What is ‘real’ sexual harassment and a ‘good’ complainant?

Views from the legislation, judicial officers and the media

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Abstract

I use a feminist lens and a qualitative analysis of media coverage of 14 high-profile sexual harassment cases from 2010 to 2017. I compare the media coverage to previous scholarship about how the courts and legislation characterise sexual harassment.

I find that, although some of the coverage is nuanced and legally accurate, the coverage also often trivialises the issue and presents sexual harassment as an isolated event rather than an example of systemic gender discrimination in the workplace. There is also gender stereotyping of the complainant, including an idealised conception of how a 'good' complainant should behave. A 'good complainant' is a stereotypical 'strong woman' or helpless victim and physical injury is the most 'real' form of harm. A 'bad' complainant lacks credibility and may have an ulterior motive for bringing a sexual harassment claim.

These misleading messages convey a narrower view of harm and credibility than is drafted in legislation. However, a positive finding is that stories are often presented through a legal lens, enabling understanding of the law. This is achieved through using expert legal sources. Therefore, I conclude by recommending improved training and guidelines for the media to better promote community understanding of sexual harassment and the law.

Table of contents

Acknowledgements .... **iii**

Abstract .... **v**

Certificate of authorship of thesis .... **vii**

1 Introduction **1**

The research question 3

Why this is an important question from a feminist perspective 4

Media construction of 'realities' 7

Why this is a timely question 8

Original contribution 9

Overview of chapters 9

Conclusion 11

2 Sexual harassment and Australian discrimination law **13**

Introduction 13

Sexual harassment law 13

Feminist origins of sexual harassment law 14

Progress(?) of the *Sex Discrimination Act 1984* (Cth) 14

Similarities and differences—state/territory legislation and the Sex Discrimination Act 17

Critiques of the legislation 19

Limited scope 19

Individualised focus 20

Procedural limitations 21

Interpretation of key constructs 23

Conclusion 27

3 Theoretical approaches to understanding media influence, editorial practice and media law **29**

Introduction 29

Media influence 31

Hegemony and transformative potential 31

Hypodermic model and the culture industry 32

Sound bites 33

Journalistic practices—news values, sourcing and news routines 36

Cultivation analysis 41

Framing analysis 43

The backlash—uses and gratifications theory, active audiences and cultural studies 50

Active audience 50

Uses and gratifications 54

Mediatisation: beyond influencing and active audiences 56

Digital developments—rethinking the role of journalists and the media 60

The law and media practice - Sub judice contempt 63

Conclusion 65

4 Media portrayals of violence against women and the 'good' victim 67

Introduction 67

Themes in the literature 67

Gendered mythology 68

Framing techniques 75

Isolated focus 77

Naming (or not naming) the parties 78

Police/legal frame 78

Awkward 'empowerment' narratives and getting help 80

'Allegations' and scepticism 81

Focus on overly sexualised behaviour 82

Conclusion 82

5 The 'good' victim in the courts and 'genuine' violence against women 85

Introduction 85

Caveat—limitations of this chapter 85

'Good victimhood' and sexual assault cases 86

Who is harmed—the 'good' victim 87

Limited efficacy of law reform 89

Gendered mythology and juries 90

'Good victimhood' and domestic violence 92

What is deemed as 'harm'—the 'real' victim 93

Persistent trivialising 96

'Good victimhood' and sexual harassment 98

Stereotypes of the 'good' victim 98

Conclusion 105

6 Methodology and method 107

Introduction.. 107

Finding the data 109

Selecting the cases 109

Selecting the articles that reported on the cases.. 111

Recording the data 112

Analysing the data—finding the messages 113

Caveats.. 115

7 Messages from the media—headlines and leads 117

Introduction.. 117

The 14 cases—framing techniques 118

Fraser-Kirk v David Jones (2010) 118

Styles v Clayton Utz (2011).. 119

Spiteri v IBM (2011) 121

Robinson v Rivers (2011).. 123

Richardson v Oracle (2012–2013).. 125

Shea v Energy Australia (TruEnergy) (2013) 127

Ewin v Vergara (2013).. 129

Ramstrom v Baldino (2013) 132

Richardson v Oracle appeal (2014) 134

Ewin v Vergara appeal (2014) 137

Matthews v Winslow Constructors (2015) 139

Dr Tan v Royal Australasian College of Surgeons (2015) 143

Marks v Colliers International (2016).. 145

Amy Taeuber v Channel 7 (2017) 148

Conclusion 151

8 Messages from the media—body of the article 153

Introduction.. 153

Fraser-Kirk v David Jones (2010).. 153

‘Are you being sued? Sordid details of $37 million DJs sex claim’............................ 153

‘Inside Australia’s biggest harassment case $37m SEX SUIT’.................................... 154

‘Nobody died, so why is she demanding a king’s ransom?’.. 155

‘DJs sex shocker—Designer defence “He’s hot—I threw myself at him”’.................. 156

'David Jones lawsuit shows that boards must be kept informed in harassment cases' . 157
Brief analytical summary of reportage ... 157

Styles v Clayton Utz (2011) ... 157
'Claims of sexism as young lawyer takes on top firm' ... 157
'Man in the middle of $200k claim—law firm's sexual harassment case' ... 158
'Sexism case dropped as lawyer reaches settlement with former employer' ... 158
'Exposing a secret culture' ... 159
'Finding the strength to fight back' ... 160
Brief analytical summary of reportage ... 160

Spiteri v IBM (2011) ... 161
'IBM saleswoman in $1.1m sexual harassment claim' ... 161
'Woman sues IBM for bullying by boss' ... 161
'Women sues IBM for $1.1m—sex pest legal fight' ... 162
'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"' ... 162
'IBM accused of ignoring sexual harassment claims' ... 163
Brief analytical summary of reportage ... 163

Robinson v Rivers (2011) ... 164
'Rivers tycoon on sex assault charge' ... 164
'Millionaire denies woman's harassment court claim—TYCOON SEX FIGHT' ... 165
'Assault payout' ... 165
'Rivers boss fights sex harassment cases' ... 166
'RETAIL BOSS SEX CLAIM—court told of modelling sessions and spy missions' .. 166
Brief analytical summary of reportage ... 167

Richardson v Oracle (2012–2013) ... 167
'Demotion after sex complaint, court told' ... 167
'Oracle to pay $18k for senior staffer's ongoing sexual harassment' ... 167
'Judge criticises law firm over settlement offer' ... 168
'Judge blasts Ashby's self-serving lawyers' ... 169
'High-octane mix of media and money backfires in court' ... 169
Brief analytical summary of reportage ... 170

Shea v Energy Australia (TruEnergy) (2013) ... 170
'Energy firm sued over harassment' ... 170

‘Fired Energy Australia director “out for revenge”, court told’ 171
‘Sacked Energy Australia executive accusing managing director of sexual harassment has “zero credibility” and a “liar”, court told’ 172
‘I’m no sleaze, executive tells Energy Australia harassment trial’............................... 172
‘Former mistress in court during Energy Australia sexual harassment case’ 173
Brief analytical summary of reportage 173

Ewin v Vergara (2013) 174
‘Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function’ 174
‘Payout awarded after work party sex’ 174
Portrayal of the complainant and respondent... 175
‘Unwanted sex costly’.. 175
‘Australia: Contractor ordered to pay half a million dollars for sexual harassment’..... 175
‘Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!’ 176
Brief analytical summary of reportage 177

Ramstrom v Baldino (2013).. 177
‘Adelaide woman loses sexual harassment case’... 177
‘Tribunal rules out harassment claims’.. 178
‘Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal’ 178
‘BALDINO TRIAL—Clerk’s trauma real, court hears’... 179
‘Court clerk’s sex claims too late’ 180
Brief analytical summary of reportage 180

Richardson v Oracle appeal (2014) 181
‘Former Oracle employee sexually harassed by manager wins increased payout on appeal’ 181
‘IT executive Rebecca Richardson’s sexual harassment win to “rock employers”’ 181
‘Oracle ordered to pay $130,000 in sexual harassment case’ 183
‘How much is a sexual harassment claim actually worth?’ 183
‘Michael Harmer: renegade reformer’ 184
Brief analytical summary of reportage 184

Ewin v Vergara appeal (2014) 185

‘Appeal rejected: woman awarded $470,000 payout over unwanted drunken sexual encounter’ 185
‘Harassment can happen beyond office’ 185
Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police’ 186
‘Record sexual harassment case upheld’ 187
‘Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for “arduous” legal journey’ 188
Brief analytical summary of reportage 189

Mathews v Winslow Constructors (2015) 189
‘1.3 mil for daily sex harassment’ 189
‘Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million’ 190
‘Melbourne sex harassment payout: worker Kate Mathews wins $1.30 million in personal injury damages’ 191
‘Female worker awarded million dollar payout over years of “hardcore filth” at Melbourne construction company’ 192
‘Bullied Vic worker receives $1.3m payout’ 193
Brief analytical summary of reportage 193

Dr Tan v Royal Australasian College of Surgeons (2015) 194
‘Victim of surgeon’s harassment speaks out: “It’s not going to go away”’ 194
‘Neurosurgeon case is a real headache’ 195
‘Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals’ 196
‘Dr Caroline Tan speaks out about sexism in Australian hospitals’ 197
‘“Endemic bullying”: health system failed doctors and nurses, says Auditor-General’s report’ 197
Brief analytical summary of reportage 198

Marks v Colliers International (2016) 198
‘“That’s the girl you sold me”: Colliers harassment case’ 198
‘Colliers appointment’ 199
‘Colliers agrees to negotiate over sexual harassment’ 199
‘Colliers could face huge payout in sexual harassment claim’ 200

‘Raunchy video revealed: “Huddo’s flirty 30”’ 201
Brief analytical summary of reportage 201

Amy Taeuber v Channel 7 (2017) 202
‘Channel 7 faces backlash over story of cadet journalist Amy Taueber’ 202
‘Learn from Weinstein’ 202
‘Predators, be afraid’ 203
‘Seven disputes reporter’s allegations’ 203
‘Sisterhood has its limits’ 204
Brief analytical summary of reportage 204

Conclusion 204

9 Themes in media coverage 205

The framing of (in)credibility—portrayal of the parties 205
Gender stereotyping and credibility 205
Other ways that complainant seen as credible victim 209
The incredible complainant 211
Respondent/respondent employer as villain 218
Respondent as victim 221
Respondent as buffoon 222
Summary—credibility messages 223

How framing and language are used to indicate a ‘real’ case of sexual harassment 224
Minimising the harm 224
Recognising the harm 231
Framing the harm—episodic versus thematic framing 235
Summary—representations of harm 237

Legal messages 237
Summary—legal Issues 240

Conclusion 241

10 Discussion 243

Introduction 243
Portrayal of the female complainant 243
‘Positive’ strong 243
‘Negative’ and vengeful 244
‘Reasonable’ versus ‘unreasonable’ 246

Summary—the real complainant 248
Portrayal of the male respondent and the respondent employer 249
Summary—the real respondent/respondent employer 250
'Real' sexual harassment? 250
Harm is minimised 250
Emphasising the harm 252
Sexual harassment is framed episodically 254
The legal messages 255
Implications for audiences 257
Conclusion 258
11 Conclusion 261
Recommendations 267
Directions for future research 269
Bibliography 271
Articles/books/reports 271
Cases 291
Legislation 292
Other 292

1 Introduction

‘Have you been injured at work?’ The large man in the pinstripe suit looks up from his strategically placed legal tome as the sound of an ambulance blares in the background. Surely all viewers at home know the answer to this question. But is it possible to be injured at work and not realise it? Surveys from the Australian Human Rights Commission suggest this is often the case with respect to sexual harassment in the workplace.

Sexual harassment has been unlawful in Australia for more than 30 years, yet surveys of the Australian public suggest that this form of workplace injury and workplace discrimination is both common and little understood. In October 2012 the Australian Human Rights Commission released its report *Working without fear: results of the 2012 sexual harassment national telephone survey*. The survey found that 21% of people over the age of 15 had experienced sexual harassment in the workplace during the previous five years.[1] The survey also found that there was a lack of understanding among the general public of the meaning of sexual harassment. The report concluded, ‘Almost one in five (18%) respondents indicated that they had not been sexually harassed based on the legal definition, but went on to report experiencing behaviours that are likely to constitute unlawful sexual harassment.’[2] This finding suggests that, while these respondents were aware of something being ‘not right’ or uncomfortable in the workplace, they may not have been able to name their experience as sexual harassment. This was a similar result to the commission’s 2008 survey, reported in *Sexual harassment: serious business*, which found ‘Around one in five (22%) respondents who said they **had not** experienced “sexual harassment”’ then stated later in the survey that they had ‘experienced behaviours that may in fact amount to sexual harassment under the *Sex Discrimination Act 1984* (Cth)’, such as unwanted touching, sexually suggestive comments or jokes and intrusive questions about their private life or physical appearance.[3]

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[1] Australian Human Rights Commission, ‘Working without fear: Results of the sexual harassment national telephone survey’, October 2012, 1. The Commission surveyed 2002 people aged 15 and over.

[2] Ibid.

[3] Australian Human Rights Commission, ‘Sexual harassment: serious business—Results of the 2008 Sexual Harassment National Telephone Survey’, October 2008, 1-2. The Commission surveyed 2005 people aged 18 to 64.

This trend has continued. The 2018 commission survey found that, while more participants recognised their experiences as sexual harassment than in previous surveys, many respondents were still not able to name their experience:

> In total, 43% of respondents reported having been sexually harassed on the basis of the legal definition. This is despite the fact that a much larger number (71%) of people went on to report having experienced one or more of the 16 sexual harassment behaviours listed at some point in their lifetime.[4]

I am interested in the reasons for this gap in people's knowledge about this serious and insidious form of violence against women. I have chosen the Australian news media as the subject of my investigation, because this is the primary source of information for the layperson about the law in general. As many people in the community do not read the Commonwealth Law Reports for pleasure or attend the hearings of cases involving people they do not know, it is the reporting of these cases through the news media that informs them about the way the law treats sexual harassment.

In this thesis, I investigate the social and political messages in the news reporting of sexual harassment cases. Given the power of the media to shape audiences' perceptions of their legal rights and responsibilities, I am mindful of the words of Our Watch—who lobby to eliminate violence against women and their children:

> More informed and helpful media commentary will assist Our Watch and others to achieve a common, community-wide message of respect, equality and non-violence.[5]

This mission statement recognises the duality of the power of the media—to reinforce dominant patriarchal power structures or to challenge these structures and effect positive social change. This duality is also apparent within the law itself, with hard-won feminist law reform often colliding with archaic judicial attitudes about what constitutes 'genuine'

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[4] Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces', 2018, 24. The commission surveyed more than 10,000 people aged 15 and over.

[5] Our Watch, *National Media Engagement Project* <https://www.ourwatch.org.au/What-We-Do/National-Media-Engagement-Project>.

violence against women and 'good' victimhood (which may or may not align with women's actual experiences).

My thesis focuses on gender discrimination in the workplace. While sexual harassment does occur in other contexts, including on the street ('street harassment'), this is outside the scope of my thesis. It is important to note that women are not the only victims of sexual harassment. The 2018 Australian Human Rights Commission survey found that men also experience sexual harassment. The report reads:

> Women are significantly more likely than men to have experienced sexual harassment over the course of their lifetime. However, rates of sexual harassment are also high among Australian men.[6]

The 2018 survey report also noted that a small sample of respondents identified as non-binary or a gender other than male and female, and that these respondents were 'very likely' to have experienced sexual harassment in their lifetimes.[7] It also found that the majority of workplace harassment was perpetrated by men.[8] I have focused on situations where a woman is sexually harassed by a male perpetrator, because each of the cases in my sample featured a female complainant and male alleged harasser.

The research question

In this thesis, I answer the following research question:

> After more than 30 years of statutes in all Australian jurisdictions prohibiting sex discrimination, more than 30 years of legal precedent, and the efforts of Commonwealth and state sex discrimination commissioners to educate the Australian public about sexual harassment, Australian Human Rights Commission surveys continue to show that a significant number of people do not recognise their experiences as sexual harassment. Do messages from the media, legislation and the courts about 'real' sexual harassment and 'good' victims help explain this gap in knowledge?

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[6] Australian Human Rights Commission (n 4), 7.

[7] Ibid 8.

[8] Ibid 8.

To answer this question, I examine the messages conveyed to people about sexual harassment law by the legislation, the judiciary and the media.

Why this is an important question from a feminist perspective

Sexual harassment, described by Martha Chamallas as 'the quintessential feminist harm'[9] and by Catharine MacKinnon as 'the first time in history … that women have defined women's injuries in a law',[10] is a feminist cause of action. It is a product of feminist struggles for gender equality, equal opportunity and women winning greater access to the workplace. Sexual harassment is a known barrier to justice in the workplace, with devastating financial, psychological and health effects on its targets.[11] It is therefore critical to examine the effectiveness of sexual harassment law and its representation in the media through a feminist theoretical framework.

I undertake research and analysis of mainstream corporate news media representations of sexual harassment cases from the perspective of viewing the media as often favouring the perspectives of the most powerful and as having an important influence on community attitudes about an issue like sexual harassment. Hence, I examine the coverage using a feminist lens, honed through my review of feminist media scholarship to examine the ways that patriarchal power extends into the idealised 'level playing field' of the workplace.

The news media has been widely recognised as influencing audience attitudes. While the 'media influence' versus 'active audience' debate raises questions about the extent to which audiences have the agency to critique or reject messages from the media, there is a loose consensus among media scholars that the media does play a strong socio-political role. In this thesis, I have a particular interest in the cultivation theory of Gerbner and Gross, where the media are 'telling most of the stories to most of the people most of the time'.[12] I am interested in the mainstream corporate media's apparent monopoly on storytelling, and its potential to

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[9] Martha Chamallas 'Writing About Sexual Harassment: A Guide to the Literature' (1993-1994) 4 *UCLA Women's Law Journal* 37, 38.

[10] Catharine A. MacKinnon 'Sexual Harassment: Its First Decade in Court (1986)' Feminism Unmodified: *Discourses of Life and Law* 103, 105 (1987) quoted in Chamallas Ibid.

[11] See the summary of studies in Paula McDonald 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14 *International Journal of Management Reviews* 1, 4.

[12] George Gerbner, Larry Gross, Michael Morgan and Nancy Signorielli 'Living With Television: The Dynamics of the Cultivation Process', In. J. Bryant & D. Zillmann (Eds.) *Perspectives on Media Effects* (Lawrence Erlbaum Associates., 1986) 17, 18.

construct a 'reality' for audiences.[13] While social media groups such as the facebook groups 'Destroy the Joint' and 'Mad Fucking Witches' offer an alternative feminist perspective, mainstream corporate news media conveys the dominant discourse.

Feminist theorists have found that the media has a strong cultivation effect on its audience and plays a large role in setting community perceptions of violence against women:

> The media is an extremely powerful shaper of social attitudes. It is a primary socialiser of our children. It does have the potential to do much good. Unfortunately, it has instead commonly perpetuated inaccurate and unjust myths about sexual violence and its victims.[14]

Media portrayals of violence against women have often used gendered mythology, where women are portrayed not only as 'other' but also as liars. There is at times awkward use of 'empowerment' narratives, which emphasise women's responsibility to prevent violence or otherwise to seek help. Victim-blaming, including suggestions of 'mutuality' of violence, is often achieved through the use of 'episodic' rather than 'thematic' framing techniques—a focus on individual stories at the expense of the broader social and political context. Such themes present a fascinating picture of what the news media considers to be 'genuine' violence against women and a 'good', 'worthy' victim. Hence some women may be depicted as contributing to or responsible for their situation or judged as lacking credibility before they even set foot in a courtroom.

From a feminist perspective, the latter is crucial. For instance, previous feminist scholarship has found that media coverage of violence against women has included gendered mythology about the 'ideal' victim (powerless, blameless and not known to her attacker[15]) and focused

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[13] Of course, the Courts have their own storytelling, which is less accessible to the general public despite ideals of open justice. Most people do not curl up with the Australian Law Reports over their morning coffee.

[14] Patricia Easteal and Louise McOrmond-Plummer *Real Rape, Real Pain—Help for women sexually assaulted by male partners* (Hybrid Publishers, 2006) 43.

[15] Kathleen Custers and Jan Van den Bulck 'The Cultivation of Fear of Sexual Violence in Women: Processes and Moderators of the Relationship Between Television and Fear' (2013) 40 *Communication Research* 96, 98.

on victim behaviour—leading to inferences of mutual responsibility for violence, victim blaming[16] and even suggestions that the perpetrator is the 'real' victim.[17]

In the courts, similar gendered mythology about violence against women can also be found. This is seen in court constructions of the 'ideal' chaste and virtuous victim,[18] present-day resonance of ancient narratives about female incredibility[19] and a legacy of perceptions that the law should not intervene in 'private' matters.[20] This has meant that violence that falls outside this narrow construct, such as sexual assault by an intimate partner, is not taken seriously by the media and the courts. Taking the example of sexual assault, mythology about 'ideal' victim behaviour and 'real' violence has meant that, when a sexual assault victim knows her assailant, attacks 'are still treated as exceptional, with policies, procedures and attitudes shaped towards responding to stranger rapes.'[21]

This has implications for victims of violence against women at all levels of the complaint process. Firstly, attitudes in the legal system that sexual assault by a partner does not 'count' as real sexual assault[22] mean that victims may have difficulty naming their traumatic experience and seeking help. Secondly, if policies and procedures are targeted at instances of assault by a stranger, help may not be available for particular victims. Thirdly, if the case proceeds to court, the research indicates that judges and juries view such circumstances as less harmful and the complainant as less credible.[23] While sexual harassment is different,

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[16] Renae Franuik, Jennifer L. Seefelt, Sandy L. Cepress, Joseph A. Vandello 'Prevalence and Effects of Rape Myths in Print Journalism – The Kobe Bryant Case' (2008) 14(3) *Violence Against Women* 287, 295.

[17] Martha T. McCluskey 'Fear of Feminism—Media stories of feminist victims and victims of feminism on college campuses' in Martha A. Fineman and Martha T. McCluskey (Eds.), *Feminism, Media and the Law* (Oxford University Press, 1997) 57, 61, Michelle Dunne Breen, Patricia Easteal, Kate Holland, Georgina Sutherland, Cathy Vaughan 'Exploring Australian journalism discursive practices in reporting rape: The pitiful predator and the silent victim' (2017) *Discourse & Communication* 1, 14.

[18] See for example Patricia Easteal *Less Than Equal—Women and the Australian Legal System*, (Butterworths, 2001) 172; Jocelynne A Scutt The Incredible Woman—Power & Sexual Politics Vol 1, (Artemis Publishing, 1997,) 6; Catharine A. MacKinnon *Women's Lives—Men's Laws*, (The Belknap Press of Harvard University Press, 2005) 34-35.

[19] Regina Graycar and Jenny Morgan *The Hidden Gender of Law* (The Federation Press, 2002 (2nd ed)), 354.

[20] Anna Carline and Patricia Easteal AM *Shades of Grey—Domestic and Sexual Violence Against Women* (Routledge, 2017) 32.

[21]Mary Heath 'Women and Criminal Law: Rape' in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 88, 90-91.

[22] See for example Patricia Easteal *Less Than Equal – Women and the Australian Legal System*, (n 18) 124, Jessica White and Patricia Easteal 'Feminist Jurisprudence, the Australian Legal System and Intimate Partner Sexual Violence: Fiction over Fact' (2016) 5 *Laws* Article 11, 2.

[23] Jessica White and Patricia Easteal ibid, 4-6.

similar attitudes about ideal victimhood and 'genuine' harm also occur in judicial attitudes to sexual harassment.[24]

Media construction of 'realities'

Overall, studies of the media have emphasised its political power and its importance as a subject of academic inquiry. In *Mass media, politics and democracy*, John Street recognised the ability of news media to both support and subvert the status quo and dominant culture.[25] To Street, media products such as news and current affairs, television programs and movies help to disseminate a '"common sense" view of how the world is and how it works' that reinforces power and authority. Street comments, 'These thoughts, the unexamined assumptions of our routines, help us to know our place and our identity.'[26] Street further observes, 'Just as media can serve authority, they can also subvert it. Challenges to "common sense" can find expression in the same media that reinforce it.'[27] However, media influence theorists generally characterise the media as serving, rather than subverting, authority.

In contrast to the 'media influence' theorists, who focus on the role of the media as propagandist and shaper of popular thought, others have placed greater emphasis on the agency of audiences and their ability to accept or reject media messages. Kitzinger refers to a 'two-step model of media influence' that has been developed 'in direct opposition' to classic media influence theorists and their 'pessimistic generalisations'.[28] For these theorists, there is a distinction between the first step, or the media messages, and the second step—which examines how the messages are internalised, critiqued or even rejected by audiences.

The positioning of events in a narrative directs audience interpretation to a particular way of understanding the story. Gerbner observes, 'Humans are the only species that lives in a world erected by the stories they tell.'[29] Cultivation theorists argue that reporting of particular issues may create certain misleading impressions in the minds of audiences. For example, Morgan,

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[24] Patricia Easteal and Keziah Judd "'She Said, He Said': Credibility and sexual harassment cases in Australia", (2008) 31*Women's Studies International Forum* 336, 343, Patricia Easteal AM and Skye Saunders "'Did Ya Win?' The (Un)successful Rural Workplace Sexual Harassment Complainant", (2011) 10(2) *Canberra Law Review* 84, 94 -95.

[25] John Street *Mass Media, Politics and Democracy* (Palgrave Macmillan, 2nd ed, 2011) 12.

[26] Ibid 11.

[27] Ibid.

[28] Jenny Kitzinger *Framing Abuse – Media Influence and Public Understanding of Sexual Violence Against Children* (Pluto Press, 2004) 16.

[29] George Gerbner 'Cultivation Analysis: An Overview' (1998) 3(4) *Mass Communication & Society*, 175, 175.

Shanahan and Signorielli observe that previous studies in cultivation have found that people who spend more time watching television are more likely to have exaggerated conceptions of danger, mistrust and victimisation and to hold inaccurate views on crime and law enforcement.[30] When viewing television programs, audiences absorb dominant cultural narratives expressed in storytelling. This creates their 'commonsense' view of the world.

My qualitative analysis of the news coverage of high-profile sexual harassment cases is informed by my review of various literature. This includes the way that the media has been found to engage with and shape the views of audiences, previous feminist scholarship on the way that the media reports on violence against women and previous feminist scholarship on the way the legislation and the courts have dealt with violence against women in general and sexual harassment in particular. I explore media coverage of sexual harassment cases while considering Kitzinger's media studies dichotomy of the 'hypodermic model' of media influence and the 'active audience' model of negotiated codes. I consider the role of sound bites and 'clickbait' in the digital environment, the cultivation theory developed by Gerbner and Gross and conduct framing analysis. The thesis demonstrates for instance how the ideal victim may be perpetuated through the use of 'episodic' rather than 'thematic' framing techniques, which focus on individual stories at the expense of the broader social and political context.[31]

Why this is a timely question

When I began my PhD studies, I noticed the news media beginning to take an interest in high-profile sexual harassment cases, such as *Fraser-Kirk v David Jones* (2011). In 2017 this level of media interest reached a crescendo with the Harvey Weinstein revelations and the international breakthrough of the 'Me Too' movement. Women of colour (WOC) activists in the United States of America founded the Me Too movement in 2006 to support survivors of sexual violence.[32] The movement became a hashtag, which went viral internationally in 2017. My sample includes one post–Me Too case—Amy Taeuber's 2017 sexual harassment complaint against her former employer Channel 7.

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[30] Michael Morgan, James Shanahan and Nancy Signorielli 'Yesterday's New Cultivation, Tomorrow' (2015) 18(5) *Mass Communication and Society* 674, 681.

[31] Kellie E Carlyle, Michael D Slater and Jennifer L Chakroff 'Newspaper coverage of intimate partner violence: Skewing representations of risk' (2008) 58 *Journal of Communication* 168, 181.

[32] 'History and Vision' *me too* <https://metoomovment.org/about>.

Since the emergence internationally of Me Too, several sexual harassment claims have been made against high-profile alleged perpetrators—including celebrity gardener Don Burke, actor Geoffrey Rush, barrister Charles Waterstreet and actor Craig McLachlan. These cases attracted considerable attention in the public eye. My research focuses on cases that have involved ordinary people but have attracted media attention and become high profile cases, rather than cases involving high-profile parties. I have concentrated my research in this way because I am interested in the messages that the media convey to the layperson about sexual harassment. A high-profile case involving ordinary people in an everyday workplace is closer to the experience of the everyday person than a case involving a glamorous celebrity.

My findings, in chapters 7 and 8, do refer to influence of the Me Too movement on media coverage of high-profile sexual harassment cases when discussing the coverage of the 2017 case in my sample. However, given the time frame of my sample, further research is needed to trace this potential influence beyond 2017.

Original contribution

My thesis makes an original contribution to the existing body of knowledge about sexual harassment law in Australia. My thesis is unique because of the length of my study and the size of my sample. I examine the media coverage of 14 high-profile cases over the years 2011 to 2017. While it is not the first study to specifically focus on media reporting of Australian sexual harassment cases,[33] my thesis provides a broader and more holistic perspective on sexual harassment by comparing my findings from the media analysis with the perspectives of the legislation and the judiciary about violence against women.

I use feminist qualitative analysis on my sample to examine the potential cultivation effect of media coverage of sexual harassment cases on Australian audiences. This is unique in Australian media and legal scholarship.

Overview of chapters

In chapter 2 I review the literature on how sexual harassment is defined in Australian legislation and how it is often interpreted by the courts. This includes the history of sexual harassment law in Australia and the different ways it has been legislated in the

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[33] See Keziah Judd and Patricia Easteal ‘Media Reportage of Sexual Harassment: The (In)credible Complainant’ (2013) 25 *The Denning Law Journal* 2013 1 and Paula McDonald, Sara Charlesworth ‘Framing sexual harassment through media representations’ (2013) 37 *Women’s Studies International Forum* 95.

Commonwealth, state and territory jurisdictions and interpreted in the courts. I review feminist critiques of the legislation and case law. I also examine the remedies available to victims of sexual harassment.

In chapter 3 I look at the literature on the role of the media in shaping audience attitudes and beliefs. I examine media studies scholarship, including the ongoing debate between media influence theorists, who view the media as a powerful shaper of attitudes, and active audience theorists, who argue that audiences have more agency to accept or reject messages from the media.

In chapter 4 I present what has been found in previous studies to be the 'good' victim as constructed by the media. I review the feminist scholarship on how the news media have reported violence against women, including how stories are framed and the presence of gender stereotyping.

The feminist lens is further explored in chapter 5. I review the literature about how the legal system views violence against women, including what constitutes 'real' harm and credible victimhood.

I describe the qualitative analysis methodology of my thesis in chapter 6. This includes the selection of the cases in my sample and the choice of news articles. I outline the methods I use for data analysis. I explain how I use a feminist media analysis to examine the framing of the news media coverage of 14 high-profile Australian sexual harassment cases from 2010 to 2017 and the messages this coverage may convey to audiences about what 'real' sexual harassment is and what constitutes a 'good' victim. I outline the way my findings and discussion will be presented.

In chapter 7 I analyse the analysis of the headlines and leads of the articles in my sample. The headline and opening paragraph have been identified in previous media scholarship as key framing devices, which foreground the most significant and 'newsworthy' aspects of the story.

In chapter 8 I conduct in-depth analysis of the body of the articles in my sample (excluding the headline and lead discussed above). I see what messages about sexual harassment are considered less 'important' than the information in the headlines and leads but are nonetheless conveyed in the coverage.

In chapter 9 I build on my analysis in chapters 7 and 8 to compare the messages from the prominent and less prominent parts of the coverage. I extrapolate the key themes from these chapters about ‘real’ sexual harassment and the ‘good’ victim and consider these in depth.

In discussion chapter 10 I provide a feminist critique of my findings and compare the messages from the media about ‘real’ sexual harassment and the ‘good’ victim with what has been found in previous scholarship on media and judicial attitudes to sexual harassment and violence against women.

In chapter 11 I outline my conclusions and answer my research question. I also provide a list of recommendations for the news media to consider when reporting on sexual harassment cases.

Conclusion

In this thesis, I look at the way messages from the media, the legislation and the courts may explain an apparent gap in knowledge about sexual harassment. I reflect on my findings, discussion chapters and the role of the news media in contributing to public awareness of sexual harassment. I will discuss this in the context of previous work by feminist theorists on the treatment of sexual harassment and violence against women in the Australian legal system. I will also offer recommendations on how sexual harassment should be reported in future.

2 Sexual harassment and Australian discrimination law

Introduction

The landscape of sexual harassment in the workplace as a cause of action under Australian discrimination law reflects both its origins as a milestone of feminist law reform and its positioning within patriarchal legal institutions. The fundamental tension between progressive law reform and conservative legal institutions is seen in the history of the development of the legislation, the different legislative approaches to sexual harassment in Commonwealth, state and territory jurisdictions and the critiques of how the legislation operates in practice.

As a starting point, I take Chamallas's description of sexual harassment as a 'feminist intervention into the law' that has 'affected the cultural meanings of interactions between men and women in the workplace',[1] and observe that concerns remain about the extent to which the case law and legislation accurately reflect the experiences of working women and offer adequate remedies. I investigate this tension between feminist ideals and the practical operation of the law by reviewing the academic commentary on Australian sexual harassment legislation and case law. I review how the legislation and the courts characterise the 'reasonable person' test and 'unwelcome' behaviour of a sexual nature, and the benefits and limitations of law reform to provide a foundational understanding of the practical application of sexual harassment law in Australia. Where appropriate, I include extracts from relevant sexual harassment case law. In chapter 5 I expand on this to review the academic literature on how the common law addresses the issue of violence against women more generally, including the way 'genuine' harm and 'ideal' victim behaviour have been characterised by the courts. This includes further extracts from the relevant case law.

Sexual harassment law

Under Australian law, sexual harassment is generally defined as unwelcome conduct of a sexual nature and is an example of unlawful discrimination. Sexual harassment is a civil action, where the onus is on the individual complainant to make a complaint and bring a case. Sexual harassment is prohibited under Commonwealth, state and territory legislation. The

[1] Martha Chamallas 'Writing about sexual harassment: a guide to the literature', (1993-1994) 4 *UCLA Women's Law Journal* 37, 37.

legislation expressly prohibits sexual harassment in specific contexts, such as employment, education, accommodation and the provision of goods, services and facilities.[2] I focus on sexual harassment in employment.

Feminist origins of sexual harassment law

Sexual harassment law has a strong feminist pedigree. The cause of action was developed in the United States as a result of the campaigning work of feminist legal academics including Catharine MacKinnon. In the preface to her landmark 1979 work *Sexual harassment of working women*, Catharine MacKinnon recalled the impact of her work concerning sexual harassment on the US legal system:

> The project began late in 1974. The argument was written by late spring 1975, and the draft circulated. As that point, no court had held that sexual harassment was sex discrimination: several had held that it was not.[3]

Sexual harassment became enshrined in US legislation during the 1970s, in Title VII of the Civil Rights Act.[4] Chamallas observes that the term 'sexual harassment' was coined in the mid 1970s by feminist academics, 'given legal context by feminist litigators and scholars' and then nourished through 'a wide-ranging body of scholarship generated largely by feminist academics.'[5] Since MacKinnon's pioneering efforts in the 1970s, sexual harassment has become a cause of action enshrined in legislation around the world, including in anti-discrimination law in Australia.

Progress(?) of the *Sex Discrimination Act 1984* (Cth)

In Australia, legislation prohibiting sexual harassment is also the product of feminist law reform. Mason and Chapman describe the development of legislation in Australia that prohibited sexual harassment as part of the second wave feminist movement and the 'broader international movement for the recognition of the human rights of women.'[6] As noted by Hilary and Sara Charlesworth, the *Sex Discrimination Act 1984* (Cth) (SDA) was developed

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[2] See for example *Sex Discrimination Act 1984* (Cth), ss28B–28H.

[3] Catharine A. MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979), xi.

[4] Chamallas (n 1) 37.

[5] Ibid 37-38.

[6] Gail Mason and Anna Chapman 'Defining sexual harassment: a history of the Commonwealth legislation and its critiques' (2003) 31 *Federal Law Review* 195, 197.

in response to Australia's 1983 ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[7] Anne Genovese describes the SDA as distinct from earlier anti-discrimination legislation such as the *Racial Discrimination Act 1975*, which targeted discrimination in the workplace because the former was 'embodied' in women's experiences and 'the incipient legislative language of discrimination was confronted by a specifically feminist legal critique' through the provisions prohibiting indirect discrimination and sexual harassment.[8] The history of the SDA illustrates the fundamental tension between the gender equality goals of the second wave feminists and the complicated realities of both women's lives and a conservative legal system.

