lead to political demise... Nor is it trivial because the general effect of the imputation is to cause ridicule, rather than hatred or loathing. A lessening of admiration and respect may be seriously damaging even if it does not cause a person to be shunned or avoided.<sup>47</sup>

Higgins J relied upon the evidence of political advisers, journalists, and politicians that the story raised doubts about the political sincerity. However, his Honour ruled inadmissible general evidence from politician Bill Hayden and journalist Laurie Oakes that unfounded rumours of misconduct would have a deterrent effect upon would-be politicians. He chided the former Governor-General for 'unwisely' providing examples such as retelling malicious gossip about former Prime Minister Paul Keating under privilege in the court room.<sup>48</sup> It is striking that the judge stresses the potential damage caused by the comments to the honour and reputation of the male plaintiffs in their professional occupations as politicians.

Higgins J of the Supreme Court anticipated wider arguments that defamation law was being used to quell freedom of speech. His Honour launched into a pre-emptive attack, and argued that defamation law helped promote 'responsible speech':

People who relay unfounded rumours, discreditable to others — it used to be called backbiting and calumny — engage in conduct which is not only hurtful to others, but destructive of the community good. If persons engaging in such conduct find themselves paying substantive damages, then that does not seem to me to be a result destructive of freedom of speech. It encourages responsible speech.<sup>49</sup>

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<sup>46</sup> *Ettinghausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443; *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449; *Berkoff v Burchill* [1996] 4 All ER 1008.

<sup>47</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 33.

<sup>48</sup> *Ibid* 28.

<sup>49</sup> *Ibid* 29.

It is striking that Higgins J should use the archaic language of ‘backbiting’ and ‘calumny’ to condemn the offensive work of Bob Ellis. His Honour chastised Ellis for spreading such a malicious anecdote, and not admitting that it was false. Justice Higgins emphasized that the author and the publisher could not raise the defence of fair comment or qualified privilege. Moreover, his Honour seemed to suggest that such conduct would be unlikely to attract constitutional protection in respect of freedom of communication.

In his appeal judgment, Miles J discusses the nature of the imputations.<sup>50</sup> His Honour found that there was considerable force in the remarks of Gaudron and Gummow JJ in *Chakravarti v Advertiser Newspapers Ltd*<sup>51</sup> that ‘words do not mean what the parties choose them to mean and that ordinarily the defamatory material will, itself, sufficiently identify and, thus, confine the meanings on which they may rely’. His Honour maintained the matter complained of would convey the meaning relied on by the plaintiff at trial ‘without the need for prolix ‘particulars’ of meaning pleaded as imputations or false innuendoes’.<sup>52</sup> Miles J observed that the

debate about the meaning of the passage in question has become increasingly remote from the text as the case has moved progressively from pleadings to trial to appeal, so that, in the end, much time and effort has been taken up in concentrating on what the trial judge meant when he recast the imputation of ‘promiscuity’ as one of ‘unchasteness’ when neither word appears in the text at all.<sup>53</sup>

[45] He maintained that such ‘profitless exercises about the meaning of meanings’ should be avoided in common law jurisdictions such as the Australian Capital Territory.<sup>54</sup> Such comments betray an anxiety about the slippery and elusive nature of language, how it is difficult to fix the meaning of words.

Miles J considers the submission made on behalf of the appellant that the compensatory component of the award should reflect the likelihood that the

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<sup>50</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224, 243.

<sup>51</sup> *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 545.

<sup>52</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224, 243.

<sup>53</sup> *Ibid* 243.

<sup>54</sup> *Ibid* 243.

reputations of all plaintiffs hardly suffered at all. In particular, it was argued that there was no harm done to Mr Costello and Mr Abbott who remained respectively Treasurer, and the Parliamentary Secretary to the Minister for Employment Education and Youth Affairs. Some commentators believed that it was therefore inappropriate for them to bring a defamation action. David Marr observed that the politicians suffered a vicarious hurt on behalf of their wives:

Perhaps Peter Costello and Tony Abbott should never have joined the case in the first place. The real hurt was always to the women. The notion that two grown, tough politicians would sue for the little embarrassment of Ellis's tawdry — and false — anecdote was the source of all the hilarity that followed.<sup>55</sup>

Miles J admitted: 'There could be and was no suggestion that their parliamentary careers had suffered as a result of the publication and there was no direct evidence that, as a result of the publication, anyone had ever questioned their private or public integrity'.<sup>56</sup> However, his Honour points out that defamation trials are seldom concerned with proof of damage to reputation, and such direct evidence was unnecessary in the circumstances.

### ***The Anxiety Of Litigation***

The *Abbott and Costello Case* also provided an opportunity for a debate over the rationale for the award of damages in respect of personal hurt. Higgins J awarded substantial damages to the plaintiffs for injury to reputation, injury to feelings, and aggravated damages — as well as interest.<sup>57</sup> The Full Court of the Federal Court upheld the damages awarded by the trial judge.

Higgins J considered that Mrs Costello was the most seriously wounded in regard to injury to feelings, especially given that she was a deeply religious woman. Higgins J awarded Mrs Costello \$30,000 for injury to feelings. In relation to Mrs Abbott, his Honour remarked that such an additional award was warranted because of the angst

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<sup>55</sup> David Marr, 'Butt Out, Boys, This Case Is Tanya's And Margaret's', *Sydney Morning Herald* (Sydney), 1 September 1999, 4.

<sup>56</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224, [118]–[119].

<sup>57</sup> Mrs Costello received a total of \$90,000; Mrs Abbott was awarded \$47,500; Mr Costello was awarded \$74,000 and Mr Abbott was awarded \$66,000.

caused by the legal proceedings: 'There was the inevitable anxiety of the litigation'.<sup>58</sup> Higgins J awarded \$20,000 to Mr Costello in recognition of his anger and outrage at a political attack on him through his wife. His Honour awarded \$15,000 to Mr Abbott. His Honour explained: 'I feel, however, that Mr Abbott's sense of outrage and injury were lessened by the considerable local publicity given to the withdrawal and pulping of the book'.<sup>59</sup>

Higgins J awarded aggravated compensatory damages. He was particularly disturbed by the behaviour of the publishers: 'The failure to check the anecdote was negligent. So was the failure to name the supposed Mata Hari which did not save Tanya Costello, and cast a slur of suspicion on Margaret Abbott'.<sup>60</sup> Higgins J was critical of the failure of the publishers to properly and promptly to fully apologise:

[46] In the present case, though withdrawing the book, having ascertained with a high degree of certainty that the story concerning the plaintiffs was false, the defendant did not itself publicly endorse that finding. It offered no solace to the plaintiffs save an inference that it could not support the truth of the matter complained of. It did not dissociate itself from the occasional defiant rumblings attributed in the press to the author.<sup>61</sup>

Once they knew the story was false, the judge said that the publishers failed in common decency in not immediately retracting it and apologising. They were also criticised for not initiating the process of drafting a public apology.

Higgins J complained that the steps Random House took to recall copies of *Goodbye Jerusalem* from bookshops fell short of the ideal and their efforts to get them out of libraries were seriously inadequate. He observed:

A book is, of course, more of a permanent record than is a newspaper though, no doubt, archives could be accessed to find a libel in a newspaper. It is not entirely lost to circulation after the day of issue. A book can be passed from reader to reader. Extracts

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<sup>58</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 46.

<sup>59</sup> *Ibid* 45.

<sup>60</sup> *Ibid* 48.

