The Grant of Interlocutory Injunctions in Defamation Cases in Australia following the Decision in *Australian Broadcasting Corporation v O'Neill*

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1. Introduction

In considering whether or not to grant an interlocutory injunction in defamation cases, common law courts have generally upheld the view that, where a defendant pleads justification, fair comment or privilege and states that they will be able to support this plea with evidence at the trial, the injunction will be refused. This caution is borne of judicial recognition that 'free and general discussion of public matters is fundamental to a democratic society',[1] and is excused in part because, in all but the most extraordinary cases, compensatory damages will be an adequate remedy. As Lord Coleridge stated in the seminal case of *Bonnard v Perryman*:[2]

> But it is obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed: but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.

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1 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 163-164 per Hunt J.

2 [1891] 2 Ch 269 at 284; [1891-4] All ER Rep 965 at 968. Lord Esher MR and Lindley, Bowen and Lopes LJJ concurring.

Over time, this cautious approach to the grant of interlocutory injunctions in defamation cases developed into a so-called rigid or strict rule in various jurisdictions, including Australia.[3] However, following the decisions of *National Mutual Life Association of Australasia Ltd v General Television Corporation Pty Ltd* [4] and *Chappell v TCN Channel Nine Pty Ltd* [5] a more flexible approach had crept into most Australian jurisdictions.

The difference between the rigid and flexible approaches was recently reviewed by the High Court of Australia in *Australian Broadcasting Corporation v O'Neill* [6] in which James O'Neill, a convicted murderer sought to halt the national screening of a documentary entitled *The Fishermen: Journey into the Mind of a Killer* which sensationally accused him of multiple child killings including the disappearance and probable murder of the Beaumont children, arguably Australia's most infamous and unsolved case.

It will be shown below that all of the High Court judges in *Australian Broadcasting Corporation v O'Neill* appeared willing to accept that the flexible approach is appropriate when considering applications for interlocutory injunctions in defamation cases. However, in both of the majority judgments of Gleeson CJ and Crennan J[7] and Gummow and Hayne JJ[8] concern was expressed about the statement of Crawford J, the trial judge in this matter, that as a consequence of the flexible approach, he had 'unfettered discretion'.[9] In considering the requirements for an interlocutory injunction, Gummow and Hayne JJ endorsed the approach taken in the earlier High Court decision in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [10] that the relevant inquiry is first, whether the plaintiff has established a *prima facie* case and secondly, whether the balance of convenience favours the grant of an injunction. The other majority judges, Gleeson CJ and Crennan J, simply agreed with the

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3 *Holley v Smyth* [1998] QB 726 at 740F; *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462 at paragraph 78; *Hosking v Runting* [2005] 1 NZLR 1; *Canada Metal Co Ltd v Canadian Broadcasting Corporation* (1975) 55 DLR (3d) 42; *Stocker v McElhinney (No 2)* [1961] NSWR 1043.

4 [1989] VR 747.

5 (1988) 14 NSWLR 153.

6 [2006] HCA 46.

7 [2006] HCA 46 at [32].

8 [2006] HCA 46 at [85].

9 *O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie* [2005] TASSC 26 at [23].

10 (1968) 118 CLR 618.

explanation of the organising principles propounded by Gummow and Hayne JJ.[11] In the process, the High Court extinguished any suggestion that a different set of equitable principles were to be applied to defamation proceedings. Notwithstanding, the Court as a whole emphasised the importance of the public interest in freedom of speech and the extreme caution that should be exercised in considering applications for injunctions in defamation cases. Despite this recognised need for extreme caution, Kirby J and Heydon J were both convinced that this was an appropriate case for interlocutory relief. The majority however, were more convinced that the balance swung in favour of publication and consequently set aside the orders of Crawford J in the Supreme Court of Tasmania and Blow and Evans JJ in the Full Court restraining the Australian Broadcasting Corporation from broadcasting *The Fishermen: Journey into the Mind of a Killer* until judgment or earlier order.

In this article, we analyse the High Court's decision in *Australian Broadcasting Corporation v O'Neill* against the backdrop of earlier case law. We query the majority's emphasis in reaching their decision on the overriding influence of freedom of speech and the likelihood that O'Neill could only recover nominal damages and conclude that ultimately the decision reached was based on a disdain of the respondent and his 'bad' reputation rather than in any glaring error at first instance.

2. Interlocutory injunctions in defamation cases in Australia

The classic authority on the grant of interlocutory injunctions in defamation cases in Australia is the decision of Walsh J in *Stocker v McElhinney.*[12] In that case, his Honour summarised the precedents established in the early English authorities, concluding that the discretion to grant an interlocutory injunction to restrain publication in defamation cases is to be 'exercised with great caution, and only in very clear cases',[13] where a judge would set aside a finding by the jury to the contrary as unreasonable. In other words, an injunction would be refused:[14]

> [i]f, on the evidence before the judge, there is any real ground for supposing that the defendant may succeed upon any such ground as privilege, or of

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11 [2006] HCA 46 at [19].

12 *(No 2)* (1962) 79 WN (NSW) 541.

13 *(No 2)* (1962) 79 WN (NSW) 541 at 543-544.

14 *(No 2)* (1962) 79 WN (NSW) 541 at 543-544.

> truth and public benefit, or even that the plaintiff, if successful, will recover nominal damages only...

These considerations were seen as 'special exceptions'[15] to the general rule that an injunction would be granted where it was 'just and convenient' to do so. The decision was based primarily on the court's strong support for the overriding principle of free speech. This view was affirmed by Hunt J in the later decision of *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd.*[16] His Honour succinctly summarised the principles as follows:[17]

> I accept as the settled law that the power to grant interlocutory injunctions in defamation cases must be exercised with great caution, and only in very clear cases. A plaintiff must establish that a subsequent finding by a jury that the matter complained of was not defamatory of him would be set aside as unreasonable; that there is no real ground for supposing that the defendant may succeed upon any defence of justification, privilege or comment, and that he, the plaintiff, is likely to recover more than nominal damages only. In particular, questions of privilege and malice are not normally appropriate to be decided upon an interlocutory application. Nor will an injunction go which will have the effect of restraining the discussion in the press of matters of public interest or concern.