The initial drafting of the SDA was controversial, with critiques that the wording made it difficult for complainants to bring a cause of action. When the SDA was first enacted, the initial definitions of 'sexual harassment' included a requirement for 'disadvantage' in the complainant's employment due to their rejection of unwanted sexual conduct. Mason and Chapman note that the onus was on the complainant to prove disadvantage in her employment or possible employment—that either rejecting a sexual advance 'caused her to suffer actual disadvantage' or 'she had reasonable grounds for believing that such refusal, rejection or objection would disadvantage her'.[9] This requirement was controversial, with critics of the legislation querying the broadness of the terms 'reasonable belief' and 'disadvantage'[10] and whether this sufficiently addressed women's experiences of discrimination in the workplace such as a 'hostile work environment'[11]. In a 1984 article in the *Legal Service Bulletin*, Helen Mills observes that the definition in the Sex Discrimination Bill 1983 (Cth) 'may cause difficulties by putting too much stress on the reasonableness or otherwise of fears for disadvantage'[12] and may not adequately address circumstances where 'the employment detriment consists of having to constantly negotiate and control a sexual situation at work.'[13]

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[7] Hilary Charlesworth and Sara Charlesworth 'The Sex Discrimination Act and international law' (2004) 27 *University of New South Wales Law Journal* 858, 858.

[8] Anne Genovese 'A Radical Prequel: Historicising the Concept of Gendered Law in Australia' in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 47, 51.

[9] Mason and Chapman (n 6) 206.

[10] Ibid 207.

[11] Ibid.

[12] Helen Mills 'Sexual Harassment as Sex Discrimination' (1984) 9 *Legal Service Bulletin* 5, 7.

[13] Ibid 8.

The SDA was amended in 1992 to remove the 'disadvantage' requirement on the recommendation of a House of Representatives standing committee.[14] However, Margaret Thornton has commented that the reference to disadvantage was a more accurate recognition of the gender discrimination aspects of sexual harassment, because it 'took greater account of the discriminatory effect.' [15] Thornton does not consider the 'disadvantage' requirement to be 'unproblematic' but notes that, when it was replaced in 1992 with the 'offended, humiliated and intimidated' wording, this was seen as a positive development but had the consequence of downplaying the systemic 'discriminatory effect' of sexual harassment and treating it as the action of 'aberrant individuals'.[16]

A 2008 Senate committee inquiry into the SDA recommended further amendments to the 'reasonable person' test to refer to the **possibility** that the person harassed would have been offended, humiliated or intimidated and to consider the subjective personal circumstances of the victim.[17] Mackay observes that this is similar to the Queensland definition and is cautiously optimistic about this 'shift in focus away from the victim and on to the harasser's conduct.'[18]

The *Sex Discrimination Amendment Act 2011* modified the test in section 28A of the SDA to give effect to the Senate committee recommendation. The amendment provides that a person sexually harasses another person if the person engages in unwelcome sexual conduct in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the *possibility* that the person harassed would have been offended, humiliated or intimidated.[19] The amendments also inserted a new section 28A(1A), which provided that 'all the circumstances' included the personal circumstances of the person harassed, including (but not limited to) the sex, age, sexual preference, religious belief and

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[14] Mason and Chapman (n 7) 211.

[15] Margaret Thornton 'Sexual harassment losing sight of sex discrimination', (2002) 26 *Melbourne University Law Review* 422, 430.

[16] Ibid.

[17] Senate Standing Committee on Legal and Constitutional Affairs 153 Parliament of Australia, Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality <https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2008-10/sex_discrim/report/index> at 2 April 2019, 153.

[18] Anita Mackay 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14(2) *Deakin Law Review* 189, 201.

[19] *Sex Discrimination Amendment Act 2011* (Cth), s 53.

disability, and the relationship between the parties.[20] Later in this chapter, I look from a feminist perspective at how this test may be limited.

Similarities and differences—state/territory legislation and the Sex Discrimination Act

Sexual harassment is prohibited in all Australian jurisdictions. The Commonwealth, states and territories have all enacted legislation that provides that sexual harassment is unlawful.[21] MacDermott observes that sexual harassment law has 'a measure of commonality in legislative approach in the different jurisdictions', with each state and territory including these three core elements in discrimination legislation: 'unwelcomeness; conduct of a sexual nature; and the reasonable person test'.[22]

However, there are some key differences in how these elements are framed in legislation, including the balance of subjective and objective elements in the reasonable person test. For example, the Commonwealth and Queensland definitions incorporate the particular circumstances of the person harassed, such as age, race, gender identity and the relationship between the parties.[23]

The Commonwealth, Queensland and the Northern Territory legislation define sexual harassment as unwelcome conduct of a sexual nature where a reasonable person would have anticipated the *possibility* that the person would have been humiliated, intimidated or offended.[24] This is a lower threshold than other jurisdictions, such as New South Wales and Victoria—which refer to unwelcome conduct where 'a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.'[25] ACT legislation ascribes the 'reasonableness' standard to the person being harassed and not the harasser, referring to the unwanted sexual conduct 'in

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[20] Ibid s 54.

[21] See Sex Discrimination Act *1984 (Cth)*, *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1997* (NSW), *Equal Opportunity Act 2010* (Vic), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (Tas), *Anti-Discrimination Act 1992* (NT), *Equal Opportunity Act 1984* (WA).

[22] Therese MacDermott 'Reassessing sexual harassment: it's time' (2015) 40(3) *Alternative Law Journal* 157, 159.

[23] Sex Discrimination Act 1984 (Cth) s 28A(1A) and Anti-Discrimination Act 1991 (Qld) s 120.

[24] *Sex Discrimination Act 1984* (Cth) s 28A(1), *Anti-Discrimination Act 1991* (Qld), s 119(f), *Anti-Discrimination Act 1992* (NT) s 22(1)(e)(ii).

[25] *Anti-Discrimination Act 1997* (NSW) s 22A(b), *Equal Opportunity Act 2010* (Vic) s 92(1).

circumstances in which the other person reasonably feels offended, humiliated or intimidated.'[26]

The *Equal Opportunity Act 1984* (WA) and *Anti-Discrimination Act 1992* (NT) retain references to 'detriment' and 'disadvantage' to the person being harassed. As discussed, this requirement was removed from the definition of sexual harassment in the Commonwealth Act. The WA Act requires the person experiencing harassment to either 'have reasonable grounds for believing' that rejecting or objecting to the conduct 'would disadvantage the person' in their employment or possible employment, or that the person suffered actual disadvantage in their employment or possible employment.[27] In the NT Act, experiencing disadvantage is not a prerequisite for establishing that sexual harassment occurred but is acknowledged as an example of the effect of the behaviour on the other person. The Act provides that sexual harassment includes unwanted sexual conduct done with the 'intention of offending, humiliating or intimidating' the other person, unwanted sexual conduct where 'a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated' or unwanted sexual conduct where the other person 'is, or reasonably believes that he or she is likely to be, subjected to some detriment if he or she objects' to the harassing behaviour.[28]

Vicarious liability for employers for the discriminatory actions of employees is a significant feature of sexual harassment law in all Australian jurisdictions. There is some variation in the framing of vicarious liability in anti-discrimination legislation. A common theme is the onus on the employer to take 'all reasonable steps' to prevent discrimination, including sexual harassment, from occurring. Several jurisdictions state that taking reasonable steps is a defence to vicarious liability, while others place a positive obligation on employers to take reasonable steps. The Commonwealth, ACT, NSW, and WA Acts provide that the vicarious liability provisions do not apply if the employer took 'all reasonable steps' to prevent discriminatory conduct from occurring.[29] The Victorian and Queensland Acts expressly state that the onus of proof is on the employer for a defence of taking reasonable steps, stating that

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[26] *Discrimination Act 1991* (ACT) s 58(1).

[27] *Equal Opportunity Act 1984* (WA) s 24(3).

[28] *Anti-Discrimination Act 1992* (NT) s 22(e) and (f).

[29] *Sex Discrimination Act 1984* (Cth) s 106(2), *Anti-Discrimination Act 1977* (NSW) s 53(3), *Discrimination Act 1991* (ACT) s 121A(3) and *Equal Opportunity Act 1984* (WA) s 161(2).

the employer must prove this 'on the balance of probabilities'.[30] The SA and NT Acts provide legislative guidance on what may constitute reasonable steps, including implementation and enforcement of an appropriate policy, prompt investigation of alleged acts and appropriate action and provision of anti-discrimination training.[31] The Tasmanian Act places a positive obligation on an organisation to 'ensure that its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which this Act relates' and to 'take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct'.[32]

Critiques of the legislation

Legal scholars have significantly critiqued the SDA and state and territory anti-discrimination legislation prohibiting sexual harassment, arguing that this law reform has failed to sufficiently address gendered harms. This can be seen in its limited scope, individualised focus and procedural hurdles for complainants—including low awards of damages and unconscious gendered interpretation of key constructs such as the 'reasonable person' test, 'unwelcome' conduct and 'offended, humiliated or intimidated'.

Limited scope

Although the SDA was developed to implement Australia's international obligations under CEDAW, its individualised focus has not led to widespread social change to systemic gender discrimination and it does not give full effect to the treaty. Charlesworth and Charlesworth describe the SDA as a 'partial and porous translation of Australia's international commitments',[33] which alone 'does not constitute the constitutional or statutory guarantee of equality for women required by art 2 of *CEDAW*'.[34] Other authors have argued that the SDA also takes a piecemeal approach to sexual harassment, with 'real' sexual harassment recognised in only limited contexts and positioned as separate from other forms of gender discrimination.

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[30] *Equal Opportunity Act 2010* (Vic) s 110 and *Anti-Discrimination Act 1991* (Qld) s 133(2).

[31] *Equal Opportunity Act 1984* (SA) s 91(3) and *Anti-Discrimination Act 1992* (NT) s 105(3).

[32] *Anti-Discrimination Act 1998* (Tas) s 104(1)(a) and 104(2).

[33] Charlesworth and Charlesworth (n 7) 865.

[34] Ibid 864.

In a 2009 article on recent developments in sexual harassment law, Mackay describes the SDA as 'failing to achieve the goal of promoting equality between women and men',[35] citing a 'high percentage of women who report having experienced sexual harassment' combined with a 'low reporting rate' of complaints through official channels.[36]

Harris has argued that anti-discrimination law does not sufficiently address sexual harassment as a legal harm due to the limited range of circumstances covered by the SDA. Harris argues that the 'key shortcoming' of the SDA is that it 'makes sexual harassment unlawful in only a specified range of circumstances'—namely employment, education and trading in goods and services.[37] For example, the legislation does not recognise street harassment, which is recognised as a common form of harassment experienced by women.

Other scholars have also identified the limitations of anti-discrimination law in dealing with sexual harassment. Henry and Powell express similar views to Harris on the legislation and identify an implicit public–private divide:

> currently it only prohibits sexual harassment in specified areas of public life, such as the workplace, accommodation, education and goods and services.[38]

Henry and Powell observe that sexual harassment law currently does not recognise 'revenge porn' situations (where intimate images that a woman has initially shared consensually have been 'misused as a form of public harassment, revenge and shaming')[39] as 'real' harassment, despite this being a growing concern in the lives of adult women.

Individualised focus

On the 25th anniversary of the SDA, Pru Goward expressed the view that its impact was positive though incomplete. She said, 'Since the introduction of the *SDA,* an enormous amount has been achieved, yet there is still a long way to go.'[40] However, to Goward, the

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[35] Mackay (n 18) 196.

[36] Ibid.

[37] Bede Harris 'A Roman law solution to an eternal problem: A proposed new dignitary tort to remedy sexual harassment', (2017) 42(3) *Alternative Law Journal* 200, 200-201.

[38] Nicola Henry and Anastasia Powell 'Beyond the "sext": Technology-facilitated sexual violence and harassment against adult women' (2015) 48(1) *Australian & New Zealand Journal of Criminology* 104, 111.

[39] Ibid.

[40] Pru Goward 'The Sex Discrimination Act: looking back and moving forward' (2004) 27(3) *University of New South Wales Law Journal* 922, 923.

individualised focus is a good 'temperature check' for the lives of women in Australia because the complaints 'help identify emerging areas of disadvantage' by showing 'the lived experiences of Australian women.'[41]

This contrasts with the views of Thornton, who argues that a focus on individualism dovetails with neoliberal ideology and a reduction in protections for workers generally. She describes the statutory separation of sexual harassment from other forms of gender discrimination as obscuring its true nature:

> The erection of a line of demarcation between sexual harassment and sex discrimination has been legitimated in Australia through legislation, despite the fact that the proscriptions against harassing or discriminatory conduct are contained in the same legislative instruments.[42]

Thornton posits that this legislative separation has led to an individualised approach to sexual harassment that fails to address the systemic gender discrimination that causes it:

> The privileging of the sexual in sexual harassment means that the focus is on the aberrant behaviour of individuals rather than the structural and systemic manifestations of discrimination.[43]

Sexual harassment occurs because of the unequal power balance between men and women in the workplace, and not because of a few 'bad apples'. This focus on aberrant individuals rather than systemic sexism also occurs in the legal response to other gender-based violent crimes such as domestic violence. This will be discussed further in chapter 5.

Procedural limitations

The 2018 Australian Human Rights Commission survey on sexual harassment in Australian workplaces found that only 17% of respondents who had experienced sexual harassment made a formal report or complaint.[44] This low reporting rate may be due to the way that sexual harassment legislation operates in practice.

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[41] Ibid 924.

[42] Thornton (n 15) 423.

[43] Ibid 424.

[44] Australian Human Rights Commission *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces* (Australian Human Rights Commission 2018), 9.

Feminist scholars have argued that sexual harassment legislation has not achieved gender equality or sufficiently addressed the harm done to individual women in the workplace. To MacDermott, it is the practical application of sexual harassment law that is the most problematic, and not the way the legislation was drafted:

> the problem is not necessarily with the legislative framework itself, but the recognition of the application of the law to the conduct in question, and the response by an organisation to the conduct.[45]

MacDermott summarises the main problem as a workplace culture of 'toleration' of sexual harassment, where it is not acknowledged by an organisation as a problem until 'it reaches a certain threshold', which is 'often set higher than the legislative scheme actually requires.'[46]

Other feminist critics have pointed to a 'risk management' and 'legal compliance' attitude to sexual harassment in organisations, where internal dispute resolution procedures 'are more effective in protecting employers from liability, a "bureaucratic vaccine against lawsuits", than they are in protecting or assisting complainants.'[47] In a case study of the banking industry, Charlesworth found that organisations emphasised 'a legalistic procedural fairness' that favoured the employer rather than the complainant and where complying with the legislation was 'balanced against the risk to the organisation should a complaint be pursued outside the workplace.'[48]

Harris notes that the SDA and state and territory anti-discrimination legislation impose a number of procedural hurdles on sexual harassment complainants, including requirements to conciliate the complaint. At the Commonwealth level, the Australian Human Rights Commission 'lacks the power to grant remedies', so if the conciliation process is not successful, 'the only avenue for the plaintiff to recover them is by launching proceedings de novo in the Federal Supreme Court.'[49] At the state and territory level, there are similar procedural requirements, where 'anti-discrimination tribunals can order payment of damages, but again only after the matter has gone through a prior process of investigation and attempted

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[45] MacDermott (n 22) 159.

[46] Ibid.

[47] Paula McDonald 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14 *International Journal of Management Reviews* 1, 10.

[48] Sara Charlesworth 'Risky Business—Managing Sexual Harassment at Work' (2002) 11 *Griffith Law Review* 353, 373.

[49] Harris (n 37) 201.

conciliation.'[50] Harris describes these procedural steps as 'a deterrent to plaintiffs and a buffer for defendants',[51] citing the inherent power imbalance between the parties and greater access by employers to the financial and legal resources necessary to pursue litigation.

McDonald and Charlesworth identify similar procedural shortcomings for the internal resolution of sexual harassment disputes, observing that even if an agreement is reached between the parties when a sexual harassment complaint is conciliated, 'anti-discrimination commissions in Australia do not have a statutory role to monitor compliance with settlement terms.'[52] McDonald and Charlesworth also note that these commissions lack the power to monitor employer policies and organisational change designed to prevent and respond to sexual harassment.[53]

The importance of workplace procedures and job security and the shortcomings of insecure work were recognised in McDonald and Dear's study of cases of discrimination and harassment reported to the Queensland Working Women's Service (QWWS). McDonald and Dear observe that 'nearly half' of the women in the sample who sought advice from QWWS had permanent full-time jobs but that this was probably because 'their permanency affords them more employment rights and that they are more aware of these rights and willing to seek redress should these problems occur.'[54] McDonald and Dear also found a high percentage of trainees making complaints of discrimination and harassment and that this 'may be more a function of precarious employment arrangements than the gender distribution of employees across the organisation or sector.'[55]

Interpretation of key constructs

Beth Gaze believes that the judicial interpretation of anti-discrimination law in general has been ineffectual and unfavourable to complainants, where 'courts have not seen sex discrimination laws as requiring them to pursue the social goal of equality or equity beyond the minimal level' and place a heavy evidentiary onus on complainants to prove direct

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[50] Ibid.

[51] Ibid.

[52] Paula McDonald and Sara Charlesworth 'Settlement outcomes in sexual harassment complaints' (2013) 24(4) *Australasian Dispute Resolution Journal* 259, 269.

[53] Ibid 267.

[54] Paula McDonald and Kerriann Dear, 'The incidence and patterns of discrimination and harassment affect working women in Australia' (2008) 22 *Women's Studies Journal* 42, 43.

[55] Ibid 44.

discrimination took place 'even though knowledge and evidence of the actual basis of the decision or action are in most cases confined to the respondent.'[56] To Gaze, judicial interpretation of anti-discrimination law is narrow and individualised, and fails to address the fundamental power imbalance between complainants and respondents.

Reasonableness

As discussed above, there has been considerable legislative reform of the concept of 'reasonableness' in sexual harassment legislation, with the test incorporating the subjective characteristics of the 'target'.

There has been significant feminist critique of the 'reasonable person' test in law in general and the specific requirements for the person harassed to feel 'offended, humiliated or intimidated' in sexual harassment law. Mason and Chapman observe that the concept of 'reasonableness' has been criticised for being too masculocentric:

> It is widely acknowledged amongst feminist scholars that liberal legal concepts, including reasonableness, are derived from, and continue to be interpreted by the law from a masculine perspective.[57]

The 'reasonableness' requirement is derived from the archaic legal concept of the 'reasonable man'. Feminist critics such as Martin point to a history of the law ignoring the lives and experiences of women, where 'the male experience is taken as including and representing the female experience, with no acknowledgement of an alternative female view.'[58] Replacing the 'reasonable man' standard with a 'reasonable woman' or 'reasonable person' does not change the historical antecedents of the standard or the masculocentric values that make up 'reasonableness'. Martin argues that, even if the standard does not expressly refer to gender, the reasonable person is defined by 'what is considered "positive" in male culture' including 'rationality, objectivity, intellect, prudence, courage, ability to be dispassionate or calm in time of crisis, ability to deal with principle and avoid the personal'.[59]

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[56] Beth Gaze 'The Sex Discrimination Act at 25: Reflections on the Past, Present and Future', in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 107, 110–111.

[57] Mason and Chapman (n 6) 218.

[58] Robyn Martin 'A Feminist View of the Reasonable Man: an alternative approach to liability in negligence for personal injury' (1994) 23 *Anglo-American Law Review* 334, 341.

[59] Ibid 349.

Concepts of reasonableness may vary depending on the views of the decision-maker. Martin observes that the reasonable man/person is 'that person whom the Judge believes him or her to be, according to the Judge's life experience, the Judge's priorities, and the Judge's values.'[60] In sexual harassment cases, the concept of reasonableness is about the decision-maker's understanding of the complainant's behaviour:

> In determining reasonableness, which is about the determination of whether the behaviour was sexual and unwelcome, and whether the complainant was in fact humiliated, and, if so, the degree of distress experienced, it seems that frequently, it is the identity, history and behaviour of the complainant that is put under the spotlight and evaluated.[61]

The 'reasonableness' requirement may be interpreted through a lens that does not accord with the complainant's reality. In *Less than Equal*, Easteal observes:

> what is constructed by tribunals as a 'reasonable' response may not include passivity or a 'shut down' robotic mode of behaviour.[62]

As Tahmindjis observes, ideas of 'reasonableness' may depend on the 'gender, age, race and cultural background of the people concerned.'[63] Feminist legal scholars such as Scutt have long highlighted the masculine biases of the law, where legal precedent may have antecedents in 'patriarchal notions of a woman's place, biased assumptions about (non) deserving women, or simple sex-prejudice'[64] which may carry over into future court decisions. In the case of 'reasonableness', this may lead to requiring female complainants to 'conform to male perceptions of acceptable behaviour, particularly in those jurisdictions where the reasonableness factor is tied to the complainant's reaction and perception of detriment.'[65]

Standards of reasonableness have been criticised for not incorporating the breadth of human experience or individual circumstances such as age, gender, race and disability. Pace observes

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[60] Ibid 343.

[61] Patricia Easteal 'Tips: The Iceberg and Global Warming Metaphor' in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis Butterworths Australia, 2010) 482, 486.

[62] Patricia Easteal *Less Than Equal—Women and the Australian Legal System* (Butterworths, 2001), 171.

[63] Phillip Tahmindjis 'Sexual Harassment and Australian Anti-Discrimination Law' (2005) 7 *International Journal of Discrimination and the Law* 87, 97.

[64] Jocelynne A. Scutt *The Incredible Woman—Power & Sexual Politics Vol 1* (Artemis Publishing, 1997), 148.

[65] Tahmindjis (n 63) 97.

that even using a 'reasonable woman' standard will not accurately reflect the diversity of women's lives:

> It ignores the reality that women's experiences are diverse and that there are differences between women in terms of race, age, religion, class or sexuality. By doing so, it thereby perpetuates the same wrongs inherent in the 'reasonable person' test.[66]

Similarly, Mackay observes that 'it would be difficult for any objective standard' to reflect the 'multidimensional' experiences of women.[67]

The Queensland and Commonwealth changes discussed above offer an alternative perspective on the 'reasonableness' standard that takes on the subjective characteristics of the target. This change in approach is reflected in the case law. For example, in Queensland, the first instance decision of *Smith v Hehir and Financial Advisors Aust Pty Ltd*[68] the Tribunal considered the allegations of an unwanted massage in light of the relationship between the parties, including that 'the action was not one between friends of long-standing: it was an action by a middle-aged employer to a young female employee who had only worked in the office for two weeks.'[69] In the Federal Court of Australia case *Stanley v Service to Youth Council Incorporated* used the similar 'reasonableness' test from the Commonwealth Sex Discrimination Act, but found that the complainant had not been sexually harassed when her employer made suggestions that she delay her return to work after maternity leave that the complainant described as 'sexualised'[70] [cite]. The Court observed:

> In context, it appears to connote conduct involving or evidencing sexual attraction, instinct, activity or relationships. The expression may have a broad scope, and a wide range of matters may be able to be characterised as constituting conduct of a sexual nature. However, the expression is not without limits. Essentially it requires that the conduct be characterised as sexual, or sexually-related.[71]

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[66] Fiona Pace 'Concepts of "reasonableness" in sexual harassment legislation: did Queensland get it right?' (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 189, 197.

[67] Mackay (n 18) 199.

[68] *Smith v Hehir and Financial Advisors Aust Pty Ltd* [2001] QADT 11, cited in Pace above n 66.

[69] Ibid [3.2] (Member Tahmindjis).

[70] *Stanley v Service to Youth Council Incorporated* [2014] FCA 643 [73].

[71] Ibid [84] (White J).

The Court found that the comments 'did not involve or evidence sexual attraction, instinct, activity, or relationships' and thus did not constitute sexual harassment.[72]

Offended, humiliated or intimidated

Feminist legal academics have also critiqued the concept of the complainant being 'offended, humiliated or intimidated' by sexual harassment. Mason and Chapman observe that there have been concerns raised about 'whether the emotions of offence, humiliation or intimidation' are an appropriate characterisation of a woman's reaction to sexual harassment[73] and that these concepts emphasise private 'matters of morality at the expense of equality.'[74] Thornton argues that these terms have a 'moralising and trivialising' effect and that the emphasis on the 'sexual' in sexual harassment 'essentially camouflages the systemic discrimination that fosters the harassment.'[75] Thornton also points out that, even if the conduct is sexualised, 'the sexualised conduct itself may not be probatively problematic because a woman in a non-traditional workplace may not necessarily be "offended, humiliated or intimidated" by the harassing acts.'[76]

The more subjective elements in the tests in the Queensland and Commonwealth legislation offer scope for greater judicial consideration of the feelings of the complainant. However, the judicial comments in *Stanley* suggest that while there have been reforms that require courts to take into account the subjective characteristics of the complainant, the focus continues to be on heterosexed conduct and morality, rather than systemic workplace discrimination.

Conclusion

The development of sexual harassment law in Australia has been an important step in the fight for gender equality in the workplace. However, the legislation and case law remain an imperfect mechanism for achieving feminist aims. This critique of the legislation has demonstrated the difficulties of making legal drafting resonate with the experiences of women in the workplace. As Van Der Winden observes, 'The objective determination of what

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[72] Ibid [88].

[73] Mason and Chapman (n 6) 220.

[74] Ibid.

[75] Margaret Thornton (n 15) 429.

[76] Ibid 432.

constitutes sexual harassment makes it, by nature, a challenging area to legislate.'[77] Van Der Winden argues that anti-discrimination legislation like the SDA can only go so far, and 'can only act as a deterrent, once policy and education have fallen short and the judicial system must step in.'[78]

Feminist critics have identified circumstances where the legislation and judicial interpretation do not yet align with the experiences of women who are sexually harassed in the workplace, including trivialisation of the harm through inadequate awards of damages and masculocentric expectations of 'reasonable' victim behaviour—such as prompt reporting. While the current trend for higher awards of damages suggests a growing judicial understanding of the traumatic effects of sexual harassment, this remains an area of law that requires further research and scrutiny.

When researching the portrayals of sexual harassment cases by the media, it is also important to be aware of the social and legal context underpinning the media itself, including the law of sub judice contempt. In the next chapter, I will examine theoretical approaches to understanding media influence, editorial conventions and media law.

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[77] Catherine Van Der Winden 'Combatting sexual harassment in the workplace: policy vs legislative reform' (2014) 12(1) *Canberra Law Review* 203, 221.

[78] Ibid.

3 Theoretical approaches to understanding media influence, editorial practice and media law

Introduction

In this chapter, I review key theoretical approaches to understanding the influence of news media on audience attitudes and beliefs. This work will inform my examination of the messages conveyed by the media about sexual harassment cases. I focus primarily on 'traditional' television, print and online news and journalism rather than on 'alternative' media, blogs and social media. I review the 'media influence' scholarship, including Gramsci's hegemony, Adorno and Horkheimer's 'hypodermic model', the significance of soundbites and clickbait, Gerbner and Gross's 'cultivation analysis' and framing analysis techniques. I examine 'active audience' scholarship, including the cultural studies approach and 'uses and gratifications' theory. I also review and discuss recent scholarship on the impact of the changing digital environment and the rise of social media on traditional journalism. While there have been dramatic changes in the media environment, the question of media influence continues to remain central and critical in the context of seeking to understand factors that shape public understandings and policy responses to social issues and problems such as sexual harassment. I also use this chapter to examine editorial practices and the impact of the law of *sub judice* contempt on the media.

Considerable academic attention has been devoted to the power of the media—with a particular focus on mainstream news and journalistic practices—to influence societal attitudes and beliefs. There is a vast body of literature dedicated to the intersections between the mass media, politics and audiences. While there seems to be a level of consensus in media scholarship that the mass media has a political dimension, and does affect audiences in some way, clear debates have emerged about the extent to which this occurs and the relative agency of the audience.

The major debate in the media studies field centres on the extent to which the media influences audiences. Media studies theorists are divided on whether the media has a purely propagandist role and whether audiences are able to actively create their own meanings and messages in response to news stories. Kitzinger characterises these approaches as falling into

two main groups: 'approaches that focus on the power of the media' or 'media influence' and 'approaches that focus on the power and activity of audiences' or 'active audience'.[79] Although this assessment of the media studies field was published in 2004 and much has changed in the media environment since, Kitzinger's work remains an important starting point for my literature review. Her work focuses on media framing and public understanding of violence against women and children. It provides a useful foundation for consideration of the literature when writing about another form of violence against women: sexual harassment.

In this chapter, I discuss the way that some media theorists characterise the mass media as a powerful propaganda tool to engage in a 'one-way' political communication with the audience while other theorists view this dialogue as more complex and place the audience in a position of greater 'active' agency. I take Kitzinger's media studies dichotomy as a starting point and delve further into the particular approaches that fall on either side of this. I draw together the approaches taken in the 'hypodermic model' of media influence, the role of soundbites and clickbait in the digital environment, cultivation theory, framing analysis, the 'active audience' model and negotiated codes. I also examine 'mediatisation theory', in which there is greater interaction between the media, its audiences and its sources—including state institutions. I prefer the 'media influence' view but also recognise that audiences may have their own way of responding to media messages, including oppositional interpretation.

Overall, studies of the media have emphasised its political power and its importance as a subject of academic inquiry. I examine the different theoretical approaches to the media and its power to both shape and reflect audience attitudes, and I use them as building blocks for further study. I focus on theoretical approaches to the relationship between politics, audiences and the mainstream news media. Many of these approaches can also be seen in feminist theoretical approaches to media criticism, which are outlined in the next chapter. I note that the rise of social media and digital communication has changed the nature of news itself, with audiences no longer relying on the traditional newspaper and television sources to inform them of current events. Despite these changes, the question of media influence continues to remain central and critical in the context of seeking to understand factors that shape public understandings and policy responses to social issues and problems such as sexual harassment.

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[79] Jenny Kitzinger *Framing Abuse—Media Influence and Public Understanding of Sexual Violence Against Children* (Pluto Press, 2004) 12.

Media influence

Media influence scholarship emphasises the power of the media to shape and control people's attitudes and beliefs. Media influence theorists place the media, and in particular television news and print journalism (the primary concern of this chapter), in a very powerful position. The news media has the power to determine which messages are received by audiences about particular issues, often to the benefit of the state and other dominant power structures.

Hegemony and transformative potential

Media influence theorists argue that the news media reinforces dominant power structures in society. Street argues that the news media and popular culture contribute to a person's commonsense understanding of the world, which reinforces the authority and legitimacy of the most powerful in society. [80] However, as discussed in the introduction, Street recognises the ability of the media to challenge and reinforce the status quo.[81] The media influence theorists I discuss below tend to describe the media using its influence to reinforce rather than challenge authority.

The hegemony theory developed by Antonio Gramsci expands upon this characterisation of the media serving dominant power relations. In *Gramsci's political thought*, Joseph Femia characterises Gramsci's hegemony as a theory of control by a dominant social class 'by moulding personal convictions into a replica of prevailing norms', through 'an order in which a common social-moral language is spoken, in which one concept of reality is dominant, informing with its spirit all modes of thought and behaviour.'[82] One important way of achieving this domination is through control of the mass media. Femia quotes Gramsci's argument that the mass media is used to make a connection between 'political' and 'civil' society. If the state wishes to initiate an unpopular action or policy, it uses its power to create and disseminate a 'suitable, or appropriate public opinion' in advance.[83] This is reminiscent of Herman and Chomsky's contention in their classic 1994 work *Manufacturing consent*, about the propagandist role of the mass media:

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[80] John Street *Mass Media, Politics and Democracy* (Palgrave Macmillan, 2nd edition, 2011) 11.

[81] Ibid 12.

[82] Antonio Gramsci *PP,* 158 quoted in Joseph V. Femia *Gramsci's Political Thought—Hegemony, Consciousness, and the Revolutionary Process* (Clarendon Press, 1981) 27.

[83] Ibid.

> It is their function to amuse, entertain, and inform, and to inculcate individuals with the values, beliefs, and codes of behavior (sic) that will integrate them into the institutional structures of the larger society.[84]

To these theorists, the media plays the role of strengthening the power of the state and making sure that individuals are appropriately receptive to its power.

For Gramsci, the mass media help the state to organise and centralise a suitable public opinion. Femia notes Gramsci's view that 'governments can often mobilize the support of the mass media and other ideological instruments'[85]. This is achieved by marshalling the 'various elites' who 'share similar world-views and lifestyles' and through the institutions of civil society.[86] To Gramsci, the press is 'the most dynamic part' but not the only part of this ideological structure.[87] Commenting on Gramscian theory, Kellner and Durham observe: 'a hegemonic social structure is always contested by counterhegemonic forces', citing the example of a rise of liberalism and social-democratic movements in the 1990s as a counter-hegemonic reaction to conservative government in the 1980s.[88] A similar view of the role of resistance as itself reinforcing dominant power structures can be seen in the 'hypodermic model' of media influence.

Hypodermic model and the culture industry

Some media influence theorists place the media in a dictatorial position, with a one-way communication style. This approach dates back to the beginning of media studies as a discipline in the 1940s, and the development of what is characterised as the 'hypodermic model' by theorists such as Adorno and Horkehimer of the Frankfurt School. Under this model, the media is characterised as furthering dominant cultural and economic interests by using its products to 'inject' a particular perspective into the culture.[89]

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[84] Edward S. Herman and Noam Chomsky *Manufacturing Consent—The Political Economy of the Mass Media* (Vintage, 1994), 1.

[85] Gramsci (n 4) 27.

[86] Ibid 27–28.

[87] Douglas M. Kellner and Meenakshi Gigi Durham 'Adventures in Media and Cultural Studies: Introducing the KeyWorks', Meenakshi Gigi Durham and Douglas M. Kellner (eds) *Media and Cultural Studies—KeyWorks*, Antonio Gramsci "(i) History of the Subaltern Classes; (ii) The Concept of "Ideology"; (iii) Cultural Themes: Ideological Material" (Blackwell Publishing, 2006) 12, 16.

[88]Ibid xvi.

[89] Jeffery L Bineham 'A historical account of the hypodermic model in mass communication' (1988) 55 *Communication Monographs* 230, 236.

In their classic essay ‘The culture industry: enlightenment as mass deception’, Adorno and Horkheimer argue that life itself is homogenised by the mass media’s ‘culture industry’, which is ‘infecting everything with sameness’ through a system of film, radio and magazines.[90] They argue that this homogenisation has a clear political purpose. Cultural products and the technology to distribute them are developed with the purpose of reinforcing dominant political and economic interests, in which ‘the basis on which technology is gaining power over society is the power of those whose economic position in society is strongest’[91] and political opposition has itself been subsumed into the ‘culture industry’—‘belong[ing] to it as the land reformer does to capitalism.’ They observe wryly that, ‘Realistic indignation is the trademark of those with a new idea to sell.’[92] From this perspective, the presence of opposition does not reduce the strength of dominant power relations in society; it reinforces them.

The ‘culture industry’ thesis echoes through generations of media scholarship. Some theorists have built on the central premise of ‘mass media as propagandist’ to examine more subtle forms of media influence. For example, McCombs and Shaw examined the relationship between media coverage of the 1968 US presidential election and voter patterns and quote Cohen’s more nuanced observation, in which ‘the press “may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think *about*.”’[93] McCombs and Shaw conclude that the agenda-setting function of the mass media can be seen in the way voters agree with the media about what issues are important.[94] While the voters in the study did not simply parrot the messages they received from the media, they absorbed the overall impression of what the media considered to be important issues.

Sound bites

In a late 20th century rendition of the ‘media influence’ argument, Jeffrey Scheuer contends that the media deliberately ‘dumbs down’ its reporting to reinforce dominant power structures

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[90] Theodor Adorno and Max Horkheimer, “The Culture Industry.” In *Dialectic of Enlightenment: Philosophical Fragments*, Gunzelin Schmid Noerr (ed), trans. Edmund Jephcott (trans) (Stanford University Press, 2002, 94) 94, 94.

[91] Ibid 95.

[92] Ibid 104

[93] Maxwell E McCombs and Donald L Shaw ‘The agenda-setting function of mass media’, (Summer 1972) 36(2) *Public Opinion Quarterly* 176, 184, quoting Bernard Cohen *The Press and Foreign Policy*, Princeton, (Princeton University Press, 1964) 13.

[94] Ibid.

and 'the very notion of "news" erodes in a tide of formulaic and mass entertainment."[95] Scheuer argues that the media, especially television, reduce stories to simplistic summaries, symbols and slogans for the purpose of discouraging critical thinking, creating 'a society anaesthetized to violence, one that is cynical but uncritical, and indifferent to, if not contemptuous of, the more complex human tasks of cooperation, conceptualization, and serious discourse.'[96] This cynical view of the media creating a form of Orwellian Newspeak through symbols echoes Gramsci's hegemony and Adorno and Horkheimer's culture industry.

Like Adorno and Horkheimer, Scheuer argues that the media not only favour certain political ideas but determine the parameters of political engagement itself. The influence of television has reduced political discourse to 'an audio-visual vocabulary of images, slogans and sound bites' that 'favors (sic) certain political ideas and disfavors (sic) others.'[97] To Scheuer, the 'favoured' messages focus on 'the immediate and the obvious; the near-term, and the particular; on identity between appearance and reality'—that is, on the individual rather than larger communities.[98] According to this line of thinking, the very shallowness of the message is an ideological tool that keeps the audience ignorant and serves dominant power structures.

The adaptation of politicians to the 'sound bite' environment was noted in an amusing 2011 column for *The Guardian* by journalist and *Black mirror* creator Charlie Brooker, which described then UK Leader of the Opposition, Ed Miliband, repeating the same phrase over and over during an interview,

> The reason for the Speak-and-Spell tactic is obvious…the PR handler responsible must have figured that since the interview would be whittled down to one 10-second soundbite for that evening's news bulletins, and since they didn't want to risk their man saying anything ill-advised or vaguely interesting, they might as well merely ignore all the questions and impersonate an iPod with just one track on it.[99]

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[95] Jeffrey Scheuer The Sound Bite Society – How Television Helps the Right and Hurts the Left (Routledge, 2001) 8.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Charlie Brooker 'The Ed Miliband loop and the media reality deficit' *The Guardian* (online at 4 July 2011) <http://www.theguardian.com/commentisfree/2011/jul/03/charlie-brooker-stop-ed-miliband>.

