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Judge blasts 'disturbing' ABC press release in Heston Russell defamation case

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A Federal Court judge has criticised the ABC for its “disturbing” decision to issue a press release implying the court was forcing journalists to reveal confidential sources.

Justice Michael Lee lambasted the broadcaster on Wednesday, during the final day of closing submissions in a [defamation case](#) brought by ex-commando [Heston Russell](#), who alleges two ABC articles have implied he was complicit in the execution of an Afghan prisoner.

The first article, published in October 2020, relied on the evidence of pseudonymous “ear witness” Josh, a US Marine Corps helicopter chief who heard a “pop” over a radio and asserted Australian soldiers had killed an Afghan prisoner.

Earlier in the trial, the court heard [the ABC intended to drop its public interest defence](#), rather than comply with a court order that it hand over documents to his lawyers revealing Josh’s identity.

In a preliminary decision in February, Justice Lee noted the “strange” fact that Josh’s photo was published by the ABC, despite his desire to remain anonymous.

Justice Lee said at the time: “(He was) given the pseudonym Josh, but strangely enough is pictured, notwithstanding both the (online articles) ... record he does not want to be identified because he ‘fears retribution.’”

“If those responsible for publication of Josh’s photograph within the ABC thought there was substance in Josh’s fears of retribution, they must have assumed his potential assailants were a somewhat incurious and lazy lot,” Justice Lee said.

But barrister Lyndelle Barnett, for the ABC, told the court Josh’s photograph had been published “in a particular circumstance where the information from him was that he doesn’t have a digital footprint and he wouldn’t be able to be identified from his photograph”.

Consequently, when the ABC was ordered to hand over the documents identifying Josh, they refused to do so and chose to drop the public interest defence, issuing a press release on July 12 speaking to the importance of protecting confidential sources.

ABC News Director Justin Stevens said in a statement at the time: “Commitments made and kept by journalists to sources are central to ensuring journalists retain the ongoing trust of people speaking truth to power. They are a key tenet of journalistic ethics and press freedom in this country.”

“We wanted the opportunity to defend our journalism in court; however, a greater principle is now at stake – our ethical responsibility to honour the promise protecting the name of our source.”

But in Wednesday’s closing submissions hearing, Justice Lee took issue with the media statement, criticising the broadcaster for grandstanding, and accepting no fault in the matter despite having revealed elements of Josh’s identity itself.

“I must say I’m disturbed at the press releases, particularly the draft press releases, that were prepared within the ABC which seem to ... reflect no responsibility on their part,” Justice Lee said.

“(They were) trying to suggest the court was making them reveal their sources, when they’ve got a statutory protected privilege which they couldn’t invoke because of their own conduct.

“That was notably absent from the press releases, which was this self congratulatory (statement) to make them look like great fellas to the journalistic community.”

Two days after the ABC had dropped the public interest defence, it was reinstated and is now the sole defence relied upon in the case.

Justice Lee on Wednesday also took issue with evidence from Mr Russell, who had admitted he made changes to a charity invoice before giving it to journalist Josh Robertson.

The invoice was handed over in order to disprove an article which accused him of failing to donate money he had raised through Only Fans to a veterans affairs charity, despite promising to do so.

Justice Lee said if it was proved Mr Russell had manipulated the document, that would constitute “pretty bad behaviour”.

“What he’s accused of doing, more fundamentally, is getting in a witness box, taking an oath, and telling a deliberate lie to a judge,” Justice Lee said. “And then, seeking to produce documents in order to misrepresent the position to a judge, which goes to the heart of the administration of justice.”

ABC barrister Nicholas Owens SC on Wednesday defended the broadcaster’s “very beneficial” reporting, claiming few journalists are bold enough to criticise Australian troops.

“The reporting on the subject of war crimes is a very delicate one for obvious reasons,” Mr Owens said.

“There’s an obvious reluctance that exists to criticise Australian troops. There’s an obvious public merit in the position that the service and sacrifice of troops is to be recognised and applauded.

“And to start saying, ‘Well, yes, I can accept that on the one hand, but on the other hand, I wish to point out that some other things happen which ought not to be lauded’, it’s a topic which is likely to invoke ... pushback.”

Mr Owens said the reporting was in the public interest, as evidenced by the Office of the Special Investigator’s decision to investigate allegations made in the article.

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