Reflections on the Ben Roberts-Smith Defamation Trial of the Century

Michael Cameron, National Editorial Counsel, News Corp Australia, and **Marlia Saunders,** Partner, Thomson Geer, discuss the implications of the Ben Roberts-Smith trial.

MARLIA SAUNDERS: The Ben Roberts-Smith defamation proceedings have been a huge talking point (particularly for defamation lawyers) for the last 5 years, and now we finally have an outcome with Justice Besanko upholding the newspapers' truth and contextual truth defences. As a newspaper man from way back, what's the significance of a media company spending tens of millions of dollars defending its journalism?

MICHAEL CAMERON: I think it has great significance. Some people bemoan the influence and power of big media companies in society but the fact is that in many instances only a well-resourced media entity can afford to fight defamation claims brought by well-resourced plaintiffs in this country. The frightening part about the Ben Roberts-Smith case is the cost involved. I'm told total legal costs for the matter are likely to end up somewhere between $30-40 million. For just one case! How would Nine Newspapers have fared if the verdict went the other way? Would they have had to close newspapers? Sack journalists? Even if they prevail in the appellate court the newspapers are unlikely to recover all their costs. It's a multi-million dollar exercise in an industry where profit margins are forever shrinking. And a strong and ferocious press is vital to the functioning of a democracy. There has to be a better way to resolve these disputes.

What's your take on the BRS matter? Do you think it sets the standard for costs going forward? Will the result, assuming it is upheld by the Full Court, scare off future litigants? Will it embolden the press to defend such claims?

MARLIA: It's certainly the most expensive defamation matter Australia has seen to date. If that's how much defamation matters are going to cost to litigate going forward, then something definitely needs to change. It's not fair or sustainable for media companies to have to put such huge sums of money at risk to defend their public interest journalism. There also aren't many plaintiffs who would be in a position to fund such a case and barristers are much less likely to accept such costly cases 'on spec', so the BRS matter may well disincentivise prospective plaintiffs from commencing proceedings going forward.

Part of the reason why defamation cases have become so expensive is the way the Federal Court requires litigation to be run, including extremely tight timeframes, increased involvement of senior counsel, preparation of affidavit evidence and the preference for all issues in dispute to be determined at trial. We may even see a return to cases being commenced against the media in the State courts as a result of the BRS litigation.

How do you think the 'public interest' defence in s 29A of the Uniform Defamation Acts would have fared if it had been applicable to the BRS case? Do you think the public interest defence might provide a viable alternative to media defendants having to incur the costs of a truth defence?

MICHAEL: I think that the newspapers would definitely have sought to use the new public interest defence if it had been available at the time Roberts-Smith filed his claim. The allegations of war crimes involving members of the ADF in Afghanistan are clearly important matters of public interest, as opposed to mere prurient interest. I suspect that it is the kind of subject matter the Attorneys-General had in mind when considering the introduction of the new defence. I'm not sure if the public interest defence would have been of any use to Fairfax in relation to the domestic violence imputations in the BRS matter.

I think that the public interest defence could provide a useful deterrent for undeserving plaintiffs beginning defamation actions in the future, particularly when they are public figures involved in public matters. Under the old qualified privilege regime the 'Reynolds' test of reasonableness generally failed at the slightest hint of journalistic imperfection. The legislative reforms provide that the court must consider a range of non-exclusive factors in assessing whether or not a defendant has made out the public interest defence. We're still awaiting some case law on this question. It remains to be seen how much weight a court will apply to factors like the "integrity" of sources or what amounts to a "reasonable" attempt to get a person's side of the story. I'm hopeful that the courts will take a balanced approach to these questions and not, as they have in the past, demand a level of legal precision for the reporting of important public issues that is incommensurate with the realities of the working journalist.

Do you think the public interest defence would have prevailed in the BRS case? Do you think the courts will apply equal weight to the factors set out in Section 29A or will some, such as what amounts to a reasonable attempt to get the other side of the story, be regarded more seriously than others? While I've got you, what do you think amounts to a reasonable amount of time for journalists when seeking comment from the person they are reporting on, given the realities of the competitive digital news market? One hour? One day? One week? Asking for a friend.

MARLIA: I do think the public interest defence *should* have prevailed in the BRS case, and given the thorough and measured way Justice Besanko approached the trial and his reasons (including in relation to contextual truth, where he found some imputations were not proved true but that Roberts-Smith's reputation was not further harmed due to the truth of the contextual imputations), I have faith that he would have upheld the public interest defence here.

There are two upcoming trials this year where the s 29A defence has been pleaded, so Justice Lee (in *Heston Russell v ABC*) or Justice Abraham (in *Munjed Al Muderis v Nine Network Australia & Ors*) will be the first to write judgments on this defence. Whether the defence has its intended effect of providing a viable alternative to a truth defence for public interest journalism will depend on the courts recognising the important role of the media in shining a light on suspected bad behaviour, even where such bad behaviour can't be proven in a court of law to the balance of probabilities. The defence is essentially the legislative embodiment of the adage 'sunlight is the best disinfectant'. My hope is that the courts will approach each case on its facts, will give appropriate consideration to each of the factors set out in the section and will place

sufficient weight on the final factor - the importance of freedom of expression in the discussion of issues of public interest.

