Abbott, Kennett and Costello

In among a swag of recent defamation decisions, there have been interesting issues about how judges and juries differ in assessing the "ordinary reader's" view about interpretation and moral issues

1999's first quarter has been a busy time for defamation watchers.

February and March saw the start of the mammoth Marsden trial and the mixed outcome in *Harris v Perkins*. Racing odds assessor Arthur Harris won $20,000 for a series of allegations, including suggestions that he conspired with a criminal to obtain Robbie Waterhouse's unjust conviction in connection with the Fine Cotton ring, but the jury also found it proved that Harris was a slanderer and scandalmonger and a cheat/self-confessed liar.

Tony Deren, once accused of being paedophile "Mr Bubbles", faces a retrial of his defamation case against NSW police, although the police failed in their appeal against Dawn Deren's $450,000 verdict. Two union officials, Edward Palmer and Denis Boner were awarded a total of $165,000 over letters sent by an opposing faction during a union election, suggesting they misappropriated union funds.

Two of the most high profile cases involved superficially contradictory verdicts. Members of the Abbott and Costello families walked away from a stoush with Bob Ellis publisher Random House with more than $250,000 damages between them, while Jeff Kennett lost his case against *The Australian*, leaving him with rather large legal bills.

The divergent outcomes are easily explained by the different facts in each case.

Kennett's case illustrates the challenges faced by the media when publishing rumours. *The Australian's* references to "unsubstantiated accusations" about extramarital affairs in the context of an article about outside pressures on the Kennett marriage were found not to defame him. The context of the story appeared to make the difference for the jury: the paper argued that readers understood it to mean Kennett had been plagued by rumours, not that he had actually been unfaithful.

In contrast, Bob Ellis' anecdote about undergraduate antics by the Abbotts and Costellos repeated rumours *as fact*. It recounted how the two politicians were student members of the Labor Party and were inducted into the Young Liberals by one woman who had sex with both and married one. Random House did not seek to prove the story was true and Justice Higgins found it was completely false. His task was simply to decide how the publication of those events reflected on those involved.

In a sometimes surprising decision, Justice Higgins found that the Ellis anecdote suggested that Mrs Abbott and Mrs Costello were "guilty of unchastity" and that Mr Abbott and Mr Costello were so shallow in their political commitments that they were prepared to abandon their principles in return for sexual favours.

The "unchastity" finding is surprising because it reflects a dated moral disapproval of a woman who slept with one man other than her husband before marriage. It begs the question of whether the same thing said of a man would, in Justice Higgins' view, be defamatory.

The "shallow political commitment" finding involves taking a very literal, rather than contextual, view of the story. Saying someone swapped political sides on the lure of sex many years ago as a student is very different to suggesting they did it while a senior government member.

In Justice Higgins' view, these imputations were regarded very seriously, resulting in some of the highest defamation damages awards in the ACT. Random House recently lodged an appeal against the decision.

Although they were very different cases, the *Kennett, Abbott* and *Costello* and *Harris* cases raise interesting questions about the way judges and juries differ in their approach to interpreting articles and addressing moral issues. Both are required to do this from the perspective of the "ordinary reasonable reader".

The *Kennett* jury appears to have taken a pragmatic view, accepting that mentioning "smoke" doesn't automatically mean you are suggesting "fire". Justice Higgins' suggestion that readers would think Messrs Abbott and Costello were politically shallow after reading Ellis' anecdote, coupled with high damages awards, perhaps suggests a more po-faced view of the average reader.

Justice Higgins' delicate approach to sexual morality turned, in his words, on "what Mr Alfred Doolittle in My Fair Lady...described as 'middle class morality.'" This does not appear to have been on the minds of the NSW jury in Harris, which found that a suggestion that Harris was homosexual was not defamatory.

The task of accurately assessing the interpretations and opinions of "ordinary reasonable readers" is inevitably imprecise and impressionistic. In this writer's view, these recent cases (along with the Queensland Court of Appeal's finding in last year's Pauline Hanson case - **CU issue 148, October 1998**) confirm the importance of keeping juries involved as a window on community perceptions.

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