In the later case of *Chappell v TCN Channel Nine Pty Ltd* [18] Hunt J contended that his insertion of this last sentence concerning matters of public interest or concern was an 'important addition' to the rules stated in *Stocker v McElhinney.* Other judgments at around the same time tended to reflect the approaches of Walsh J in *Stocker v McElhinney* and Hunt J in *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd.*[19] However, Ormiston J's decision in *National Mutual Life Association of Australasia Ltd v General Television Corporation Pty Ltd* [20] signalled the start of a significant change in approach by the courts. In that case a current affairs program had been broadcast containing material allegedly defamatory of the plaintiffs' sickness and disability policies and the manner in which they were sold to the public. The plaintiffs had subsequently sued for defamation and

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15 *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 350.

16 [1980] 1 NSWLR 344.

17 [1980] 1 NSWLR 344 at 349-350.

18 (1988) 14 NSWLR 153 at 158.

19 For example see *Swimsure (Laboratories) Pty Ltd v McDonald* [1979] 2 NSWLR 796; *Gabriel v Lobban* [1976] VR 689; *Edelsten v John Fairfax & Sons Ltd* [1978] 1 NSWLR 685; *Harper v Whitby* [1978] 1 NSWLR 35.

20 [1989] VR 747.

conspiracy to injury. When the defendants proposed to broadcast a second segment on the same topic the plaintiffs objected, applying to the Supreme Court of Victoria for an interlocutory injunction.

In a landmark decision, Ormiston J held that while the facts before him were insufficient for any departure from the general rule, he could envisage circumstances where such a departure could ensue, commenting:[21]

> ... the real question on any application such as this, where the defamatory nature of the words is not disputed, is whether it is 'just and convenient' to grant relief, and this is to be determined in particular by what is the balance of convenience and hardship. It is at this point, in my opinion, that the courts have for 100 years determined that a balance is normally be struck in favour of the free discussion of matters of public or general interest, particularly where damages are both a normal and sufficient remedy. If the authorities to which I have referred go further, then they should not be read as laying down more than prima facie tests, which must be adapted to the broad principles which have always governed the grant of equitable relief.

Importantly, whilst Ormiston J accepted that the particular circumstances of some cases would warrant the grant of an interlocutory injunction, in general, most applications would be refused:[22]

> I have already accepted that there is a discretion which will be exercised if it be 'just and convenient' to do so, but in considering the balance of convenience one cannot ignore the rule of public policy designed to permit public discussion of matters of general concern.

Only two months after Ormiston J's decision in Victoria, Hunt J, in the Supreme Court of New South Wales decision of *Chappell v TCN Channel Nine Pty Ltd,*[23] agreed with his Victorian counterpart, holding that the 'rules' in *Bonnard v Perryman* laid down 'no more than prima facie tests which must be adapted to the broad principles which have always governed the grant of equitable relief'.[24] This judgment marks a significant extension of his Honour's earlier decision in *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd.*[25] In *Chappell v TCN Channel Nine Pty Ltd*, the plaintiff, who had formally captained the Australian cricket team, sought an interlocutory

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21 [1989] VR 747 at 754.

22 [1989] VR 747 at 757.

23 (1988) 14 NSWLR 153.

24 (1988) 14 NSWLR 153 at 161.

25 [1980] 1 NSWLR 344.

injunction against the proposed broadcasting of allegedly defamatory material by the defendants.

After reviewing the English authorities Hunt J remained unimpressed by the weight of judicial authority, holding that the judiciary was increasingly favouring flexibility in applications for an interlocutory injunction including those granted in defamation cases observing:[26]

> In my view, the time has come in New South Wales to reject as *rigid rules of practice* those rules laid down by Lord Esher in *William Coulson and Sons v James Coulson and Co.* That I am free to do so as a matter of precedent has already been established. Those decisions of appellate courts elsewhere in Australia in which Lord Esher's rigid rules have been applied in defamation cases are, of course, entitled to due respect, but I do not find them to be persuasive because ... there was no consideration given to following any other course. ...
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> That is not to say that the considerations enshrined in the 'rules' laid down by Lord Esher should be ignored in an application for an interlocutory injunction in defamation cases. Far from it. Those considerations should in my view continue still to be relevant, but not in the absolute terms in which they were expressed over 100 years ago by Lord Esher.

Justice Hunt's influential decision was affirmed by the New South Wales Court of Appeal in *Marsden v Amalgamated Television Services Pty Ltd.*[27] Whilst their Honours refused to grant the interlocutory injunction in that case - ostensibly because the applicant's private life was already a matter of public discussion - they upheld the flexible approach, maintaining that the so-called rigid rules were better viewed as 'powerful considerations' rather than a checklist demanding compliance.[28]

The importance of the decisions reached by Ormiston J in Victoria and Hunt J in New South Wales was the recognition that interlocutory injunctions in defamation cases could be accommodated adequately in the principles that governed the grant of interlocutory injunctions in general, but with the significant caveat that the importance of free speech demanded 'exceptional caution' in their application. In our view, the distinction between the rigid and flexible approaches is illusory, or, at best, overstated. Indeed, it could be argued that the earlier decisions of *Stocker v McElhinney*[29] and *Church of Scientology of California*

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26 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 163.

27 (unreported 2 May 1996) per Priestley, Handley & Cole JJA.

28 (unreported 2 May 1996) at 14.

29 *(No 2)* (1962) 79 WN (NSW) 541.

Incorporated v Reader's Digest Services Pty Ltd [30] were not, in fact, examples of the application of the rigid rule. In both cases, the judges turned their minds to the usual balance of convenience considerations. For instance, it appears that they were both of the view that, even in those instances where a probable case has been made out, unless the applicant could also satisfy the requirement that they would be entitled to more than nominal damages the injunction should still be refused.[31] In short, it is suggested that their Honours were attempting solely to provide guidance within the broad discretionary parameters permitted in determining equitable remedies, and consequently these 'powerful considerations' were never meant as rigid rules of compliance.

The flexible approach subsequently found support in South Australia in the Full Court decision of *Jakudo Pty Ltd v South Australian Telecasters Ltd*[32] and in Western Australia in *JDP Australasia Pty Ltd v Pneumatic Systems International Pty Ltd,*[33] although the rigid approach has continued to be applied in Queensland.[34] In the most recent case involving James O'Neill and the Australian Broadcasting Corporation, the Tasmanian Supreme Court weighed into the controversy.

