

Is this another death blow to press freedom in Australia?

Dr Chau Chak Wing's defamation case against the ABC's *Four Corners* highlights the inadequacies of Australia's defamation laws.

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SEP 03, 2019

CHAU CHAK WING (IMAGE: AAP/PETER RAE)

Two relatively safe things to say about Dr Chau Chak Wing are that he is very rich and very litigious. He has this year taken down *The Sydney Morning Herald* and the ABC in defamation cases. The *Herald* sank to the tune of \$280,000 (it's launched an appeal). The ABC hasn't lost its case yet, but it has lost its defence (the ABC has also launched an appeal against this decision).

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It began with a 2017 *Four Corners* program about Chinese influence in Australian politics and universities. Chau wasn't the main focus. If you don't know him, Chau is a Chinese-born Australian citizen, well connected, fabulously rich, and generous with his donations to political parties and universities.

Four Corners reported a few sensational allegations regarding Chau. *Crikey* won't repeat the allegedly defamatory comments made about Chau. But for the sake of the story, the brief summary is that *Four Corners* suggested that Chau had come onto ASIO's radar as someone with close ties to the Chinese Communist Party, causing ASIO to warn both major political parties about continuing to accept donations from him. It also pointed to what it said was evidence that a substantial illegal bribe that had been paid to a UN official in New York had come from the bank account of a Chau company. However, the program said, there was no suggestion that Chau knew about any illegality.

As for *Crikey* and me, we do not suggest that any of what *Four Corners* reported is true and we're not adopting it.

Chau sued for defamation, alleging that *Four Corners* had conveyed extremely defamatory imputations about him, including espionage, being a Chinese agent, corruptly buying political influence and committing the crime of bribery.

The contrast between what *Four Corners* said, and what Chau said those words conveyed, is stark. This is one of the reasons defamation law has become such a hellish swamp; the fight isn't about what the media says, it's about what the audience hears. *Four Corners* had run what it said was a pile of circumstantial evidence pointing to something potentially worrying. But Chau claimed that it conveyed that he was, as a fact, a spy and a criminal.

The ABC pleaded two defences: truth and qualified privilege. As I've said, qualified privilege is useless to the media under our current defamation law, so it's truth or nothing. Or, as the ABC attempted, a more exotic tactic called alternative imputations. The idea is to plead a set of imputations similar to, but less serious than, the plaintiff's, and try to prove the truth of yours instead. If it works, it's a complete defence. The ABC's imputations were the same as Chau's, but with "there are reasonable grounds to believe that" at the front of each of them.

Pretty clever — proving that there are grounds for suspicion is a lot easier than proving guilt. Unfortunately, it didn't work.

In August 2018, Federal Court Justice Steven Rares kicked out both the ABC's alternative imputations and its entire defence of truth. A year later, the full court on appeal agreed. The ABC has been left with its crappy qualified privilege defence.

On the law as it stands, I think the judges were right. Grounds for suspicion and guilt are nowhere near the same thing. And the ABC has no hope of proving the objective truth of what Chau says *Four Corners* accused him of being and doing. It just doesn't stack up that high.

Chau still has to go to trial and convince a judge that *Four Corners* did accuse him of espionage, being a Chinese agent, corruptly buying political influence and committing the crime of bribery.

It's a bet-the-house play. The ABC can't prove those allegations are correct, but it can say that it never made the allegations in the first place. If Chau has overcooked his imputations, and the court finds that they don't fairly arise from the program's content, then he doesn't get a second bite on the basis that he was defamed, just not as badly as he had claimed. It's all or nothing.

So the ABC can still win, even if the removal of its defence is upheld on appeal. But this is not a satisfactory state of affairs.

For the media, the case is a reminder that if you publish investigative work about a rich, litigious subject, they can drag you into court and run a case that leaves you with literally no viable defence except the winner-takes-all play of arguing that the imputations they're alleging didn't arise at all. Winning that fight will mean you get your costs back, too, but the huge cost and risk of getting that far is a powerful disincentive from poking the bear in the first place. The ABC is already down hundreds of thousands in the Chau case with the main game yet to come.

So, yes, it is another death blow. The need for defamation law reform gains urgency by the judgment.