HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

AUSTRALIAN BROADCASTING CORPORATION APPELLANT

AND

JAMES RYAN O'NEILL RESPONDENT

Australian Broadcasting Corporation v O'Neill [2006] HCA 46
28 September 2006
H1/2006

ORDER

1. Appeal allowed.

2. Set aside the order of the Full Court of the Supreme Court of Tasmania made on 29 August 2005 and, in its place, order that:

(a) the appeal be allowed; and

(b) Order 1 of the orders made by Crawford J on 22 April 2005 be set aside insofar as it applies to the appellant.

3. The appellant to pay the respondent's costs of the appeal to this Court.

On appeal from the Supreme Court of Tasmania

Representation:

R J Whitington QC with A T S Dawson for the appellant (instructed ABC Legal Services)

P W Tree SC with J E Green for the respondent (instructed by Hobart Community Legal Service)

CATCHWORDS

Australian Broadcasting Corporation v O'Neill

Defamation – Injunctions – Interlocutory injunctions – Interlocutory injunction to restrain publication – Appellant restrained from broadcasting documentary film making allegations including that respondent suspected of having committed notorious unsolved crime – Principles on which interlocutory injunction to restrain publication granted – Relevance of "flexible" or "rigid" approaches to granting interlocutory injunctions – Significance of value of free speech – Significance of avoiding "trial by media" – Whether relevant that only nominal damages likely to be awarded – Significance of status of respondent as convicted life prisoner.

Injunctions – Interlocutory injunctions – Defamation – Whether general principles governing grant of interlocutory injunctions to restrain wrongs apply to interlocutory applications to restrain publication of allegedly defamatory matter – Relationship between *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 and *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 – Whether respondent had made out an entitlement to an interlocutory injunction within the principles established by *Beecham* – Whether Full Court and primary judge shown to have erred in granting of interlocutory injunction.

Defamation – Injunctions – Jurisdiction to grant interlocutory injunction to restrain publication of allegedly defamatory matter – Nature of equitable jurisdiction to grant injunctions to restrain publication – Effect of *Common Law Procedure Act* 1854 (UK) – Effect of *Judicature Act* 1873 (UK).

Appeal – Interlocutory injunction in defamation proceedings – Necessity of demonstrating error in order to justify intervention by High Court – Whether error shown in approach and conclusion of Full Court and primary judge.

Defamation – Defences – Justification – Whether avoiding "trial by media" relevant to determination of "public benefit" required by *Defamation Act* 1957 (Tas) s 15.

Words and phrases – "public benefit", "public interest".

Common Law Procedure Act 1854 (UK), ss 79, 82.
Judicature Act 1873 (UK), s 25(8).
Supreme Court Civil Procedure Act 1932 (Tas), s 11(12).
Defamation Act 1957 (Tas), s 15.

1 GLEESON CJ AND CRENNAN J. This appeal concerns the application, in what has long been recognised as the special context of a defamation action[1], of the principles according to which the discretionary remedy of an interlocutory injunction is granted.

2 The proceedings were brought in the Supreme Court of Tasmania. The provision of the *Supreme Court Civil Procedure Act* 1932 (Tas) (s 11(12)) empowering the grant of injunctive relief, including interlocutory injunctions, was considered recently by this Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[2]. The general principles according to which courts grant such relief were there explained[3]. That was not a defamation case. The central issue concerned the nature of the right which the plaintiff sought to vindicate in the litigation; a matter that arose in the context of considering whether the plaintiff was able to show a sufficient colour of right to final relief to justify the grant of an interlocutory injunction. That question, together with the likelihood of injury for which damages would not be an adequate compensation, and wider considerations of the balance of convenience, goes to the justice and convenience of granting interlocutory relief. In the present case, there is no doubt about the nature of the legal right which the respondent seeks to vindicate in the action, although the existence of that right is disputed.

The threatened publication

3 In 1966, three children, aged nine, seven and four, members of the Beaumont family in South Australia, disappeared. The police suspect that the children were murdered, but investigations so far have been inconclusive. It is one of Australia's most notorious unsolved crimes.

4 In November 1975 the respondent was convicted of the murder, in Tasmania, in February 1975, of a young boy whom he had abducted. He was sentenced to imprisonment for life. In May 1975, in an interview with Tasmanian police, the respondent confessed to the murder in April 1975 of another young boy. Following the conviction for the February 1975 murder, and the imposition of the life sentence, the Tasmanian prosecuting authorities announced that they did not intend to proceed with charges in relation to the April 1975 occurrence. In the Full Court of the Supreme Court of Tasmania, in the present proceedings, Slicer J said that it was open on the evidence to

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1 *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

2 (2001) 208 CLR 199.

3 (2001) 208 CLR 199 at 216-218 [8]-[16], 231-232 [59]-[61], 239-248 [86]-[105].

conclude that there was a "high likelihood" that the appellant, if necessary, would be able to prove the respondent's guilt of the second murder.

5 Since at least 1999, Mr Davie, a former police officer, who was joined as a defendant in the present proceedings but who has taken no part in the appeal, has been investigating what he claims to be a connection between the respondent and the disappearance of a number of missing children, including the Beaumont children. Mr Davie has made allegations about the respondent which have been widely reported in the Tasmanian media. Mr Davie, and another defendant, Roar Film Pty Ltd (which, like Mr Davie, has not participated in this appeal) produced a documentary film called "The Fisherman", under contract with the appellant (a national television broadcaster). The film was displayed at the Hobart Film Festival in January 2005. There is an issue as to whether the appellant was involved in that publication, but that is not the publication with which this appeal is concerned. The media and political response was summarised by Crawford J, at first instance, as follows:

> "The defendants rely on the fact that similar, but far more detailed, imputations to the ones of which the plaintiff complains have been made to the public in recent times. Copies of articles in the Hobart based Mercury newspaper on 26, 27, 28, 29 and 30 January 2005, and 6, 7, 8, 11, 12, 13 and 15 April 2005, in addition to the one on 3 January 2005, to which I have already referred, were tendered. They contained many statements concerning the plaintiff, many of which are likely to have been highly defamatory. I will refer to some of them. The Tasmanian Commissioner of Police was reported as saying that the plaintiff could be responsible for the kidnapping of the Beaumont children in 1966 and that he was convinced that the plaintiff had murdered more children than the one of which he was convicted in 1975. The Commissioner was reported as saying: 'He's got a real lust for kiddies. He's a multiple murderer.' It was also reported that the plaintiff was wanted in Victoria on 12 charges involving the abduction and sexual assault of four boys in the 1970s and that the Commissioner had said that he was also a suspect concerning the disappearance and presumed murders of several boys and girls around Australia before 1974. However, South Australian police were reported as saying that they had found no evidence to support the plaintiff's involvement in the disappearance of the Beaumont children and that he had been discounted from their inquiries. Notwithstanding those denials, the Tasmanian Commissioner was reported as maintaining what he had said and of saying 'he's killed plenty of other people', 'he's a multiple murderer' and 'he would kill other kids, there is no doubt in the world if he gets out', adding 'we discovered that in the fortnight prior to the second boy disappearing that there were probably four if not five other children picked up, taken to remote locations, and had managed to escape the person who abducted them and get away relatively injury free'. He

described the plaintiff as 'cold blooded, psychopathic, a prolific liar ... would seek gratification at all costs ... no remorse, no emotion, no guilt.'

Mr Davie was reported as saying 'I know O'Neill has told other people he was responsible for killing the Beaumonts', referring to a denial by the plaintiff as a refusal to confess. Mr Davie was also reported to have said that the plaintiff had murdered more children than the one for which he was gaoled for life in 1975. A journalist, who was said to have worked with Mr Davie on the documentary, was reported to have made similar statements, adding that she was convinced that she knew where the Beaumont children were buried and that she wanted an investigation into the murders she believed the plaintiff had committed before being imprisoned.

Politicians became involved in the newspaper publicity. The Opposition justice spokesman called for the plaintiff to be immediately moved from the Gaol Farm to the security of Risdon Prison, demanding that the Attorney-General 'guarantee the safety of O'Neill's accommodation arrangements to the people of the Derwent Valley'. The Attorney-General was reported as saying that such calls were 'scandalous'. The Opposition spokesman was then reported accusing the Attorney-General of 'breathtaking arrogance and potential recklessness' and challenging the Attorney-General to state publicly that she was personally satisfied that housing the plaintiff at Hayes Prison Farm posed no risk to the community.

It was reported in the Mercury on 8 February 2005 that the plaintiff was prepared to meet a reporter to establish pre-interview guidelines and to have an article based on an acceptable level for him, but the Director of Prisons prohibited the meeting. A reference was made in the Mercury to a political storm having erupted concerning a day-release program for prisoners which had allowed the plaintiff to fish for trout in the Derwent River accompanied only by his pet dog. The Opposition spokesman then called for a representative of victims of crime to be a member of the Parole Board for 'appropriate balance', to which the Attorney-General retorted that the suggestion was insulting to existing members of the Board.

On 11 April 2005, the Mercury reported a claim by a man identified as Lionel, who stated that he had been picked up by the plaintiff in a car when a 10 year old and had escaped from his clutches.

On 7 April 2005, the Mercury newspaper published having received a letter from the plaintiff's lawyer complaining that the Mercury was attempting to keep him in custody through trial by media and that he considered it to be totally irresponsible and grossly unfair that he was

> being persecuted 30 years after his conviction. His lawyer said that he believed that he deserved a second chance if the Parole Board deemed him suitable for release."

6 The facts recited by Crawford J show the level of media and political attention to the respondent over the period between early January and mid-April 2005. The Tasmanian Commissioner of Police was reported as describing the respondent as a "multiple murderer", with "a real lust for kiddies". The respondent's custodial situation became a political issue. This was all before the publication sought to be restrained in these proceedings.

7 The appellant intended to broadcast "The Fisherman" nationally on 28 April 2005. On 15 April 2005, the respondent commenced, in the Supreme Court of Tasmania, an action for defamation against the appellant, Roar Film Pty Ltd, and Mr Davie. The respondent claimed damages, and permanent injunctive relief. The respondent also applied for interlocutory relief to prevent the appellant from broadcasting the documentary pending the hearing of the action. The application was heard by Crawford J. It was successful. It is that matter that is the subject of this appeal.

8 It is not suggested that there are any current criminal proceedings against the respondent or that any such proceedings are presently in contemplation. In particular, so far as appears from the evidence, there is no present intention on the part of any prosecuting authority to charge the respondent with offences in relation to the Beaumont children, or any other children. No issue of contempt of court arises. This consideration is relied upon, in different ways, by both sides in argument. The appellant says that there is no question, in the circumstances, of jeopardising the fairness of a criminal trial because, so far as presently appears, there will be no such trial. The respondent says that this makes his position all the worse; he will face trial by media, with all the unfairness and injustice that entails.

The proceedings in the Supreme Court of Tasmania

9 The application for interlocutory relief was heard by Crawford J on 20 and 21 April, and judgment was delivered on 22 April 2005. Up to that time, no statement of claim had been filed. Indeed, Crawford J did not see the documentary. The application was conducted on the agreed basis that the documentary was capable of conveying the following imputations:

1. That the respondent is a suspect in the disappearance of the Beaumont children.

2. That the respondent is a suspect in the murder of the Beaumont children.

3. That the respondent was a multiple killer of children.

10 It was acknowledged in argument in this Court that there are difficulties with the form of those imputations. The case was argued before Crawford J on the basis that, at trial, the appellant will rely upon a defence of justification which, under the *Defamation Act* 1957 (Tas) ("the Defamation Act")[4], meant truth and public benefit (s 15). What exactly would the appellant need to show was true? What does it mean to say that the respondent is a suspect? Suspected by whom? Obviously, he is suspected by Mr Davie. Perhaps it can be shown that he is suspected by other people as well. On the evidence, the Tasmanian Commissioner of Police may be one of them. Does the pleading mean that it is imputed that the respondent is suspected by the South Australian police, or prosecuting authorities, or by the Tasmanian police, or prosecuting authorities, or at least by one or more persons in those ranks? What, if anything, would the appellant need to show about the state of mind of at least some of those people in order to show that the matter to be published is true? There was also debate in this Court about the meaning of the third imputation. Does "multiple" mean more than one, or more than two? Having regard to the respondent's signed confession to a second murder, if the imputation bears the first meaning, it appears that the appellant may have little difficulty in establishing its truth. If it means more than two, the position may be different.

11 Crawford J considered it obvious that "there will be little difficulty in proving that [the respondent] is suspected of being involved in the disappearances and possible murders of the Beaumont children in the light of the Mercury's publications". He thought it was not so clear that it could be proved that the respondent was a multiple murderer of children, although he did not say what he meant by "multiple". At all events, he was ready to accept that there was a substantial likelihood that the appellant could show the imputations to be true. In his view "a greater problem for the [appellant] will be to establish that the publication of the imputations will be for the public benefit". He said, in a passage that conveys the essence of his reasons for granting an interlocutory injunction:

> "My view is that, in general, it is not for the public benefit that the media should publicly allege that a person has committed crimes of which he or she has not been convicted, whether or not there are currently proceedings afoot with respect to the crimes. It is instead in the public

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4 The *Defamation Act* 2005 (Tas) came into force on 1 January 2006, but it was the Act of 1957 that was in force at the time of the proceedings in the Supreme Court of Tasmania, and it was the law as stated in the Act of 1957 that governed the decisions the subject of this appeal.

> interest that such allegations should usually be made to the public only as a result of charges and subsequent conviction. That the media on occasions makes such allegations is often referred to as 'trial by media', of which it appears the plaintiff complained to the Mercury. However, so far as concerns the imputation that the accused is a multiple killer of children, a more appropriate description in this case would be 'conviction by media'. No suggestion of a trial, as we understand that word, will be involved here. Similarly, I can see no aspect of public benefit in the making public of allegations that the plaintiff was responsible for the disappearance and murder of the Beaumont children or that he is suspected of being responsible. The responsibility owed to the public with regard to the investigation of crime is entrusted by our society to the police and other public investigators and prosecutors. If there is evidence available that might assist the authorities to investigate the disappearance of the children in question, it should be made available to them. I have difficulty accepting that it is in the public interest that instead, such information be bandied about in public. There will, of course, be cases when in the light of prior public statements by the person who is being defamed, or the public conduct of that person, it will be for the public benefit to publish allegations of that kind to the general public, but I have difficulty seeing that this is such a case. It is sufficient to say that the claim of the defendants to 'public benefit' may well be unsuccessful.
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> It follows from what I have been saying that I am unpersuaded that the granting of an interlocutory injunction restraining the defendants from publishing the imputations will 'restrain the discussion in the media of matters of public interest', as that expression was used by Hunt J in *Chappell's* case at 164, applying, of course, the law's use of the term 'public interest'."

12 Crawford J granted an interlocutory injunction[5]. The order restrained the appellant from broadcasting or otherwise publishing any part of the documentary known as "The Fisherman" that imputes or implies that the respondent was responsible for or is suspected of being responsible for the disappearance or murder of children commonly referred to as the Beaumont children or that the respondent is a multiple killer of children. The form of the order in some respects went beyond the form of the agreed imputations, but, to the extent that it followed those imputations, it reflected their defects.

13 The appellant appealed to the Full Court of the Supreme Court of Tasmania. By majority (Evans and Blow JJ, Slicer J dissenting), the appeal was

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5 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26.

dismissed.[6] Blow J, with whom Evans J agreed, concluded that it had not been shown that Crawford J acted on some wrong principle, or that the interlocutory order involved substantial injustice. He reviewed in some detail the authorities that show that courts "have been most reluctant to grant interlocutory injunctions in defamation cases", but observed that the weight of authority in Australia favoured a flexible rather than a rigid approach. Crawford J, he said, was not obliged to treat as decisive the public interest in free speech which is one of the reasons for the traditional reluctance to grant interlocutory injunctions in defamation cases, and had exercised his discretion in accordance with the appropriate principles.

14 Slicer J, who dissented, summarised the position as he saw it in this way:

> "1. The respondent's status was that of a public persona. His conduct as a prisoner could be said to be of general interest and his past a matter which was in the public domain.
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> 2. The fate of the Beaumont children had been and remained of community interest.
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> 3. Issues concerning the release of prisoners have always been concerns of the community.
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> 4. The statements, allegations or innuendoes presented in the documentary had previously been published to the community.
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> 5. The ambit of the documentary was far wider than that portraying the activities of the respondent whilst in prison, and ... the respondent believed himself to have been betrayed [by Mr Davie who had gained access to the respondent on what the respondent says is a false basis].
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> 6. Notwithstanding the belief of betrayal, the respondent had previously agreed to participate in the documentary process, albeit on a differing assumption. The allegations were, on their face, defamatory although the action was subject to statutory defences or justifications.
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> 7. The respondent had an arguable basis for an action in defamation."

15 Slicer J emphasised that "public benefit" for the purpose of the statutory defence of justification is not co-extensive with "public interest" for the purpose

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6 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82.

of considering prior restraint of publication. "The existence of a defence is a relevant factor, but prohibition of publication is governed by different legal principle." There were involved, he said, different value judgments. He regarded freedom of speech as "a compelling factor". The respondent retained his claim for damages. His reputation was already tainted. There had already been extensive publication of the material in question. The unsolved crimes, the murder to which the respondent had confessed but for which he had not been tried, and the respondent's future prospects of release, were all matters of public interest. He held that Crawford J had erred in failing to give appropriate weight to the public interest in free speech.

Prior restraint of publication in defamation action

16 In his widely quoted judgment in *Bonnard v Perryman*[7], in which Lord Esher MR, and Lindley, Bowen and Lopes LJJ concurred, Lord Coleridge CJ explained why "the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong" and why, when there is a plea of justification, it is generally wiser, in all but exceptional cases, to abstain from interference until the trial and determination of the plea of justification. First, there is the public interest in the right of free speech. Secondly, until the defence of justification is resolved, it is not known whether publication of the matter would invade a legal right of the plaintiff. Thirdly, a defence of justification is ordinarily a matter for decision by a jury, not by a judge sitting alone as in an application for an injunction. Fourthly, the general character of the plaintiff may be an important matter in the outcome of a trial; it may produce an award of only nominal damages.

17 In one respect, what Lord Coleridge CJ said, in its application to this case, requires qualification. His Lordship was dealing with a context in which truth of itself amounted to justification. Here, in the state of the law at the time of the proceedings before Crawford J and the Full Court, the appellant needed the added element of public benefit. Subject to that significant matter, what his Lordship said is directly in point. The general public interest in free speech is involved. The trial judge was prepared to accept that there was a strong possibility that the imputations could be shown to be true. The defence of justification remains unresolved. The respondent's general character, or if the difference be material, reputation[8], is such that, even if he succeeded at trial, the damages awarded for the publication the subject of the interlocutory application could well be nominal.

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7 [1891] 2 Ch 269 at 283-285.

8 cf *Plato Films Ltd v Speidel* [1961] AC 1090 at 1138.

18 Lord Coleridge CJ's conclusion was that "it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial"[9]. That form of expression does not deny the existence of a discretion. Inflexibility is not the hallmark of a jurisdiction that is to be exercised on the basis of justice and convenience. Formulations of principle which, for purposes of legal analysis, gather together considerations which must be taken into account may appear rigid if the ultimate foundation for the exercise of the jurisdiction is overlooked. Nevertheless, so long as that misunderstanding is avoided, there are to be found, in many Australian decisions, useful reminders of the principles which guide the exercise of discretion in this area. One of the best known statements of principle is that of Walsh J, before he became a member of this Court, in *Stocker v McElhinney (No 2)*[10]. After referring to the 5th edition of *Gatley on Libel and Slander*, and citing *Bonnard v Perryman*, he said:

> "(1) Although it was one time suggested that there was no power in the court, under provisions similar to those contained in [the Act governing procedure in the Supreme Court of New South Wales] to grant an interlocutory injunction, in cases of defamation, it is settled that the power exists in such cases.
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> (2) In such cases, the power is exercised with great caution, and only in very clear cases.
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> (3) If there is any real room for debate as to whether the statements complained of are defamatory, the injunction will be refused. Indeed, it is only where on this point, the position is so clear that, in the judge's view a subsequent finding by a jury to the contrary would be set aside as unreasonable, that the injunction will go.
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> (4) If, on the evidence before the judge, there is any real ground for supposing that the defendant may succeed upon any such ground as privilege, or of truth and public benefit, or even that the plaintiff if successful, will recover nominal damages only, the injunction will be refused."

19 The principles were discussed, for example, in *Chappell v TCN Channel Nine Pty Ltd*[11] (a decision referred to by Crawford J in a passage quoted above), *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty*

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9 [1891] 2 Ch 269 at 285.

10 [1961] NSWR 1043 at 1048.

11 (1988) 14 NSWLR 153.

Ltd[12], and *Jakudo Pty Ltd v South Australian Telecasters Ltd*[13]. As Doyle CJ said in the last-mentioned case, in all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. We agree with the explanation of these organising principles in the reasons of Gummow and Hayne JJ[14], and their reiteration that the doctrine of the Court established in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[15] should be followed[16]. In the context of a defamation case, the application of those organising principles will require particular attention to the considerations which courts have identified as dictating caution. Foremost among those considerations is the public interest in free speech. A further consideration is that, in the defamation context, the outcome of a trial is especially likely to turn upon issues that are, by hypothesis, unresolved. Where one such issue is justification, it is commonly an issue for jury decision[17]. In addition, the plaintiff's general character may be found to be such that, even if the publication is defamatory, only nominal damages will be awarded.

Public benefit and public interest

Section 15 of the Defamation Act provided:

"15. It is lawful to publish defamatory matter if –

(a) the matter is true; and

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12 [1989] VR 747.

13 (1997) 69 SASR 440 at 442-443.

14 See [65]-[72].

15 (1968) 118 CLR 618.

16 See also *Firth Industries Ltd v Polyglas Engineering Pty Ltd* (1975) 132 CLR 489 at 492 per Stephen J; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 at 708 per Mahoney JA; *World Series Cricket v Parish* (1977) 16 ALR 181 at 186 per Bowen CJ.

17 As to the practice concerning trial by jury in various Australian jurisdictions, see George, *Defamation Law in Australia*, (2006) at 225-226.

(b) it is for the public benefit that the publication should be made."

21 These were both questions of fact (s 20). However, par (b) called for a value judgment as to whether the public would benefit from the publication in issue – here the publication of the documentary[18].

22 In *London Artists Ltd v Littler*[19], Lord Denning MR said: "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment." The contexts of fair comment, and qualified privilege, are somewhat different from the context of justification. However, it may be noted that, in *Bellino v Australian Broadcasting Corporation*[20], where this Court was concerned with a Queensland statutory defence of publication in good faith in the course of the discussion of some subject of public interest, the public discussion of which is for the public benefit, Dawson, McHugh and Gummow JJ said that "[i]n the great majority of cases, the public discussion of a subject of public interest must be for the public benefit."[21] There are some obvious exceptions, such as public discussion that might imperil national security.

23 The requirement of public benefit, as an element of the defence of justification in a number of Australian jurisdictions, had a long history. In *Rofe v Smith's Newspapers Ltd*[22], Street ACJ said, in words that applied equally in Tasmania:

> "The defence of justification rests on a different footing in New South Wales from that on which it rests in England. In England it is a complete answer to a civil action that the defamatory matter complained of was true. The reason upon which this rule of law rests, as I understand, is that, as the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it. The law was

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18 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 229.

19 [1969] 2 QB 375 at 391.

20 (1996) 185 CLR 183.

21 (1996) 185 CLR 183 at 229.

22 (1924) 25 SR (NSW) 4 at 21-22.

> altered in this respect in New South Wales many years ago. It was felt that to allow past misconduct, or discreditable episodes which were dead and gone, to be revived and dragged into the light of day at will by maliciously minded scandalmongers was too hard upon people who, whatever indiscretions they might have committed in the past, were leading respectable lives; and the Legislature, accordingly, provided that, in an action for defamation, the truth of the matters charged should not amount to a defence, unless it was for the public benefit that they should be published."

24 The matter in question in this case goes far beyond the reporting of the past indiscretions of a person of otherwise good reputation, whose privacy ought to be respected. The unsolved mystery of the disappearance of the Beaumont children, the presence within the Tasmanian prison system of a convicted murderer who is suspected of responsibility, the respondent's confession to another murder with which he has never been charged, and the political controversies concerning release on licence or parole of serious offenders are all matters of public interest in the relevant sense. It would have been open to a tribunal of fact to find that the public discussion of those matters, with particular reference to the respondent, is for the public benefit. What might be thought to stand in need of explanation is how suppression of public discussion of those matters could serve the public interest.

25 The reasoning of Crawford J, which was approved by the majority in the Full Court, rested upon a central proposition: it is not for the public benefit, and is contrary to the public interest, for there to be "trial by media". Crawford J said in the passage earlier quoted, that the public interest dictates that allegations of the kind here in question "should usually be made to the public only as a result of charges and subsequent conviction". That proposition requires further analysis.

26 First, it is not the fact that allegations of serious criminal conduct usually become known to the public only as a result of charges and subsequent conviction. On the contrary, the process often works in reverse: charges and subsequent conviction often result from the publication of allegations of serious criminal conduct. Subject to the law of contempt (and, of course, the law of defamation) media outlets are free to make, and frequently make, allegations which are directed towards, or which have the effect of, prompting action by the authorities. Condemnations of trial by media sometimes have a sound basis, but they cannot be allowed to obscure the reality that criminal charges are sometimes laid as a response to media exposure of alleged misconduct. The idea that the investigation and exposure of wrongdoing is, or ought to be, the exclusive province of the police and the criminal justice system, bears little relation to reality in Australia, or any other free society. There are heavily governed societies in which the police and other public authorities have the exclusive capacity to make, and pursue, allegations of misconduct; but not in ours. Indeed,

in our society allegations of misconduct are sometimes made against the police and public officials.

27 Secondly, it may well be in the public interest that inaction on the part of the police and prosecuting authorities be called publicly into question. It is certainly in the public interest that it is *open* to be called into question. The facts of this case provide an example. At least according to the Hobart Mercury, the South Australian Commissioner of Police and the Tasmanian Commissioner of Police have formed different views on the respondent's likely responsibility for a number of murders. These may reflect legitimate differences of opinion, but why should such differences not be a matter of public knowledge and discussion, bearing in mind the respondent's existing conviction and custodial status?

28 Thirdly, if the expression "trial by media" means any public canvassing by the media, outside the reporting of court proceedings, of the merits of topics which could become, or are, the subject of civil or criminal litigation, then we are surrounded by it. The idea that the criminal justice system ought to be the exclusive forum for canvassing matters of criminal misbehaviour is contrary to the way our society functions in practice.

29 Fourthly, a complaint that what is going on is trial by media implies that there is some different, and better, way of dealing with the issues that have been raised. Unless it be suggested that the public interest is best served by silence on the subject of the respondent's possible complicity in the disappearance of the Beaumont children, it is not easy to see what, in the circumstances, that might be. Crawford J was willing to accept that it was likely that it would be shown to be true that the respondent was suspected of being involved in the murders of the Beaumont children. The South Australian authorities appear to have no present intention of charging the respondent with those murders. The respondent is a convicted murderer, serving a life sentence. The Tasmanian Commissioner of Police has been reported as saying that the respondent has killed many children. The corollary of the respondent's argument is that the public should not be allowed to hear of the suspicions. Any public revelation of those suspicions is likely to be stigmatised as trial by media. The alternative is silence. The third imputation alleged is that the respondent is a multiple murderer. He has confessed to a second killing. That is a matter of public interest. The authorities have never brought him to trial for that matter, perhaps because it would be a work of supererogation. If any media outlet publishes the fact of the respondent's confession, then no doubt it can be said that the question of his guilt is being canvassed without all the protections and safeguards of the criminal trial process. That would be true. Yet it seems surprising that the public could never be told of the respondent's confession.

30 It is difficult to resist the conclusion that, in their natural and proper concern for fairness to the respondent, the judges who decided the case in his

favour have fallen into the error of treating the criminal trial process as the only proper context in which matters of the kind presently in question may be ventilated. More fundamentally, however, it is apparent that they failed to take proper account of the public interest in free communication of information and opinion, which is basic to the caution with which courts have approached the topic of prior restraint of allegedly defamatory matter.

31 The public interest in free speech goes beyond the public benefit that may be associated with a particular communication. The failure to recognise this was an error of principle on the part of the judges who found in favour of the respondent. As Auld LJ pointed out in *Holley v Smyth*[23], Blackstone, in his *Commentaries*[24], as long ago as 1769 distinguished between prior restraint of publication and subsequent legal consequences: "The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity" (emphasis in original). What lay behind Blackstone's remarks was the conclusion in the late 17th century of the controversy between Parliament and the Crown over free speech and freedom of the press. From Tudor times, the House of Commons appreciated that its role in public life would be seriously curtailed without such freedoms. This explains the House's repeated assertions, over the century, of a "liberty" to "speak freely their consciences without check or controlment"[25]. This liberty found its way into The Bill of Rights, 1689[26]. The "check or controlment" complained about came from the Crown or its councillors. A freedom to speak on behalf of the commons became a freedom, as Blackstone notes of "[e]very freeman". Hand in hand with these developments went the dismantling of the Crown's control, or censorship, of the press, first asserted generally by Ordinance in 1534, and requiring all manuscripts to be scrutinised and licensed by the Stationers' Company. Decrees in Star Chamber reinforced that control or censorship in respect of both printers and books. As explained in the joint reasons of Gummow and Hayne JJ, the dismantling of the licensing system was

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23 [1998] QB 726 at 737.

24 Blackstone, *Commentaries*, (1769) bk 4, at 151-152.

25 "The Apology of the Commons, 20 June 1604" in Stephenson & Marcham, *Sources of English Constitutional History*, (1972), vol 1, 418 at 422.