3. Background to the High Court decision in Australian Broadcasting Corporation v O'Neill

In an urgent application to the Supreme Court of Tasmania, the applicant, James O'Neill a convicted child killer who had been sentenced to life imprisonment in 1975, sought an interlocutory injunction restraining the defendants from screening *The Fishermen: Journey into the Mind of a Killer,* a documentary already being advertised and due to be screened nationally less than a fortnight later.[35] At the hearing of the application, it was conceded by the defendants that the documentary made allegations about other child killings O'Neill may have been responsible for,

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30 [1980] 1 NSWLR 344.

31 *Stocker v McElhinney* and *(No 2)* (1962) 79 WN (NSW) 541 at 544; *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 357-358.

32 (1997) 69 SASR 440 at 443.

33 [1999] WASC 14 at [15].

34 *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199; *Australian Broadcasting Corporation v Hanson* (unreported, Court of Appeal of Queensland, 28 September 1998).

35 *O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie* [2005] TASSC 26.

including the disappearance and probable murder of the Beaumont children.

Quite apart from these explosive allegations, the proposed screening coincided with an application for parole that O'Neill had made to the Parole Board of Tasmania. According to O'Neill, if the documentary were screened it would affect his chances of success before the Parole Board and, even if such an application were successful, it would extinguish any chance he had of living a solitary and unidentified existence anywhere in Australia.[36]

Weighing the competing interests, Crawford J granted the interlocutory injunction. His Honour's judgment was founded on the flexible approach in a case where adoption of the strict rigid rules approach would almost certainly have seen the application refused but where there was a possibility of irreparable harm if the injunction were not granted. On appeal, the Full Court of the Supreme Court affirmed the decision, the majority (comprising Blow and Evans JJ, Slicer J in dissent) conceding that whilst the judiciary 'have been most reluctant to grant interlocutory injunctions in defamation cases'[37] the flexible approach was to be preferred.[38]

When an application by the Australian Broadcasting Corporation for special leave to appeal to the High Court of Australia was granted, it appeared likely that there would be pronouncement on the appropriate principles to be applied across Australia in determining the grant of an interlocutory injunction in defamation cases.

4. Australian Broadcasting Corporation v O'Neill

The High Court decision in *Australian Broadcasting Corporation v O'Neill*[39] is a landmark case for defamation in Australia. The 4-2 decision in favour of the Australian Broadcasting Corporation is at its most elementary a significant win for free speech, as the media were swift

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36 For example in a letter to *The Mercury* O'Neill claims that attempts were being made to keep him in jail through 'trial by media'. 'He instructs us that he believes it is totally irresponsible and grossly unfair that he is being persecuted 30 years after his conviction,' his solicitor, Benedict Bartl stated. 'He believes he has served his time and deserves a second chance if the parole board deems him suitable for release.' G Lower, Killer pleads for second chance, *The Mercury*, Thursday 7th April 2005 at 1-2.

37 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [53].

38 *Australian Broadcasting Corporation v O'Neill* [2005] TASSC 82 at [67].

39 [2006] HCA 46.

to acknowledge.[40] The decision upholds the English precedents that 'exceptional caution' must be exercised in granting an interlocutory injunction to restrain prior publication in defamation cases. The decision also has important implications for persons with 'unpromising' reputations and there was also important *obiter dictum* on the issue of 'trial by media'.

4.1 Rejection of the rigid approach

Perhaps the clearest message from the High Court in *Australian Broadcasting Corporation v O'Neill* is that the bench was at one in their rejection of the rigid approach in deciding applications for interlocutory injunctions in defamation actions. All of the judgments in *Australian Broadcasting Corporation v O'Neill* addressed this issue of whether there is a distinct set of rules relating to defamation actions. All agreed that defamation requires a particularly cautious approach, but that this approach is but one aspect of the normal exercise of curial discretion in decisions regarding interlocutory injunctions, which require consideration of what is just and convenient.[41] This approach is encapsulated in the statement by Gleeson CJ and Crennan J that '[i]nflexibility is not the hallmark of a jurisdiction that is to be exercised on the basis of justice and convenience'.[42] However, it must be acknowledged that their Honours followed this statement with words of extreme caution:[43]

> Formulations of principle which, for purposes of legal analysis, gather together considerations which must be taken into account may appear rigid if the ultimate foundation for the exercise of the jurisdiction is overlooked.
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> In the context of a defamation case, the application of those organising principles will require particular attention to the considerations which courts have identified as dictating caution. Foremost among those considerations is the public interest in free speech. A further consideration is that, in the defamation context, the outcome of a trial is especially likely to turn upon issues that are, by hypothesis, unresolved. Where one such issue is justification, it is commonly an issue for jury decision. In addition, the plaintiff's general character may be found to be such that, even if the publication is defamatory, only nominal damages will be awarded.

Justices Gummow and Hayne also rejected the distinction between rigid and flexible approaches, concluding that '[t]hese cases [those taking the

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40 For example, see T Dick, Beaumont decision a win for free speech, *Sydney Morning Herald*, 29th September 2006.

41 See, for example, section 11(12) of the *Supreme Court Civil Procedure Act 1932* (Tas).

42 [2006] HCA 46 at [18].

43 [2006] HCA 46 at [18]-[19].

flexible approach] rightly stress the application in this field of the general principles exemplified in Beecham'.[44] However, they added that the flexible approach gives rise to two difficulties. First, it tends to give insufficient weight to the plaintiff's character and reputation on the one hand and freedom of the press on the other. And secondly, it leads too readily to an assumption that all that is involved is an exercise of an unbounded discretion.[45]

Justice Kirby was also of the view that applications for injunctions in defamation cases should be considered within the framework of the general principles governing the grant, or refusal of such injunctions. For Kirby J, however, the discretionary character of the general rule must be recognised and hence, 'it is unlikely that any exercise of the judicial function of that character will permit a particular feature of the case (such as the value of free speech or free press) to swamp entirely other features.[46] Justice Heydon's lengthy judgment would also seem to lend support to Kirby J's views as to the broad discretionary character of the general rule.[47]

The case of *Australian Broadcasting Corporation v O'Neill* signals that there is now clear High Court authority for the application of the flexible approach to the grant of interlocutory injunctions in defamation cases. However, the majority emphasised that in the exercise of this discretion, considerations of free speech are particularly important.[48] In doing so, the majority emphasised the importance of the distinction between the public interest in freedom of speech, which is relevant at the interlocutory stage, and the public interest or public benefit in publication, which, at the time when the proceedings were instituted, was a relevant consideration with regard to the truth defence under the *Defamation Act 1957* (Tas). The majority was critical of the lower court judges (apart from Slicer J) for failing to maintain this distinction.