<sup>61</sup> *Ibid* 48–9.



from newspapers may also, but less commonly. The fact that this book contained a libel will no doubt enhance its desirability as a collector's piece. Further, various newspaper reports have, albeit with rebuttal thereof, repeated the text or substance of the offending matter.<sup>62</sup>

Higgins J cited evidence from Dr Cathro at the National Library that a list of stocks of the first edition of the book held by 800 libraries, including about 200 public libraries would have been obtainable. His Honour was appalled that Random House were so tardy in seeking to recall such books. Higgins J has a peculiar reverence for the book as a receptacle of truth. He envisions that literature is a lasting testament, an indelible part of the public record. Hence his Honour was sympathetic to the argument that that the defamation was continuously being repeated, because of its existence inside a library.

The legal system laid bare the publishing process behind *Goodbye Jerusalem*. It revealed the usually hidden relationship between the author, and the editor. Higgins J noted that a number of changes were made to the offending section as a result of the intervention of the editor. Thus, Rodney Cavalier's 'gusty' account became 'gutsy'; 'we're both in the Right Wing of the Labor Party' became 'they're both...'; and in the final line of the story, 'abominable' became 'unthinkable'.<sup>63</sup> His Honour was disappointed that the editor had not intervened to check the accuracy of the offending anecdote, or excise it altogether. Higgins J was critical of the assertion of the editor Linda Funnell that she did not consider that the passage in the Ellis book to be defamatory: 'If, as Ms Funnell, says, the meaning did not occur to her, then her powers of comprehension of the English language must have temporarily deserted her'.<sup>64</sup>

A lawyer from Minter Ellison was asked to read the manuscript and advise of any passages that would be defamatory and actionable. His response covered seven pages. It identified over fifty names of persons who might consider themselves defamed and take action. Most of them were well-known political figures. Changes were advised.

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<sup>62</sup> Ibid 34.

<sup>63</sup> Ibid 30–1.

<sup>64</sup> Ibid.

However, the lawyer had never identified the offending paragraph as potentially defamatory. Higgins J was scathing of the legal advice provided by Minter Ellison to the publishers Random House:

[The advice] betrays a disappointing moral bankruptcy on the part of the adviser. The ‘filthy’ story complained of, hurtful and damaging to the plaintiffs, as the defendant knew it to be, was a lie and the defendant then knew it. Perhaps the ideals of honesty and accuracy did not commend themselves to the defendant or its advisers as a [47] reason to correct the lie and apologise for telling it... To my mind, this statement is pious cant. It represents merely a transparently contrived attempt to justify the indefensible.<sup>65</sup>

The book’s editor, Ms Linda Funnell, told the court she would have deleted the paragraph before publication if it had been identified by the lawyer.

The Supreme Court also considered the role of defamation law in the protection of privacy. The plaintiffs argued that exemplary damages should be awarded to protect the privacy of people engaged in public life and their families. Higgins J recognised that ‘the story would have been a “nasty” invasion of privacy’.<sup>66</sup> His Honour reflected:

To allow public debate to descend to the levels of the gutter is not in the public interest, however amusing it may be to those politically opposed to those discomfited by it. There ought to be protection of privacy from intrusion that cannot be justified in the public interest. A person about whom factually false material is published should be entitled, in the interests of historical truth, to have the falsity corrected, hopefully summarily, even if it is not defamatory.<sup>67</sup>

Nonetheless, the judge noted that such considerations about the protection of privacy did not warrant exemplary damages in this particular case: ‘However, those matters

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<sup>65</sup> Ibid 40.

<sup>66</sup> Ibid 6.

<sup>67</sup> Ibid 51.

do not entitle me to rewrite the law or to punish the defendant simply to deter others outside the limits of the law as it presently stands'.<sup>68</sup>

### *Goodbye Babylon*

Random House did not call Bob Ellis as a witness, presumably because it feared that his evidence would hinder and undermine the case of his publishers. Nonetheless the author visited Canberra, and commented on the proceedings during the trial. Bob Ellis made grumpy interjections from the gallery of the courtroom — such as 'Liar!', 'Put me in the stand', and 'I told her it was true'.<sup>69</sup> He also held forth about the defamation case outside the court to the assembled media.<sup>70</sup> In retrospect, the writer maintains that his behaviour was misunderstood by the media:

I've just seen for the first time how I looked to the media that day — 'like a possum erupting from a Glad Bag,' Bob Carr happily described it — when, hair disordered, shabby, glutinous with flu, my gait much like John Nash's during one of his demon-possessions.<sup>71</sup>

This performance — and its blatant disrespect to the court — did little to bolster his publishers' case. Although he did not expressly mention such interjections, Higgins J was undoubtedly left with an unfavourable impression of the author. Bob Ellis was noticeably absent from the proceedings of the appeal. Miles J notes the impact of the case upon the author: 'At the end of the litigation one might note, almost in passing, that the person whose reputation is in tatters is the author'.<sup>72</sup>

Bob Ellis was doleful about the consequences of the litigation:

[48] My book, number one on the bestseller list, has been banned (of course) on the orders of Abbott and Costello, that humourless comedy team, and their lawyers Laurel, Hardy, Curly and Mo, and the eight thousand I won't make this week, and the eight

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<sup>68</sup> Ibid 51.

<sup>69</sup> David Marr, 'Can "Reckless" Words Hurt A Politician?', *Sydney Morning Herald* (Sydney), 11 November 1998.

<sup>70</sup> Carmel Egan, 'Ellis Fires From Grassy Knoll', *Daily Telegraph*, 11 November 1998.

<sup>71</sup> Bob Ellis, *Goodbye Babylon: Further Journeys In Time And Politics* (2002) 336.

<sup>72</sup> *Random House Australia Pty Ltd v Abbott* (1999) 167 ALR 224, 248.

thousand I won't make next week, and the house to replace the one burnt down I won't complete this year — all weigh heavy on my pocket calculator and my soul.<sup>73</sup>

A conflict over a contractual clause for the next book *Goodbye Babylon* caused Ellis to sever ties with Random House. The writer went off to publish his next book at Penguin Books. The media and marketing manager for Random House, Maggie Hamilton, has said that the publisher has not banished Ellis: 'He's never discussed in-house not that he's persona non grata, nothing like that, but my understanding is, he chose to go to Penguin'.<sup>74</sup> The book *Goodbye Babylon* has encountered legal problems in relation to contempt of court of an ongoing trial.<sup>75</sup>

In a curious reversal of roles, Bob Ellis was outraged by the publication of the book *Ellis Unplugged* by Michael Warby, a member of the conservative, right-wing think-tank, the Institute of Public Affairs.<sup>76</sup> He alleged that there were 'over two hundred errors of fact, omission and extrapolation in its 215 pages'.<sup>77</sup> Ellis contemplated suing the publisher of the book, Duffy and Snellgrove:

Perhaps I will sue. Perhaps I can make a million dollars. Perhaps the prim Catholic Michael Duffy is a bit apprehensive now. No way, not Michael. He has an agenda, and he doesn't mind being sued, because that's how the game is played, I'm told. You keep your enemy busy, litigious, unsleeping and broke.<sup>78</sup>

Ellis sought to assume the high moral ground, and refrain from litigation. His wife Anne Brooksbank, though, contemplated legal action because she perceived 'demonstrable harm was being done to both our income and our family'.<sup>79</sup> In response, Duffy and Snellgrove withdrew the book from publication in

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<sup>73</sup> Bob Ellis, *So It Goes: Essays, Broadcasts, Speeches 1987–1999* (2000).