These sound bite interviews have so dominated political engagement with the media, leading to what Brooker describes as a situation where '… many people working in TV news have grown so accustomed to seeing tapes in which politicians blankly replicate a single phrase as if they're summoning Candyman, it no longer strikes them as unusual.'[100] This suggests a symbiotic relationship between politicians and the 'sound bite' media, with the media structuring how political messages are conveyed and some politicians showing an extreme response to the media's constraints. Brooker suggests that this has resulted in a frustrating situation in which neither politicians nor the media can convey any meaningful message to an audience. There are implicit links between the 'sound bite' culture and mediatisation theory, in which there is direct engagement between the mass media and non-media players from state institutions. Mediatisation is discussed later in this chapter.

Scheuer's critique anticipates the rise of the internet, social media and 'clickbait' journalism, in which news items are reduced to tantalising tabloid tags. Digital strategist and former journalist Mark S. Luckie makes similar observations in a 2016 article provocatively titled 'Adele and the death of clickbait'. Luckie draws parallels between the more substantive news stories that are the opposite of clickbait and the more 'worthy' and complex music of the singer Adele, who is considered the opposite of more 'disposable' pop singers. The 'sound bite' is more important but shallower than ever, and news stories are designed to encourage web traffic rather than inform audiences. However, like fans of Adele, many audiences prefer more substantive content. Luckie comments: 'Some journalism has been reduced to a pre-fab format of what we think will get web denizens to make that all-important click'.[101] However, Luckie does not view clickbait as the end of journalism—commenting that, while shallow uninspired content abounds, we should not discount the power of an audience to reject such empty content. He notes that the 'secret to virality' is that the audience wants content that they and their friends can 'connect to on an emotional level.'[102] This view is more aligned with that of the 'active audience' theorists, which I discuss later in this chapter.

Palau-Sampio takes a similar attitude to Scheuer in a critique of clickbait journalism. In a study of the digital journey of Spanish broadsheet *El pais* to *Elpais.com*, Palau-Sampio found that the 'newspaper of reference' adopted tabloid tactics to preserve its viability in a changing

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[100] Ibid.

[101] Mark S Luckie "Adele and the death of clickbait", (January/February 2016) 104 (1) *Quill*. 18, 18.

[102] Ibid.

media landscape at the expense of quality journalism. She observes three 'worrying trends' in a former broadsheet aping tabloid techniques such as clickbait articles. Firstly, Palau-Sampio expresses concern about the ability of a newspaper aping a clickbait entertainment site to perform the traditional journalistic role of explaining the causes and effects of significant events.[103] Secondly, Palau-Sampio questions the 'social responsibility' of a newspaper using purely eye-catching headlines and unverified, uncontested sources.[104] Thirdly, Palau-Sampio is concerned about the ability of *Elpais.com* to fulfil its role as a check on government power, observing that the entertainment 'raises serious questions' about the democratic role of the press to research and rigorously report relevant issues.[105] The example of *Elpais.com* suggests that, as newspapers develop an online presence, the messages conveyed to readers may become more shallow and attention-seeking. With this focus, the press is more interested in collecting mouse clicks than in any romanticised notion of speaking the truth to power.

Journalistic practices—news values, sourcing and news routines

Media reporting is of course informed by journalistic practices and editorial conventions. Examples of this are seen in scholarship about 'news values', editorial practices and news routines. When critiquing media portrayals of legal issues, it is important to understand the dynamics of the newsroom itself, including the commercial and structural constraints in which journalists operate.

News values

Scheuer's 'sound bite' contention is somewhat reminiscent of previous scholarship on news values and the sociology of news, with its focus on entertainment and surprise for the reader. However, other news values are also significant. In their classic 1965 study of news values in Norwegian newspaper reporting on international crises, Galtung and Ruge test eight hypotheses on how an event becomes news, using the metaphor of a radio frequency. First, the more similar the 'frequency' of the event is to the 'frequency' of the news medium, the more likely it is to become 'news'.[106] Galtung and Ruge define 'frequency' as the 'time-span

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[103] Dolors Palau-Sampio 'Reference press metamorphosis in the digital context: clickbait and tabloid strategies in *Elpais.com*' (2016) 29(2) *Communication & Society* 63, 76.

[104] Ibid.

[105] Ibid.

[106] Johan Galtung and Mari Holmboe Ruge 'The Structure of Foreign News – The Presentation of the Congo, Cuba and Cyprus Crises in four Norwegian Newspapers' (1965) 2(1) *Journal of Peace Research* 64, 66.

needed for the event to unfold itself and acquire meaning'.[107] Second, the event must meet a certain threshold before it will be recorded at all.[108] Third, the event must have a certain level of clarity to be reportable news, so that 'there is only one or a limited number of meanings in what is received'[109]. Fourth, the event must be considered 'meaningful' within the cultural framework of the audience.[110] Fifth, the event aligns with the 'mental matrix' of what a person 'predicts' may happen for 'easy reception and registration of the event if it does finally take place'.[111] Sixth, an event is 'unexpected or rare'.[112] Seventh, once an event has already been reported on, it will 'continue to be defined as news for some time'[113]. Finally, the newsworthiness of an event may depend on the 'composition' of the broadcast or newspaper and its relationship to other news items in the day's report.[114] Galtung and Ruge identify these additional values, which work in concert with the previous list: an event is more likely to become a news item if it concerns 'elite' powerful nations or 'elite people', if it can be seen in 'personal' terms as 'due to the action of specific individuals' and if it is 'negative in its consequences'.[115]

In 'What is news? News values revisited (again)' Harcup and O'Neill revisit the findings of their 2001 study of news values. They had concluded that news stories must generally include one or more of:

- the power elite—stories concerning powerful individuals or organisations, celebrity, entertainment, surprise, bad news, good news, magnitude
- relevance—stories about matters that are believed to be relevant to the audience
- follow-up—stories about subjects already in the news
- topics that fit the newspaper's own agenda.[116]

[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid 66-67.
[111] Ibid 67.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid 68.
[116] Tony Harcup and Deirdre O'Neill 'What is News? News values revisited (again)' (2017) 18(12) *Journalism Studies* 1470, 1471.

On revisiting this study in 2017, Harcup and O'Neill provide an updated list of news values for a digital media world with a 24-hour news cycle: exclusivity, bad news, conflict, surprise, shareability on social media, audio-visuals, entertainment, unfolding drama, follow-up, relevance, magnitude, celebrity, good news and the news organisation's agenda.[117] There continues to be news value in reporting on the doings of the rich and famous, entertaining stories and good and bad news, even while technologies and audiences have changed.

It is important to recognise the role and agency of individual journalists when discussing the news media. Journalistic practices such as sourcing and news routines also have a significant impact on the construction of news stories. Berkowitz argues that both reporters and their sources are able to influence the news, that their relationship 'represents a long-term, yet dynamic influence on society: the ability to shape ongoing meanings in a culture.'[118] This shaping of meaning occurs when the journalist chooses particular sources to quote, and the '[n]ews becomes a construction',[119] when the sources themselves are 'able to influence the shape of an issue that gains a place on the agenda and then form the initial discussion about that issue'[120] or even 'influence whether an issue will reach the news agenda and public discussion'.[121] Berkowitz argues that these short-term decisions for an individual news story can lead to a long-term influence on news discourse and, echoing Street, individuals' common sense understandings of the world.[122]

Lee B Becker and Tudor Vlad make similar observations about news routines. They describe news organisations as having a fundamental need for story ideas, which affects journalistic practice:

> The structure of the organizations and their routines result from this need, and these structures and routines, in turn, shape the final news product.[123]

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[117] Ibid 1482.

[118] Daniel A. Berkowitz 'Reporters and Their Sources' in Karin Wahl-Jorgensen and Thomas Hanitzch (eds) *The Handbook of Journalism Studies* (Routledge, 2009) 102, 102.

[119] Ibid 103.

[120] Ibid 105–106

[121] Ibid 106.

[122] Ibid 111.

[123] Lee B Becker and Tudor Vlad 'News Organizations and Routines' in Wahl-Jorgensen and Thomas Hanitzch (eds) (n 40) 59, 69.

To Becker and Vlad, it is the routine of generating ideas for stories, or the 'story ideation' that is the 'key process' in the creation of news.[124] The importance of storytelling is also central to the work of the 'cultivation analysis' theorists, which I discuss in the next section.

Media outlets and journalists are subject to certain pragmatic constraints. These constraints help shape and limit news production. This was recognised back in 1955 with the classic Warren Breed article 'Social control in the newsroom'.[125] Breed argues, 'Every newspaper has a policy, whether admitted or not.'[126] This 'policy' is the newspaper's attitude to the particular issues of the day, such as politics, and is expressed in the 'slanting' of stories.[127] Breed observes that journalists end up complying with editorial 'policy' even if their personal views are different, for six key reasons: 'institutional authority and sanctions', 'feelings of obligation and esteem for superiors', 'the pleasant nature of the activity', 'absence of conflicting group allegiance', 'mobility aspirations' and a mindset of 'news as a value'.[128]

Economic constraints can play a strong role in the nature of news. Writing about the commercialisation of the news, McManus comments on the economic factors in play for the traditional news media and their effect on the quality of journalism. This includes the frequency of 'hard' investigative reporting:

> Economic theory predicts that when a producer is not able to capture some of the value of the product, it is under-produced. Since deterrence of corruption is entirely uncompensated, and what builds deterrence – investigative reporting – is very expensive and little compensated as competitors are able to offer the revelations almost immediately, economic theory provides an explanation of why it is so rare.[129]

This view of the commercial constraints on news media is echoed by Stuart Allan, who observes:

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[124] Ibid 70.

[125] Warren Breed 'Social control in the newsroom' (1955) 33(4) *Social Forces* 326.

[126] Ibid 327.

[127] Ibid.

[128] Ibid 330-331.

[129] John H. McManus 'The Commercialization of the News' in Wahl-Jorgensen and Hanitzch (eds) (n 40) 218, 228.

> The economic pressure to maintain a cost-efficient, profitable news organization, in part by avoiding expenses which may not result in a news story, means that investigative reporting is often disallowed on those terms…[130]

Journalism works within the broader economic constraints on news organisations. In addition to market constraints on media organisations, the deadline culture of the newsroom places time constraints on journalists. This includes 'a need to conform to the news organization's daily production schedule'.[131] Reich and Godler observe that deadline constraints:

> ….have been shown to be significantly and negatively related to such fundamental properties of individual news items as source diversity, cross-checking and use of leaked information.[132]

Reich and Godler further comment that heavy reliance on some sources was seen as a time saver by journalists, where:

> …some sources, such as PR, spokespersons and frequent contacts, were apparently adept at bending time – as the reliance on them was associated with speedier journalistic performance.[133]

It is also important to be aware of the roles and power dynamics within the newsroom itself. For example, when considering the framing of stories, which I discuss later in this chapter, this must be done with the awareness that individual journalists do not write the headlines for their own stories. The literature also highlights the significance of newsroom management culture. In a 2019 study of the East African Reuters newswire bureau, Mel Bunce found that journalists responded to managerial changes in different ways. Following a 2007 merger, Reuters became 'Thomson Reuters' and its focus changed from 'hard' news to business and financial stories.[134] Bunce found that some 'old guard' journalists had different news values from management and 'articulated a deeply ingrained set of 'public interest' news values' such as raising awareness of political and humanitarian issues, which they considered to be

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[130] Stuart Allan *News Culture* (Open University Press, 3rd ed, 2010), 80.

[131] Ibid.

[132] Zvi Reich and Yigal Godler 'A time of uncertainty – The effects of reporters' time schedule on their work' (2014) 15(5) *Journalism Studies* 607, 613.

[133] Ibid.

[134] Mel Bunce 'Management and resistance in the digital newsroom' (2019) 20(7) *Journalism* 890, 890-891.

more important than business and financial news.[135] The 'new hires' were supportive of the financial and business focus.[136] This illustrated 'the role that individual journalists can play in the maintenance or transformation of organizational culture and norms.'[137] Bunce also highlights the importance of audience metrics in the measurement of 'successful' news stories.[138] Similar observations were made by Tang Tang and Chih-Hui Lai's study of local news consumption among 'millennials', where they conclude that local news outlets would do well to focus on audience engagement:

> …it is important for local news managers to pursue evidence-informed strategies that address multiplatform content creation, with particular attention to different combinations of media platforms for content distribution and management.[139]

When assessing media coverage of sexual harassment cases, it is important to recognise these practical, economic and editorial constraints on journalists and media outlets.

Cultivation analysis

The 'cultivation analysis' theories developed by George Gerbner and colleagues offer an alternative, longer-term perspective on media influence. Under cultivation analysis, the influence of the media stretches beyond the adult consumers described by other theorists. While classic cultivation theory focuses on the role of television, and its monolithic power as a storyteller, this theory is also applicable to other forms of media such as print and online news. In 'Living with television: the dynamics of the cultivation process', Gerbner, Gross, Morgan and Signorielli argue that 'television has become the primary common source of socialisation and everyday information' and its repetitive messages and images 'form the mainstream of a common symbolic environment'.[140] Television begins to invade the consciousness and shape the perceptions of its audience almost from birth. As a common source of socialisation and everyday information, television has great power to influence its

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[135] Ibid 899.

[136] Ibid 898.

[137] Ibid 902.

[138] Ibid 901.

[139] Tang Tang and Chih-Hui Lai 'Managing old and new in local newsrooms: an analysis of Generation C's multiplatform local news repertoires' (2018) 15(1) *Journal of Media and Business Studies* 42, 52.

[140] George Gerbner, Larry Gross, Michael Morgan and Nancy Signorielli 'Living With Television: The Dynamics of the Cultivation Process', In. J Bryant & D Zillmann (Eds.) *Perspectives on Media Effects* (Lawrence Erlbaum Associates., 1986) 17, 18.

audiences. The televised images shape audiences' understanding of the world around them, 'telling most of the stories to most of the people most of the time'.[141] While print and online news do not have the same ability to convey subconscious messages to infants as television (with the benefit of sounds and pictures), I believe that the written word plays a similar storytelling role for adult audiences and helps to construct their 'reality'.

Street echoes the work of the cultivation theorists by arguing that the media not only reflect the 'reality' of our world but also shape it through the use of narrative techniques. To Street, stories form a 'causal chain', identify notions of responsibility and blame and 'steer the audience's response towards one view of the world rather than another.'[142] This is reminiscent of the framing techniques I discuss later in this chapter. By aligning events in a narrative structure and implying cause and effect, media stories create powerful messages for audiences about the world around them. The story becomes a world in itself.

As discussed in the introduction, a narrative positions events in a particular way to determine the way the audience is to understand the event. This is a technique I discuss further in my review of scholarship on framing analysis. Cultivation theorists argue that reporting of certain events may mislead audiences about the broader issues at play. If there is news reporting on crime, this may give audiences the impression that crime is more prevalent than it actually is.[143] When viewing television programs, audiences absorb dominant cultural narratives expressed in storytelling. This creates what Street would call their commonsense view of the world.

In the present day, cultivation theorists have needed to respond to a changing media landscape. The impact of the internet, social media and subscription services such as Netflix has been a reduction in the power of television to dominate media discourse. However, cultivation theorists argue that, while there is a need to re-evaluate previous research techniques to accommodate new media, many of the messages remain the same. In their 2015 article 'Yesterday's new cultivation, tomorrow', Morgan, Shanahan and Signorielli observe that, while the media environment has changed since cultivation theory was developed in the 1970s, television 'still maintains its position as the dominant storyteller of the culture' and

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[141] Ibid.

[142] John Street Mass Media, Politics and Democracy (Palgrave, first ed, 2001) 4.

[143] Michael Morgan, James Shanahan and Nancy Signorielli 'Yesterday's New Cultivation, Tomorrow' (2015) 18(5) *Mass Communication and Society* 674, 681.

attracts the largest audience of any other medium.[144] They 'guardedly' view new digital technologies as an expansion of television viewing that will mean 'more of the same', though advise that any assessment of whether cultivation theory continues to fit the new media will require 'caution and, of course, data'. [145]

While there have been technological changes to the way stories are consumed, Morgan, Shanahan and Signorielli consider the forces of cultivation to be largely unchanged, noting that 'people watch stories on screens even more now than they ever did'. [146] This suggests that, while there are new forms of 'screen time', in which stories are consumed outside of traditional broadcast television on other devices such as tablets and computers, cultivated human behaviour remains the same. However, Morgan, Shanahan and Signorielli recognise that technological change has made a more diverse collection of stories available to audiences, which may affect the notion of a 'common' message.[147] This is left as a question for future examination and analysis. However, cultivation theory remains a powerful way of considering the messages available to audiences and the way they are processed into 'reality'.

Framing analysis

While cultivation theorists have examined the potential influence of the substantive 'story' content on audiences, other media scholars have analysed the way that news stories themselves are structured or 'framed' and the effects of this framing on audiences. Shanto Iyengar observes, 'What psychologists call "framing"—the specific concepts and terms used to present choice or decision options—has been found to exert powerful effects on judgment and choice.'[148] Some media theorists[149] have developed the concept of 'framing analysis' to conceptualise the power of the media to shape public opinion. These theorists examine the physical structure of news stories and argue that, by using framing techniques, the media prioritises certain information to craft its messages to its audience.

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[144] Ibid, 679.

[145] Ibid 693.

[146] Ibid 694.

[147] Ibid 695.

[148] Shanto Iyengar 'Framing Responsibility for Political Issues: The Case of Poverty' (March 1990) 12(1) 'Cognition and Political Action' *Political Behavior* 19, 19–20.

[149] See, for example, Iyengar, Zhongdang Pan and Gerald M. Kosicki, Robert M. Entman, William A. Gamson and Andre Modigliani and Todd Gitlin.

As identified by Jorg Matthes in a review of the literature on framing analysis, there is some variation in the definition of 'framing' across media scholarship. Some theorists, such as Gitlin, describe frames more generally as 'principles of selection, emphasis, and presentation' about 'what exists, what happens and what matters', and others 'specify what frames generally do, such as defining problems, making moral judgments and supporting remedies'.[150] Matthes notes that this variation has also led to a variation in methodology, commenting that some theorists have analysed individual news articles while others have focused on visual elements of news stories.[151] However, despite these differences, there are unifying elements in the use of framing analysis across the literature.

Entman defines the use of framing by the media as 'culling a few elements of perceived reality' and then 'assembling a narrative that highlights connections among them to promote a particular interpretation'.[152] To Entman, framing 'typically performs' the functions of 'problem definition, causal analysis, moral judgment and remedy promotion'.[153] It is a powerful tool for setting the parameters of what audiences should consider important. The framing of an issue, and the choices made by media about what should and should not be emphasised, defines a particular version of 'reality' for an audience.

Echoing Street's concept of the media disseminating the commonsense view of those in power, Zhongdang Pan and Gerald M. Kosicki observe that news operates within a discourse of pervasive 'shared beliefs about society' that are 'accepted by a majority of society as common sense or conventional wisdom'.[154] The way a news story is framed is an important component of the message that is transmitted to an audience.

Pan and Kosicki suggest framing analysis is used in two different ways: as a 'cognitive device used in information encoding, interpreting, and retrieving' and as a 'strategy of constructing and processing news discourse or as a characteristic of the discourse itself'. [155] Entman makes a similar observation, commenting that the media uses framing techniques to 'shape and alter

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[150] Jorg Matthes 'What's in a frame? A content analysis of media framing studies in the world's leading communication journals, 1990-2005' (Summer 2009) 86(2) *J & MC Quarterly* 349, 350.

[151] Ibid.

[152] Robert M. Entman 'Framing Bias: Media in the Distribution of Power' (2007) 57 *Journal of Communication* 163, 164.

[153] Ibid.

[154] Zhongdang Pan and Gerald M. Kosicki 'Framing Analysis: An Approach to News Discourse' (1993) 10 *Political Communication* 55, 57.

[155] Ibid.

audience members' interpretations and preferences through priming' and 'introduce or raise the salience or apparent importance of certain ideas'.[156]

Pan and Kosicki identify four categories of framing devices at work in news discourse: 'syntactical structure', 'script structure', 'thematic structure' and 'rhetorical structure'.[157] 'Syntactical structure' refers to the way a news story is constructed. Pan and Kosicki refer to the standard 'inverted pyramid structure',[158] which consists of the following attributes in descending order of importance: the headline, lead, episodes, background and closure.[159] They also identify a number of professional news-writing techniques 'that have been developed to indicate balance or impartiality'[160] as part of the syntactical structure, such as 'claiming empirical validity' through quoting an 'expert' or citing data 'linking certain points of view to authority by quoting official sources' and 'marginalizing certain points of view' by linking these views to a 'social deviant'. [161] Here the structure of the news story disguises rhetorical manipulation as impartiality.

'Script structure' refers to the storytelling functions of journalism and is similar in some ways to the techniques observed by Gerbner in cultivation analysis. Pan and Kosicki describe news storytelling as having two distinct purposes: firstly, news stories 'cover concrete newsworthy events—arbitrarily chunked concretes in a continuous flow of history' and, secondly, news stories have a social function and 'orient audiences toward their communal environment and… help link audiences with the environment that transcends their limited sensory experiences'[162]. Pan and Kosicki argue that news stories achieve these purposes by positioning newsworthy events within a particular news 'script' with 'a beginning, a climax and an end.'[163] This echoes Scheuer's critique of 'sound bite' reporting, in which the form of the news story discourages complex analysis and a contextual understanding of newsworthy events.

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[156] Entman (n 74) 164.
[157] Pan and Kosicki (n 76), 59.
[158] Ibid.
[159] Ibid.
[160] Ibid 60.
[161] Ibid.
[162] Ibid.
[163] Ibid.

Pan and Kosicki identify the use of a 'thematic structure' in news stories in which 'so called issue stories that focus on one issue or topic at a time and report several events, actions or statements related to the issue'[164]. From their perspective, such stories contain 'hypothesis testing elements' in which 'a theme is presented or implied, and evidence in the forms of journalists' observations of actions or quotations of a source is presented to support the hypothesis.'[165] The use of a unifying theme shapes the way events are interpreted and positioned in a news story. The hypothesis is presented in the news story and is proven. This shapes audience perceptions about the importance of the issue in favour of the media's preferred depiction of 'reality'.

Gamson and Modigliani make similar observations in their study of media coverage (a blend of television news coverage, newsmagazine accounts, editorial cartoons and syndicated opinion columns) on the issue of nuclear power. They comment on the media's use of 'packages' with a unifying theme—namely, 'a central organizing idea, or *frame*, for making sense of relevant events, suggesting what is at issue.'[166] This central idea helps to shape the positioning of information in the story and provide a contextual explanation for events.

The importance of themes in the positioning of information in news stories is readily apparent in Iyengar's studies of US media representations of poverty from 1987 and 1990. Iyengar contrasts the media's use of 'thematic' and 'episodic' framing, using the example of stories about poverty. Iyengar describes a 'thematic' frame as where the 'the news might consist of information bearing on general trends' such as the poverty rate or matters of public policy.[167] Iyengar describes an 'episodic' frame as a more individual story defined in terms of personal experience, such as reporting on 'a particular instance of an individual or family living under economic duress.'[168]

Iyengar identifies a strong correlation between the choice of media frame and audience attitudes to poverty. He observes that, when the media used a 'thematic' frame to describe poverty generally, participants in the study were 'least apt to hold individuals causally

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[164] Ibid.

[165] Ibid.

[166] William A Gamson and Andre Modigliani 'Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach' (July 1989) 95(1) *American Journal of Sociology* 1, 3.

[167] Iyengar (n 70) 22.

168 Ibid.

responsible and most apt to consider society responsible'[169]. Iyengar refers to his own earlier 1987 experimental study of media framing and attitudes to poverty, in which he found that 'when news coverage of poverty dwelled on particular instances of poor people, individuals were more apt to hold the poor causally responsible'[170]. In his 1990 study, Iyengar found that when the media used an 'episodic' frame to describe a particular person or family living in poverty, attitudes varied depending on the person or family's attributes, with 'single mother frames' leading the audience to attribute a higher level of causal responsibility than 'poor child' and 'unemployed man' frames.[171]

Iyengar concludes that 'what people take to be the causes and cures of poverty depends significantly on the manner in which television news presentations frame the issue,' and that news audiences hold the government more responsible for poverty when it is defined as a 'general phenomenon' (thematic) rather than a 'specific poor person' (episodic).[172] This strongly demonstrates the power of media framing to influence public opinion.

Pan and Kosicki define the 'rhetorical structure' of news framing as 'the stylistic choices made by journalists in relation to their intended effects.'[173] These stylistic choices have significant consequences for media coverage. Wagner and Gruszczynski found that the rhetorical structure of news framing could have a powerful effect on individual opinions and political party identification. They argue that 'the way partisan elites' efforts to frame issues are quoted or cited by journalists in news coverage can make it easier for people to select the party with which they most closely identify.'[174] Entman identifies a similar phenomenon, critiquing Cohen's often-quoted position that, while the media does not necessarily dictate what people think, it does shape what people think *about*. Entman argues that this distinction is essentially meaningless because 'short of physical coercion, all influence over "what people think" derives from telling them "what to think about."' [175] To Entman, the 'what to

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[169] Ibid 26.

[170] Ibid 23.

[171] Ibid 26–27.

[172] Ibid 28.

[173] Pan and Kosicki (n 76) 61.

[174] Michael W. Wagner and Mike Gruszczynski 'When Framing Matters: How Partisan and Journalistic Frames Affect Individual Opinions and Party Identification' (2016) 18(1) *Journalism & Communication Monographs* 5, 10.

[175] Entman (n 74) 165.

think'/'what to think about' distinction implies a greater degree of audience agency and media subtlety than exists in reality.

Entman argues that the framing of issues by the media is key to exerting influence over 'what people think' and that agenda setting is simply 'another name for successfully performing the first function of framing: defining problems worthy of public and government attention.'[176] This reference to 'worthiness' echoes Iyengar's view that framing can be a very powerful tool for social control, where the media determines what an audience should consider to be important. The way an issue is framed can help shape public opinion. Audiences absorb messages about what is seen as 'worthy of public and government attention', becoming what Street described as a commonsense view of the world.

However, the 'rhetorical structure' is just one aspect of media stories and does not necessarily imply passive audience consumption. Gamson and Modigliani identify a number of different factors in the framing of issues and salience of themes, including the use of common cultural symbols and interaction with 'sponsors' who are official spokespeople for particular concepts and ideas.[177] They conclude:

> However dependent the audience may be on media discourse, they actively use it to construct meaning and are not simply a passive object in which the media work their magic.[178]

In their work on 'sponsorship', Gamson and Modigliani go further than other framing theorists by expressly identifying a more official figure 'pulling the strings'. This concept of an official 'sponsor' for a media message is explored in more detail by the mediatisation theorists, who acknowledge and examine the direct engagement between the media and non-media actors—such as politicians, judges and criminologists.

Similarly, Van Gorp argues that audiences bring their own cultural frames to the news stories that they consume. Van Gorp defines 'culture' as 'an organized set of beliefs, codes, myths, stereotypes, values, norms, frames … shared in the collective memory of a group or society'

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[176] Ibid 164.

[177] Gamson and Modigliani (n 88) 9.

[178] Ibid 10.

that sit 'largely externally of the individual'.[179] However, Van Gorp sees frames as cultural products that audience members bring to their interpretation of a news story during the reading process. The frames are 'part of culture', and the frame itself is separate from the text of a news story and 'not encompassed in media content'.[180]

Van Gorp distinguishes between framing by the media and framing through the media. If framing is done by the media, this means 'the journalists arrive at a particular frame in their representation of an event'.[181] If framing is done through the media, this means that the frames 'have been processed in communication utterances by frame sponsors and other actors' such as politicians responding to questions from journalists.[182] This framing through the media is reminiscent of mediatisation scholarship, which is discussed in more detail later in this chapter.

Van Gorp recognises the existence of alternative readings of a particular frame but argues that it is the dominant ideological perspective that is the most powerful, due to its cultural resonance. Van Gorp notes that 'one person may take a framing device strongly into consideration when reading or hearing a news story' while another person 'may decide to ignore that element, even though both are exposed to the same frame'[183] but that 'when cultural themes constitute the central framing idea, there is probably a stronger basis for resonance between the media text and the schema of the receivers.'[184] To illustrate this point, Van Gorp refers to a 1997 study by Nelson, Clawson and Oxley, where audiences displayed different attitudes to an extremist Ku Klux Klan rally depending on whether it was framed under the 'cultural theme' of freedom of speech or the 'cultural theme' of the preservation of public order.[185]

Todd Gitlin comments that, despite the long intellectual tradition of literacy in media framing techniques, the sheer 'torrent' of information in the 21st century means that media messages

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[179] Baldwin van Gorp 'The Constructionist Approach to Framing: Bringing Culture Back In' (2007) 57 *Journal of Communication* 60, 62.

[180] Ibid 63.

[181] Ibid 68.

[182] Ibid 68-69.

[183] Ibid 69.

[184] Ibid.

[185] Ibid 69, citing Nelson, T. E., Clawson, R. A., & Oxley, Z. M. (1997). 'Media framing of a civil liberties conflict and its effect on tolerance' 91 *American Political Science Review* 567–583.

may still be absorbed at ‘face value’. The speed and volume of digital media mean that audiences generally do not analyse particular images in their day-to-day life and may not ‘care to make images stand still’.[186] Gitlin observes that, with this ‘torrent’ of messages, audiences may not ‘fix them like fully developed photographs or inspect them for their multiple meanings’.[187] While framing does present a useful method of understanding the construction of media messages, audiences do not always have the energy to engage in critical analysis.

The backlash—uses and gratifications theory, active audiences and cultural studies

The media influence theories discussed above are predicated on the assumption that the ‘audience’ is a homogeneous mass of passive consumers and are dismissive of the ability of engaged audiences to question and critique media messages. This has led to the development of alternative ‘active audience’ theories of media engagement. In contrast to the ‘media influence’ theorists, who focus on the role of the media as propagandist and shaper of popular thought, other media theorists have placed greater emphasis on the agency of audiences and their ability to accept or reject media messages. This goes further than Van Gorp’s position that different audience members may offer alternative interpretations of the same cultural frame.

Kitzinger refers to a ‘two-step model of media influence’, which has been developed ‘in direct opposition to the pessimistic generalisations of the Frankfurt school and its hypodermic thesis.’[188] For these theorists, there is a distinction between the first step, or the media messages, and the second step—which examines how the messages are internalised, critiqued or even rejected by audiences. This technique can be seen in the uses and gratifications, active audience and cultural studies approaches to media analysis.

Active audience

‘Active audience’ media theories have developed in direct response to the ‘media influence’ approaches discussed above. These theorists argue that audiences of the mass media have more diversity, agency and sophistication than the one-way consumers of media influence

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[186] Todd Gitlin *Media Unlimited – How the Torrent of Images and Sounds Overwhelms Our Lives* (Metropolitan Books, 2007) 126.

[187] Ibid.

[188] Kitzinger (n 1) 16.

theory. Different audiences consume and interpret media messages in different ways. Two of the most prominent theorists in this field are David Morley and Stuart Hall.

Hall describes the process of audience interaction with the media as a relationship of 'encoding' and 'decoding' messages. The producers of media content 'must yield encoded messages in the form of a meaningful discourse.'[189] However, these messages can only be effective if they are 'appropriated as a meaningful discourse and can be meaningfully decoded.'[190] Hall argues that it is the decoded messages that '"have an effect", influence, entertain or persuade, with very complex perceptual, cognitive, emotional, ideological or behavioural consequences.'[191]

In the process of 'decoding', the original messages may be altered. The audience may also make 'resistant' readings of stories and directly challenge the messages from the media. Hall uses the example of television news and argues that there are 'three hypothetical positions from which decodings of a televisual discourse may be constructed',[192] describing these positions as (1) the 'dominant-hegemonic position', (2) the 'negotiated code or position' and (3) the 'oppositional code'.[193]

According to Hall, under the 'dominant-hegemonic' position, 'the viewer takes the connoted meaning from, say, a television newscast or current affairs programme full and straight, and decodes the message in terms of the reference code in which it has been encoded.'[194] This is the way that the 'media influence' theorists have characterised viewers, and suggests a passive, 'one-way' communication between the media and the audience. Audiences take a news broadcast at face value, consume its messages and do not engage in critical analysis.

In Hall's 'negotiated code' position, the audience's negotiated response to media messages is complex and 'shot through with contradictions'.[195] Hall argues that audiences demonstrate sophistication and critical thinking in their response to media messages. Hall describes the 'negotiated version as 'a mixture of adaptive and oppositional elements', which include

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[189] Stuart Hall 'Encoding, decoding' from Simon During (ed) The Cultural Studies Reader (Routledge, 1993) 90, 93.
[190] Ibid.
[191] Ibid.
[192] Ibid 100.
[193] Ibid 101–103.
[194] Ibid 101.
[195] Ibid 102.

giving ‘the privileged position to the dominant definitions of events while reserving the right to make a more negotiated application to “local conditions”’.[196] Audiences accept the dominant ideological messages conveyed by the media but engage in more nuanced processing of these messages. The messages therefore may be varied in accordance with the audience’s own circumstances and personal ideological perspectives.

In the ‘oppositional code’ position, the audience directly rejects the messages presented by the media and places the news story within its own counter-frame. According to Hall, the audience member ‘detotalises the message in the preferred code in order to retotalise the message within some alternative frame of reference’.[197] In the oppositional code position, the audience removes media reporting from its original encoded context and interprets the message within its preferred ideological framework.

Hall’s concepts of negotiated and oppositional readings have themselves been criticised by other media theorists for presenting an overly generous view of audience activity. Greg Philo directly opposes Hall’s concept of oppositional readings and argues, ‘There is a fundamental error here in what is being suggested about how audiences can reject messages.’[198] Philo does not dispute that texts may be ‘open to a variety of interpretations’ but argues that this does not amount to the creation of new meanings. He comments that audiences ‘do not typically create a new meaning with each ‘‘reading’’ or counter with an encoded message.’[199] Instead, audiences ‘criticise the content of the message in relation to another perspective, which they hold to be correct’[200]. According to Philo, while audiences may not agree with the message being presented, it does not necessarily follow that the message is ‘retotalised within some alternative frame of reference’. To Philo, this audience resistance simply means that the viewer is disagreeing with the encoded message rather than creating a new message themselves.

Like Stuart Hall, David Morley examines the power and agency of ‘active audiences’. Morley directly confronts the concept of a ‘common symbolic environment’ that conveys uniform hegemonic messages to audiences. He argues that differences between audiences (for

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[196] Ibid 102.

[197] Ibid 103.

[198] Greg Philo ‘Active Audiences and the Construction of Public Knowledge’ (2008) 9 (4) *Journalism Studies* 537, 537.

[199] Ibid.

[200] Ibid.

example, cultural differences) mean that a single media message may be consumed and interpreted in a variety of ways. To Morley, the viewer's access to and use of technology may also shape their reception of media messages. Morley comments that 'no technology has straightforward effects'[201] and that audience responses 'will eventually be guided by their existing cultural repertoire'[202]. He observes 'the further question is how they (variously) ignore or mobilise these technologies.'[203] Indeed, differing uses of technology may affect how audiences have access to the messages themselves. For example, many media messages are available exclusively online—they may be published on news sites or disseminated through social media platforms such as Facebook and Twitter. If a person does not have internet access or chooses not to use online platforms, they do not receive these messages.

Morley argues that, while active audiences are not as powerful as the media messages they consume, it is not correct to characterise media consumption as a one-way transaction. Morley concedes, in an echo of Philo's criticism of Hall's model, 'that some recent audience work has exaggerated, and wrongly romanticised the supposed power and freedoms of media consumers' to 'constantly produce oppositional readings of its products.'[204] However, while Morley rejects the notion of a powerful audience locked in constant battle with the media, he remains in firm opposition to the 'media influence' position. Morley argues that, while some theorists may have exaggerated the capacity of an audience to produce resistant readings, to describe audiences as incapable of 'making over' media messages is inaccurate and indeed patronising. He criticises media influence theory as reducing popular media to 'a world of "bread and circuses"' that the powerful elites use to 'dupe the vulnerable masses', who operate 'outside the realms of adult maturity and transcendent consciousness happily inhabited by the critic Himself.'[205] To Morley, such a concept is reductive and patronising to audiences.

Thus, to Morley, the media is more than a propaganda tool of the state, and the audience is more than a passive absorber of dominant messages. Audiences have the potential to effect political change through resistant readings. Morley argues that media influence theories do

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[201] David Morley 'Television, Technology and Culture: A Contextualist Approach' (2012) 15 *The Communication Review* 79, 80.

[202] Ibid.

[203] Ibid.

[204] David Morley 'Unanswered Questions in Audience Research' 9 *The Communication Review* 101, 102-103.

[205] Ibid 103.

not adequately explain the relationship between the media, the audience, politics and power. He observes that these theories are 'premised on a very restricted sense of what "politics" is' and fail to take into account 'the crucial role of the media in the construction of what we might call "cultural citizenship".[206] Morley further notes that viewing news media may give the audience 'the impetus for political change'.[207] While an audience member engaging in resistant readings may not immediately take political action on viewing a single news broadcast, audiences may be inspired to take political action in response to the cumulative effect of many resistant readings to media messages. To Morley, the links between 'negotiated' forms of media consumption and political change are worthy of further investigation.