It could be argued that as a result of the majority decisions in *Australian Broadcasting Corporation v O'Neill* we now have a *de facto* rigid rule, in the sense that, whenever freedom of speech considerations are raised, an interlocutory injunction will be refused, irrespective of the risk of irreparable harm to the plaintiff. While the majority judgments in

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44 [2006] HCA 46 at [78].

45 [2006] HCA 46 at [79]-[83].

46 [2006] HCA 46 at [147].

47 See particularly [2006] HCA 46 at [280]-[281].

48 See particularly [2006] HCA 46 at [30]-[32] per Gleeson CJ and Crennan J.

Australian Broadcasting Corporation v O'Neill have not gone so far as Lord Denning MR in suggesting that the media can never be restrained in advance from publishing,[49] the effect of their decision is that the cards are stacked very much in favour of the proponent of free speech.

4.2 A return to the '*prima facie*' test?

The majority judgments of the High Court in *Australian Broadcasting Corporation v O'Neill* [50] provide that the relevant principles to be applied in determining the grant of an interlocutory injunction in defamation cases are those adopted by the Court in *Beecham Group Ltd v Bristol Laboratories Pty Ltd.*[51] In that case it was held that when determining the grant of an interlocutory injunction the court must address two main inquiries:[52]

> The first is whether the plaintiff has made out a prima facie case ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.

The problem with the prima facie case test propounded by the High Court in *Beecham* and like cases in the UK was that it encouraged courts to conduct 'mini trials' at an early stage of proceedings. In effect, the courts undertook 'a preliminary trial of the action upon evidential material different from that upon which the actual trial would be conducted, that is, evidence given on affidavit not tested by cross-examination'.[53] Lord Diplock took particular issue with this approach in the seminal case of *American Cyanamid Co v Ethicon Ltd*,[54] stating that:[55]

> In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50

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49 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 16-17.

50 See [2006] HCA 46 at [19] per Gleeson CJ and Crennan J and at [65]-[72] per Gummow and Hayne JJ.

51 (1968) 118 CLR 618.

52 (1968) 118 CLR 618 at 622-623.

53 G Dal Pont and D Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd Edition) (LBC Information Services: NSW 2000) at 815.

54 [1975] AC 397.

55 [1975] AC 397 at 406.

> per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

Rather, for His Lordship, '[t]he court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried'.[56] In summary, the key points to come from Lord Diplock's judgment are that the first issue to be addressed in deciding whether or not to exercise the discretion is not to ask whether the plaintiff has a prima facie case or a probability of succeeding at trial, but whether there is a serious question to be tried, or, put another way, they have any real prospect of succeeding at trial. Dictum by Lord Diplock that this requires that the claim be neither frivolous nor vexatious has frequently been adopted in subsequent cases,[57] arguably setting too low a threshold for the grant of interlocutory injunctions.

This apparent disparity in the threshold requirement for interlocutory injunctions formulated by the High Court in *Beecham* and Lord Diplock in *American Cyanamid* was rejected by Gummow and Hayne JJ in *O'Neill,* where they stated:[58]

> When *Beecham* and *American Cyanamid* are read with an understanding of the issues for determination and an appreciation of the similarity in outcome, much of the assumed disparity in principle between them loses its force. There is then no objection to the use of the phrase 'serious question' if it is understood as conveying the notion that the seriousness of the question, like the strength of the probability referred to in *Beecham*, depends upon the considerations emphasised in *Beecham*.

In conclusion, it appears that, whatever the test is called, the court should not undertake a preliminary hearing on the merits. But it does have to deal with the question of whether the plaintiff has grounds for seeking interlocutory relief. According to Gummow and Hayne JJ, relevant considerations include the nature of the action (defamation being different from other causes of action because of the freedom of speech issues that are raised by suppressing publication prior to consideration of the merits) and the practical consequences. It would seem that all of the judges in

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56 [1975] AC 397 at 407.

57 For some recent examples across a range of Australian jurisdictions see: *Soiland Pty Ltd v Ridgepoint Corporation Pty Ltd* [2005] WASC 124 (10 June 2005) at [22]; *Mobileworld Operating Pty Ltd v Telstra Corporation Limited* [2005] FCA 1365 (23 September 2005) at [21]; *Graetz Pty Ltd & Anor v NTHG Pty Ltd* [2002] NTSC 40 (7 June 2002) at [25]; *Gonsalves v Debreczini* [1999] NSWSC 488 (24 May 1999) at [19].

58 [2006] HCA 46 at [70].

O'Neill accepted that these matters should be considered[59] – the question is whether this should be as part of or a precursor to the balance of convenience considerations.

The principal difficulty with the High Court's decision is that the reason that the *Beecham* test had previously been reformulated in Australia[60] continues to remain valid. Essentially, it amounts to the courts being required to prejudge the respective parties' cases at a preliminary proceeding, a situation in which the likelihood of unfairness is a distinct possibility. This potential for unfairness arises due to the possibility that not all of the 'evidence' will be known or even become apparent until either a later date or at the final hearing.[61] This state of affairs is particularly noticeable in defamation cases where generally an application to restrain publication will arise urgently, and where consequently the ability of the applicant to demonstrate a prima facie case may not yet have been established but where the possibility of irreparable harm is apparent.

A case in point is that which was before the High Court. O'Neill was always going to have difficulties rebutting the documentary's circumstantial evidence. With the Supreme Court of Tasmania hearing the application only days before the proposed screening the only 'evidence' that was able to be obtained was two affidavits: one from O'Neill denying that he had abducted and murdered the Beaumont children and another from Graeme Barber the Director of Prisons who had on a prior occasion viewed the documentary.