<sup>74</sup> Tina Faulk, 'Pulp and Be Damned: The Preferred Choice', *The Canberra Times*, 7 July 2001, 8.

<sup>75</sup> As a result of concerns about contempt of court, the publisher of Bob Ellis's new book *Goodbye Babylon* had quarantined copies in South Australia. The Supreme Court heard the book had references to material suppressed in South Australia's Snowtown killings case.

<sup>76</sup> The book was republished under the title *Ellis Unpulped: Michael Warby, Ellis Unpulped: Bob Ellis And The Art Of Celebrity* (2001).

<sup>77</sup> Bob Ellis, 'Warby Plugged' (2001) *Overland* 41.

<sup>78</sup> *Ibid* 43.

<sup>79</sup> Faulk, above n 74.

acknowledgment of errors in the text. The author, Michael Warby, resigned from the Institute of Public Affairs.

In the wake of the decision in the *Abbott and Costello Case*, there were a number of defamation actions brought against publishers. David Marr observed: 'The *Goodbye Jerusalem* case has proved a gold mine for the law and sweet relief for those barristers who usually spend their days reading contracts and wills'.<sup>80</sup> The book *Waterfront*<sup>81</sup> by journalists Helen Trinca and Anne Davies was recalled and reissued by Random House after a complaint by Peter Costello about a reference to fake letters in the 1996 election campaign being 'concocted by a person working in Costello's election office'.<sup>82</sup> Similarly, *The Men's Room*, by Toby Green, was also withdrawn and reissued by Random House.<sup>83</sup> The book *Michael Hutchence* by Vince Lovegrove was published with an apology from its publishers Allen and Unwin after defamation [49] proceedings because of the nature of references to Paula Yates and Heavenly Hiranni Tiger Lily.<sup>84</sup> However, Jeff Kennett was unsuccessful in a contemporaneous Victorian action.<sup>85</sup>

The biography, *Les Murray: A Life In Progress*<sup>86</sup> was withdrawn and reissued by Oxford University Press, because of threatened legal action by John Thompson and Drusilla Modjeska.<sup>87</sup> The biographer, Peter Alexander, complained that 'Hardly a week goes by without the law of libel being invoked to silence some writer or journalist, and biographers are very prominently in the firing line'.<sup>88</sup> Alexander opined upon the significance of the *Abbott and Costello Case*:

After the *Goodbye Jerusalem* verdict, publishers have become hyper-sensitive to the merest threat of legal action. For them the issue increasingly is not 'Is my author right

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<sup>80</sup> David Marr, 'A Lawyer At My Table' (August 2000) *Australian Author* 10–15.

<sup>81</sup> Helen Trinca and Anne Davies, *Waterfront: The Battle That Changed Australia* (2000).

<sup>82</sup> David Marr, 'Costello Pulps Another Book', *Sydney Morning Herald* (Sydney), 2 June 2000.

<sup>83</sup> Toby Green, *The Men's Room* (1999).

<sup>84</sup> Vince Lovegrove, *Michael Hutchence. A Tragic Rock 'N' Roll Story — A Definitive Biography* (1999).

<sup>85</sup> Michael Sexton, 'Sex, Politics and A Tale Of Two Cities: The Verdict in the Abbott and Costello Defamation Case Suggests That Jeff Kennett Should Have Sued The Australian In The Australian Capital Territory', *Australian Financial Review*, 20–21 March 1999, 23.

<sup>86</sup> Peter Alexander, *Les Murray: A Life In Progress* (2000).

<sup>87</sup> Jane Sullivan, 'Publish and Be Damned? Not These Days', *The Age* (Melbourne), 6 April 2001.

<sup>88</sup> Alexander, above n 13.

in this dispute?’ but ‘Which route will be least expensive?’. A large Australian publisher pointed out to a journalist inquiring about one pulping decision that the cost was equivalent to three days’ fees for a top Sydney QC; the decision to pulp was a ‘no-brainer’.<sup>89</sup>

Alexander offers an eloquent defence of biography against the intervention of defamation law: ‘The biography has the universality of the novel, universal appeal I mean, with the added attraction to a scientific age of being based on facts’.<sup>90</sup> Alexander, however, leaves himself open to challenge. Given his stress on facts, he fails to grapple with the argument that defamation law ensures a fidelity to the factual basis of forms of non-fiction — like biography.

Defamation law has also had an indirect impact upon literary publishing. In the book *The First Stone*, the author Helen Garner presented one academic in the Ormond case, Jenna Mead, as six different people, at the insistence of her publisher’s defamation lawyers.<sup>91</sup> Cassandra Pybus was critical of this astonishing sleight-of-hand in a work of non-fiction. She observed:

Investigative non-fiction — be it history or serious journalism — has conventions of form and ethics. In a novel, the validity of the world created comes from its internal coherence, from the persuasiveness of the language and the skill of the narrative structure. In non-fiction, the validity of the world created includes those elements, but in the final analysis its legitimacy comes from the author’s rigorous intellectual engagement with the material and personal sources which exist outside the construction of the text.<sup>92</sup>

A rejoinder to *The First Stone*, the book *Bodyjamming*,<sup>93</sup> published by Random House, was itself the subject of a defamation action by psychologist Mary Nixon.<sup>94</sup>

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<sup>89</sup> Peter Alexander, ‘Publish And Be Damned By Absurd Defamation Laws’, *Sydney Morning Herald* (Sydney), 30 November 2000, 20.

<sup>90</sup> *Ibid.*

<sup>91</sup> Helen Garner, *The First Stone: Some Questions About Sex And Power* (1995); and Helen Garner, ‘Libel Law Made Many A Mead’, *Sydney Morning Herald* (Sydney), 23 September 1995, 28.

<sup>92</sup> Cassandra Pybus, ‘The First Stone’, *Sydney Morning Herald* (Sydney), 10 May 1995, 15.

<sup>93</sup> Jenna Mead (ed), *Bodyjamming* (1997).

<sup>94</sup> *Nixon v Random House and Mead* [1999] VSC 393.

[50] The author John Birmingham complained that his book *Dopeland*,<sup>95</sup> published by Random House had been 'hollowed out' by the intervention of lawyers:

Just before we went to print, the lawyers brain-spasmed about my favourite part of the book. They said you can't do it. It was about a guy who'd had some legal problems. My point was that he'd been open about what he'd done, for pseudo-political reasons. But ... they didn't want to go there.<sup>96</sup>

Birmingham blamed the 'defamation industry' for opportunistic writs triggered when Random House paid \$275,000 to the Abbott and Costello families for comments in Bob Ellis's book *Goodbye Jerusalem* four years ago. His publisher, Jane Palfreyman of Random House, said: 'Having lived through the [Abbott and Costello] experience, we're not going to let it happen again.'<sup>97</sup> Birmingham threatened to only release future works of non-fiction in the United States and the United Kingdom to circumvent such legal problems.

Most notably, Don Watson's biography of Paul Keating, *Recollections Of A Bleeding Heart*, was carefully checked by lawyers before publication.<sup>98</sup> As a result, the book is a particularly circumspect memoir, careful not to cause offence. As David Marr observed: 'More than ever, what we read and write in Australia is mediated by the law and by the zest courts show these days for punishing errors, slurs, disrespect and far-fetched.'<sup>99</sup> As a result, there are inevitably gaps and ellipses within books, as a result of deletions prompted by the fear of legal action.

