

# MLRC Media Law Conference

## International Law Boutique

Oct. 5, 2023 – 11:25-12:25

### Co-Chairs:

Adam Cannon, The Sun

Jack Browning, Davis Wright Tremaine

## Recent Issues in Commonwealth Media Law

### 1. Fair Dinkum – The Epic Defamation Trial of Ben Robert Smith

- In a lawsuit described as “a war-crimes trial masquerading as a defamation action,” Victoria Cross recipient and former SAS soldier Ben Roberts-Smith sued the publisher of *The Sydney Morning Herald*, *The Age* and *The Canberra Times* for reporting that he had engaged in unlawful killings and other atrocities while serving in Afghanistan between 2009 and 2012. The newspapers were also sued for reporting that Roberts-Smith had physically abused a woman with whom he was having an extramarital affair.
- Roberts-Smith, who was backed by Kerry Stokes (a rival media magnate to the publisher of the defendant newspapers), commenced in 2019. The case went to trial in 2020 – with delays for the pandemic – and the newspapers’ sole defense was truth. In seeking to prove the truth of their reporting that Roberts-Smith had committed war crimes, the defendant newspapers set forth evidence that Roberts-Smith committed or oversaw six unlawful killing, including:
  - Machine gunning an unarmed man with a prosthetic leg, then encouraging other soldiers to drink from it;
  - Pressuring a new recruit to execute an elderly, unarmed Afghan;
  - Kicking an unarmed and defenseless Afghan off a cliff before ordering soldiers to shoot him dead;
  - Ordering another soldier to shoot an Afghan male who was under detention.

Soldiers also testified that Roberts-Smith engaged in a program of intimidation and bullying to cover up his crimes. His former mistress testified that he had hit her after a party and engaged in other coercive behavior, including threatening to disclose intimate photographs.

- Roberts-Smith testified that he had served his country with honor and distinction and never broke the rules of engagement. He further dismissed the allegations against him as part of a smear campaign orchestrated by soldiers who were jealous that he had been awarded the Victoria Cross – Australia’s highest military honor.
- In June 2023, Justice Besanko dismissed Roberts-Smith’s case on the grounds that he had committed war crimes. Justice Besanko found that the newspapers’ reporting on four of the unlawful killings was true, although it found that two reported killings were not substantiated under the heightened Briginshaw principle which requires stronger evidence for serious allegations. Justice Besanko also found that the reports of domestic abuse had not been substantiated. Yet the claims based on those statements were dismissed under the doctrine of “contextual proof” – which is akin to the libel proof plaintiff doctrine whereby the his reputation had been so seriously damaged by substantially true claims that it could not be damaged further by false ones.
- Roberts-Smith has appealed. Proceedings are ongoing over attorneys’ fees and costs, which will be levied against Roberts-Smith unless his appeal is successful and have been estimated by one respondent to be approximately \$30 million.

*Roberts-Smith v. Fairfax Media Publication Pty Limited (No 41)*, [2023] FCA 555. See also *The Guardian* Podcast on the case [Ben Roberts-Smith v. The Media](#).

## 2. Celebrities Suing the Media (and Each Other)

- *Wagatha Christie* – This was a high-profile defamation dispute between two so-called WAGS, *i.e.*, Wives and Girlfriends of England footballers – Colleen Rooney (wife of Wayne Rooney) and Rebekah Vardy (wife of Jamie Vardy).
  - In late 2019, Colleen Rooney claimed that she had discovered – through an elaborate 18 month sleuthing process involving an Instagram trap – that stories leaked to a tabloid newspaper could only have come from “... Rebekah Vardy’s account.” This story became an internet sensation, with the tabloid press dubbing this detective work the case of “Wagatha Christie.” The broadsheets also joined in, with the Guardian describing it as “the best day on Twitter of all time.”
  - Not seeing the funny side, Vardy sued Rooney for defamation. The court determined that the tweet carried the defamatory meaning that Vardy “regularly and frequently abused her status as a trusted follower of Ms.

Rooney's personal Instagram account by secretly informing The Sun newspaper of Ms. Rooney's private posts and stories." The primary substantive issue at trial was whether this accusation was substantially true.