26 Expressed as a right to "freedom of speech and debates or proceedings in parliament."

effectively completed by 1695[27]. The public interest in free speech is explained not least by reference to the fact that freedom of speech and freedom of the press were important aspects of the constitutional struggles which came to rest with the Act of Settlement of 1701. Subsequently, courts of equity were not willing to enjoin publication of defamatory matter, not only because that would usurp the authority of juries, but also because they were most reluctant to be asked "to exercise the powers of a censor"[28]. This latter consideration remains important in our democracy.

32 It is one thing for the law to impose consequences, civil or criminal, in the case of an abuse of the right of free speech. It is another matter for a court to interfere with the right of free speech by prior restraint. In working out the consequences of abuse of such freedom, the law strikes a balance between competing interests, which include an individual's interest in his or her reputation. When, however, a court is asked to intervene in advance of publication wider considerations are involved. This is the main reason for the "exceptional caution"[29] with which the power to grant an interlocutory injunction in a case of defamation is approached. It is not reflected in the reasoning of Crawford J, or the majority of the Full Court. It is only in the reasoning of Slicer J that it was influential.

Reputation

33 There is a further reason why this case was a most unpromising candidate for this unusual form of relief. It concerns the final matter referred to by Lord Coleridge CJ in *Bonnard v Perryman*. This is a case in which, if the intended publication were to proceed, and if it were found to involve actionable defamation, it may be that an award of only nominal damages would follow. The three imputations upon which the respondent relied in argument before Crawford J, and which were the basis of the Full Court's decision, have to be considered in the light of two significant matters. First, the respondent is a convicted murderer, who is serving a life sentence, and who has confessed to another murder. To say of him that he is suspected of the murder of the Beaumont children, and that he is a multiple murderer, might not attract an award of substantial damages, especially if, as Crawford J was willing to assume, those imputations could be shown to be true. Secondly, as at 28 April 2005, the date of the threatened publication the subject of the interlocutory injunction, there had

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27 See [80].

28 *Fleming v Newton* (1848) 1 HLC 363 at 371 per Lord Cottenham LC.

29 *Bonnard v Perryman* [1891] 2 Ch 269 at 284 per Lord Coleridge CJ.

already been extensive publication of matters involving allegations of the most serious nature against the respondent.

Conclusion and Orders

34 The primary judge, and the majority in the Full Court, erred in principle in two respects in their approach to the exercise of the discretionary power to grant an interlocutory injunction in the special circumstances of a defamation case. They failed to take proper account of the significance of the value of free speech in considering the question of prior restraint of publication, and they failed to take proper account of the possibility that, if publication occurred and was found to involve actionable defamation, only nominal damages might be awarded. The appeal should be allowed.

35 The question as to the appropriate course for this Court to take, in the event that the appeal is allowed, is complicated by the fact that the legislation under which this litigation was conducted has been replaced by the *Defamation Act* 2005 (Tas), which came into effect on 1 January 2006. Under the new Act, which applies to the publication of defamatory matter after that date (s 48), the defence of justification is made out by proof of truth of the defamatory imputations. Public benefit is no longer an element of the defence. The defamatory matter the subject of the existing injunction has not yet been published. The element of public benefit was the decisive factor in Crawford J's decision to grant an injunction.

36 The decision to grant an interlocutory injunction was discretionary. Ordinarily, if it were concluded that there was error in the exercise of the discretion, the matter would be remitted for further consideration. Here, however, the case against a grant of interlocutory relief was very strong. Furthermore, the allegedly defamatory publication with which this appeal is concerned has not yet occurred. The change in statute law that has taken place provides an additional reason for not continuing the restraint on the appellant[30]. In particular, it removes the element of the defence of justification that was central to the primary judge's decision to grant relief. As will appear, the conditions on which special leave to appeal was granted preserve the appellant's entitlement to costs of the proceedings in the Supreme Court of Tasmania in any event.

37 The appeal should be allowed. The order of the Full Court of the Supreme Court of Tasmania should be set aside. In place of that order it should be ordered

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30 *Trade Practices Commission v Milreis Pty Ltd (No 2)* (1978) 32 FLR 234 at 241.

that the appeal to that Court be allowed. Order 1 of the orders made by Crawford J should be set aside insofar as it applies to the appellant.

38 It was a condition of the grant of special leave to appeal that the appellant would undertake to pay the respondent's costs of the appeal in any event and would not seek to disturb the costs orders made in the Supreme Court of Tasmania. Accordingly the appellant must pay the respondent's costs of the appeal.

39 GUMMOW AND HAYNE JJ. This appeal from the Full Court of the Supreme Court of Tasmania raises matters of principle respecting the exercise of jurisdiction to enjoin apprehended publication of defamatory matter, pending trial of an action. For the reasons which follow, the interlocutory restraint imposed upon the appellant ("the ABC") should be removed, and the appeal allowed.

The Supreme Court action

40 In an action instituted in the Supreme Court of Tasmania by writ filed on 15 April 2005, the present respondent ("Mr O'Neill") sought injunctive relief, particularly to restrain the ABC from broadcasting on 28 April 2005 a television programme, being a film entitled "The Fisherman". Mr O'Neill also sought damages for defamation against the ABC and the two other defendants (Roar Film Pty Ltd and Mr Gordon Davie, a filmmaker) by reason of the showing of the film at the Hobart Summer Film Festival during the first week of January 2005. The ABC throughout the litigation has denied any participation in that alleged publication. However, in this Court, it was an agreed fact that at some time before the granting of the interlocutory relief which has given rise to this appeal, the ABC had published "The Fisherman" to certain newspapers with a view to indicating the nature of the proposed transmission on 28 April 2005.

41 Before the institution of his Supreme Court action, Mr O'Neill had not obtained the leave required for the commencement of his action by the *Prisoners (Removal of Civil Disabilities) Act* 1991 (Tas)[31]. However, in that regard, no point has been taken against his case.

42 Eventually, an amended statement of claim by Mr O'Neill was filed on 24 February 2006 and the ABC filed its defence to that pleading. Mr O'Neill claims against the ABC (and the other defendants) damages and a final injunction against publication of any part of "The Fisherman" which "imputes or implies that [he] was responsible for or is suspected of being responsible for the disappearance or murder of the children commonly referred to as the Beaumont children or that [he] is a multiple killer of children". As the above chronology indicates, there has been no trial of the action.

43 Mr O'Neill was aged 57 when he instituted the present action. He is serving in Tasmania a life sentence of imprisonment following his conviction in November 1975 for the murder of a child. He had been charged with the murder of a second child, aged nine, the respective events occurring in February and April 1975. Following the conviction and sentence for the February killing, the

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31 cf *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

Tasmanian prosecuting authorities decided not to proceed with a trial for the April occurrence. The three Beaumont children, aged four, seven and nine, disappeared in South Australia on Australia Day 1966.

44 The evidence includes articles published in a Hobart newspaper, *The Mercury*, on various dates in January, February and April 2005. There is an account in those articles of, or references to, the content of the film "The Fisherman", with indications that Mr O'Neill may have been involved in the disappearance of the Beaumont children and that he had confessed his guilt of the murders to the filmakers. Mr Davie, the third defendant, was reported as saying that he knew that Mr O'Neill had told other people he was responsible for killing the Beaumont children, and the Tasmanian Commissioner of Police was reported as saying he was convinced that Mr O'Neill had murdered more children than the child for whose murder he had been convicted in 1975. The article in the issue for 6 April 2005 speaks of preparations by the ABC to screen "The Fisherman" on 28 April, and to the ABC having pulled it from its original timeslot of 21 April after contact by Mr O'Neill's lawyers.

45 When the action was instituted, the *Defamation Act* 1957 (Tas) ("the 1957 Act") was in force. Section 15 made it lawful to publish defamatory matter if it was true and "for the public benefit" that the publication be made[32]. Section 5 classified as a question of law the question whether matter is capable or not capable of bearing a defamatory meaning (par (3)), and as a question of fact whether matter is or is not defamatory (par (4)). This division in the functions of judge and jury represented the common law as settled by *Capital and Counties Bank v Henty*[33] for civil actions in a manner analogous, as Lord Blackburn pointed out[34], to that established by statute, Fox's *Libel Act* 1792 (UK)[35] for prosecutions for criminal libel.

46 With effect from 1 January 2006, the 1957 Act was replaced by the *Defamation Act* 2005 (Tas) ("the 2005 Act"). This was after the decision of the Full Court from which the present appeal is brought to this Court. As to any accrued claim for damages and the conduct of the action with respect to that

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32 The legislative history of the addition in Australian defamation law of a requirement of public benefit to the defence of justification is traced in Mitchell, "The Foundations of Australian Defamation Law", (2006) 28 *Sydney Law Review* 477.

33 (1882) 7 App Cas 741.

34 (1882) 7 App Cas 741 at 775-776.

35 32 Geo III c 60.

claim, the governing legislation remains the 1957 Act. This follows from the operation of s 16(1) of the *Acts Interpretation Act* 1931 (Tas)[36] and s 48(3)(a) of the 2005 Act[37]. Questions respecting the operation of the 2005 Act upon any publication by the ABC were it now to take place were the subject of further written submissions by the parties. It will be necessary to make some reference to those submissions later in these reasons.

47 This appeal arises from interlocutory injunctive relief obtained by Mr O'Neill.

The interlocutory application

48 Upon an interlocutory application filed on 15 April 2005, the same day as the action was instituted, and after a hearing on 20 and 21 April 2005, on 22 April Crawford J made an order, until judgment in the action or earlier order, restraining the ABC and the other defendants "from broadcasting or otherwise publishing to the general public any part of the documentary known as 'The Fisherman' that imputes or implies that [Mr O'Neill] was responsible for or is suspected of being responsible for the disappearance or murder of children commonly referred to as the Beaumont children or that [Mr O'Neill] is a multiple killer [of] children". In the subsequently filed amended statement of claim, an order in these terms is sought as final relief.

49 Crawford J did not view the film and the evidence disclosed little of its contents. For the purpose of the interlocutory application, the defendants conceded that several imputations were capable of being conveyed by the film. These were that Mr O'Neill is "a suspect" in the disappearance and murder of the Beaumont children and that he is "a multiple killer of children". Counsel for the ABC told the Supreme Court that the ABC would plead truth and public benefit under s 15 of the 1957 Act.

50 An appeal was brought to the Full Court by the ABC, but not by the other defendants. They have played no further part in the interlocutory litigation. The Full Court (Evans and Blow JJ; Slicer J dissenting) dismissed the appeal.

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36 Section 16(1) of the *Acts Interpretation Act* 1931 (Tas) provides that, unless the contrary is expressly provided, the repeal of a statute does not affect any right or liability acquired thereunder or affect any legal proceeding in respect thereof.

37 Section 48(3)(a) of the 2005 Act provides that the existing law continues to apply to any cause of action that accrued before the commencement of the 2005 Act in the same way as it would have applied had the 2005 Act not been enacted.

The issues

51 The issues before this Court are whether the majority of the Full Court erred in upholding the order made by the primary judge, whether the primary judge misunderstood or misapplied the principles governing the administration of the jurisdiction with respect to interlocutory injunctive relief, particularly to restrain publication of defamatory matter, and, if so, what consequential relief should be granted in this Court were the appeal to be allowed.

52 In his reasons for judgment as one of the majority in *Lovell v Lewandowski*[38], Kennedy J, after a review of the case law and non-judicial writings on the subject, concluded that, as matters stood at intermediate appellate level in Australia, the position with respect to the grant or refusal of interlocutory injunctions in defamation actions is "exceptional", when compared with "the ordinary equitable principles upon which an interlocutory injunction can be granted"[39]. Kennedy J considered various reasons which had been assigned for the development of "exceptional rules" in this particular area[40]. It will be necessary to return to consider those matters. At this point, it is sufficient to note that they concerned a reluctance to restrain freedom of speech, the policy of the law in favour of jury trials in defamation actions, and what was perceived at least in the past as the absence of a legal proprietary right in personal reputation. These considerations applied to final as much as, if not more so, to interlocutory relief by way of injunction.

53 In *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*[41], it was said in this Court that the grant of an interlocutory injunction is a matter of practice and procedure. However, where, as in this case, matters of principle are involved, an appeal stands somewhat above the ordinary appeal in a matter of practice and procedure. The same also properly may be said of the interlocutory anti-suit injunction and the assets preservation order considered by this Court respectively in *CSR Ltd v Cigna Insurance Australia Ltd*[42] and *Cardile v LED Builders Pty Ltd*[43], and the issues respecting interlocutory injunctive relief

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38 [1987] WAR 81.

39 [1987] WAR 81 at 90-91.

40 [1987] WAR 81 at 91.

41 (1981) 148 CLR 170 at 176-177.

42 (1997) 189 CLR 345.

43 (1999) 198 CLR 380.

considered in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[44].

The jurisdiction of the Supreme Court

54 Neither the 1957 Act nor the 2005 Act refers explicitly to the role of injunctive relief in defamation actions[45]. Accordingly, and the contrary is not suggested, the jurisdiction of the Supreme Court with respect to interlocutory and final injunctive relief which was invoked by Mr O'Neill was that conferred by the *Supreme Court Civil Procedure Act* 1932 (Tas) ("the 1932 Act"). This provides for the concurrent administration by the Supreme Court of law and equity (s 10) and was introduced by the Parliament with the expressed objective of adopting the Judicature system established in England over 50 years earlier[46]. Section 11(12) of the 1932 Act confers power to grant an interlocutory injunction "in all cases in which it shall appear to the Court or judge to be just and convenient that such order should be made". This Court affirmed in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[47], a Tasmanian appeal considering s 11(12), that, where an interlocutory injunction is sought, it is necessary to identify the legal (including statutory) or equitable rights which are to be determined at the trial and in respect of which final relief is sought. This meant, in particular, that the Supreme Court of Tasmania did not have jurisdiction to grant an interlocutory injunction when no legal or equitable rights were to be so determined.

55 The present appeal does not involve a situation resembling that considered in *Lenah Game Meats*. Here, there is no doubt that there were legal rights at stake, namely, the tort action against the ABC for defamation under the 1957 Act. The significant point is that not all apprehended commissions of tortious acts attract an injunctive remedy on a *quia timet* basis. In particular, Ashburner wrote[48]:

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44 (1998) 195 CLR 1.

45 However, s 6(2) of the 2005 Act states that that statute does not affect the operation of the general law, meaning thereby "the common law and equity" (see s 4), in relation to the tort of defamation, except to the extent that the 2005 Act expressly or by necessary implication provides otherwise.

46 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 239-240 [86]-[87].

47 (2001) 208 CLR 199 at 217 [10], 231-232 [59]-[60], 241 [91].

48 *Ashburner's Principles of Equity*, 2nd ed (1933) at 341.

> "It was settled before the Judicature Act that the Court of Chancery had no jurisdiction to restrain a publication merely because it was a libel."

On the eve of the introduction of the Judicature system, Lord Cairns LC, speaking for the Court of Appeal in Chancery in *Prudential Assurance Company v Knott* declared[49]:

> "[A]s I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain them, will not be restrained the less because they happen also to be libellous."

56 The qualification expressed by Lord Cairns LC allowed, for example, for injunctive relief in respect of those torts of slander of title and slander of goods, where property interests were involved, and which were classified as "trade libel"[50], and later, after *Ratcliffe v Evans*[51], were developed as the tort of injurious falsehood, elements of which were malice and special damage. The logical consequence was that, where causes of action both for defamation and injurious falsehood lay in the same situation, an injunction might be granted in respect of the injurious falsehood claim[52].

57 Thereafter, in *Monson v Tussauds Limited*; *Monson v Louis Tussaud*[53], Lord Halsbury, sitting in the English Court of Appeal, declared "[t]he Court of Chancery had no jurisdiction in libel cases". A more accurate proposition was that, unless, as was the position in *Saxby v Easterbrook*[54], a jury already had found the matter complained of to be libellous and repetition of the libel was calculated to do material injury to a legal proprietary interest of the plaintiff, an injunction would not be issued. In *Saxby*, a final injunction was granted to restrain further publication of allegations that the plaintiff had dishonestly and improperly presented a petition for the grant of a patent on the basis that he was

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49 (1875) LR 10 Ch App 142 at 144.

50 See *Lee v Gibbings* (1892) 67 LT 263; *White v Mellin* [1895] AC 154.

51 [1892] 2 QB 524.

52 See *Collard v Marshall* [1892] 1 Ch 571.

53 [1894] 1 QB 671 at 690.

54 (1878) 3 CPD 339.

the true inventor whereas his claimed invention was pirated from that of the defendants.

58 It was in this setting that, in *Bonnard v Perryman*[55], Lord Coleridge CJ delivered reasons with the concurrence of Lord Esher MR and Lindley, Bowen and Lopes LJJ. Jurisdiction to grant injunctive relief in defamation actions now was seen as conferred by statute and located in ss 79 and 82 of the *Common Law Procedure Act* 1854 (UK) ("the 1854 Act")[56] and its continuation by the Judicature legislation. In what was still Van Dieman's Land, the 1854 Act (including the text of ss 79 and 82) was adopted by *The Common Law Procedure Act No 2* 1855 (Tas). The relevant sections of this statute, ss 63 and 66, were repealed by the 1932 Act, but not so as to take away, lessen or impair any jurisdiction vested in the Supreme Court of Tasmania by that repealed legislation[57].

59 In *Bonnard*, Lord Coleridge CJ said[58]:

> "Prior to the [1854 Act], neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this: not Courts of Equity, because cases of libel could not come before them; not Courts of Law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82nd sections of the [1854 Act] undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation."

60 Dean Pound cogently challenged what the Lord Chief Justice had described as the undoubted conferral of power by the 1854 Act with respect to defamation actions[59]. Section 79 of the 1854 Act did speak of "all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action" and went on to say that in such instances the party might claim a writ of injunction. However, Pound observed that it was

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55 [1891] 2 Ch 269.

56 17 & 18 Vict c 125.

57 1932 Act, s 2(4)(a); cf *Southern Textile Converters Pty Ltd v Stehar Knitting Mills Pty Ltd* [1979] 1 NSWLR 692 at 697-698.

58 [1891] 2 Ch 269 at 283.

59 "Equitable Relief against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 665-666.

reasonably clear that the 1854 Act referred to those cases "where there ought to be an injunction on the principles of equity jurisdiction"[60].

61 The provisions in the 1854 Act followed upon the *Second Report of Her Majesty's Commissioners for inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law* which was published in 1853[61]. The Commissioners had noted that the injunction protected not merely equitable rights but also those rights violation of which was remedied by an action at common law; equity had gradually enlarged its jurisdiction, originally assumed by analogy to the case of waste, to include such torts as trespass and patent and copyright infringement and the restraint of breaches of negative covenants[62]. The Commissioners had supported the empowering of the Courts of Common Law to "exercise the same jurisdiction, and restrain violation of *legal* rights in the cases in which an injunction now issues for that purpose from the courts of equity"[63]. This legislative history supports the construction placed by Pound upon the 1854 Act.

62 However, in *Bonnard*, the Lord Chief Justice went on[64] to declare that the power he saw in the 1854 Act was by the Judicature legislation conferred upon the Chancery Division of the High Court as representing the old Courts of Equity. His Lordship continued[65]:

> "Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a Court of Common Law till *Saxby v Easterbrook*[66], which was decided in 1878. In that case the injunction was

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60 "Equitable Relief against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 665.

61 (1853) [1626] at 42-44; the Report is reprinted in *British Parliamentary Papers, Legal Administration, General, Courts of Common Law*, vol 9 at 165.

62 *Second Report of Her Majesty's Commissioners for inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law*, (1853) [1626] at 43.

63 *Second Report of Her Majesty's Commissioners for inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law*, (1853) [1626] at 43 (original emphasis).

64 [1891] 2 Ch 269 at 283.

65 [1891] 2 Ch 269 at 283.

66 (1878) 3 CPD 339.

> not applied for, nor, of course, granted, till after a verdict and judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action for libel."

63 There is thus some force in the thesis advanced by Pound[67] that the English courts had been moved "to strain a point" in order to be rid of the jurisdictional bar upon the injunctive remedy imposed by decisions such as *Prudential Assurance Company v Knott*[68].

64 The upshot of this development in the injunctive remedy, however haphazard, is that the existence of the jurisdiction in a Judicature system, such as that established in Tasmania by the 1932 Act, to grant injunctive relief to restrain publication of defamatory matter must be taken as settled. The question in the present appeal then arises at another level. This concerns the operation in this context of the principles respecting the grant of the special remedy of injunctive relief that is interlocutory in nature.

Interlocutory injunctions

65 The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[69]. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued[70]:

> "The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."

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67 "Equitable Relief against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 666.

68 (1875) LR 10 Ch App 142 at 144.

69 (1968) 118 CLR 618.

70 (1968) 118 CLR 618 at 622-623.

By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument[71]. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal[72]:

> "How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks."

66 For example, special considerations apply where injunctive relief is sought to interfere with the decision of the executive branch of government to prosecute offences[73]. Again, in *Castlemaine Tooheys Ltd v South Australia*[74], Mason ACJ, in the original jurisdiction of this Court, said that "[i]n the absence of compelling grounds" it is the duty of the judicial branch to defer to the enactment of the legislature until that enactment is adjudged ultra vires, and dismissed applications for interlocutory injunctions to restrain enforcement of the law under challenge.

67 Various views have been expressed and assumptions made[75] respecting the relationship between the judgment of this Court in *Beecham* and the speech of Lord Diplock in the subsequent decision, *American Cyanamid Co v Ethicon*

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71 (1968) 118 CLR 618 at 620.

72 (1968) 118 CLR 618 at 622.

73 *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 156 per Mason ACJ.

74 (1986) 161 CLR 148 at 155-156; cf the earlier assumption in *Murphy v Lush* (1986) 60 ALJR 523 at 526; 65 ALR 651 at 655 that "a triable issue" of invalidity was sufficient to pass to consideration of the balance of convenience.

75 See, for example, *Administrative and Clerical Officers Association, Commonwealth Public Service v Commonwealth* (1979) 53 ALJR 588 at 591; 26 ALR 497 at 502; *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland* (1982) 57 ALJR 425; 46 ALR 398; *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 58 ALJR 283 at 284; 52 ALR 651 at 653; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 24 [21]; *Fejo v Northern Territory* (1998) 195 CLR 96 at 122 [26].

Ltd[76]. It should be noted that both were cases of patent infringement and the outcome on each appeal was the grant of an interlocutory injunction to restrain infringement. Each of the judgments appealed from had placed too high the bar for the obtaining of interlocutory injunctive relief.

68 Lord Diplock was at pains to dispel the notion, which apparently had persuaded the Court of Appeal to refuse interlocutory relief, that to establish a prima face case of infringement it was necessary for the plaintiff to demonstrate more than a 50 per cent chance of ultimate success. Thus Lord Diplock remarked[77]:

> "The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent."

69 In *Beecham*, the primary judge, McTiernan J, had refused interlocutory relief on the footing that, while he could not dismiss the possibility that the defendant might not fail at trial, the plaintiff had not made out a strong enough case on the question of infringement[78]. Hence the statement by Kitto J in the course of argument in the Full Court that it was not necessary for the plaintiff to show that it was more probable than not that the plaintiff would succeed at trial.

70 When *Beecham* and *American Cyanamid* are read with an understanding of the issues for determination and an appreciation of the similarity in outcome, much of the assumed disparity in principle between them loses its force. There is then no objection to the use of the phrase "serious question" if it is understood as conveying the notion that the seriousness of the question, like the strength of the probability referred to in *Beecham*, depends upon the considerations emphasised in *Beecham*.

71 However, a difference between this Court in *Beecham* and the House of Lords in *American Cyanamid* lies in the apparent statement by Lord Diplock that, provided the court is satisfied that the plaintiff's claim is not frivolous or vexatious, then there will be a serious question to be tried and this will be sufficient. The critical statement by his Lordship is "[t]he court no doubt must be

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76 [1975] AC 396.

77 [1975] AC 396 at 406.

78 (1967) 118 CLR 618 at 619.

satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried"[79]. That was followed by a proposition which appears to reverse matters of onus[80]:

> "So *unless* the material available to the court at the hearing of the application for an interlocutory injunction *fails to disclose* that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought." (emphasis added)

Those statements do not accord with the doctrine in this Court as established by *Beecham* and should not be followed. They obscure the governing consideration that the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.

72 The second of these matters, the reference to practical consequences, is illustrated by the particular considerations which arise where the grant or refusal of an interlocutory injunction in effect would dispose of the action finally in favour of whichever party succeeded on that application[81]. The first consideration mentioned in *Beecham*, the nature of the rights asserted by the plaintiff, redirects attention to the present appeal.

Defamation and interlocutory injunctions

73 In *Bonnard v Perryman*[82], after explaining what was to be taken as the derivation from the 1854 Act of the modern jurisdiction to enjoin defamatory publications, Lord Coleridge CJ continued[83]:

> "But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to

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79 [1975] AC 396 at 407.

80 [1975] AC 396 at 408.

81 See the judgment of McLelland J in *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 at 535-536 and the article by Sofronoff, "Interlocutory Injunctions Having Final Effect", (1987) 61 *Australian Law Journal* 341.

82 [1891] 2 Ch 269.

83 [1891] 2 Ch 269 at 284.

> interfere by injunction before the trial of an action to prevent an anticipated wrong."

His Lordship added[84]:

> "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

It is apparent from these remarks that the English Court of Appeal in *Bonnard* was dealing with a defamation law where truth was an absolute defence, whereas under the 1957 Act s 15 required truth and public benefit[85].

74 The Lord Chief Justice spoke in *Bonnard* expressly with reference to considerations attending the administration of interlocutory injunctive relief on a *quia timet* basis. However, this was at a time when that remedy was in a state of development and before the modern formulations of general principle, exemplifed for Australia by *Beecham*.

75 One sequel was the production of a body of case law in Australia dealing with what was said in *Bonnard* as if interlocutory injunction applications in defamation actions occupy a field of their own and are somehow more than but one of the species of litigation to which the principles in *Beecham* apply.

76 The body of Australian case law itself does not follow a single pattern, as Kennedy J explained in *Lovell v Lewandowski*[86]. The judgment of Blow J (with whom Evans J agreed) in the Full Court in the present litigation distinguished between "rigid" and "flexible" rules of practice in this regard[87]. The former are

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84 [1891] 2 Ch 269 at 284.

85 Section 25 of the 2005 Act creates a defence if the defendant proves that the defamatory imputations are "substantially true".

86 [1987] WAR 81.

87 [1987] WAR 81 at 90-91.

associated with the decision of Walsh J in *Stocker v McElhinney (No 2)*[88]. His Honour there said that an interlocutory injunction would be granted in cases of defamation only if the judge were of the view that a subsequent jury verdict to the contrary would be set aside as unreasonable, and that an injunction would be refused:

> "[i]f, on the evidence before the judge, there is any real ground for supposing that the defendant may succeed upon any such ground as privilege, or of truth and public benefit, or even that the plaintiff, if successful, will recover nominal damages only".

77 *Stocker* was decided before the decision of this Court in *Beecham*. It also was decided before the adoption in New South Wales of the Judicature system and in reliance upon the jurisdiction then found in the New South Wales equivalent of the provisions of the 1854 Act[89].

78 The second or "flexible" view of the exercise of the interlocutory injunction power in these cases is exemplified in *Chappell v TCN Channel Nine Pty Ltd*[90] and in cases following and applying it[91]. These cases rightly stress the application in this field of the general principles exemplified in *Beecham*. However, they give rise to two difficulties.

79 The first difficulty is that the cases which advocate "flexibility" tend to give insufficient weight to the range of significant rights asserted on applications to restrain *quia timet* defamatory publications. A plaintiff asserts interests in character and reputation, while the defendant may assert what are special considerations derived from 17th and 18th century events which have been regarded in Britain as part of its constitutional history[92].

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88 [1961] NSWR 1043 at 1048. See also *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 349-350; *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199; and, in New Zealand, *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 at 133.

89 *Common Law Procedure Act* 1899 (NSW), ss 176-179.

90 (1988) 14 NSWLR 153.

91 These include *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747 and *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440.

92 For example, in the third edition of his work, *Introduction to the Study of the Law of the Constitution*, published in 1889, Dicey devoted Ch 6 to "The Right to Freedom of Discussion".

80 Two special (and related) considerations which underpinned the denial of jurisdiction in the Court of Chancery to enjoin publication of defamatory matter were identified by Lord Cottenham LC in *Fleming v Newton*[93]. He asked[94]:

> "how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under the 55 Geo III, c 42, or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private."[95]

The reference to "the liberty of the press" reflected the statement by Lord Mansfield in *R v Shipley*[96] that "[t]he liberty of the press consists in printing without any previous licence, subject to the consequences of law". The statutory system of press licensing in England had lapsed in 1695 and 13 proposals over the next decade for its revival had come to nothing[97]. (The unsuccessful attempts by Governor Darling to institute a press licensing system are a landmark in the constitutional history of New South Wales[98].)

81 There remained available to the Executive Government in England the power to prosecute the offences of criminal and seditious libel and this then led to great controversy as to the respective functions of judge and jury in such trials. The dispute culminated at the end of the 18th century in the passage of Fox's

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93 (1848) 1 HLC 363 [9 ER 797].

94 (1848) 1 HLC 363 at 376 [9 ER 797 at 803].

95 *Fleming v Newton* was an appeal from Scotland; hence the reference to the *Jury Trials (Scotland) Act* 1815 (UK), 55 Geo III c 42. It is apparent that the Lord Chancellor was referring to the 1815 statute as it had been amended, in particular, by the *Jury Trials (Scotland) Act* 1819 (UK) (59 Geo III c 35).