However, there has yet to be a deeper change in the culture of publishing, in which there is a greater emphasis upon editing, instead of marketing. As David Marr observes: 'When litigation began to be the problem it has become for Australian publishing, there was some hope that it would mean the return of in house editors, those men and women who once sat in series rows checking manuscripts for nonsense

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<sup>95</sup> John Birmingham, *Dopeland* (2003).

<sup>96</sup> John Birmingham, 'He Wrote With A Joint In His Hand', *Sydney Morning Herald* (Sydney), 26 April 2003, available at <<http://www.smh.com.au/articles/2003/04/25/1050777396470.html>>.

<sup>97</sup> Malcolm Knox, 'Defamation Abuse Has Stifled Criticism: Author', *Sydney Morning Herald* (Sydney), 26 April 2003.

<sup>98</sup> Don Watson, *Recollections Of A Bleeding Heart: A Portrait Of Paul Keating PM* (2002).

<sup>99</sup> Marr, above n 80, 10–15.

— in fact and style’.<sup>100</sup> Reluctant to return to the old model of publishing, publishers have persevered with freelance editors. They have shown, though, a great propensity to consult lawyers and libel insurers about manuscripts. It is curious that modern publishers have such poor corporate memories, and have failed to put into place an editorial process, which will ensure a greater compliance with defamation law.

### ***Cry From the Grave: Defamation Law and Journalism***

In July 2000, the ABC television program, *Media Watch*, accused Richard Carleton of lifting his *60 Minutes* report on the tragic massacre in the former Yugoslavian town of Srebrenica from a BBC/Antelope documentary *Cry from the Grave*.<sup>101</sup>

The current affair program, *60 Minutes*, decided to produce a fifteen minute program to mark the fifth anniversary of the massacre in the Bosnian town of Srebrenica. In 1995, the Bosnian Serb Army under the command of General Mladic had entered into the ‘safe haven’ of Srebrenica protected by the United Nations. It expelled the women and girls to Muslim-controlled areas, and executed the men and boys, and disposed of their bodies in mass graves. The number of victims was about 8000. In a war marked by atrocities on each side this was, possibly, the worst. General Mladic’s deputy, General Krstic, was later put on trial for war crimes in The Hague in relation to this massacre.<sup>102</sup>

[51] Television journalist Richard Carleton had a personal interest in the topic because he had been in Belgrade at the time. He wanted to retell the grim events of the ethnic cleansing and genocide in Bosnia to a wider commercial television audience. Carleton was impressed and distressed by a book, *End Game*, by The *Christian Science Monitor* journalist, David Rohde, which told the story of the massacre. He was also taken with a BBC/Antelope documentary, *Cry From The Grave*, as well as a CBS television documentary on the American *60 Minutes*.

Carleton contacted the producer of a BBC/Antelope documentary for assistance in producing a story along the same lines as the one hour, forty five minute documentary. The producer shared with Carleton the names and contacts for the

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<sup>100</sup> Ibid 15.

<sup>101</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127.



researcher and interview subjects used by Antelope films. Carleton purchased footage from sources identified by Antelope Films, as well as material from the International Criminal Tribunal, and various library footage from Channel Nine and CBS. He instructed his agent that, as a negotiating ploy, he should invoke the defence of fair dealing under copyright law if the film holders wanted too high a price for the footage.<sup>103</sup> Essentially, Channel Nine was relying upon the defence of fair dealing under the *Copyright Act 1968* (Cth) as a bargaining tool to obtain relevant television broadcast footage.<sup>104</sup> Carleton and a film crew were dispatched to the Hague and Bosnia to film new interviews with witnesses and footage related to the massacre. The *60 Minutes* segment *The Evil That Men Do* was screened on Channel Nine on 9 July 2000. However, the debt to *Cry From The Grave* was not acknowledged in the credits of the report.

On the 17th July 2000, the program *Media Watch* presented a critical review of the *60 Minutes* report:

This was an appalling story, well told, well shot, *60 Minutes* at its best. But, and it's a big but, it wasn't all their own work. Back in April, SBS showed a documentary called *Cry from the Grave* made by the BBC in 1999. Richard Carleton wasn't in it but everything else was. The shocking scene in the morgue kicked off both programs. Both had the hose, washing the remains. *60 Minutes* chose the same shots of Radko Mladic walking into town. They chose the same shots of Mladic giving a present to the UN commander. They used the same shots of the War Crimes Tribunal in the Hague.<sup>105</sup>

Barry accused the Channel Nine program of copying its English counterpart without proper attribution: 'The story, the scenes, the shots, and the characters were almost all the same and *60 Minutes* lifted them lock, stock and barrel'.<sup>106</sup> He concluded: 'Now I

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<sup>102</sup> Ibid [3]–[6].

<sup>103</sup> Ibid [27].

<sup>104</sup> It is worth noting that Channel Nine has argued elsewhere that the defence of fair dealing should be limited in respect of television broadcasts: *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333; *TCN Channel Nine v Network Ten Pty Ltd* (2001) 50 IPR 335; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112; and Michael Handler, "'A Real Pea Souper': The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381–422.

<sup>105</sup> *Media Watch*, Australian Broadcasting Corporation, 17 July 2000, <<http://www.abc.net.au/mediawatch/transcripts/s154080.htm>>.

<sup>106</sup> Ibid.

don't know quite what you call this — plagiarism perhaps. But whatever the name it fits a pattern. *60 Minutes* has been caught at this by *Media Watch* several times before'.<sup>107</sup>

On the 24th July 2000, Paul Barry reiterated his criticisms of the program:

*Media Watch* didn't accuse *60 Minutes* of stealing film footage. And we always believed that they had been helped by those who worked on the BBC documentary. The point of our report was that they failed to acknowledge their debt. As I said last week I'm not sure what you call it, perhaps it's plagiarism, certainly it's lazy journalism.<sup>108</sup>

[52] *60 Minutes* executive producer John Westacott demanded that the ABC retract such comments. He wrote a strongly worded letter to the executive producer of *Media Watch*, saying in part:

There is no property right attaching to historical facts or surviving witnesses to those facts. The relevant footage was properly acquired and paid for and the BBC documentary was itself a re-broadcast, in part, of footage on the earlier CBS *60 Minutes* program and/or Nine's *Sunday* program. The research was carried out by Richard Carleton and the *60 Minutes* production team with the full co-operation and assistance of Antelope Films.<sup>109</sup>

Westacott defended the footage of the morgue scene as necessary to 'tell a story which in fact was a matter of historical record'.<sup>110</sup> He observed that three people appearing in the *60 Minutes* program were featured in the Antelope Films production and justified the selection of interview subjects: 'All three were later interviewed by Richard Carleton as the people best able to give a direct account of what in fact happened at Srebrenica'.<sup>111</sup> He also defended the top shot of the town of Srebrenica: 'The coincidence of both productions using this location is no more remarkable than a

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [48].

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

foreign crew shotting the Sydney Harbour Bridge, Big Ben or Times Square to locate themselves in Sydney, London or New York'.<sup>112</sup>

Richard Carleton was outraged by the allegations of *Media Watch*, and demanded an apology and a correction. He threw a glass of Chivas Regal at the television when he saw the program *Media Watch* screened on the Australian Broadcasting Corporation: 'I was drinking a glass of whisky and I threw it at the television set'.<sup>113</sup> Carleton claimed that the allegation of plagiarism was a terrible slur upon his professional reputation. He said that he felt 'like someone in the community accused of paedophilia. I mean, plagiarism is to journalism as paedophilia is to the community. And that's what I was branded'.<sup>114</sup> Richard Carleton and two of his colleagues, the executive producer John Westacott, and producer Howard Sacre, brought an action for defamation against the ABC as well as two staff of *Media Watch* — the presenter Paul Barry and the executive producer Peter McEvoy.