With urgent applications, affidavit evidence may be the only evidence that can be readily obtained. The difficulties that this creates for plaintiffs in defamation actions was starkly borne out in the proceedings before the Supreme Court of Tasmania, with none of the respondents tendering either a transcript or copy of the documentary. Apart from two untested affidavits, the only other 'evidence' that O'Neill was able to tender were

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59 [2006] HCA 46 at [33] per Gleeson CJ and Crennan J, at [71]-[72] per Gummow and Hayne JJ, at [115] per Kirby J and at [295]-[299] per Heydon J.

60 *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland* (1982) 46 ALR 398; *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 52 ALR 651 at 653; *A v Hayden (No 1)* (1984) 56 ALR 73 at 77-78; *Queensland v Australian Telecommunications Commission* (1985) 59 ALJR 562; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; *Richardson v Forestry Commission* (1987) 164 CLR 261 at 274-276.

61 For example see Justice Marshall's comments in *Hogan v Attorney-General of Newfoundland* (1998) 163 DLR (4th) 672 at 684.

a bundle of papers which demonstrated that he and the Tasmanian Department of Justice had been 'badly misled and deliberately told misrepresentations... concerning the proposed content of the documentary'.[62] However, whilst these documents were not relevant to the issue of whether or not the documentary contained defamatory imputations it was clearly open to the court to think the worst. As Kirby J noted:[63]

> The potential for distortion, one-sidedness and partiality in a film produced in such a way, under such conditions, is not inconsiderable. It was open to the primary judge to conclude that the risk of presenting the respondent unfairly, in the worst possible light, was very large indeed.

The decision by the High Court in *Australian Broadcasting Corporation v O'Neill* to return to the *prima facie* test in determining the grant of interlocutory injunctions sets a high bar for future applications, particularly in defamation cases.[64] As a consequence, in future defamation cases it is likely that free speech will loom even more largely over any application seeking prior restraint of a publication. In the circumstances of the case, the decision reached seems harsh on O'Neill who was clearly able to establish that the Australian Broadcasting Corporation and the other respondents had 'misrepresented' to him and the Tasmanian Department of Justice as to the content of the documentary. Unfortunately for O'Neill he was unable to clearly establish a prima facie case, with the respondents able to demonstrate that their defences were capable of argument. In future, successful applicants will have to establish a clear prima facie case as a first step and only then can they hope to convince the Court that the balance of convenience lies in the grant of an injunction. In general, the balance of convenience will only rest with the applicant in a case where there is the probability of irreparable harm.

The High Court in *Australian Broadcasting Corporation v O'Neill* has sought to restructure significantly the way in which the relevant questions are assessed. That is, rather than weighing up the competing interests as has generally been done, the High Court has held that when an

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62 *O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie* [2005] TASSC 26 at [10].

63 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [121] per Kirby J.

64 However, these concerns are not exclusive to defamation actions. In a recent application for an injunction in a copyright action, the plaintiff was not able to convince the court that it had a prima facie case even though the decision centred around a technical decision as to the permissible duration of broadcasts for fair dealing in news reporting. See *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd* [2007] FCA 568.

application for an interlocutory injunction in defamation cases is sought, the court must first turn their mind to the question of whether or not a prima facie case has been made out and if the case is at all ambiguous the injunction will be refused. It is only after the applicant has clearly established a prima facie case that the balance of convenience factors such as irreparable harm and delay can be considered.

4.3 Protection of reputation in defamation actions

Perhaps the most disappointing aspect of the majority decisions in *Australian Broadcasting Corporation v O'Neill* was the holding that the respondent was a 'most unpromising candidate'[65] for the relief sought as he would only be entitled to nominal damages.[66] The majority were careful not to endorse the view that the respondent was a 'libel-proof plaintiff', as the doctrine is known in the United States. However, their narrow interpretation of the remedies sought has, as Justice Kirby noted in his judgment, set a precedent that 'any prisoner, serving a sentence for a heinous crime is fair game for anything at all that a media organisation ... might choose to publish'.[67]

In the influential article *The Social Foundations of Defamation Law: Reputation and the Constitution*[68] Robert Post clearly enunciates three distinct concepts of reputation that defamation law has sought to protect: reputation as property, as honour and as dignity. While reputation as property is conceptualised as an asset earned by an individual's efforts and labour, and reputation as honour is thought of as an individual's fulfilment (or failure to fulfil) the requirements of their social position, reputation as dignity is concerned with protection of an individual's intrinsic worth. As Justice Stewart in the United States decision of *Rosenblatt v Baer* observed:[69]

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.

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65 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [33] per Gleeson CJ and Crennan J.

66 Also see *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [89] per Gummow and Hayne JJ.

67 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [165].

68 R Post, The Social Foundations of Defamation Law: Reputation and the Constitution (1986) 74 *California Law Review* 691.

69 *Rosenblatt v Baer* 383 US 75 (1966) at 92 per Stewart J. See also the Canadian decision of *Hill v Church of Scientology* (1995) 126 DLR (4th) 129 at 163 per Cory J.

However, Post also acknowledges that whilst the notion of reputation as dignity is intrinsic to every human being, in his view reputation is ultimately concerned with 'membership within the community' and is therefore societal. Given this acknowledgement it is therefore not surprising that an individual's reputation is fluid, capable of both growth and decline. In our view, the majority of the High Court focused too much attention on O'Neill having been convicted of murder and being sentenced to life imprisonment in 1975 rather than acknowledging that at that time, a life sentence for murder was mandatory.[70] They also failed to acknowledge that, since his conviction, he had been housed in a minimum security prison farm for many years, had been allowed out on day release to go fishing, was involved in a successful rehabilitation program run by the prison, and it was likely that he would receive parole or at the very least be re-sentenced with the likelihood that he would be released in the foreseeable future.[71]

There was also a failure of the majority to recognise the harm that would result from the documentary being shown. It was O'Neill's firm belief that if the documentary were shown it would harm his chances of success before the Parole Board of Tasmania, and, that even if he were to be granted parole, would affect his chances of being able to live a quiet life following his release from prison.[72] That is, O'Neill believed that irreparable damage would result from publication of the imputations.