96 (1784) 4 Dougl 73 at 170 [99 ER 774 at 824]. The earlier writings to the same effect by Blackstone influenced the initial reading of the denial by the First Amendment to the Congress of power to legislate "abridging the freedom of speech, or of the press" as importing no more than a freedom from prior restraint: Story, *Commentaries on the Constitution of the United States*, (1833), vol 3, §§1874-1879.

97 Deazley, *On the Origin of the Right to Copy*, (2004) at 1-29.

98 Bennett, *Sir Francis Forbes*, (2001) at 83-100.

Libel Act 1792 (UK)[99], and its subsequent judicial adoption for civil trials, to which reference has been made earlier in these reasons.

82 The remarks by Lord Cottenham LC in *Fleming v Newton* manifest the reluctance by the courts of equity to participate in any indirect reinstatement of a licensing system by a method of prior restraint by injunctive order. The injunction (interlocutory or final) was a prior restraint and the decision was that of a judge alone. The jurisdictional objection was to disappear later in the 19th century, but distaste for prior restraint and respect for the role of the jury remained significant for the administration of the interlocutory injunction[100]. Section 21 of the 2005 Act confers upon each party in defamation proceedings in the Supreme Court an election for jury trial, subject to the power of the Supreme Court to order otherwise[101]. (However, s 22(3) of the 2005 Act reserves to the judicial officer the determination of the amount of any damages and unresolved issues of law and fact relating to that determination.)

83 The second difficulty with the "flexible" approach is that it leads too readily to an assumption that all that is involved here is the exercise of an unbounded discretion, which thereafter is insusceptible of appellate interference. The course of the present litigation demonstrates that hazard.

The present case

84 The "rigid" approach of *Stocker* was rejected by the primary judge. However, his Honour proceeded on the basis that he had "an unfettered discretion" and concluded:

> "My view is that, in general, it is not for the public benefit that the media should publicly allege that a person has committed crimes of which he or she has not been convicted, whether or not there are currently proceedings afoot with respect to the crimes. It is instead in the public interest that such allegations should usually be made to the public only as a result of charges and subsequent conviction. That the media on occasions makes such allegations is often referred to as 'trial by media', of

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99 32 Geo III c 60.

100 See the judgment of Fry J in *Thomas v Williams* (1880) 14 Ch D 864 at 870-871 and, more recently, that of Brooke LJ in *Greene v Associated Newspapers Ltd* [2005] QB 972 at 977.

101 cf *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 409 [116] respecting s 7A of the *Defamation Act* 1974 (NSW).

> which it appears the plaintiff complained to the Mercury. However, so far as concerns the imputation that the accused is a multiple killer of children, a more appropriate description in this case would be 'conviction by media' ... There will, of course, be cases when in the light of prior public statements by the person who is being defamed, or the public conduct of that person, it will be for the public benefit to publish allegations of that kind to the general public, but I have difficulty seeing that this is such a case. It is sufficient to say that the claim of the defendants to 'public benefit' may well be unsuccessful."

85 Several points are to be made here. First, the issue was not whether to deny the plaintiff interlocutory relief would be to encourage "trial by media" or an outcome identified by some other evidently pejorative description. The issue differed in form and substance. It was whether, having regard to the nature of the rights asserted, including the special considerations, well rooted in Australian law, which caution equitable intervention to impose a prior restraint upon publication, and other relevant matters including the apparent weakness or strength of the proposed defence under s 15 of the 1957 Act, the plaintiff's case appeared sufficiently strong to pass on to the second inquiry, respecting the balance of convenience. The pursuit of these two inquiries by a court of equity in the circumstances of the particular case is hindered, not advanced, by the taking of the apparent refuge offered by such terms as "rigid" and "flexible".

86 Secondly, the ABC correctly submits that the primary judge conflated the requirement of "public benefit" in s 15 of the 1957 Act with the more general, and more profound, issue involved in the policy of the law respecting prior restraint of publication of allegedly defamatory matter.

87 The stance taken by the courts against prior restraint was not adopted in innocence of the malign influence, on occasion, which may be exerted by media of mass communication. Indeed, in *R v Shipley*[102], Lord Mansfield, after speaking of the liberty to print without previous licence, continued:

> "The licentiousness of the press is Pandora's Box, the source of every evil. Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the State."

As in other fields[103], the policy of the law struck here represents a particular balance between competing interests. With respect to tortious liability to be

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102 (1784) 4 Dougl 73 at 170 [99 ER 774 at 824].

103 See *Cattanach v Melchior* (2003) 215 CLR 1 at 32-35 [70]-[75].

determined at trial, that balance for this case is struck by statute, the 1957 Act. With respect to interlocutory restraint by injunction, attention must be paid to the case law as analysed in these reasons.

88 In his dissenting judgment in the Full Court, Slicer J correctly said of the treatment by the primary judge of the notion of "public benefit":

> "Irrespective of the import of the language when used in consideration of the tort of defamation, I do not accept, with due respect to the learned primary judge, that any synonymity, if such be the case, transfers into the principle of injunctive restraint of publication. The existence of a defence is a relevant factor, but prohibition of publication is governed by different legal principle."

89 There is a further matter. As the Chief Justice and Crennan J explain in their reasons, the general character of Mr O'Neill may well assume such importance at a trial as to be followed by an award of no more than nominal damages. That prospect is a powerful factor in considering the balance of convenience to favour the denial of interlocutory relief.

Conclusion and orders

90 The upshot is that the majority of the Full Court erred in upholding the decision of the primary judge. That decision proceeded upon wrong principle[104]. The appeal to this Court should be allowed.

91 Section 37 of the *Judiciary Act* 1903 (Cth) authorises this Court on allowing an appeal to give such judgment as might have been given in the first instance. The outcome in this Court is to be determined on the state of the law at the time of the judgment of the Full Court on 29 August 2005, before the commencement of the 2005 Act[105].

92 It is unnecessary to decide here whether, if the interlocutory relief were to be permitted by this Court to continue, then, upon subsequent application to the Supreme Court by the ABC, a further order would be appropriate because the enforcement of the existing order would be unjust in the light of changes to the

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104 *House v The King* (1936) 55 CLR 499 at 505.

105 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85, 87, 109-110, 112-113.

law made by the 2005 Act[106]. Nor is it appropriate here to enter upon the prospects of success in any action by Mr O'Neill which might be brought under the 2005 Act following publication by the ABC of "The Fisherman" after the dissolution of the injunction now in force.

93 The Chief Justice and Crennan J emphasise that the case against the grant of interlocutory relief was very strong. We agree.

94 It follows that in addition to the appeal to this Court being allowed, orders should be made to set aside the orders of the Full Court, allow the appeal to that Court, and set aside the orders of the primary judge so as to dismiss the interlocutory application filed on 15 April 2005, in so far as it was made against the ABC. This will require variation of Order 1 of the orders made by Crawford J on 22 April 2005 so as to remove any prohibition upon the ABC. The position respecting costs is stated by the Chief Justice and Crennan J.

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106 See *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 178; *Trade Practices Commission v Milreis Pty Ltd (No 2)* (1978) 32 FLR 234 at 241; *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* (2005) 225 ALR 369 at 373-374.

95 KIRBY J. This Court is a court of error. This feature derives from the nature of an "appeal" to it, as provided by the Constitution[107], as interpreted by past decisions[108]. Although the Court can hear new arguments, raising fresh points of law addressed to the record[109], it cannot receive new evidence in appeals. Absent demonstrated error, it has no authority to substitute its own opinion on the merits of the case decided below[110].

96 Least of all, in default of error, can this Court substitute its opinion for a discretionary order of a judge possessed of the requisite jurisdiction and powers. Above all, it may not do so in a discretionary order made at an interlocutory stage in the exercise of the practice and procedure of a court of trial[111]. Were this Court to assume that function, it would reward those with "long pockets", determined to use their money and power to the disadvantage of vulnerable adversaries[112]. Such an intrusion would be alien to the functions of this Court.

97 An appeal is before the Court from an order of the Full Court of the Supreme Court of Tasmania[113]. By majority[114], that Court dismissed an appeal against an interlocutory injunction issued four months earlier by a judge of the Supreme Court (Crawford J[115]). That injunction, granted on the usual terms,

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107 Constitution, s 73.

108 See eg *Mickelberg v The Queen* (1989) 167 CLR 259 at 269-271, 297-299; *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [16]-[18], 25 [73], 35 [111], 63 [190], 96-97 [290]; cf 93 [277], 117-118 [356].

109 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 153-155 [135]-[138]; *Crampton v The Queen* (2000) 206 CLR 161 at 171-174 [12]-[21], 179-185 [38]-[57], 200-207 [105]-[123], 212-219 [145]-[165].

110 *Lowndes v The Queen* (1999) 195 CLR 665 at 679 [40]; *AMS v AIF* (1999) 199 CLR 160 at 179 [47], 222-223 [184].

111 *House v The King* (1936) 55 CLR 499 at 504-505; *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 626-628; *Mace v Murray* (1955) 92 CLR 370 at 377-378.

112 *In re the Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323; cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 163-164, 173-174.

113 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82.

114 Evans and Blow JJ; Slicer J dissenting.

115 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26.

restrained the defendants to the proceedings, relevantly the Australian Broadcasting Corporation ("the ABC"), "until judgment in this action or earlier order"[116], from broadcasting or otherwise publishing to the general public any prohibited part of a documentary film known as *The Fisherman*. The prohibited part was that which "imputes or implies" that Mr James O'Neill ("the respondent") was "responsible for or is suspected of being responsible for the disappearance or murder of children commonly referred to as the Beaumont children or that [he] is a multiple killer of children"[117].

98 As was recognised in the Full Court by Blow J (who wrote the reasons of the majority) the issue for decision was not whether the Full Court would grant the interlocutory injunction on the same facts, if the application were presented to its judges at first instance. Consistent with binding legal authority and principle, the issue was whether the ABC had demonstrated an error on the part of the primary judge that would warrant disturbance of his interlocutory order[118]. Such an error might involve a misunderstanding of the governing law or a demonstration that the primary judge had acted on a wrong principle[119] or had misstated facts or reached a conclusion that was "plainly wrong"[120]. But error was essential to intervention.

99 Consistently with this approach, the Full Court rejected the ABC's appeal. The majority in the Full Court were of the view that the primary judge had taken into account a correct understanding of the applicable legal principles in exercising his discretion to grant the interlocutory relief and a correct appreciation of the evidence. The Full Court majority also concluded that the primary judge had not applied a wrong principle[121]. At the threshold of the ABC's appeal to this Court lies the question whether the majority of the Full Court erred in so concluding. If it did not, that is the end of the appeal. Simply holding a different opinion of the merits of the application or reaching a different conclusion on the facts would not be sufficient to sustain intervention by this Court and the substitution of different orders. At least this would be so unless the appellate court were convinced that the earlier decision, for whatever reason, was "plainly wrong".

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116 [2005] TASSC 26 at [37].

117 [2005] TASSC 26 at [37].

118 [2005] TASSC 82 at [50].

119 *House v The King* (1936) 55 CLR 499 at 504-505.

120 *Mace v Murray* (1955) 92 CLR 370 at 377-378 citing *Clark v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35 at 37.

121 [2005] TASSC 82 at [82].

The case in context

100 *Grave imputations*: The interlocutory injunction contested in these proceedings resulted from an action brought by the respondent against the ABC and others in respect of the documentary film *The Fisherman*. The film was shown to a limited audience at the Hobart Summer Film Festival in January 2005. The ABC intends to broadcast the film nationally if relieved of the injunction ordered by the primary judge.

101 Neither at trial, nor on the appeal, did the ABC tender a copy of the film, or excerpts of it, or a transcript. It was therefore necessary for the courts below (as it is now for this Court) to proceed, in respect of the contents of the film, by reference to snippets of information arising out of the knowledge of the respondent gleaned from interviews with him and from published reports on the showing of the film at the Hobart Summer Film Festival.

102 In a document negotiated between the representatives of the parties when they were before the primary judge, it was agreed that the film was capable of conveying three imputations: (1) that the respondent is a suspect in the disappearance of the Beaumont children; (2) that he is a "suspect in the murder of the Beaumont children"; and (3) that he is a "multiple killer of children"[122]. The Beaumont children were three young members of a family who disappeared in South Australia in 1966. Police suspect that they were murdered. They have never been found or accounted for. No one has been charged or tried, still less convicted, in connection with their disappearance.

103 Without more, to say of a person that he is a "multiple killer of children" and is a suspect in the notorious disappearance and murder of the Beaumont children, is to defame that person in one of the most serious ways imaginable. In every society, a special fear and revulsion is reserved for child murderers. From earliest infancy we learn to fear them. To accuse a person of being a "multiple killer of children" and of being a suspect in still more unsolved disappearances and murders is to impute to that person the most heinous of wrongdoings. It is to expose that person to the fear and hatred of ordinary decent individuals. It is gravely defamatory.

104 It may be the law that a person, subject to such a defamation, has no remedy to secure an interlocutory order of the kind made at the respondent's request by the primary judge against an intending publisher. The particular circumstances may deny the possibility of such relief. However, in the past, Australian courts have granted interlocutory injunctions of such a kind to prevent

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122 [2005] TASSC 26 at [3].

the publication of matters containing imputations infinitely less serious[123]. It was common ground that the South Australia Police had investigated the allegations of the respondent's involvement in the disappearance of the Beaumont children; had completed their investigation; and had no present intention to bring proceedings against the respondent. In these circumstances, to broadcast the imputation to the nation (and beyond) would seem to be about as grave a threatened defamation as it would be possible to imagine. If an interlocutory injunction were not available in such a case, it would be almost impossible to imagine any defamation that would warrant such interlocutory relief[124].

105 *Temporary relief*: The second contextual consideration is likewise mentioned by Blow J at the outset of his reasons in the Full Court[125]. It is the very nature of an interlocutory injunction that it will be effective for a limited period only. In the present proceedings, it was sought, and granted, in support of the trial of the respondent's action in the Supreme Court. Those proceedings had been commenced when the injunction was granted. Amongst the relief claimed in those proceedings was a prayer not only for damages for defamation but also for a permanent injunction of the broadcast or publication of *The Fisherman* in so far as it imputes that the respondent was responsible for, or is suspected of being responsible for, the disappearance or murder of the Beaumont children or is a "multiple killer of children".

106 As Blow J observed[126]:

> "If the action is brought to trial, it might be held that the documentary is defamatory of the respondent, and a permanent injunction might be granted. If not, the televising of the documentary will have been delayed, rather than prevented. If the [ABC] has paid for a documentary that should never go to air, the existing injunction works no injustice. If it has paid for a documentary which should be permitted to go to air, any injustice in delaying its transmission until this action has been determined would not be substantial, in a financial sense, in my view … the injunction appealed against restrains the publication of material concerning the alleged or suspected criminal activities of one man; it concerns events prior to his incarceration in 1975; and it is of a temporary nature. Because

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123 See eg *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153. The imputation was that a sporting identity, who was of high public profile and a member of a sporting ethics committee, had engaged in an extra-marital affair.

124 See also the reasons of Heydon J at [170].

125 [2005] TASSC 82 at [51].

126 [2005] TASSC 82 at [51].

> of those circumstances I think that, even if the injunction does work some injustice to the appellant in a non-financial sense, any such injustice is not substantial."

107 In a previous appeal before this Court, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[127], observations were made about the election of the ABC to contest an interlocutory injunction forbidding a broadcast. By its terms, such an order simply restrains the broadcast until the trial or other order. The logic of the order is that it is at the trial, when all relevant evidence (including presumably the documentary film itself) is considered by the tribunal (probably a jury), that final decisions will be made, including as to the respondent's entitlement to any permanent injunctive relief.

108 Instead of applying for an expedited hearing of the trial of the substantive action, the ABC, in these proceedings as in *Lenah Game Meats*, contested the provision of temporary protection until the asserted justification of the intended broadcast could be judged at trial. Callinan J, in circumstances not wholly dissimilar to the present, remarked that the "claimed need for urgency of communication to the public" has, on occasions, been "exaggerated"[128]:

> "[Earlier cases] show that the assertion that news is a perishable commodity often lacks foundation[129] and the ends to which publishers may be prepared to go in pursuit of their own interests. The asserted urgency as often as not is as likely to be driven by commercial imperatives as by any disinterested wish to inform the public. It would be naive to believe that the media's priorities would be otherwise … It will be rare in fact that the public interest will be better served by partial truth and inaccuracy this Tuesday than balance and the truth on Friday week."

109 Even if the delay in securing a hearing of the respondent's substantive proceedings against the ABC would, as here, have been more than a few weeks, it is hard to believe that it would have been as long as that occasioned by the interlocutory appellate process launched by the ABC. This is one reason why appellate courts are, and should be, reluctant to interfere in the provision of interlocutory injunctions. The course adopted suggests that the appeals have been brought by the ABC in an endeavour to prove a point that, even in so grave a defamation as that alleged here, free speech trumps not only the reputation of

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127 (2001) 208 CLR 199 at 265-268 [159] ("*Lenah Game Meats*").

128 *Lenah Game Meats* (2001) 208 CLR 199 at 305 [267].

129 Contrast: *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153.

the respondent, but also his right in principle[130] to have his reputation protected until the contest can be decided on the merits in a full hearing[131].

110 *Balance of interests*: In this case, unlike *Lenah Game Meats*, the ABC did not seek to invoke the implied constitutional freedom of communication recognised by this Court[132]. By inference, both parties accepted that this was not a case where the intended broadcast could be characterised as one in respect of governmental and political matters of the type impliedly protected in the Constitution.

111 Upon this basis, the issues in this appeal must be decided without the complication of any claimed reliance on constitutional imperatives. This feature of Australian decisions, concerning the availability of interlocutory injunctions to restrain the exercise of freedom of speech and freedom of the press, distinguishes the case law in this country from that decided in the courts of the United States of America[133]. Because of the language of the First Amendment to the United States Constitution, and the way that its provisions have been interpreted by the Supreme Court, pre-publication injunctions are extremely rare in that country. Thus it has been said that even "the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth"[134].

112 In the United States, if the allegedly defamatory statements are directed at a "public figure" (a phrase widely defined) actual malice must be proved by clear and convincing evidence to establish a legal right sounding in damages[135]. This is not what the Constitution, statute law or the common law, provide in Australia.

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130 See International Covenant on Civil and Political Rights, Art 17.

131 cf [2005] TASSC 82 [38] citing *Lenah Game Meats* (2001) 208 CLR 199 at 285 [211] and *R v Central Independent Television Plc* [1994] Fam 192 at 203 per Hoffmann LJ. See also the reasons of Heydon J at [177].

132 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-575.

133 For a general comparison of approaches to defamation law, see Kenyon, *Defamation: Comparative Law and Practice*, (2006) at 239-280.

134 *Linn v Plant Guard Workers* 383 US 53 at 63 per Clark J delivering the opinion of the Court (1966); *Letter Carriers v Austin* 418 US 264 at 283-284 (1974).

135 *New York Times Ltd v Sullivan* 376 US 254 at 279-280 per Brennan J delivering the opinion of the Court (1964); Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11, (1979) at 247-253.

Unlike the United States, in Australia there is no constitutional presumption against prior injunctive relief[136]. Whilst free speech and the free press are important values in Australian law, they must find their expression and operation in a way that is harmonious with other legal values, including the protection of reputation, individual honour, privacy and the fair trial of legal proceedings.

113 In this respect, Australian law appears to reflect more accurately the balance of rights that is found in statements of fundamental rights in international law[137]. Many of the submissions advanced by the ABC, both in the Full Court and in this Court, amounted to a repetition of its arguments of principle against interlocutory relief advocated in *Lenah Game Meats*. It is therefore necessary to say once again that only in the United States of America is the rule in favour of free speech and freedom of the press as unconfined as the appellant advocated. Under our Constitution, there is no express prohibition equivalent to that in the United States Constitution. Analogous principles have been rejected by this Court[138], by courts in other common law countries[139] and by law reform bodies asked to review Australian law in this respect[140].

114 The uniform defamation law that came into force in Australia after these proceedings were heard[141], like the Australian law before it[142], rejects the extreme

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136 *Organization for a Better Austin v Keefe* 402 US 415 at 419 (1971); *Pittsburgh Press Co v Pittsburgh Commission on Human Relations* 413 US 376 at 389-390 (1973); *Gilbert v National Enquirer, Inc* 43 Cal App 4th 1135 (1996); 51 Cal Reptr 2d 91 at 96 (2nd Dist); *Hajek v Bill Mowbray Motors Inc* 645 SW 2d 827 at 831 (Texas 1982); *Wilson v Superior Court of LA County* 13 Cal 3d 652 at 657-658 (1975); 119 Cal Reptr 468.

137 International Covenant on Civil and Political Rights, Art 17. See *Lenah Game Meats* (2001) 208 CLR 199 at 282-283 [201]-[202].

138 *Theophanous* (1994) 182 CLR 104 at 134.

139 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 203-204, 215; Stone and Williams, "Freedom of Speech And Defamation: Developments in The Common Law World", (2000) 26 *Monash University Law Review* 362 at 364.

140 Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11, (1979) at 77-78 [146].

141 Relevantly the *Defamation Act* 2005 (Tas) commencing 1 January 2006. It was common ground that the present appeal was to be determined by reference to the previous statute.

142 Relevantly, *Defamation Act* 1957 (Tas).

and semi-absolute protection of free speech and the free press that prevails, for constitutional reasons, in the United States. Unsurprisingly, the Australian law on interlocutory injunctions against publication reflects this different constitutional and decisional setting of the relevant law. None of this is to say that defence of freedom of speech and of a free press are not important values of Australian law. They are. But they are not absolute. In a particular case, they must be given effect in a way consonant with the competing legal values.

115 The competing values in Australia extend to protecting individuals against gross humiliation, irreparable damage, public and gratuitous harm and other like wrongs[143]. In every case, the court from which relief is sought must weigh the competing interests at stake[144]. It will do so knowing that sometimes media power is abused and, when this happens, that courts are often the only institutions in society with the authority and the will to protect the individual from such abuse of power[145].

The facts and legislation

116 *The background facts*: The facts of this case, so far as relevant, are stated in the reasons of Gleeson CJ and Crennan J[146]. Also explained there is the course of proceedings in the Supreme Court of Tasmania, with some reference to the successive reasons in that Court, both at first instance and on appeal[147].

117 One feature of the facts which the primary judge mentioned "by way of background" might be noticed[148]. In his affidavit in support of the interlocutory injunction, the respondent described how he had become involved in a farm associated with the prison in which he was serving his mandatory sentence of life imprisonment. He had been sentenced to that term in 1975. In the prison farm, he had developed an expertise in breeding insects and worms. In 1999 he was contacted by Mr Gordon Davie, formerly a detective and by then a journalist, who is named as the third defendant in the proceedings. Mr Davie played no part in this appeal.

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143 *Lenah Game Meats* (2001) 208 CLR 199 at 275-276 [180]-[183].

144 *Lenah Game Meats* (2001) 208 CLR 199 at 285 [212].

145 *Lenah Game Meats* (2001) 208 CLR 199 at 276 [183].

146 Reasons of Gleeson CJ and Crennan J at [3]-[8].

147 Reasons of Gleeson CJ and Crennan J at [9]-[15].

148 [2005] TASSC 26 at [6].

118 According to the respondent's affidavit, Mr Davie represented to the respondent a desire to make a documentary film about the latter's activities at the worm farm. The respondent gave permission for the filming of his activities at that farm. He signed a proffered agreement with the ABC permitting it to prepare a film with the working title *The Worm Farm*[149]. The respondent said that he was induced into taking part in the film by an assurance that it would be confined to his activities at the worm farm and would not be about the crime for which he had been convicted or any other allegations against him of a criminal nature[150]. Confirmation that this was how Mr Davie represented himself to the respondent is apparent from letters that passed between the two men from 1999 onwards. The respondent indicates an awareness of Mr Davie's deception in a letter sent by him dated 24 March 2003. However, in his response, Mr Davie stated that "it was and still is my view that the person who was sentenced to imprisonment in 1975 is a different person to the one I have been visiting since September 1999". Mr Davie suggested that conducting further interviews would be "one of the best ways of portraying this fact"[151]. There was no suggestion that the documentary film would do otherwise.

119 In fact, before *The Fisherman* was screened at the Film Festival in Hobart in January 2005, *The Mercury* newspaper in Hobart described it as a documentary that followed "former Victorian detective Gordon Davie as he interviews prisoner James O'Neill and tracks his path on the [Australian] mainland before he came to Tasmania in the 1970s". *The Mercury* reports Mr Davie as saying that he thought that what he had read about the plaintiff in 1999 "showed a strong pattern of behaviour and [he] wondered if O'Neill could have committed other crimes before arriving in Tasmania". Apparently, it was for this purpose that Mr Davie developed his relationship with the respondent. It was not to portray the respondent's activities at the worm farm. It was to test his possible involvement in the deaths of eight children[152].

120 As the primary judge acknowledged, the foregoing facts represent largely background material of little direct relevance to the grant, or refusal, of an interlocutory injunction against the ABC. However, they show how the respondent was "badly misled and deliberately told untrue representations by Mr Davie concerning the proposed content of the documentary"[153]. Tricks,

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149 [2005] TASSC 26 at [6].

150 [2005] TASSC 26 at [7].

151 [2005] TASSC 26 at [8].

152 [2005] TASSC 26 at [9].

153 [2005] TASSC 26 at [10].

deceptive conduct and false representations are not uncommon features of media conduct in cases of this kind[154]. Media interests might assert that it is the only way to "get the story". Yet conduct of such a kind is not wholly immaterial when a party, with the requisite interest and a relevant legal right, comes before a court seeking an interlocutory injunctive remedy that is equitable both in history and in character[155].

121 In the absence of the actual film, or of excerpts or a transcript or equivalent record, the statements attributed to Mr Davie represent the best evidence available to the primary judge concerning the content of *The Fisherman* film, which the ABC wished to broadcast. On the face of things, it is a film portraying the respondent for the purpose of propounding and illustrating Mr Davie's hypothesis and doing so contrary to the undertaking given to the respondent. It was built on a false relationship which Mr Davie allegedly created by his pretended interest in other things. The potential for distortion, one-sidedness and partiality in a film produced in such a way, under such conditions, is not inconsiderable. It was open to the primary judge to conclude that the risk of presenting the respondent unfairly, in the worst possible light, was very large indeed.

122 *The legislation*: The interlocutory injunction was sought as incidental to the respondent's action for defamation. At the relevant time, the law on that subject was governed in Tasmania by the *Defamation Act* 1957 (Tas). Importantly, in that State, it was not sufficient, at the time this action was brought, for a publisher, or proposed publisher, to prove that the matter complained of was true. To establish the defence of truth, it was also necessary to prove that the publication was one "for the public benefit"[156]. This added ingredient presented a question of fact for ultimate decision by the jury (or judge) assigned to try the case.

123 This was a point of importance for the primary judge in deciding whether the legal foundation had been laid for the provision of interlocutory injunctive relief. The decision of this Court in *Lenah Game Meats* determined the ambit of the jurisdiction and power of the Supreme Court of Tasmania to grant an injunction under s 11(12) of the *Supreme Court Civil Procedure Act* 1932 (Tas).

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154 cf *Lenah Game Meats* (2001) 208 CLR 199 at 262-263 [151].

155 In the Full Court, Slicer J also referred to the representation. See [2005] TASSC 82 at [12]-[15]. See also the reasons of Heydon J at [179]-[180].

156 *Defamation Act* 1957 (Tas), s 15(b). See [2005] TASSC 82 [25]; cf *Defamation Act* 2005 (Tas), s 25 which now provides a defence of substantial truth with no requirement of public benefit.

Following *Lenah Game Meats* it was common ground in this appeal that s 11(12) did not expand the jurisdiction and power of the Supreme Court to permit the grant of an interlocutory injunction at large, where no legal or equitable rights were presented for judicial determination[157].

124 Here, the primary judge was willing to accept, on the evidence, that the ABC might prove that the respondent was "suspected" of being involved in the disappearance and possible murder of the Beaumont children[158]. Although the South Australia Police were "reported as saying that they had found no evidence to support the [respondent's] involvement in the disappearance of the Beaumont children and that he had been discounted from their inquiries"[159], the Commissioner of Tasmania Police had been reported in *The Mercury* newspaper as saying that the respondent could be responsible for the kidnapping of the Beaumont children in 1966. In such circumstances, proof of the truth of the fact of "suspicion" might not be difficult for the ABC. Likewise, if the respondent's additional confession (which he now disputes), signed in May 1975, of the murder of another boy, might conceivably lay a basis on which the ABC could establish the truth of the imputation that the respondent was "a *multiple* killer of children". This assumes that "multiple", in this context, meant, or included, two such killings, a meaning that would be open to contest.

125 For the primary judge, however, the problem faced by the ABC was that, under the Tasmanian law, as it then stood, the ABC would be obliged to prove that the broadcast or publication would be "for the public benefit". The primary judge said[160]:

> "[A] greater problem for the defendants will be to establish that the publication of the imputations will be for the public benefit. The submissions of counsel for the defendants about the matter at the hearing were slight in substance and in content. It appears that was due to a belief that counsel for the plaintiff had conceded the issue of public benefit. I had not understood that such a concession had been made."

126 A check of the sound recording by the judge confirmed his impression. Counsel for the respondent had accepted that the subject matter of the proposed broadcast would be on a subject of "public interest". This did not extend to an

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157 *Lenah Game Meats* (2001) 208 CLR 199 at 216-218 [8]-[16], 231-232 [59]-[61], 239-248 [86]-[105]. See also the reasons of Gleeson CJ and Crennan J at [2].

158 [2005] TASSC 26 at [24].

159 [2005] TASSC 26 at [14].

