

***LAWFARE* BY GEOFFREY ROBERTSON KC (HARPERCOLLINS PUBLISHERS, 2023) PAGES 1-150. PRICE \$12.99 (e-Book). ISBN: 978-0-008-60790-6.**

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I. INTRODUCTION

Media law has never been more topical than it has in recent years. In Australia, the public has been gripped by the trial of war veteran Ben Roberts-Smith,<sup>1</sup> as well as the ongoing battle between various networks and Bruce Lehrmann.<sup>2</sup> The UK has seen various lawsuits filed in connection with the Duke and Duchess of Sussex.<sup>3</sup> Defamation trials, often against the press, raise various debates, including: the balance between the right to reputation or privacy and freedom of speech, and the dual obligation of media organisations to make a profit while upholding their role as the fourth estate.

Robertson's book *Lawfare* explores these various debates in the context of the United Kingdom.<sup>4</sup> In his scathing review of the legislative and precedential state of media law in the UK, Robertson argues that the only way to safeguard freedom of speech and the watchdog function of the press is for the government to change the legislation. The book provides a detailed legal analysis, interspersed with anecdotal examples from Robertson's personal experience as a barrister. Robertson's main contentions are that freedom of speech in the UK is being eroded to the point of not existing at all on matters of importance. Furthermore, the means by which the public is made aware of these important issues, specifically through investigative journalism, have been attacked, making it increasingly fraught with danger to engage in.

II. THE BOOK

In Robertson's book, 'Lawfare' is defined as the 'use of legal strategies to harass or intimidate publishers',<sup>5</sup> and it sets the scene for the battle between the press and wealthy litigants with their teams of reputational lawyers. The lawsuits, which often involve injunctions and high damages awarded, have seen publishers not accept or

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<sup>1</sup> Federal Court of Australia, 'Online File' (Web Page, 29 August 2023) <<https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/ben-roberts-smith>>.

<sup>2</sup> Federal Court of Australia, 'Online File' (Web Page, 30 August 2023) <<https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/lehrmann>>.

<sup>3</sup> HRH *The Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 2160.

<sup>4</sup> Geoffrey Robertson KC, *Lawfare* (HarperCollins Publishers, 2023).

<sup>5</sup> Ibid 2.

publish works and journalists threatened.<sup>6</sup> Another impact of lawfare is that important pieces of journalism work are held up in litigation so long that they lose their relevance to the public.<sup>7</sup> It is noted that damages are not the desired outcome for these litigants; rather, litigation is a means of preventing the exposure of wrongdoing and corruption.<sup>8</sup> Robertson describes how lawfare has recently emerged as a significant issue, focusing particularly on the use of defamation laws to threaten journalists and publishers.<sup>9</sup>

Robertson observes that the judiciary in the UK has employed a balancing test between freedom of speech and the right to privacy, a test which usually swings in favour of privacy.<sup>10</sup> While a public interest defence is available for reputational claims, it requires that the defendant prove the subjective belief that statements made against the plaintiff at the relevant point in time were in the public interest,<sup>11</sup> a test that can be incredibly difficult to meet. Robertson calls for this to be abolished and proposes instead a presumption in favour of freedom of speech,<sup>12</sup> akin to the systems in Europe.<sup>13</sup> Australia also holds a position similar to Europe's, where freedom of speech for political communication has been entrenched through an implication found in the system of representative democracy in Australia.<sup>14</sup>

Robertson identifies two additional factors that pose substantial difficulty for the press when defending a defamation claim. Firstly, the burden of proof rests squarely on the defendant, usually the press, to substantiate the truth of their assertions.<sup>15</sup> This is particularly difficult where information is hidden, such as if the source is afraid of retribution,<sup>16</sup> or has died or disappeared.<sup>17</sup> Robertson calls for legislation to be amended on this front,<sup>18</sup> in a way that aligns with defamation laws in civil systems where a claimant should have to make out the 'essence' of their claim, namely that the statements made were false.<sup>19</sup> The position is also different in the US, where the US Supreme Court in *New York Times v Sullivan* refused to follow UK precedent,<sup>20</sup> and held that reversing the onus of proof is 'antithetical' to freedom of speech safeguarded by the American Constitution.<sup>21</sup> Secondly, Robertson argues that a defendant should be entitled to have a jury decide whether the claimant's reputation was damaged, or privacy has been invaded, particularly when a public interest defence is raised.<sup>22</sup> Robertson bluntly states that a jury would be unlikely to share the same bias in favour of corporate claimants that the judiciary appears to have.<sup>23</sup> Televising proceedings has also been highlighted as a way to ensure all participants are held accountable for their actions in court.<sup>24</sup>

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<sup>6</sup> Ibid 5.