- But the case was noteworthy for evidentiary issues, including in-person testimony from former England football captain Wayne Rooney and revelations that a key witness had "lost" the phone through which she had allegedly sent incriminating messages when she dropped it overboard on a sightseeing trip to the North Sea shortly before trial.
- Of perhaps greater long-term significance, the court issued an important ruling that journalists from *The Sun* could not be forced to disclose the identity of their confidential source.
  - The publisher of *The Sun* and its journalists sought to avoid compelled disclosure under Section 10 of the Contempt of Court Act 1981, which protects compelled disclosure of confidential sources.
  - Both Vardy and her assistant waived their right to confidential source protection, but the assistant subsequently withdrew her waiver. Vardy argued that the waiver was sufficient to overcome any privilege in the event that the assistant was the source. Alternatively, if the source was not the assistant, there was no reasonable chance or serious risk of compromising the sources identity. Rooney argued that disclosure should be ordered in the interests of justice because (i) the documents sought would have been disclosed if they had not been lost or destroyed, (ii) the evidence could be dispositive, (ii) the waivers were important factors and (iv) source protection should be limited because Vardy was likely to be the source and the information in purpose was gossip leaked for venal purposes.
  - The Court held that Section 10 did apply. The protections for journalists are not limited to anonymous or unknown sources. In any event, Vardy had denied being the source and so her purported waiver did not put her in the same position as an on-the-record witness or someone who had divulged they were the source. There was also a serious risk or reasonable chance that questioning the journalists on the witness summaries was or was likely to disclose the identity of sources.

- The Court further noted that Section 10 would still apply even if the assistant had not revoked her waiver.
- Finally, the Court held that it was unnecessary to override the source protection in the interests of justice. Although the documents were relevant and possibly highly significant, both parties admitted that they would be able to maintain or defend the claim without the disclosure (and the privilege would still apply even if that was not the case).

*Vardy v. Rooney*, [2022] EWHC 1209 (QB), <https://www.5rb.com/wp-content/uploads/2022/06/Vardy-v-Rooney.pdf>

- On the merits, the court dismissed Vardy’s claim on the basis that Rooney’s “Wagatha Christie” tweet was substantially true. The court found that significant parts of Vardy’s evidence that she was not the leaker of Rooney’s private social media messages was not credible and the absence of her assistant from trial was damning (especially given the near certainty that it was she who leaked the stories at issue). Rooney, on the other hand, was deemed honest and reliable.
- The court also addressed Rooney’s back up defense – that the publication was in the public interest under section 4 of the UK defamation act – and held that this defense failed because she had not given Vardy an opportunity to comment prior to publication.

*Vardy v. Rooney*, [2022] EWHC 2017 (QB), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.5rb.com%2Fwp-content%2Fuploads%2F2022%2F07%2FVardy-v-Rooney-Trial-Judgment-1.docx&wdOrigin=BROWSELINK>

- *Sussex Round Up* – Harry and Meghan had filed at least seven lawsuits against British and U.S. media organizations since 2019.
  - In July 2020, the Sussexes filed a lawsuit alleging that unnamed paparazzi photographers used drones and helicopters to take photographs of their son Archie in violation of California law. They settled the case in October 2020 for an agreement from the photo agency to apologize and stop distributing the pictures.
  - Meghan won a privacy claim against Associated Newspapers in February 2021 for publishing extracts of a letter she had written to her estranged father in 2018. The ruling was upheld on appeal, notwithstanding evidence suggesting that Meghan may have written the letter with the intent that it would be leaked.

- Harry sued News Group Newspapers, publisher of *The Sun*, over historical phone hacking. The bulk of Harry's claim – which related to the interception of voicemail messages – was thrown out because he missed the six-year window for bringing a lawsuit over those claims. In reaching this decision, the Court rejected Harry's argument that he was the victim of a "secret agreement" between Buckingham Palace and the Murdoch family in 2012 not to bring phone hacking claims until after other lawsuits had been settled. But the judgment ruled "that there is no reasonable prospect of the Duke proving at trial that he did not know and could not with reasonable diligence have discovered facts that would show that he had a worthwhile claim for voicemail interception..." Harry will, however, be allowed to pursue a trial over whether *The Sun's* use of private investigators broke the law.
- Harry filed a similar phone hacking lawsuit against the publisher of *The Mirror* and that case was tried this spring, with Harry himself taking the stand. The verdict is expected imminently.
- Another phone hacking case was filed against the publisher of *The Daily Mail*, which has sought to have the case thrown out as untimely.
- Harry filed a defamation lawsuit against the publisher of *The Daily Mail* in the United Kingdom over its reporting about his attempts to secure police protection. That case is pending.

### 3. Private Practice – Reporting the News Under U.K. Privacy Law

- *The Mystery of the 'Rapist' Member of Parliament* – A Conservative Member of Parliament was arrested in May 2022, but his name was never reported by any major news organization. The decision not to report the name of the accused was not due to a privacy injunction but rather the fear of incurring liability due to cases like *XZC v. Bloomberg* and *Cliff Richard v. BBC*, which recognized a reasonable right to privacy and anonymity for people have been arrested but not charged with a crime.