160 [2005] TASSC 26 at [25].

acceptance that it would be "for the public benefit" for the respondent to be accused in such a way of additional crimes of which he had never been charged, and crimes for which he had been excluded from involvement by the police force with the relevant responsibility.

127 The primary judge upheld the respondent's objection because he was concerned that the proposed broadcast and publication would amount to "trial by media". Indeed, as described, it would represent "conviction by media". And it would amount to such a conviction without the benefit of any "trial, as we understand that word". The primary judge concluded[161]:

> "I can see no aspect of public benefit in the making public of allegations that the [respondent] was responsible for the disappearance and murder of the Beaumont children or that he is suspected of being responsible. The responsibility owed to the public with regard to the investigation of crime is entrusted by our society to the police and other public investigators and prosecutors. If there is evidence available that might assist the authorities to investigate the disappearance of the children in question, it should be made available to them."

128 The majority in the Full Court saw no error in this approach[162]. It is therefore important to keep in mind the content of the defence of justification under Tasmanian law as it stood when the decisions below were made. It was important to the approach of the courts below to the claim for an injunction pending the hearing of the trial of the action.

129 Various other provisions of the *Defamation Act* 1957 were invoked by the ABC[163]. However, in the way the appeal proceeded in this Court, it is not necessary to consider these. Nevertheless, it should be noted that as a convicted prisoner, the respondent was under a procedural disability restricting his capacity to commence his action for defamation in the Supreme Court. The significant disability that formerly applied to convicted felons[164] was removed by statute in Tasmania in 1991[165]. The respondent still required leave of the court to commence his action. He had not sought that leave. Very properly, the ABC

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161 [2005] TASSC 26 at [28].

162 [2005] TASSC 82 at [76].

163 [2005] TASSC 26 at [30]-[31].

164 cf *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 587, 592, 601-603; cf at 610.

165 *Prisoners (Removal of Civil Disabilities) Act* 1991 (Tas), s 4(2).

expressly disavowed any reliance on that procedural impediment when the appeal came before the Full Court[166]. It was not revived as an issue in this Court.

Common ground

130 I have already said that there was common ground between the parties that this case did not attract any implied constitutional freedom to publish the matter complained of. It was also agreed, in accordance with *Lenah Game Meats*, that to secure an interlocutory injunction under the applicable law, the respondent had to demonstrate a legal or equitable right which was to be determined at trial in respect of which final relief was sought there[167].

131 In these proceedings, unlike *Lenah Game Meats*, there was no doubt that the respondent had identified a legal right that was to be determined at the trial and in respect of which final relief was sought. That right concerned his entitlement to remedies under the *Defamation Act* 1957. Those remedies included the claim to a permanent injunction against the publication by the ABC of the identified matter. The ABC did not contest that, the defences aside, the publication was actionable as a defamation. Nor, in the light of the evidence, could it have done so.

132 The respondent, for his part, did not deny that the grant of an interlocutory injunction, to prevent the publication of a matter the subject of proceedings for defamation before trial, was rare in Australia. He accepted that applications of the present kind were to be approached with care and caution and that relief was not lightly afforded. One of the reasons for this principle of restraint, in a case such as the present, is that there are notorious instances where media persistence in questioning the fairness and correctness of criminal process have beneficially affected outcomes where the formal process is claimed to have failed[168]. What the respondent did contest was that these principles of restraint had hardened into a "fixed rule" against the provision of such relief, whether generally or in cases where the proposed publisher had indicated an intention to defend the proceedings at trial, specifically on the basis of justification of the truth of the matter complained of.

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166 [2005] TASSC 82 at [2] per Slicer J.

167 *Lenah Game Meats* (2001) 208 CLR 199 at 218 [16] per Gleeson CJ; 232 [61] per Gaudron J; 241 [91] per Gummow and Hayne JJ; cf at 270-271 [167] of my own reasons.

168 See *Stuart v The Queen* (1959) 101 CLR 1; Kirby, "Black and White Lessons for the Australian Judiciary", (2003) 23 *Adelaide Law Review* 195. Normally, the cases have involved assertions of innocence not further guilt of the prisoner.

133 The respondent also contested the ABC's submissions that his was not an exceptional case warranting such relief; that damages would be an adequate remedy for any wrong done to him; and that his reputation was already so poor, by reason of his conviction of the murder of one young boy, that he would suffer no significant additional damage by reason of the intended broadcast to warrant the issue of an interlocutory injunction against such a broadcast.

134 For its part, the ABC accepted that the only real damage that it would suffer by the continuance of the injunction to the trial of the respondent's action was a delay in the resolution of its right to publish the film. On this footing, although not trivial or at this stage permanent, any damage suffered by the ABC was temporary and potentially transient.

The issues

135 The following issues arise for determination in this appeal:

(1) *The rigid or flexible approach issue*: Whether the agreed significance for the grant of an interlocutory injunction of the values of free speech and a free press[169] was such that relief, by way of prior restraint, should virtually always be refused where the publisher indicated an intention to defend the proceedings and where such defence was not obviously futile or bound to fail? Or whether the general principle applicable to the grant of interlocutory injunctive relief, as stated in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* ("*Beecham*")[170] and refined in subsequent cases[171], applied to such cases so that, in each instance, the issue was whether the applicant has demonstrated that there was a serious question to be tried and that the balance of convenience is in favour of the grant of the injunction sought?

(2) *Flexible relief – error of principle issue*: Whether, if the answer to issue (1) is that the "rigid rule" approach to the provision of an interlocutory injunction in advance of the trial of an action for defamation is rejected, the judges below erred in failing to give proper weight to the consideration

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169 In this context the value of a 'free press' applies equally to the value of free expression in other forms of public media including radio and television.

170 (1968) 118 CLR 618.

171 *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Qld* (1982) 57 ALJR 425 at 425-426 per Gibbs CJ; 46 ALR 398 at 398-399; *Murphy v Lush* (1986) 60 ALJR 523 at 524; 65 ALR 651 at 653; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-154 per Mason ACJ.

of the value of free speech and of a free press so that an error of principle has been demonstrated warranting the intervention of this Court?

(3) *The bad reputation issue*: Whether the courts below erred in failing to pay any, or adequate, regard to the bad reputation which the respondent already had? An adverse reputation had resulted from the respondent's conviction and sentence to life imprisonment for the murder of a young child, and the alleged confession in 1975 to the additional murder of another child. It was suggested that any added damage to his reputation would be minimal, rendering it probable that, at most, he would recover only nominal damages were he to succeed in his action, so that an interlocutory injunction should not be granted. Was this a case where damages thus constituted an adequate and appropriate remedy for any wrong done to the respondent? Or would acceptance of that submission postulate a class of defamation-free plaintiffs, diminishing the principle of equality before the law for all persons such that none are put beyond the protection of the law where they can prove that they have been defamed without the availability of an applicable legal defence?

136 In their joint reasons, Gleeson CJ and Crennan J appear to accept[172] the "flexible rule" for the grant of interlocutory injunctions before the trial of an action for defamation and the applicability to such an action of the general principles governing interlocutory injunctions as stated by this Court in *Beecham*[173], and appropriately modified in *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Qld*,[174] *Murphy v Lush*[175], and *Castlemaine Tooheys Ltd v South Australia*[176]. However, they conclude that the primary judge, and the Full Court, erred in failing to approach the application for the interlocutory injunction with "exceptional caution". In other words, Gleeson CJ and Crennan J

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172 Reasons of Gleeson CJ and Crennan J at [19].

173 (1968) 118 CLR 618 at 622-623. Gleeson CJ and Crennan J also refer to the reasoning of Doyle CJ in *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440 at 442-443, which appropriately describes the three-stage test generally applicable to applications for interlocutory injunctions in respect of defamatory material.

174 (1982) 57 ALJR 425 at 425-426 per Gibbs CJ; 46 ALR 398 at 398-399, where the threshold requirement of a "prima facie case" was substituted for the need to show there was a "serious question to be tried", applying *American Cyanamid v Ethicon Ltd* [1975] AC 396.

175 (1986) 60 ALJR 523 at 524; 65 ALR 651 at 653.

176 (1986) 161 CLR 148 at 153-154 per Mason ACJ.

suggest that insufficient weight was given to the public interest in free speech when determining the "balance of convenience". They caution against court interference with the "right of free speech by prior restraint"[177] and state that only Slicer J, dissenting in the Full Court, treated these considerations as "influential"[178]. In their view, these considerations are decisive. Gleeson CJ and Crennan J also conclude that because of the respondent's already poor reputation only nominal damages might be awarded to him and that this consideration had likewise not been taken into account as a consideration against providing, and upholding, the injunction[179]. These are the errors of principle which are said to authorise the substitution by this Court of contrary orders. I agree with their resolution of the first issue but I disagree with their resolution of the second and third issues.

137 In their joint reasons, Gummow and Hayne JJ hold that the primary judge conflated the requirement of "public benefit" in s 15 of the *Defamation Act* 1957 with the general question of "public interest in free speech"[180]. They also hold that his Honour mistook the nature of his discretion and narrowly focused on whether it would be for the "public benefit" for the plaintiff to face "trial" or "conviction" by the media[181]. On the third issue outlined above, Gummow and Hayne JJ record their agreement with the reasons of Gleeson CJ and Crennan J. For the reasons that follow, I do not agree with these assessments.

138 Relevantly, Gummow and Hayne JJ also argue that the test stated in the phrase "serious question to be tried", as understood from statements of Lord Diplock in *American Cyanamid v Ethicon Ltd*[182], should not be followed[183]. Rather, that requirement should be read consistently with the "considerations emphasised in *Beecham*"[184], whereby the "governing consideration" is that the "probability of ultimate success depends on the nature of the rights asserted and

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177 Reasons of Gleeson CJ and Crennan J at [32].

178 Reasons of Gleeson CJ and Crennan J at [32].

179 Reasons of Gleeson CJ and Crennan J at [33].

180 Reasons of Gummow and Hayne JJ at [86].

181 Reasons of Gummow and Hayne JJ at [84]-[85].

182 [1975] AC 396 at 407-408.

183 Reasons of Gummow and Hayne JJ at [71].

184 Reasons of Gummow and Hayne JJ at [70].

the practical consequences likely to flow from the interlocutory order sought"[185]. With respect, I do not believe that this formulation is consistent with the approach repeatedly preferred in this Court in determining the threshold question of whether there is a "serious question to be tried"[186]. It diminishes the right of individuals to have serious questions tried on the evidence not pre-judged on limited predictions of success. This is not to deny that the propounded inquiry is relevant in determining whether the *balance of convenience* favours the grant of an interlocutory injunction. As the authorities attest, this is particularly the case when deciding whether to grant an interlocutory injunction to restrain an alleged defamation. But the legal entitlement to an injunction should not be confused with the secondary question of whether convenience favours it being issued.

The flexible rule for injunctions in defamation

139 *Two approaches to relief*: In England, it has long been the law that "once a defendant says he is going to justify [the matter complained of], that is the end of the case so far as an interim injunction is concerned"[187]. The "classic exposition"[188] on the law with regard to the grant of interlocutory injunctions in actions of defamation in England was offered by Lord Esher MR in *William Coulson & Sons v James Coulson & Co*[189]:

> "To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided

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185 Reasons of Gummow and Hayne JJ at [71]. See also *Beecham* (1968) 118 CLR 618 at 622.

186 *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board* (1982) 57 ALJR 425 at 425-426 per Gibbs CJ; 46 ALR 398 at 398-399; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-154 per Mason ACJ; *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440 at 442-443; *National Australia Bank Ltd v Zollo* (1995) 64 SASR 63 at 70-71. See also the persuasive reasoning of Diplock J in *American Cyanamid v Ethicon Ltd* [1975] AC 396 at 407: "The use of such expressions as 'a probability,' a 'prima facie case,' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief".

187 *Gatley on Libel and Slander*, 8th ed (1981) at [1571] cited by Olney J in *Lovell v Lewandowski* [1987] WAR 81 at 94-95.

188 *Duncan and Neill on Defamation*, 2nd ed (1983) at [19.03]. See also *Halsbury's Laws of England*, 4th ed, vol 28, para 168.

189 (1887) 3 TLR 846 at 846.

> whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest case, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from these three rules that the Court could only on the rarest occasions exercise their jurisdiction."

140 In the way of these things, common law judges sought to firm up these broad principles and turn them into hard and fast rules. Thus, in *Fraser v Evans*[190], Lord Denning MR said:

> "The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v Perriman*[191]. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. As the court said in that case[192]:
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> > 'The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done'.
>
> There is no wrong done if it is true, or if it is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication."

141 This approach has been adopted in many cases and is commonly stated as a rule of law. It has been applied so as to take cases relating to defamation proceedings out of the category where the general principles applicable to interlocutory injunctions apply. This has been the approach observed in England[193], Canada[194] and New Zealand[195].

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190 [1969] 1 QB 349 at 360-361.

191 [1891] 2 Ch 269.

192 [1891] 2 Ch 269 at 284.

193 *Bestobell Paints Ltd v Bigg* (1975) 1 FSR 421 at 429-430; *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412 at 1417; [1986] 3 All ER 577 at 581. See also *Holley v Smyth* [1998] QB 726 at 740, 743-744.

142 However, in Australia, appellate courts in most States have accepted a more flexible rule. They have acknowledged that the competing considerations of free speech and the free press, as well as reputation and privacy, can be accommodated adequately by the application of the normal principles for the grant of interlocutory injunctions. Thus the "flexible rule" has been adopted in New South Wales[196], Victoria[197], South Australia[198], and more recently in Western Australia[199]. Some authority in Australia favours the "rigid approach"[200]. Obviously, if that approach expressed the applicable law, it would demonstrate an error on the part of the Full Court in these proceedings. Without more, it would warrant the intervention of this Court to reverse the order made by the primary judge.

143 *Preferring the flexible rule*: Generally speaking, the rule adopted in Australia when an interlocutory injunction is sought in defamation cases, whilst involving a need to consider competing values of great importance, can nonetheless be adequately expressed within the framework of the general principles governing the grant, or refusal, of such injunctions. This means that, in Australia, such applications are to be decided within the framework of general

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194 *Canadian (Human Rights Commission) v Canadian Liberty Net* (1998) 157 DLR (4th) 385 at 413-414 [47]; cf *Canada Metal Co Ltd v Canadian Broadcasting Corporation* (1975) 55 DLR (3rd) 42.

195 *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4; *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520; *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406; *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129; *Hosking v Runting* [2005] 1 NZLR 1 at 39 [152]-[154].

196 *Marsden v Amalgamated TV Services Pty Ltd*, unreported, New South Wales Court of Appeal, 2 May 1996 at 15.

197 *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747 at 764.

198 *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440 at 442.

199 *JDP Australasia Pty Ltd v Pneumatic Systems International Pty Ltd* [1999] WASC 14 at [15]; cf *Lovell v Lewandowski* [1987] WAR 81.

200 eg *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199. See also *Australian Broadcasting Corporation v Hanson* [1998] QCA 306.

principle for the grant of interlocutory injunctions generally, established by the previous decisions of this Court[201].

144 There is no reason in legal concept to excise defamation actions, as a unique or special sub-category, from the general approach to interlocutory injunctions. That approach is already expressed in principles of broad application, adaptable to particular needs and circumstances. It accommodates a great variety of cases invoking vastly differing legal rules and values. In matters of basic approach, it is ordinarily undesirable to fashion "stand alone" principles. Moreover, it is difficult to justify grafting a special exception onto the general language of the statute law that ultimately governs the case, namely s 11(12) of the *Supreme Court Civil Procedure Act* 1932. That sub-section does not contain an express exception for interlocutory injunctions in defamation actions.

145 There are two additional considerations that support this conclusion. The first is the reminder, contained in the reasons of Blow J in the Full Court[202], referring to the analysis of Dr I C F Spry QC, in his work *Equitable Remedies*[203], that devising a peculiar and special rule for defamation actions (and specifically for those in which the publisher indicates an intention to justify the matter complained of) is fundamentally inconsistent with the provision of a remedy that is equitable in nature, such as an injunction. According to Dr Spry[204], the expression of a particular rule for defamation actions was:

> "A further example of the manner in which judges trained in a common law rather than an equitable tradition may misunderstand the nature of equitable discretions, and hence attempt to describe them in terms of inflexible rules … In such cases the right to obtain an interlocutory injunction ought, on general equitable principles, to depend simply on whether, in the special circumstances in question, the balance of justice inclines towards the grant or refusal of relief; and such matters should be taken into account as considerations of hardship in relation to the parties, any special considerations of unfairness that may arise, the

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201 *Beecham* (1968) 118 CLR 618 at 622-623; *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Qld* (1982) 57 ALJR 425 at 425-426 per Gibbs CJ; 46 ALR 398 at 398-399; *Murphy v Lush* (1986) 60 ALJR 523 at 524; 65 ALR 651 at 653; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-154 per Mason ACJ.

202 [2005] TASSC 82 [57].

203 Spry, *Equitable Remedies*, 6th ed (2001).

204 Spry, *Equitable Remedies*, 6th ed (2001) at 20-21.

> undesirability that a defendant should be prevented from making statements the legality or illegality of which will only subsequently be established with certainty, the extent to which third persons or the public generally may be interested in the truth of those statements, the degree of probability that the alleged libel will be published and will be wrongful, the degree to which the plaintiff will be injured in the event of its publication, and any other material considerations."

146 A second consideration is that, at the time of the application in this case, in a number of Australian jurisdictions, justification was not established merely by proof that the matter complained of was true[205]. To justify, the publisher had to additionally establish (as in this case) that the matter complained of was published "for the public benefit". This additional consideration adds a matter for judgment and evaluation that renders outcomes more uncertain than where what is in issue is simply a question of fact: true or false. As the primary judge understood in this case, that additional factor made it more debatable as to whether, at trial, the ABC would succeed in justifying publication of the kind intended by the contested film.

147 Before this Court, the ABC was somewhat ambivalent about the foregoing debate. It suggested that, whatever legal test was applied, and at whatever stage in the application of that test, paramountcy had to be accorded to the community's interest in free speech and a free press. However, there is an important difference between the approach required by a special rule for defamation cases and viewing such proceedings as an instance of the application of the general rule, although to circumstances having special features[206]. An endorsement of the approach contained in the general rule demands recognition of the discretionary character of the decision that has always to be made. It suggests that it is unlikely that any exercise of the judicial function of that character will permit a particular feature of the case (such as the value of free speech or a free press) to swamp entirely all other features. It also suggests that

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205 This is another reason why, in addition to the difference between the modern test for the granting of an interlocutory injunction as distinct from the historical formulation, disproportionate weight should not be given to Lord Coleridge CJ's reasons in *Bonnard v Perryman* [1891] 2 Ch 269 at 283-285. See the criticisms of the *Bonnard* test in Brandis, "Interlocutory injunctions to restrain speech", (1992) 12 *Queensland Lawyer* 169. See also the reasons of Heydon J at [207]-[209], [280]; cf the reasons of Gleeson CJ and Crennan J at [16]-[18] and the reasons of Gummow and Hayne JJ at [73]-[83].

206 *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 350 [17] but cf *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 161 per Hunt J.

no exercise of the discretion will place any particular class of persons (even convicted murderers) into a sub-category where they are treated as falling outside the law's protection.

148 All of this was clearly recognised in the reasons of Blow J in the Full Court[207]. It remains to take the community interest in the free discussion of matters of public or general interest into account in deciding whether it is "just and convenient" to grant relief. But, in so far as the ABC submitted that the question of convenience was not even reached (because of the paramountcy of the values accorded to free speech and a free press in the governing rule) that submission should be rejected[208].

The value of free speech was respected

149 *Approach of the majority*: The reasons of Gleeson CJ and Crennan J do not suggest error on the part of the majority in the Full Court (or the primary judge) on the basis that those judges had failed to apply the "rigid approach" of rejecting the claim for an interlocutory injunction outright, once the ABC indicated that it intended to plead justification as a defence. Instead, the reasons of Gleeson CJ and Crennan J conclude that the error, evident of the majority in the Full Court, was that the majority failed to observe the "exceptional caution" applicable to the grant of an interlocutory injunction in a case of defamation. Only Slicer J, it is said, evidenced reasoning that treated that consideration as "influential"[209].

150 Various particular criticisms are made in the reasons of Gleeson CJ and Crennan J of the weight assigned to identified considerations contained in the reasoning of the majority in the Full Court. These include the concern expressed by the primary judge about "trial by media" and the fact that published media had already made "suspicions" concerning the respondent matters of public debate and that, in cases of prior restraint of publication, the law tends to favour free expression.

151 However, it is quite wrong, with respect, to suggest that the values of free speech or of a free press were overlooked, or ignored, either by the primary judge or by the majority in the Full Court. The primary judge repeatedly acknowledged the authorities holding that "the power to grant an interlocutory

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207 [2005] TASSC 82 at [57]-[67].

208 cf *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747 at 754.

209 Reasons of Gleeson CJ and Crennan J at [32].

injunction to restrain an allegedly defamatory publication should be exercised with great caution, only in very clear cases"[210]. He accepted that an interlocutory injunction "will not usually be granted 'where such an injunction would restrain the discussion in the media of matters of public interest or concern'"[211]. He accepted the ABC's submissions about "the need to uphold and protect the freedom of the press". Nevertheless, he concluded that "like all freedoms, it is not an absolute one. The protection of individuals from the power and influence of the media is also important."[212] His reasons clearly indicate attention to the values expressed in the law and relied on by the ABC. Crawford J did not, in my view, conflate the general question of "public interest in free speech" with the question of whether there was a defence of truth and public benefit[213]. Both questions were suitably considered[214]. Moreover, Crawford J did not inflate the nature of his discretion. With respect, in their reasons, Gummow and Hayne JJ[215] attach undue weight to his characterisation of this discretion as an "unfettered" one. Clearly, read in context, this description was used by Crawford J to reject the submission that the "rigid" approach was the applicable rule[216].

152 In the Full Court, the majority reasons of Blow J likewise acknowledged the importance of the values of free speech and of the free press. Thus Blow J describes[217]:

> "The special practices adopted in such cases result from the need to protect freedom of speech and freedom of the press, and from the

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210 [2005] TASSC 26 at [23].

211 [2005] TASSC 26 at [24] citing *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 164; *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 351-352. See also [2005] TASSC 26 at [29].

212 [2005] TASSC 26 at [36].

213 [2005] TASSC 26 at [25], [29]; reasons of Heydon J at [282]-[286]; cf the reasons of Gummow and Hayne JJ at [84]-[86].

214 See also the reasons of Heydon J at [282]-[286], [289]-[294].

215 Reasons of Gummow and Hayne JJ at [84].

216 [2005] TASSC 26 at [23]: "[b]ut as was made very clear by Hunt J in *Chappell*, there are no rigid rules relating to the question. I have an unfettered discretion."

217 [2005] TASSC 82 at [53].

> associated notion that a decision as to whether published material is or is not defamatory is properly a decision for a jury rather than a judge."

153 Repeatedly, Blow J referred to, and extensively cited from, decisions that lay emphasis on the need to exercise the power in question "with great caution, and only in very clear cases"[218] and the need to be specially cautious where an injunction "would restrain the discussion in the media of matters of public interest to all concerned"[219]. The majority in the Full Court thus accepted that "the freedom of the press"[220] was a relevant consideration. They expressed the view that the primary judge had considered it in weighing the relevant factors for and against the grant of an injunction. In response to the suggestion that the primary judge had applied a wrong principle that would confine the media to making allegations of a criminal nature only in reports of charges, trials and convictions, Blow J said[221]:

> "In fact the learned primary judge did not express such a view in absolute terms, but used the adverb 'usually'. The learned primary judge was entitled to take into account the way our system of justice operates, the nature of the documentary in question, and the nature and extent of any benefit to the public that might result from the televising of the documentary prior to the trial of the action. He was entitled to form and express views in relation to those matters. The view that he expressed was reasonably open to him. He did not apply a wrong principle in taking that view into account."

154 In this passage, three things stand out. First, the majority in the Full Court were correctly addressing the issue of whether any error was shown that would authorise disturbance of the trial judge's order of the interlocutory injunction. Secondly, they were judging that issue by reference to the record, including so far as this disclosed the nature of the film by reliance on such extrinsic material as was available. And thirdly, they were emphasising that the injunction granted merely restrained the broadcast "prior to the trial of the action". It was strictly temporary. It lasted only until the trial or other order. It was designed to prevent

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218 [2005] TASSC 82 at [54]-[56] citing specifically *Stocker v McElhinney (No 2)* [1961] NSWR 1043 at 1048 per Walsh J and *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 349-350, along with other authority.

219 [2005] TASSC 82 at [72] citing *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.

220 [2005] TASSC 82 at [72].

221 [2005] TASSC 82 at [76].

foreclosure of the issue of prejudice and infliction of widespread damage until a trial of the action could determine the defences, including justification and the remedies, if any, appropriate to the case. This was not an instance of sudden, urgent, contemporary politics. It was a story concerning a long-standing mystery which lacked an element of urgent revelation present in earlier cases where attempted prior restraint has failed.

155 Different judges might take different views about the dangers of "trial by media" and the need to protect particular individuals against it. However, dangers certainly exist. In the absence of the tender by the ABC of the film itself (or excerpts or a transcript) it was open to the primary judge, drawing on the established extrinsic materials, to infer that the film in issue in these proceedings would not present a fair picture of potentially inflammatory material concerning the respondent. Instead, it would pursue the hypothesis of Mr Davie. On the materials before the primary judge, that course of conduct would arguably be grossly defamatory and unfairly damaging to the respondent so that its publication should be restrained, until his complaints about it were finally determined at trial where he was claiming a permanent injunction as one of his remedies.

156 Appellate judges might disagree with this evaluation of where the balance of convenience lay in this case. But unless an error of principle or approach is shown, they are not authorised to substitute their evaluations for that of the primary judge. All that was missing from the reasoning of the primary judge and the majority in the Full Court, which was present in the reasoning of Slicer J, was a reference by the latter to the "compelling" character of the value of "freedom of the press"[222]. I do not consider that the omission from the reasons of the other judges of such an adjective evidences a lack of appreciation of the need to protect freedom of speech and freedom of the press in our society. Especially so because such values are repeatedly referred to throughout the cases to which extensive mention was made in all of the reasons. Moreover, it was clearly in the mind of, and expressed in terms in the reasons of, Blow J[223]. As Slicer J correctly conceded, while "freedom of the press" is a compelling factor it is not a "trump card"[224].

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222 [2005] TASSC 82 at [38].

223 [2005] TASSC 82 at [53].

224 [2005] TASSC 82 at [38], referring to my reasons in *Lenah Games Meats* (2001) 208 CLR 199 at 285 [211], where I cited *R v Central Independent Television Plc* [1994] Fam 192.

157 *No disregard of principle*: I would therefore reject the suggestion that the primary judge and the majority of the Full Court failed to approach the power to grant an interlocutory injunction, in a case of defamation, with the measure of caution that is required by the need to uphold the legal values of free speech and freedom of the press. On the contrary, those judges gave express weight to such values. However, they did so in the context of the competition of those considerations with other values, including the individual right in a particular case to the defence of reputation against grave, widespread and possibly irreparable harm.

The respondent was not outside legal protection

158 *The approach of the majority*: By reason of the respondent's earlier conviction of a heinous crime, the majority concluded that the already damaged reputation of the respondent meant that it was possible that he had little reputation to lose and would therefore recover only nominal damages if he made good his assertion that the ABC's broadcast of the film would defame him and was not protected or excused by an available defence. It is suggested in the reasons of Gummow and Hayne JJ that this prospect operates as a "powerful factor in considering the balance of convenience to favour the denial of interlocutory relief"[225]. Gleeson CJ and Crennan J suggest that this, too, is a reason why an injunction should have been refused and that the primary judge, and the majority in the Full Court, failed to take account of that possibility and, on that ground, to decline or dissolve the interlocutory injunction[226].

159 *Defects in the holding*: The notion that a person such as the respondent is rendered "libel-free" is not one to which I would readily come. It is specifically contrary to the enactment by the Tasmanian Parliament of an express recognition that prisoners, such as the respondent, are entitled to pursue their legal rights[227]. Moreover, it is contrary to the fundamental notion of equality of all before the courts and under the law[228]. It would require very clear legislation to deprive the respondent of equal access to a right which other persons enjoy, if damaged by an actionable defamation to which no defence applies, to look to the courts for remedies. Those remedies include the remedy of a permanent injunction which the respondent has sought. No one is above the law. Equally, it needs very clear legal provisions to place anyone outside the law's protection. Here the jurisdiction and powers granted to the Supreme Court of Tasmania were

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225 Reasons of Gummow and Hayne JJ at [89].

226 Reasons of Gleeson CJ and Crennan J at [33]-[34].

227 *Prisoners (Removal of Civil Disabilities) Act* 1991 (Tas).

228 See International Covenant on Civil and Political Rights, Art 14.1.

expressed in general terms. Neither the *Defamation Act* 1957, nor the *Prisoners (Removal of Civil Disabilities) Act* 1991 (Tas), makes reference to excluding from ordinary legal entitlements a person such as the respondent.

160 In the United States, the courts have considered the notion that some persons are "libel-free", whether because of notorious criminal behaviour or anti-social conduct[229]. However, the concept was rejected in 1984 by the Court of Appeals for the District of Columbia[230]. In 1991 it was rejected by the Supreme Court of the United States[231]. Although the notion has not entirely disappeared from reasoning in State courts in the United States[232], it has no supporting authority in Australia. Nor should it have, because the idea is alien to basic concepts of legal equality. It reflects ideas of outlawry that are incompatible with modern notions of the law making legal protection available to all on a basis of equality[233]. The punishment for the respondent's crime, of which he has been convicted, is his sentence to life imprisonment. It would be contrary to basic principle to add to that sentence an unenacted deprivation of protection under the law of defamation or the law of procedural remedies. As stated by Stewart J in *Rosenblatt v Baer*[234]:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty."