Gossip columnists observed of the *Carleton* case: 'The last time this much fun was had in the annals of Australian defamation was when Tony Abbott and Peter Costello took Bob Ellis's publishers to the cleaners'.<sup>115</sup> The legal dramatic personae were similar to those who had appeared in the *Abbott and Costello Case* trial. Higgins J was again the presiding judge in the proceedings. The senior counsel for the Channel Nine staff was McClintock QC — who had represented Random House in the *Abbott and Costello Case*. The senior counsel for the ABC and its staff was Tobin QC who had acted for the Abbotts and Costellos. There was legal debate as to whether the allegations of 'plagiarism' and 'lazy journalism' were defamatory. There was also some ambiguity as to the subject of the defamatory imputations — it was unclear whether they targeted the presenter, the executive producer or the producer of the Channel Nine program. There was much greater scope to raise legal defences in the *Carleton* case. The ABC raised a number of defences — including truth, qualified privilege, and fair comment. Furthermore, the discussion of remedies in the *Carleton*

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<sup>112</sup> Ibid.

<sup>113</sup> Transcript of proceedings, *Richard Carleton v Australian Broadcasting Corporation* (Supreme Court of the ACT, 27 February 2002) 240.

<sup>114</sup> Ibid 242.

<sup>115</sup> David McNicoll and Emma-Kate Symons, 'Stewth: Don't You Dare', *The Australian*, 2 June 2003, 10.

case took place in a new context, which significantly different to the *Abbott and Costello* case. The court had to consider the new reforms to defamation law implemented by the *Defamation Act 2001* (ACT).

[53] *Plagiarism and Lazy Journalism*

In the case of *Richard Carleton v The Australian Broadcasting Corporation*, Higgins J reiterated the test for determining what allegedly defamatory material conveys, which he had expounded in *Costello v Random House Australia Pty Limited*.<sup>116</sup> The relevant meaning is that which the hypothetical ordinary reasonable reader/viewer would derive from the matter complained of. He observed: 'It is important to distinguish between inferences which the ordinary reasonable reader would draw from the matter published and speculation such a reader might, even probably, engage in.'<sup>117</sup>

Higgins J peruses dictionary definitions of plagiarism, invoking the Latin derivation of the word – 'plagiarus-ii, m. kidnapper, plagiarist'. Higgins J accepts a distinction drawn by the defendant between plagiarism and theft:

The defendants do concede that plagiarism is alleged. They deny that it amounts to an allegation of stealing material. I would respectfully agree. 'Theft' or 'stealing' is an appropriation of material, not only without acknowledgement but without permission. In terms of film footage that could also be a breach of copyright. However, it seems to me that what Mr Barry conveyed by what he said and showed was that Mr Carleton's segment was a copy or imitation of the program *Cry from the Grave*.<sup>118</sup>

Higgins J also emphasizes that 'not every copying or imitation of the work of another without attribution will be plagiarism'.<sup>119</sup> In his view, 'it must also be wrongful'.<sup>120</sup> Higgins J emphasizes that 'the average reasonable viewer will not assume that the term "plagiarism" is used in some benign fashion'.<sup>121</sup> His Honour emphasizes that

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<sup>116</sup> *Costello v Random House Australia Pty Limited* [1999] ACTSC 13; (1999) 137 ACTR 1, 8–9.

<sup>117</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [76].

<sup>118</sup> *Ibid* [72]–[73].

<sup>119</sup> *Ibid* [110].

<sup>120</sup> *Ibid* [110].

<sup>121</sup> *Ibid* [78].

plagiarism is a form of 'dishonesty' which journalists and many others would regard as 'an accusation of disgraceful and reprehensible conduct'.<sup>122</sup>

Higgins J provides a muddled examination of the legal meaning of plagiarism. He emphasizes that item 10 of the journalism Code of Ethics says, expressly 'do not plagiarise'.<sup>123</sup> Higgins J contemplates the possibility that plagiarism involves a breach of economic rights of reproduction and communication to the public: 'In terms of film footage that could also be a breach of copyright.'<sup>124</sup> However, his Honour seems to assume that attribution of authorship is merely a common courtesy, without legal repercussions. Higgins J observed:

In other words, the *60 Minutes* program was not plagiarised from the BBC program. It follows that it did not need to acknowledge prior research or its inspirational source or sources. Nor had the *Cry from the Grave* producers been obliged to, nor did they, acknowledge the preceding accounts of the story they told in their way. That is not to say that it would not have been courteous to have done so. It is simply that the omission of a courtesy does not constitute plagiarism.<sup>125</sup>

Higgins J forgets the legal recognition provided for moral rights under the *Copyright Amendment (Moral Rights) Act 2000* (Cth) — the right to be identified as the author of a work, and the right to object to the [54] derogatory treatment of a work. British filmmakers would be entitled to insist that Channel Nine provide full proper attribution of their documentary, if they so desired.

*Media Watch* had made the additional accusation that Channel Nine was a serial plagiarist: '*60 Minutes* has been caught at this by *Media Watch* several times before'.<sup>126</sup> In the trial, the counsel for the ABC pointed to five previous programs to justify the accusation of previous plagiarism — including stories about the serial killer Aileen Wuornos, Shaolin warrior monks, the animation *Wallace And Grommit*,

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<sup>122</sup> Ibid [103].

<sup>123</sup> Ibid [71].

<sup>124</sup> Ibid [73].

<sup>125</sup> Ibid [128]–[130].

<sup>126</sup> *Media Watch*, Australian Broadcasting Corporation, 17 July 2000, <<http://www.abc.net.au/mediawatch/transcripts/s154080.htm>>.

guru busters, and two women murdered by Eric Edgar Cooke. Higgins J dismissed such allegations:

In truth none of these *Media Watch* programs alleged more than a revisiting by *60 Minutes* of previously told and, usually more detailed stories ... It cannot be said to have been ‘plagiarism’. Nor was that the *Media Watch* complaint at the time. It was more a complaint of repetition, of boring viewers with a story recently told elsewhere rather than the telling of a new story.<sup>127</sup>

Arguably Higgins J is being rather generous about the Channel Nine programs in his assessment that they are merely rehearsing recent stories. His characterisation of the *Media Watch* complaints is not necessarily very convincing either because they were very clearly suggesting that Channel Nine was recycling content.

Higgins J considers the connotations of the allegation of ‘lazy journalism’ that were made in the second telecast by *Media Watch*. He observes that the phrase has a pejorative meaning:

Then there is the allegation of ‘lazy journalism’. Clearly, that is to be understood as utilising the work of others, whether improperly or not, so as to save time and effort. Of course, that is precisely what Mr Carleton did. But was it laziness or efficiency? Clearly, the word ‘laziness’ carries with it the connotation of idleness, lethargy, indolence, slothfulness, lack of energy.<sup>128</sup>

Higgins J suggests that such an accusation goes to the professionalism of a producer: ‘It would be inferred that the producer was also guilty of that disgraceful conduct and had been complicit in the lack of professionalism implied by “lazy journalism”’.<sup>129</sup> Higgins J concludes that the imputation of ‘lazy journalism’ is clearly defamatory. Nonetheless he notes that such an allegation ‘would convey a less derogatory meaning than “plagiarism”’.<sup>130</sup>

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<sup>127</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [140]–[142].