<sup>7</sup> Ibid 14.

<sup>8</sup> Ibid 56.

<sup>9</sup> Ibid 4.

<sup>10</sup> Ibid 94, 98.

<sup>11</sup> Ibid 65.

<sup>12</sup> Ibid 51, 118.

<sup>13</sup> Robertson (n 5) 93.

<sup>14</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>15</sup> *Defamation Act* 2013 (UK) 2.

<sup>16</sup> Robertson (n 5) 56.

<sup>17</sup> Ibid 58.

<sup>18</sup> Ibid 117.

<sup>19</sup> Ibid 59.

<sup>20</sup> (1964) 401 US 265.

<sup>21</sup> Robertson (n 5) 40.

<sup>22</sup> Ibid 91.

<sup>23</sup> Ibid 96; 124.

<sup>24</sup> Ibid 134.

Large corporations in the UK are able to sue for defamation, and with their bountiful resources, present further challenges for the press. Robertson states, ‘the UK is a land of expensive rather than free speech’,<sup>25</sup> with legal fees often far exceeding the damages awarded, fees that these corporations can easily afford.<sup>26</sup> Further, conditional fee arrangements are being used by the wealthy rather than the intended poor, which Robertson argues has turned ‘the Temple of the Law into a casino’, where claims are taken in the hopes of winning.<sup>27</sup> Australia and the US have avoided the issue of lawfare by large corporations with seemingly bottomless pockets for litigation by legislating that a corporation cannot sue for defamation.<sup>28</sup> The proposed solution is to follow their lead, and also introduce a strict means test for funding schemes to prevent the wealthy from utilising those schemes. Another solution raised to address legal fees is to remove the privacy clauses on legal costs and awards of damages; such measures have shown to be an effective way to reign in exorbitant fees.<sup>29</sup>

The main thrust of the book is that legislative intervention is necessary to protect freedom of speech and investigative journalism from lawfare. However, Robertson is most scathing of the ‘Modern’ Bill of Rights that had been proposed by the then Secretary of State for Justice, Dominic Raab. Robertson’s analysis of the Bill draws a comparison akin to a wolf in sheep’s clothing; it professes to strengthen freedom of speech while removing the public interest defence in cases of criminal proceedings, privacy, citizenship, and national security.<sup>30</sup> These areas are where such a defence is most vital, and Robertson asserts that the Bill ‘is primarily concerned with reducing people’s access to justice.’<sup>31</sup>

### III. CONCLUSION

It is important to protect one’s reputation and privacy.<sup>32</sup> However, these should not be used as an excuse to infringe upon free speech or shield corruption. The difficulties of media in the modern age of social media are evident, as are the financial pressures on privately-owned organisations that still need to turn a profit. However, Robertson argues that the state of media law in the UK reduces the ability of the media to produce content that is of public interest and renders engaging in serious investigative journalism an extremely difficult task.<sup>33</sup> This book paints a bleak picture of escalating human rights concerns, judicial bias, and increasing governmental control over the press in the UK. While reforms are suggested, they all require legislative intervention which does not appear to be forthcoming. Despite the insights provided, however, Robertson did not provide an assessment of the policy rationale behind the current government actions. Legislation does not exist in a political vacuum, and an investigation into, or at least an acknowledgment of, various political factors or considerations may have better situated the book. Nevertheless, the book is an accessible read for people of any knowledge level, with enjoyable real-world snippets that effectively highlight the issues at hand.

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<sup>25</sup> Ibid 24.

<sup>26</sup> Ibid 70.

<sup>27</sup> Ibid 73.

<sup>28</sup> Ibid 69; *Defamation Act* 2005 (NSW) s 9.

<sup>29</sup> Ibid 133.

<sup>30</sup> Ibid 109.

<sup>31</sup> Ibid 114.

<sup>32</sup> Ibid 77.

<sup>33</sup> Ibid 116.