161 *Hill v Church of Scientology of Toronto*[235], a decision of the Supreme Court of Canada, endorsed this passage and stressed that the reputation of every human being deserved protection under law. "Reputation", it was said, "is the

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229 *Cardillo v Doubleday & Co Inc* 518 F 2d 638 (2nd Cir 1975); *Wynberg v National Enquirer* 564 F Supp 924 (CD Cal 1982). See also Kenyon, *Defamation: Comparative Law and Practice*, (2006) at 269-270.

230 *Liberty Lobby Inc v Anderson* 746 F 2d 1563 (DC Cir 1984).

231 *Masson v New Yorker Magazine Inc* 111 SCt 2419 (1991).

232 *Jewell v NYP Holdings Inc* 23 F Supp 2d 348 (SDNY 1998).

233 cf *Hirst v The United Kingdom (No 2)* [2005] ECHR 681 at [56]-[82].

234 383 US 75 at 92 (1966). See also *R v Dyment* [1988] 2 SCR 417 at 427 per La Forest J.

235 [1995] 2 SCR 1130 at 1178 per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

'fundamental foundation on which people are able to interact with each other in social environments'. At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth[236]." I agree with this analysis.

162 *Unequal impact of law*: But can it be said that, in practical terms, the respondent's situation is such that he is not likely to be injured in his reputation nor, any more than he already is, prone to suffer from being shunned, avoided, ridiculed or despised[237]?

163 This argument was considered in the Full Court by Blow J. He answered it in a convincing way[238]:

> "The respondent's reputation is already a bad one since it is well known that he is serving a life sentence for the murder of a child, and the *Mercury* has published material suggesting that he is suspected of involvement in the disappearance of the Beaumont children … But it was open on the evidence for the learned primary judge to conclude that the televising of the documentary in question might spread the respondent's bad reputation more widely, and that members of the public might receive information injurious to his reputation that they had not received before. He made findings to that effect. In my view he did not err in doing so, and certainly did not act on a wrong principle."

164 Even if the respondent might not recover large (or any) damages, because of his already diminished reputation, this would not mean that he would fail in an application to prevent the publication of a broadcast if the film were held at trial to contain serious falsehoods, or unjustifiable, unbalanced and unfair opinions to which no pleaded defence was applicable. Both the primary judge and the Full Court gave consideration to the question of whether damages would be a sufficient remedy for any wrong to the respondent. They rejected that suggestion. No error has been shown in their reasoning or their conclusion.

165 With respect, then, I find the suggested oversight of the possibility that the respondent would recover only nominal damages a most unlikely hypothesis. It reflects an attitude to the rights of persons who approach the courts for relief

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236 [1995] 2 SCR 1130 at 1178 per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ, citing Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?", (1994) 4 *National Journal of Constitutional Law* 169 at 197.

237 *Defamation Act* 1957 (Tas), s 5(1)(c).

238 [2005] TASSC 82 at [74].

which I would not embrace. Effectively, it means that any prisoner, serving a sentence for a heinous crime, is fair game for anything at all that a media organisation, such as the appellant, might choose to publish about him or her. I do not consider that this represents the law of Australia. In *Falbo v United States*[239], Murphy J remarked that "[t]he law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." The wrongs to which his Honour referred are not confined to wrongs by government. They can, on occasion, include wrongs done by large media organisations, public and private[240].

166 *Amendment of the law*: Nor do I believe that the alteration in the law of defamation in Tasmania, which now provides a defence of substantial truth with no requirement of public benefit[241], in trials taking effect after 1 January 2006, alters the foregoing conclusions. The issue before this Court is whether the law, as applied by the primary judge and the Full Court, was correctly stated at the time of its application. Only if the question arose on a fresh application to dissolve the injunction or on an application (error being shown) that this Court should now exercise afresh the powers that miscarried below, would the new law be relevant to the disposition of this appeal.

167 On the basis of the new law, the ABC might be warranted to seek modification or dissolution of the present orders. However, such an application would have to be made to the Supreme Court of Tasmania; not to this Court. Our function is the correction of error. In my view, no error of law or fact or principle has been shown. No occasion for the substitution of different orders therefore arises.

Orders

168 The appeal should be dismissed with costs.

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239 320 US 549 at 561 (1944).

240 *Lenah Game Meats* (2001) 208 CLR 199 at 272 [172], 276 [183].

241 *Defamation Act* 2005 (Tas), s 25.

169 HEYDON J. At the hearing of the application for special leave to appeal, counsel for the Australian Broadcasting Corporation ("the Corporation") submitted that the case raised "very important questions about the appropriate principles to be applied"; that the Court would be able to "speak on an issue it has never spoken on before, that is, in what circumstances should an interlocutory injunction [against defamation] go"; and that the Court could deal decisively with the question of how the community interest in free speech on a matter of public interest should manifest itself in the exercise of a judgment as to whether or not an interlocutory injunction to restrain publication of defamatory material should be granted. On the appeal, counsel urged the Court to "adopt a guideline", which it might be appropriate to treat as having "the force of a binding rule" for cases like the present. Counsel advanced various "tests" for the role free speech should play – the "paramountcy of free speech", the "primacy of the role of free speech", the "overriding principle of free speech", free speech as "a predominant consideration", or "dominant" consideration, to be given "special weight", and free speech as an "independent and overriding" factor.

170 The outcome of this appeal will bitterly disappoint the authors of these doubtlessly sincere asseverations. There is no majority in the Court on any contested point of law. In truth, only one proposition of any importance flows from the appeal. That is that as a practical matter no plaintiff is ever likely to succeed in an application against a mass media defendant for an interlocutory injunction to restrain publication of defamatory material on a matter of public interest, however strong that plaintiff's case, however feeble the defences, and however damaging the defamation.

171 It is necessary initially to notice some preliminary points, to identify the decisive reasoning underpinning the allowing of the appeal, to survey the history, structure and justification of the present law, and to analyse the role of free speech in relation to it. Then the reasons why the appeal should be dismissed will be stated.

Three key questions about free speech

172 Three key questions about free speech are provoked by the power to grant interlocutory injunctions against the publication of defamatory material. An understanding of what follows may be assisted by posing them, and answering the first two dogmatically.

173 The first is whether, apart from the need to satisfy the rule in *Bonnard v Perryman*, which states specific limits on the grant of relief[242], there is an overriding rule that no interlocutory injunction will be granted if it would

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242 [1891] 2 Ch 269. See pars [207]-[208].

interfere with the exercise of free speech on a matter of public interest. Some have suggested that there is such a rule, but it has no support in *Bonnard v Perryman* or the other leading authorities[243].

174 The second question is whether, even though freedom of speech is not reflected in an overriding rule of that kind, it must still be taken into account independently of the rule in *Bonnard v Perryman*. A great many able lawyers seem to have thought so or to think so, but *Bonnard v Perryman* gives that position no support. *Bonnard v Perryman* eloquently employed freedom of speech as a justification for the limits it laid down, but it did not stipulate that freedom of speech had any independent role beyond those limits. What was said in justification of the limits stated in *Bonnard v Perryman* is not to be treated as having created some further rule additional to the limits so justified. It is to be treated only as a statement of justification of those limits, or as a statement of the consequences of those limits[244].

175 The third question is whether the Court of Appeal erred in *Bonnard v Perryman* in giving excessive weight to freedom of speech by causing the defamation defences which protect freedom of speech to be treated in a manner which is unjustified and anomalous compared to the way defences to other wrongs capable of being restrained by interlocutory injunctions are treated. That is not a question which this appeal makes it necessary or desirable to answer, but it is briefly discussed below[245].

Kirby J: three points

176 Next, it is appropriate to record agreement with three points made by Kirby J.

177 The first is that it would have been better if the Corporation had turned its energies to the central matter – an early trial of the action (which counsel for the Corporation in this Court said might be necessary in some cases, and which counsel for all defendants indicated they desired, after the primary judge granted the interlocutory injunction). Instead the Corporation concentrated on the time-consuming but sterile sideshows of protracted interlocutory appeals – an appeal to the Full Court, a special leave application to this Court and an appeal to this

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243 See pars [270]-[271].

244 See par [209]. This error underlay not only the Corporation's arguments, but also, to some extent, the reasoning in the courts below on issues indicated later.

245 See pars [272]-[278].

Court[246]. The Corporation did not submit that the fact that no trial had taken place was the plaintiff's fault; if it had been, that would have been a powerful ground on which the Corporation could have sought dissolution of the interlocutory injunction. It did at one point unsuccessfully seek to dissolve it, but for another reason.

178 The second is that the issue in determining an appeal from the grant (or the failure to grant) an interlocutory injunction is not whether a judge sitting in the appellate court would have made the same orders as those appealed against had that judge been the primary judge[247]. With this approach, the Corporation's submissions rightly conform.

179 The third is the dishonest procurement of the plaintiff's cooperation in making the film which the Corporation wishes to broadcast. The person responsible was the third defendant, Mr Davie, a former detective[248]. That worthy, although an active participant in the interlocutory proceedings represented separately from the Corporation, did not read any affidavit denying the plaintiff's evidence that he had acted dishonestly, and the Corporation itself did not read any relevant affidavit either by him or by those in the Corporation who dealt with him. The conclusion that the plaintiff's account of his dealings with Mr Davie was correct may therefore confidently be drawn. In turn it follows that the Corporation, at least from the time when the plaintiff's affidavit was served, was on notice of Mr Davie's dishonesty. Thus it must have been aware that the effect of its defence of the interlocutory proceedings, and its defence of the proceedings as a whole, was to exploit in its own interests an advantage gained by that dishonesty, or at least to try to do so[249]. In neither of its

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246 Reasons of Kirby J at pars [108]-[109].

247 Reasons of Kirby J at pars [96] and [98].

248 Reasons of Kirby J at pars [117]-[121]. See also *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [6]-[10].

249 See also *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169 (film taken by the Corporation during a trespass accompanied by harassing interrogation); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (accepting "video footage provided to it for nothing and surreptitiously made on private property during the course of the commission of an offence of trespass, probably following the even more serious offence of breaking and entering, the general nature of which" it knew: per Callinan J at 290 [225]). In the court below a different aspect of the Corporation's conduct attracted criticism from Slicer J. Although he made orders in favour of the Corporation, he did state that its reliance against a prisoner on delay as a defence revealed "an arrogance of power": *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [20].

(Footnote continues on next page)

appeals has the Corporation challenged the trial judge's findings supporting those conclusions.

180 The Corporation's conduct in this regard will surprise many. In defamation proceedings of this kind the misconduct of a defendant which is distinct from the defamatory character of what it publishes has limited relevance – beyond questions of damages and costs, perhaps none[250]. But so far as it has relevance to damages, it has relevance to interlocutory relief. Misconduct of this type on the part of commercial media defendants is common. The Corporation, however, might be thought to be in a different position from commercial media defendants. It has no need to seek out, attract and retain advertisers. Its survival does not depend on securing mass audiences or on appealing to the lowest common denominator in public taste. As "the provider of an independent national broadcasting service"[251], which is of long standing, and which promotes itself as "everyone's ABC", it is admired and trusted by many people who hold its rivals in less esteem. Its Board is under a statutory duty to maintain its "integrity"[252] and to "ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognized standards of objective journalism"[253]. The journalists employed by the Corporation are presumably subject to an ethical duty to use "fair, responsible

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No doubt he was alluding to certain words of Rudyard Kipling – once celebrated to the point of cliché, now little known. They were employed by his first cousin Stanley Baldwin against Lord Beaverbrook (owner of the *Daily Express* and *Evening Standard*) and Lord Rothermere (owner of the *Daily Mail* and the *Evening News*) on 17 March 1931. Speaking at the Queen's Hall, two days before the St George's by-election, the Leader of the Opposition said: "What the proprietorship of these papers is aiming at is power, and power without responsibility – the prerogative of the harlot throughout the ages." See Middlemas and Barnes, *Baldwin*, (1969) at 600. The key passages in the speech have enduring value and modern-day application.

250 cf *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 306 [269] per Callinan J; see also Kirby J in the present appeal at par [120].

251 *Australian Broadcasting Corporation Act* 1983 (Cth), s 6(2)(a)(iii), which is part of what the Corporation refers to, in the language of the marginal note to s 6, as its "Charter".

252 *Australian Broadcasting Corporation Act* 1983 (Cth), s 8(1)(b).

253 *Australian Broadcasting Corporation Act* 1983 (Cth), s 8(1)(c).

and *honest* means to obtain material"[254]. If so, the Corporation itself must be under an ethical duty not to publish material obtained in breach of such a duty by outside producers with whom it contracts for the supply of material[255]. The Corporation is a body corporate funded by the tax revenues raised by the Federal Government. For these reasons it might be thought that the Corporation, like the Federal Government itself, should conform to higher standards and ideals than may be current in society at large – and in the Corporation's case, higher standards than its commercial rivals. It might be thought that this should be so both in the material it broadcasts and the means it employs to get that material.

The approach of the Full Court majority

181 The majority in the court below considered that the Corporation's appeal to that Court should not be allowed unless the primary judge had acted on some wrong principle, or the interlocutory injunction he granted had worked a substantial injustice to the Corporation. The correctness of that approach has not been challenged in the sense that, apart from a few alleged factual errors on which the Corporation relied in this appeal but which, understandably, form no part of the grounds on which the appeal is to be allowed, the approach of the Corporation has been to endeavour to demonstrate errors of principle, not fact, in the judgment of the primary judge. There is no suggestion that the order worked any specific injustice independently of its inevitable, and in the circumstances rather slight, effect in delaying the broadcasting of the material identified.

The narrowness of the Corporation's challenge

182 The factual errors which the Corporation alleged were limited to errors about its motivation in broadcasting the film and about the plaintiff's reputation. The Corporation did not, however, argue that the primary judge erred in accepting its concessions about the capacity of the imputations to arise. It did not argue that he erred in his findings about their defamatory character: indeed it conceded that the imputations were "of the gravest and most damaging kind", were "of extreme gravity" and were "some of the gravest allegations" which could be made. And it did not argue that he erred in his findings about the weakness of the supposed defences.

183 The findings about the weakness of the defences are important. The primary judge doubted the availability of the defence given by s 15 of the

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254 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 305 [268] n 476 (emphasis added).

255 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 306 [269].

Defamation Act 1957 (Tas)[256], because he doubted whether public benefit could be established[257]. That conclusion itself is not attacked – it turns on questions of fact (s 20), and the Corporation's limited factual criticisms did not include any on this subject – although criticism was directed to the primary judge for discussing "trial by media" in that context. Numerous other defences were briefly advanced. The trial judge dealt with s 14(1)(a), (d) and (h)[258] thus[259]:

> "Paragraph (d) concerns fair comment about the merits of a case. There is no reason to think that such an issue will arise at the trial of the plaintiff's action. Paragraph (h) concerns fair comment about a communication made to the public on any subject. I did not understand counsel to identify what the relevant communication was and I think that the defendants will have some difficulty at trial with the requirement for fairness. Counsel for the ABC said that par (a) is the most obvious paragraph that applies to this

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256 Section 15 provided:

> "It is lawful to publish defamatory matter if –
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> (a) the matter is true; and
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> (b) it is for the public benefit that the publication should be made."

257 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [25]-[29].

258 Section 14(1) relevantly provided:

> "It is lawful to publish a fair comment respecting –
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> (a) any of the matters with respect to which the publication of a fair report in good faith for the information of the public is declared by section 13 to be lawful;
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> ...
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> (d) the merits of a case, whether civil or criminal, that has been decided by a court of justice, or the conduct in that case of a person as a judge, party, witness, counsel, or solicitor, or as an officer of the court, or the character of such a person, so far as his character appears in that conduct;
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> ...
>
> (h) a communication made to the public on any subject."

259 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [30].

> case, but I cannot see that it would found a defence, for it brings in the provisions of s 13, none of which conceivably arise here."

And he dealt with s 16(1)(c), (e) and (h)[260] thus[261]:

> "The defendants also intend to plead qualified privilege pursuant to s 16(1)(h), but as that defence requires public benefit to be established, its likely success is open to doubt. Counsel for the second and third defendants said that his clients will also rely on s 16(1)(c) and possibly also (e). Paragraph (c) concerns a publication 'for the public good'. I think that a defence relying on that may have difficulty for the reasons I expressed when dealing with the question of public benefit. I regard par (e) as likely to be inapplicable in the circumstances of the case. Once again, it would raise the question of the public's interest or benefit."

In these passages the primary judge was courteously saying that the defences were completely baseless.

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260 Section 16(1) relevantly provided:

> "It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith –
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> ...
>
> (c) for the protection of the interests of the person who makes the publication, or of some other person, or for the public good;
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> ...
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> (e) for the purpose of giving information to the person to whom it is made with respect to a subject as to which that person has, or is reasonably believed by the person who makes the publication to have, such an interest in knowing the truth as to make the last-mentioned person's conduct in making the publication reasonable in the circumstances;
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> ...
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> (h) in the course, or for the purposes, of the discussion of a subject of public interest the public discussion of which is for the public benefit."

261 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [31].

The five wrong principles alleged

184 According to the majority judgments in this Court taken together, the primary judge acted on five wrong principles:

(a) He conflated the requirement of "public benefit" in s 15 of the *Defamation Act* with the public interest in having free speech unfettered.

(b) He wrongly focused on the question whether it was satisfactory that, were the film to be broadcast, the plaintiff would face trial or conviction "by media".

(c) He failed to take proper account of the significance of free speech.

(d) He failed to appreciate that the issue before him was whether, having regard to the nature of the rights asserted, including the special considerations cautioning against prior equitable restraint upon publication, and other relevant matters including the apparent weakness or strength of the proposed defence under s 15, the plaintiff's case was strong enough to justify passing on to an inquiry into the balance of convenience. This point overlaps in part with criticism (c) above.

(e) He failed to take account of the possibility that only nominal damages might be awarded in view of the fact that the plaintiff is a convicted murderer, who is serving a life sentence, and who has confessed to another murder, and in view of the fact that by 28 April 2005, the date of the proposed broadcast, there had already been or would have been extensive publication of matters involving allegations of the most serious nature about the plaintiff.

The circumstances in which judgment was delivered

185 In reading the primary judge's reasons for judgment in the light of these five criticisms of them, it is desirable to bear in mind the following circumstances. The plaintiff's application for an interlocutory injunction to restrain a broadcast planned for Thursday 28 April 2005 was filed on 15 April 2005. It was heard in circumstances of urgency over two days on 20 and 21 April 2005. The proceedings are recorded on over 100 pages of transcript. At the end of the hearing, the primary judge reserved judgment until 2.15pm the following day, Friday 22 April. This was two clear working days before the proposed broadcast. After also receiving on that day submissions with which he had not had time to deal in detail, the primary judge duly delivered his reasons. They were neither short nor perfunctory[262]. This was an appropriately

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262 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [1] and [25].

speedy response to the exigencies created by the manoeuvring of the parties. But speed can come at a price – a necessary and reasonable price. Seeming infelicities or obscurities or confusions in a reserved judgment pondered for some time might be regarded as signs of error. They ought to receive a more benevolent construction, if that is reasonably available, when they appear in a judgment produced under the pressure of the circumstances just outlined.

Evidentiary gaps

186 There is no evidence of the relevant contents of the film complained of. That is because no party tendered either the film or a transcript of it. It was in the possession of the Corporation, and it would have been easy for the Corporation to tender it. Although the defence deals with the public discussion of deficiencies in the investigation of serious crimes by the police, it is not possible to assess whether that topic was a theme of the film, as distinct from being a theme of newspaper articles in early 2005.

187 There were in evidence newspaper reports that the police had charged the plaintiff with another murder but had not proceeded with those charges; that the Tasmanian Commissioner of Police thought that the plaintiff could be responsible for the kidnapping and murder of the Beaumont children and had murdered more than one child; that the plaintiff was a suspect in relation to the murders of various children; and that the South Australian police had "discounted" the plaintiff from their inquiries into the disappearance of the Beaumont children. But those newspaper reports were not tendered to prove the truth of the assertions contained in them. They were only tendered to establish that the Corporation's programme would not be likely to damage the plaintiff's reputation. Hence they cannot be used to establish that there was no present intention on the part of the police to charge the plaintiff over additional offences, or that he was suspected of crimes by the persons quoted in the articles, or that he had committed additional crimes. Any reasoning which depends on their use to establish these propositions (as opposed to assuming them before examining some further proposition) is to that extent flawed.

History of the power to grant interlocutory injunctions to restrain the publication of defamatory material

188 *Jurisdiction before 1854.* Before 1854 courts exercising common law jurisdiction had no power to grant injunctions, and hence no power to grant interlocutory injunctions restraining publication of defamatory matter. It came generally to be thought, at least from 1875, that before 1875 the same was true of courts exercising equitable jurisdiction in the sense that although they had power to grant injunctions, including interlocutory injunctions, that power did not extend to interlocutory injunctions restraining publication of defamatory matter.

They "had power to intervene by injunction to protect property, but not to protect character; [they] had no power to try a libel"[263]. Hence they could grant injunctions against torts seen as affecting the plaintiff's proprietary rights even though they also had a defamatory character, for example, the torts then known as trade libel but now known as injurious falsehood (slander of goods and slander of title), and some kinds of passing off[264].

189 *The 1854 Act.* In 1854 courts exercising common law jurisdiction (but not courts exercising equitable jurisdiction) were given jurisdiction to grant injunctions. Section 79 of the *Common Law Procedure Act* 1854 (UK) provided:

> "In all Cases of Breach of Contract or other Injury, where the Party injured is entitled to maintain and has brought an Action, he may, in like Case and Manner as herein-before provided with respect to Mandamus, claim a Writ of Injunction against the Repetition or Continuance of such Breach of Contract, or other Injury, or the Committal of any Breach of Contract or Injury of a like kind, arising out of the same Contract, or relating to the same Property or Right; and he may also in the same Action include a Claim for Damages or other Redress."

Section 82 provided in part:

> "It shall be lawful for the Plaintiff at any Time after the Commencement of the Action, and whether before or after Judgment, to apply *ex parte* to the Court or a Judge for a Writ of Injunction to restrain the Defendant in such Action from the Repetition or Continuance of the wrongful Act or Breach of Contract complained of, or the Committal of any Breach of Contract or Injury of a like kind, arising out of the same Contract, or relating to the same Property or Right; and such Writ may be granted or denied by the Court or Judge upon such Terms as to the Duration of the Writ, keeping an Account, giving Security, or otherwise, as to such Court or Judge shall seem reasonable and just ...".

190 *Effect of the 1854 Act.* It seems that even if ss 79 and 82 conferred a power to grant interlocutory injunctions of any kind, before 1875 it was "very seldom"[265] or "never" exercised[266]. It also seems that no injunction restraining

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263 *Collard v Marshall* [1892] 1 Ch 571 at 577 per Chitty J.

264 *Croft v Day* (1843) 7 Beav 84 [49 ER 994]; *Routh v Webster* (1847) 10 Beav 561 [50 ER 698].

265 *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 Ch D 501 at 510 per Baggallay LJ.

266 *Monson v Tussauds Ltd* [1894] 1 QB 671 at 693 per Lopes LJ.

publication of defamatory matter was granted by the common law courts in the period 1854-1875.

191 There is a controversy, discussed below[267], about whether or not the grant by ss 79 and 82 to courts exercising common law jurisdiction of power to grant injunctions included a grant of power to grant injunctions restraining publication of defamatory matter. Even if it did, it certainly did not include a grant of that power to courts exercising equitable jurisdiction. Those courts continued to maintain the position that they had no other source of power. That was the ground on which, on 20 January 1875, the Court of Appeal in Chancery (Lord Cairns LC, James and Mellish LJJ) upheld a refusal to grant an interlocutory injunction in *Prudential Assurance Co v Knott*[268]. Six years earlier, in *Dixon v Holden*, Sir Richard Malins V-C contended that equity would grant injunctions against defamation where it "would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation". He went on to state: "Professional reputation is the means of acquiring wealth, and is the same as wealth itself"[269]. But Sir John Wickens V-C very soon drew attention to the "wholly new" character of this attempted destruction of any distinction between torts damaging personal reputation and torts which, while damaging proprietary interests, had a defamatory aspect as well[270]. And the Court of Appeal in Chancery in *Prudential Assurance Co v Knott* said that the general propositions in *Dixon v Holden* were at variance with the settled practice and principles of the court[271].

192 *The Judicature Act 1873.* Soon after, on 1 November 1875, the *Judicature Act* 1873 (UK) came into force. Section 16 provided for the transfer to the newly established High Court of Justice of the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any of various courts, including the High Court of Chancery and various common law courts. Section 25(8) relevantly provided:

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; and

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267 See pars [194]-[202].

268 (1875) LR 10 Ch App 142.

269 (1869) LR 7 Eq 488 at 494.

270 *Mulkern v Ward* (1872) LR 13 Eq 619 at 621.

271 (1875) LR 10 Ch App 142 at 147.

> any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just ...".

193 *The Tasmanian position.* The Tasmanian equivalents to ss 79 and 82 of the 1854 Act are ss 63 and 66 of the *Common Law Procedure Act, No 2* 1855 (Tas). They were repealed by the *Supreme Court Civil Procedure Act* 1932 (Tas), Sch 1. But s 2(4)(a) of that Act provided that the repeal did not take away any jurisdiction vested in the Supreme Court of Tasmania by the repealed sections. The Tasmanian equivalent to s 25(8) of the *Judicature Act* 1873 is s 11(12) of the *Supreme Court Civil Procedure Act*, which relevantly provides:

> "An injunction may be granted or a receiver appointed by an interlocutory order of the Court or a judge thereof in all cases in which it shall appear to the Court or judge to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court or judge shall think just ...".

194 *Interlocutory injunctions restraining publication of defamatory matter: Sir George Jessel MR.* Between 1875 and 1894 it came to be accepted that any division of the High Court had jurisdiction to restrain the publication of defamatory matter by interlocutory injunction.

195 The basis for this conclusion was first enunciated by Sir George Jessel MR in his usual masterful way. The case in which he did so, *Beddow v Beddow*[272], was not a defamation case. It was an application for an interlocutory injunction to restrain the defendant from acting as arbitrator on grounds of unfitness. Further, the Master of the Rolls did not say anything specific about defamation. In his ex tempore judgment he did, however, say[273]:

> "It is to be remembered that the jurisdiction of the Court of Chancery to grant injunctions was formerly limited; it was limited by the practice of different Chancellors. The jurisdiction was never extended in modern times beyond what was warranted by the authorities; and in course of time various vexatious and inconvenient restrictions were adopted. The granting of an injunction was always looked upon as an extraordinary exercise of jurisdiction, but it is not so now. One of the most useful functions of a Court of Justice is to restrain wrongful acts; and a power of this kind was given to the Common Law Courts in the largest terms by the *Common Law Procedure Act*, 1854, s 79."

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272 (1878) 9 Ch D 89.

273 (1878) 9 Ch D 89 at 91-92.

He then set out and discussed parts of ss 79, 81 and 82. Referring to the words "reasonable and just" in s 82, he said[274]:

> "What is reasonable and just is the only limit. No doubt the Court of Chancery was not originally limited by any other terms; but the instances in which an injunction might be granted were decided by that Court, and there were certain well-known cases in which it was settled that the Court ought not to grant an injunction."

He then said[275]:

> "That being so, when we come to the *Judicature Act*, 1873, we find this: First, all jurisdiction whatever which was exercised by any of these Courts is transferred to the new Court. Next, all Acts of Parliament applying to any one of the old Courts apply to the High Court of Justice, which consequently has jurisdiction to grant injunctions whenever it may seem just."

After setting out s 25(8) of that Act, giving power to grant interlocutory injunctions in all cases where it appeared to the court to be just and convenient, he concluded[276]:

> "If this can be done by interlocutory application *à fortiori* it can be done at the trial of the action, on the principle of '*omne majus continet in se minus*'. Next, by the *Common Law Procedure Act* this power would have been exercised at the trial as far as it was 'just.' The only addition is that in the *Judicature Act* you have 'just or convenient': not that that would be convenient which was unjust; but that in ascertaining what is 'just' you must have regard to what is convenient. All acts, therefore, which a Common Law Court or a Court of Equity only could formerly restrain by injunction, can now be restrained by the High Court.
>
> That being so, it appears to me that the only limit to my power of granting an injunction is whether I can properly do so. For that is what it amounts to. In my opinion, having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles."

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274 (1878) 9 Ch D 89 at 92.

275 (1878) 9 Ch D 89 at 92-93.

276 (1878) 9 Ch D 89 at 93.

196 In *Quartz Hill Consolidated Gold Mining Co v Beall*[277] the defendant appealed against the grant of an interlocutory injunction to restrain publication of a defamation. The first argument of its counsel was[278]: "We contend that there is no jurisdiction to grant an interlocutory injunction." Sir George Jessel MR referred to *Beddow v Beddow*. Counsel responded with the following not implausible[279] submission:

> "That case does not shew that the Court can grant an injunction in a case like this, unless it could have been granted at common law under the *Common Law Procedure Act*, 1854. Now, under sect 79 of that Act, the injunction could only have been granted at the trial."

Sir George Jessel MR said: "I am not prepared to agree to that." After further debate, he said: "There is no doubt about the jurisdiction."