Audiences may also be more 'active' owing to the changing digital environment, and able to create their own content and engage more directly with the political process. However, as Couldry argues, this potential should be viewed with some caution. While there is greater potential for audiences to engage with the political process, the old barriers remain as 'corporations and even many elements in civil society have a vested interest in *avoiding* such fundamental reorganization'.[208] Couldry further argues that any optimistic predictions of revolutionary change 'tend to rely on a rather thin account of social processes'.[209]

Uses and gratifications

The 'active audience' theorists have strong links to the 'uses and gratifications' approach to media studies (abbreviated in the literature as 'U&G'). Sundar and Limperos define U&G as an 'audience-centered approach' to media scholarship, where 'individuals have particular needs that drive selection of certain types of media'.[210] The audience's 'gratifications' are 'largely based on a given user's pre-existing needs, rather than on specific technological features of media.'[211]

Shandar and Limperos quote the 1974 definition of U&G research developed by Katz, Blumler and Gurevitch, who argue that this approach to media research is concerned with the

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[206] Ibid.

[207] Ibid 103–104.

[208] Nick Couldry *Media, Society, World: Social Theory and Digital Media Practice* (Polity Press, 2012) 109.

[209] Ibid.

[210] S. Shayam Sundar and Anthony M. Limperos 'Uses and Grats 2.0: New Gratifications for New Media' (2013) 57(4) *Journal of Broadcasting and Electronic Media* 504, 506.

[211] Ibid.

social and psychological origins of audience needs, which generate expectations from the mass media. This leads to 'differential patterns of media exposure' for audiences, resulting in 'need gratifications'.[212] They observe that this perspective is predicated on an assumption, 'that people have needs that can be satisfied by the media', and that this assumption has dominated U&G research to date.[213] This suggests that audiences seek media messages that satisfy their own interests, desires and innate biases. The audience is placed in the driver's seat when interacting with the media. This is a starkly different approach from the 'media influence' theorists, who view the relationship between the media and audiences as a one-way dialogue with the media steering the conversation.

The U&G approach to media studies is not without its critics. Ruggiero identifies a number of systemic weaknesses in U&G theory, including a too-individualistic focus on audience consumption, studies that are too compartmentalised, a lack of clarity and consistency in the approaches of U&G researchers when using central theoretical concepts (such as social and psychological backgrounds, needs, motives, behaviour uses, gratifications and functional alternatives).[214] He also observes that the assumptions made by researchers about active audiences and the validity of self-report data may be simplistic or naive.[215]

Nevertheless, Ruggiero believes that U&G theory still has value and potential, and that 'reproach of U&G must be tempered with encouragement' because it offers a 'benchmark of data for other studies to further examine media use.[216] The idea of an audience pursuing media messages to address its own consumption needs adds another dimension to the media influence/active audience debate. Audiences have their own personal filters, which may affect their response to media messages. Further refinement of U&G theory is a matter for future scholarship. The approach appears somewhat underdeveloped in comparison with the more comprehensive 'media influence' and 'active audience' theories discussed above.

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[212] E Katz, JG Blumler, and M Gurevitch, (1974) 'Utilization of mass communication by the individual' in J.G. Blumler & E. Katz (Eds.) *The uses of mass communications: Current perspectives on gratifications research* (pp19-32). Beverly Hills, CA: Sage, p20, quoted in S. Shayam Sundar and Anthony M. Limperos (n 132), 506.

[213] Sundar and Limperos (n 132) 506.

[214] Thomas E. Ruggiero 'Uses and Gratifications Theory in the 21st Century' (2000) 3(1) *Mass Communication & Society* 3, 12.

[215] Ibid.

[216] Ibid.

Mediatisation: beyond influencing and active audiences

Recent media studies scholarship has identified a trend of 'mediatisation', in which there is not just influence but direct engagement between the media and broader society—including state institutions. This is similar to but expands on Gamson and Modigliani's description of public relations 'sponsors' for media messages. Theorists such as Stig Hjarvard, Winfried Schultz, Carlos M. Roos and Andre Jansson identify the connections between the media and the players who engage with it, and the significance of this joint messaging in news stories.

Mediatisation perspectives complicate the distinction between media and non-media actors on the grounds that the practices of the latter are shaped by the former. Stig Hjarvard and Winfried Schultz argue that the media and society are inextricably linked. Hjarvard observes, 'Contemporary society is permeated by the media, to an extent that the media can no longer be conceived of as being separate from cultural and other social institutions.'[217] For Hjarvard, the media has achieved a level of cultural saturation in which the media is simultaneously 'part of the fabric of society and culture' and 'an independent institution' in its own right that 'stands between other cultural and social institutions and coordinates their mutual interaction.'[218] Schultz makes a similar observation, noting that the media is 'woven into the fabric of everyday life', and 'the media's definition of reality amalgamates with the social definition of reality.'[219] This is a more powerful, yet more subtle, method of media influence on society than that described by Adorno and Horkheimer. The media are not simply a propaganda device for the state but help determine the parameters in which society itself operates.

For mediatisation theorists, there is a symbiotic relationship between the media and social institutions. As Hjarvard states, the media 'intervene into, and influence the activity of other institutions' and 'provide a "commons" for society as a whole'[220] to communicate. This echoes Gerbner's 'cultivation theory' of media influence, in which the stories told by the

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[217] Stig Hjarvard 'The Mediatization of Society – A Theory of the Media as Agents of Social and Cultural Change' (2008) 29 *Nordicom Revie*w 105, 105.

[218] Ibid 106.

[219] Winfried Schultz 'Reconstructing Mediatization as an Analytical Concept' (2004) 19(1) *European Journal of Communication* 87, 89.

[220] Hjarvard (n 139) 115.

media provide a common experience for audiences and shape their perceptions and attitudes virtually from birth.

Schultz argues that mediatisation has the effects of ‘extension’ and ‘substitution’. Schultz observes that the ‘extension’ function of the media can help people to communicate, as ‘[m]edia technologies extend the natural limits of human communication capacities’ and ‘serve to bridge spatial and temporal distances.’[221] The media technologies can also ‘completely substitute social activities and social institutions and thus change their character’ through developments such as internet banking and computer gaming.[222] Schultz also identifies a ‘middle’ effect—‘amalgamation’—in which ‘media activities not only extend and (partly) substitute non-media activities; they also merge and mingle with one another.’[223] This merging and mingling of technology and traditionally non-technological activities can change the nature of everyday activities and create a more media-saturated culture.

Anat Peleg and Bryna Bogoch describe ‘mediatisation’ somewhat negatively as ‘the process of social change stemming from the entry of a critical and cynical media to the public arena’ in which ‘social institutions become increasingly dependent on the media and must accommodate to their commercial logic.’[224] Peleg and Bogoch conducted a study of the mediatisation of the law and legal institutions in Israel. This negative assessment relates to the concept of mediatisation of the law, where the media and the legal system are increasingly linked. However, Hjarvard also cautions that care must be taken to not view mediatisation as a purely negative phenomenon, where ‘media influence becomes synonymous with a decline in the political public sphere or the disintegration of civil society.’[225] For Hjarvard, the effect of mediatisation must be considered on a case-by-case basis in specific contexts and its merits and weaknesses should not be generalised.[226] There is no uniform mediatisation effect, and the concept should not be viewed as exclusively negative.

Further, Hjarvard makes a distinction between ‘direct’ and ‘indirect’ mediatisation. Hjarvard defines direct mediatisation as a social activity that has been ‘substituted’ or ‘transformed

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[221] Schultz (n 141) 88.

[222] Ibid.

[223] Ibid 89.

[224] Anat Peleg and Bryna Bogoch ‘Removing Justitia’s blindfold: the mediatization of the law in Israel’ (2012) 34 *Media, Culture and Society* 961, 963.

[225] Hjarvard (n 139) 114.

[226] Ibid 114.

from a non-mediated activity to a mediated form'.[227] Hjarvard describes indirect mediatisation as being 'of a more subtle or general character', where there is a 'general increase in social institutions' reliance on communication resources'.[228] Hjarvard cites online banking and computer-based chess games as examples of 'direct' mediatisation, where the activity is similar to its 'traditional' low-tech counterpart, but the presence of a computer has expanded the options available to participants.[229] Hjarvard describes the merchandising around fast food restaurants as an example of 'indirect' mediatisation, where media symbols have become part of the eating experience while not being the sole purpose of dining there.[230]

The literature also describes examples of mediatisation in practice. Peleg and Bogoch found evidence of Schultz's concepts of extension, substitution and amalgamation. They argue that extension effects of mediatisation can be seen in the 'impact of the expansion of media technologies … on the following features: the coverage of legal matters; the nature of legal reporting; and the relations between media and legal actors.'[231] According to Peleg and Bogoch, evidence of extension can be seen in an increase in coverage of legal matters in the newspaper, greater visibility of legal reporters, and coverage that has been alternately described by lawyers, reporters and judges as more 'sensational' in tone, 'of limited depth', 'too aggressive and critical of the court', distancing reporters from 'real legal experience' and 'competitive and innovative.'[232]

Peleg and Bogoch also identify an 'accommodation' of mediatisation in the Israeli legal world, in which 'key legal actors have accorded increasing importance to media policy and media strategies' and 'accommodated their behavior to media demands'.[233] This has had a flow-on effect where 'journalists covering the law have become more cynical and distrusting of legal actors' and lawyers have 'claimed that in order to win legal battles they must manage the media'.[234] However, in examining the presence of Schultz's 'amalgamation', Peleg and Bogoch conclude that, despite the mediatisation of the legal system, faith in the system

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[227] Ibid 115.

[228] Ibid.

[229] Schultz (n 141) 114-115.

[230] Ibid 115.

[231] Peleg and Bogoch (n 146) 965.

[232] Ibid 965–966.

[233] Ibid 966.

[234] Ibid.

remains. None of the participants in the study, which included judges, lawyers and legal reporters,[235] ‘claimed that the judicial process had been overtaken by the media’; all participants ‘professed a basic belief in the impartiality of the legal process’.[236] These positive attitudes remained despite concerns about some examples of Schultz’s ‘substitution’ occurring, including ‘the novel use of court-like procedures in the media, such as having a witness reconstruct the crime at the crime site, or using polygraph tests’.[237]

Peleg and Bogoch do note some concerns expressed by legal and media participants in their study about ‘trial by media’, where the press are not subject to the rules of evidence. However, they noted that ‘both judges and lawyers objected to restricting the freedom of the press by legal means.’[238] Their study indicates that there is considerable criticism of a mediatised legal system from many different players but at the same time a grudging acceptance that mediatisation is now part of the modern world.

The potential for non-media actors to engage with the mass media is further explored by Barak through the concept of ‘newsmaking criminology’. Barak presents a guarded but optimistic picture of ‘mediatisation’ for criminologists who engage with the mass media. Barak defines ‘newsmaking criminology’ as:

> the conscious efforts and activities of criminologists to interpret, influence or shape the representation of ‘newsworthy’ items about crime and justice.[239]

He notes that newsmaking criminology ‘attempts to demystify images of crime and punishment’ and argues that there is a need to ‘to improve the likelihood of productively using the media’ to make ‘major points and policy recommendations’[240]. Barak cites his own successful experience of presenting radio programs during the OJ Simpson trial, whereby close engagement with the media and taking control of what was said provided a valuable opportunity for a more nuanced portrayal of the case. However, he also cautions that media engagement is not a simple process, and that successful newsmaking criminology is not

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[235] Ibid 964.

[236] Ibid 971.

[237] Ibid 972.

[238] Ibid 972.

[239] Gregg Barak ‘Doing newsmaking criminology from within the academy’ (2007) 11(2) *Theoretical Criminology,* 2007 191, 191–192.

[240] Ibid 194.

guaranteed and depends on how well the criminologist's message meshes with the media discourse. [241]

There remains ambiguity about who exactly is in control of the media messages in a mediatised environment. While Barak describes examples of successful engagement between criminologists in the media, and presents the most optimistic view of mediatisation in the literature that I have reviewed, he is conscious that mediatisation is unpredictable. Barak also writes from the position of 'sponsor' of a particular media message and conceives success as journalistic acceptance of this message. This concept is more problematic when examining it from the perspective of 'sponsors' pushing particular political opinions, where 'success' may actually be propaganda.

Digital developments—rethinking the role of journalists and the media

Recent technological developments, such as the rise of social media and the increase in digital news sources, have inspired media scholars to comment on the changes to the role of journalists and the mainstream media and to rethink theories of media scholarship. The literature indicates an acknowledgement that the media environment has changed. However, there is uncertainty in the scholarship about whether these changes are positive or negative, whether there is still a role for traditional journalism in the digital world and whether the media theories discussed above are still an appropriate tool to understand the relationship between the media and audiences.

Singer describes online journalism as 'immersive, interconnected, iterative and instantaneous'.[242] Online media is ever-present in people's lives and is no longer something that is only accessed from time to time.[243] Media scholars have observed changes to the traditional divide between producers and consumers of media content. Singer argues that these roles have become 'interchangeable' with 'any given individual filling both roles all but simultaneously'.[244] Tong notes that a rise in online 'citizen journalism' and direct engagement

[241] Ibid 194.

[242] Jane B Singer 'Transmission creep—Media effects theories and journalism studies in a digital era' (2018) 19(2) Journalism Studies 209, 215.

[243] Ibid 216.

[244] Ibid.

by politicians in social media may be a challenge to the role of traditional journalism in a democracy.[245]

Media scholars have discussed whether the 'traditional' media theories (which are discussed above) are still applicable to the contemporary digital environment. Steensen and Ahva observe 'digitisation has brought a need to reassess the theories with which we make sense of journalism.'[246] Singer argues that traditional media effects theories such as cultivation theory are difficult to test and have become less applicable to a digital world. To Singer, the components of media effects theory, including a 'distinct and identifiable communicator, communications act or product, channel and recipient' and an identifiable effect, have always been difficult to define and assess, and assessing these components in a digital environment is 'harder today than they were yesterday'.[247] Singer astutely recognises the blurring of the lines between media and audience and the changing nature of news in a digital environment.

Singer articulates the challenges of media scholarship in the digital environment, including 'interchangeable' message senders and recipients, messages that are constantly being transmitted in 'disparate forms' and 'instantly reshaped and distributed in myriad ways by myriad people', and a 'wildly diverse and uniquely personal' media experience for audiences.[248] However, Steensen and Ahva point out that, while there is some uncertainty in media scholarship about how to conceptualise theory in a digital space, this has not stopped media scholars from trying—by being inspired either to 'assume new avenues to theorising journalism' or to 'reassess old theories.'[249] While the digital environment has changed the nature of the media, this does not necessarily mean that the 'media influence' or 'active audience' theories are no longer valid or that the messages conveyed by the media have necessarily changed. However, it is important for media scholars to continue to reassess these theories in a changing media landscape.

Kormelink and Meijer's study of 'clicks' and digital news user practices supports Singer's assertion of a personalised media experience. They found that users had varied reasons for

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[245] Jingrong Tong 'Journalistic Legitimacy Revisited', (2018) 6(2) *Digital Journalism* 256, 262.

[246] Steen Steensen and Laura Ahva 'Theories of journalism in a digital age—An exploration and introduction' (2015) 9(1) *Journalism Practice*, 2015 1, 1.

[247] Singer (n 164) 215.

[248] Ibid 217.

[249] Steensen and Ahva (n 168) 13.

clicking or not clicking on a news report. They conclude that clicking is a 'flawed instrument'[250] for assessing people's interest in news and that audience interest is more complex. A news headline may convey too little information for a reader to click on an article or enough information to render clicking unnecessary.[251] A reader may use different techniques of 'checking, monitoring, snacking and scanning' a news webpage and be informed about the latest news without needing to click on the articles.[252]

Tong observes that, while the current digital media environment is subject to commercial and political pressures, traditional journalism still has an important role to play in a democracy—writing 'we cannot ignore the possibility that the dual dynamic of digital media technologies and societal change can also offer new grounds for journalistic legitimacy.'[253] Tong further argues that journalism has experienced the beginning of a revival in the digital environment, where mainstream news organisations have adopted digital media technologies and journalism has been 'redefined' as '24/7 multimedia journalism'. Journalists combine their new skills in analysing data in a digital environment with their traditional functions of fact checking, reporting and serving democracy.[254] This includes a rise in data analysis expertise for journalists, a restoration of the image of a journalist as an 'authoritative and ethical story-teller' who is distinguished from 'fake news' and some challenges due to the immediacy of online news. [255] However, Tong is careful to note that this apparent renaissance is still in its early days, 'We do not yet know whether and to what extent all the attempts to restore journalistic legitimacy will be successful, given the great pressures from politics and the market.'[256]

This note of caution can also be heard in Couldry's assessment of the shifts in the media landscape due to digital technology. Couldry notes the revolutionary potential of the internet but argues that the developments are often more commercial than democratic.[257]

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[250] Tim Groot Kormelink and Irene Costera Meijer 'What clicks actually mean: Exploring digital news user practices' (2018) 19(5) *Journalism* 668, 680.

[251] Ibid.

[252] Ibid.

[253] Tong (n 167) 263.

[254] Ibid.

[255] Ibid 268.

[256] Ibid 268.

[257] Couldry (n 130) 23.

The law and media practice - Sub judice contempt

In addition to understanding the socio-legal context of sexual harassment law in Australia, it is important to recognise the legislative underpinnings of the media landscape.

There are constraints on the reporting of ongoing court cases. In addition to defamation law considerations, mainstream media outlets must also be aware of the rules of sub judice contempt when reporting on ongoing legal proceedings.

Contempt of court has been described as 'The area of law that arguably has the greatest impact on the daily operations of the media in relation to court reporting'.[258] 'Sub judice' means 'before the court'. For the media, care must be taken when reporting because:

> …any publication which has a tendency to interfere with the administration of justice by preventing the fair trial of any proceeding in a Court of justice is a contempt of court...[259]

Media outlets must be mindful of their obligations to report on ongoing legal matters in a responsible way and not interfere with the course of justice. These obligations apply to criminal and civil cases, first instance hearings and appeals.[260] The media must not influence witnesses.[261] In *Civil Aviation Authority v Australian Broadcasting Corporation*, Kirby P observed:

> A broadcast or publication will be a contempt if there is a real and substantial risk of adversely influencing actual or potential witnesses.[262]

Kirby P further observed that the risk of contempt was increased 'where the witnesses themselves are interviewed in advance of a hearing.'[263]

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[258] David Rolph, Matt Vitins, Judith Bannister, Daniel Joyce *Media Law – Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2015), 358.

[259] *Ex Parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 248.

[260] Rolph et al above n 180 370, 377.

[261] Ibid 379.

[262] *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540, 551.

[263] Ibid.

Significant academic and legal attention has been dedicated to the relevance, applicability and scope of sub judice contempt in a digital and social media age. Hughes and Suzor comment on the difficulties of enforcement and prosecution of sub judice contempt, observing that while in a traditional media environment sub judice contempt was 'relatively straightforward to enforce'[264] against a small number of influential publications, social media presented a challenge. With the rise of platforms such as Facebook and Twitter, the 'ordinary consumer' could suddenly be as influential as the media giants, able to 'make prejudicial comments to potentially large audience' that could be 'widely amplified by other users, including 'potential or actual jurors'.[265]

Hughes and Suzor further observe the changing nature of news, where major media outlets no longer control the news cycle and more people get their news from social media platforms like Facebook and Twitter. They argue that this presents significant jurisdictional hurdles to enforcement of sub judice contempt:

> This increase in power means traditional publishers are losing control of news distribution, which has important consequences for a sub judice doctrine that has historically applied primarily to those publishers. The law technically applies to Facebook and other social media platforms as well, but the fact that these massive companies are incorporated outside of Australia and immunised from legal penalty by US law makes it much more difficult (though not impossible) to apply the law in practice.[266]

Jason Bosland also comments on the changing nature of the media and its impact on sub judice contempt. Bosland describes a decline in reliance on sub judice contempt by Victorian courts and a preference for judges to make specific orders for non-publication of extraneous prejudicial material.[267] Bosland observes that there are fewer specialist court reporters, and

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[264] Rachel Hews and Nicholas Suzor '"Scum of the earth': An analysis of prejudicial twitter conversations during the Baden-Clay murder trial' (2017) 40(4) *UNSW Law Journa*l 1604, 1609.

[265] Ibid.

[266] Ibid 1612.

[267] Jason Bosland 'Restraining 'extraneous' prejudicial publicity: Victoria and New South Wales compared' (2018) 41(4) *UNSW Law Journal* 1263, 1266.

with this decline in specialist reporting there is a 'potential risk that journalists reporting the courts will be less familiar' with sub judice contempt. [268]

Much has been written about the interaction between sub judice contempt and principles of open justice. Sharon Rodrick comments on the ability of the media to both assist and hinder principles of open justice:

> To the extent that media reports are detailed, accurate and give a comprehensive account of typical cases that come before the courts, the media augment the educative effect of the principle; to the extent that reports and commentary are inaccurate, biased, ill-informed, superficial or sensational, their educative effect must be questioned.[269]

While reporting on the 'bare facts' of a case will not constitute contempt of court, this dry and clinical approach may be at odds with the commercial principles under which media outlets operate. Media outlets must achieve a balancing act between achieving the aims of open justice and freedom of speech and making sure that reporting does not derail the course of justice.

Conclusion

There is a degree of consensus among media studies theorists that the mass media is a great source of political power. In today's globalised world, its reach is considerable—as is its potential to influence audiences. However, media studies theorists are divided in their assessment of the intersections between the mass media, political power and audience consumption.

On the one hand, 'media influence' theorists contend that the media in general, and news reporting in particular, are a propaganda tool. The media are seen from this perspective as having the power to challenge or support dominant power structures, and generally supporting them. The media reduce complex political issues to meaningless soundbites, supplant

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[268] Jason Bosland 'Restraining 'extraneous' prejudicial publicity: Victoria and New South Wales compared' (2018) 41(4) *UNSW Law Journal* 1263, 1266.

[269] Sharon Rodrick 'Achieving the aims of open justice? The relationship between the courts, the media and the public' (2014) 19(1) *Deakin Law Review* 123, 128.

independent thought through popular culture and cultivate the taste sensibilities of their audiences virtually from birth.

On the other hand, ‘active audience’ theorists contend that, while the media have great reach and political influence, audiences have greater diversity and agency than the homogeneous ‘duped masses’ of ‘media influence’ theory. The messages of the mass media are open to interpretation. Audiences may receive and interpret media messages differently depending on variables of gender, culture and class. Audiences may also reject media messages through resistant readings.

Recent scholarship on the digital environment suggests a need to reconsider traditional media scholarship and the role of journalists. However, the level of uncertainty in the literature suggests a need for further work in this area.

My thesis shares a perspective with the ‘media influence’ theorists. In my examination of media portrayals of sexual harassment case law, I am interested in what Cohen described as the media not necessarily telling audiences what to think but definitely telling them what to think about (and perhaps *how* to think about it). I believe that the media has the potential to play a powerful educative role in giving audiences information about important legal issues, and also the potential to mislead audiences about important legal issues. However, I am also conscious that these messages are not simply a ‘one-way’ dialogue and aware that the diversity of audiences may lead to differences in interpretation. I also note that digital technology means that audiences may be exposed to diverse messages and that the divide between readers and producers of media content is blurred.

When considering media reportage of high profile sexual harassment cases, it is also important to be mindful of the legal regime underpinning news reporting itself, including defamation law and sub judice contempt.

4 Media portrayals of violence against women and the 'good' victim

Introduction

Media portrayals of violence against women are problematic. Feminist scholarship has recognised the cultivation effect of the media on its audience and its role in influencing community perceptions of violence against women:

> The media is an extremely powerful shaper of social attitudes. It is a primary socialiser of our children. It does have the potential to do much good. Unfortunately, it has instead commonly perpetuated inaccurate and unjust myths about sexual violence and its victims.[1]

Feminist theorists have observed that representations of violence against women reflect the media's ambivalence towards feminism and tendency to convey an uneasy coalition of patriarchal values and the language of empowerment.[2] These theorists have used a combination of framing analysis and discourse analysis to identify themes in coverage of violence against women. The following themes have been observed in studies of media portrayals of violence against women: gendered mythology, the awkward use of 'empowerment' narratives emphasising prevention and how to get help, mutuality of violence, victim blaming and the use of 'episodic' rather than 'thematic' framing techniques through a predominant focus on individual stories at the expense of the broader social and political context. These themes present a fascinating picture of what the news media consider to be 'genuine' violence against women and a 'good', 'worthy' victim.

Themes in the literature

When identifying themes in media portrayals of violence against women, feminist theorists have used discourse analysis techniques. In discourse analysis, researchers critically analyse

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1 Patricia Easteal and Louise McOrmond-Plummer *Real Rape, Real Pain—Help for women sexually assaulted by male partners* (Hybrid Publishers, 2006) 43.

2 See, for example the 'seeking help' narratives in Pamela Hill Nettleton 'Domestic Violence in Men's and Women's Magazines: Women are Guilty of Choosing the Wrong Men, Men are Not Guilty of Hitting Women' (2011) 34 *Women's Studies in Communication* 139, 147-148; Charles Goehring, Valerie Renegar and Laura Puhl '"Abusive Furniture": Visual Metonymy and the Hungarian Stop Violence Against Women Campaign' (2017) 40(4) *Women's Studies in Communication* 440; Sarah N Keller, Timothy Wilkinson, AJ Otjen 'Unintended effects of a domestic violence campaign' (Winter 2010) 39(4) *Journal of Advertising* 53-67. This will be discussed in further detail later in this chapter.

texts in the context of dominant power relationships in society. Feminist analysis of media coverage of violence against women places news stories in the context of a patriarchal society that subordinates women and minimises their experiences. This aligns with Mogashoa's definition of critical discourse analysis as helping to understand the social problems that are mediated by mainstream ideology and power relationships and disseminated through the texts people read in their daily lives.[3]

The feminist theoretical perspective recognises and critiques the ideology of sexism in the context of social power relationships. The ideology of sexism has been found to reverberate through the media coverage of violence against women. The discourse analysis by feminist theorists of the coverage of violence against women recognises the power of language and its ability to challenge and reinforce dominant social power relationships.

Gendered mythology

Feminist researchers have used discourse analysis to identify gendered mythology in the media coverage of violence against women. This phenomenon is astutely identified by Jenna Mead in *Bodyjamming* as reinforcing gendered mythology by using 'a very limited number of stereotyped narratives and archetypal characters to do the job of representing the world around us'.[4] Mead describes the following gendered clichés in the coverage of the high-profile 1990s Ormond College sexual harassment case[5] as 'codes that are as ancient as they are inflammatory: the seductress, the victimised man, the man-hating woman'. [6] Mead observes:

> The language of the media is limited: 'Feminists' are always 'ideologues'. 'Women in the workplace' invariably 'threaten the place of men'. 'Complaints' of sexual harassment are constantly 'on the rise'. The tone ranges from flattened to melodramatic, often, without that much in between.[7]

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[3] Tebogo Mogashoa 'Understanding Critical Discourse Analysis in Qualitative Research' (July 2014) 1(7) *International Journal of Humanities Social Sciences and Education* 104, 106.

[4] Jenna Mead 'Introduction: Tell It Like It Is', Jenna Mead (ed) *Bodyjamming—Sexual Harassment, Feminism and Public Life* (Random House, 1997) 1, 6.

[5] In this case, two University of Melbourne students made a complaint of sexual harassment against the Master of Ormond College. The case was the subject of Helen Garner's infamous 1995 book *The First Stone* (Picador 1994).

[6] Mead (n 4) 6.

[7] Ibid.

These crude archetypal characters and themes have reappeared in coverage of violence against women. Feminist theorists have also found that the coverage has reinforced a stereotype of a pure, virginal and innocent 'good' victim.

The victimised perpetrator

The character of the 'victimised man' has been found in 1990s coverage of date rape on college campuses in the United States.[8] McCluskey observes a media focus on 'victim narratives' for privileged white heterosexual men and 'stories about male victimization from ambiguous or false claims of sexual harassment or date rape'.[9] This includes more emphasis being given to male victims of false claims than female victims of actual incidents of sexual violence.

The 'victimised man' has also been found in Breen, Easteal, Holland, Sutherland and Vaughan's study of media coverage of the 2015 Luke Lazarus sexual assault case in Australia. Although the trial resulted in a conviction (now overturned on appeal), much of the coverage used framing techniques to position Lazarus as victimised by the allegation and trial:

> In the reporting of the Lazarus case, we saw how a disproportionate focus on his feelings, his insistence that he had done nothing wrong and the effects of the publicity of his conviction on him worked to position him as in some way a victim.[10]

This emphasis on the feelings of the perpetrator also served to minimise the voice of the victim of sexual assault. The media coverage devoted little space to the voice of the victim and downplayed her victim impact statement. Further analysis of this case is seen in the 'framing' section of this chapter.

Sexuality and aggressive masculinity

Researchers have identified a trend of normalising and indeed glorifying a predatory hypermasculine 'sexuality' of dominance and conquest in reporting of violence against

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[8] Patricia Easteal, Kate Holland, Keziah Judd 'Enduring themes and silences in media portrayals of violence against women', (2015) 48 *Women's Studies International Forum* 103, 108.

[9] Martha T. McCluskey 'Fear of Feminism—Media stories of feminist victims and victims of feminism on college campuses' in Martha A. Fineman and Martha T. McCluskey (Eds.), *Feminism, Media and the Law* (Oxford University Press, 1997) 57, 61.

[10] Michelle Dunne Breen, Patricia Easteal, Kate Holland, Georgina Sutherland, Cathy Vaughan 'Exploring Australian journalism discursive practices in reporting rape: The pitiful predator and the silent victim' (2017) *Discourse & Communication* 1, 14.

women. This is similar to the concept of an 'hegemonic masculinity' in sociology scholarship.[11] In her work on the media coverage of sexual assault cases involving football players, Deb Waterhouse-Watson identifies a reification of a brutal form of masculinity. This is apparent in general sporting coverage and in reporting on the cases themselves. Waterhouse-Watson observes that footballers are often described in a way that reduces their human identities to a physical body with emphasis on 'size, power, toughness and violence'.[12] Waterhouse-Watson argues that this leads to an idea of 'the footballer's body as big, tough and indestructible, inherently and legitimately violent, and thus immune from being accountable for sexual assault'.[13] This construction of masculinity in the media serves to diminish a perpetrator's responsibility for committing crime. The perpetrator is simply reduced to a 'body without a mind'.[14] Bob Pease argues that only by working against such an emotionally closed-off view of masculinity, and 'engaging men emotionally in processes that interrogate their privilege', men can help achieve gender equality.[15] Cover builds on Waterhouse-Watson's view of the individual taking on the brutish performative masculinity of the group, even if the individual man would otherwise not dream of committing such brutal acts alone.[16]

Researchers have also found a media view of male sexuality that is predatory and conquest-focused in other coverage of high-profile sexual assault cases. In the reporting of the Lazarus case, Breen et al. find references to the 'taking' of the victim's virginity, observing:

> The idea of virginity as something that is taken draws on the discourse of male predatory sexual conquest and of virginity being an object or prize for the taking.[17]

This perpetuates gendered mythology about masculine aggression and normalises criminal behaviour.

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[11] See Raewyn Connell 'Masculinities in global perspective: hegemony, contestation and changing structures of power' (2016) 45 *Theor Soc* 303, 303.

[12] Deb Waterhouse-Watson 'Playing Defence in Sexual Assault 'Trial By Media': The Male Footballer's Imaginary Body' (2009) 30 *The Australian Feminist Law Journal* 109, 117.

[13] Ibid.

[14] Ibid 119

[15] Bob Pease 'The politics of gendered emotions: disrupting men's emotional investment in privilege' (2012) 47(1) *Australian Journal of Social Issues* 125, 138.

[16] Rob Cover 'Suspended ethics and the team: Theorising team sportsplayers' group sexual assault in the context of identity' (2013) 16(3/4) Sexualities 300, 310.

[17] Dunne Breen et all (n 10), 14.

The 'good' and 'not-so-good' victim

Gendered mythology about 'good' and 'bad' victims continues to appear in media coverage of violence against women, despite decades of feminist scholarship. This echoes the ancient and inflammatory 'madonna/whore' dichotomy, with the 'ideal' victim having the following traits:

> (a) female, very old or very young (or a combination of these), (b) being powerless in relation to the offender, (c) being free from blame about what happened, and (d) being unrelated to and unacquainted with the offender.[18]

Studies of media coverage of violence against women have found that the coverage tends to link youth, innocence and virginity with credibility and 'goodness' in women, particularly in reporting of sexual assault cases. In the reporting of the Lazarus case, it was found that the victim was generally portrayed as an ideal 'good' victim, with 'innocence, youth and inexperience' that aligned with the credible side of the Madonna/whore dichotomy where it was 'difficult to impute any provocation'. [19] Ferguson defines the Madonna/whore dichotomy as a duality of stereotypes of women who 'evince sacred or profane female powers and their corresponding degrees of legitimacy or illegitimacy', with the Biblical examples of the Virgin Mary vs Mary Magdalene.[20]

This concept of an ideal victim was also found in US coverage of the 2003 Kobe Bryant sexual assault case. Media coverage of the case perpetuated harmful myths about sexual assault victims and perpetrators by presenting the complainant as a less than ideal victim.[21] Some of the information used against the alleged victim, such as judgements that she was promiscuous or emotionally unstable 'could have been used to discuss her *heightened* vulnerability to sexual assault' rather than to undermine her credibility.[22]

An ideal victim behaves in an ideal way. Attacks by a stranger at random are seen as more 'real'. Studies of media coverage of sexual harassment cases and sexual assault trials have

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[18] Kathleen Custers and Jan Van den Bulck 'The Cultivation of Fear of Sexual Violence in Women: Processes and Moderators of the Relationship Between Television and Fear' (2013) 40 *Communication Research* 96, 98.

[19] Dunne Breen et al (n 10), 13.

[20] Marjorie Ferguson 'Images of Power and the Feminist Fallacy' (1990) 7 *Critical Studies in Mass Communication* 215, 219

[21] Renae Franuik, Jennifer L Seefelt, Sandy L Cepress, Joseph A Vandello 'Prevalence and Effects of Rape Myths in Print Journalism – The Kobe Bryant Case' (March 2008) 14(3) *Violence Against Women* 287, 295.

[22] Ibid 301.

found a tendency to scrutinise the behaviour of the victim.[23] This scrutiny may impute responsibility to the victim for being in the wrong place at the wrong time, not fighting back or not reporting promptly. Extraneous details may be reported, such as the victim drinking or speaking to the perpetrator prior to the incident of violence.[24] While such details are not pertinent to the crime being committed, they may contribute to a picture of the victim, and women who claim to experience violence, as less credible in the eyes of readers.

Meyers comments on intersection of racism, sexism, classism and 'good victimhood' in a study of media coverage of violence against young African-American women during the 'Freaknik' Spring Break festival in Atlanta, United States. The coverage minimised violence against the women and divided them into two 'types' of victim, invoking racial and gendered stereotypes where some women were 'naïfs' who 'unwittingly put themselves in harm's way', while and others were 'Jezebels' who provoked the violence from men with their lewd behaviour:

> Both characterizations reflect the intersection of gender, race and class oppressions. The naïfs were identified as out-of-staters, code for law-abiding students. Their representation was gendered as victims of sexual harassment, class-based in terms of their association with middle class behavior (sic) and values, and racialized within the context of their background and the event. Their comparison to the Jezebels who – unlike the naïfs, according to the news – *do* want to be "fondled and groped" also reflects the racialization of gender.[25]

Meyers' study identifies two different examples of victim-blaming, and demonstrates the impossibility of meeting the media's ideal standard of the 'good' victim. The 'good' women should have been more careful, and the 'bad' women brought the violence on themselves.

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[23] Georgina Sutherland, Angus McCormack, Jane Pirkis, Patricia Easteal, Kate Holland, Cathy Vaughan 'Media Representations of violence against women and children: State of knowledge paper' Australia's National Research Organisation for Women's Safety (ANROWS), *Landscapes, State of Knowledge*, November 2015, 17.

[24] Ibid.