The other significant difficulty with the majority decision was its failure to recognize another equally important consideration in a defamation action namely the vindication of the applicant to the public through having the allegations dismissed as false.[73] O'Neill was never solely interested in the compensatory damages that he may have received

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70 Mandatory life sentences were only abolished with the passing of the *Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994* (Tas).

71 The failure of the court to look beyond the circumstances that existed at the time of O'Neill's imprisonment is also borne out in the recognition that the Statute book has substantially changed with regard to the intrinsic worth of prisoners. For example in 1991 Tasmania had introduced the *Prisoners (Removal of Civil Disabilities) Act 1991* into the statute book. This Act removed the restrictions of long term prisoners to sue. See for example *O'Neill v Australian Broadcasting Corporation & Ors* [2005] TASSC 75.

72 For example see *O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie* [2005] TASSC 26 at [20].

73 For example see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 per Windeyer J; *John Fairfax and Sons Ltd v Palmer* [1987] 8 NSWLR 297 at 309 per Samuels JA.

following a favorable outcome to his action. This case was opportunity for him to establish his innocence, thereby providing him with the time he needed for his parole and/or re-sentencing[74] to be assessed, with a view to starting his life anew after thirty years in prison. As was recognized as long ago as Blackstone:[75]

> And the chief excellence of the civil action for a libel consists in this, that it not only affords a reparation for the injury sustained, but it is a full vindication of the innocence of the person traduced.

Whilst not expressly endorsing the introduction of the 'libel-proof plaintiff' doctrine into Australia, the majority of the High Court were swift in their judgment of O'Neill's reputation, labelling him a 'most unpromising candidate'[76] and if successful as warranting of 'no more than nominal damages'.[77] The 'libel-proof plaintiff' doctrine that operates in the United States allows courts to dismiss a defamation action if it appears that a plaintiff's reputation has not been significantly harmed.[78] The doctrine, which is composed of two distinct branches – the 'issue specific' branch[79] and the 'incremental' branch,[80] has been rejected by

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74 *Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994* (Tas).

75 Blackstone, *Commentaries on the Laws of England* 15th ed, vol 3 Ch 8, note at 126.

76 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [33] per Gleeson CJ and Crennan J.

77 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [89] per Gummow and Hayne JJ.

78 The terms were first used in Note, The Libel-Proof Plaintiff Doctrine (1985) 98 *Harvard Law Review* 1909. Also see D Marder, Libel Proof Plaintiffs – Rabble Without a Cause (1987) 67 *Boston University Law Review* 993; E Peyton, Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine (1993) 34 *Santa Clara Law Review* 179; J Hemphill, Libel-Proof Plaintiffs and the Question of Injury (1992) 71 *Texas Law Review* 401.

79 The 'issue specific' branch involves dismissal of the case on summary judgment if the judge determines that the plaintiff's reputation is already so tarnished that any harm caused by the publication challenged would lead only to nominal damages. *Cardillo v. Doubleday* 518 F 2d 638 (2d Cir 1975); *Ray v. Time Inc* 452 F Supp 618 (W.D. Tenn. 1976); *Jackson v. Longcope* 476 NE 2d 617 (Mass. 1985); *Wynberg v. National Enquirer* 564 F Supp 924 (CD Cal 1982).

80 The 'incremental branch' involves dismissal of the case on summary judgment where the judge determines that unchallenged statements within an article or group of statements challenged damage a plaintiff's reputation to such a degree that the incremental harm caused by the challenged statement would lead only to nominal damages. *Simmons Ford Inc v. Consumers Union of United States* 516 F Supp 742 (S.D.N.Y. 1981); *Herbert v. Lando* 781 F 2d 298 (2d Cir 1986); *Crane v. Arizona Republic* 972 F.2d 1511 (9th Cir. 1992); *Jones v. Star, Jones v. National Enquirer* No. 94 - CV - 1468, 1995. U.S. Dist. LEXIS 22080 (Conn. 1995); *Church of Scientology International v. Time Warner* 932 F. Supp. 589 (S.D.N.Y. 1996); *Jewell v. NYP Holdings* 23 F. Supp.2d 391 (S.D.N.Y. 1998).

the Supreme Court of the United States,[81] although it continues to have some support within the State courts in that country.

There are a number of reasons why the libel-proof plaintiff should not be adopted in Australia. First, it leaves persons with an already 'bad' reputation extremely vulnerable to attack from the media.[82] A further difficulty with the doctrine is its rejection of the individual's 'right' to equal justice and protection before the law.[83] For example in *Davis v. United States*[84] the court held that even individuals with prior criminal convictions 'must be assured that they have a stake in our society, and that they can achieve justice by application to the law'.[85] To do otherwise, the court admonished 'would tend to go contrary to our society's basic tenets, by establishing a kind of outlaw, outside the protection of the law'.[86]

A final difficulty with the libel-proof plaintiff doctrine is its inherent injustice to a plaintiff who wishes to start afresh by proving their innocence. By adopting the libel-proof plaintiff doctrine the courts are circumventing the opportunities of plaintiffs such as James O'Neill to prove their innocence and to thereby improve the standing of their reputation in the community. As one Judge in the United States concluded about the libel-proof plaintiff doctrine:[87]

> [T]he theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law,

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81 *Masson v. New Yorker Magazine Inc.* Ill S. Ct. 2419 (1991).

82 The 'Kick 'em while they are down' defence in the words of one commentator: see J Hemphill, Libel-Proof Plaintiffs and the Question of Injury (1992) 71 *Texas Law Review* 401 at 430. Also see *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [165] per Kirby J.

83 Article 17 of the International Covenant on Civil and Political Rights provides (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks. Also see *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 at 622 per Lord Nicholls of Birkenhead.

84 409 F. 2d 453 (D.C. Cir. 1969). The case concerned whether the trial court had erred in excluding evidence of a robbery victim's own convictions for assault and rape. The Appellate court, the District of Columbia Circuit holding that the trial court properly excluded the evidence reasoning that admitting such evidence would create a risk that the jury would acquit based on their dislike of the victim rather than the guilt of the attacker.

85 409 F. 2d 453 (D.C. Cir. 1969) at 457.

86 409 F. 2d 453 (D.C. Cir. 1969) at 457. Also see E Peyton, The Constitutionality of the Libel-Proof Plaintiff Doctrine (1993) 34 *Santa Clara Law Review* 179 at 211.