197 In his judgment the Master of the Rolls said[280]:

> "I have no doubt whatever that there is jurisdiction to grant such an injunction. It is plain that the jurisdiction conferred on the Common Law Courts by the *Common Law Procedure Act* of 1854 extended to the granting of such an injunction. The 79th section is as large in terms as can well be, and the 82nd section allows *ex parte* injunctions in every case where a final injunction could be granted under the 79th section. Of course, under the rule of *omne majus continet in se minus*, if the Court can grant an injunction *ex parte*, *à fortiori* it can grant it on notice. It is, therefore, clear to my mind that the Common Law Courts had this jurisdiction in all Common Law actions. That jurisdiction is transferred to the High Court, and that would suffice to decide this question of jurisdiction. But by the *Judicature Act* of 1873, s 25, subs 8, a larger jurisdiction to grant injunctions than existed before is given in every case; and in my opinion that enactment extends the general jurisdiction given in Common Law actions to all actions whether in Equity or at Common Law. The result, therefore, is that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel."

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277 (1882) 20 Ch D 501.

278 (1882) 20 Ch D 501 at 506.

279 In *Monson v Tussauds Ltd* [1894] 1 QB 671 at 693 Lopes LJ doubted whether the 1854 Act gave the common law courts power to grant interlocutory injunctions. On the other hand, the reference to ex parte relief in s 82 suggests that it did.

280 (1882) 20 Ch D 501 at 507.

Baggallay and Lindley LJJ spoke to similar effect. However, since the appeal was allowed and the injunction discharged on other grounds, the remarks were obiter.

198 *Pound's criticism.* Sir George Jessel MR's approach has never been judicially doubted since *Bonnard v Perryman*, when it was unanimously approved by a six member Court of Appeal[281]. It has, however, been contradicted by Roscoe Pound.

199 According to Pound, the Act of 1854[282]:

> "gave the courts of common law in their discretion power to grant injunctions in actions at law in cases where an injunction ought to issue ... It is reasonably clear that this referred to cases where there ought to be an injunction on the principles of equity jurisdiction."

He drew attention to *Richmond v The Dubuque and Sioux City Railroad Co*[283] which, he said, held that a similar American statute "was construed not to give a court of law power to do more than a court of equity could have done in the way of preserving the *status quo* pending the action at law"[284]. Pound said that, contrary to Sir George Jessel MR's view, the Act of 1854 could not have given the common law courts power to grant interlocutory injunctions in defamation actions, since courts of equity could not do so. Pound continued[285]:

> "Thus, we are to believe, the Act of 1854 put liberty of the press and all the common-law rights of Englishmen into the hands of the judges, so far as injunctions may affect them, subject to no restraint beyond the judicial sense of what justice may demand. If the judges had not been anxious to put equitable relief against defamation on a sound basis, we may be sure they would never have tolerated such arguments. In truth the good sense and sound instinct of the English courts led them to strain a point ... ".

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281 [1891] 2 Ch 269 at 283 per Lord Coleridge CJ, Lord Esher MR, Lindley, Bowen and Lopes LJJ; at 285 per Kay LJ.

282 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 665.

283 33 Ia 422 (1871) (SC Iowa).

284 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 665 n 74.

285 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 665-666.

Precisely what he meant by "all the common-law rights of Englishmen" is unclear. It is also not clear how what is, on his analysis, an egregious error of statutory construction can be described as putting equitable relief on a "sound basis" or as reflecting "good sense and sound instinct". The duty of judges is to construe statutes correctly, not to substitute for the correct construction their own opinions of what the legislature ought to have enacted. And Pound's words "no restraint beyond the judicial sense of what justice may demand" ignore Sir George Jessel MR's requirement that interlocutory injunctions only be granted "according to sufficient legal reasons or on settled legal principles"[286].

200 *The Common Law Commissioners.* Although the breadth of the language used in ss 79 and 82 contradicts Pound's opinion, that opinion may receive some support from the origins of those sections. Those origins lie in the *Third Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law* in 1831[287]. The Report recommended that the writ of prohibition be widened to permit courts of common law to "restrain violations of *legal* rights in the same cases in which an injunction now issues for that purpose from the Courts of Equity"[288]. The Report described equitable jurisdiction to grant injunctions in relation to rights "for the violation of which an action lies at common law" as extending to injunctions against waste; certain torts, the "principal" of which were trespass by mining, copyright or patent infringement, and destruction of deeds and certain chattels; and certain breaches of contract. Parliament did not act on this recommendation.

201 Pound's theory is supported by the failure of the Report to refer to defamation as one of the torts equity would restrain by injunction. On the other hand, the listed torts were only the "principal" torts. The Report did not specify what other torts the Commissioners had in mind. The Commissioners were a strong group, consisting of Bosanquet J and Alderson J of the Court of Common Pleas, Patteson J of the Court of King's Bench, and Henry John Stephen, Serjeant at Law, but no equity lawyer was among them. It must be remembered that by 1831 there was only one well-known statement in Chancery[289] denying the

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286 *Beddow v Beddow* (1878) 9 Ch D 89 at 93.

287 Reprinted in *British Parliamentary Papers, Legal Administration, General, Courts of Common Law*, vol 2 at 193.

288 *Third Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law*, (1831) at 18; emphasis in original.

289 *Gee v Pritchard* (1818) 2 Sw 402 at 413 [36 ER 670 at 674]. The other well-known cases came after 1831: *Martin v Wright* (1833) 6 Sim 297 at 299 [58 ER

(Footnote continues on next page)

existence of power in the Court of Chancery to grant injunctions against libel, while there was one statement in the Court of King's Bench affirming it[290]. That Chancery statement – what Pound called Lord Eldon LC's "offhand remarks"[291] and his "over-cautious" dicta[292] – was uttered in argument. The relevant observation was: "The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes." It may be arguable that even by 1831 the law was unsettled in the sense that either equitable practice was extending to grant injunctions against wrongs not formerly so controlled, like various kinds of trespass[293], and the possibility of further extension to defamation was foreseen, or at least the door was not firmly closed against granting interlocutory injunctions to prevent libel: the relevant inquiries would be difficult ones, not limited to published reports, but fortunately not compelled by this appeal. It may also be arguable that whether or not equity lawyers thought that the Court of Chancery lacked power to restrain libels, common lawyers did not think so, and it is their thinking that is material to the construction of ss 79 and 82. That is because the *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law* in 1853[294], also the product of distinguished common lawyers, quoted the relevant passages from the 1831 Report and made a similar recommendation. This time the recommendation was acted on by the legislature in enacting ss 79-82 of the 1854 Act.

202 In consequence, the correct construction of ss 79 and 82 is a nice question. "If an appellate court, particularly an ultimate appellate court, is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to

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605 at 606]; *Clark v Freeman* (1848) 11 Beav 112 [50 ER 759]; *Emperor of Austria v Day* (1861) 3 De G F & J 217 at 239 [45 ER 861 at 870].

290 *Du Bost v Beresford* (1810) 2 Camp 511 [170 ER 1235].

291 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 645.

292 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 646.

293 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 643: "[I]n 1818 the jurisdiction of equity to enjoin trespasses on land was not yet well developed and the whole subject of equity jurisdiction over torts was backward because of the unsatisfactory mode of trial". See also at 644 and 646.

294 Reprinted in *British Parliamentary Papers, Legal Administration, General*, vol 9 at 165.

stand in the way of declaring the true intent of the statute"[295]. It is wrong to "give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time"[296]. If this Court thought, after proper argument, that Pound were correct in criticising the cases holding that the relevant provisions (and their modern descendants) gave power to grant interlocutory injunctions to restrain publication of defamatory matter, it would be necessary to overrule those cases. None of them are decisions of this Court, or even of the Privy Council or the House of Lords. Very few of them are decisions of intermediate appellate courts. The Corporation, which has a long-term interest in contending that they be overruled, did not do so – perhaps surprisingly in view of the portentous significance with which its submissions invested this appeal. On the other hand, it may be possible to argue that, even if the cases are wrong in their own terms, the language of the post-1875 legislation is such "that Parliament itself has approved a particular judicial interpretation" of the earlier legislation, and that in consequence that interpretation should be adhered to[297]. Prior notice would have to be given to the plaintiff, and further argument received, if the cases were to be overruled. Hence in this appeal it is right to abstain from overruling the cases. But they cannot be finally treated as having settled the law without argument on their correctness.

203 *Source of power to grant quia timet injunctions.* Section 79 of the 1854 Act conferred no power to grant a quia timet injunction against publication of defamatory material, because it required that the plaintiff be entitled to bring an action at law as a condition of seeking an injunction. The Corporation raised a question whether anything in the *Judicature Act* 1873, in particular s 25(8), had changed that. The point is entirely moot in this case, because the parties eventually agreed that before the proceedings began the Corporation had published the film to three persons in Tasmania[298]. The injunction was thus not sought against a publication which was feared but had not yet happened: it had happened, and what was to be restrained was its repetition.

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295 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13 per Mason J. (footnotes omitted)

296 *Hamilton v Baker* (1889) 14 App Cas 209 at 222 per Lord Macnaghten.

297 *Geelong Harbor Trust Commissioners v Gibbs Bright & Co (A Firm)* [1974] AC 810 at 820; see also *Geelong Harbour Trust Commissioners v Gibbs, Bright & Co* (1970) 122 CLR 504 at 518 per McTiernan and Menzies JJ, 518-519 per Kitto J.

298 Being distinct from the publication that took place with the showing of the film at the Hobart Summer Film Festival in January 2005, about which there is an issue as to the involvement of the Corporation.

204 *Section 25(8) as an independent source of power.* It should be added that in *Monson v Tussauds Ltd*[299] Lord Halsbury based the power to grant interlocutory injunctions against defamation not on the *Common Law Procedure Act* 1854 in combination with s 25(8) of the *Judicature Act* 1873 but on s 25(8) by itself. He did so in answering the argument that "the Court ought not to pronounce anything to be a libel when that very question must afterwards be submitted to the judgment of a jury ...". He said[300]:

> "[T]he legislature ... gave the power by the unqualified language of its enactment to do the very thing in question wherever the Court should deem it just and convenient. Had it thought right to limit the exercise of such power to cases where no question should be afterwards determined by a jury, it might have limited the exercise of such a power to such cases. It cannot be assumed to be ignorant of the state of the law or the practice, and it has enacted in the widest terms the jurisdiction in question. It is not necessary to enumerate, but there are other examples of jurisdictions where judges must exercise, in the first instance, a judgment which must, nevertheless, afterwards be submitted to a jury."

But it has been questioned whether such general words could support this particular outcome: for example, Brett LJ in *North London Railway Co v Great Northern Railway Co*[301] said that if no court had power to issue an injunction before the *Judicature Act* 1873, no part of the High Court had power to issue an injunction after it.

205 *Unnecessary questions.* For want of argument, among other reasons, it is not necessary or desirable to decide:

(a) whether s 79 of the 1854 Act conferred on common law courts a power to grant injunctions restraining the publication of defamatory matter;

(b) whether, if it did confer the power mentioned in (a), s 25(8) added a power to grant quia timet injunctions;

(c) whether, if s 79 did not confer the power mentioned in (a), s 25(8) did;

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299 [1894] 1 QB 671.

300 [1894] 1 QB 671 at 688-689. The idea that s 25(8) alone was a source of power had been advanced earlier in *Thorley's Cattle Food Co v Massam* (1877) 6 Ch D 582 at 588-590 per Sir Richard Malins V-C.

301 (1883) 11 QBD 30 at 36-37.

(d) whether, assuming negative answers to (a)-(c), there are other possible sources of power.

The curious evolution of *Bonnard v Perryman*

206 If Pound is correct and Lord Halsbury is wrong, some most curious events took place between 1875 and 1894. On the one hand, by a gross misconstruction of the relevant legislation, the judges arrogated to themselves a power to grant interlocutory injunctions restraining publication of defamatory matter which they had not hitherto had. On the other hand, they developed four limits regulating that power which were so restrictive that the power could hardly ever be exercised in favour of plaintiffs, and hardly ever has been.

207 The limits can be labelled "the rule in *Bonnard v Perryman*"[302]. The case is significant: the Court of Appeal must have considered that it raised important issues since, very unusually, it was heard by six judges (Lord Coleridge CJ, Lord Esher MR, Lindley, Bowen and Lopes LJJ, Kay LJ dissenting); despite the exceptionally offensive nature of the defamation involved, the plaintiff lost; and the core of its reasoning has hardly ever been doubted[303].

208 The consequence of the limits stated – perhaps their cause too – is that the jurisdiction to grant injunctions restraining the publication of defamations is "delicate"[304], only to be exercised "most cautiously and warily"[305] in the "clearest cases"[306], "exceptionally clear cases"[307], or "very clear cases"[308], and on the "rarest occasions"[309]. These occasions can only arise where, first, a jury's verdict would be set aside as unreasonable if it did not find the matter to be defamatory. The second limit relates to defences. There can be no relief if the defence of

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302 Many of them may be found earlier, in *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846.

303 See n 335 below.

304 *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846.

305 *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

306 *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846.

307 *Monson v Tussauds Ltd* [1894] 1 QB 671 at 690 per Lord Halsbury.

308 *Stocker v McElhinney (No 2)* [1961] NSWR 1043 at 1048 per Walsh J.

309 *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846 at 846.

justification will probably succeed, or even "might, not would, succeed"[310]; nor, if privilege or fair comment is alleged[311], can there be relief unless there is probably malice on the part of the defendant, or the defendant is "clearly malicious"[312], or, in modern formulation, the evidence of malice is "so overwhelming that the judge is driven to the conclusion that no reasonable jury could find otherwise; that is, that it would be perverse to acquit the defendant of malice"[313]. This need for the plaintiff to exclude the possible defences – to carry a "burden of proof"[314], and at a very high level – is triggered, on some authorities, by the mere claim on behalf of the defendant that particular defences will be advanced[315]. The third and fourth limits relate to damages. The third limit is that no injunction should be granted where the court cannot "tell what may be the damages recoverable"[316]. The fourth limit is that there must be no "real ground" for supposing that the plaintiff, if successful, will recover nominal damages only[317]. It is true that in Australia there has been some modification of these tests. One is illustrated in *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd*. Ormiston J said that it was not[318]:

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310 *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412 at 1417-1418; [1986] 3 All ER 577 at 581 per Sir John Donaldson MR.

311 *Fraser v Evans* [1969] 1 QB 349 at 360 per Lord Denning MR.

312 *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 1 WLR 958 at 960; [1982] 2 All ER 701 at 703 per Lord Denning MR.

313 *Herbage v Pressdram Ltd* [1984] 1 WLR 1160 at 1162; [1984] 2 All ER 769 at 771 per Griffiths LJ.

314 *Crest Homes Ltd v Ascott*, *The Times*, 4 February 1975 per Geoffrey Lane LJ, quoted in *Bestobell Paints Ltd v Bigg* (1975) 1 FSR 421 at 435 per Oliver J.

315 Little more than this appeared from the defendant's unsatisfactory affidavit in *Bonnard v Perryman* [1891] 2 Ch 269 at 287-288. A mere announcement of an intention to justify evidently sufficed in *Bestobell Paints Ltd v Bigg* (1975) 1 FSR 421 at 429. See also *Crest Homes Ltd v Ascott* (1980) 6 FSR 396 at 398 per Lord Denning MR; *Herbage v Pressdram Ltd* [1984] 1 WLR 1160 at 1162; [1984] 2 All ER 769 at 771 per Griffiths LJ; *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412 at 1416; [1986] 3 All ER 577 at 580 per Sir John Donaldson MR.

316 *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

317 *Stocker v McElhinney (No 2)* [1961] NSWR 1043 at 1048 per Walsh J.

318 [1989] VR 747 at 754.

> "necessarily sufficient for a defendant to assert that it proposes to plead justification and prove the truth of its allegations at the trial. The nature of the material which will be sufficient to deny a plaintiff interlocutory relief must vary according to the sources of the defendant's information and according to the form of discussion which the publication of the defamatory material will take and the extent to which it may be seen to be genuine, serious and in the public interest."

Another is seen in *Chappell v TCN Channel Nine Pty Ltd*[319], which some say marks the beginning of a more "flexible approach". Hunt J said that an inability to hold that a jury's verdict of no libel would be set aside as unreasonable did not require the plaintiff's application for an interlocutory injunction to be rejected on that ground alone. He also said that there was no rule that an interlocutory injunction would be refused if, on the relevant defences being raised, the court were not satisfied that the libel was untrue or that the defendant was actuated by malice: those were relevant but not decisive factors. But despite these modifications, generally the tests stated in *Bonnard v Perryman* have been adopted in Australia[320].

209 As noted above[321], there is a famous passage in *Bonnard v Perryman*[322] extolling "the importance of leaving free speech unfettered". That is not, however, stated as an independent rule. It is stated only as a justification for the limits summarised above. In this respect, as in others, *Bonnard v Perryman* has never been specifically overruled by any relevant final or intermediate Court of Appeal.

Application of *Bonnard v Perryman* to other causes of action

210 Sometimes attempts are made to sidestep the difficulties created by *Bonnard v Perryman* by relying on a cause of action other than defamation. These attempts have had only limited success. Thus *Bonnard v Perryman* has a certain width of application, and hence importance. It has been held that

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319 (1988) 14 NSWLR 153 at 158-163.

320 See, for example, *Wilson v Parry* (1937) 54 WN (NSW) 167; *Stocker v McElhinney (No 2)* [1961] NSWR 1043; *Gabriel v Lobban* [1976] VR 689; *Royal Automobile Club of Victoria v Paterson* [1968] VR 508; *Edelsten v John Fairfax & Sons Ltd* [1978] 1 NSWLR 685; *Harper v Whitby* [1978] 1 NSWLR 35; *Swimsure (Laboratories) Pty Ltd v McDonald* [1979] 2 NSWLR 796; *Lovell v Lewandowski* [1987] WAR 81.

321 See par [174].

322 [1891] 2 Ch 269 at 284: it is set out in par [254] below.

Bonnard v Perryman applies not only to defamation but to injurious falsehood[323]; to unlawful interference with trade closely allied to injurious falsehood[324]; and to passing off[325] and claims for breach of confidence[326], at least where the issues are broadly the same as they would be in defamation. On the other hand, *Bonnard v Perryman* has been held both not to apply[327] and, at least in a modified form, to apply[328] to a conspiracy involving defamatory material. It has been held not to apply where the defamatory words were published in the course of the torts of nuisance and intimidation[329]. In some breach of confidence cases involving defamation it has been said that the court would be entitled to grant an interlocutory injunction[330]. What test isolates these cases? One formula is[331]:

> "If the court were to conclude that though the plaintiff had framed his claim in a cause of action other than defamation but nevertheless his principal purpose was to seek damages for defamation, the court will refuse interlocutory relief. If, on the other hand, the court is satisfied that there is some other serious interest to be protected such as confidentiality, and that that outweighs considerations of free speech, then the court will grant an injunction."

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323 *Bestobell Paints Ltd v Bigg* (1975) 1 FSR 421; *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51.

324 *Lord Brabourne v Hough* (1981) 7 FSR 79.

325 *Sim v H J Heinz Co Ltd* [1959] 1 WLR 313; [1959] 1 All ER 547.

326 *Woodward v Hutchins* [1977] 1 WLR 760; [1977] 2 All ER 751.

327 *Gulf Oil (Great Britain) Ltd v Page* [1987] Ch 327.

328 *Femis-Bank (Anguilla) Ltd v Lazar* [1991] Ch 391.

329 *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51.

330 *Fraser v Evans* [1969] 1 QB 349 at 362 per Lord Denning MR. An example is *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; [1984] 2 All ER 408.

331 *Microdata Information Services Ltd v Rivendale Ltd* (1991) 18 FSR 681 at 688 per Griffiths LJ; *Essex Electric (Pte) Ltd v IPC Computers (UK) Ltd* (1991) 18 FSR 690.

But the correctness of this reasoning has been doubted[332]. Thus the rule in *Bonnard v Perryman* is tending to bring considerable technical difficulties in its train.

211 The limits stated in *Bonnard v Perryman* seem to have flowed from inhibitions experienced as much by judges whose professional lives had been in the common law courts – perhaps because common law courts had no jurisdiction to grant injunctions of any kind before 1854 – as they were by judges whose professional lives had been spent in equity courts – perhaps because before 1854 the want of a proprietary right, or the criminal character of the conduct, may have been seen as fatal, and the 1854 Act did not apply to courts of equity. In a practical sense the outcome of the present appeal vindicates most of the limits stated in *Bonnard v Perryman*, and much of the reasoning used to justify them. The curious thing is that courts which, on Pound's view, so violently seized the relevant power quickly became very timid in exercising it. They usurped the kingdom, but shrank from its delights. They thought themselves capable of exercising the new judicial power they were creating – until they had created it.

212 It is thus an available view, to adopt Milsom's words in another context, that: "The miserable history ... can be shortly told. Nothing worth-while was created. There is no achievement to trace"[333]. Whether that view is sound depends on whether the limitations sanctioned in *Bonnard v Perryman* are defensible. Those limitations are certainly both deliberate and significant, because they were stated in the face of the following explicit submission for the plaintiffs in that case[334]:

> "The Court should be governed in a libel action by the same principles as in other cases in which it is asked to grant an interlocutory injunction; that is, it should take into consideration the balance of convenience and inconvenience."

To this Lindley LJ replied: "Libel is a new subject-matter." And Fry LJ added: "May not, therefore, new considerations arise?" What are these new considerations justifying the limitations, which are different from those governing other interlocutory injunctions?[335]

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332 *Western Front Ltd v Vestron Inc* (1987) 13 FSR 66.

333 *Historical Foundations of the Common Law* (1969) at 353.

334 [1891] 2 Ch 269 at 281.

335 Save on points of detail, *Bonnard v Perryman* has been criticised very rarely. For three exceptions to that statement, see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 339-341 [350]-[351] per

(Footnote continues on next page)

Libel as crime

213 The justification advanced by Lord Eldon LC in *Gee v Pritchard* in the course of argument for equity's refusal to grant injunctions against libel was that the publication of libel is a crime, and he lacked jurisdiction to prevent the commission of crimes[336]. Latterly it has been put thus[337]:

> "[T]he absence in this area of the procedural safeguards traditionally associated with trial for criminal defamation and the dangers inherent in enjoining conduct which may give rise to criminal liability make the remedy one fraught with potential for abuse."

This justification for *Bonnard v Perryman*, vague as its terms are, is rarely, if at all, now employed in the authorities. It can have little force: the privilege against self-incrimination is available in the civil proceedings, the standards of proof are different, and the civil outcome cannot affect the criminal outcome. It has particularly little force in Australia, where the scope of civil defamation and the scope of crimes based on defamatory publications are very far from being co-incident[338], and where there are very few prosecutions for the latter type of narrowly defined crime.

Callinan J; Spry, *The Principles of Equitable Remedies*, 6th ed (2001) at 20-22; Brandis, "Interlocutory Injunctions to Restrain Speech", (1991) 12 *Queensland Lawyer* 169.

336 (1818) 2 Sw 402 at 413 [36 ER 670 at 674].

337 Hayes, "Injunctions Before Judgment in Cases of Defamation", (1971) 45 *Australian Law Journal* 125 at 192-193.

338 The common law misdemeanour of defamatory libel has been earlier abolished or modified by legislation in all Australian jurisdictions. In lieu there are, in the three Code States, in New South Wales and South Australia, and in the Australian Capital Territory, provisions having the effect of rendering criminal the publication without lawful excuse of matter defaming another living person knowing the matter to be false or without having regard to whether the matter is true or false, and intending to cause serious harm to the victim or any other person or without having regard to whether such harm is caused: *Criminal Code* (Q), s 365; *Criminal Code* (WA), s 345; *Criminal Code* (Tas), s 196; *Crimes Act* 1900 (NSW), s 529; *Criminal Law Consolidation Act* 1935 (SA), s 257; *Crimes Act* 1900 (ACT), s 439. The *Criminal Code* (NT), ss 203-208, renders certain types of defamation with specific intent criminal. The *Wrongs Act* 1958 (Vic), ss 3-13, adopts elements of both approaches.

Injunctions and proprietary rights

214 It is often said that in its auxiliary as distinct from its exclusive jurisdiction, equity only intervenes to protect proprietary rights. That rule has become much attenuated. But, attenuated or not, it is immaterial in the present field. *Bonnard v Perryman* injunctions do not depend directly on the auxiliary jurisdiction, but have statutory backing. Further, the twin facts that the rule in *Bonnard v Perryman* applies, for example, to injurious falsehood, where proprietary rights are protected, and also does permit limited injunctive relief even where there is no proprietary right being protected, suggest that the rule is not to be justified by reference to the protection of proprietary rights.

Involvement of courts in controversial disputes

215 *Bonnard v Perryman* has been justified by the following argument[339]:

> "[T]he damages remedy, applied after jury determination of the 'libel-no libel' question in favour of the plaintiff, involves the courts only minimally in disputes which are politically or otherwise controversial, while in contrast, the availability of injunctive relief means that they may be thrust unwillingly into such disputes, with supervision and enforcement of the equitable remedy placing a heavy burden on their officials."

This is not a justification which has been advanced in the authorities. Only a small proportion of defamation cases are so "politically or otherwise controversial" as to be disputes from which the courts ought to be excluded, which the courts may feel peculiar unwillingness to decide, or in relation to which there will be difficulty in enforcing injunctive relief.

Trial of libel question on motion to commit

216 In *Liverpool Household Stores Association v Smith*, Lopes LJ said[340]:

> "It would be most inconvenient to have the question of libel or no libel tried by a Judge on motion to commit [for contempt of court] instead of being tried by a jury."

Indeed it would. But this type of reasoning is a common argument against granting injunctions in a particular form whatever the wrong. The relevant inconvenience does not turn on the difference between the determination of the

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339 Hayes, "Injunctions Before Judgment in Cases of Defamation", (1971) 45 *Australian Law Journal* 125 at 192; see also at 127.

340 (1887) 37 Ch D 170 at 184. See also at 183 per Cotton LJ.

issue by judge and determination of the issue by jury. It turns on the unsatisfactoriness of having to decide whether the defendant's conduct is in contravention of a legal norm, not at a civil hearing, but in proceedings for such non-civil sanctions as sequestration, fines or imprisonment. To do so converts civil wrongs into crimes. The inconvenience flows from the error of drafting the interlocutory injunction by reference to whether the particular matter was tortious – in this instance, defamatory. A properly drafted injunction against the publication of particular material would not lead to the question of libel or no libel being tried by a judge on motion to commit for contempt of court – only the question of publication of the material.

The importance of jury trial

217 It is now necessary to examine various arguments resting on the fact that the trial of issues in defamation cases at common law was in part the responsibility of juries, while consideration of whether injunctions should be granted against defamation before trial is the province of judges sitting alone.

218 *Fox's Libel Act 1792*. It has often been said that after Fox's Libel Act 1792 no relief could be given in relation to a libel unless it had first been submitted to a jury decision. Thus in *Saxby v Easterbrook*, Lord Coleridge CJ said[341]: "Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury". Similarly, Pound was of the view that "Fox's Libel Act applies ... to criminal prosecutions and to *actions on the case for damages*"[342]. However, in *Thomas v Williams*, Fry J rightly said that this was "entirely untenable", since Fox's Libel Act 1792 "applies only to proceedings by way of criminal information or indictment for libel, and has nothing whatever to do with civil actions based upon the libel"[343]. The legislative background related entirely to controversies about criminal cases[344]. The Act was entitled "An Act to remove

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341 (1878) 3 CPD 339 at 342.

342 "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 656 (emphasis added). It is more correct to say, as Lord Blackburn said in *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 775, that "it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings".

343 (1880) 14 Ch D 864 at 871.

344 Stephen, *A History of the Criminal Law of England* (1883), vol 3 at 300-359; Holdsworth, *A History of English Law*, vol 10, at 672-696.

Doubts respecting the Functions of Juries in Cases of Libel."[345] The preamble recited that:

> "[d]oubts have arisen whether on the trial of an indictment or information for the making or publishing of any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue ...".

Section 1 provided that:

> "[O]n every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

The balance of the Act consisted of provisions saving the rights of the judge to give "his opinion and directions to the jury" (s 2), of the jury to find a "special verdict, in their discretion, as in other criminal cases" (s 3), and of the defendant to move in arrest of judgment in any manner that would have been available before the passing of the Act (s 4). Contrary to what is sometimes suggested, Fox's Libel Act did not preserve to the jury only the issues of what was published and whether it was defamatory; it gave the jury the right to find the defendant not guilty for any reason and on any issue which to the jury seemed fit.

219 *Status of Fox's Libel Act 1792 as "declaratory"?* The Act has sometimes been said in relation to other contexts and problems to be a "declaratory act"[346]. But it cannot have been declaratory of any point of common law or equity in 1792 relevant to interlocutory injunctions restraining publication of defamatory matter if the general opinion is correct that there was a shared incapacity on both sides of Westminster Hall to grant injunctions of that kind.

220 *The Jury Trials (Scotland) Act 1815*[347]. In *Fleming v Newton*[348] Lord Cottenham LC in the House of Lords had to consider a Scottish appeal.

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345 32 Geo III c 60.

346 *Parmiter v Coupland* (1840) 6 M & W 105 at 108 [151 ER 340 at 342] per Parke B; *Baylis v Lawrence* (1841) 11 Ad & E 920 at 924 [113 ER 664 at 665] per Lord Denman CJ.

347 55 Geo III c 42.

The Lord Ordinary, Lord Robertson, granted an interim interdict to restrain the Scottish Mercantile Society from publishing in its book a copy of a Register in which there appeared protests for failure by the pursuer to honour two promissory notes. He also ordered that the case be reported for the opinion of the Lords of the Second Division of the Court of Session. They were divided, but the majority decreed for the pursuer. On appeal to the House of Lords, Lord Cottenham LC questioned how, if the Court of Session had to decide the question in future, the alleged jurisdiction could[349]:

> "be reconciled with the trial of matters of libel and defamation by juries under the 55 George III, cap 42, or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private. But if the publication is to be anticipated and prevented by the intervention of the Court of Session, the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed."