[25] Marian Meyers 'African American Women and Violence: Gender, Race and Class in the News' (2004) 21(2) *Critical Studies in Media Communication* 95, 111

Gilchrist argues that media coverage of violence against women has a racialised 'hierarchy of victims', with the most 'newsworthy' victims being 'conventionally beautiful (thin, blonde, young), middle-class, White women'.[26]

Media coverage of the 2012 Australian case of the murder of Allison Baden-Clay by her husband, Gerard Baden-Clay, was found to invoke significant gender stereotyping, with the 'good' victim, the 'monstrous' perpetrator and the 'predatory' mistress of the perpetrator:

> Allison's beauty is mythologised next to Baden-Clay's beastliness and McHugh's "predator" desire to have what Allison has, at least in outward appearances.[27]

This assessment of victim 'goodness' has also been found in media representations of sexual harassment. Judd and Easteal's study of media representations of five high-profile Australian sexual harassment cases found reporting of extraneous detail had acted to undermine the credibility of complainants. This included histories of drinking, mental instability and previous relationships.[28] These details were not directly relevant to the sexual harassment claim and served to stereotype the complainants as less than ideal victims. Similar trends were found in reportage of changes in consent legislation in New South Wales, with links made between 'female binge drinking and vulnerability to rape.'[29]

Sexual harassment is another example of violence against women that has received problematic media coverage. Media coverage of high-profile sexual harassment cases has been found to highlight similar gendered mythology to that of the courts, which is discussed in chapter 5. However, some notable exceptions have been found. For example, in reporting on Kristy Fraser-Kirk's sexual harassment claim against her former boss Mark McInnes and former employer David Jones, Fraser-Kirk was positioned as an incredible complainant, despite having many of the aspects of an 'ideal' complainant in the courts (youth, being in a subordinate workplace role and making a prompt complaint).[30] The media were more

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[26] Kristen Gilchrist '"Newsworthy" Victims? Exploring differences in Canadian local press coverage of missing/murdered Aboriginal and White Women' (2010) 10(4) 373 *Feminist Media Studies* 385

[27] Janine Little 'Domestic violence beyond representation: finding a feminist subject in the Allison Baden-Clay murder case' *Feminist Media Studies* (online 9 December 2018) <https://doi.org/10.1080/14680777.2018.1546214> 8.

[28] Keziah Judd and Patricia Easteal 'Media Reportage of Sexual Harassment: The (In)credible Complainant' (2013) 25 *The Denning Law Journal* 2013 1, 14.

[29] Easteal, Holland and Judd (n 8) 108.

[30] Patricia Easteal, Skye Saunders, Keziah Judd and Bruce Arnold 'Sexual Harassment on Trial—the DJs case' (2011) 36 *Alternative Law Journal*, 230, 233.

interested in what made the case distinctive or 'newsworthy' and the complainant a little 'suspect'—that is, the $37 million claim for damages.[31] This case is part of my sample and is discussed further in chapters 7, 8 and 9.

High-profile coverage of the kind in Kobe can reinforce dangerous stereotypes about sexual assault, including intimate partner sexual violence:

> Most articles about sexual assault are about stranger rape (also fulfilling rape myths) and/or get ignored because they get very little press. The attention given to this case and the use of rape myths make this case particularly damaging, regardless of how representative it is of the way the print media typically treat sexual assault.[32]

In media coverage of high-profile sexual harassment cases, similar aspects have been highlighted by journalists and editors. A preoccupation with salacious 'heterosexed' details was found in coverage of some high-profile Australian sexual harassment cases, with tabloids using headlines such as 'Woman sues IBM for $1.1m—sex pest legal fight' and 'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"', placing the focus on the 'sexual' rather than employment discrimination aspects of harassing behaviour.[33] This case is also in my sample and is discussed further in chapters 7, 8 and 9.

Themes of mutuality for intimate partner violence were found in Berns' 2001 study of men's magazines. The magazines in the sample portrayed men and women as equally culpable in domestic violence situations and equally capable of committing violence and did not acknowledge the gendered aspects of abuse:

> These men's and political magazines continue to ignore the male abuser and the cultural and structural context that tolerates male violence. They point out the cultural context that tolerates female violence without providing a similar analysis for the tolerance of male violence.[34]

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[31] Ibid.

[32] Franiuk et al (n 21) 304.

[33] Keziah Judd and Patricia Easteal 'Media Reportage of Sexual Harassment: The (In)Credible Complainant' in Patricia Easteal AM (ed) Justice Connections (Cambridge Scholars Publishing, 2013) 88, 98.

[34] Nancy Berns 'Degendering the Problem and Gendering the Blame – Political Discourse on Women and Violence' (2001) 15(2) *Gender & Society* 262, 273.

Media reporting that reinforces gendered mythology has been described as potentially deterring complainants from coming forward, reducing access to justice.[35]These stereotypes of 'ideal' and 'less than ideal' victims can lead to themes of victim blaming and mutuality of violence, which presents a skewed view to the reader of a systemic social problem. Stereotypes of the 'ideal' perpetrator can also have a similarly distorting effect. The 'ideal' perpetrator is discussed in more detail below.

The 'ideal' perpetrator

Researchers have found that there is a tendency for the media to portray the perpetrator of violence against women as 'other'. Custers and Van den Bulck observe that there is a tendency for the cultural construction of the 'ideal' perpetrator to be 'typically men who are poor, uneducated or, more recently, immigrants (or a combination of these)'.[36] This 'othering' of the perpetrator has also been found in Australian media coverage of filicide cases, with an 'emphasis on the mental illness of the perpetrator as an explanatory device' for this violent crime.[37]

The cultivation effect of this coverage is that violence against women is seen as a rare, horrific event committed at random by 'other' people and not as a widespread social problem.[38]

Framing techniques

As discussed in chapter 3, the media uses framing techniques to highlight particular messages for news audiences. For example, media theorists have identified the use of 'episodic' framing, which focuses on individual incidents or individuals, and 'thematic' framing, which focuses on the broader context of general social themes and trends. Previous studies suggest that, when the media uses thematic framing, audiences are less likely to hold individuals responsible for what happens to them and more likely to hold society responsible.[39] Studies of media portrayals of violence against women have found that episodic framing is the most

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[35] Deb Waterhouse-Watson 'News media on trial: towards a feminist ethics of reporting footballer sexual assault trials' (2016) 16(6) Feminist Media Studies 952, 961.

[36] Custers and Van den Bulck (n 18) 98.

[37] Janine Little '"Family violence happens to everybody": gender, mental health and violence in Australian media representations of filicide' (2015) 29(4) Continuum: Journal of media & Cultural Studies 605, 607.

[38] See for example Easteal, Holland and Judd (n 8) 107, Cathy Ferrand Bullock 'Framing Domestic Violence Fatalities: Coverage by Utah Newspapers' (Spring 2007) 30(1) *Women's Studies in Communication* 34, Janine Little (n 20) 12.

[39] Shanto Iyengar 'Framing Responsibility for Political Issues: The Case of Poverty' (March 1990) 12(1) 'Cognition and Political Action' *Political Behavior* 19, 26.

prevalent technique used by the media. Other framing techniques, including the decision to name or not name the parties, have also been found to be significant. This chapter examines the themes identified by feminist theorists applying framing analysis techniques to media coverage of violence against women.

Researchers have used framing analysis to identify themes in media coverage of violence against women. In particular, reporting on domestic violence has been found to rely on an episodic frame. Incidents are reported on in isolation, with a focus on what is unusual or sensational about the particular case. This is at the expense of using a thematic frame, which places an incident in a social context.[40] This presents a picture of domestic violence as an isolated, aberrant occurrence and not a common event in a patriarchal society.[41] This may present a picture to the reader, listener or viewer that violence only happens to 'other' people and is not a phenomenon that requires a strong social response or a change in culture.[42]

Researchers have also identified the framing of a media story as having an effect beyond the particular case being reported. In media coverage of sexual assault, the framing techniques used by the media for one particular sexual assault case can have an effect on public perceptions of other cases and community attitudes to sexual assault in general.[43]

Reporting of violence against women has also been found to be sensationalised. Australia's National Research Organisation for Women's Safety Limited (ANROWS) is an independent, not-for-profit national research initiative with the goal of providing research to shape 'policy and practice leading to a reduction in the levels of violence against women and their children.'[44] A 2016 report for ANROWS found that a minority of coverage of violence against women and their children used 'sensational headlines, graphic language and photographs that minimised or trivialised the issue'.[45] While it is heartening that this only

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[40] Kellie E Carlyle, Michael D Slater, Jennifer L Chakroff 'Newspaper Coverage of Intimate Partner Violence: Skewing Representations of Risk' (2008) 58 *Journal of Communication* 58 (2008) 168, 180-181.

[41] Ibid.

[42] Ibid.

[43] Waterhouse-Watson (n 35) 956.

[44] Australia's National Research Organisation for Women's Safety (ANROWS) *About ANROWS* (Web Page) <https://www.anrows.org.au/about/>

[45] Georgina Sutherland, Angus McCormack, Jane Pirkis, Cathy Vaughan, Michelle Dunne-Breen, Patricia Easteal, Kate Holland Australia's National Research Organisation for Women's Safety (ANROWS), 'Media representations of violence against women and their children: Final report', *Horizons Research report*, June 2016, 2.

occurred in a minority of the coverage, it remains a concern that the media do continue to minimise and trivialise violence against women.

Isolated focus

Another minimising technique is used when violent incidents are presented as individual occurrences rather than as part of a broader social context and perpetrators are portrayed as 'other', operating outside established social and cultural norms.

In their study of media representations of sexual harassment cases in English-language newspapers, online news sources, online magazine stories and newswires over a six-month period from March to August 2010,[46] McDonald and Charlesworth found that most news stories framed sexual harassment as 'an individual aberration' with 'little mention of the broader workplace context in which the sexual harassment had occurred' or any 'broader trends in the prevalence or patterns of sexual harassment'.[47] They found that very few articles placed sexual harassment cases in the broader context of gender discrimination in the workplace.[48]

This individualised framing, even if it is done in a way that is sympathetic to a particular complainant, means that the systemic nature of sexual harassment in the workplace is concealed from the reader. The cases that are reported are also often those that correspond to the court's construct of a 'good victim'. McDonald and Charlesworth observe:

> There was an almost exclusive focus in these media articles on "classic" forms of sexual harassment, that is, harassment perpetrated by a male who was more senior to the complainant, such as a line manager towards a female subordinate.[49]

This reinforces a particular view of what 'real' sexual harassment is and the circumstances in which it can occur. Such a limited view is problematic, because it sends a message to the reader that other forms of sexual harassment in the workplace, such as peer to peer, are not 'real' and actionable causes of action.

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[46] Paula McDonald, Sara Charlesworth 'Framing sexual harassment through media representations' (2013) 37 *Women's Studies International Forum* 95, 97.

[47] Ibid 99.

[48] Ibid 100.

[49] Ibid 99.

Naming (or not naming) the parties

The decision by a journalist to name or not name the parties in a case of violence against a woman can have a strong effect on perceptions of violence. Researchers have found that deciding not to name the perpetrator places the focus onto the victim as someone who is more 'responsible' for the violence occurring.[50] For example, in a study on Turkish media reporting of violence against women, Zeynep Alat found that many headlines did not name the victim or perpetrator.[51] Alat argues that, when the Turkish press uses these techniques, 'the victim's story becomes irrelevant and is not given any place'[52]. Therefore, although the victim's story is used for news and entertainment value, her own experience is deliberately erased.

Similar trends were observed in the aforementioned ANROWS 2016 report on media coverage of violence against women.[53] Much of the coverage minimised the presence of the perpetrator. The authors note that in 60 per cent of the coverage 'perpetrators were rendered invisible in the news'[54] and they conclude that, while violence against women is committed by another person, it is 'frequently reported as though that other person—boyfriend, husband, partner—does not exist'.[55] This style of reporting gives the bizarre impression that such events occur out of thin air and has the flow-on effect of minimising the victim's story.

Police/legal frame

Feminist researchers have critiqued a reliance by journalists on the 'official' police/legal system viewpoint to frame their coverage of violence against women.[56] This has been described by researchers as presenting an 'objective' and 'official' view that obscures the systemic nature of violence against women and mutes the experiences of victims.[57] In a study of the framing of domestic violence fatalities by the Utah press, Cathy Ferrand Bullock argues that using a 'law enforcement/legal system' frame in reporting on violence against women presents a misleading picture of the real nature of the crime. To Bullock, an overreliance on the law enforcement perspective is a rhetorical device that focuses on the authority of male-

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[50] Zeynep Alat 'News Coverage of Violence Against Women – the Turkish Case,' (2006) 6(3) *Feminist Media Studies* 295, 302.

[51] Ibid.

[52] Ibid.

[53] Sutherland et al (n 45) 32.

[54] Ibid.

[55] Ibid.

[56] Bullock (n 38) 46.

[57] Ibid 47.

dominated institutions and ignores 'gender-related power imbalances inherent within these institutions'.[58]

The law enforcement/legal system frame is also generally used as an 'episodic' frame. The media coverage that uses this frame presents violence against women as individual incidents of crime, rather than a systemic social problem. A 2016 review of international guidelines for the reporting of violence against women noted that a police/law enforcement frame dominated coverage of violence against women.[59] The police were characterised as the 'experts' in the coverage, at the expense of the women's own stories or the expertise of advocates, service providers or researchers.[60] This means that the media tend to report the reactive responses of law enforcement officials responding to an acute situation rather than the more considered responses of advocates, service providers or researchers who offer a 'big picture' perspective on a systemic social problem.

This dominance of the police/law enforcement frame was also recognised in the 2016 ANROWS report. The ANROWS study found that the most frequently quoted sources in the coverage were the police, lawyers and magistrates. The authors observe:

> This 'police frame' likely influences many other aspects of reporting on violence against women, including the types of violence that most commonly appear in the news and the language used to depict criminal offending.[61]

In using a law enforcement frame, the news media reinforce what is considered by the police and the legal system to be 'genuine' violence. This frame favours a focus on law enforcement responses to specific incidents of violence at the expense of a coordinated social response to a systemic social problem.

Media representations of sexual harassment in the workplace have also been found to use a 'techno-legal discourse', defined by McDonald and Charlesworth as '[l]egal clarification or raising of a legal or technical issue'.[62] In their study, McDonald and Charlesworth identified

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[58] Ibid 52.

[59] Georgina Sutherland, Angus McCormack, Patricia Easteal, Kate Holland and Jane Pirkis 'Media guidelines for the responsible reporting of violence against women: a review of evidence and issues' (2016) 38(1) *Australian Journalism Review* 5, 7.

[60] Ibid 7-8.

[61] Sutherland et al (n 45) 32.

[62] McDonald and Charlesworth (n 46) 98.

the techno-legal discourses in their sample, which s described the legal components of sexual harassment and focused on what was unusual about the individual case.[63] Where coverage discussed techno-legal issues, the focus was on 'themes such as vicarious liability and immunity from lawsuits', suggesting an emphasis on the employer's perspective.[64]

Awkward 'empowerment' narratives and getting help

There has been a trend in media coverage, particularly stories in women's magazines, towards including information about how victims of violence can get help, how women can help a friend experiencing violence or campaigns to raise awareness of intimate partner violence.[65] While laudable aims, these practices may also have the unintended effect of placing responsibility for avoiding violence on the victim.

In a study of coverage of violence against women in magazines, Nettleton observed that women's magazines place women in the guardianship of other women, instructing readers to intervene with friends who are being abused.[66] Nettleton argued that, with coverage focusing on individual responses to domestic violence and placing responsibility on women to help each other, women's magazines actually achieve the anti-feminist aim of promoting 'the idea that the appropriate social response is for the woman to abandon her life and flee.'[67] This reinforces perceptions that violence against women is a problem for individual women and not a widespread social problem to be addressed by society as a whole.

A study of guidelines for media reporting of violence against women (from Australia, Canada, the International Federation of Journalists, the United Kingdom, the United States and New Zealand)[68] found that five of the 11 guidelines in the sample recommended providing resources in the coverage for women who may need help, such as crisis and support helplines.[69] In contrast, only two guidelines in the sample recommended providing information for perpetrators.[70] While providing this information for victims in the media coverage is invaluable, there remains a disproportionate focus on the individual victim

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[63] Ibid 101.

[64] Ibid.

[65] See studies listed above n 2

[66] Nettleton (n 2) 148.

[67] Ibid.

[68] Sutherland et al (n 59) 8.

[69] Ibid 10.

[70] Ibid.

seeking help rather than the perpetrator changing their abusive behaviour. This disproportionate focus on the victim rather than the perpetrator was also seen in Hungary, in an Amnesty International media campaign to raise awareness of domestic violence. In the 'Abusive furniture' campaign, 'a woman, who is coded as a victim of domestic abuse, appears next to a piece of furniture or household object that functions as a replacement for an abusive partner'.[71] The authors observe:

> By erasing the perpetrator and act of violence, responsibility and agency are shifted away from the abusers to the women in the images and the audience that the text addresses.[72]

The authors describe the 'Abusive furniture' campaign as one of unintended victim blaming, which 'places the burden of responsibility on an inanimate object for causing the violence, on the victim for making excuses, and on the audience to see through excuses'.[73] In other words, everyone is responsible for the violence except the person who committed it. Unlike the women's magazine coverage discussed above, the 'Abusive furniture' campaign did not have information about where to seek help but provided a vague direction to 'support Amnesty International'[74] and was ultimately conceded by Amnesty International to be ineffective in reducing intimate partner violence.[75]

'Allegations' and scepticism

While care must be taken in the reporting of ongoing legal matters to avoid pronouncing on issues that have not yet been proven in a court of law, some media coverage has been found to place a disproportionate emphasis on alleged perpetrators' claims of innocence or to establish that the case remains an 'allegation'.[76] Although journalists may often refer to an 'alleged victim', it is the victim who is doing the alleging against a person who has committed a crime against her—the alleged assaulter.[77]

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[71] Goehring, Renegar and Puhl (n 2) 441.

[72] Ibid.

[73] Ibid 453.

[74] Ibid 455.

[75] Ibid.

[76] See, for example, Anya Pouckhanski 'Ripples from the First Stone' (2011) 39 *The Sydney Institute Quarterly* (39), 10, 12; Judd and Easteal (n 28) 13; Dunne Breen et al (n 10) 9.

[77] Poukchanski (n 76) 12.

For example, in a study on sexual harassment media coverage, Judd and Easteal found that, in one article of only 500 words, there were multiple uses of the word 'alleged' when one in the introduction establishing the state of the case would have sufficed.[78] While journalists commonly use 'alleged' in an attempt to avoid exposure to sub judice contempt and suggesting contested allegations ongoing proceedings have been proven, repeated use of the term can have the counter-effect of creating a presumption that the contested allegations are untrue. Such excessive displays of journalistic scepticism undermine the credibility of victims of violence and conceal the systemic nature of the problem.

Focus on overly sexualised behaviour

Coverage of sexual harassment and sexual assault cases may emphasise the 'sexual' aspects of the case. Studies of reporting of sexual harassment and sexual assault have found that some journalism places a prurient focus on salacious pornographic detail or the 'naturalness' of the behaviour.[79] This reduces a traumatic and serious crime to titillating entertainment for the reader and may lead to these events being taken less seriously.

Some headlines and lead paragraphs have been found to conflate 'sex' and sexual assault. For example, headlines in sexual harassment cases have used terms such as 'sex suit' or 'sex pest legal fight'.[80] This trend has also been seen in reporting of sexual assault.[81] This conflates a violent event with a consensual act. A conflation of sex and sexual assault was also found in coverage of the previously discussed Lazarus case.[82]

Conclusion

Previous feminist research has used discourse and framing analysis to identify themes in media coverage of different forms of violence against women. The discourses reflected in the coverage and framing techniques used by journalists present a somewhat misleading and inaccurate view of violence against women for the reader, even in circumstances where the article includes information for victims on how to get help. Such inaccurate views could be argued to be a product of newsroom practices and the 24-hour news cycle, where there is a fundamental tension between media reporting of novel, episodic and 'tangible' incidents and

[78] Judd and Easteal (n 28) 17.

[79] Waterhouse-Watson (n 12), 116; Dunne Breen et al (n 10) 9-10, McDonald and Charlesworth (n 46) 101.

[80] Judd and Easteal (n 28) 10.

[81] Sutherland et al (n 45) 39.

[82] Dunne Breen et al (n 10) 8.

the complexities and lengthy cycles of violence against women, which may include extended emotional and psychological abuse that is less ‘newsworthy’ than a single violent episode.

In chapters 7, 8 and 9, I build on this work in my qualitative analysis of high-profile Australian sexual harassment cases. These chapters provide the results of my framing analysis and discourse analysis of the media coverage of sexual harassment cases to identify specific themes and to explore if and in what ways Australian media reporting of sexual harassment cases accords with or departs from findings from the previous research described in this chapter. The next chapter focuses on the legal system’s characterisation of the ‘real’ victim and genuine violence against women.

5 The 'good' victim in the courts and 'genuine' violence against women

Introduction

Women have been 'othered' throughout Western legal history. Legal discourse has developed to reflect and reinforce a male-dominated society, where women's experiences are left on the periphery. As Graycar and Morgan observe in their landmark work *The Hidden Gender of Law,* the legal doctrines have historically ignored women's lives or reduced women's experiences to narrow and sexist stereotypes in legal texts.[1] While there have been some significant strides in feminist law reform, this history of omission and stereotyping continues to resonate in the constructions of 'real' violence against women and 'the good victim' by the legislature and the courts. To feminist theorists, the legal system uses a patriarchal fantasy of a 'good victim' and 'genuine' violence to determine cases—and this is often completely at odds with women's actual lives and experiences.

There is a considerable body of feminist critique of the attitudes of the legal system to violence against women. Much of this critique stems from a concept of the legal system being 'gendered' in itself, with a masculocentric perspective that favours straight cisgendered male experiences. As the following chapter shows, feminist researchers have found continuing themes of trivialising violence against women, viewing women as less credible victims if their experiences do not align with narrow legal categories and a gendered mythology in their analyses of case law and legislation. Judicial attitudes appear to reflect a historic social and legal division of human experience into 'public' and 'private' spheres.

Caveat—limitations of this chapter

In this chapter, I review the literature on 'good victimhood' for sexual assault, domestic violence and sexual harassment cases. However, these are not the only examples of violence against women that appear before the courts. The invisibility of women's stories in the legal system has also been seen in the way violence against women may take place in the 'background' of cases outside of the criminal law, illustrating 'the law's indifference to, or

[1] Regina Graycar and Jenny Morgan *The Hidden Gender of Law* (The Federation Press, 2002, 2nd ed), 2.

indeed its tacit complicity in, violence against women'.[2] Examples of violence against women are found in cases involving the equitable doctrines of undue influence and unconscionability in property transactions executed under duress,[3] personal injury cases where women caring for partners who had been injured in accidents had been subjected to domestic violence by their partners,[4] evidence of domestic violence being viewed as 'irrelevant' by judges in family law matters[5] and social security case law not taking into account the circumstances of domestic violence in cases where women had obtained benefits as a single person while fitting the technical definition of being in a 'marriage-like relationship.[6] In these cases, gender-biased legal views of which stories were more important meant that the 'goodness' of these invisible victims was not even considered by the courts.

'Good victimhood' and sexual assault cases

Much has been written about gender stereotyping in the attitudes of the legal system to sexual assault. Previous feminist scholarship has identified an artificially constructed 'good victim' of 'real' sexual assault in jurisprudence, which bears little resemblance to women's actual experiences. For example, attributes such as sexual 'virtue', obvious resistance and prompt reporting have often been recognised by the legal system as the marks of a credible complainant.[7]

This legal construction of the 'good victim' in sexual assault cases has its genesis in early Western legal history. As observed by Graycar and Morgan, stereotypical views have a basis in historic legal skepticism of sexual assault complainants, including 17th century English jurist Lord Hale's description of sexual assault as 'an accusation easily to be made and hard to be proved, and harder to be defended by the party accused'.[8] These misogynist views developed into legal doctrines including a 'fresh complaint' rule that linked prompt complaint to credibility, the 'corroboration warning' from judges to juries about convicting on the basis

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[2] Regina Graycar, 'Telling Tales: Legal Stories About Violence Against Women' (1996) 7 *The Australian Feminist Law Journal* 79, 80.

[3] Ibid 84.

[4] Ibid 86-87.

[5] Ibid 89.

[6] Patricia Easteal 'Tips: The Iceberg and Global Warming Metaphor' in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis Butterworths Australia, 2010) 482, 491.

[7] See for example Patricia Easteal *Less Than Equal—Women and the Australian Legal System* (Butterworths, , 2001) 172; Jocelynne A Scutt *The Incredible Woman—Power & Sexual Politics Vol 1* (Artemis Publishing, 1997) 6; Catharine A. MacKinnon *Women's Lives—Men's Laws* (The Belknap Press of Harvard University Press, 2005) 34-35.

[8] Graycar and Morgan (n 1) 354.

of a woman's uncorroborated testimony and permitting the woman's past sexual history to be led in evidence.[9] Kathy Mack comments on the misogynist history and legacy of the corroboration warning and its use in cases involving children and young people:

> There are two reasons [corroboration warnings] continue. One is a technical legal reason based on the interpretations trial judges and appeal courts have given to the legislation. The second, more profound reason is the persistence of social and judicial attitudes which accept and endorse the myths which were used to justify the older practices of denigrating the credibility of those who testify about sexual assault.[10]

This is illustrative of what Scutt described as women being 'incredible' in the eyes of the Anglo-Australian legal system[11] and echoes MacKinnon's scathing assessment of an 'ideal rape' as committed by a (non-white) stranger, in a strange location, where the victim resisted 'within an inch of her life'.[12] MacKinnon observes, 'To the extent your reality does not fit the law's picture, your rape is not illegal.'[13] The legal system's view of violence against women often does not align with the reality of the victim.

The law's rather limited picture of a 'good victim' can be seen in studies of the attitudes of judges and juries to sexual assault. Indeed, the use of 'gendered mythology' by the courts has been a common theme in studies of judicial attitudes to rape.

Who is harmed—the 'good' victim

Scutt identified egregious and archaic madonna/whore stereotypes in judicial reasoning in sexual assault cases. A 'good victim' who experiences 'real violence' is a chaste and virtuous woman. This was seen in reduced penalties in the case *R v Heros Hakopian*,[14] where the victim was a sex worker. To Scutt, such reasoning is illustrative of a legal system with no compassion for or understanding of women's experiences:

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[9] Graycar and Morgan (n 1) 355.

[10] Kathy Mack 'You should scrutinise her evidence with great care' 59-75 Patricia Easteal (ed) *Balancing the Scales—Rape, Law Reform & Australian Culture* (The Federation Press, 1998)59, 65.

[11] Scutt (n 7) xi.

[12] MacKinnon (n 7) 35.

[13] Ibid.

[14] *R v Heros Hakopian,* Unreported decision, Supreme Court of Victoria, Court of Criminal Appeal, 8 August 1997 cited in Scutt *The Incredible Woman* (n 7), 24.

> The 'principle' that women with sexual experience warrant lesser penalties for their rapists, on the basis that they are less harmed by the activity, confirms simply that male orientated and dominated courts are unable to establish a set of principles that recognise the reality of rape: that it is violence and power centred in sexually dominant and dominating activity, that is detrimental to the very essence of being a woman.[15]

While Scutt was writing in the 1990s, similar trends continue to be observed by researchers well into the 21st century, which are outlined below.

The relative scale of 'harm' correlating with degree of victimisation has also been found with intimate partner sexual violence (IPSV). Patricia Easteal and Louise McOrmond-Plummer comment on legal and societal attitudes to IPSV, where there is a pervasive myth that 'if a woman has had sex with the man before, then the rape couldn't be as traumatic for her.'[16] Easteal observes that the marital rape licence for husbands, a legal fiction espoused by Lord Hale in the 17th century, has influenced attitudes about IPSV well into the present day:

> The marital immunity may have been a fiction without the backing of case law or a legal foundation but it was a fiction which had a potent impact on the attitudes and actions of the courts and the community. Although legislation has been enacted to negate the immunity, one wonders, looking at the incidents of prosecution incidence, consent, and sentencing, if fictions, like attitudes, are so easily eradicated.[17]

Heath also observes that, while sexual assaults perpetrated by someone known to the complainant are statistically more common, these crimes are treated as exceptional by the courts.[18]

This view of IPSV as less 'real', as inflicting a lower degree of harm on victims, has been reflected in judicial attitudes to establishing non-consent—where the courts have not recognised the forms of coercion experienced by victims, including social coercion and

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[15] Scutt (n 7) 24.

[16] Patricia Easteal and Louise McOrmond-Plummer *Real Rape, Real Pain—Help for women sexually assaulted by male partners* (Hybrid Publishers, 2006) 40.

[17] Patricia Easteal 'Rape in marriage—Has the licence lapsed?' pp107–123, Patricia Easteal (ed) *Balancing the Scales* (n 10), 107, 121.

[18] Mary Heath 'Women and Criminal Law: Rape' Patricia Easteal (ed) *Women and the Law in Australia*, LexisNexis Butterworths, Australia, 2010, 88, 90-91.

threats of physical force, as affecting capacity to consent.[19] This is reinforced by low reporting,[20] low conviction rates[21] and echoes of the ancient 'marital immunity' in lighter sentencing.[22]

Limited efficacy of law reform

There have been significant reforms in sexual assault law, with attempts to overturn many harmful stereotypes of victims. This can be seen as a parallel to the reforms to the *Sex Discrimination Act 1984* (Cth) and *Anti-Discrimination Act 1991* (Qld) discussed in chapter 2, which codify requirements to consider the subjective circumstances of the target of sexual harassment. In a 2016 address to the Australian High Commission in Sri Lanka, The Hon. Justice Virginia Bell AC of the High Court of Australia observed that feminist law reform had led to some positive outcomes for victims, including the ability for complainants to give evidence remotely via closed-circuit television,[23] a prohibition on cross-examination of complainants about their sexual history and[24] a duty on the judge in many states and territories to disallow 'harassing, intimidating, offensive, oppressive or humiliating' questions.[25] Justice Bell notes that the common law 'corroboration warning' no longer applies, and that judges are now required to instruct juries that lack of corroboration or a delay in making a complaint does not necessarily mean that an allegation is false.[26]

Despite such significant feminist gains, these stereotypes are still present in Western legal systems. The features of the stereotypical 'good victim' have been found to influence the decisions of prosecutors to pursue a sexual assault case in court. These include ability to deliver consistent testimony, 'corroboration' in the form of obvious visible injuries, medical evidence or eyewitnesses, and fresh complaint.[27] The reforms that were praised so emphatically by Justice Bell have been found to be 'ignored and subverted by defence

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[19] Anna Carline and Patricia Easteal AM *Shades of Grey—Domestic and Sexual Violence Against Women*, (Routledge, 2017) 212–213.

[20] Ibid, 215–216.

[21] Ibid.

[22] Ibid, 221.

[23] The Honourable Justice Virginia Bell AC, High Court of Australia, "The protection of women in the administration of criminal justice in Australia" (October 2016) 28(9) *Judicial Officers' Bulletin* 85, 87.

[24] Ibid.

[25] Ibid.

[26] Ibid 87–88.

[27] Denise Lievore 'Victim Credibility in Adult Sexual Assault Cases' (November 2004) 288 *Trends and Issues in Crime and Criminal Justice* 1, 3.

counsel, judges and prosecutors alike'.[28] Legislation restricting admission of evidence of sexual reputation and sexual history continues to allow significant judicial discretion.[29] This discretion does not operate in a vacuum and is arguably informed by the 'overt, covert, and even unconscious gender-biases' of a male-dominated legal system.[30] As noted by Kennedy and Easteal in their study of the effects of reforms in the ACT *Sexual and Violent Offences Legislation Amendment Act 2008* on court procedure for victims of sexual violence, the attitudes of prosecutors and judicial officers may affect the implementation of law reform, where:

> victims who do not conform to the societal view of normal or "real" rape may not be perceived as especially vulnerable and therefore slip through the gaps and be left unprotected by the legislation.[31]

This is a continuing challenge for law reform efforts. While there are beneficial changes on paper, it may take longer for the legal system itself to catch up and properly address the needs of victims in the courtroom.

Gendered mythology and juries

Gendered mythology has also been found in studies of jury deliberations in sexual assault trials. The work of UK researchers Emily Finch and Vanessa Munro, which includes mock jury deliberations, focus groups and trial simulations, has identified persistence of regressive social attitudes in jurors, despite some attempts by the UK legislature to address victims' experiences by including a framework to provide better guidance on questions of consent.[32] Some participants in the study were found to presume consent 'in the absence of positive dissent'.[33] Participants also continued to emphasise a need for evidence of physical resistance to prove non-consent, despite being provided with legal directions that included mock

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[28] Rosemary Hunter 'Border Protection in Law's Empire—Feminist Explorations of Access to Justice' (2002) 11 *Griffith Law Review* 263, 267.

[29] Jessica Kennedy, Patricia Easteal 'Shades of Grey: Indeterminacy and Sexual Assault Law Reform' (December 2011) 13(2) *Flinders Law Journal* 49, 56.

[30] Ibid, 52.

[31] Jessica Kennedy and Patricia Easteal 'View from the Inside: the Sexual and Violent Offences Legislation Amendment Act 2008' in Patricia Easteal AM (ed) *Justice Connections* (Cambridge Scholars Publishing, 2013) 10, 36.

[32] See Emily Finch and Vanessa E Munro 'Breaking boundaries? Sexual consent in the jury room' (September 2006) 26(3) *Legal Studies* Vol. 26, No. 3, September 2006 303.

[33] Ibid 315–316.

medical evidence in the trial that a lack of physical injury did not necessarily mean that sexual assault did not take place.[34]

Similarly, a pilot study of juror attitudes in sexual assault cases involving intoxicants found evidence of victim blaming and gender stereotyping of the victim and defendant in circumstances that were not relevant to the elements of the offence.[35] Participants expressed an interest in the victim's past sexual history.[36] One commented on the morality of the defendant's behaviour as relevant to the case, saying that the defendant not leaving his telephone number was 'the sort of uncaring attitude in keeping with a man who would not care whether or not the victim was consenting to intercourse.'[37]

Similar trends have been identified in Australian research on mock juror attitudes to sexual assault. Beliefs that 'real' rape was committed by a stranger, where a 'real' victim physically resisted were seen in the results of the study. Participants were more likely to see the defendant as guilty and not attribute blame to the victim if the circumstances of the assault fitted this stereotypical scenario.[38] An Australian mock juror study found that 'strong, often stereotypical expectations' about 'ideal' victim behaviour influenced perceptions of complainant credibility.[39] 'Incredible' victim aspects included flirting with the defendant, not screaming for help, no evidence of physical injury and delay in reporting.[40]

Taylor observes that such persistent inaccurate juror beliefs can make it very difficult for prosecutors to pursue sexual assault cases in court:

> Unfortunately for prosecutors, this type of scenario in which sexual assault occurs is common. Rape is not always committed by strangers, victims do not always scream for help, obvious physical injury is uncommon and the majority of victims do not report the incident to police at all. The reality for many sexual assault victims is that,

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[34] Ibid 316.

[35] Emily Finch and Vanessa E. Munro 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants—The Findings of a Pilot Study' (2005) 45(1) *British Journal of Criminology* (2005) 25, 36.

[36] Ibid 35–36.

[37] Ibid 36.

[38] Blake M McKimmie, Barbara M Masser, Renata Bongiorno 'What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes and Participant Gender on How the Complainant and Defendant are Perceived' (2014) 29(12) *Journal of Interpersonal Violence* 2273, 2275, 2293–2294.

[39] Natalie Taylor 'Juror attitudes and biases in sexual assault cases', *Trends and Issues in Criminal Justice*, Australian Government—Australian Institute of Criminology, No. 344 August 2007, 5.

[40] Ibid.

> as long as misinformation about rape and stereotypical beliefs about how a victim would behave exist within the community, the likelihood of convincing a jury that a sexual assault did occur in the absence of supporting evidence will remain low.[41]

This is a self-perpetuating cycle. As long as cases where the victim falls outside the 'ideal' stereotype are not brought forward, the courts will continue to reinforce how an ideal, credible complainant should behave—whether or not convictions are achieved.

'Good victimhood' and domestic violence

This historic legacy of treating the experiences of women as 'other' has also been found in the attitudes of the legal system to domestic violence and who is considered as a 'real' victim of violence. The legal system has traditionally divided human experience into 'public' and 'private' spheres, where the public is associated with men and the private with women.[42] Carline and Easteal identify echoes of the ancient public–private divide in present-day conceptions of domestic violence, where a masculine experience (such as a single punch or pub brawl) is the benchmark.[43] The limitations of the legal system are starkly apparent in the difficulties experienced by domestic violence victims who kill their violent partners, where their actions do not align with traditional concepts of self-defence.[44] The 2016 discussion paper *Out of Character – Legal Responses to intimate partner homicides by men in Victoria* by the Domestic Violence Resource Centre Victoria found that despite 2005 reforms attempting to address this very situation:

> women who kill in response to family violence are still likely to struggle to successfully argue self-defence due to a lack of understanding about the impact of family violence about who is a legitimate or 'benchmark' victim.[45]

Carline and Easteal argue that the gendered nature of domestic violence is obscured through gender-neutral language in legislation.[46] They further comment:

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[41] Ibid.

[42] Easteal (n 7) 9, Graycar and Morgan (n 1) 8–9.

[43] Carline and Easteal (n 19) 32.

[44] Gail Hubble 'Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence' (1997) 9(12) *Current Issues in Criminal Justice* 113, 116-122; Easteal (n 7) 48.

[45] Domestic Violence Resource Centre Victoria *Out of Character – Legal Responses to intimate partner homicides by men in Victoria* (Discussion Paper, 2016) 36.

[46]Carline and Easteal (n 19) 32.

> The family as a private place is a continuing theme in all areas of law. This contributes to a perceived dichotomy between 'real' criminal assault and what takes place in the home. There continues to be a mismatch between what victims experience as violence and what players in the criminal justice system tend to conceptualise as a criminal act.[47]

This suggests a fundamental tension in the legal system, where the competing notions of penalising criminal assault and non-intervention in the 'privacy' of the family play out in the courtroom. It contributes to gendered mythology that women who experience domestic violence are not 'real' victims.