<sup>128</sup> *Ibid* [143].

<sup>129</sup> *Ibid* [105].

<sup>130</sup> *Ibid* [83].

Higgins J suggested that *Media Watch* took an elitist and snobbish view of popular media:

In truth, the effort put into and the preparation for all of the programs referred to, including *The Evil that Men Do* bespeaks the opposite [of lazy journalism]. The real criticism is that, in the instances chosen, including the present, *60 Minutes* was retelling a story previously told, usually in greater depth and to a different audience served by a different outlet. That different outlet was, almost invariably, catering to a much lesser audience in terms of numbers. *60 Minutes* adopts a "popular press" rather than a "quality press" approach. Indeed, the *Media Watch* approach simplistically focussing on similarities in the retelling of stories is no more valid a criticism as a complaint that the *Telegraph Herald* had told a similar story, though more succinctly, to an in-depth article in the *Sydney Morning Herald*. It is an elitist view that ignores the fact that the audiences for the stories in question are different.<sup>131</sup>

[55] Higgins J was complimentary about the public function of *Media Watch*:

the program has adopted a somewhat superior air 'exposing' foibles, mistakes and lapses in standards of other members of the media. That the program is a valuable tool for the maintenance of proper standards of journalistic behaviour cannot be doubted.<sup>132</sup>

Nonetheless, his Honour suggests that perhaps the program was guilty of 'lazy journalism' itself for not rigorously and thoroughly checking the facts of its report on the *60 Minutes* story.

### ***The Cult of the Celebrity Reporter***

As in the *Abbott and Costello Case*, there was some ambiguity as to the target of the defamatory remarks. In the popular imagination, the television reporter is the guiding force behind the creation of a television programme:

The reporter is to the fore in most TV current affairs shows. Walking towards the camera, talking authoritatively, asking questions, nodding to interviewees. The inevitable impression is that reporters "own" stories, that they have done the research

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<sup>131</sup> Ibid [144].

<sup>132</sup> Ibid [44].

and interviews, drawn their conclusions, written the scripts and sat through the editing.<sup>133</sup>

However, a number of other collaborators play an important role in the creation of a television program — most notably, the executive producer and the producer.

In his judgment, Higgins J considered whether viewers would assume that the defamatory comments related to the executor producer John Westacott and the producer Howard Sacre — as well as the report Richard Carleton. Higgins J discussed the role of an executive producer in a television program. His Honour noted that ‘the imputations against Mr Westacott are not defamatory of him if it is merely to be understood by the viewer/reader that he was only vicariously responsible for the content of the particular and previous programs exhibiting “plagiarism”’.<sup>134</sup> However, Higgins J concluded that, given the close association of John Westcott’s name with the *60 Minutes* program, ‘it would generally be assumed that an executive producer in his position would have, at least, authorised and approved the publication of Mr Carleton’s program knowing of its provenance and content’.<sup>135</sup> It is curious that the judge should imbue the reasonable viewer with such a sophisticated knowledge of the internal workings of the television industry.

Higgins J also highlighted the role of a producer in a television program:

Whilst an executive producer has and would be expected to exercise well-informed though general control of each segment of a *60 Minutes* program, a producer would be regarded as responsible only for those particular segments on which he or she had (or was believed to have) worked.<sup>136</sup>

His Honour was satisfied that the reasonable viewer would have assumed that Mr Sacre had sanctioned the plagiarism and lazy journalism because ‘he actively

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<sup>133</sup> Jenny Tabakoff, ‘On The Box: Who’s Talking?’, *Sydney Morning Herald* (Sydney), 26 March 2002.

<sup>134</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [94].

<sup>135</sup> *Ibid* [95].

<sup>136</sup> *Ibid* [97].



participated in the detail of it in relation to the particular program in question'.<sup>137</sup> Indeed the program *60 Minutes* has a reputation as 'a producers' show'.<sup>138</sup>

[56] The trial laid bare the process behind the production of the television programme. Tobin QC exacted a number of admissions from the journalist Richard Carleton. The television presenter admitted that he presented a piece to camera while standing beside a mass grave, pretending the bodies being exhumed were from the Srebrenica massacre. In fact, the grave site was hundreds of kilometres away and contained no Srebrenica bodies. Carleton admitted under close questioning by both the judge and counsel for the ABC Terry Tobin, that he had 'misled in the technical sense, and insofar as that misleading is taken to mean lying, yes I lied'.<sup>139</sup> The judge found that Carleton had misled his audience for dramatic effect.

Richard Carleton could not recall which of *60 Minutes*' four editors put the report together. He was unsure whether material from the CBS show had been included. Carleton was unaware that a section of the documentary screened by the BBC had been inserted in the *60 minutes* show as well. He said that the misleading subtitles had been done by somebody else. Furthermore Carleton admitted that a Czech-born staffer at Channel Nine impersonated a Serbian voice. Richard Carleton had not written the draft script. His barrister, Bruce McClintock, objected to a question because 'it proceeds on the assumption that he wrote the script, which he said he didn't'.

Jenny Tabakoff comments that the *Carleton* case challenged the popular conception that the reporter was the sole author of a television program.<sup>140</sup> The matter revealed the collaboration and teamwork between a number of workers — such as the reporter, the producer, the executive producer, the researcher, editor, the cameraman, and the sound man. Tabakoff considered the nature of the reporter's role in this collaborative context. As a bare minimum, she suggests, 'Most people in the industry agree that the reporter should have done some of the research, had an active role in devising the

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<sup>137</sup> Ibid [99].

<sup>138</sup> Tabakoff, above n 133.

<sup>139</sup> Transcript of proceedings, *Richard Carleton v Australian Broadcasting Corporation* (Supreme Court of the ACT, 27 February 2002) 278–9.

questions, done as many of the interviews as is physically possible, and written the script, with the usual sub-editing.’<sup>141</sup>

### *Honest Commentary*

Counsel for the ABC, Terry Tobin, QC, argued in the court that his client was basing his defence on the need to protect freedom of communication and the free exchange of ideas.<sup>142</sup> Mr Tobin said ‘honest comment’, no matter how prejudiced or biased, was ‘a treasure of the system of government and law’ in Australia.<sup>143</sup> He told the judge he should find that there was a paramount need to encourage freedom of communication ‘for the ultimate good of the community’.<sup>144</sup>

Higgins J was conscious that the Legislative Assembly had expanded the range of defences available in respect of defamation actions under the *Defamation Act 2001* (ACT).<sup>145</sup> His Honour first considered whether the ABC could avail itself of the protection of the defence of qualified privilege. His Honour considered the key High Court decision which enunciated the defence of qualified privilege. In *Lange v Australian Broadcasting Corporation*, the High Court held that arising from sections 7 and 24 of the Constitution there was a ‘freedom of communication between the people concerning political or governmental [57] matters which enables the people to exercise a free and informed choice as electors’.<sup>146</sup> The High Court also held that the common law concerning libel and slander must conform to this freedom. It stated the scope of a defence that must be available to a defendant in a defamation matter and held that an Australian legislature could not abridge the scope of this defence. In the *Carleton* case, Higgins J held that the ABC could not avail itself of the defence of qualified privilege because its treatment of the Channel Nine program was unfair:

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<sup>140</sup> Tabakoff, above n 133.

<sup>141</sup> Ibid.