In argument he had suggested that if the court exercised the jurisdiction claimed, it would be "to exercise the powers of a censor"[350].

221 The following points may be noted.

222 First, Lord Cottenham LC decided the appeal on other grounds, and said it was not expedient to give any opinion on the general question of what jurisdiction the Court of Session had to grant interdict against the publication of libels.

223 Secondly, the report suggests that the statute Lord Cottenham LC referred to as "the 55 George III, cap 42", the *Jury Trials (Scotland) Act* 1815, was not discussed in argument.

224 Thirdly, the *Jury Trials (Scotland) Act* 1815, unlike Fox's Libel Act 1792[351], in the form in which it was originally enacted, made no specific

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348 (1848) 1 HLC 363 [9 ER 797].

349 (1848) 1 HLC 363 at 376 [9 ER 797 at 803].

350 (1848) 1 HLC 363 at 371 [9 ER 797 at 801].

351 With which some have erroneously confused it: for example, Pound, "Equitable Relief Against Defamation and Injuries to Personality", (1916) 29 *Harvard Law Review* 640 at 656; Ford, "A Note on the Protection of Reputation in Equity",

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provision for "the trial of matters of libel and defamation by juries", nor appointing "a jury as the proper tribunal for trial of injuries to the person by libel or defamation". It enacted detailed provisions extending trial by jury to Scotland in civil cases but limiting it to those cases in which an order for jury trial had been made by either Division of the Court of Session.

225 Sections 42 and 45 provided that the provisions of the Act were to endure, in the first instance, for only seven years. Section 43 provided for each Division of the Court of Session to report to Parliament annually specifying what issues had been directed for jury trial of their own motion, and what issues had otherwise been directed or refused. Section 44 provided for annual reports to Parliament specifying the issues tried pursuant to the Act and certified by the Commissioners who presided at the trial of the issues. This introduction of jury trial seems to have been regarded by Parliament as a success, because in 1819 another Act entitled *Jury Trials (Scotland) Act*[352] was enacted. The long title described it as an Act to amend the 1815 Act, though it was enacted by way of addition rather than amendment. Section 1 provided:

> "[I]n all Processes raised in the Outer House of the Court of Session, by ordinary Action or otherwise, on account of Injuries to the Person, whether real or verbal, as Assault or Battery, Libel or Defamation, or on account of any Injury to Moveables, or to Lands, where the Title is not in question; or on account of Breach of Promise of Marriage, Seduction or Adultery, or any Action founded on Delinquency or *quasi* Delinquency of any kind, where the Conclusion shall be for Damages and Expences only; the Lord Ordinary of the Outer House, before whom such Processes shall be enrolled, do remit, and he is hereby authorised and required, after Defences are lodged, to remit the whole Process and Productions forthwith to the Jury Court in Civil Causes; which last mentioned Court is authorised and required, according to Rules and Regulations which the said Court and the Court of Session are hereinafter empowered to make, to settle an Issue or Issues, and to try the same by a Jury to be summoned and impannelled under the Provisions now in force, or hereinafter enacted for that Purpose."

Since the remitter was only to take place after a defence was lodged, the provision did not in terms collide with the obtaining of urgent interlocutory relief before a defence was lodged. Indeed, where interlocutory relief of a wholly quia timet character was sought, it would seem questionable whether any action for

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(1954) 6 *Res Judicatae* 345 at 346; Hayes, "Injunctions Before Judgment in Cases of Defamation", (1971) 45 *Australian Law Journal* 125 at 126.

352 59 Geo III c 35.

damages in the Outer House could be commenced. It seems that *Fleming v Newton* itself was a case of that kind[353]. Further, the *Jury Trials (Scotland) Act* 1819, which dealt only with civil proceedings, contains no provision equivalent to s 1 of Fox's Libel Act 1792 for criminal proceedings. The *Jury Trials (Scotland) Act* 1815 was amended again by the *Jury Trials (Scotland) Act* 1837, but not in any way relevant to Lord Cottenham LC's observations. This history does not suggest that trial by jury in defamation cases was viewed as being so fundamental, integral and universal an institution of the Scottish legal system in civil proceedings as somehow to debar the Court of Session from granting interim interdicts.

226 Fourthly, Lord Cottenham LC saw the rights of defendants as "unrestricted", subject only to "the responsibilities attached to the publication of libels". That is, defendants were at liberty to publish libels subject only to the risk of later having to pay damages for them, and the risk of criminal sanctions. That view may correspond with English law as applied in the Court of Chancery at the time. It is not possible to reconcile that view with *Bonnard v Perryman* and the many authorities holding that by reason of the legislation of 1854 and 1873 there is jurisdiction to grant interlocutory injunctions against the publication of defamatory matter, subject to strict and narrow rules, and that rights of freedom of speech are not automatic bars to that remedy.

227 *Application of Fox's Libel Act 1792 by analogy.* Another argument was that although Fox's Libel Act dealt only with criminal libel, it was applied to civil actions for libel "by analogy"[354]. That may be accepted in relation to trials – proceedings for final relief. But is there any analogy between the mode of hearing proceedings for final relief (in which factual questions are for the jury) and the mode of hearing proceedings for interlocutory relief?

228 In the late 18th century jury trial was universal for factual issues in trials on indictment, and very common in common law civil proceedings. Had the view which was rejected in Fox's Libel Act 1792 prevailed, it would have created an anomalous exception, for libel cases alone, to the universal rule in trials on indictment. It was not irrational, in the succeeding decades, to apply the criminal rule for final hearings of criminal libel cases to the final hearings of civil libel cases. Since then, in criminal proceedings jury trials have become relatively less common. And in civil litigation, jury trial has declined very sharply in significance. The first step was the creation of County Courts, in which juries came to be rare, by the *County Courts Act* 1846 (UK). The second was the *Common Law Procedure Act* 1854, s 1, which made possible the trial of issues of

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353 (1848) 1 HLC 363 at 370-371 [9 ER 797 at 800-801].

354 *Dunlop v Dunlop Rubber Co Ltd* [1920] 1 IR 280 at 302-303 per Powell J.

fact by the judge alone in common law courts, with the consent of the parties. They were followed by several enactments, in both parliamentary legislation and rules of court, which have made trial by jury very rare in civil cases, both in England[355] and in Australia. Against that background, the determination of factual questions in proceedings for interlocutory injunctions against the publication of defamatory matter looks less exceptional; what is exceptional is the determination of those factual questions by juries in final proceedings.

229 On occasion the common law is developed by analogy with statutes. But when that process is undertaken, it is not a process which it is easy or necessarily right to freeze in time. As the relevant body of statutes changes, the relevant analogies drawn from them may change. The present question does not relate to the common law in the sense of judge-made non-statutory law, but concerns the exercise of a discretion conferred by statutes which are largely in common form across the country and share a common origin in the 1854 Act. The parameters within which the discretion is to be exercised depend on each statute. Even assuming that before 1854 courts of equity drew analogies with Fox's Libel Act 1792 to support an abstention from granting interlocutory injunctions against the publication of defamatory material, it is not clear why it was appropriate to do so in construing the 1854 Act, which said nothing in terms about that type of injunction or about Fox's Libel Act 1792. It also is not clear why it is appropriate to do so in construing Australian legislation enacted after jury trial began to decline in civil cases. Nor is it clear why it is appropriate to do so after Australian defamation statutes began to dilute the pre-eminence of jury trial in defamation. Full allowance must be made for difficulties in drawing analogies with defamation statutes differing in different parts of the Australian federation[356]. Further, if the relevant statute conferring a power to grant interlocutory injunctions against the publication of defamatory matter had a certain construction by reason of some analogy with Fox's Libel Act 1792 before these defamation statutes were enacted, no doubt their enactment alone, without more, might not change that construction. But the enactment of those defamation statutes does create so acute a tension as to suggest either that the analogy never existed or that the proposition inferred from it has been impliedly repealed.

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355 Jackson, "The Incidence of Jury Trial During the Past Century", (1937) 1 *Modern Law Review* 132; Simpson, "The Survival of the Common Law System" in *Legal Theory and Legal History: Essays on the Common Law*, (1987) at 399-400.

356 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 669 per Gibbs CJ; *Lamb v Cotogno* (1987) 164 CLR 1 at 11 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-63 [23]-[28] per Gleeson CJ, Gaudron and Gummow JJ.

230 What, then, is the legislative position in Australia? Leaving aside the power of judges to prevent proceedings going to a jury by striking out allegations on the ground, for example, that the matter complained of is incapable of bearing the meaning pleaded or that the meaning is not reasonably capable of being defamatory[357], the legislative position in recent decades is as follows.

231 The proposition that juries decide the issue of libel or no libel, and the related proposition that juries have a unique role in relation to defences and damages, have not been true in practice in the Australian Capital Territory since 1934. From 1934 to 2002, by reason of the *Supreme Court Act* 1933 (ACT), s 22[358], trial was by judge alone unless the court otherwise ordered, which it rarely did. Since 2002, by reason of an amendment to that provision[359], trial is always by judge alone.

232 In the Northern Territory, from at least 1934 until 2006, trial was by judge without jury unless the court otherwise ordered: Supreme Court Ordinance 1934 (NT), s 2; Juries Ordinance 1962 (NT), s 7; Juries Ordinance 1967 (NT), s 7; *Juries Act* (NT), s 7; Supreme Court Rules (NT), O 47.02. Since 26 April 2006 trial has been by judge alone: *Juries Act* (NT), s 6A.

233 In South Australia, since 1984 trial has been by judge alone: *Juries Act* 1927 (SA), s 5[360]. Prior to this, s 5(1) of the *Juries Act* 1927 (SA) provided that the normal mode of trial was to be by judge alone, although the Court was able to order trial by jury if it appeared that a question might arise whether any party had been guilty of any indictable offence. Evatt noted that this situation would occur very rarely but that:

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357 Occasionally this power rested on a specific legislative basis, for example, the *Defamation Act* 1974 (NSW), s 7A(2), between 1995 and 2005. Usually it was based on rules of court. There is also a common law basis. "Before a question of libel or slander is submitted to a jury the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the Court": *Stubbs Ltd v Russell* [1913] AC 386 at 393 per Lord Kinnear.

358 Initially enacted as *Seat of Government Supreme Court Act* 1933 (Cth), s 14.

359 See *Civil Law (Wrongs) Act* 2002 (ACT), Sch 3, amdt [3.39].

360 As amended by *Juries Act Amendment Act* 1984 (SA), s 5.

"One illustration is a defamation action where an indictable offence is imputed and justification pleaded"[361].

234 In New South Wales, from 1 July 1972 to the end of 2005 trial on a claim in respect of defamation was by jury, although the court had power to order trial without jury in certain circumstances: *Supreme Court Act* 1970 (NSW), s 86[362]. Prior to 1 January 1995, the jury decided questions of fact and the judge questions of law, although the *Defamation Act* 1974 (NSW) provided that questions of public interest (s 12) and qualified privilege (s 23) were decided by the judge, not the jury. The respective functions of the judge and jury were altered by the passage of the *Defamation (Amendment) Act* 1994 (NSW). From 1 January 1995 the jury dealt with the questions whether the matter carried the pleaded imputation, whether it was defamatory, and whether the defendant published it; the judge dealt with defences and damages: *Defamation Act* 1974 (NSW), s 7A. Since 1 January 2006 the position has been that unless the court otherwise orders, a plaintiff or a defendant may elect for the proceedings to be tried by jury: *Defamation Act* 2005 (NSW), s 21(1). The jury deals with the questions whether the defendant has published defamatory matter about the plaintiff and whether any defence has been established: s 22(2). The judge deals with damages: s 22(3).

235 In Victoria, from at least 1987 to 2005, trial was without jury unless the court ordered otherwise or either party elected for jury trial: General Rules of Procedure in Civil Proceedings 1986 (Vic), r 47.02; Supreme Court (General Civil Procedure) Rules 1996 (Vic), r 47.02. Since 1 January 2006 the position has been as it is in New South Wales: *Defamation Act* 2005 (Vic), ss 21(1), 22(2) and (3).

236 In Queensland, from at least the commencement of the Rules of the Supreme Court of 1900 on 1 January 1901 to 30 June 1999 trial was by judge without jury unless either party required a jury trial or the court ordered otherwise: Rules of the Supreme Court (Q), O 39, rr 4-5. From 1 July 1999 to the end of 2005, either party could elect for jury trial unless the court otherwise ordered: Uniform Civil Procedure Rules 1999 (Q), rr 472 and 474. Since 1 January 2006 the position has been as it is in New South Wales: *Defamation Act* 2005 (Q), ss 21(1), 22(2) and (3).

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361 Evatt, *The Jury System in Australia*, (1936) 10 *Australian Law Journal* Supp 57 at 59.

362 Initially enacted as *Supreme Court Act* 1970 (NSW), ss 88 and 89. These sections were omitted, and substituted s 86 inserted, by the *Courts Legislation Amendment (Civil Juries) Act* 2001.

237 In Western Australia, from 1 May 1936 to the end of 2005 trial on a claim in respect of defamation was by jury, although the court had power to order trial without jury in certain circumstances: *Supreme Court Act* 1935 (WA), s 42. Since 1 January 2006 the position has been as it is in New South Wales: *Defamation Act* 2005 (WA), ss 21(1), 22(2) and (3).

238 In Tasmania, from 1 January 1934 to the end of 2005, a party was entitled to a jury trial in relation to any "action, question or issue which, before the commencement of the Act, could have been instituted in the Court as an action of law", although the Court had power to order trial without jury in certain circumstances: the Rules of Court 1932 (Tas), O 39, rr 6-7; Rules of the Supreme Court 1965 (Tas), O 39, rr 6-7; Supreme Court Rules 2000 (Tas), rr 557-558. Since 1 January 2006 the position has been as it is in New South Wales: *Defamation Act* 2005 (Tas), ss 21(1), 22(2) and (3).

239 Hence, after considerable legislative wavering, the present position in the six States and the two principal Territories is that in none of the eight jurisdictions is there a strict and unqualified right to jury trial; three have completely abandoned jury trial on all civil issues; and while in the remaining five the question of whether publication is defamatory is left to the jury, together with issues other than damages, all questions of damages are removed from the jury. If it is legitimate to take into account the legislative environment, it scarcely supports a process of reasoning by analogy to the conclusion that a judicial power to grant interlocutory injunctions to restrain the publication of defamatory matter should be exercised only narrowly because of the importance of the judiciary not trespassing into the province of the jury. The role of the jury in Australia is now much narrower than it was in England before 1854, and during the years in which the rule in *Bonnard v Perryman* was being developed.

240 *Influence of judicial opinions on juries.* In *Liverpool Household Stores Association v Smith* Kekewich J, in the course of refusing an application for an interlocutory injunction to prevent future publication of a libel, said that the court had to be[363]:

> "... cautious in expressing an opinion lest it should influence the minds of a jury, who are supposed to be more liable to be influenced than a judge of first instance or the Court of Appeal. Whether that be so or not is fairly open to question. But that is the principle upon which the Court is reluctant to express an opinion, or to grant an injunction, which might be equivalent to expressing such an opinion."

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363 (1887) 37 Ch D 170 at 175.

This reasoning was rejected by Oliver J in *Bestobell Paints Ltd v Bigg*[364]: the rule in *Bonnard v Perryman* applies to applications for interlocutory injunctions against injurious falsehood and other wrongs which are not tried by jury.

241 In these circumstances it must be questioned whether what was said in the cases and elsewhere about a statute relating to criminal libels and a statute relating to Scottish jury trial, each enacted before 1854, and about jury trial generally, has any materiality in relation to Australian law today.

242 *Conclusion.* The rule in *Bonnard v Perryman* cannot be explained by reference to the role of juries at the trial on issues such as publication of defamatory material, justification and other defences, and damage to reputation, in contrast to their absence in interlocutory hearings. To call the jury the "constitutional tribunal" in relation to the defences of justification and fair comment[365] or any other issue in defamation[366] is to assume an answer to the question being asked. To say that damages are "peculiarly the province of the jury"[367] was once true, but no longer is in Australia; even if it were, it would not support *Bonnard v Perryman*.

Other difficulties in interlocutory hearings

243 The different treatment of applications for interlocutory injunctions against apprehended defamations compared to applications for interlocutory injunctions against other apprehended wrongs cannot be justified, as Sir George Jessel MR sought to do in *Quartz Hill Consolidated Gold Mining Co v Beall*[368], by reason of the fact that the question of express malice in answer to privilege is very hard to try "upon affidavit, or in the mode in which an interlocutory application is disposed of". There are many potential issues in interlocutory applications against apprehended wrongs other than defamation which are difficult to try on affidavit in interlocutory hearings, but that has not led to the development of any rules peculiarly adverse to plaintiffs in such cases.

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364 (1975) 1 FSR 421 at 431 and 434.

365 *Fraser v Evans* [1969] 1 QB 349 at 360 per Lord Denning MR.

366 *Greene v Associated Newspapers Ltd* [2005] QB 972 at 990 [57] per Brooke LJ.

367 *Davis & Sons v Shepstone* (1886) 11 App Cas 187 at 191.

368 (1882) 20 Ch D 501 at 509.

Uncertainty of interlocutory hearings

244 As indicated earlier[369], the limits on the power to grant interlocutory injunctions restraining publication of defamatory matter described as "the rule in *Bonnard v Perryman*"[370] can be grouped as follows. Until it is clear (a) that the material complained of is defamatory, and (b) that there is no defence available, the court will not know whether any right of the plaintiff has been infringed. Further, it will only rarely be clear at the interlocutory stage (c) how much will be recoverable by way of damages, or (d) that more than nominal damages will be recoverable. If these matters are not clear interlocutory relief should be refused.

245 The fundamental question these rules raise is why, given that in an application for an interlocutory injunction against any wrong, not just defamation, it is likely that many issues will be unresolved, and unresolvable until a final hearing, there should be special rules for defamation despite the absence of any reference to them in the statutes which are said to ground the relevant power.

246 *(a) Uncertainty about whether material is defamatory.* Lord Esher MR said in *Coulson v Coulson*[371]:

> "To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable."

The primary aspect of Lord Esher MR's reasoning rests on a contrast between judicial decision and jury decision, a matter discussed above[372]. Underlying that primary aspect may be a concern turning on a revulsion from deciding, in a hearing for an interlocutory injunction, that material is defamatory before a trial court can consider the matter after a more thorough inquiry in the less hurried atmosphere of a trial. But that is a difficulty which afflicts all hearings for interlocutory injunctions. It has not led to the development in any other field of any special rules of the type stated in *Bonnard v Perryman* for defamation.

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369 See par [208].

370 Described in pars [206]-[208] above.

371 (1887) 3 TLR 846. The Court of Appeal quoted this with approval in *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

372 See pars [217]-[242].

247 *(b) Uncertainty about whether any defence is available.* In *Coulson v Coulson* Lord Esher MR said[373]:

> "The Court [hearing an application for an interlocutory injunction against defamation] must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant."

This was reflected by the observation of the Court of Appeal in *Bonnard v Perryman* about the common law defence of justification:

> "Until it is *clear* that an alleged libel is untrue, it is not clear that any right at all has been infringed ... [W]e cannot *feel sure* that the defence of justification is one which, on the facts which *may be* before them, the jury may find to be *wholly unfounded* ..."[374].

Thus the rule is founded partly on the pragmatic grounds stated by Brooke LJ in *Greene v Associated Newspapers Ltd*[375]:

> "[U]ntil there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it ... [A] court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies."

248 The difficulty with the reasoning is that it is out of line with that employed in other types of case in which an interlocutory injunction is sought on the basis that the defendant's conduct is legally wrong unless a defendant can establish some defence. When an interlocutory injunction is sought to restrain breach of a covenant in a contract and the defendant contends that the covenant is in unreasonable restraint of trade, the court hearing the application for an interlocutory injunction will often not be able to find that it is "clear" that the defence will fail, or to "feel sure" that the court later conducting the trial will, "on the facts which may be before it", find the defence "wholly unfounded". It does not embark on those inquiries. "[W]here the defendant goes into evidence on the interlocutory application the Court does not undertake a preliminary trial, and give or withhold interlocutory relief upon a forecast as to the ultimate result of

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373 (1887) 3 TLR 846.

374 [1891] 2 Ch 269 at 284 (emphasis added).

375 [2005] QB 972 at 990 [57] per Brooke LJ.

the case"[376]. It can be relevant to consider the strength of any defence as well as the strength of the claim[377] but the plaintiff does not have to exclude the possibility of any defences succeeding. In *Films Rover International Ltd v Cannon Film Sales Ltd*[378] Hoffmann J said:

> "The principal dilemma about the grant of interlocutory injunctions ... is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described."

Avoiding the risk of a "wrong" decision requires some attention to the strength of the defendant's defences, but it does not suggest that the plaintiff must completely exclude them. The court does not abjure the possibility of interlocutory relief until it is certain that the plaintiff must obtain final relief.

249 Hence there is no rule in cases other than defamation cases that the plaintiff will fail to obtain an interlocutory injunction merely because the defendant says defences will be raised at the trial, without consideration of what their strength is likely to be. Even in patent infringement cases where the defendant announces an intention to challenge the validity of the patent, it is necessary for the defendant to show by evidence that there is "some ground" for disputing validity[379].

250 *(c) Uncertainty about quantum of damages.* One of the grounds given by the Court of Appeal in *Bonnard v Perryman* for refusing an interlocutory injunction against defamation was that the court could not "tell what may be the damages recoverable"[380]. Yet an interlocutory injunction may be granted restraining publication of defamatory material before it has ever been published,

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376 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622 per Kitto, Taylor, Menzies and Owen JJ.

377 *Hubbard v Vosper* [1972] 2 QB 84 at 96 per Lord Denning MR.

378 [1987] 1 WLR 670 at 680; [1986] 3 All ER 772 at 780-781.

379 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623-625 per Kitto, Taylor, Menzies and Owen JJ; cf *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 405-406 per Lord Diplock.

380 [1891] 2 Ch 269 at 284.

even though if the plaintiff succeeds at the trial and obtains a final injunction, there will be no damage and no damages will be recovered. And, at least where the plaintiff is likely to suffer some harm by the publication, and it can be seen that damages will not be adequate to compensate for that harm, an interlocutory injunction may be an appropriate remedy even though it is not clear what quantum of damages would have been recovered if the injunction were not granted.

251 *(d) Risk of nominal damages.* In *Bonnard v Perryman* the Court of Appeal said that in the particular case before them[381]:

> "[T]he decision at the hearing may turn upon the question of the general character of the Plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial, – on which further it is not desirable that the Court should express an opinion before the trial. Otherwise, an injunction might be granted before the trial in a case in which at the trial nothing but nominal damages, if so much, could be obtained."

It goes without saying that at trials the issues can be much more satisfactorily examined, after proper preparation and without undue rush, than at interlocutory hearings. However, it is strange that *Bonnard v Perryman* proceeds on the basis of assuming that the defendant's defences are strong until the plaintiff excludes their application, while assuming that the plaintiff has no chance of recovering more than nominal damages until the contrary is established. At the interlocutory hearing the strength of the defendant's defences, which the defendant has the burden of proving at trial, is presumed in favour of the defendant; the weakness of the plaintiff's case on damages is also presumed in favour of the defendant. Why?

Free speech

252 The differences between the approach to interlocutory injunctions against defamation and the approach to interlocutory injunctions against other wrongs are often justified by what many think to be a deeper consideration than any of those listed above – the role of free speech.

253 The *Bonnard v Perryman* restrictions came to be recognised 37 years after the supposed conferral of jurisdiction by a generally phrased statute not referring to "freedom of speech". However, appeals to the importance of free speech made before that statute have often been repeated after it.

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381 [1891] 2 Ch 269 at 284-285.

254 *Some post-1891 authorities.* In *Bonnard v Perryman*[382] the plurality judgment stated, as a justification for the limits stated in that case rather than as an independent rule in its own right:

> "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

255 These ideas have been much repeated. In 1968 Lord Denning MR stressed "the importance in the public interest that the truth should out"[383]. In 1981 Lord Denning MR said[384]:

> "The freedom of the press is extolled as one of the great bulwarks of liberty. It is entrenched in the constitutions of the world. But it is often misunderstood. I will first say what it does *not* mean. It does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the course of justice or to do anything that is unlawful. I will next say what it *does* mean. It means that there is to be no censorship. No restraint should be placed on the press as to what they should publish. Not by a licensing system. Nor by executive direction. Nor by court injunction. It means that the press is to be free from what Blackstone calls 'previous restraint' or what our friends in the United States – co-heirs with us of Blackstone – call 'prior restraint'. The press is not to be restrained *in advance* from publishing whatever it thinks right to publish. It can publish whatever it chooses to publish. But it does so at its own risk. It can 'publish and be damned.' Afterwards – after the publication – if the press has done anything unlawful – it can be dealt with by the courts. If it should offend – by interfering with the course of justice – it can be punished in proceedings for contempt of court. If it should damage the reputation of innocent people, by telling untruths or making unfair comment, it may be made liable in damages. But always afterwards. Never beforehand. Never by previous restraint."

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382 [1891] 2 Ch 269 at 284.

383 *Fraser v Evans* [1969] 1 QB 349 at 360.

384 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 16-17 (emphasis in original).

256 In 1984 Griffiths LJ attributed the rule in *Bonnard v Perryman* to "the value the court has placed upon freedom of speech and ... upon the freedom of the press, when balancing it against the reputation of a single individual who, if [wronged], can be compensated in damages"[385].

257 In 1988 Hunt J said that granting interlocutory injunctions against defamation interfered with "an important right of the defendant, that of his freedom of speech" and in many cases created[386]:

> "an interference with an even more important right, the right of the community in general to discuss in public matters of public interest and concern and to be informed of the different views held by others. ... A free and general discussion of public matters is fundamental to a democratic society."

Also in 1988 the Full Court of the Supreme Court of Victoria said[387]:

> "[T]he very great importance which our society and our law have always accorded to what is called free speech, means that equity exercises great care in granting injunctive relief. ... [I]t is by no means rarely a benefit to society that a hurtful truth be published. It has been felt ... that it is usually better that some plaintiffs should suffer some untrue libels for which damages will be paid than that members of the community generally, including the so-called news media, should suffer restraint of free speech. The judges over the centuries have also been well aware how easy it would be for a tyrant to stifle all opposition by deciding what was 'genuine' free speech, to be allowed, on the one hand and what was an unjust or unfair or dishonest taking advantage of free speech, to be repressed, on the other hand. When the court enjoins, it must be extremely clear that no unacceptable repression is taking place."

258 In 2004 the English Court of Appeal said[388]:

> "In this country we have a free press. Our press is free to get things right and it is free to get things wrong. It is free to write after the manner

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385 *Herbage v Pressdram Ltd* [1984] 1 WLR 1160 at 1162; [1984] 2 All ER 769 at 771.

386 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 163-164.

387 *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747 at 764.

388 *Greene v Associated Newspapers Ltd* [2005] QB 972 at 977 [1].

> of Milton, and it is free to write in a manner that would make Milton turn in his grave. Blackstone wrote in 1769 that the liberty of the press is essential in a free state, and this liberty consists in laying no previous restraints on publication. 'Every freeman', he said[389] ... 'has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press.'"

259 In some of these passages there is, with respect, a certain appeal to emotion, even a degree of shrillness and fustian. These qualities are evident in non-judicial writings also.

260 *Blackstone.* The famous Blackstone passage partially quoted by the English Court of Appeal comes from Book 4 of the *Commentaries*, on Public Wrongs. It appears in Ch 11, entitled "Of Offences Against the Public Peace". Blackstone there deals successively with riotous assembly, unlawful hunting, unlawful threats, destruction of property, affrays, riots, tumultuous petitioning, forcible entry and detainer, riding or going armed, spreading false news, false and pretended prophecies, and challenges to fight. The last of the crimes discussed are "malicious defamations", which have a direct tendency to lead to breaches of the public peace. After some analysis of the precise rules of law, Blackstone moved onto a loftier height in making the following complacent remark[390]:

> "Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the antient *decemviri,* or the later emperors."

The reference to the "middle age" is a reference to the reign of Augustus, whose love of liberty and whose humanity are, of course, both well-known. Blackstone then concluded the chapter thus[391]:

> "In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the *liberty of the press*, properly understood, is by

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389 *Commentaries on the Laws of England, Book the Fourth*, (1769) at 151-152. (footnote added)

390 *Commentaries on the Laws of England*, *Book the Fourth*, (1769) at 151 (emphasis in original).

391 *Commentaries on the Laws of England, Book the Fourth,* (1769) at 151-152.

> no means infringed or violated. The liberty of the press is indeed essential to the nature of a free State: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." (emphasis in original)

Blackstone then put the following as his last major argument[392]:

> "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment."

261 Five points may be made.

262 First, in these passages Blackstone sounds "ringing tones"[393]. The prose is indeed highly rhetorical. But it is not particularly rational. Unlike his approach in describing the offences analysed earlier, his language is largely not the language of argument. It is only the language of peroration.

263 Secondly, so far as the passage contains reasoning, it is in essence circular. Why will the law not grant an injunction before publication? Because to do so would destroy the freedom of the press. Why would it destroy the freedom of the press? Because the defining characteristic of press freedom is that there can be "no *previous* restraints upon publications".

264 Thirdly, Blackstone was speaking of matters much wider than civil proceedings against defamatory publications. The second passage just quoted establishes a contrast between "this" instance – "malicious defamations" – and "the other instances which we have lately considered" in other parts of the *Commentaries*. In the quoted passages Blackstone meant by "libels" not only

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392 *Commentaries on the Laws of England, Book the Fourth*, (1769) at 152 (footnote omitted).