What is deemed as 'harm'—the 'real' victim

Problematic social and judicial attitudes have contributed to an artificial gradation of 'harm' caused by domestic violence. Evan Stark, who used the concept of 'coercive control' to explain the dynamic of violent intimate partner relationships, observes that the courts continue to deal with domestic violence in terms of isolated incidents:

> This is largely the result of a paradigm that defines domestic violence as an incident-specific crime, equates abuse with physical and psychological assault, applies a "calculus of harms" to assess severity (the more injury or trauma, the more serious the abuse), and rations intervention accordingly. When shelters, police, courts, or medical personnel use this frame to understand male partner abuse, the oppression battered women experience is disaggregated, trivialized, normalized or rendered invisible, with interventions actually becoming more perfunctory as subjugation becomes more comprehensive.[48]

This institutional assessment of 'harm' as physical injury misrepresents the experience of domestic violence for victims and the different layers of trauma that can occur.

An equation of harm with physical injury and domestic violence with individual incidents is reflected in Welch's account of the UK police service in light of a 2014 report by Her Majesty's Inspectorate of Constabulary (HIMC) on the police response to domestic violence. Welch cites the 'macho' culture of the police force, which dismisses responding to domestic

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[47] Carline and Easteal above (n 19) 60.

[48] Evan Stark 'Rethinking Coercive Control' (2009) 15(12) *Violence Against Women* 1509, 1510.

violence as removed from the 'aggressive tactics, high adrenaline-pumping incidents, and selective law enforcement' of 'real police work'[49] and describes a correlation between low prosecution rates and police apathy.[50] While Welch urges police officers to adopt a more 'victim centric philosophy' and a better understanding of domestic violence,[51] the article frequently refers to individual 'domestic abuse incidents'[52] rather than patterns of behaviour causing harm to the victim over a period of time. This reinforces Stark's observation that the institutional response to domestic violence characterises it as an incident-specific crime.

Some intimate partner violence (IPV) scholars have identified different types of violence, with varying degrees of harm. This parallels the representation of violence against women by the media, as discussed in the preceding chapter (including work of Meyers, Berns and Hammer). For example, Michael Johnson divides IPV into the following categories: 'intimate terrorism', defined as 'violence enacted in the service of taking control over one's partner; 'violent resistance', defined as violence used in response to intimate terrorism; and 'situational couple violence', defined as 'a function of the escalation of a specific conflict or series of conflicts'.[53] Johnson argues that, while 'intimate terrorism' is 'primarily male perpetrated' and gendered, 'situational couple violence' is 'much more common' and 'nearly gender symmetric'.[54] Johnson's concept of 'intimate terrorism' is somewhat similar to Rhonda Hammer's concept of 'family terrorism', a term Hammer argues captures the 'contextual and systemic nature of relations of subordination, domination and violence through which those in hierarchical positions of power control others.'[55]

Jane Wangmann has found that the Family Court of Australia has adopted Johnson's distinctions and that this has affected its characterisation of what violence 'counts' and who is a worthy victim. IPV is 'real' when 'it is "serious" and well documented'. In contrast:

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[49] Daniel Welch 'Domestic abuse—a continuing problem for police' (Winter 2016) 8(1) *Australasian Policing* 10, 10.

[50] Ibid 11.

[51] Ibid 11.

[52] Ibid 10—11.

[53] Michael Johnson 'Domestic violence: It's Not About Gender: Or Is It?' (2005) 67(5) *Journal of Marriage and Family* 1126, 1127.

[54] Ibid.

[55] Rhonda Hammer 'Militarism and Family Terrorism: A Critical Perspective' (2003) 25(3) *The Review of Education, Pedagogy & Cultural* Studies 231, 237.

> violence that is "messy"—where both parties have used violence against the other, where parties do not fit the dichotomy of victim and perpetrator, where there are competing issues that are also critical in the determination of the best interests of the child—then allegations of IPV tend to be viewed as situational couple violence or separation-instigated violence (and of less consequence to resultant parenting orders) …[56]

Wangmann found that 'regardless of the category of violence, fathers were far more likely to be identified as the sole perpetrator'.[57] Wangman also found examples of Family Court judges scrutinising the behaviour of women, questioning whether they were 'truly fearful' if they 'stood-up' for themselves in interactions with the alleged perpetrator, or in family court counselling sessions' and also criticised for being 'too passive' and remaining in a violent relationship.[58] Wangmann cited *Carlton & Carlton*, in which the Family Court described the mother's 'amazing' response to a violent incident:

> I find it quite amazing, however, that after this incident, and after the police had attended her premises, the mother actually initiated a telephone call to the husband in order to challenge him about his assertion that her home was a brothel. These are scarcely the actions of a woman who considered herself afraid of the father's actions and behaviour.[59]

Wangmann also cited the Family Court appeal *Lyons v Adder*, in which the Family Court referred to the original decision's characterisation of the mother as 'well enough empowered and confident to engage in dispute with the father.'[60] However, Wangmann noted too that these views were 'not shared or widespread' in the sample and that other judicial officers expressed a more nuanced understanding of IPV.[61]

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[56] Jane Wangmann 'Different types of intimate partner violence—What do family law decisions reveal?' (2016) 30 *Australian Journal of Family Law* 77, 105.

[57] Ibid 111.

[58] Ibid 105.

[59] *Carlton & Carlton* [2008] FMCAfam 440 at para 135

[60] *Lyons v Adder* [2014] FamCAFC 6 at para 25

[61] Wangmann above n 56, 105.

Persistent trivialising

Studies looking at judicial attitudes to domestic violence have found that, despite decades of feminist law reform, judges and magistrates continue to trivialise this form of violence and hold anti-feminist views when deciding cases involving intervention orders.[62] This parallels the minimising of violence against women in media reporting discussed in the previous chapter. Rosemary Hunter describes this as an 'implementation problem'.[63] In a study of the attitudes of magistrates and judges in domestic violence order and Family Court proceedings, Hunter found that magistrates would often place greater weight on recent isolated incidents of violence rather than examine the power relationship between the parties when deciding an intervention order.[64] Magistrates did not consider the psychological effects of domestic violence on victims and in some cases encouraged the parties to reconcile.[65] Orders were often of short duration, with 12 months considered an appropriate length, despite cases in which abusive behaviour had continued for years.[66] In matters involving ongoing Family Court proceedings, parental access rights for fathers were often seen by judges and magistrates as more important than protecting mothers and children from violence.[67] Hunter also observed negative gender stereotypes of women being deployed in intervention order applications:

> In contested intervention order proceedings observed, women complaining about domestic violence were sometimes constructed as bad mothers or vindictive ex-wives, either as an alternative to a 'relationship stress and conflict' analysis, or in conjunction with it.[68]

These attitudes meant that there was a jarring disconnect between the way judges and magistrates viewed domestic violence and the way it was experienced by victims.[69] Victims

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[62] Scutt (n 7) 20 was very critical of domestic violence intervention order system in 1997, arguing that dealing with these matters outside of the criminal courts effectively decriminalising domestic violence.

[63] Rosemary Hunter 'Narratives of Domestic Violence' (December 2006) 28(4) *Sydney Law Review* 733, 737.

[64] Ibid 755–756.

[65] Ibid 761.

[66] Ibid 763.

[67] Ibid 764.

[68] Ibid 767.

[69] As discussed in Chapter 4, the media itself often does little to dispel such attitudes in the general public, as seen in the reporting of commentary by Senator Pauline Hanson about women making allegations of violence to prevent men from having access to their children – see Jade MacMillan 'Family law inquiry given green light by Senate as Rosie Batty

of domestic violence were found to be more likely treated more favourably and viewed as credible by magistrates if they were legally represented.[70]

This disconnect is also apparent in the failure of judicial officers to recognise the nature of intimate partner violence beyond physical violence and emotional responses to physical violence. Evan Stark observes that the courts continue to deal with domestic violence as isolated incidents, with trauma or injury measured in terms of 'physical and psychological assault'—where 'the more injury or trauma, the more serious the abuse' and intervention by the legal system occurring only in those incidents considered the most 'serious'.[71] Stark describes such an assessment as completely out of step with the realities of intimate partner violence:

> When shelters, police, courts, or medical personnel use this frame to understand male partner abuse, the oppression battered women experience is disaggregated, trivialized, normalized or rendered invisible, with interventions actually becoming more perfunctory as subjugation becomes more comprehensive.[72]

This institutional assessment of 'harm' as physical injury misrepresents the experience of intimate partner violence for victims and the different layers of trauma that can occur. Hunter cites the case of *T v S*, in which the mother 'T' successfully appealed the trial judge's refusal to admit evidence of intimate partner violence. The trial judge accepted evidence from T's general practitioner 'Dr RS' that T suffered 'histrionic personality disorder' and therefore viewed her allegations lacking. credibility.[73] However, on appeal, the Court commented on an alternative explanation of T's 'erratic' behaviour and the difficulties she experienced as a self-represented litigant:

> Had she been represented by competent counsel who had been properly instructed, no doubt the cross-examination would have been directed to the issue as to whether the observed symptoms might have been a reaction to a long history of domestic violence. Counsel would have no doubt drawn attention to the history as now described by the

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questions Pauline Handon's role' 18 September 2019 *Abc.net.au* (online) <https://www.abc.net.au/news/2019-09-18/rosie-batty-family-law-inquiry-pauline-hanson-bias/11523914>

[70] Hunter (n 28) 272.

[71] Stark (n 48) 1510.

[72] Ibid.

[73] *T v S* (2001) Fam LR 342 [62].

> mother and the literature, some of which is contained in the additional material that is sought to be introduced before us, to the effect that victims of domestic violence may exhibit symptoms of the type described by Dr RS as a result of having been subjected to domestic violence.[74]

The 'implementation problem' was also found in a study of cross-applications for domestic violence protection orders in Queensland, where police often support both parties. Themes of trivialising violence and assuming mutual responsibility in relationships for violence were identified—meaning 'there is a risk that dangerous coercive controlling violence is missed'.[75]

'Good victimhood' and sexual harassment

As discussed in chapter 2, sexual harassment was developed as a cause of action from the pioneering work of second wave feminist legal activists including Catharine MacKinnon. Sexual harassment law was informed by the experiences of women in the workplace, whose experiences are described by MacKinnon as being dismissed by 'employers, husbands, judges, and the victims themselves' as 'trivial, isolated, and "personal," or as universal "natural" or "biological" behaviors (sic)'.[76] MacKinnon reflects:

> …it took a women's movement to expose these experiences as systematic and harmful in the first place, a movement that took women's point of view on our own situation as definitive of that situation, as the basis for beginning to embody it in the law of sex equality.[77]

However, despite being a relatively new cause of action informed by the experiences of women, many of the old stereotypes have surfaced in judicial attitudes to sexual harassment.

Stereotypes of the 'good' victim

The credible victim

There has been significant feminist critique of the way the courts characterise a 'good' and credible victim of sexual harassment. Credibility has been found to be assessed in accordance

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[74] Ibid [120]

[75] Heather Douglas and Robin Fitzgerald 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *UNSW Law Journal* 56, 71.

[76] Catharine A. MacKinnon *Sexual Harassment of Working Women* (Yale University Press, 1979) 2.

[77] MacKinnon (n 7) 111.

with the victim conforming with various 'conflicting myths and stereotypes',[78] such as making a prompt complaint in situations where there is a significant power imbalance between the harasser and the victim,[79] being simultaneously 'dependent and passive' like a traditional woman while demonstrating autonomy and acting independently by quitting her job[80] and demonstrating the appropriate emotional response when giving evidence, even though a 'flattened' demeanour could be evidence of depression after being sexually harassed.[81]

Complainant credibility has also been found in previous studies of sexual harassment cases to be linked to youth, Anglo-Saxon ethnicity, chastity and 'rational' presentation of evidence.[82] For example, in *Cooke v Plauen Holdings*, the age difference between the complainant and alleged harasser made the complaint of sexual harassment contributed to the Court finding on the balance of probabilities that the complainant had been sexually harassed, as the alleged harasser '…was a much older man... and she was unlikely to have any interest in him.'[83] The Court was not impressed by the testimony of the complainant in *Cross v Hughes and Anor* which failed to convey that she was 'profoundly affected by the events described'.[84] In *Horman v Distribution Group Limited,* evidence of the complainant's attitudes to sexuality, including her suggestive eating of a banana[85] and whether she had shaved her pubic hair and mentioned this at work[86], was considered by the Court to be relevant to when considering her credibility as a witness.

These stereotypical perceptions of credibility are part of the same gender mythology that normalises harassing behaviour in the workplace. In particular, research on rural workplaces by Saunders and Easteal has indicated that cultural myths of masculine behaviour ('boys

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[78] Deb Tyler and Patricia Easteal 'The Credibility Gap' (1998) 23(5) *Alternative Law Journal* 211, 215.

[79] Ibid 213.

[80] Ibid.

[81] Ibid.

[82] Patricia Easteal and Keziah Judd '"She Said, He Said": Credibility and sexual harassment cases in Australia' (2008) 31 *Women's Studies International Forum* 336, 343.

[83] *Cooke v Plauen Holdings* [2001] FMCA 91 per Driver FM at para 20, cited in Easteal and Judd above n 79, 339

[84] *Cross v Hughes & Anor* [2006] FMCA 976 per Lindsay FM at para 23 cited in Easteal and Judd above n 79, 341.

[85] *Horman v Distribution Group Limited* [2001] FMCA 52 [36] (Raphael FM).

[86] Ibid [26].

being boys') has led to women in rural areas not recognising their experiences as 'real' sexual harassment.[87]

Thornton has found that a sexual harassment case is more likely to be successful if it conforms to gender stereotypes on the way men and women behave:

> the more the harassing conduct is like heterosexed activity (conceptualised in terms of an active male harasser and a passive female 'victim') the more likely it is to be accepted as sexual harassment.[88]

In the ideal sexual harassment case, the offending conduct is as close as possible to 'heterosexed activity', with an 'active male harasser' and 'passive female "victim"'.[89] A 'good victim' is woman who is subjected to a 'single heterosexed act' of 'blatant lasciviousness and lust' rather than 'a succession of seemingly trivial put-downs',[90] even though to Thornton, such 'trivial' behaviour is actually indicative of the daily normalised microaggressions that create a hostile and discriminatory workplace. This stereotypical characterisation of the 'good victim' as passive female also disadvantages male victims of sexual harassment, who may be bullied by other men for not meeting traditional masculine norms of behaviour or gender presentation.[91] Gender stereotypes continue to affect what is seen as 'genuine' sexual harassment and how a 'good' credible victim should behave.

Judges and magistrates in sexual harassment cases have relied on similar gender stereotypes to those used to measure victim credibility in sexual assault matters with judges and magistrates seeing a 'chaste' victim, prompt complaint and consistent delivery of evidence as indicators of a credible sexual harassment complaint.[92]

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[87] Skye Saunders and Patricia Easteal '"I just think it all comes down to how the girl behaves as to how she is treated": Sexual harassment "Survival" behaviours and workplace thinking in rural Australia" in Patricia Easteal (ed) *Justice Connections* (n 31) 106, 119.

[88] Margaret Thornton 'Sexual harassment losing sight of sex discrimination' (2002) 26 *Melbourne University Law Review* 422, 425.

[89] Ibid.

[90] Ibid 435.

[91] Ibid 433.

[92] Easteal and Judd (n 82) 343.

A complainant is more likely to be viewed as incredible in a sexual harassment case if she 'reacted passively rather than confrontationally' to harassing behaviour.[93] This assessment fails to take into account gendered power relations, the way women are socially conditioned to behave in a passive way or a victim's fears of retribution by the organisation should she make more 'assertive' complaint.[94]

Tyler and Easteal argued that complainants in sexual harassment matters have been held to a 'masculocentric ideal of white middle class womanhood'.[95] Stereotypes over how a 'real' victim of sexual harassment 'should' behave are often out of step with the realities of sexual harassment. Australian researchers have found that 'ideal' sexual harassment complainants are more likely to have their complaints upheld if they are extremely young, from Anglo-Saxon background, report promptly, have their claims corroborated and are consistent and 'not too emotional' in their delivery of evidence in the witness box.[96] When determining whether the behaviour constituted sexual harassment, judicial officers have been found to scrutinise the complainant's own behaviour, identity and history, including her sexual history and the complainant's 'engaging in sexual jokes'.[97] In a study of Commonwealth sexual harassment cases between 2000 and 2006, in nine out of 25 cases the respondent 'introduced evidence of the complainant's relationships with men and attitudes to sexuality'.[98] However, in seven of these cases the complainant was still successful and in some cases the federal magistrate commented on the (lack of) relevance of this evidence.[99]

'Real' sexual harassment

Although sexual harassment is recognised as a form of discrimination in Commonwealth, state and territory law, Margaret Thornton argues that the greater emphasis on the 'sexual' elements has 'deflected attention away from the sex-based discrimination that informs it.'[100]

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[93] Patrice Rosenthal and Alexandra Budjanovcanin 'Sexual Harassment Judgments by British Employment Tribunals 1995—2005' (July 2011) 49(S2) *British Journal of Industrial Relations* 236, 251.

[94] Ibid.

[95] Tyler and Easteal (n 78) 215.

[96] Patricia Easteal AM and Skye Saunders "'Did Ya Win?' The (Un)successful Rural Workplace Sexual Harassment Complainant" (2011) 10(2) *Canberra Law Review* 84, 94–95, Easteal and Judd (n 75) 343.

[97] Easteal and Judd (n 82) 343.

[98] Ibid 339.

[99] Ibid.

[100]Thornton (n 88) 423.

The legislative and judicial focus is on a discrete incidence of somewhat sexualised behaviour, rather than on systemic discrimination in a workplace.

Feminist theorists have cited the historically low awards of compensatory damages for sexual harassment as evidence that the courts do not take sexual harassment seriously as a legal harm.

Gaze examines the awards of damages for sex discrimination and sexual harassment that were made by the then Federal Magistrates Court (now Federal Circuit Court) and the Federal Court from 2000 to 2009. Gaze notes that the Federal Magistrates Court made awards of damages ranging from $750 to $100,000 for successful matters. More than $25,000 compensation was awarded in only four cases and 'the highest award [of] $100,000 [was] awarded to a female civilian employee of a naval base who was sexually harassed, including rape.'[101] This 'exceptional' case was *Lee v Smith*, in which the Court made the following ruling on compensation:

> In my view, the sum of $100 000.00 is a relatively modest amount of compensation taking into account the Applicant's hurt and humiliation, pain and suffering. I have not provided a break up of the damage caused as a result of the various aspects of the Applicant's claim. It seems clear that the substantial injury and damage was caused by the sexual harassment culminating in the rape and that it was made worse by the victimisation that the Applicant suffered because of her complaint that the First Respondent sexually assaulted her. Accordingly, I propose to order that all four Respondents be jointly responsible for the payment of that amount.[102]

Gaze describes a similar trend of low awards of damages in the Federal Court during this time:

> In one sexual harassment case, the respondent did not appear and damages of $10 000 were awarded. In the other sexual harassment cases, damages awards were $20 000,

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[101] Beth Gaze 'The Sex Discrimination Act at 25: Reflections on the Past, Present and Future', in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, Canberra, 2010) 107, 112.

[102] *Lee v Smith & Ors* [2007] FMCA 59 [215] (Connolly FM).

> $24 000 and, in the most recent case, $466 000, where a relatively well-paid real estate agent lost her job and was unable to work for some time.[103]

In *Elliott v Nanda & the Commonwealth* the complainant, a medical receptionist who was found to have been sexually harassed by her doctor employer, was awarded $20,000 in compensation for harassing conduct that included unwanted touching, sexual comments and unwanted sexual advances. The Court concluded that this conduct 'had a significant and negative effect on the applicant and the effect lasted for at least two years.'[104] In *Gilroy v Angelov* the complainant was awarded $24,000 in compensation for harassing conduct that included unwanted touching and threats of rape against the complainant and her daughter. The Court concluded:

> Taking into account the whole of the evidence, as to the effect of Mr Angelov's conduct on Ms Gilroy, I think it is appropriate to assess damages in the sum of $20,000. I add two years' interest at 10% to take the figure to $24,000.[105]

Gaze argues that these low compensatory awards mean that 'the courts regard the harms women suffer from discrimination and sexual harassment as not very serious.'[106]

Court awards of damages for sexual harassment have increased since that in recent years.[107] Van Der Winden observes that, 'in a relatively short period of time, court ordered damages have increased exponentially, from an average of $20,000 for "non-economic loss" a decade ago to over $100,000 in recent years.'[108] An example of a more recent case with a higher awards of damages is *Ewin v Vergara*, in which the complainant was awarded damages of $476,163 'together with interest' for loss of past earning capacity, loss of future earning capacity, general damages, past expenses and future expenses.[109] This case is included in my sample and the judgement was upheld on appeal.

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[103] Gaze (n 101) 113

[104] *Elliott v Nanda; Elliott v Commonwealth* 111 FCR 240 [176].

[105] *Gilroy v Angelov* [2000] FCA 680 [106].

[106] Gaze (n 101) 112.

[107] This recognition of the gendered harms of sexual harassment arguably parallels the growing interest in tackling the 'macho' bullying culture in the military – refer 'UNSW Canberra research addresses abuse in the military' 17 January 2018 (online) <https://www.unsw.adfa.edu.au/unsw-canberra-research-addresses-abuse-culture-military-0>

[108] Catherine Van Der Winden 'Combatting sexual harassment in the workplace: policy vs legislative reform' (2014) 12(1) *Canberra Law Review* 203, 215.

[109] *Ewin v Vergara (No 3)* [2013] FCA 1311 [692].

MacDermott discusses the impact of the 2014 *Richardson v Oracle Corporation Australia*[110] Full Federal Court appeal decision on sexual harassment case law. In the original decision, the Federal Court awarded the complainant damages of $18,000.[111] MacDermott observes:

> The Oracle appeal is a landmark decision as it empathically rejected the idea of a "permissible range", and instead relied on the community's "deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct" to find the initial award of $18 000 manifestly inadequate.[112]

In the appeal decision, the Court commented that while historically awards of damages for sexual harassment had been low, and that the original award of damages fell within the range, it was 'manifestly inadequate' and 'out of step with the general standards prevailing in the community regarding the monetary value of the loss and damage of the kind Ms Richard sustained.'[113] This case and its appeal is also included in my sample.

MacDermott argues that this decision represents a better understanding of the trauma experienced by women who were sexually harassed in the workplace and establishes a new precedent for higher compensatory awards. MacDermott describes this as a turning point for complainants, which 'may have some impact on countering the fact that with such low awards it was not generally worth litigating a harassment matter.'[114]

Monetary awards in conciliated sexual harassment complaints have also been found to be low. In their study of conciliated matters that had settled, McDonald and Charlesworth state that: 'Financial compensation ranged from $364 to $114,128 (mean $13,596; median $7,000).'[115] They conclude that settlement amounts are 'in no way commensurate with the substantial financial detriment often experienced as a result of being sexually harassed' or the 'well-demonstrated and significant psychological and physical health consequences' experienced by

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[110] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

[111] *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102.

[112] Therese MacDermott 'Reassessing sexual harassment: it's time' (2015) 40(3) *Alternative Law Journal* 157, 158.

[113] *Richardson v Oracle* (n 110) [118] (Kenny J).

[114] MacDermott (n112) 158.

[115] Paula McDonald and Sara Charlesworth 'Settlement outcomes in sexual harassment complaints' (2013) 24(4) *Australasian Dispute Resolution Journal* 259, 263.

targets of sexual harassment. [116] The compensatory amounts fail to accord with the realities of psychological trauma and financial distress that are experienced by victims of sexual harassment.

The literature indicates that the courts and anti-discrimination commissions have not considered sexual harassment to be a 'real' legal harm. However, the recent increases in the awards of compensatory damages indicate that this may be changing for the better and that judicial officers are more aware of the impact of sexual harassment on victims.

Conclusion

As memorably noted by MacKinnon, 'No law addresses the deepest, simplest, quietest and most widespread atrocities of women's everyday lives.'[117] Despite significant changes in the laws relating to sexual assault, domestic violence and sexual harassment, gendered stereotypes of what constitutes 'real' harm and a 'good' victim remain.

These stereotypes are seen in the attitudes of judges and juries to sexual assault, trivialising of domestic violence as not being 'real' violence and gender stereotyping of complainants in sexual harassment cases. Themes of incredible complainants, masculocentric standards of behaviour and failure to recognise harm continue to permeate attitudes in the legal system to violence against women.

As discussed in the previous chapter, gender stereotyping and minimising of harm also occurs in media representations of violence against women.

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[116] Ibid, 267–268.

[117] MacKinnon (n 7) 34.

6 Methodology and method

Introduction

This chapter details the methodological approach and specific methods I used to analyse media reporting of sexual harassment. I chose a qualitative methodology to answer my research question. As this is a multidisciplinary study, I have chosen an approach that suits both research about the law and research about the media. Qualitative analysis has been used in previous scholarship about violence against women[1] and in previous scholarship about the media, including media portrayals of violence against women.[2] From the legal perspective, I agree with Chevalier's view that '[t]o truly understand law is to understand its story' and that 'qualitative case studies offer valuable insights into the full story of law.'[3] I am interested in whether media representations of sexual harassment conveyed accurate messages to readers about the law, and whether the sexist messages from the media and the law alike about violence against women found in previous studies would also be apparent in my study.

From the media perspective, I am mindful of Brennen's description of the work of qualitative research in exploring language and its construction of realities:

> Qualitative researchers consider alternative notions of knowledge and they understand that reality is socially constructed. They showcase a variety of meanings and truths, and draw on a belief in and support of a researcher's active role in the research process.[4]

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[1] See for example Denise Lievore 'Victim Credibility in Adult Sexual Assault Cases' (November 2004) 288 *Trends and Issues in Crime and Criminal Justice* 1, 2; Blake M McKimmie, Barbara M Masser, Renata Bongiorno 'What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes and Participant Gender on How the Complainant and Defendant are Perceived' (2014) 29(12) *Journal of Interpersonal Violence* 2273, 2278-2279.

[2] See for example Pamela Hill Nettleton 'Domestic Violence in Men's and Women's Magazines: Women Are Guilty of Choosing the Wrong Men, Men Are Not Guilty of Hitting Women' (2011) 34 *Women's Studies in Communication* 139, 139–140; Michelle Dunne Breen, Patricia Easteal, Kate Holland, Georgina Sutherland, Cathy Vaughan 'Exploring Australian journalism discursive practices in reporting rape: The pitiful predator and the silent victim' (2017) *Discourse & Communication* 1, 2–4, Janine Little 'Filicide, journalism and the "disempowered man" in three Australian cases 2010–2016' Journalism (2018) 1, 3–4.

[3] Danielle Antoinette Margeurite Chevalier 'A continuous process of becoming: the relevance of qualitative research into the storylines of law', (2018) 11 *Erasmus Law Review* 93, 93.

[4] Bonnie S. Brennen *Qualitative Research Methods for Media Studies* (Taylor & Francis, 2013), 4.

As my work focuses on both the story, or stories, of sexual harassment law and the ability of the media to shape the social construction of realities, a qualitative approach is the ideal way to answer my research question.

From a feminist lens, I conducted qualitative thematic analysis of 14 high-profile sexual harassment cases from the years 2010 to 2017 to identify the key messages from the media about what constitutes 'real' sexual harassment—including the portrayal of the parties, any assessments of harm and how the legal issues are represented. I used a combination of the approaches taken by Easteal and Judd in '"She said: he said": credibility and sexual harassment cases in Australia'[5] and by Dunne Breen et al. in 'Exploring Australian journalism practices in reporting rape: the pitiful predator and silent victim'.[6] From the former, I examined variables from earlier feminist legal research that are associated with perceptions of complainant (in)credibility to see whether these continue to be associated with credibility and 'real' sexual harassment in the high-profile sexual harassment cases.[7] From the latter, I analysed the framing of the news coverage of the high-profile sexual harassment cases according to 'discursive news practices', such as placing the most significant information with the highest 'news value' in the headline and opening paragraph in the inverted pyramid news structure', the quoting of sources and the perspectives that are presented in the story.[8] I selected newspapers for my study, rather than television or radio news, for a number of reasons. Firstly, newspapers were chosen because of the ease and practicality of research. Print and online newspapers were more immediately accessible in online databases and library archives than television and radio reporting. Secondly, newspapers are arguably the most 'traditional' of the mainstream news media, and I had access to a wealth of literature through which to develop my methodology. Thirdly, I was interested in the way that newspapers had adapted to a digital environment.

The sample in my study consists only of written text material. This encompasses print newspaper coverage, online 'newspapers' such as news.com.au and abc.net.au and newswire services. In my selection of print media, I do not wish to give the impression that this was the only form of media coverage received by these cases. For example, Dr Caroline Tan's sexual

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[5] Patricia Easteal and Keziah Judd "'She Said, He Said': Credibility and sexual harassment cases in Australia" (2008) 31 *Women's Studies International Forum* 31 336.

[6] Dunne Breen et al (n 2) 1.

[7] Easteal and Judd (n 5) 338.

[8] Dunne Breen et al (n 2) 3-4.

harassment case was covered in the ABCTV *Four Corners* story 'At Their Mercy', which originally aired on 25 May 2015.

I used a thematic conceptual matrix[9] to answer my research question and find out the key messages about 'real' sexual harassment and the 'good' victim. This matrix is in the form of an Excel spreadsheet, where I tabulated the key variables for each news article. I discuss this in further detail below.

Finding the data

Selecting the cases

As a first step, I established a Gmail account for the purposes of my research. I set up a Google media alert for 'sexual harassment'. I later refined the terms to 'sexual harassment Australia' in an attempt to confine my alerts to Australian cases. I checked this account regularly during my pre–write-up time as a PhD student (from 2011 to 2017). I used the news alert as an indicator that a sexual harassment case had attracted enough media attention to be picked up by the Google algorithm and therefore enough media attention for me to investigate further. I was aware of the 2010 case *Fraser-Kirk v David Jones* prior to beginning my candidature due to the saturation of media coverage. The media interest in this case inspired my choice of PhD topic.

I checked my Google news alerts every couple of months. The Google alert captured a range of news items with the key terms 'sexual harassment'. These included blog posts, international news and articles from general interest magazines such as *Cosmopolitan*. Some of the alert items were about specific cases, while others provided more general discussion of sexual harassment without referring to specific cases. When reviewing the alerts, I focused on the news reporting, including newspapers and news wires about specific Australian cases. I prepared a running list of potential cases of interest, concentrating on Australian sources and news articles about particular Australian cases. I searched the news databases NewsBank, Newspaper Source Plus, Factiva and the Google search engine for the cases on my list. My sample does not include every Google Alerts case. I removed cases from my list that did not attract many articles. For example, I initially included in my sample the case of *Britt v Patrick Stevedores*, about a hostile work environment on the docks. I decided not to proceed with this

[9] Matthew B Miles and A Michael Huberman *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications 2nd ed, 1994) 131.

case because it was only covered in a single news article. I also removed from my sample list the case of *Ashby v Slipper*, where James Ashby made a sexual harassment complaint against the then Speaker of the House of Representatives, because I wanted to focus my analysis on 'ordinary' cases that had become prominent in the media, rather than cases that became prominent because one of the parties was already 'high profile'.

When choosing the cases in the sample, I attempted to provide a broad range of complainants and employers and cover a long time frame, to identify any changes to the messages about 'real' sexual harassment and 'good' complainants.

I chose the following sexual harassment cases for my sample:

- Fraser-Kirk v David Jones[10] (2010)
- Styles v Clayton Utz (2011)[11]
- Spiteri v IBM (2011)[12]
- Robinson v Rivers (2011)[13]
- Richardson v Oracle (2012-2013)[14]
- Shea v Energy Australia (TruEnergy) (2013)[15]
- Ewin v Vergara (2013)[16]
- Ramstrom v Baldino (2013)[17]
- Richardson v Oracle appeal (2014)[18]
- Ewin v Vergara appeal (2014)[19]
- Mathews v Winslow Constructors (2015)20

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[10] *Fraser-Kirk v David Jones Limited* [2010] FCA 1060.

[11] *Styles v Clayton Utz* [2011] NSWSC 1314; *Styles v Clayton Utz* (No 2) [2011] NSWSC 1219; *Styles v Clayton Utz* (No 3) [2011] NSWSC 1452.

[12] *Spiteri v IBM Australia Ltd* [2011] FCA 1318.

[13] *Robinson v Goodman* [2013] FCA 893, *Robinson v Goodman* [2013] FCA 894. The media coverage in my sample was published in 2011, when the case was initially filed.

[14] *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102, *Richardson v Oracle (No 2)* [2013] FCA 359.

[15] *Shea v TruEnergy Services Pty Ltd (No 6)* [2014] FCA 271, *Shea v Energy Australia Services Pty Ltd (No 7)* [2014] FCA 1091.

[16] *Ewin v Vergara (No 3)* [2013] FCA 1311.

[17] *Ramstrom v Baldino* [2013] SAEOT 14.

[18] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

[19] *Vergara v Ewin* [2014] FCAFC 100.

[20] *Mathews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728.

- Tan v Royal Australasian College of Surgeons (2015)[21]
- Marks v Colliers International (2016)
- Taeuber v Channel 7 (2017).

This list includes cases that had just been filed, cases that had been settled, first-instance court decisions, court appeal decisions and a case that took place many years before the media took an interest. I provide more detail about the facts of these cases in chapter 7.

Selecting the articles that reported on the cases

I used the databases NewsBank, Newspaper Source Plus and Factiva and the Google search engine to select the articles for each case in my sample. I searched for the parties' names and the term 'sexual harassment'. I downloaded and saved electronic copies of each article for each case I found on the databases. Some cases were covered more widely than others. For example, I collected 18 articles on *Shea v Energy Australia (TruEnergy)* and five on the initial *Ewin v Vergara* decision. I chose five articles for each case as a workable sample for qualitative analysis. I selected the articles with the aim of using a variety of news sources. These included traditional broadsheet newspapers such as *The Sydney Morning Herald* and *The Australian*, traditional tabloid newspapers such as *The Daily Telegraph* and *Herald Sun*, print media and online sources. My sample included a mixture of reporting and opinion pieces. I then examined the articles more closely and chose five that provided a diversity of sources and perspectives.

I selected articles in an attempt to mimic the perspective of the ordinary reader. As discussed in chapter 3, readers in the digital age are exposed to a deluge of different news sources and have many different levels of engagement with a news story, including 'checking, monitoring and scanning'.[22] I selected articles from a range of sources to provide a scaled-down model of this information deluge. For example, for the *Ewin v Vergara* initial decision, I selected five articles—and included the print and online versions of *The Courier-Mail*, the online news website ninesmn.com and the Mondaq.com newswire. For *Fraser-Kirk v David Jones* case,

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[21] The original case *Tan v Xenos (No 3)* [2008] VCAT 584 was decided in 2008. Media interest in the case developed in 2015 following controversial comments that were made about the case by a female surgeon, Dr Gabrielle McMullin, on International Women's Day. I refer to the case as *Tan v Royal Australasian College of Surgeons* because coverage framed the case as a battle between Dr Tan and the college and covered the response to Dr McMullin's comments.

[22] Tim Groot Kormelink and Irene Costera Meijer 'What clicks actually mean: Exploring digital news user practices', (2018) 19(5) *Journalism* 668, 680.

the five articles included reporting and opinion pieces from *The Sydney Morning Herald* and reporting from *The Daily Telegraph*.

Recording the data

Collecting key variables on a spreadsheet

I recorded the following data in an Excel spreadsheet:

- name of the publication
- date and page/URL
- headline and author
- portrayal of alleged victim
- portrayal of alleged harasser
- whether age was mentioned
- relationship between the two
- behaviour complained of
- complainant's response
- whether size of claim was mentioned
- whether an expert source was quoted
- other.

These variables were derived from my literature review of previous scholarship about 'good' complainants and 'real' sexual harassment. I initially devoted significant attention to the page number of the article, looking at whether the case made front page news. However, I was not able to make a suitable comparison with the online sources. I used a 'general conceptual framework'[23] of gendered mythology to construct my spreadsheet and select my variables, with a view to identifying patterns in how the media represented these concepts.[24]

For example, as discussed in chapter 5, the following features have been associated with credible sexual harassment complainants whose complaints are upheld: extreme youth, prompt reporting of the behaviour, corroboration and consistent and emotionally 'appropriate' delivery of evidence.[25] I have attempted to capture these aspects by recording whether the

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[23] Miles and Huberman (n 9) 18.

[24] Ibid 69.

[25] Patricia Easteal AM and Skye Saunders "'Did Ya Win?' The (Un)successful Rural Workplace Sexual Harassment Complainant", (2011) 10(2) *Canberra Law Review* 84, 94–95.

news article mentioned the complainant's age, the complainant's response to the harassment (including her emotional reaction and any reporting of the behaviour) and general observations on how the parties were portrayed.

As discussed in chapter 2, the following aspects have been linked to whether sexual harassment is considered 'real': a similarity to 'heterosexed activity' and a power imbalance between the parties where there is an active male and passive female.[26] And, as discussed in chapter 4, media representations of sexual harassment have been found to focus on 'classic' stereotypical scenarios of a powerful man harassing his female subordinate.[27] Hence, I have attempted to capture these aspects by recording the relationship between the parties and the way the article reported the alleged harassing behaviour.

I recorded whether the article quoted an 'expert' source—since, as discussed in chapter 4, media portrayals of violence against women have been found to use an 'expert' voice often with a police/law enforcement perspective[28] in the place of the voice of the victim of violence.