<sup>142</sup> Roderick Campbell, ‘Media Presenter Accused Of Lying’, *The Canberra Times* (Canberra), 23 May 2002, 6.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Standing Committee on Justice and Community Safety, *Defamation Bill 1999*, Scrutiny Report No 1 of 2000 (8 February 2000); and Matthew Collins, ‘Reform in the ACT’ (2000) 5(2) *Media and Arts Law Review* 98–9. The *Defamation Act 2001* (ACT) recognises a number of defences, including truth and public interest (s 16); lack of negligence (s 23); unlikely to suffer harm (s 15); a fair report of a proceeding of public concern (s 17); contained in a public document (s 17); and reasonable publication under contract (s 19).

<sup>146</sup> *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

The *Media Watch* story was unfair because it did not acknowledge the evident diligence and trouble to which the *60 Minutes* team had gone to procure historic footage, to visit and interview 'talent' and to visit and film sites illustrative of the massacre. This effort had made it Richard Carleton's story (and, hence, that of *60 Minutes*) not a BBC or CBS story.<sup>147</sup>

Nonetheless, there has been academic criticism of the scope of the defence of qualified privilege. Roger Magnusson observes: 'The specific and limited nature of the implied constitutional freedom of communication within Australia leads predictably to an impoverished juridical and philosophical notion of free speech as well'.<sup>148</sup>

However, Higgins J held that the ABC could be protected by the defence of fair comment. His Honour observed:

In my view, the production of a program designed to imitate or copy a previous program could honestly be believed to be plagiarism assuming, of course, lack of attribution. It is not, in my opinion, a fair or reasonable opinion, but it is one an honest commentator could honestly hold. In that sense the *Media Watch* broadcasts do not go beyond the protection of fair comment. Consistently with that view, the characterisation of past programs exhibiting similar characteristics could be so characterised by an honest, though wrong-headed or ill-informed, commentator.<sup>149</sup>

The emphasis upon the importance of freedom of speech in his judgment was no doubt in part to due to the brilliant advocacy of Tobin QC.

In the statement, Carleton said Barry and McEvoy had not had 'the spine' to apologise to him and did not 'have the guts to get in the witness box and defend their

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<sup>147</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [201]–[204].

<sup>148</sup> Roger Magnusson, 'Freedom of Speech In Australian Defamation Law: Ridicule, Satire And Other Challenges' (2001) 9 *Torts Law Journal* 269, 276. See also Michael Chesterman, *Freedom Of Speech In Australian Law: A Delicate Plant* (2000).

<sup>149</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [253].

attacks on me and the program'.<sup>150</sup> He said: 'The reason is obvious. They have no defence to the lies they have told.'<sup>151</sup> However, Higgins J did not find this absence overly significant. He observed: 'Accordingly, I am not persuaded, notwithstanding the lack of oral testimony from Messrs Barry and McEvoy, that the defence of fair comment is defeated by malice'.<sup>152</sup> The decision is an interesting contrast to the *Abbott and Costello Case* — in which the judge made much more of the failure to apologise and withdraw defamatory comments.

### ***The Price of Honour***

Having upheld the defence of the ABC, Higgins J held that the plaintiffs were not entitled to damages [58] for defamation. In a subsequent hearing, he awarded court costs against Channel Nine and for the ABC.<sup>153</sup>

Lest the case be overturned on appeal, Higgins J provided an indication of the damages that he would have awarded to the plaintiffs had they been successful. His Honour would have awarded \$50,000 to Mr Carleton for damage to his reputation and feelings:

I consider that he was genuine in his assertion of hurt and affront. It was exacerbated by the repetition of the offending matter and a denial of a retraction and withdrawal, though the latter is ameliorated by the fact, as it seems to me, that the refusal, though inappropriate, was made in good faith. The award is further ameliorated by the two opportunities, both by means of television and radio, which Mr Carleton took to defend his position.<sup>154</sup>

Furthermore, Higgins J would have awarded \$20,000 each to Mr Sacre and Mr Westacott: 'That represents a lesser audience to whom they were known and hence less damage to reputation'.<sup>155</sup> He noted that the producer and the executive producer also benefited, albeit indirectly, from Mr Carleton's advocacy of his cause.

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<sup>150</sup> Roderick Campbell, 'Lawyer Borrows Bogart Line in *Media Watch* Defence', *The Canberra Times* (Canberra), 29 March 2002.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [292]

<sup>153</sup> *Richard Carleton v Australian Broadcasting Corporation* [2003] ACTSC 28.

<sup>154</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [294].

<sup>155</sup> *Ibid* [295].

Higgins J was concerned that the outcome in this case was unsatisfactory. His Honour acknowledged that defendants, in the media or otherwise, should not have to pay damages where they have published matter in circumstances not amounting to defamation, where it is excused by an appropriate defence, even if they have made untruthful, hurtful and possibly damaging statements. Higgins J observes:

In the present case, I have found the accusations levelled by the defendants at the plaintiffs to be untrue. Yet I am obliged to deny them damages, rightly so, as the defendants' freedom of speech, protected by fair comment, allows them to have published their opinions, however wrongheaded and prejudiced, without legal penalty. But that leaves the plaintiffs who have been falsely accused of plagiarism with no legal remedy. They have, by reason of my findings, vindicated their reputations, at least in my opinion. This is not a just result but it is the only conclusion to which I can come.<sup>156</sup>

The judge considers the reforms wrought by the *Defamation Act 2001* (ACT) — including offers to amend, greater scope for apologies, and rules governing damages.<sup>157</sup> Higgins J wondered:

Why should not a person about whom an untrue and damaging statement is made, whether or not strictly defamatory and whether or not excused by privilege, qualified or absolute, or by fair comment at least be entitled to a correction of that untruth?<sup>158</sup>

Higgins J noted that further law reform in the field of defamation law may be necessary. His Honour observed: 'The new *Civil Law (Wrongs) Act 2002* may provide, in future cases, a useful alternative to litigation such as the present.'<sup>159</sup>

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<sup>156</sup> Ibid [308].

<sup>157</sup> The *Defamation Act 2001* (ACT) contains a series of provisions aimed at vindication of reputation without litigation, at least in a case such as the present — including the offer of amends (ss 6–8), a court order (s 11), an apology (s 20), and compensation (s 21). Furthermore, a court must ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded, and take into account the ordinary level of general damages component in personal injury awards in the Territory (s 25).

<sup>158</sup> *Richard Carleton v Australian Broadcasting Corporation* [2002] ACTSC 127, [297]–[299].

<sup>159</sup> Ibid [209].

[59] *Bismarck's Sausage*

In his wisdom, Higgins J produced a judgment, which seemed to please all the competing parties — at once vindicating the reputation of Richard Carleton, and defending the capacity of *Media Watch* to engage in fearless criticism. The headlines showed signs of some confusion as to the outcome. *ABC Online* reported 'Carleton wins *Media Watch* defamation case', while *The Age* reported 'Carleton loses *Media Watch* defamation case'. The journalist Mark Day observed gleefully:

It must have been a happy Christmas. Richard Carleton was happy because the court decided he had been defamed and was not a plagiarist. Paul Barry was happy because the court said he was entitled to his robust opinions and was breaking no law by expressing them. And doubtless, the lawyers were happy at their fat fees. But that's all the happiness that can be found in the unedifying episode of Carleton vs Barry in the ACT Supreme Court.<sup>160</sup>

The ABC welcomed the decision by Justice Higgins to award costs in its favour in the defamation case brought by Richard Carleton and two *60 Minutes* producers against *Media Watch*.<sup>161</sup> As the new presenter of the program *Media Watch* said: 'It was a good win – for us and for the media generally. It confirmed the right to make vigorous criticism in the face of deep and genuine differences of opinion. Even at Channel 9, journalists must have secretly breathed a sigh of relief.'<sup>162</sup>

Although Carleton's decision to sue was publicly supported by colleagues at Channel Nine, the journalist was sharply criticised by his contemporaries in the press. In a column in *The Canberra Times*, Matthew Ricketson marvelled that the legal case had all the charm of the satiric current affairs documentary, *Frontline*.<sup>163</sup> He observed that the journalist Richard Carleton had been ostracised for bringing a legal action against his peers:

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<sup>160</sup> Mark Day, 'No Winners In Journalists' Stoush', *The Australian*, 26 December 2002.