393 As Auld LJ pointed out in *Holley v Smyth* [1998] QB 726 at 737-738.

defamatory libels dealt with in civil proceedings, but those dealt with in criminal proceedings, as well as seditious, blasphemous and obscene libels. He was speaking of many matters which were then crimes, but are now neither crimes nor civil wrongs. That limits the relevance of his observations to the present problem. He was dealing in large measure not with disputes between citizens and newspapers, but with disputes between citizens and the State.

265 Fourthly, if the law now permits a judge to grant an interlocutory injunction against the publication of matter which is clearly defamatory, in relation to which no defence can be raised and which is likely to sound in substantial damages, it cannot now sensibly be said, as Blackstone suggested in 1769, that the law would subject all freedom of sentiment to the prejudices of that judge, and make that judge the arbitrary and infallible judge of all controverted points in learning, religion and government. Nor can that sensibly be said even if the plaintiff's case is less strong than that postulated.

266 Fifthly, the reasoning would create an absolute bar to the grant of interlocutory injunctions in defamation cases. Yet this is not the law: since the time of Sir George Jessel MR it has been thought that there is power to grant them, though within only narrow limits. In these circumstances, whatever else Blackstone's analysis would justify, it will not justify the present law, because his conclusion is inconsistent with it. For that reason it can have no significance in applying the present law.

267 *Dicey*. Dicey, writing just before *Bonnard v Perryman*, analysed matters thus. He quoted Odgers[394]:

> "Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty, he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment."

Dicey then said[395]:

> "Any man may ... say or write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement ... which he is not legally entitled to make."

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394 *Introduction to the Study of the Law of the Constitution*, 3rd ed (1889) at 225, quoting Odgers, *A Digest of the Law of Libel and Slander*, (1881) at 12.

395 *Introduction to the Study of the Law of the Constitution*, 3rd ed (1889) at 225.

These passages repeat Blackstone's rejection of the power to impose restraints prior to publication. In that respect they do not state the law in 1889, when the third edition of Dicey's *Introduction to the Study of the Law of the Constitution* was published, or 1885, when the 1st edition was published. A little later Dicey wavered[396]:

> "[I]t is questionable how far the Courts themselves will, even for the sake of protecting an individual from injury, prohibit the publication or republication of a libel, or restrain its sale until the matter has gone before a jury and it has been established by their verdict that the words complained of are libellous."

The extent to which the courts will restrain libels before a jury holds them to be libels may have been questionable in 1889, and indeed, in a different sense, it still is; but the post *Judicature Act* 1873 decisions leading up to and including *Bonnard v Perryman* did plainly hold that there is jurisdiction to restrain libels before trial.

268 It is notable that Dicey is concerned to stress the freedom of Englishmen to publish libels independently of control by the Crown or the Ministry[397]. Civil actions by private persons against other private persons may, perhaps, be thought to be in a very different category, particularly when the former are weak and poor individuals and the latter are wealthy and powerful privately owned or state corporations operating large newspaper, radio or television businesses, most of them driven by motives of profit. The factors which make attempts by the government to censor what citizens say in advance of publication are not present where citizens are attempting to protect their reputations before these businesses destroy them.

269 *Free speech as a complete bar to interlocutory relief.* Apart from the approach adopted in *Bonnard v Perryman* the Court could doubtless approach the relationship between protecting free speech and the granting of interlocutory injunctions against publication of defamatory material in numerous ways: here it is proposed to consider only three possibilities.

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396 3rd ed, (1889) at 234, citing *Prudential Assurance Co v Knott* (1875) LR 10 Ch App 142, *Saxby v Easterbrook* (1878) 3 CPD 339 and Odgers, *A Digest of the Law of Libel and Slander*, (1881) at 13-16.

397 For example, *Introduction to the Study of the Law of the Constitution*, 3rd ed (1889) at 235. See also the discussion of State control of the press in France at 238-244 and State control of the press in England in the 16th and 17th centuries at 244-247.

270 First, free speech could be a complete bar to the grant of interlocutory injunctions in the sense that no matter how strong a plaintiff's case, interlocutory relief will always be refused if it could interfere with the exercise of free speech on a matter of public interest. That would correspond with the stand taken by Blackstone, to some extent by Dicey, and by Lord Denning MR.

271 Sometimes that is said to be the law, although it is not. That is, sometimes it is said that any impairment on freedom of speech likely to be caused by the grant of an interlocutory injunction in relation to a matter of public interest would itself be a bar to the grant of the interlocutory injunction. Thus in 1980 Hunt J, after setting out the elements of the rule in *Bonnard v Perryman*, stated, as an independent bar, that an injunction would not be granted "which will have the effect of restraining the discussion in the press of matters of public interest or concern"[398]. *Bonnard v Perryman* stated no such rule; it referred to "the importance of leaving free speech unfettered", not as an independent and additional rule, but as a justification for the rule it proceeded to state. In terms Hunt J's language suggests that even if it were completely clear that matter was defamatory, that there was no defence, and that damages would be substantial, no injunction would be granted if that injunction would have the effect of restraining the press from discussing matters of public interest. Indeed, Hunt J later said that there is a principle "that an injunction will not go, if it has the effect of restraining the discussion in the press of matters of public interest or concern", and he described that principle as "independent or overriding"[399]. He repeated that description in *Chappell v TCN Channel Nine Pty Ltd*, although he retreated from its overriding character by leaving open the possibility of an injunction which interfered with free speech being granted very exceptionally, stating[400]: "The degree of interference may in some cases be minimal; in other cases, it may in any event be justified, although I am unable at present to envisage the circumstances of any such case." Neither the blanket nor the modified approach corresponds with the present law. If they were sound, there would be no need for the rule in *Bonnard v Perryman*. So far as there is a difference between them and the present law, although the Corporation's submissions sometimes seem to embrace them, this Court was not in the end specifically asked to resolve that difference by changing the law, and it should not be changed.

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398 *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 349-350.

399 *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 351.

400 (1988) 14 NSWLR 153 at 164.

272 *Free speech lacking in independent operation outside the defences.* Secondly, going to the other extreme, it could be that issues of free speech should have no independent operation outside the defences.

273 In *Lange v Australian Broadcasting Corporation* this Court said[401]:

> "Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'. The common law torts of libel and slander are such exceptions. However, these torts do not inhibit the publication of defamatory matter unless the publication is unlawful – that is to say, not justified, protected or excused by any of the various defences to the publication of defamatory matter, including qualified privilege. The result is to confer upon defendants, who choose to plead and establish an appropriate defence, an immunity to action brought against them. In that way, they are protected by the law in respect of certain publications and freedom of communication is maintained."

274 This stress on the role of the defamation defences in preserving free speech suggests that if no defences are available in relation to an impending publication, it would be unquestionably unlawful, it would fall within an exception to the "assumption" of free speech, and it would be open for it to be restrained by interlocutory injunction like many other threatened torts. But it does not follow from the bare existence of arguable defences that no interlocutory injunction should be granted.

275 On the approach under discussion, the role of free speech is neither greater nor less than its reflection in the substantive defences to the tort of defamation. Those defences vindicate free speech at the trial. They also vindicate free speech at hearings for interlocutory injunctions. The less it can be seen at an interlocutory hearing that they are likely to fail at a trial, the more likely it is that an interlocutory injunction will be refused, and the role of free speech will be legitimately affirmed at that stage. The more it can be seen at an interlocutory hearing that they are likely to fail at a trial, the more likely it is that an interlocutory injunction will be granted, with a consequential limitation on free speech, but not on legitimate free speech. Free speech is important and, as reflected in the defences, free speech is significant, but it is not at the interlocutory hearing the ace of trumps, or indeed a card of any value at all, save to the extent that the defences give it value. The approach conforms with principles of legality: it gives weight to policies and considerations outside the

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401 (1997) 189 CLR 520 at 564-565 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ (footnotes omitted).

law so far as they have been reflected in rules of law, but not so far as they have not been. On this approach, freedom to speak as one wishes is not given greater weight in relation to interlocutory injunctions against defamation than, for example, freedom to work as one wishes is given in hearings relating to interlocutory injunctions against breach of covenants in restraint of trade. In the latter instance liberty of trade is seen as important, but it is not given significance going beyond its recognition in the rules stipulating when restraints of trade are unreasonable. There is no principle that independently of the factors going to whether there is a serious question as to breach of covenant and as to its reasonableness the court must bear in mind in addition, as an especially weighty factor, the age-old right to trade freely.

276 This approach would depart from *Bonnard v Perryman* by treating applications for interlocutory injunctions against defamation in the same way as applications for interlocutory injunctions against any other wrong.

277 Some support could be obtained for this approach from *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*. There Callinan J said, in discussing the judicial caution employed when considering whether to grant an interlocutory injunction against the impending publication of a defamation[402]:

> "The rationale offered for judicial caution is usually that free speech is precious beyond all other things ... To give all weight to ... free speech ... is to overlook, or to give insufficient weight to the continued hurt to a defamed person pending trial; the greater resources generally available to a defendant to contest proceedings; the attrition by interlocutory appeals to which a plaintiff may be subjected; the danger that by the time of vindication of the plaintiff's reputation by an award of damages not all of those who have read or heard of the defamation may have become aware of the verdict; the unreasonableness of requiring the plaintiff, in effect, at an interlocutory stage, unlike in other proceedings for an interlocutory injunction, to prove his or her case; and, the fact that rarely does a publication later, rather than earlier, do any disservice to the defendant or to the opportunity to debate the issues in an informed but not defamatory way, and therefore to free speech."

278 Many of these difficulties would be met if free speech were given no more than the weight which the law's recognition of defamation defences gives it, and the strength of those defences were assessed in the circumstances of particular applications for interlocutory injunctions.

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402 (2001) 208 CLR 199 at 341 [351] (footnote omitted).

279 *Free speech as independent but indeterminate factor.* Thirdly, the law could adopt an intermediate position. It would be more favourable to the plaintiff than *Bonnard v Perryman* in departing from that case by abandoning or loosening the strict limits laid down in that case. It would allow a degree of favour to the interests of defendants by giving free speech some role independently of the defences – thus departing in another respect from *Bonnard v Perryman*, which stresses the importance of free speech merely as the justification for the strictness of the limits stated, without giving it any independent role beyond the limits themselves. On this approach, the question of free speech will be decisive in some cases but not others: perhaps it will be determinative when all other factors are evenly balanced, perhaps it is a factor to be given greater weight than other factors; the test will be difficult to define, and it will be difficult to state specific propositions about how it should be applied.

280 *Conclusion.* If it were desirable and necessary to do so, the Court could consider whether *Bonnard v Perryman* should be departed from. Many things would have to be taken into account. The points made by Callinan J in the passage just quoted and elsewhere in the same judgment[403] would be relevant. Another relevant question would be whether principles directed to tyrants, or at least to the Tudor, Stuart and Hanoverian monarchs, should control the modern law of Australia in its attempts to deal with defamatory statements by large corporations about ordinary citizens. Attention could be given to the significance of changed social conditions – to the fact that the judges who decided the cases which culminated in *Bonnard v Perryman* had just finished living through an era when the leading political journalists were Robert Cecil and Walter Bagehot; the name of Harmsworth was unknown; there were no relatively cheap mass circulation newspapers operated by large publicly owned companies; and no radio or television outlets were operated by those companies and by the state. Consideration could be given to whether those favoured children of equity should, in the light of past experience, become less favoured. Have changes which have affected other groups in society passed the mass media by to some degree? Was Baroness O'Neill of Bengarve right to say in the fifth of her Reith Lectures in 2002, under the title "License to Deceive", "The media ... while deeply preoccupied with others' untrustworthiness – have escaped demands for accountability"?[404] Another question is whether she was also right to say[405]:

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403 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 299-309 [254]-[276].

404 O'Neill, *A Question of Trust*, (2002) at 89.

405 O'Neill, *A Question of Trust*, (2002) at 92-93.

> "We may use twenty-first century communication technologies, but we still cherish nineteenth century views of freedom of the press, above all those of John Stuart Mill. The wonderful image of a free press speaking truth to power and that of investigative journalists as tribunes of the people belong to those more dangerous and heroic times. In democracies the image is obsolescent: journalists face little danger (except on overseas assignments) and the press do not risk being closed down. On the contrary, the press has acquired unaccountable power that others cannot match."

More particularly, attention would have to be given to whether the very narrow capacity of plaintiffs to obtain urgent relief against the publication of defamatory material should be widened in view of the fact, if it is a fact, that it is not only the scale and power of the media which has increased, but its penetration, its pervasiveness, and its capacity to do harm also. Those who decided *Bonnard v Perryman* had lived through a time when there was no electronic media and no problem of cross-media ownership; the print organs were much more fragmented than now, were directed to a population with much lower literacy than now, were much less able to reach most of the adult population, and were much less able speedily to disseminate defamatory material. In short, attention would have to be directed to whether in modern conditions the mass media are more able to inflict harm which is not also grave but irreparable, and if so, whether it ought to be less difficult for plaintiffs to obtain urgent interlocutory relief to prevent such harm. These and other relevant matters have not been debated in argument.

281 In this case it is not desirable to decide whether the law should depart from *Bonnard v Perryman* because it is not necessary to do so. It is not necessary to consider whether the law should become less restrictive in its approach to the grant of interlocutory injunctions to restrain publication of defamatory matter because, subject to considering the five errors of principle summarised above, this case as seen by the primary judge falls within the areas in which *Bonnard v Perryman* permits an injunction to be granted. There are clear imputations of a highly defamatory kind; it is unlikely that any defences will be established; it is unlikely that damages will be nominal. Nor is it necessary to consider whether the law should depart from *Bonnard v Perryman* by becoming more restrictive: the Corporation did not distinctly argue for this outcome.

First error: conflation of "public benefit" and "public interest"?

282 The first error of principle for which the primary judge is criticised is that he conflated the requirement of "public benefit" in s 15 of the *Defamation Act* with the public interest in having free speech unfettered. The existence of this error was contended for by the Corporation[406]. The Corporation also submitted

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406 See par [183] above.

that in the Full Court only Slicer J, but not the majority, dealt with the question whether this supposed error of the primary judge had taken place.

283 That latter submission can be rejected at once. In the Full Court the Corporation's submission was advanced in support of Ground 14 of its Notice of Appeal, which was as follows:

> "The learned primary judge erred in treating his consideration of whether it was arguable for the purposes of section 15 of the Act that the publication of the imputations would be for the public benefit, as determinative of the more general question of public interest for the purposes of the grant of an interlocutory injunction restraining the publication of defamatory matter."

The Full Court majority revealed a sound understanding of that ground in saying[407]:

> "The learned primary judge needed to consider whether it was arguable for the purposes of s 15 that the publication of the relevant imputations would be for the public benefit, and needed also to consider whether the effect of an injunction would be to restrain the discussion of matters of public interest or concern. Those are two separate questions. Ground 14 asserts that the learned primary judge erred by treating the question of public benefit in relation to s 15 as determinative of the more general question."

284 The Full Court majority then analysed the primary judge's reasoning as follows[408]:

> "The learned primary judge referred to the proposition that an interlocutory injunction will not usually be granted 'where such an injunction would restrain the discussion in the media of matters of public interest or concern' [409]; then proceeded to consider the strength of a s 15 defence based on truth and public benefit, paying particular attention to the question of public benefit; expressed the view that, in general, it was not for the public benefit that the media should publicly allege that a

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407 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [80].

408 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [81]. In the next four footnotes [nn 409-412], the particular paragraphs of the primary judge's reasons for judgment which the majority appear to have in mind are identified.

409 This is a reference to *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [24].

> person has committed crimes of which he or she has not been convicted, but that such allegations should usually be made to the public only as a result of charges and subsequent conviction; and concluded that a claim of 'public benefit' may well be unsuccessful[410]. He then returned to the more general question. He said it followed from what he had been saying that he was unpersuaded that an interlocutory injunction would 'restrain the discussion in the media of matters of public interest'. He said that he applied 'the law's use of the term "public interest"'[411]. He had earlier referred to a submission made by counsel for the appellant to the effect that the term 'public interest' in defamation statutes in other jurisdictions meant the same as 'public benefit' in the *Defamation Act*, s 15"[412].

The Full Court majority concluded with the following summary[413]:

> "[His Honour] took into account the correct principles relating to the freedom of the press, took into account separately the prospects of a successful defence based upon truth and public benefit, and exercised his discretion in accordance with the appropriate principles. He did not apply a wrong principle."

Whatever else may be said of these passages, they do deal with the question whether the primary judge had wrongly conflated public benefit under s 15 with public interest. The Corporation's submission that they did not is baseless.

285 Further, the Full Court majority's summary of the primary judge's approach is correct. The Full Court majority's conclusion that the primary judge maintained a separation between two questions – the question whether an injunction would restrain media discussion of "matters of public interest" and the question whether the "public benefit" element of the defence afforded by s 15 was likely to be made out – is supported by a specific statement in the primary judge's reasons for judgment. He referred to an argument by counsel for the

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410 The preceding three clauses are references to *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [28].

411 These two sentences refer to *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [29].

412 This sentence is a reference to *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [24] and [26].

413 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [82].

plaintiff that "matters of crime are quite obviously matters of public *interest*", and then said[414]:

> "[A]greeing that matters of crime are matters of public *interest* is a far cry from conceding that the public dissemination by the media of all matters relating to crime, or matters concerning crimes allegedly committed by the plaintiff, will be for the public *benefit*".

286 Hence, the Full Court majority reasons were correct to conclude that the primary judge did not conflate the two questions in the manner complained of in Ground 14 of its Notice of Appeal to the Full Court. It is true that in a long passage discussing the availability of the s 15 defence, the primary judge four times used the phrase "public benefit" and twice used the phrase "public interest"[415]. It is also true that the primary judge appeared to suggest that it followed from that passage that he was not persuaded that the injunction would restrain media discussion of matters of public interest. However, when his reasons for judgment are read as a whole, and allowances in relation to matters of the type just mentioned are made in view of the circumstances in which the reasons were composed, it is necessary respectfully to reject the view that the primary judge's reasoning was afflicted by the conceptual confusion alleged.

Second error: trial by media

287 The Corporation submitted that the primary judge erred in characterising the broadcasting of the film as trial by media and as treating the criminal process as the only proper context in which to ventilate matters of the kind which the Corporation wished to ventilate. The issue cannot be described as irrelevant[416]. The primary judge's comments on trial by media are criticised by reference to various propositions which it is unnecessary to repeat. If those propositions are to have a status greater than that of personal opinions based on common human experience, they would have to be supported by evidence, of which there is none. So far as they are only personal opinions based on common human experience, it is necessary respectfully to register deep disagreement with them.

288 It is curious that the Corporation, which put arguments depending heavily on the importance of leaving untested issues in relation to allegations of civil

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414 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [27] (emphasis added).

415 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [28].

416 The Full Court of the Supreme Court of Victoria saw it as a possible issue in some cases in *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747 at 765.

defamation to jury trial, did not acknowledge that there might be some importance in leaving untested issues in relation to allegations of criminal conduct to criminal jury trial.

Third error: the significance of free speech

289 Even if the primary judge did not confuse the s 15 issue with the issue of free speech, can it be said that he dealt properly with the free speech issue in other respects?[417] He referred to a submission by the Corporation and the other defendants that "the power to grant an interlocutory injunction to restrain an allegedly defamatory publication should be exercised with great caution, only in very clear cases and usually not in cases where the defendant asserts that it has good defences"[418]. He said that counsel had referred, in support of that proposition, to *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd*[419], *Chappell v TCN Channel Nine Pty Ltd*[420] and "a number of English cases". He also said that the defendants placed particular reliance on a statement of Hunt J[421] that an interlocutory injunction would not usually be granted "where such an injunction would restrain the discussion in the media of matters of public interest or concern"[422]. He also said[423] that he was "unpersuaded that the granting of an interlocutory injunction restraining the defendants from publishing the imputations will 'restrain the discussion in the media of matters of public interest', as that expression was used by Hunt J[424] ...". And he concluded by saying[425]:

> "Much was said at the hearing by counsel for the defendants about the need to uphold and protect the freedom of the press. But like all freedoms, it is not an absolute one."

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417 See n 244 above.

418 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [23].

419 [1980] 1 NSWLR 344.

420 (1988) 14 NSWLR 153.

421 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 164.

422 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [24].

423 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [29].

424 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 164.

425 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [36].

290 It is not to be presumed that the primary judge failed to pay attention to what counsel submitted to him, or to what the cases cited said. The vital issue is whether he turned his mind to the correct question, not whether one agrees with his answer to the question. He did have in mind the importance of media discussions of matters of public interest. Indeed, in perhaps assuming that the need to uphold press freedom is a requirement additional to the limits stated in *Bonnard v Perryman* (as distinct from seeing it merely as a justification for them) the primary judge may have been unduly favourable to the Corporation.

291 The Full Court majority itself noted the reluctance of the courts to grant interlocutory injunctions in defamation cases and the need to protect freedom of speech[426]. The Corporation tended to advance a submission that the Full Court majority wrongly rejected "the paramountcy of free speech" and failed to treat free speech as an "independent and overriding" factor. But the law does not go so far as to place free speech on a pinnacle of irrefragable significance. If it did, it would ban the grant of interlocutory injunctions against defamation in any circumstances, not merely in circumstances where there are doubts about the plaintiff's prospects at trial. This ban would reflect the approach of Blackstone and Lord Denning MR. But the law does not reflect this approach. It permits the grant of interlocutory injunctions within the limits of *Bonnard v Perryman*, perhaps with local modifications. In these circumstances the courts below did not err.

292 The key question is: what should the primary judge have done that he did not do? Success for the Corporation on this point depends on concluding that the correct approach was taken by Slicer J and that the primary judge did not take it. Slicer J quoted Hunt J in *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd*, and reconciled that case with Hunt J's later decision in *Chappell v TCN Channel Nine Pty Ltd* by perceiving the latter to turn on a distinction "between matters internal or personal to the life of a citizen and those which are, by reason of public life, within the public domain"[427]. Blackstone, like Hunt J in *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd*, suggests that the restraint of press discussion is not merely one factor to be weighed, but an absolute bar to injunctive relief. Yet Slicer J rejected the existence of any absolute bar of this kind. He quoted authority[428] holding that the public interest in free discussion of matters of public interest is something that

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426 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [53].

427 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [30].

428 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [32].

only arises "when the balance of convenience comes to be weighed", and that "weighs heavily against the grant of an injunction"[429]. Slicer J did then say[430]:

> "Whilst I do not necessarily agree that the criteria of free discussion of matters of public general interest simply substitute a test of balance of convenience in favour of the intended publisher, the reasoning that it operates against the person claiming pre-publication restraint accords with my approach."

293 But later he agreed with the primary judge that "freedom of the press" is "not absolute" and said it is "not a trump card" but only "a compelling factor"[431].

294 If Slicer J is correct, where did the primary judge err? What was the respect in which Slicer J correctly took press freedom into account while the primary judge did not? What was the aspect of Slicer J's reasoning which was decisively superior to that of the primary judge? These are not questions which the Corporation answered. To criticise the primary judge for not employing "exceptional caution" when he said that he was conscious of the need for "great caution"[432] is not a course which can be undertaken unless the Corporation has shown that this verbal distinction corresponds with any substantive difference. This it did not do. It has not been shown that the primary judge made the third error.

Fourth error: primary judge's analysis of plaintiff's case

295 Did the primary judge err in his method of analysing the strength of the plaintiff's case before moving to the balance of convenience? Save for one brief passing reference, the primary judge did not touch on the application of "rigid" or "flexible" tests, and any error he made in that regard cannot be considered as determinative. Rather, the primary judge's summary of the parties' submissions, and his comments on them, reveal that, in addition to bearing in mind the traditional reluctance of the courts to grant interlocutory injunctions against defamation except in clear cases because of the importance of media debate about matters of public interest, the principal steps in his reasoning were as follows.

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429 *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440 at 442 per Doyle CJ.

430 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [33].

431 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [9] and [38].

432 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [23].

296 First, he acted on the Corporation's admission that its film was capable of conveying imputations that the plaintiff was a suspect in the disappearance and murder of the Beaumont children, and was a multiple killer of children. Secondly, he evidently thought that to say that the plaintiff was a suspect in the disappearance and murder of the Beaumont children was defamatory[433]. Thirdly, he also thought that to say that the plaintiff was a multiple killer of children was highly defamatory[434] (and therefore deeply injurious to the plaintiff). Fourthly, he impliedly accepted that publication of the admitted imputations in the manner threatened by the Corporation might injure the plaintiff's reputation beyond the extent to which it had already been damaged by his conviction and by third party statements: this damage was particularly likely in northern Tasmania[435]. Fifthly, the s 15 defence was unlikely to succeed because the Corporation's conduct, even if it dealt with matters of public interest, was not for the public benefit[436], and other defences referred to in argument (*Defamation Act*, s 14(1)(a), (d) and (h) and s 16 (1)(c), (e) and (h)) lacked merit[437]. Finally, the primary judge, in dealing with the adequacy of damages, found the suggestion that damages would only be nominal not to be persuasive[438].

297 Only the last proposition is controverted by the Corporation. It will be dealt with below: at this stage the point is simply that the primary judge did identify the question about whether damages might be nominal as a relevant one, even if minds may differ on the rightness of his answer to it.

298 The primary judge did not in terms direct attention to the practical consequences of the injunction. This was not erroneous, because the injunction had no practical consequences of any significance beyond those flowing from its mere grant: the interlocutory injunction did not, for example, finally dispose of the action.

299 It is true that the primary judge did not employ the precise language used in the submissions advanced to this Court. The question, however, is whether in substance he attended to the criteria which he was obliged to bear in mind. The answer is that he did. In substance he found a threat to repeat the publication of

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433 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [20]-[21].

434 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [22].

435 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [20].

436 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [25] and [28].

437 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [30]-[31].

438 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [33].

serious defamations – publication which was potentially very injurious to the plaintiff, in relation to which no defence could be established and which was capable of sounding in more than nominal damages. To grant an interlocutory injunction in these circumstances does not suggest any error in principle. The case as perceived by the primary judge can be described as very clear, and as one in which, even if a judge were to exercise great caution, an interlocutory injunction might be granted: the absence of any viable defences removed any inhibition based on the fear of restraining lawful media discussion of matters of public interest.

Fifth error: possibility of only nominal damages

300 The primary judge said that at the trial the court might "find against the plaintiff or award him only nominal damages, but those possibilities are not persuasive to me when resolving the appropriate outcome for the application"[439]. In the light of that passage it is necessary to reject the proposition that the primary judge failed to take account of the possibility that, if publication occurred and was found to involve actionable defamation, only nominal damages might be awarded. It would also not be correct to hold that the Full Court majority failed to advert to the matter and failed to perceive that the primary judge had not taken account of the possibility that only nominal damages might be awarded. In any event, these points were not taken in the Amended Notice of Appeal or in the Corporation's submissions.

301 Either the primary judge considered the nominal damages question, or he did not. If he did not consider it, he erred in principle. If he considered it (as he did), but came to a wrong factual conclusion, he erred in fact, but not in principle.

302 It has not been demonstrated that the primary judge did err in fact. It has not been demonstrated that he was wrong, for example, in identifying northern Tasmania as an area where the adverse publicity had not reached. He habitually sat in northern Tasmania. He resided there. He was unaware of the publicity. He was much better placed to assess the point than any other judge.

303 Hence it has not been demonstrated why it would not be open to a jury to compensate the plaintiff for injury to reputation, and injury to feelings, despite the fact that he has been convicted of an odious crime and is serving a life sentence – for he remains a resident of this country, entitled to the protection of its law, which prides itself on assisting those who may have done much to make themselves hated. Damages might be greatly affected by a matter which cannot now be assessed and on which no adverse prejudgment is to be made – the

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439 *O'Neill v Australian Broadcasting Corporation* [2005] TASSC 26 at [33].

plaintiff's performance as a witness. It would be for the jury to make a judgment of him as a man, and, to adopt one of Mr Davie's ideas, to estimate whether the man who once murdered is the same being as the man who is now suing. The Corporation placed considerable reliance on the fact that the police have possession of a document which, the Corporation alleges, is a signed confession to another murder. But that document is, with all respect to the police, the product of another era. In 1975, when the confession was supposedly made, police practice, and to some extent the law, whispered the last enchantments of an age holding a view not now in favour. The view was put thus by a Chief Constable of Greater Manchester[440]:

> "No machine should be allowed to get in between the suspect and his interrogator ... It would break that essential rapport which a detective needs to elicit an admission of guilt legitimately."

But attitudes have changed. So, partly through legislative and partly though judicial means, has the law. As a consequence, and as a sign, of "the persistent and continuing denigration of police evidence in this country"[441], majority decisions of this Court[442] have discounted to insignificance confessions which have not been recorded on videotape or audiotape where it was technically possible to do so. In 1975 videotaping may well have been impossible for the Tasmanian police officers concerned, and perhaps audiotaping was too. But the fact that the confession is not mechanically recorded is not its only defect. The circumstances surrounding it are suspicious. The confession occupies only eight typed pages, but it purports to be a verbatim record of questions and answers despite being the result of an interview which is said to have lasted three hours and 10 minutes. This raises questions, however many allowances are made for slow thinking, slow speaking and slow typing. Hence the "confession" is of a type which has fallen into discredit since 1975. It is also a confession which the plaintiff contests. It will not, at this stage of the proceedings, bear any useful weight.

Conclusion

304 It is thus necessary respectfully to disagree with the central arguments advanced to make good each of the five errors which are said to justify the allowing of the appeal. It follows that the appeal should be dismissed.

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440 Mortimer, *In Character*, (1984) at 82.

441 *R v Schaeffer* (2005) 159 A Crim R 101 at 105 [12] per Ormiston JA.

442 See *Nicholls v The Queen* (2005) 219 CLR 196.

Orders

305 I agree with the orders proposed by Kirby J.