87 *Liberty Lobby v. Anderson* 7466 F 2d 1563 (D C Cir 1984) at 1568.

> however, proceeds upon the optimistic premise that there is a little bit of good in all of us – or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse.

The decision of the majority of the High Court on the issue of reputation is a worrying precedent that circumvents one of the fundamental principles of defamation law, namely the protection of reputation, however 'nominal' it may be.[88] In finding for the Australian Broadcasting Corporation the majority of the High Court took an extremely narrow view of 'reputation', and in doing so, failed to consider the potential for reform. This is particularly pertinent for people in the position of O'Neill: prisoners who have 'served their time' and have rehabilitated to the point where they are being considered for parole. It is of concern that the majority of the High Court were unable to see beyond O'Neill's conviction more than thirty years ago.

A further consequence of the majority's decision on this point is that it tends to suggest that the only reason for bringing a defamation action is to seek compensation for the damage to reputation by publication of the defamatory imputations. In the instant case, the majority of the High Court failed to recognize the more important rationale for O'Neill bringing his action – the dismissal of baseless allegations and the opportunity to live in solitude following his release from prison. In this regard, equitable remedies including declarations and permanent injunctions could have been made available to O'Neill had he succeeded at trial. Moreover, while it was accepted by O'Neill's counsel that, if the court were concerned solely with compensatory damages, he would probably only be entitled to a nominal award, the reproachful conduct of the defendants is this case warranted some consideration. O'Neill and the Department of Justice in Tasmania were badly misled about the content of the documentary[89] and, as a consequence, it is possible that aggravated damages might have been awarded.

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88 On this point, see Kirby J's judgment at [162]-[164].

89 For example in a 'Department of Justice Briefing Note' dated the 4th February 2005 it is noted 'The documentary had Departmental support and consent, however, the finished product looked nothing like the initial written proposal…' While in a letter written by Mr Graeme Barber, the Director of Prisons to Mr Gavin Lower a journalist with *The Mercury* on the 4th February 2005 he writes: 'The Prison Service is distressed that the content and emphasis of the documentary does not appear to reflect the original intent of the film producers as described to the then Department of Justice…'.

It is hoped that in future courts will recognize both that reputation is not a stagnant concept, but rather that it is capable of changing over time, and that compensation for damage to reputation is not the only tool, nor even, in some circumstances, the most appropriate tool available to the courts to remedy the harm resulting or likely to result from the publication, actual or threatened, of defamatory imputations.

4.4 Freedom of speech, prior restraint and trial by media

The risk in allowing unfettered freedom of speech by the media is that at times this can amount to 'trial by media', or even, in some circumstances, to 'conviction by media'.[90] In defamation law, a balance is struck between the public interest in freedom of speech and the protection of reputation through the extensive body of defences that are available to defendants in such actions. However, where a plaintiff seeks to suppress publication before the relative strengths of the plaintiff's cause of action and the defendant's defences are adjudicated, the threat to freedom of speech is particularly pronounced. It is beyond debate that exceptional care is required of judges in considering applications for interlocutory injunctions in defamation actions because such orders operate as prior restraints on freedom of speech. Not unexpectedly, consideration of this issue was a major component of each of the High Court judgments in *Australian Broadcasting Corporation v O'Neill.*[91]

Crawford J at first instance in *O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie,*[92] expressed the view that public allegations to the effect that a person has committed crimes of which he has not been convicted are not for the public benefit. For his Honour, the public interest dictates that such allegations 'should usually be made in public only as a result of charges and subsequent conviction'.[93] The difficulty with this proposition is that it seems to ignore the valuable contribution that the media makes in uncovering illegal activity and prompting action by the authorities. As Gleeson CJ and Crennan J rightly pointed out in their judgment in *Australian Broadcasting Corporation v O'Neill*, '[c]ondemnations of trial by media sometimes have a sound basis, but they cannot be allowed to obscure the reality that criminal charges are sometimes laid as a response to media

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90 Crawford J alluded to this problem in the first instance decision in *O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie* [2005] TASSC 26 at [28].

91 [2006] HCA 46.

92 [2005] TASSC 26.

93 *Ibid.*

exposure of alleged misconduct'.[94] Defamation law draws the line between legitimate and illegitimate allegation by the media by allowing those wronged by such allegations to recover damages and, in some instances, suppress further publication. But there must be some point where the risk of irreparable harm is so high and the actions of the media are so contumelious that prior restraint is the only acceptable option. It is suggested that the actions of the Australian Broadcasting Corporation and the other defendants in this case may well have crossed this line.

Both Kirby J and Heydon J alluded to the inappropriateness of some of these actions including the dishonest way in which the plaintiff's cooperation was obtained and the conduct of the Australian Broadcasting Corporation during the course of the litigation. For example in O'Neill's affidavit, read at first instance, he alleged that Mr Davie, the third defendant and maker of the documentary in issue, sought the plaintiff's cooperation by dishonest means. Neither the Corporation nor Mr Davie attempted to rebut the plaintiff's accusations and therefore, according to Heydon J, '[t]he conclusion that the plaintiff's account of his dealings with Mr Davie was correct may therefore be confidently drawn.'[95] Both Kirby J and Heydon J criticised the Corporation for concentrating on 'time-consuming but sterile sideshows of protracted interlocutory appeals rather than focusing their energies on an early trial of the action.'[96]

The actions of the Australian Broadcasting Corporation caused Heydon J to issue the following stern rebuke:[97]

> The Corporation's conduct in this regard will surprise many. ... Misconduct of this type on the part of commercial media defendants is common. The Corporation, however, might be thought to be in a different position from commercial media defendants. It has no need to seek out, attract and retain advertisers. Its survival does not depend on securing mass audiences or on appealing to the lowest common denominator in public taste.

For these and other reasons, Heydon J concluded that 'it might be thought that the Corporation, like the Federal Government itself, should conform to higher standards and ideals than may be current in society at large...'[98] Regrettably, the fact that the defendants never sought to tender the documentary itself meant that the judges were not able to make any

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94 [2006] HCA 46 at [26].

95 [2006] HCA 46 at [179].

96 [2006] HCA 46 at [108] per Kirby J and [177] per Heydon J.

