

THOUGHTS ON A POTENTIAL BRUCE LEHRMANN / BRITTANY HIGGINS DEFAMATION CASE

The scope of the case

It is not clear what publications Mr Lehrmann would sue over.

There would be plenty to choose from. He need not sue Ms Higgins herself. He could sue a media organisation, or a journalist, or anyone else who participated in the communication of content that affected his reputation. This could even extend, for example, to going after someone on Twitter sharing media content; or even Twitter itself (or a company behind such a platform).

The identification issue

If he went after Lisa Wilkinson's 2022 Logies speech, he could choose to sue Wilkinson herself or the broadcaster, Nine. That speech and a number of other relevant publications do not name Lehrmann explicitly. That the person defamed was *identified* by the publication is necessary to succeed in a defamation action. Identification may be a critical issue in Lehrmann's case, as it was in Christian Porter's discontinued defamation claim against the ABC.

Another complication is that relevant defamation laws were recently amended, and that those amendments took effect in the ACT at a time after Higgins broke her story, but before Lehrmann was identified in the media. The new laws strengthen defences for publishers and shorten the period of time in which a defamation claim can be commenced. Will those new provisions apply to Lehrmann's case? It may depend on what, exactly, he chooses to sue over.

How will the media defend themselves?

If Lehrmann sues a media organisation rather than Higgins, it will put the media defendant in an awkward position. They may want to run a justification defence, arguing that any defamatory imputations they conveyed were substantially true. But how will they prove that? Presumably, they would need to call Ms Higgins as a witness. If she does not want to assist in the case, they could try to force her with a subpoena, which would obviously be awful. But I understand that Higgins has indicated she would be prepared to participate in a civil proceeding.¹

The defamation trial would differ from a criminal trial

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https://twitter.com/BrittHiggins_/status/1600381415362699264?s=20&t=W11sLCNSnODEB3GH0At2KQ

Unlike a criminal trial, the standard of proof for a defamation claim is the balance of probabilities. If a defendant were to run a justification defence, they would essentially need to prove that it is more probable than not that the defamatory allegations are true. So the key question—whether Lehrmann raped Higgins—is not decided in the same way that it would have been in the criminal trial. Much will turn on the credibility of the witnesses, in the view of either the judge or the jury.

Will this case have a jury? Again, this is unclear. If Lehrmann sues in the Federal Court, which he could, then a jury would be less likely. I doubt Lehrmann would want to go before another jury, but who knows.

The tension between #MeToo, criminal justice and defamation law

The case does highlight the tension between the culture of #MeToo and some of our legal institutions.

When a person tweets #MeToo and shares that they are victim survivors, they obviously do so from the premise that they are telling the truth and that some other person committed a crime. The criminal justice system assumes innocence, but only for the purpose of allocating criminal responsibility according to the law. Just because criminal procedure presumes you are innocent, does not mean that you are innocent.

Defamation law is in tension with both the culture of #MeToo sharing, and the presumptions that inhere in our criminal justice system. As for #MeToo, defamation law does not start from the premise that victim survivors are telling the truth. Rather, it starts with the principle that reputational interests are deserving of legal protection. Subject to a new statutory requirement of serious harm, it falls on a defendant to prove the truth of any defamatory allegation.

As for defamation law and criminal justice, each deals with whether a person is deserving of negative judgment, but for very different purposes. Criminal justice protects the public interest in seeing laws obeyed, which indirectly serves the interests of complainants. Defamation law protects the private interest of the plaintiff to protect their reputation, but balances that private interest against the public interests in freedom of speech and access to information.

A futile exercise

A key purpose of suing in defamation is to vindicate one's reputation in the eyes of the public. Whatever the outcome of a defamation claim—even if he wins—many won't change their mind on Mr Lehrmann or Ms Higgins. I certainly won't. It is hard to see how this key purpose of suing in defamation could be achieved.

Like Ben Roberts-Smith's case, a claim by Mr Lehrmann could expose him to the real risk of coming out looking worse. Suing in defamation is an expensive exercise, made all the more expensive if it achieves nothing of value.

That this defamation case is being brought at all is very unfortunate.