

No vindication: Porter's defamation action falls flat, and taxpayers foot part of the bill

There could be myriad reasons for Christian Porter dropping his defamation case against the ABC, none of which appear to vindicate the former attorney-general.



ABC JOURNALIST LOUISE MILLIGAN (IMAGE: AAP/ JAMES ROSS)

The trial of the century won't be happening. Christian Porter has dropped his defamation case against the ABC — or “settled” as *The Australian* termed it — for no apology, no damages but a contribution by the ABC to his rapidly spiraling legal bills (although according to the ABC, it only agreed to cover Porter's mediation costs).

What caused this sudden and spectacular retreat? You can take your pick from three possibilities: Porter looking down the barrel at long, extremely expensive litigation with the risk of utterly destroying his reputation; the imminence (on Tuesday) of Porter's attempt to strike out the most enticing parts of the ABC's defence, with the attendant risk of their becoming public very soon; or the loss last week of Porter's preferred senior counsel, Sue Chrysanthou SC, removed from the case by the Federal Court because of a conflict of interest.

My guess is all three. For the ABC, while its lawyers (all lawyers, actually) would have been relishing the prospect of defending its story about the rape allegation against Porter, particularly the tasty constitutional implied freedom argument Justin Gleeson had cooked up for it, litigation isn't its core business. Like any sensible media organisation, it will always be looking for the closest exit from the courthouse.

In that context, covering even a bit of Porter's costs would have been unpleasant, because he was nowhere near a sure thing for a win and the downside risks to him would always outweigh the ABC's, but settlement rarely comes with no pain at all. The irony, that it was the taxpayer after all who paid (some of) Porter's legal fees, will stick more in the public's throat than that of either party.

Porter, like all defamation plaintiffs, was riding a wild bull without a saddle. He had thrown down the maximum challenge to the ABC by pleading the grossest defamatory imputations possible: that the ABC had called him a brutal anal rapist.

The ABC had not taken that bait, adopting instead the sensible tactical approach of denying that that imputation ever arose and pleading that the worst thing its story had implied about Porter was that there was a reasonable basis for suspecting him of committing the alleged rape. It had also put a ton of material in its defence which was suppressed by the court pending Porter's attempt to strike it all out on the basis that it was scandalous. Whatever it included, Porter sure didn't want anyone else to read it.

The strike-out application would have been hard-fought; we can assume that the ABC's extremely high-quality legal team had put together a document it was very confident it could support. Porter was facing the risk of an early loss in the interlocutory fight, followed by the publication of the full defence and the extra attention his attempt to keep it out would have provoked. The media was swarming like mice to a grain silo.

That strike-out argument was due to be run by Porter's senior counsel, Chrysanthou. However, on Thursday in separate Federal Court proceedings, Justice Tom Thawley ruled that she should never have accepted a brief from Porter, and that he knew he might lose her, because of a conflict. Porter had made himself a party to that litigation and conducted the defence on Chrysanthou's behalf.

The costs of that litigation are yet to be ruled upon by the judge, so it's premature to talk too much about it, but it certainly wasn't part of Porter's strategy to lose the case or his counsel so spectacularly. Given that Chrysanthou's conflict had been present from the very start, it also had some potentially disastrous implications for his case against the ABC.

For whatever reasons, Porter pulled out. Did he achieve an aim here, of quieting the media's interest in the underlying allegation by suing, only to drop the case later? If that was the plan, it has failed. The story is anything but dead. He is still a cabinet minister, there has still been no inquiry into the allegation and his fitness to serve in cabinet, and the calls for an inquiry aren't going to go away. If anything, I think, they'll be all the louder for the public perception of his litigiousness.

The ABC is reporting the end of the litigation as a victory for its reporting, emphasising that it paid no damages and hasn't apologised. Porter got on his own front foot, declaring that the ABC capitulated because it couldn't prove its allegations.

Well, no. There's no vindication in this for Porter, no matter how hard he spins it. The ABC's article will remain online forever, and he discontinued his court action. Yes, it's a settlement, but getting back some part of the costs you've outlaid and nothing else to show for the effort is a long way short of a justification for starting proceedings in the first place.

Anyway, however you look at it, it's over. The losers are the taxpayers, who footed most of the bill for Porter's recourse to the courts for a case which, if the defamation law was amended in a way he has himself previously advocated, he couldn't have run at all.

As usual, the ironies are many and profound.

If you or someone you know is impacted by sexual assault or violence, call 1800RESPECT on 1800 737 732 or visit 1800RESPECT.org.au.

Michael Bradley, Crikey's legal correspondent, was lawyer to Kate, the woman who accused Porter of assault, at the time of her death. He was also Jo Dyer's lawyer when she retained Sue Chrysanthou, and in Dyer's recent litigation against Chrysanthou and Porter.

ABOUT THE AUTHOR

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