As discussed in chapter 3, issues attract media attention because they correspond with pre-determined 'news values'—such as exclusivity, bad news, conflict, surprise, relevance, magnitude, celebrity and good news.[29] I have attempted to capture this by recording whether the article mentioned the size of the claim (magnitude, surprise) and using the catch-all aspect of 'other' to note any particular aspects of the article that were of interest in identifying 'real' sexual harassment and 'good' victimhood but did not fall neatly into the other categories in the spreadsheet.

Analysing the data—finding the messages

Using thematic analysis, I identified the way that the media reports portrayed a sexual harassment complainant as 'credible' and 'genuine'.

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[26] Margaret Thornton 'Sexual harassment losing sight of sex discrimination', (2002) 26 *Melbourne University Law Review* 422, 425.

[27] Paula McDonald and Sara Charlesworth 'Framing sexual harassment through media representations' (2013) 37 *Women's Studies International Forum* 95, 101.

[28] Georgina Sutherland, Angus McCormack, Patricia Easteal, Kate Holland and Jane Pirkis 'Media guidelines for the responsible reporting of violence against women: a review of evidence and issues', (2016) 38(1) *Australian Journalism Review* 5, 7–8.

[29]Tony Harcup and Deirdre O'Neill 'What is News? News values revisited (again)' (2017) 18(12) *Journalism Studies* 1470, 1482.

To find the messages from the media reports about 'real' sexual harassment and the 'good' victim, I reviewed the data that I recorded in my Excel spreadsheet. As a first step, I read my notes in detail multiple times. My analysis of the spreadsheet data was informed by the literature on framing, news values and discourse analysis. I took my cue from Entman and used framing analysis to examine the way each article used sources and foregrounded and backgrounded information to 'promote a particular interpretation' of events.[30] I considered Van Gorp's distinction between framing *by* the media, where the story is shaped by the journalist's efforts, and framing *through* the media, where the story is shaped by the story's sources or 'sponsors'.[31] I assessed the use of episodic and thematic framing in the coverage and whether the articles addressed the systemic nature of gender discrimination or presented sexual harassment as an isolated incident in the same way that the media have been found to report domestic violence.[32] As discussed in chapter 3, the headline and lead have been identified as key framing devices. I paid particular attention to the information in the headlines and leads, because this has been identified in previous scholarship as the location of the most 'important' content in the article.[33] I also considered whether the coverage aligned with the news values discussed above.

I used discourse analysis to investigate the use of language in the articles and whether this language reinforced gendered mythology about violence against women. I considered the extent to which Mead's 'flattened or melodramatic' dichotomy could be seen.[34] I explored the use of qualifying language like 'alleged' to support a patriarchal discourse about female incredibility.[35] I considered whether the article portrayed the complainant or the alleged harasser as the victim in the case.[36] I also examined the representation of the legal issues, and

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[30] Robert M. Entman 'Framing Bias: Media in the Distribution of Power' (2007) 57 *Journal of Communication*, 163, 164.

[31] Baldwin van Gorp 'The Constructionist Approach to Framing: Bringing Culture Back In' (2007) 57 *Journal of Communication* 60, 68–69.

[32] Kellie E Carlyle, Michael D Slater, Jennifer L Chakroff 'Newspaper Coverage of Intimate Partner Violence: Skewing Representations of Risk' (2008) 58 *Journal of Communication* 168, 180-181.

[33] Zhongdang Pan and Gerald M Kosicki 'Framing Analysis: An Approach to News Discourse' (1993) 10 *Political Communication* 55, 59.

[34] Jenna Mead 'Introduction—Tell it Like it Is,' Jenna Mead (ed) *Bodyjamming—Sexual Harassment, Feminism and Public Life* (Allen and Unwin, 1997) 1, 6.

[35] See Anya Poukchanski 'Ripples from the First Stone' (2011) 39 *The Sydney Institute Quarterly* 10, 12.

[36] See Dunne Breen et al (n 2),14.

whether this aligned with MacDonald and Charlesworth's findings about the use of a techno-legal discourse.[37]

When analysing the data captured in my spreadsheet, I asked the following research questions:

- Did the portrayal of the parties raise issues of credibility? Was there evidence of gender stereotyping?
- Did the portrayal of the parties suggest the complainant behaved in a 'reasonable' way?
- Did the description of the behaviour suggest it was unwelcome?
- How did Mead's flattened/melodramatic dichotomy apply to the tone of the article? Did this indicate a credible/reasonable complainant?
- How were the legal issues (for example, remedy and outcome) presented?

I created a second 'working document' to conduct framing and discourse analysis and search for patterns and themes in my spreadsheet data. I distilled the information from each article to five to 10 key dot points. I highlighted the information from the headlines and leads in red and green. In my thematic coding process, I examined the information in the dot points and made marginal remarks to help add 'meaning and clarity' to my notes. [38] I also used these as a coding aid to find patterns[39] in the portrayal of the parties and representation of legal issues. I reviewed my marginal notes for common observations about the portrayal of the complainant, respondent, respondent employer and legislation. I developed names for these observations, such as 'complainant as credible'.

As I reviewed the articles, I took note of who had been quoted as a source (i.e. whose 'voice' dominated the coverage). Throughout the findings and discussion chapters I will use the concept of the 'voice' to examine the impact of source quotes on the portrayal of the cases.

Caveats

In considering the results of this analysis, it is important to identify the caveats concerning the findings.

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[37] See McDonald and Sara Charlesworth (n 28) 101.

[38] Miles and Huberman (n 9) 67.

[39] Ibid 88.

First, there are limitations to the generalisability of these data and the results. The sample is small and confined to Australian cases and Australian news sources. All of the cases in the sample have female complainants. Other countries use different legal frameworks to define sexual harassment, which may mean that overseas news reporting on sexual harassment cases is different from the reporting on Australian cases. Further, the majority of sexual harassment claims do not proceed to court.[40] My study focuses on a 'double minority' of sexual harassment claims—that is, cases that proceed to court *and* attract media attention. In addition, the cases in this sample do not reflect the range and variety of Australian workplaces. The majority of cases in this sample took place in a traditional 'office' environment; only one case involved a hospital and one a construction site.

The second limitation concerns the time frame. All but one of the cases in my sample were reported on prior to the worldwide emergence of the Me Too movement in 2017. Further media reporting of high-profile cases may reflect changing social attitudes towards sexual harassment, such as a growing awareness of the reasons why victims often do not report immediately and an understanding of the traumatic effect of sexual harassment in the workplace.

And, thirdly, we need to be cautious in looking at the messages conveyed by the media in these 14 matters about the law. The cases in the sample represent a small percentage of the claims that do proceed to court and have demonstrable 'news value'—generally in the size or public profile of the employer and the high award of damages. In these matters, the findings concerning journalistic interpretations of legal concepts of reasonableness and vicarious liability may be interpreted more broadly than other cases that proceed to hearing where journalists can directly quote the courts themselves.

[40] Paula McDonald and Sara Charlesworth 'Settlement outcomes in sexual harassment complaints' (2013) 24(4) *Australasian Dispute Resolution Journal* 259, 260–261.

7 Messages from the media—headlines and leads

Introduction

In this chapter I use a qualitative textual analysis method to examine the way stories about high-profile sexual harassment cases are framed in the headline and lead. As discussed in chapter 6, this has been identified in previous research as a framing device used by the media to present the most 'important' issues upfront, referred to by Pan and Kosicki as the 'inverted pyramid structure'.[1] As discussed in chapter 6, I focus on the way that certain aspects are foregrounded and backgrounded in the media coverage and how the parties to the case have been portrayed. I analyse the headline and lead to identify the media messages concerning the act of sexual harassment and the parties to the case. My sample is comprised of written text material only, encompassing the print and online versions of newspapers and online news websites such as news.com.au and abc.net.au.

I focus here on the headlines and leads of 14 cases from the years 2010 to 2017. These cases gained a high profile in the media and the alleged perpetrators were not celebrities.[2] I am aware of the post–Me Too cases involving Geoffrey Rush, Don Burke and Craig McLachlan but have chosen to focus on non-celebrity cases because these are the source of media messages about 'everyday' people for the 'everyday' reader. Although the celebrity cases may have entered the cultural consciousness and it could be speculated that these cases either deliberately or unconsciously shape reporting choices made by the editorial team, it is the non-celebrity story that is closer to the experiences of everyday people and everyday readers.

In the first section of this chapter, I introduce each case with a description of the 'facts' and record the way the media coverage framed each story in the headline and lead, including whose 'story' is emphasised (that is, the complainant, the alleged harasser or the employer). I then describe the way framing techniques present a picture of (in)credibility of the complainant, how the harm in sexual harassment is emphasised or minimised and the way the

[1] Zhongdang Pan and Gerald M. Kosicki 'Framing Analysis: An Approach to News Discourse' (1993) 10 *Political Communication* 55, 59.

[2] In this chapter, I use the term 'complainant' to refer to the alleged victim, 'respondent' to refer to the alleged perpetrator and 'respondent employer' to refer to the employer.

legal issues are presented. As discussed in chapter 6, I assess the portrayal of the parties to the case. I also examine the way the alleged harassing behaviour was reported.

The 14 cases—framing techniques

Fraser-Kirk v David Jones (2010)

Facts

In 2010 former publicist Kristy Fraser-Kirk made a sexual harassment complaint against retail giant David Jones and its then CEO Mark McInnes. The case attracted significant media attention. Media coverage focused on the more colourful aspects of the case, such as the size of Fraser-Kirk's $37 million claim of punitive damages. The case was ultimately settled for an undisclosed amount.

Articles

- Belinda Kontominas and Simon Mann, 'Are you being sued? Sordid details of $37 million DJs sex claim', *Sydney Morning Herald*, 3 August 2010
- Janet Fife-Yeomans, with additional reporting by Vikki Campion and Anna Napoli, 'Inside Australia's biggest harassment case $37m SEX SUIT', *Daily Telegraph*, 3 August 2010.
- Miranda Devine, 'Nobody died, so why is she demanding a king's ransom?', *Sydney Morning Herald*, 5 August 2010.
- Joel Christie and Annette Sharp, 'DJs sex shocker—designer defence: "He's hot—I threw myself at him"', *Daily Telegraph*, 4 August 2010.
- Malcolm Maiden, 'David Jones lawsuit shows that boards must be kept informed in harassment cases', *Sydney Morning Herald*, 'BusinessDay' 5 August 2010.

Headlines

Four headlines in the sample use sensationalised language and are mocking or dismissive of the case. These headlines also emphasise the size of the claim. Headlines in the sample included the front-page stories 'Are you being sued? Sordid details of $37 million DJs sex claim'[3], 'Inside Australia's biggest harassment case $37m SEX SUIT'[4], 'Nobody died, so why is she demanding a king's ransom?'[5] and 'DJs sex shocker—designer defence: "He's hot—I

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[3] Belinda Kontominas and Simon Mann 'Are you being sued? Sordid details of $37 million DJs sex claim', *Sydney Morning Herald* 3 August 2010, 1.

[4] Janet Fife-Yeomans - additional reporting by Vikki Campion and Anna Napoli 'Inside Australia's biggest harassment case $37m SEX SUIT', *The Daily Telegraph* 3 August 2010, 1.

[5] Miranda Devine 'Nobody died, so why is she demanding a king's ransom?', *Sydney Morning Herald* Opinion 5 August 2010, 15.

threw myself at him"'[6]. The fifth article has a more flattened impact, with the headline 'David Jones lawsuit shows that boards must be kept informed in harassment cases',[7] promising analysis of the legal implications of the case but not referring to the complainant or her story.

The headlines foreground the more colourful aspects of the case, even for matters that are not directly relevant to the case. For example, the 'designer defence' headline includes a quote from fashion designer Alannah Hill, who was not connected to the case but spoke in an interview about finding the alleged perpetrator attractive.[8] The inclusion of this quote in the headline may suggest that it is the complainant who made the comment about throwing herself at him. There is an emphasis on salacious details above legal analysis.

Leads

Two of the leads position the case as a strategic game. The complainant chose to 'invite the full glare of public attention' rather than 'leav[e] the matter shrouded'.[9] The complainant 'put herself up as a champion of women as she lodged a $37 million sexual misconduct action'.[10] An opinion column uses the lead to set a scene of 'angst-ridden feminists' and 'hysterical overreach' before mentioning the complainant's name.[11] The 'designer defence' article features a lead that is sympathetic to the alleged perpetrator, with Hill quoted as describing the case as a 'glitch' and McInnes as 'hot stuff'.[12] The BusinessDay analysis opens with a paragraph describing the case as influential and legally significant for employers, highlighting problems in the current system.[13]

Styles v Clayton Utz (2011)

Facts

In 2011 junior solicitor Bridgette Styles made a complaint about harassing behaviour by her colleagues at the top-tier law firm Clayton Utz after her relationship with colleague Luis Izzo

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[6] Joel Christie and Annette Sharp 'DJs sex shocker—Designer defence: "He's hot—I threw myself at him"', *The Daily Telegraph* 4 August 2010, 3.

[7] Malcolm Maiden 'David Jones lawsuit shows that boards must be kept informed in harassment cases', *Sydney Morning Herald*, BusinessDay liftout, Opinion & Analysis, 5 August 2010, 6.

[8] Christie and Sharp (n 6) 3.

[9] Kontominas and Mann (n 3) 1.

[10] Janet Fife-Yeomans et al (n 4) 1.

[11] Devine (n 5) 15.

[12] Christie and Sharp (n 6) 3.

[13] Maiden (n 7) 6.

ended. Ms Styles's complaint included that the law firm was a 'hostile place to work' and did not take action against a Facebook group called 'Clayton Utz Workplace Relations (Sydney) Whorebags' or investigate her internal complaints of sexual harassment.[14]

Articles

- Louise Hall, 'Claims of sexism as young lawyer takes on top firm', *Sydney Morning Herald*, 8 June 2011.
- 'Exposing a secret culture', *The Daily Telegraph*, 3 December 2011.
- Vanda Carson, 'Man in the middle of $200k claim—law firm's sexual harassment case', *Daily Telegraph*, 4 July 2011.
- Vanda Carson, 'Finding the strength to fight back—exclusive interview', *Daily Telegraph*, 3 December 2011.
- Louise Hall, 'Sexism case dropped as lawyer reaches settlement with former employer', *Sydney Morning Herald* (online), 30 November 2011.

Headlines

Three of the headlines in the sample focus on the complainant's story and her courage and strength. These include 'Claims of sexism as young lawyer takes on top firm',[15] 'Exposing a secret culture'[16] and 'Finding the strength to fight back—exclusive interview'.[17] One headline positions the alleged harasser as the victim: 'Man in the middle of $200k claim—law firm's sexual harassment case'.[18] Another headline provides a more clinical description of the case that does not name the parties: 'Sexism case dropped as lawyer reaches settlement with former employer'.[19]

Leads

Four of the leads focus on the complainant's story. For example, one article opens with the statement: 'A young lawyer has filed a sexual harassment claim against the top-tier law firm

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[14] Keziah Judd and Patricia Easteal 'Media Reportage of Sexual harassment: the (in)credible complainant', Patricia Easteal AM (ed) *Justice Connections* (Cambridge Scholars Publishing, 2013), 88, 93.

[15] Louise Hall 'Claims of sexism as young lawyer takes on top firm', *Sydney Morning Herald,* 8 June 2011, 3.

[16] 'Exposing a secret culture', *The Daily Telegraph*, 3 December 2011, 5.

[17] Vanda Carson 'Finding the strength to fight back—exclusive interview', *The Daily Telegraph*, 3 December 2011, 4.

[18] Vanda Carson 'Man in the middle of $200k claim - Law firm's sexual harassment case', *The Daily Telegraph*, 4 July 2011, 17.

[19] Louise Hall 'Sexism case dropped as lawyer reaches settlement with former employer', *Sydney Morning Herald* (online), 30 November 2011 <http://www.smh.com.au/nsw/sexism-case-dropped-as-lawyer-reaches-settlement-with-former-employer-20111129-1o53k.html>.

Clayton Utz, claiming it is a hostile place for women to work.'[20] Another article begins with this sentence: 'CLAIMS of a culture of sexism and lewd comments and jokes in the top-tier law firm Clayton Utz have surfaced following a decision by a young female lawyer to drop her suit for sexual harassment, victimisation and defamation.'[21] A third article uses the lead to position the case as a feminist victory: 'THE young lawyer who took on top-tier law firm Clayton Utz, claiming its culture was sexist, says she believes sexual harassment "seems to be endemic'" across many workplaces.'[22]

The *Daily Telegraph* article 'Exposing a secret culture' uses the lead to describe the case as 'one of the most sensational sexual harassment cases to come before the courts in recent years' and to refers to Ms Styles bringing a lawsuit against Clayton Utz and her 'former boyfriend'.[23]

Vanda Carson's article 'Man in the middle of $200K claim …' uses the lead to focus on the alleged harasser and his story: 'This is Luis Izzo, the Clayton Utz lawyer at the centre of a $200,000 sexual harassment claim by a former colleague.'[24] In chapter 8 I discuss the reinforcement of this focus further in the article, including the use of phrases such as 'brief fling'[25] and 'volley of legal claims from his scorned lover'[26]. Carson's later article 'Finding the strength to fight back', focuses on the complainant's story, including the support she received from her fiancée and grandmother and the fulfilment she found in 'simple things like cooking and eating dinner at home with your family, rather than at work'.[27]

Spiteri v IBM (2011)

Facts

Former IBM salesperson Susan Spiteri made a complaint of sexual harassment by a former senior manager of IBM. The complaint covered sexual comments, unwanted touching and harassing behaviour such as name calling and telephoning her late at night.[28] Ms Spiteri also

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[20] Hall (n 15) 3.
[21] Hall (n 19).
[22] Carson (n 17) 4.
[23] 'Exposing a secret culture' (n 16) 5.
[24] Carson (n 18) 17.
[25] Ibid.
[26] Ibid.
[27] Carson (n 17) 4.
[28] Judd and Easteal (n 14) 93.

made a claim against her employer for failing to investigate her complaint of sexual harassment. Themes of gendered language, sensationalism and melodrama appeared in the headlines. There was also considerable interest in the size of the claim.

Articles

- Ben Butler, 'IBM saleswoman in $1.1m sexual harassment claim', *Age*, 16 April 2011.
- Woman sues IBM for bullying by boss', *Age*, 21 October 2011.
- Ruth Lamperd, 'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"', *Herald Sun*, 20 October 2011.
- Marianne Betts, 'Woman sues IBM for $1.1m—sex pest legal fight', *Herald Sun*, 15 April 2011.
- Sue Lannin, 'IBM accused of ignoring sexual harassment claims', *ABC Premium News* (online), 20 October 2011, updated 21 October 2011.

Headlines

None of the headlines refer to the complainant by name. Four of the five articles in the sample refer explicitly to the gender of the complainant in the headline: 'IBM saleswoman in $1.1m sexual harassment claim',[29] 'Woman sues IBM for bullying by boss',[30] 'Woman sues IBM for $1.1m—sex pest legal fight'[31] and 'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"'.[32] One of the articles does not refer to the complainant at all: 'IBM accused of ignoring sexual harassment claims'.[33]

Three of the articles in the sample refer to the size of the claim, framing this as the most important issue in the case.

Leads

One *Age* article in the sample quotes the complainant's legal representative in the lead.[34] This means that the article began with the complainant's version of events, seen through a lens of legal professional corroboration. The other article from the *Age* uses the lead to focus on the

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[29] Ben Butler 'IBM saleswoman in $1.1m sexual harassment claim', *The Age*, 16 April 2011, 3.

[30] 'Woman sues IBM for bullying by boss', *The Age*, 21 October 2011, 7.

[31] Marianne Betts 'Woman sues IBM for $1.1m—Sex pest legal fight', *Herald Sun*, 15 April 2011, 9.

[32] Ruth Lamperd 'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"', *Herald Sun*, 20 October 2011, 13.

[33] Sue Lannin 'IBM accused of ignoring sexual harassment claims', *ABC Premium News* (online), 20 October 2011, updated 21 October 2011, http://www.abc.net.au/news/2011-10-20/ibm-sexual-harassment-case/3580656.

[34] Butler (n 29) 3.

more salacious, sensational details by emphasising the complainant's claim that a senior manager told her to 'get those boobies out'.[35] A *Herald Sun* article uses the lead to refer to the complainant as 'a woman' without referring to her name or job, and includes the word 'boobies' before saying that she 'watched while her life was ruined'.[36]

A *Herald Sun* article in the *Spiteri v IBM* sample uses the lead and the remainder of the article to raise questions about the complainant's credibility through repeated use of the words 'alleged' and 'allegation'.[37] These terms are used seven times in a 301-word article, often multiple times in the same sentence.[38] This is further discussed in chapter 8.

One of the IBM articles does not name the complainant in the lead, 'IBM accused of ignoring sexual harassment claims',[39] but does refer to her professional success as a 'top IBM sales executive' and describes her claims of IBM's inactivity in response to her complaints of sexual harassment.

Robinson v Rivers (2011)

Facts

Sallyanne Robinson made a sexual harassment complaint against Rivers and its owner and sole director, Philip Goodman. Ms Robinson worked as an executive in the company and made complaints of unwanted sexual advances, unwanted touching, being asked to model underwear and being addressed in a demeaning way.[40]

Articles

- Cameron Houston, 'Rivers tycoon on sex assault charge', *Sunday Age*, 4 December 2011.
- Shelley Hadfield, 'Millionaire denies woman's harassment court claim—TYCOON SEX FIGHT', *Herald Sun*, 5 November 2011.
- Shelley Hadfield, 'RETAIL BOSS SEX CLAIM—Court told of modelling sessions and spy missions', *Daily Telegraph*, 5 November 2011.
- Hamish Heard, 'Assault payout', *Sunday Herald Sun*, 13 November 2011.

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[35] 'Woman sues IBM for bullying by boss' (n 30) 7.

[36] Lamperd (n 32) 'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"', *Herald Sun*, 20 October 2011, 13.

[37] Betts (n 31) 9.

[38] Ibid.

[39] Lannin (n 33).

[40] Judd and Easteal (n 14) 93.

- Cameron Houston, ‘Rivers boss fights sex harassment cases’, *Sun-Herald*, 10 February 2013.

Headlines

Four of the headlines in the sample refer to the economic position of the respondent, who is referred to as a ‘tycoon’ in two articles[41] and a ‘boss’ in two.[42] The complainant is only referred to in one article, as a ‘woman’.[43] One headline in the sample uses two stark words—‘assault payout’—does not refer to either party and provides very little detail about the case.[44]

The ‘sex claim’ headline also refers to modelling and spy missions, giving the impression of glamour and intrigue.[45]

Leads

The *Sunday Age* article uses the lead to emphasise the seriousness of the case and the escalation of the circumstances, and repeats the headline’s characterisation of the respondent as a ‘tycoon’.[46] The *Herald Sun* article uses the lead to focus on the respondent and the allegations of sexual harassment and repeats the headline’s use of the word ‘tycoon’.[47] The *Sun-Herald* article uses the lead to link the Robinson case to a subsequent case, with further allegations that Mr Goodman acted inappropriately towards a second female employee.[48] The *Daily Telegraph* article in the sample does not name the respondent in the lead but uses the easily identifiable description ‘boss of retail chain Rivers Australia’. This article also foregrounds the more sensationalist and arguably more ‘mild’ allegations, such as being asked to model underwear and photograph competitors’ stock.[49] This is in contrast to the *Sunday*

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[41] Cameron Houston ‘Rivers tycoon on sex assault charge’, *The Sunday Age*, 4 December 2011, 1 and Shelley Hadfield ‘Millionaire denies woman’s harassment court claim—TYCOON SEX FIGHT’, *Herald Sun*, 5 November 2011, 1.

[42] Shelley Hadfield ‘RETAIL BOSS SEX CLAIM—Court told of modelling sessions and spy missions’, *The Daily Telegraph*, 5 November 2011, 1 and Cameron Houston ‘Rivers boss fights sex harassment cases’, *The Sun-Herald*, 10 February 2013, 10.

[43] Shelley Hadfield ‘Millionaire denies woman’s harassment court claim—TYCOON SEX FIGHT’, *Herald Sun*, 5 November 2011, 1.

[44] Hamish Heard ‘Assault payout’, *Sunday Herald Sun*, 13 November 2011, 21.

[45] Hadfield (n 42) 1.

[46] Houston (n 41) 1.

[47] Hadfield (n 43) 1.

[48]Houston (n 42) 10.

[49] Hadfield (n 42) 1.

Herald Sun lead in one of the articles on the Rivers case, which focuses on the complainant, who is not named, and uses the phrase 'abuse at the hands of a Melbourne retail tycoon.' [50]

Richardson v Oracle (2012–2013)

Facts

Rebecca Richardson's sexual harassment claim against software company Oracle attracted considerable coverage due to the tactics of her legal representatives, Harmers Workplace Lawyers. In this case, former project manager Ms Richardson made a complaint about the behaviour of her colleague Randol Tucker, who made unwanted sexual advances and sexual comments.[51] Ms Richardson also alleged that she was demoted by Oracle for making a complaint about Mr Tucker's behaviour. Similar to the David Jones case, the tactics of her legal representatives were considered as 'newsworthy' as the case itself.

Articles

- Amy Dale, 'Demotion after sex complaint, court told', *Daily Telegraph*, 20 March 2012.
- Harriet Alexander, 'Judge criticizes law firm over rejection of settlement offer', Legal Affairs, *Sydney Morning Herald*, 29 April 2013.
- Hannah Low, 'Judge blasts Ashby's self-serving lawyers', *Australian Financial Review*, 23 April 2013
- 'High-octane mix of media and money backfires in court', Hearsay, *Australian Financial Review*, 26 April 2013.
- Leo Shanahan, 'Oracle to pay $18k for staffer's ongoing sexual harassment', *Australian*, 21 February 2013.

Headlines

Three headlines in the sample refer to judicial criticism of the tactics of the complainant's legal representation. These are: 'Judge criticises law firm over rejection of settlement offer',[52] 'Judge blasts Ashby's self-serving lawyers'[53] and 'High-octane mix of media and money backfires in court'.[54]

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[50] Heard (n 44) 21.

[51] Amy Dale 'Demotion after sex complaint, court told', *The Daily Telegraph*, 20 March 2012, 11.

[52] Harriet Alexander 'Judge criticizes law firm over rejection of settlement offer', Legal Affairs, *Sydney Morning Herald*, 29 April 2013, 10.

[53] Hannah Low 'Judge blasts Ashby's self-serving lawyers', *Australian Financial Review*, 23 April 2013, 10.

[54] 'High-octane mix of media and money backfires in court', Hearsay, *Australian Financial Review*, 26 April 2013, 36.

The other headlines are more descriptive of the case itself and orders made: 'Oracle to pay $18k for staffer's ongoing sexual harassment'[55] and 'Demotion after sex complaint: court told'.[56] These headlines do not name the complainant. The headline 'Oracle to pay…' places the focus squarely on the respondent employer and emphasises the size of the award of damages.

Leads

The leads of the articles continue these themes. The articles that refer to judicial criticism of the complainant's legal representatives in the headlines continue to emphasise this in the leads. One article refers to the Harmers law firm as 'the law firm that was blasted by a Federal Court judge over its conduct in the Peter Slipper case'.[57]

Another article refers to judicial criticism in the lead and does not name the parties to the case until the second paragraph, instead positioning the case in the context of other cases with celebrity participants:

> The employment law firm which represented former political aide James Ashby in his sexual harassment case against Peter Slipper has come under fire for high legal costs in another sexual harassment case.[58]

The third article that criticises the law firm in the headline opens with the paragraph:

> Harmers Workplace Lawyers' strategy of seeking publicity and large damages claims for sexual harassment seems to be unravelling.[59]

The two articles that do not focus on judicial criticism in the headline do not introduce it into the lead either. The article 'Oracle to pay $18k …' used the lead to describe the case in a way that was not sensationalised, emphasising the successful proof of the claim, legal liability and the award of damages.[60] Oracle was referred to as a 'software giant.'[61] The other article in the sample that does not criticise the complainant's legal representatives was published before the

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[55] Leo Shanahan 'Oracle to pay $18k for staffer's ongoing sexual harassment', *The Australian*, 21 February 2013, 3.

[56] Dale (n 51) 11.

[57] Alexander (n 52) 10.

[58] Low (n 53) 10.

[59] 'High-octane mix of media and money backfires in court' (n 54) 36.

[60] Shanahan (n 55) 3.

[61] Ibid

judge had made the critical comments. This article uses the lead to describe the complainant's case: 'A FORMER employee of software giant Oracle is suing the company claiming she was subjected to more than six months of sexual harassment from a colleague.'[62]

Shea v Energy Australia (TruEnergy) (2013)

Facts

Former director of corporate and government affairs Kate Shea sued her former employer Energy Australia (formerly TruEnergy) for unlawfully terminating her employment after she made a complaint of sexual harassment. Ms Shea's complaint included sexual harassment by then CFO Kevin Holmes and a 'sexual harassment culture' in the workplace.[63] The case (and a subsequent appeal by Ms Shea) were ultimately dismissed.

Articles

- Jane Lee, 'Fired Energy Australia director "out for revenge", court told', Age, Business, 29 August 2013.
- David Hurley, 'Sacked EnergyAustralia executive accusing managing director of sexual harassment has "zero credibility" and a "liar", court told', Herald Sun (online), 7 October 2013.
- Jane Lee, 'Energy firm sued over harassment', Age, 27 August 2013.
- David Hurley, 'I'm no sleaze, executive tells EnergyAustralia harassment trial', Herald Sun (online), 5 September 2013.
- David Hurley, 'Former mistress in court during EnergyAustralia sexual harassment case', Herald Sun (online), 4 September 2018.

Headlines

Two of the headlines suggest the complainant may have vindictive motives for making the complaint: 'Fired Energy Australia director "out for revenge", court told'[64] and 'Sacked EnergyAustralia executive accusing managing director of sexual harassment has "zero credibility" and a "liar", court told'.[65]

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[62] Dale (n 51) 11.

[63] Jane Lee 'Fired Energy Australia director "out for revenge", court told', *The Age*, Business, 29 August 2013, 24.

[64] Ibid.

[65] David Hurley 'Sacked Energy Australia executive accusing managing director of sexual harassment has "zero credibility" and a "liar", court told', *Herald Sun* (online), 7 October 2013. <http://www.heraldsun.com.au/news/law-order/sacked-energyaustralia-executive-accusing-managing-director-of-sexual-harassment-has-8220zero-credibility8221-and-a-8220liar8221-court-told/story-fni0fee2-1226734217193>.

The headline 'Energy firm sued over harassment' presented a blander description of the case, but does not name the complainant or her alleged harasser, or indicate that this was a sexual harassment case.[66] One headline focuses on the alleged harasser's denial of the behaviour: 'I'm no sleaze, executive tells EnergyAustralia harassment trial'.[67] Another headline appears to emphasise the scandalous aspects of the case without referring to the parties or the sexual harassment allegations: 'Former mistress in court during EnergyAustralia sexual harassment case'.[68]

Leads

The leads of the articles present a range of perspectives on the case. The article 'Energy firm sued over harassment' uses the lead to describe a critique of the corporate culture of the respondent employer: 'The sexual harassment culture at TRUenergy was so bad that the human resources head followed its managing director around at the staff Christmas party to ensure he did not do anything untoward, a court has heard.'[69] This positions the article as sympathetic to the complainant and highly critical of the respondent employer.

The articles that attack complainant credibility in the headline continue this theme in the lead. 'Fired Energy Australia director "out for revenge" …' uses the lead to quote the respondent employer questioning the complainant's motives: 'Energy Australia says a woman suing the company for unlawfully ending her employment is using the lawsuit to "destroy" its managing director's reputation.'[70]

'Sacked EnergyAustralia executive accusing managing director of sexual harassment has "zero credibility" and a "liar", court told' presents a similarly damning assessment of the complainant's credibility in its lead: 'A SACKED EnergyAustralia executive who accused the managing director of the multi-billion dollar company of sexual harassment has "zero credibility" and is a "liar", a court has heard.'[71]

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[66] Jane Lee 'Energy firm sued over harassment', *The Age*, 27 August 2013, 12.

[67] David Hurley 'I'm no sleaze, executive tells EnergyAustralia harassment trial', *Herald Sun* (online) 5 September 2013 <http://www.heraldsun.com.au/news/law-order/i8217m-no-sleaze-executive-tells-energyaustralia-harassment-trial/story-fni0fee2-1226712402546>.

[68] David Hurley 'Former mistress in court during EnergyAustralia sexual harassment case', *Herald Sun* (online), 4 September 2018, <http://www.heraldsun.com.au/news/former-mistress-in-court-during-energyaustralia-sexual-harassment-case/story-fni0fiyv-1226710868841>.

[69] Lee (n 63) 24.

[70] Lee (n 66) 12.

[71] Hurley (n 65).

A similar questioning of the complainant's credibility in the lead is apparent in 'I'm no sleaze …', which focuses on denials of the behaviour and introduces elements of doubt about the complainant's character and her memory of the event: 'AN EnergyAustralia executive denied sexually harassing a colleague, and said she had been "wobbly on her feet" drunk at the time.'[72] In contrast, the article that refers to the 'Former mistress in court' uses the lead to present the respondent as somewhat hypocritical, despite the difference between unwanted sexual harassment and a consensual affair: 'THE former mistress of married EnergyAustralia boss Richard McIndoe turned up at court as he denied a "culture of sexual harassment" existed at the company.'[73] These words can be read as questioning the credibility of the respondent employer while presenting sexual harassment as something less serious and on the same level as an affair.

Ewin v Vergara (2013)

Facts

Coverage of Jemma Ewin's sexual harassment complaint against her former colleague Claudio Vergara focused on the size of the award of damages and horrific details of the case, which included allegations of violent sexual assault. Ms Ewin made a complaint that Mr Vergara sexually assaulted her after a work function.[74] Initially Ms Ewin reported a case of sexual assault to the police, but this did not result in a criminal trial. Ms Ewin then pursued her matter in a civil action as a sexual harassment case.[75]

Articles

- Kay Dibben, 'Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function', *Courier-Mail* (online), 13 December 2013.
- Erin Tennant 'Payout awarded over work party sex', *ninemsn.com* (online), 13 December 2013.
- Kay Dibben, 'Unwanted sex costly', *Courier-Mail*, 13 December 2013.

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[72] Hurley (n 67).

[73] Hurley (n 68).

[74] Kay Dibben 'Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function', *The Courier-Mail* (online) 13 December 2013 <http://www.couriermail.com.au/news/woman-wins-record-near500000-sexual-harassment-payout-for-unwanted-sex-following-work-function/story-fnihsrk2-1226782122290>.

[75] This is discussed further in coverage of the Ewin v Vergara appeal – refer 'Sexual harassment victim Jemma Ewin has $500K payout upheld, criticises Victoria Police', *ABC News* (online) 13 August 2014 <http://www.abc.net.au/news/2014-08-12/sexual-harassment-victim-has-record-payout-upheld/5665514>

- Adam Salter and Lisa Franzini, ‘Australia: Contractor ordered to pay half a million dollars for sexual harassment’, *Mondaq.com* (online), 2 January 2014.
- Belinda Winter, ‘Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!’, *Mondaq.com* (online), 19 December 2013.

Headlines

The *Courier-Mail* article ‘Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function’[76] uses the headline to focus on the size of the award. Allegations of sexual assault are referred to in the milder terms ‘unwanted sex’. A similar framing is used in the *ninemsn.com* headline ‘Payout awarded over work party sex’,[77] which does not refer to the unwanted sexual conduct.

The other *Courier-Mail* article in the sample has the headline ‘Unwanted sex costly’.[78] This brief headline does not refer to the parties at all. This headline also demonstrates a similar focus to the other articles mentioned above on the award of damages by using the word ‘costly’ but does not say who paid this cost—the complainant or the alleged perpetrator.

The other two articles in the sample were published on the *Mondaq.com* website. The headlines focused more clearly on legal issues but did not name the parties or describe the facts of the case. The headline ‘Australia: Contractor ordered to pay half a million dollars for sexual harassment’[79] is descriptive of the award of damages but does not name the parties or give any impression of what the case was about. The headline focuses on the order that the perpetrator pay damages and refers to him as a ‘contractor’ but does not name or even refer to the complainant. The other *Mondaq.com* article has a more light-hearted headline ‘Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!’[80]

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[76] Ibid.

[77] Erin Tennant ‘Payout awarded over work party sex’, *ninemsn.com* (online), 13 December 2013 http://news.ninemsn.com.au/national/2013/12/13/05/16/payout-awarded-over-work-party-sex.

[78] Kay Dibben ‘Unwanted sex costly’, *The Courier-Mail*, 13 December 2013, 25.