<sup>161</sup> Media Release, 'ABC Welcomes costs decision in Carleton case', 2 May 2003.

<sup>162</sup> 'Media Watch, Carleton And Fair Comment', 12 May 2003, <<http://www.abc.net.au/mediawatch/transcripts/s852834.htm>>.

<sup>163</sup> Matthew Ricketson, 'Truth Takes A Tragic Turn On Tabloid TV', *The Canberra Times* (Canberra), 8 March 2002, 13.

There is something positively Shakespearean about the plight of television journalism's high roller Richard Carleton. Here is a man whose lashing tongue and wolverine smile has discomfited prime ministers, reduced the unemployed to quivering wrecks and almost incited a riot at the 1999 East Timor referendum, forced to admit in a courtroom that he had lied. Here is Carleton, who wears the blinkered certitudes of tabloid television like a badge of honour, marching blindly into a tragi-farce of his own making.<sup>164</sup>

The case shared a similar sense of absurdity and tragi-comedy as the *Abbott and Costello Case* trial. Ricketson noted: 'For all his worldliness as a journalist of 35 years' standing, Carleton ignored the conventional wisdom that journalists don't sue other journalists and launched into a defamation action against the ABC's *Media Watch*'.<sup>165</sup> The breaking of this taboo might explain the virulence of the reaction against the defamation action brought by Richard Carleton.

In an acerbic article, *Sydney Morning Herald* journalist Mike Secombe commented on the *Carleton* case:

[60] Otto von Bismarck, the father of the German empire, once famously observed that laws were like sausages; it was better not to see them being made. Had television been around when he said it, Otto might well have added something else: tabloid TV current affairs.<sup>166</sup>

The press gallery member concluded: 'But even if Carleton and co win, it will be a rather pyrrhic victory. Even if *The Evil that Men Do* is found not to be plagiarism, it was certainly a very sloppily made sausage.'<sup>167</sup>

## Conclusion

This article considered the *cri de coeur* of the author John Birmingham that 'defamation was framed to protect the reputations of 19th century gentlemen

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<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Mike Secombe, 'Carleton's 15 Minutes A Very Sloppy Sausage', *Sydney Morning Herald*, 2 March 2002, 14.

<sup>167</sup> Ibid.

hypocrites'.<sup>168</sup> The two case studies provided some evidence that defamation law was having an adverse impact upon a number of genres of social criticism. Nonetheless, defamation law was not entirely negative in its impact upon biography, journalism and history. It helps ensure that the audience and viewers are provided with what David Marr calls 'gossip we can trust'.<sup>169</sup>

The diptych of defamation cases highlighted how courts extract meanings from publications and judicial perceptions as to the nature of reasonable reader or viewer. In the *Abbott and Costello Case*, Higgins J maintains that imputations should be interpreted in light of 'middle-class morality'. Rather than consider the evidence that a range of individuals have attributed to a publication, he determines the meaning of a work through reference to the figure of the hypothetical ordinary reader reasonable reader. Strangely enough, Higgins J assumes that the ordinary reader is a 'prurient reader'. He interprets the comments of Bob Ellis in light of anachronistic notions of unchastity and political disloyalty. In the *Carleton* case, Higgins J engages in a similar exercise of hermeneutics. His Honour found that the comments about plagiarism and laziness were indeed defamatory. Higgins J held that the comments extended to the presenter, the producer, and the executive producer. This time, his honour assumes that the average viewer has an extraordinary good grasp of the mechanics of the production of a television program. Magnusson cautions that 'courts should be careful, in accepting a plaintiff's imputations, not to penalise satirical comment merely because it falls outside their own middle-class horizon'.<sup>170</sup> It is a warning that should be heeded.

The two decisions from the Supreme Court of the Australian Capital Territory show the paucity of defences in respect of defamation law. In the *Abbott and Costello Case*, the publisher Random House was unable to raise the defence of fair comment and qualified privilege to the claims of defamation because the allegations about the Abbotts and Costellos were false. Furthermore, Random House would be open to a charge of negligence, because they failed to check the anecdote of Bob Ellis for its

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<sup>168</sup> John Birmingham, 'He Wrote With A Joint In His Hand', *Sydney Morning Herald* (Sydney), 26 April 2003; and Malcolm Knox, 'Defamation Abuse Has Stifled Criticism: Author', *Sydney Morning Herald* (Sydney), 26 April 2003.

<sup>169</sup> Marr, above n 12, 36.



veracity. Indeed, Justice Higgins remarks at one point on the 'negligence of the defendant'.<sup>171</sup> The judge was also unsympathetic to arguments made by the author Bob Ellis about artistic expression and freedom of speech. His Honour maintained that defamation law helped promote 'responsible speech'. In the *Carleton* case, the ABC raised the defences of truth, fair comment, and qualified privilege. Higgins J accepted the defence of fair comment. His Honour noted that 'the defendants' freedom of speech, protected by fair comment, allows them to have published their opinions, however wrongheaded and prejudiced, without legal penalty'.<sup>172</sup> The reforms introduced by the *Defamation Act 2001* (ACT) are to [61] be welcomed. However, there needs to be more work done to provide greater explicit recognition of 'the aesthetic alibi' — artistic expression and freedom of speech.<sup>173</sup>

There is much debate about what remedies are appropriate in respect of defamation actions. In the *Abbott and Costello Case*, Higgins J makes much of the behaviour of the defendants, criticising the editor, the publisher's lawyers, and the publishing house. He makes much of the failure to apologise to the plaintiffs. The size of the damages awarded in the *Abbott and Costello Case* has had an inordinate impact upon the publishing industry, given the relative value of the decision as a legal precedent in defamation law. As Eisenberg observes:

The signals sent out by cases like these undoubtedly lead to publisher nervousness about the cost, complexity and riskiness of potential legal action. They may well be manifested in more cautious decisions about whether or not to publish borderline material.<sup>174</sup>

The decision has had both a direct and indirect impact upon the genres of non-fiction — such as biography, journalism, and history. The judgment has emboldened aggrieved parties to bring legal action against publishers. Furthermore, the decision has led to greater self-censorship on the part of publishers and other media proprietors. Hopefully, the decision in the *Carleton* case will allay this trend. The

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<sup>170</sup> Magnusson, above n 148, 291.

<sup>171</sup> *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 51.

<sup>172</sup> Ibid.

<sup>173</sup> Kenyon, above n 11, 217.

<sup>174</sup> Eisenberg, above n 34, 29.

award of costs against Channel Nine will be a significant discouragement to parties seeking redress under defamation law. Such cases are better resolved in other forums than the law courts.