

Journalists play a critical role in democracy: providing relevant decision-making information to citizens. The media is deemed so important to a healthy democracy that a free press is a criterion of *The Economist's* 'Democracy Index' (McChesney 2012). However, with this important duty comes the responsibility to act within ethical and legal guidelines. Failure to weigh these responsibilities against the public interest can result in lengthy, expensive and potentially career-destroying legal battles. Two significant cases involving Australian journalists are the defamation actions taken against Fairfax by Melbourne businessman Antonio Madafferri and Chinese investor Helen Liu. The cases share some similarities, however they also share important differences, such as the judicial treatment of the journalists' rights to protect sources. Additionally, both cases have important implications for journalists writing investigatory articles.

Both of these defamation cases were brought against journalists from the media group Fairfax in relation to articles that the plaintiffs believed had caused reputational damage. Liu brought the action after journalists Richard Baker, Phillip Dorling and Nick McKenzie published a series of articles about her interactions with then-Australian Labor Party politician Joel Fitzgibbon (Merritt 2016). The articles alleged Liu had paid Fitzgibbon \$150,000 in an attempt to influence political decisions, however Liu denied the claims, stating that the documents provided to the Fairfax journalists were forgeries (Merritt 2016). As well as bringing a defamation action against the publisher, Liu took separate legal action to determine the identity of the source so that they too could be challenged in court (*Media Watch* 2013).

Similarly, the case brought against Fairfax journalist Nick McKenzie by Madefferri was also based on defamation claims. Madefferri asserted that McKenzie's articles were defamatory because they accused him of participation in organised crime,

including involvement in drug trafficking and shooting attacks on three Melbourne restaurants (Russell 2015). In another similarity, Madafferri sought access to McKenzie's sources. Ultimately, the outcomes in these cases were quite different.

Before moving on to analysis of the case studies, it is important to define defamation to understand the legal context in which these battles were waged. Defamation is covered by criminal law, however the majority of cases are civil actions (Pearson 2014). Put simply, defamation laws aim to protect the reputations of people by 'providing an action against anyone involved in the publication of defamatory material' (Breit 2011a, p. 10). To constitute defamation, the statements must have identified the person. Additionally, the published material must have:

a tendency to expose the person ... to hatred, contempt or ridicule, lower the person in "the estimation of a right thinking member of society" or cause the person ... to be shunned or avoided. (Breit 2011b, p. 293)

Once these three tests have been proven, the onus falls on the defendant to justify why the claims were published (Breit 2011b).

The selected case studies have greater complexity than most straightforward defamation actions because in both cases, the plaintiffs sought to identify the sources behind the stories. To further his case against Fairfax, Madafferri argued that 'he couldn't know whether or not the sources were reliable or had malice against him, without knowing who they were' (Robin 2015). Malice is an important element of defamation cases, as if proven, malicious intent can undermine valid defences (Breit 2011b).

Liu's attempts to uncover the sources were prompted by a desire to determine to disprove their authenticity and to bring separate claims against these parties also (*Media Watch* 2013).

Of great relevance to journalists is the defences available to combat claims of defamation. After law reforms in 2005 that created uniform defamation laws across Australian states and territories (*Defamation Act 2005*), statutory defences were introduced that would exist alongside common law defences (Breit 2011a). There are truth defences, privilege defences (of various kinds, however in this discussion, qualified privilege is the most relevant), honest opinion and fair comment defences (Brett 2011b). The two cases illustrate how defences should and should not be used. In the interests of simplicity, both cases will be analysed separately, with similarities and differences in both the defamation and source protection elements analysed later in the discussion.

In his suit against Fairfax, Madafferri sought to uncover the sources that had fed McKenzie's series of articles. McKenzie's content had ranged from Madefferri's donations to political parties, to his alleged involvement in organised crime. Madafferri was unsuccessful in pushing to have the sources identified, as the judge 'accepted that McKenzie was fearful of very serious adverse consequences if his sources were named' (Russell 2015). Importantly, the judge said the identification of the sources was not relevant to the defamation case (Russell 2015). Fairfax's defence was now free of any claims of malice. However, like many defamation cases, this one did not progress through the court system. In May 2016, Madafferri opted to drop the law suit (Le Grand 2016). Interestingly, no payment was reported to have been made, and the apology that Fairfax published as part of the settlement did not retract the inferences that Madafferri 'is the head of the Calabrian mafia in Melbourne' (Le Grand

2016). The apology simply stated that the paper 'acknowledges that Mr Madafferi is a hard-working family man who has never been charged by police with any criminal offence' (Le Grand 2016).

Under the Defamation Act 2005, Australian defamation damages were capped (current cap is \$366,000), subject to judicial discretion (Whitbourn & Hall 2015). The time consuming and costly nature of civil suits, combined with defamation caps, limits the financial incentive for parties to pursue costs through the court. In cases where defamation actions are taken through the entire court process, it can be a mutual loss in financial terms (McCausland 2016). For example, former Australian treasurer Joe Hockey was successful in suing Fairfax for its 'Treasurer for sale' article, however his \$200,000 in damages was far exceeded by the estimated \$500,000 in legal bills (ABC News, 2015). Hockey maintained that he did not regret the action, as it was motivated by a desire to clear his name and 'stand up to malicious people intent on vilifying Australians who choose to serve in public office to make their country a better place' (ABC News, 2015).