In relation to what is a reasonable amount of time to give for a response to a request for comment – how long is a piece of string? My view is the more serious and extensive the allegations, the more time is needed for a response. It's always going to be the lawyers' preference to have a response, including any denial of wrongdoing, prior to publication – but at the end of the day, it comes down to a risk vs reward analysis for the editors in the context of the commercial publishing environment.

Another feature of modern day defamation litigation, which we saw play out in the BRS case, is the impact of the court of public opinion (particularly on social media) both during the course of the proceedings and after verdict. What do you think the consequences would have been for BRS and for the media generally if he had succeeded in his action?

MICHAEL: I was pretty amazed at the social media commentary during the case, some of it by journalists. Media types should stop hating each other on Twitter and focus their ire on the real enemy: the plaintiff-friendly *Defamation Act*. I hate to think what the consequences would have been for the media in this country if the BRS verdict had gone the other way. We've yet to see the grounds for his appeal before the Full Court. There may be more twists and turns in this case yet.

A Tribute to Cath Hill

I think I started practising law in 2011. I landed as my luck would have it immediately in media and copyright practice groups. I think I recall, shortly thereafter, my first CAMLA events and, in time, my first Board meetings. I recall the first interview I ever conducted for the *Communications Law Bulletin* (with Christina Allen, then General Counsel at Fox Sports), and I recall the first editions of the *Communications Law Bulletin* I helped eventually to publish. I recall the first CAMLA seminars I attended and, in time, hosted and moderated. I think I recall the first trivia night I attended (I believe it was the special 25th anniversary at Doltone House in 2013). I recall Presidents Henty, Hoffman, Taylor and Dunn and the many Board members who have served this organisation during those years. And I recall meeting for the first time through CAMLA many of the people I now consider to be some of my closest professional friends and supporters.

CAMLA and the wonderful community it has created, and the wisdom, connections and professional opportunities it gives its members, have thankfully been a constant throughout my career as a lawyer. As I moved into new roles, took on new responsibilities, and enjoyed the pleasures of new networks, as one does throughout one's career, CAMLA has been for me (and many others I'm sure) a continuous, steady – I don't want to use the word "rock" lest this sound like a wedding speech, but I know you understand what I mean.

What I cannot recall, though, is CAMLA *before Cath*, or as the historians will one day refer to that era: CAMLA B.C.

For as long as I can recall, Cath has been the driving force behind CAMLA.

She was its face, in that she managed CAMLA's relationships with providers and partners, received and responded to queries, dealt with its members and the attendees of its events, and represented CAMLA to the public.

But she also was its soul, and its most exuberant cheerleader, as any member of the Board, or any editor of the Bulletin, or any organiser of an event, will surely attest. Cath represented – with some grief, I am repeatedly correcting my use of the present tense – the familiar delight of attending a CAMLA event. She would be there, without fail, waiting at the entrance with name tags, to admit us into the event that she had marketed, designed, set up, and ensured would run smoothly. To me, she was CAMLA's trade mark: there, to mark a CAMLA event as distinct from – and superior to – any other event a lawyer might attend.

I know as well as anyone what roles CAMLA's Executive and Board members play, and what role CAMLA's Young Lawyers Committee plays, and of course the roles that event hosts, organisers, speakers and moderators play, in CAMLA's success. I know what role the contributors to the *Communications Law Bulletin* play. But Cath was CAMLA; and CAMLA, to me, was Cath.

Cath, Ashleigh and Eli

Cath has a somewhat lawyerly knack for hoping for the best but expecting the worst (despite all historical data granting her a licence to do otherwise). Never in my years of involvement in the organisation have I witnessed a seminar or other event that could be described as a failure or as disappointing. The crowds always come, the events are always smooth. And yet, Cath would regularly and predictably stress about numbers. For her, it was personal. CAMLA's success meant so much to her, including – I would get the sense – because the organisers and attendees of events meant so much to her. Perhaps because she would so stress, or perhaps because of her talent for organising (wrangling) lawyers, CAMLA has grown steadily under her watch. New generations of members and attendees flock to our events, new organisations regularly sign up for corporate memberships. Cath helped the organisation navigate multiple challenges, including the uncertainty of a locked-down world where events could not take place in person. And, throughout that time, CAMLA went from strength to strength. Our membership numbers grew and are continuing to grow, our finances were always secure and, most importantly, that sense of a closely connected community has always been palpable.

Cath moves on with our affectionate blessings and deep, sincere, gratitude – to new roles, new responsibilities, the pleasures of new networks – as one does in one's career. We bid her farewell. We thank her. For what's to come, we wish her and her family all the best, for that is what they most unquestionably deserve.

Cath, thank you for your years of service to this organisation. Thank you for your friendship and support. Thank you for helping to build something that matters greatly to us all. Congratulations and good luck!

Eli Fisher