

Can Justin Milne sue Guthrie and the ABC for defamation?

Monday's *Four Corners* report on the Michelle Guthrie-Justin Milne ABC leadership saga included claims of inappropriate behaviour from Milne. What's the next step?

MICHAEL BRADLEY

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It made sense for *Four Corners* to do its thing on the spectacular defenestrations of the ABC's managing director and chairman. The big question — political interference in the independence of the ABC — deserved exposure to the cold light of Sarah Ferguson's stare.

What we got instead was the depressing reflection that the two people at the top of our most cherished public institution were not up to the job. It was like watching the exit interviews of two failed executives.

Unsurprisingly, Michelle Guthrie and Justin Milne have widely contradictory recollections of most of their interactions. Unedifying, uninteresting stuff. We learned nothing new about the critical question of political interference, which had already been laid bare by Milne's leaked correspondence.

It did get slightly intriguing when Guthrie dropped her bombshell allegation about something she said Milne had done to her at a board dinner at Chinese restaurant Billy Kwong in November last year.

"Inappropriate touching is the best description of it," Guthrie said. "It was... I felt icky. It was inappropriate. It was unprofessional and inappropriate." Afterwards, she said, she took steps to avoid being in a situation where it could happen again.

Milne denied the allegation in clear terms. Ferguson put to him a specific allegation, that he had put his hand on Guthrie's back. She didn't say where that allegation had come from; Guthrie had said she didn't want to get into any of the details or whether she was alleging sexual harassment by Milne, so presumably the specifics had not come directly from her.

So, to the question *du jour* — defamation, anyone? Has Milne been defamed, will he sue and, if he does, can the ABC defend it?

The art of defence

It isn't hard to defame a person, you just have to publish something which brings their reputation down. A direct allegation of sexual harassment will do. There's a probable additional defamatory imputation that Milne misused his position of relative power to intimidate Guthrie.

If sued, the ABC would face the common Me Too dilemma: can it back up what's been alleged? It has two choices: either prove the objective truth of the allegation, or have a crack at winning with qualified privilege. It's widely accepted that media organisations in Australia can't get up on qualified privilege. Maybe the ABC was thinking this could be the exception.

To prove truth, the ABC would need Guthrie in the witness box and dropping her coyness about what exactly she alleges Milne did. As the Geoffrey Rush cases demonstrates, little specifics like which hand, where it was allegedly placed, whether she was facing east or west at the time, will be critical.

What makes the truth defence an interesting prospect is the lack of specifics which Guthrie was prepared to share. Presumably, *Four Corners* did not get more out of her off-camera than she was prepared to say on the record. Perhaps they did get a fully detailed statement, and/or have a witness waiting behind the scenes. But surely then these matters would have been put to Milne too. If they only have what we saw, then it'll all have to come out in court and they'll be relying on Guthrie being more believable than Milne. High risk strategy.

Qualified privilege

As for qualified privilege: the ABC would need to prove that its audience had an interest or apparent interest in having information on the subject of Milne's alleged misconduct; and that it behaved reasonably in putting that information to air.

In practice, qualified privilege has proved an elusive prize for the media. The legitimate interest of the public is, as the courts define it, a tiny subset of what the public finds interesting. More significantly, what the courts consider to be reasonable conduct by a publisher is a long series of very high jumps.

The ABC might be thinking this: first, that the allegation against Milne falls within the definition of "government and political matters" which attracts the implied constitutional freedom and is therefore inherently a matter of proper public interest. Bit of a stretch, but I can see the argument. The conduct of the chairman of the ABC, where there may be a link between his interpersonal relations with the MD and his supposed assertion of influence over how she did her job, could be said to then connect back to the bigger question of political interference which is definitely an implied freedom issue.

That would potentially get them over the first hurdle. Then there's reasonableness. *Four Corners* did put Guthrie's allegation squarely to Milne and ran his clear denial.

Will they bother?

However, other issues will come into play and probably defeat the defence for lack of reasonableness. Among these are the non-specific nature of the allegation, which begs the question of whether it was all too vague to justify a very public airing (given how damaging to any man's reputation this would be), along with Guthrie's expressed non-desire to take it any further.

Mind you, I would be surprised if Milne bothered suing. What would a defamation suit add to the strength of his denials? Guthrie has been professionally toasted anyway, and her performance last night wasn't exactly compelling. He would be wise to leave it alone.

The truth of what happened at Billy Kwong won't ever be revealed to us, suit or no suit. The allegation should have been dealt with by formal investigation, finding and resolution. Now it's just a salacious feature in an otherwise dull boardroom shitfight.