The terms of Madafferi's settlement are unknown, however it is not unreasonable to suggest that costs in pursuing the action were a deterring factor as well as the potential for new information to arise in the proceedings. Journalist Chip Le Grand who followed the case suggested that avoiding a court case allowed Madafferi to 'avoid a potentially bruising courtroom showdown' that would have delved into his business activities (Le Grand 2016).

Liu's action against Fairfax was similar to the Madafferi case in the sense that she sought access to the journalist's sources. However, rather than trying to prove malice, Liu was seeking to launch a separate claim against the sources (Media Watch 2013). The businesswoman alleged that a series of articles delving into her

political donations were defamatory, and based on forged documents provided by an unknown source (Merritt 2016).

Justice Lucy McCallum ordered Fairfax to provide the documents and their source (Ackland 2016). After a failed appeal, Fairfax was ordered to reveal its sources (Merritt 2016). Liu has not yet pursued the order in court, and the future of the case is uncertain.

This case is significant for several reasons. First, the reasons behind Justice McCallum's order to reveal the source, according to journalists, have set a dangerous precedent (Ackland 2016). McCallum dismissed claims from Fairfax that there may be adverse consequences for the sources if revealed 'beyond the risk of them getting sued' (*ABC News* 2015).

Second, McCallum found that the journalists' claim to confidentiality could not be upheld because they had 'disobeyed a specific request from the sources not to publish certain handwritten papers that had been "included inadvertently" among the documents provided' (Fernandez 2014, p. 127). The journalists had published information obtained from the source, despite the source pleading with them to withhold the content of the handwritten notes (Fernandez 2014). There is concern that this ruling has set a precedent that 'the final arbiter of what is published should be the source, not the journalist or editor. This is bad news for journalism, press freedom, independence' (Ackland 2016).

Third, if the handwritten notes were indeed a forgery and not written by Liu, the question arises 'whether fraud by a confidential source relieves journalists of their obligation to protect that person's identity' (Merritt 2016).

This case predates the introduction of shield laws, so Fairfax's defences were based on 'the newspaper rule' (Ackland 2016). The newspaper rule 'only applies where a court considers that it serves the interests of justice' (McCausland 2016). In this case, the interests of justice were deemed to lie with revealing the sources (McCausland 2016). Interestingly, and a source of incredulity and criticism from the wider media sector, Fairfax 'agreed to not to use the statutory defence of qualified privilege' in return for a stay of orders on Justice McCallum's ruling (Bibby 2015). A defence of qualified privilege can be applied where the journalist can 'establish a legitimate duty and interest to publish the matter' (George 2011, p. 357). For this to apply, Fairfax would have to prove that they had a moral, social or ethical duty to publish the information, and the public had a duty to read it (Breit 2011b). In his defence to publishing the notes despite pleas from the source not to, Baker already laid the foundation to a qualified privilege defence when he stated that it was 'of the highest importance to Australians in regards to honesty and integrity of our political system' (Ackland 2016). Paul Bibby argues that by abandoning the qualified privilege defence, 'the journalists and *The Age* effectively opened the door for Ms Liu to pursue them instead of their sources' (Bibby 2015).

Both of the abovementioned cases share similarities. They are both defamation cases in which plaintiffs sought to uncover sources. However, Madafferri failed in his attempts due to concerns about the consequences for his source (Russell 2015), while Liu was successful due to the judge's determination that her source was not at risk of adverse consequences (Fernandez 2014). Both cases set precedents. Madafferri's was the first to be tried under the new shield laws, and served as a warning that 'the Victorian Parliament and Victorian Supreme Court recognises that such sources should be protected' (Robin 2015). Liu's case set the precedent that

journalists could be forced to give up their sources if the authenticity of the information was under question, or if the journalists had not complied with the wishes of the source (Ackland 2016). Journalist Richard Ackland said the 'decision in the Liu case seems to have brought on a spate of applications for preliminary disclosure' (Ackland 2016), including claims from businesspeople Gina Rinehart and Nathan Tinkler.

Additionally, both cases have important lessons for journalists. Perhaps most importantly for investigative journalists is the duty to be 'extremely cautious about the materials that they rely upon for stories, especially those with the potential to cause serious harm' (Fernandez 2014). Journalists should be careful to ensure authenticity, and after the Liu decision, they should ensure that they comply with the directions of the source.

Ultimately, journalists should remain mindful that they operate in a complex environment, where rapidly developing digital media is far outpacing the law's ability to keep up (McCausland 2016). Shield laws, *The Evidence Amendment (Journalists' Privilege) Act 2011*, are a positive step, however until they are fully tested in the court, they do not offer guaranteed immunity to journalists (Breit 2011b). Essentially, they 'still allow wide judicial discretion to order up the identity of sources' (Ackland 2016).

Journalists walk a fine line between serving the public interest, and adhering to the laws that aim to protect people from reputational damage. As such, they must be aware of the legal principles that govern the media (Breit 2011b). In Fairfax's appeal against Justice McCallum's order, Justice Ruth McColl warned journalists that freedom of communication is not a "weapon" to be deployed by the media' (Ackland 2016). Journalists must be aware of the high stakes involved in investigative

journalism, and balance the public interest against the duty of care to others. A free press is critical to democracy (McChesney 2012), so protecting the freedom of the media to reveal stories that are of interest to the citizens of a democracy is vital.

After all, 'it would be a very sad day if a journalist's confidential source was threatened though a forced revelation in a courtroom' (Robin 2015).

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