97 [2006] HCA 46 at [180].

98 *Ibid.*

assessment as to the allegations contained therein. This may well have resulted in further condemnation by them.

All of the judges in *Australian Broadcasting Corporation v O'Neill* traced the long history of freedom of the press.[99] For the majority, the importance of this principle was sufficient to override concerns about trial by media.[100] But the real difficulty with this conclusion is that it fails to acknowledge modern media practices.[101] There was, no doubt, a time when the media played a significant role in disabusing the rich and powerful. However, recent surveys of public attitudes towards the media illustrate a marked increase in cynicism about the news media and a concomitant decrease in trust and confidence, particularly with regard to accuracy, compassion, fairness and freedom from bias.[102] Justifications for media practices based on public interest rationales must lose some traction in the light of such findings.

The media does, of course, continue to play a vital role in promoting discussion of governmental and political matters in democratic societies. This is rightly reflected in the protections given to the media in the defamation defences. It is also rightly reflected in the reluctance of the judiciary to restrain publication of such matters prior to hearing on the merits. But different considerations must surely come into play when prior restraint concerns discussion of non-political matters, particularly when the there is no demonstrated urgency or contemporaneity. Callinan J drew particular attention to this issue in the earlier and equally well-

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99 [2006] HCA 46 at [31] per Gleeson CJ and Crennan J; [87] per Gummow and Hayne JJ; [252]-[268] per Heydon J. Kirby J focused his attention on the distinction between the United States and Australia in their approaches to the protection of freedom of speech at [111]-[114].

100 [2006] HCA 46 at [32] per Gleeson CJ and Crennan J; [87] per Gummow and Hayne JJ.

101 For critical analysis of modern media practices from the Australian perspective see particularly: Graeme Turner, Frances Bonner and P. David Marshall, *Fame Games: the Production of Celebrity in Australia* (Cambridge: Cambridge University Press; 2000); Catharine Lumby, *Gotcha: Life In A Tabloid World* (Sydney: Allen and Unwin; 1999).

102 See. for example, The Pew Research Centre for the Public and the Press, 'The Media: More Voices, Less Credibility' in *Trends 2005* (2005) Chapter 3 at 52. Available at: <http://people-press.org/commentary/display.php3?AnalysisID=105> (accessed 29 October 2007). From the Australian perspective, see Roy Morgan Research, 'Only 18% of Australians Believe the Media is Doing a Good Job Covering Elections and Controversial Topics Without Bias - TV is Main Source of News' (2004) *Finding No 3789*. Available at: <http://www.roymorgan.com/news/polls/2004/3789/> (accessed 29 October 2007).

known Tasmanian case of *Australian Broadcasting Corporation v Lenah Game Meats*:[103]

> ... the assertion that news is a perishable commodity often lacks foundation and the ends to which publishers may be prepared to go in pursuit of their own interests. The asserted urgency as often as not is likely to be driven by commercial imperatives as by any disinterested wish to inform the public. It would be naïve to believe that the media's priorities would be otherwise ... It will be rare in fact that the public interest will be better served by partial truth and inaccuracy this Tuesday than balance and the truth on Friday week.

In such circumstances, equitable principles should demand close scrutiny of the behaviour of media defendants. As Kirby J pointed out in his judgment in *Australian Broadcasting Corporation v O'Neill*, prior restraint is not a permanent bar on publication, but is strictly temporary.[104] The court has the opportunity to revisit the question of appropriateness of the restraint when all of the evidence has been marshaled and presented to it. Why is it that the media should be given the special privilege to destroy a person's reputation based on the sometimes flimsy rationale that damages will be adequate recompense? Now is perhaps the time to take heed of the comment by Heydon J that '[c]onsideration could be given to whether those favoured children of equity [the mass media] should, in the light of past experience, become less favoured'.[105]

While it may (or may not) have been appropriate to resist prior restraint in the circumstances of the case in *Australian Broadcasting Corporation v O'Neill*, the precedent that this case sets means that it will be even more difficult now than in the past to imagine a situation when a court will grant an interlocutory injunction in an action for defamation. The importance of freedom of speech and the need for extreme caution in applications for interlocutory injunctions cannot be denied. But the following statement by Heydon J sums up our views:[106]

> Free speech is important and, as reflected in the defences, free speech is significant, but it is not at the interlocutory hearing the ace of trumps, or indeed a card of any value at all, save to the extent that the defences give in value.

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103 (2001) 208 CLR 199 at [267].

104 [2006] HCA 46 at [154].

105 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [280].

106 [2006] HCA 46 at [275].

5. Summary

Whilst the decision in *Australian Broadcasting Corporation v O'Neill* was not totally unexpected, it should not be thought, as a result of the majority's finding, that freedom of speech will always be the 'trump card' that will override all other considerations in applications seeking an interlocutory injunction in defamation cases. The considerations to be weighed in *Australian Broadcasting Corporation v O'Neill* were blurred with many facts, such as the ongoing police investigations, his agreement to the documentary's filming and potential release, all unanswered at the time of the initial hearing.

The High Court has resoundingly put to rest any debate as to whether there is a distinct set of rules in interlocutory applications for injunctions relating to defamation actions, confirming that whilst defamation requires a particularly cautious approach, this approach is but one aspect of the normal exercise of curial discretion in decisions regarding interlocutory injunctions. In future, successful applicants will need to convince the courts as to why the 'exceptional caution' that would otherwise see their application dismissed, should be exercised in their favour. This consideration will ultimately be determined with the courts turning their mind to what is just and convenient.

It is of particular concern in this case that the majority held that O'Neill's reputation was fixed and incapable of rehabilitation. In this article we have attempted to demonstrate that in bringing a defamation action, some plaintiffs are primarily seeking to dispel scurrilous accusations, thereby improving their reputation and standing in the community, rather than seeking a award of compensatory damages. In future, it is hoped that courts will more readily protect those individuals who, though having committed a wrong, are still deserving of the law's protection. As was eloquently stated by Justice Murphy of the United States Supreme Court and affirmed in Justice Kirby's decision in *Australian Broadcasting Corporation v O'Neill*: '[t]he law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution'.[107]

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[107] *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [165] per Kirby J as quoted from Murphy J in *Falbo v United States* 320 US 549 at 561 (1944).