



**The decision yesterday in the defamation action against The Daily Telegraph is a good case for why juries and not judges should adjudicate on sensitive matters like these. Marque Lawyers partner Hannah Marshall dives in.**

The Tele's truth defence in the Rush case turned on facts truly known to only two people. The judge wasn't one of them.

Witness credibility assessments are a funny old part of the law. Guided by legal principle, but ultimately entirely subjective. Often critical to a decision, but almost impossible to appeal.

Justice Wigney preferred Geoffrey Rush's evidence. He said Rush was a good witness. He said that the complainant, Eryn Jean Norvill, was less believable for a few reasons. He saw inconsistency between her friendly behaviour toward Rush during King Lear and her later complaint. He saw her claim that the cast and crew of Lear were complicit in Rush's (alleged) behaviour as reflecting embellishment and exaggeration.

I don't agree with any of that. But that doesn't mean Justice Wigney's assessment was wrong.

The problem is that all the Court has is two people's conflicting stories. No time machines. No crystal balls. That's why an appeal court will usually only overturn a credit finding if it ignores strong, contrary evidence. It would be a big task for the Tele to overturn Justice Wigney's findings on Norvill's credibility.

Making a decision about who to believe unavoidably involves subjectivity. In this case, the evidence deserved assessment by a jury.

Not because Justice Wigney isn't a capable judge, but because this is exactly what a jury is for. The jury system is designed to avoid credit assessments falling to individual subjectivities or any unconscious biases. Collectively, the jury can bring to bear the community's views in a way that no individual can.

A defamation plaintiff can avoid a jury trial by suing in the Federal Court. The ability to avoid a jury is a huge tactical advantage for the plaintiff. This should not be so.

Rush's case was about a lot more than what Rush allegedly did to Norvill during the production of *King Lear*. It happened in a critical moment for the #metoo movement. It raised broader questions about our social fabric and the power of the patriarchy.

Norvill deserved the power to control whether her complaint was made public and if so on what terms. She deserved a forum adapted to the particular sensitivities of complaints about sexual misconduct.

What she got was a claim driven by Rush, resulting from a publication by the *Tele* over which she had no control, and a character assessment by one man that she'll carry for a lifetime.

Leaving aside all the systemic problems on which the #metoo movement shines a light, at the very very least this case deserved a jury.