Peter Walker, *Why is Tory MP arrested on suspicion of rape not being named?* THE GUARDIAN (May 18, 2022), <https://www.theguardian.com/uk-news/2022/may/18/why-tory-mp-arrested-suspicion-rape-not-being-named>.

- *Who's Huw (Edwards)?* On Friday July 7, 2023, *The Sun* published a news article that an unidentified presenter for the BBC was accused of paying thousands of pounds to a young person, aged 20 at the time of publication, in connection with

explicit photographs. The mother of the young person expressed her concerns that the payments had been used to fund her child's crack cocaine habit. For several days, the name of the presenter circulated on social media. But no mainstream news organization reported the presenter's name until his wife revealed that he had gone to hospital after suffering a serious mental health episode. The presenter – Huw Edwards – has anchored the flagship BBC News at Ten for 20 years and fronted its coverage of major events such as the death of Queen Elizabeth. After the story broke, the police investigated and found no evidence of a crime. Edwards did not resign but the BBC has commenced its own investigation, which is ongoing.

George Bowden, *Explained: Huw Edwards and the media scandal gripping the UK*, BBC (July 12, 2023), <https://www.bbc.com/news/entertainment-arts-66184359>.

- *UK Data Protection Act and GDPR* – The United Kingdom has enacted strong and broad data protection measures that some claimants have used to threaten claims based on old or “inaccurate” data – such as a story about a historical arrest based on charges that were later dropped. These claims, which have a right to be forgotten flavor, are governed by Article 85(1) of the UK GDPR, which creates exemptions for the use of data for journalistic purposes. News organizations can generally claim an exemption from the data protection requirements if their data is being held “with a view to publication,” if they believe that publication would be in the public interest and if complying would be incompatible with journalism.

Debbie Heywood, *The journalistic exemption – how does it apply in the UK?* Taylor Wessing (Feb. 2, 2022), <https://www.taylorwessing.com/en/global-data-hub/2022/february---data-protection-freedom-of-expression-journalism-and-the-media/the-journalistic-exemption-how-does-it-apply-in-the-uk>.

#### **4. Beneath Contempt – Reporting on Judicial Proceedings Under U.K. Contempt Law**

- *Contempt Basics* – Contempt of court is a complicated area of law in the United Kingdom that derives from the common law and the Contempt of Court Act 1981. Although the exact operation of the law depends on myriad factors and circumstances, contempt of court most often “bites” when criminal proceedings are active – *i.e.*, there has been a summons, an arrest of a charge – and contempt restrictions remain in effect until the person is convicted or acquitted. At this point, news organizations are prohibited from a wide range of reporting that might seriously prejudice the jury pool or otherwise affect the administration of justice.

- A classic example of contempt in the United Kingdom would be to report that the person charged has a prior criminal record. In the United States, this kind of reporting is fair game throughout the proceedings.
- There is both civil and criminal liability for contempt of court. The criminal penalties can be very harsh – an unlimited fine and/or up to two years in prison for the person deemed responsible, usually the editor.
- News organizations in the United Kingdom face significant challenges to keep on the right side of contempt laws when reporting on high-profile trials, for which the public has a sizeable appetite for salacious details. The recent trial of Lucy Letby – a nurse who was found guilty of murdering seven babies in her care and attempting to murder ten more – is a case in point.
- The scope of contempt law may be expanding. The Attorney General, for instance, recently circulated a notice to editors warning them not to publish material about the comedian Russel Brand that might “prejudice any potential criminal investigation or prosecutions” – even though Brand has not yet been charged. See Sean O’Neill, *Attorney-general is showing contempt for press freedom*, The Times (Sept. 25, 2023), <https://www.thetimes.co.uk/article/attorney-general-is-showing-contempt-for-press-freedom-vng2zfbcn>.

## 5. SLAPP Happy? The New U.K. Anti-SLAPP Law

- In June 2023, amendments were added to the Economic Crime and Corporate Transparency Bill in order to enact the United Kingdom’s first anti-SLAPP law. The law is controversially limited to information “in the public interest related to economic crime” – and so would not apply to other types of public interest reporting that might be at risk from predatory defamation claims. The SLAPP law will create an early dismissal mechanism that will apply if (i) the defamation claim was filed with the intent to stifle free speech or deter investigations and (ii) whether the claim has a reasonable chance of success. The burden will be on the plaintiffs to prove that their case has merit.

Jonathan Ames, *Activists praise Slapp crackdown*, THE TIMES (June 15, 2023), <https://www.thetimes.co.uk/article/activists-praise-slapp-crackdown-b870kzd33>