[79] Adam Salter and Lisa Franzini ‘Australia: Contractor ordered to pay half a million dollars for sexual harassment’, *Mondaq.com* (online), 2 January 2014 <http://www.mondaq.com/australia/x/283816/employment+litigation+tribunals/Contractor+Ordered+To+Pay+Half+A+Million+Dollars+For+Sexual+Harassment.>

[80] Belinda Winter ‘Australia: Accountant ordered to pay $476,000 in damages for sexual harassment - a timely reminder for Christmas functions!’, *Mondaq.com* (online), 19 December 2013

Leads

The two *Courier-Mail* articles include similar subject matter in their leads to the headlines. The 'Woman wins record near-$500,000 …' article featured the lead 'A WOMAN will be awarded almost $500,000 for sexual harassment by a male co-worker after a judge found he had unwanted sex with her after a work function.'[81] This provides some more information about the case but continues the focus on the size of the award and does not name the parties. The term 'unwanted sex' is again used. The other *Courier-Mail* article has the near-identical lead: 'A WOMAN will be awarded almost half a million dollars for sexual harassment by a male co-worker after a judge found he had unwanted sex with her after a work function.'[82]

The *ninemsn.com* article in the sample uses the lead to emphasise the size of the award of damages: 'A Victorian woman has won $476,000 in damages after a judge ruled that a male coworker had unwanted sex with her after a work function.'[83] The lead does not name the parties and refers to the complainant as a 'Victorian woman' and the respondent as a 'male coworker'. The harassing behaviour is again described as 'unwanted sex' and the violence is not described.

The *Mondaq.com* articles use the leads to examine the legal significance of the decision. The 'Contractor ordered to pay half a million dollars for sexual harassment' article does not refer to the parties by name, instead describing the complainant as a 'female employee' and the respondent as an '"arrogant" contractor'.[84] The lead continues the themes from the headline with a focus on the award of damages. The lead also refers to the respondent's pursuit of the complainant in an 'aggressive and persistent' manner and the complainant's 'repeated rejections'.[85] References to the complainant reporting the incident to police and resigning from her job reinforce the message that the behaviour was unwelcome.[86] The article also uses the lead to include the facts of the case including violence to the complainant: 'The actual incident leading to the claim took place after a work party, where it was alleged that the

<http://www.mondaq.com/australia/x/281662/Discrimination+Disability+Sexual+Harassment/Accountant+ordered+to+pay+476000+in+damages+for+sexual+harassment+a+timely+reminder+for+Christmas+functions.>

[81] Dibben (n 74).

[82] Dibben (n 78) 25.

[83] Tennant (n 77).

[84] Salter and Franzini (n 79).

[85] Ibid.

[86] Ibid.

contractor sexually assaulted the victim in a corridor.'[87] The lead does not use melodramatic language or include prurient details about the allegations.

In contrast, the lead of the other *Mondaq.com* article has a less light-hearted message about the case than its Christmassy headline: 'The Federal Court recently ordered a contractor accountant to pay $476,000 in damages for sexual harassment. The contractor was employed by Robert Walters Pty Ltd and placed at Living & Leisure Australia Ltd (LLA) to assist with accountancy duties.'[88]

Ramstrom v Baldino (2013)

Facts

The media coverage of clerk Rebecca Ramstrom's sexual harassment complaint against former Magistrate Joseph Baldino reinforced messages about her being an incredible witness and not a 'reasonable' victim. Ms Ramstrom's complaint included allegations of unwanted touching and sexual comments.[89] The case was ultimately unsuccessful.

Articles

- 'BALDINO TRIAL—clerk's trauma real, court hears', *Advertiser*, 9 March 2013.
- 'Adelaide woman loses sexual harassment case', *AAP Australian National News Wire*, 20 December 2013.
- Tom Fedorowytsch, 'Tribunal rules out harassment claims', *ABC Premium News* (online), 4 March 2013, updated 6 March 2013.
- Sean Fewster, 'Court clerk's sex claims "too late"', *Advertiser*, 5 March 2013.
- Sean Fewster, 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal' (headline changed from original published headline 'Clerk "made up harassment claims"'), *news.com.au* (online, reprinted from *The Advertiser*), 20 December 2013.

Headlines

An *AAP Australian National Newswire* article from the end of the case has the headline 'Adelaide woman loses sexual harassment case'.[90] This headline does not name the parties, reduces the complainant to her gender and does not provide any further detail about the case.

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[87] Ibid.

[88] Winter (n 80).

[89] 'BALDINO TRIAL—Clerk's trauma real, court hears', *The Advertiser (Adelaide)*, 9 March 2013, 33.

[90] 'Adelaide woman loses sexual harassment case', *AAP Australian National News Wire*, 20 December 2013.

An article on the *ABC News* website had the headline 'Tribunal rules out harassment claims',[91] giving the impression that the claims were thrown out due to lack of evidence or that the complainant had lost the case, but the article was written while the case was ongoing and later explains that some of the claims were not considered by the Tribunal for procedural reasons.[92] The headline does not name the parties or provide any detail about the claims or why they had been 'ruled out' by the Tribunal. The *Advertiser* headline 'Court clerk's sex claims "too late"'[93] gives a similar impression.

The *news.com.au* article 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal'[94] uses the headline to focus on the respondent's success. The article was previously published under the headline 'Clerk "made up harassment claims"', which focuses on the complainant losing her case and attacks her credibility.

The *Advertiser* article 'BALDINO TRIAL—clerk's trauma real, court hears'[95] positions the complainant as credible, even though the complainant herself is not named.[96]

The decision not to name the complainant in the headlines may be explained as an editorial (and indeed commercial) choice, given that the respondent was the one with the greatest 'public' profile. However, the case itself had become publicly known and the headlines showed a disproportionate emphasis on a single party. The complainant was later named in other parts of the coverage.

Leads

The leads of the articles convey similar information to the headlines. 'Adelaide woman loses sexual harassment case' uses the lead to refer to the loss of the case but does not convey much

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[91] Tom Fedorowytsch 'Tribunal rules out harassment claims', *ABC Premium News* (online), 4 March 2013, updated 6 March 2013 <https://www.abc.net.au/news/2013-03-04/tribunal-rules-out-harassment-claims/4551560>.

[92] Ibid.

[93] Chief Court Reporter Sean Fewster, 'Court clerk's sex claims "too late"' *The Advertiser (Adelaide)*, 5 March 2013, 14.

[94] Chief Court Reporter Sean Fewster 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal' (headline changed from original published headline 'Clerk "made up harassment claims"'), *news.com.au* (online, reprinted from The Advertiser), 20 December 2013, https://www.news.com.au/national/south-australia/former-magistrate-joseph-baldino-wins-sexual-harassment-case-in-equal-opportunity-tribunal/news-story/10c5ef560f0a00622736dbf60b3682ce.

[95] 'BALDINO TRIAL—Clerk's trauma real, court hears' (n 89) 33.

[96] The decision not to name the complainant in the headline could be generously interpreted as an attempt to extend the rules of not naming sexual assault victims to victims of sexual harassment, as recommended by the Women Lawyers Association of NSW in their submission to the Australian Human Rights Commission in June 2019 (see https://humanrights.gov.au/sites/default/files/2019-07/submission_340.2_-_women_lawyers_association_of_nsw.pdf>. However, no suppression order was in place for this case and the complainant was later named in the body of the article.

information.[97] The lead does not name the complainant and reduces her to her gender, while the respondent is referred to by his professional title of 'retired Adelaide magistrate'.[98] 'Tribunal rules out harassment claims' uses the lead to continue conveying the impression of exoneration of the respondent despite this being ultimately a matter of what had been referred to the Tribunal from the commission, and the case had not yet been decided: 'A tribunal has ruled out some allegations of sexual harassment against a now-retired magistrate.'[99] The headline 'Court clerk's sex claims "too late"' does not explain why the claims were 'too late' and this does not come until the second paragraph of the article. The lead is used to name the parties, describe the complainant's case and refer to 'three years of inappropriate comments and sexual harassment from her boss'.[100]

The lead of the article 'BALDINO TRIAL—clerk's trauma real, court hears' presents similar information to the headline. The lead refers to the complainant's 'extreme physical and emotional reaction to magistrate Joseph Baldino's sexual harassment' as '"something you can't fake" a court has heard'.[101] While on the surface an affirmation of the complainant's credibility, the suggestion that this could have been 'faked' suggests a subtle hint of scepticism.

The article 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal' uses the lead to report a scathing assessment of the complainant's credibility: 'A CLERK who accused a retired magistrate of sexual harassment twisted his words, fabricated some of her claims and cannot be believed, a tribunal has found.'[102] This lead does not name the parties and refers to them by their professional titles.

Richardson v Oracle appeal (2014)

Facts

In 2014 complainant Rebecca Richardson successfully appealed the original decision in her claim against Oracle to the Full Federal Court and received a higher award of damages, increasing her award from $18,000 to $130,000. The Court found that the initial award to be

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[97] 'Adelaide woman loses sexual harassment case' (n 90).

[98] Ibid.

[99] Fedorowytsch (n 91).

[100] Fewster (n 93) 14.

[101] 'BALDINO TRIAL—Clerk's trauma real, court hears' (n 89) 33.

[102] Fewster (n 94).

inadequate 'having regard to the nature and extent of Ms Richardson's injuries and prevailing community standards'.[103]

Articles

- Jamelle Wells, 'Former Oracle employee sexually harassed by manager wins increased payout on appeal', *ABC News* (online), 15 July 2014.
- Markus Mannheim, 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"', *Canberra Times*, 16 July 2014.
- Paul Smith, 'Oracle ordered to pay $130,000 in sexual harassment case', *Australian Financial Review* (online), 15 July 2014.
- Misa Han, 'How much is a sexual harassment claim actually worth?', *Australian Financial Review*, 10 October 2014.
- Rachel Nickless, 'Michael Harmer: renegade reformer', *Australian Financial Review*, 30 July 2014.

Headlines

An article published in *ABC News* online uses the headline 'Former Oracle employee sexually harassed by manager wins increased payout on appeal'[104] to describe the case without melodrama, though the focus is on the 'increased payout' and the complainant's success. This headline does not identify the gender of the parties and refers to the respondent by his professional title. The complainant is referred to as an 'Oracle employee' rather than by her executive role. The *Canberra Times* article in the sample uses the headline 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"'[105] to shift the focus from the complainant's story to the legal implications of the case.

Two articles in the sample from the *Australian Financial Review* feature headlines that focus heavily on the size of the award of damages. The headline 'Oracle ordered to pay $130,000 in sexual harassment case'[106] focuses on the respondent employer and does not name the

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[103] *Richardson v Oracle Corporation Australia Pty Ltd and Another* (2014) 312 ALR 285, 305 [81] (Kenny J).

[104] Court Reporter Jamelle Wells 'Former Oracle employee sexually harassed by manager wins increased payout on appeal', *ABC News* (online), 15 July 2014 http://www.abc.net.au/news/2014-07-15/rebecca-richardson-wins-increased-harassment-payout-from-oracle/5597738.

[105] Markus Mannheim 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"', *The Canberra Times*, 16 July 2014, 5.

[106] Paul Smith 'Oracle ordered to pay $130,000 in sexual harassment case', *The Australian Financial Review* (online) 15 July 2014 < http://www.afr.com/technology/enterprise-it/oracle-ordered-to-pay-130000-in-sexual-harassment-case-20140715-jik3s>.

complainant. The headline ‘How much is a sexual harassment claim actually worth?’[107] poses a question to readers about whether a sexual harassment case is worth pursuing. This headline does not refer to the parties to the Oracle appeal.

The *Australian Financial Review* headline ‘Michael Harmer: renegade reformer’[108] focuses on the complainant’s legal representative, with a suggestion that Mr Harmer was a colourful, crusading character.

Leads

The *Canberra Times* article ‘IT executive Rebecca Richardson’s sexual harassment win to “rock employers”’ uses the lead to focus on the complainant and suggest that her success and the increased award of damages would have an impact on employers beyond the case.[109] The lead repeats the headline suggestion that the case would ‘rock employers’.[110]

The *ABC News* article ‘Former Oracle employee sexually harassed by manager wins increased payout on appeal’ uses the lead to focus on court procedural matters, including the size of the original award and the new award of damages following the appeal.[111]

The *Australian Financial Review* article ‘Michael Harmer: renegade reformer’ praises the complainant’s legal representative in the lead for his unconventional but successful tactics, saying that he had ‘radically altered how how sexual harassment cases are fought – and how much they are worth’.[112]

The *Australian Financial Review* article ‘Oracle ordered to pay $130,000 in sexual harassment case’ uses the lead to focus on the increased award of damages. The respondent employer is named but the complainant is not.[113] The headline refers to the complainant as ‘the victim’. The *Australian Financial Review* article ‘How much is a sexual harassment claim actually worth?’ uses the lead to refer to a ‘recent landmark Federal Court decision on sexual harassment’ that awarded damages of ‘close to half a million dollars’, and suggests

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[107] Misa Han ‘How much is a sexual harassment claim actually worth?’, *The Australian Financial Review* 10 October 2014, 32.

[108] Rachel Nickless ‘Michael Harmer: renegade reformer, *Australian Financial Review*, 30 July 2014, 41.

[109] Mannheim (n 105) 5.

[110] Ibid.

[111] Wells (n 104).

[112] Nickless (n 108) 41.

[113] Smith (n 106).

that this decision was not typical.[114] The paragraph ends with the words 'lawyers say there are still difficulties in winning cases'.[115] Later in the article, this landmark case is revealed to be *Ewin v Vergara*. I discuss this further in chapter 8. The Oracle appeal decision is also discussed further in the article.

Ewin v Vergara appeal (2014)

Facts

In 2014 the original respondent, Mr Vergara, appealed the Court's decision in *Ewin v Vergara*. The appeal was unsuccessful.

Articles

- Shannon Deery, 'Appeal rejected: woman awarded $470,000 payout over unwanted drunken sexual encounter', *Herald Sun* (online), 12 August 2014.
- Nick Toscano, 'Harassment can happen beyond office', *Age*, 13 August 2014.
- 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police', *ABC News* (online), 13 August 2014.
- 'Record sexual harassment case upheld', *SkyNews.com.au*, 12 August 2014.
- 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police', *ABC News* (online), 13 August 2014.

Headlines

The *Herald Sun* headline 'Appeal rejected: woman awarded $470,000 payout over unwanted drunken sexual encounter'[116] does not name the parties. It almost gives the impression that the complainant lost the case before it mentions the money. The complainant is referred to as a 'woman' who won a '$470,000 payout', suggesting a windfall lottery win rather than compensation for traumatic experience.

The *Age* article 'Harassment can happen beyond the office' includes the subheading 'Court rules on pub meeting',[117] trivialising the case. The headline does not name the parties or describe the facts of the case. The headline refers to 'harassment' but not sexual harassment. The article was also published under the headline 'Sexual harassment ruling "a warning for

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[114] Han (n 107) 32.

[115] Ibid.

[116] Shannon Deery 'Appeal rejected: Woman awarded $470,000 payout over unwanted drunken sexual encounter', *Herald Sun* (online) 12 August 2014 <http://www.heraldsun.com.au/news/law-order/appeal-rejected-woman-awarded-470000-payout-over-unwanted-drunken-sexual-encounter/news-story/1f3a4e9fe42b62170bd0ef32dcef72e4>.

[117] Nick Toscano 'Harassment can happen beyond office', *The Age*, 13 August 2014, 2.

employers"',[118] focusing on the negative impact of the case on employers rather than telling the complainant's story.

One *ABC News* article 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police'[119] conveys a lot of information about the case in the headline. The headline names the complainant and describes her as a 'sexual harassment victim'. The headline focuses on the 'record $500K payout' being upheld by the court and hints that the article will provide more detail about the conduct of Victoria police.

The *SkyNews.com.au* article 'Record sexual harassment case upheld'[120] provides little detail in the headline. The headline does not name or indeed mention either party, nor does it provide any information about the facts of the case, but the words 'record sexual harassment case' imply a large award of damages. The other *ABC News* article in the sample, 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for "arduous" legal journey',[121] has a much longer and more descriptive headline. The headline names the complainant and, like the other ABC News article, describes her as a victim of sexual harassment. The headline positions the complainant as credible, using terms like 'vindication'. The quotes around the word 'arduous' suggest this was a direct quote from Ms Ewin.

Leads

The *Herald Sun* article opens with a very unsympathetic portrayal of the respondent, 'a man who refused to take no for an answer has lost an appeal'.[122] These words suggest a tone of righteous anger, with colloquial language appearing to speak to the reader and making the situation seem relatable.

The *Age* article continues the theme from the headline of focusing on the impact of the case on employers. The lead reads: 'Companies face being liable for sexual harassment charges by

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[118] Ibid.

[119] 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police', *ABC News* (online), 13 August 2014 <http://www.abc.net.au/news/2014-08-12/sexual-harassment-victim-has-record-payout-upheld/5665514>.

[120] 'Record sexual harassment case upheld', *SkyNews.com.au* (online) 12 August 2014, <http://www.skynews.com.au/news/national/2014/08/12/record-sexual-harassment-case-upheld.html> (no longer available).

[121] Madeleine Morris 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for 'arduous' legal journey', *ABC News* (online) 14 August 2014 (updated 15 August 2014), http://www.abc.net.au/news/2014-08-14/victim-jemma-ewin-says-record-compensation-is-vindication/5671498.

[122] Deery (n 116).

their employees even if it happens outside the workplace after a court upheld a payout to a Melbourne woman harassed by a colleague at a pub.'[123] The parties are not named and the violent facts of the case are not described.

The *ABC News* article 'Sexual harassment victim Jemma Ewin has record payout upheld …' has a detailed lead with a focus on the complainant, conveying similar messages about the case to its headline. The lead focuses on the police handling of the complainant's report of sexual assault.[124] The complainant is not named in the lead, but the lead focuses on her story, including on the size of the award and her call for an independent inquiry into her case.[125]

The *SkyNews.com.au* article uses the lead to focus on the complainant's story. The complainant is not named but is referred to as a 'woman awarded an Australian record damages claim'.[126] While this initially suggests a preoccupation with the size of the award, the article also indirectly quotes the complainant saying that she can 'finally start to move on'.[127]

The *ABC News* article 'Sexual harassment victim Jemma Ewin urges inquiry into case …' opens with the words 'Jemma Ewin does not come across as a victim …'[128] The lead names the complainant and describes her demeanour as articulate and precise, while acknowledging the effects of sexual harassment on her life and career.[129]

Matthews v Winslow Constructors (2015)

Facts

Media coverage of Kate Matthews's sexual harassment complaint against her former employer Winslow Constructors concentrated on the size of the award and the severity of the alleged conduct, which included threats of violence and sexual assault. Ms Matthews made a complaint to her employer about the behaviour of other workers, including assault, rape

[123] Toscano (n 117) 2.

[124] 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police' (n 119)

[125] Ibid.

[126] 'Record sexual harassment case upheld' (n 120).

[127] Ibid.

[128] Morris (n 121).

[129] Ibid.

threats, unwanted touching and sexual comments. Ms Matthews said that her complaint was 'laughed off' by her employer.[130]

Articles

- Freya Michie, 'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million', *ABC News* (online), 17 December 2015, updated 18 December 2015.
- Rania Spooner and Cameron Houston, '1.3 mil for daily sex harassment', *Age*, 18 December 2015.
- Ian Royall, 'Melbourne sex harassment payout: worker Kate Mathews wins $1.3 million in personal injury damages', *Herald Sun* (online), 18 December 2015.
- Ben Brennan, 'Female worker awarded million dollar payout over years of "hardcore filth" at Melbourne construction company', *Yahoo News* (online), 18 December 2015.
- Melissa Meehan, 'VIC: Bullied Vic worker receives $1.3m payout', *Yahoo News* (online), 17 December 2015.

Headlines

All five headlines in the sample refer to the size of the award of damages. However, different messages are conveyed depending on how the amount is positioned. The headlines all demonstrated the editorial convention of focussing on the aspect of the case with the greatest 'news value' (i.e. the large amount of money). The decision not to name the complainant in the headlines can be explained as her name being less newsworthy than the money. However, this editorial convention may also lead to the unintended consequence of suggesting to the casual reader that she was a 'lucky winner' or did not deserve the damages amount. The *Age* article '$1.3 mil for daily sex harassment'[131] places a heavy focus on the size of the award, which is presented almost as a prize. The headline also refers to 'sex harassment' rather than use the legal term 'sexual harassment'. The headline does not name the complainant or provide any detail about the case, providing little insight into why such a large amount of damages had been awarded. The subheading has a more sympathetic framing of the complainant and the case—'Workplace abuse—a filthy experience'.[132] This juxtaposition

[130] Freya Michie 'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million', *ABC News* (online), 17 December 2015, updated 18 December 2015 <http://www.abc.net.au/news/2015-12-17/female-construction-worker-awarded-1.3m-sexual-harassment/7039062>.

[131] Rania Spooner and Cameron Houston '1.3 mil for daily sex harassment', *The Age*, 18 December 2015, 2.

[132] Ibid.

suggests that the article will explain the reasons why the court awarded such a large sum of damages.

In contrast, the *ABC News* article ‘Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million’[133] places the size of the award at the end of the headline and emphasises the severity of the harassing behaviour.

The *Herald Sun* article in the sample ‘Melbourne sex harassment payout: Worker Kate Mathews wins $1.3 million in personal injury damages’[134] focuses on the award of damages similarly to the *Age* article. Once again, sexual harassment is referred to as ‘sex harassment’. The headline starts by referring to the payout, naming the complainant and then referring to the size of the award—placing double emphasis on the financial amount. The complainant is named and described as a ‘worker’ and the respondent employer is not referred to at all.

The two *Yahoo News* articles both refer to the award of damages in the headline but present different information about the case. The article ‘Female worker awarded million dollar payout over years of “hardcore filth” at Melbourne construction company’[135] does refer to the award of damages as a ‘million dollar payout’, but this is explained by the description of the harassing behaviour as severe and prolonged. The parties are not named. The complainant is referred to as a ‘female worker’ and the respondent a ‘Melbourne construction company’.[136] The other article ‘VIC: Bullied Vic worker receives $1.3m payout’[137] refers to the behaviour in much less detail, implying the complainant was ‘only’ bullied and that the award of damages was disproportionate to her suffering. Neither of the parties is named. The complainant is referred to as a ‘Vic worker’ and the headline does not refer to her gender. The respondent employer is not referred to at all.

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[133] Michie (n 130)

[134] Ian Royall ‘Melbourne sex harassment payout: Worker Kate Mathews wins $1.3 million in personal injury damages’, *Herald Sun* (online), 18 December 2015, <http://www.heraldsun.com.au/business/work/melbourne-sex-harassment-payout-worker-kate-mathews-wins-13-million-in-personal-injury-damages/news-story/e907ad0aa910fb1cce2d74c8a921e2c9>.

[135] Ben Brennan ‘Female worker awarded million dollar payout over years of 'hardcore filth' at Melbourne construction company’, *Yahoo News* (online), 18 December 2015 <https://au.news.yahoo.com/vic/a/30398737/female-worker-kate-mathews-awarded-million-dollar-payout-by-victorias-supreme-court-over-years-of-sexual-harassment-rape-threat-at-winslow-constructors-in-melbourne/>.

[136] This decision not to name the parties is not an example of compliance with a suppression order (there was not one in place for this case) or gallantry to the complainant. All parties were named later in the articles.

[137] Melissa Meehan ‘VIC:Bullied Vic worker receives $1.3m payout’, *Yahoo News* (online), 17 December 2015, < https://au.news.yahoo.com/bullied-vic-worker-gets-more-than-1m-30390910.html>.

The article 'Bullied Vic worker receives $1.3m payout' uses the lead to focus on the complainant, who is described as a 'Melbourne woman'.[138] The lead describes the rape threats and insults received by the complainant before mentioning the size of the award of damages,[139] positioning the award of damages as a just result.

Leads

The lead for the *Age* article '$1.3 mil for daily sex harassment' continues its preoccupation with the size of the award. The size of the award is positioned as the first item of interest, and the harassing behaviour is described as 'daily sexual harassment and abuse'.[140] The complainant is not named until the second paragraph.[141] The *ABC News* article in the sample takes a similar approach to its headline, with the behaviour emphasised before the size of the award.[142] The complainant is not named. The size of the award is of obvious interest but is not mentioned until the end of the sentence.

Although the *Herald Sun* article focuses heavily on the size of the award in the headline, the lead emphasises the complainant's story in a more sympathetic way. The complainant is not named and is referred to as a 'female road construction worker', giving the impression of a 'blokey' working environment.[143] The lead describes the complainant as being subjected to 'shocking sexual harassment' before referring to her being 'awarded $1.3 million in personal injury damages by the Victorian Supreme Court'.[144] This additional narrative serves to logically explain why the complainant received such a large award of damages.

The leads for the *Yahoo News* articles in the sample each mention the complainant's story and her experiences of harassment before describing the award of damages. The lead for the article 'Female worker awarded million dollar payout …' describes the harassing behaviour at the beginning of the paragraph and ends the paragraph with the award of damages.[145] The harassing behaviour is described as 'hardcore filth'.[146]

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[138] Ibid.

[139] Ibid.

[140] Spooner and Houston (n 131) 2.

[141] Ibid.

[142] Michie (n 130).

[143] Royall (n 134).

[144] Ibid.

[145] Brennan (n 135).

[146] Ibid.

Dr Tan v Royal Australasian College of Surgeons (2015)

Facts

The coverage of Dr Caroline Tan's complaint against the Royal Australasian College of Surgeons was different from that of the other cases in the sample. The coverage examined a case that had been decided in 2008, many years earlier.[147] The case became newsworthy in 2015 when another surgeon, Dr Gabrielle McMullin, made public comments about the case. Dr McMullin described Dr Tan's complaint of sexual harassment about a colleague's unwelcome sexual advances as ultimately detrimental to Dr Tan's career, saying that she would have been better off 'giving in' to the harassing behaviour.[148]

Articles

- Julia Medew, 'Dr Caroline Tan speaks out about sexism in Australian hospitals', *Sydney Morning Herald* Daily Life (online), 12 March 2015.
- Julia Medew, 'Victim of surgeon's sexual harassment speaks out: "It's not going to go away"', *Sydney Morning Herald*, 12 March 2015.
- Miranda Devine, 'Neurosurgeon case a real headache', *The Daily Telegraph* (online), 15 March 2015.
- Julia Medew and Craig Butt, 'Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals', *Sydney Morning Herald* (online), 12 March 2015.
- Rania Spooner, '"Endemic bullying": health system failed doctors and nurses, says Auditor-General's report', *Age* (online), 23 March 2015.

Headlines

The *Sydney Morning Herald* headline 'Victim of surgeon's sexual harassment speaks out: "It's not going to go away"'[149] does not name the complainant. The complainant was described as a 'victim' and is quoted as issuing a warning to women working in the medical profession. In contrast, the *Daily Telegraph* opinion piece uses the headline 'Neurosurgeon case a real headache',[150] which does not tell the complainant's story and suggests that the case

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[147] See *Tan v Xenos (No 3)* [2008] VCAT 584.

[148] Julia Medew 'Dr Caroline Tan speaks out about sexism in Australian hospitals', *Sydney Morning Herald* 'Daily Life' (online) 12 March 2015, <http://www.dailylife.com.au/dl-people/interviews/dr-caroline-tan-speaks-out-about-sexism-in-australian-hospitals-20150311-141peb.html>.

[149] Julia Medew 'Victim of surgeon's sexual harassment speaks out: "It's not going to go away"', *Sydney Morning Herald*, 12 March 2015, 1.

[150] Miranda Devine 'Neurosurgeon case a real headache', *The Daily Telegraph* (online), 15 March 2015 <http://www.dailytelegraph.com.au/news/opinion/miranda-devine-neurosurgeon-case-is-a-real-headache/news-story/b4a78194e688b5fd4205843319313ff0#load-story-comments>.

is an inconvenience to an unnamed person—perhaps the author. This messaging is discussed further in the chapter.

The *Sydney Morning Herald* article 'Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals'[151] uses the headline to position the Royal Australasian College of Surgeons as proactive in initiating the inquiry and committed to improving workplace culture in Australian hospitals. This headline does not mention the complainant or her case.

The *Age* headline '"Endemic bullying": health system failed doctors and nurses, says Auditor-General's report'[152] does not refer directly to the case but suggests a scathing indictment on the health system. This headline does not use genders or refer to sexual harassment, suggesting that the Auditor-General's report found a general bullying problem rather than a sexual harassment problem.

The *Sydney Morning Herald* Daily Life headline 'Dr Caroline Tan speaks out about sexism in Australian hospitals'[153] places an obvious focus on the complainant's story.

Leads

The *Sydney Morning Herald* article 'Victim of surgeon's harassment speaks out' does not name the complainant but focuses on her story and her calls for an inquiry.[154] The complainant is introduced at the beginning of the paragraph as a 'neurosurgeon whose career was derailed after she spoke out about a sexual assault …'[155] The rest of the lead indirectly quotes the complainant and presents her story, saying she 'demanded an inquiry into the treatment of whistleblowers to break a toxic culture of silence …'.[156] While the lead does not expressly refer to sexism, it is implicit in the references to sexual assault and a 'toxic culture'. The *Sydney Morning Herald* article 'Dr Caroline Tan speaks out about sexism in Australian

[151] Julia Medew and Craig Butt 'Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals', *Sydney Morning Herald* (online) 12 March 2015 <http://www.smh.com.au/national/health/royal-australasian-college-of-surgeons-appoints-experts-to-review-bullying-harassment-in-australian-hospitals-20150312-142nao.html#ixzz48cTjJuGV>.

[152] Rania Spooner '"Endemic bullying": Health system failed doctors and nurses, says Auditor-General's report', *The Age* (online) 23 March 2015 <http://www.theage.com.au/victoria/endemic-bullying-how-the-health-system-failed-our-doctors-and-nurses-20160323-gnp6od.html#ixzz48cX2Rf2B>.

[153] Medew (n 148).

[154] Medew (n 149), 1.

[155] Ibid.

[156] Ibid.

hospitals', written by the author of 'Victim of surgeon's harassment …', continues the whistleblower theme in its lead. Dr Tan is not named but is introduced in a similar way, as 'the surgeon who Dr Gabrielle McMullin said was professionally punished for reporting a sexual assault', and described as having 'spoken out about the treatment of female doctors in Australia's hospitals'.[157] This presents the complainant as heroically campaigning for change.

Other articles in the sample use the lead to focus on the inquiry that was triggered by Dr Tan's comments, even though they do not mention Dr Tan or her case in the lead. The article 'Royal Australasian College of Surgeons appoints experts …' uses the lead to foreground the action by the college to initiate the inquiry to 'examine its culture' but does not mention Dr Tan's case or comments that precipitated the inquiry.[158]

The lead for the article '"Endemic bullying" …' does not refer to the complainant or her case. The lead instead focuses on the findings of the Auditor-General's report into the health sector, using scathing language that seemed to be an indirect quote of the findings—such as 'widespread bullying, harassment and discrimination', 'lack of leadership' and 'culture of abuse'.[159]

The *Daily Telegraph* opinion piece uses dismissive language such as describing the case as 'Neurosurgeon Caroline Tan's decade old sexual harassment claim'.[160] The lead characterises the case as being 'seized' by 'victim feminists', suggesting a lack of agency for the complainant, and describes the 'victim feminists' using the case as 'a weapon against the crumbling edifice of patriarchal privilege'.[161]

Marks v Colliers International (2016)

Facts

Assistant Alexandra Marks made a sexual harassment complaint against Colliers International Chief Financial Officer Sean Unwin. Ms Marks made a complaint that Mr Unwin 'tried to force her face into his crotch, attempted to look up her skirt and undressed in front of her.'[162]

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[157] Medew (n 148).

[158] Medew and Butt (n 151).

[159] Spooner (n 152).

[160] Devine (n 150).

[161] Ibid.

[162] Patrick Hatch '"That's the girl you sold me": Colliers harassment case', *The Age*, 6 October 2016, 3.

Articles

- Patrick Hatch, '"That's the girl you sold me": Colliers harassment case', *Age*, 6 October 2016.
- Nick Lenaghan, 'Colliers appointment', *Australian Financial Review*, 15 August 2016.
- Michael Bleby and Misa Han, 'Colliers agrees to negotiate over sexual harassment claim', *Australian Financial Review*, 10 June 2016.
- 'Colliers could face huge payout in sexual harassment claim', *Sydney Morning Herald* (online), 10 June 2016.
- Bryce Corbett, 'Raunchy video revealed: "Huddo's flirty 30"', *Australian Financial Review* (weekend edition), Rear Window, 13 June 2016.

Headlines

The *Age* headline '"That's the girl you sold me": Colliers harassment case'[163] uses an ambiguous quote that could make the respondent appear sleazy. The complainant is not named, and the quote and the name of the respondent employer are the only details of the case emphasised in the headline.

The *Australian Financial Review* news-in-brief article 'Colliers appointment'[164] provides even less detail, with no reference to the names of the parties or the sexual harassment case. In contrast, another *Australian Financial Review* article in the sample, 'Colliers agrees to negotiate over sexual harassment claim'[165] includes some more information about the case and the respondent employer. This headline still does not mention the complainant or describe the behaviour in detail.

The *Sydney Morning Herald* headline 'Colliers could face huge payout in sexual harassment claim'[166] places the focus squarely on the respondent employer. Neither the complainant or respondent are named. The headline does not refer to the details of the case or the complainant's story, focusing its concerns on the financial impact on the respondent employer.

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[163] Ibid.

[164] Nick Lenaghan 'Colliers appointment', *Australian Financial Review*, 15 August 2016, 33.

[165] Michael Bleby and Misa Han 'Colliers agrees to negotiate over sexual harassment claim', *Australian Financial Review*, 10 June 2016, 2.

[166] 'Colliers could face huge payout in sexual harassment claim', *Sydney Morning Herald* (online), 10 June 2016 < http://www.smh.com.au/business/workplace-relations/colliers-could-face-huge-payout-in-sexual-harassment-claim-20160609-gpfwii.html>.

The *Australian Financial Review* headline 'Raunchy video revealed: "Huddo's flirty 30"'[167] suggests a fun, racy party and does not mention the case at all—even though the word 'revealed' may have initially given that impression to the reader. 'Huddo' is a nickname for Matt Hudson—then Associate Director of Retail Leasing for the respondent employer, Colliers International.[168]

Leads

The leads in the sample place a varying degree of emphasis on the harassing behaviour. '"That's the girl you sold me …"' uses the lead to focus on the respondent and the harassing behaviour in considerable detail, including 'allegations he tried to force her face into his crotch, attempted to look up her skirt and undressed in front of her.'[169] The parties are referred to by their job titles, with the respondent referred to as 'A top executive at real estate giant Colliers International' and the complainant as 'his former assistant'.[170] The complainant is defined by her professional relationship to the respondent, and neither party is named. The respondent is the subject of the opening paragraph, which states that he will 'enter private mediation' to try to resolve the case.[171]

The article 'Colliers appointment' consists of a single line, which refers to the respondent, who 'left after a sexual harassment case'.[172] The case is downplayed and the complainant is not named. No details of the case are provided.

The article 'Colliers agrees to negotiate over sexual harassment claim', uses the lead to focus on the respondent employer's agreement to negotiate. The parties are not named and are referred to as a 'former employee' and 'an executive at the real estate group'.[173] The complainant is described as a 'former employee who accused an executive at the real estate

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[167] Bryce Corbett 'Raunchy video revealed: "Huddo's flirty 30"', Rear Window, Australian Financial Review (weekend edition), 13 June 2016, <http://www.afr.com/brand/rear-window/colliers-raunchy-video-revealed-huddos-flirty-30-20160613-gpi393#ixzz4Pm9sqPN5>.

[168] Ibid.

[169] Hatch (n 162) 3.

[170] Ibid.

[171] Ibid.

[172] Lenaghan (n 164) 33.

[173] Bleby and Han (n 165), 2.

group of sexual harassment', and the claim is referred to as 'lurid allegations'.[174] There is no detail about what such 'lurid' allegations are.

The article 'Colliers could face huge payout …' takes a somewhat dismissive view of the case in the lead, focusing on the respondent employer entering into private mediation with the complainant. The parties are not named. Dismissive language is used to describe the complainant as 'a former assistant who claims a senior executive harassed her'.[175]

The article 'Raunchy video revealed …' uses the lead to discuss the case in a more informal way. The lead begins with the words 'Consider this a public service' and refers to *Australian Financial Review* coverage of 'the sexual harassment lawsuit that was lodged by executive assistant Alexandra Marks against Colliers and its CFO Sean Unwin in the Federal Court (reported exclusively in this august organ last Thursday).'[176]

Amy Taeuber v Channel 7 (2017)

Facts

Amy Taeuber's complaint against Channel 7 was the first case in the sample to be reported after the Me Too movement hit the mainstream media.[177] Ms Taeuber was a cadet journalist employed by Channel 7. Ms Taeuber alleged that she was dismissed from her employment for making a sexual harassment complaint against Channel 7 reporter Rodney Lohse.[178] This case was covered in a different way from the other cases in this sample, with much of the coverage linking the case to the Harvey Weinstein allegations in the United States and suggesting that the tide was turning in favour of victims of sexual harassment.

Articles

- Karl Quinn, 'Seven disputes reporter's allegation', *Sydney Morning Herald*, 27 September 2017.

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[174] Ibid.

[175] 'Colliers could face huge payout in sexual harassment claim' (n 166).

[176] Corbett (n 167).

[177] The website meetoomvnt.org describes the origins of the Me Too movement: 'The 'me too' movement was founded in 2006 to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing … In less than six months, because of the viral #metoo hashtag, a vital conversation about sexual violence has been thrust into the national dialogue. What started as local grassroots work has expanded to reach a global community of survivors from all walks of life and helped to de-stigmatize the act of surviving by highlighting the breadth and impact of a sexual violence worldwide.', me too, History and Vision <https://metoomovment.org/about/>.

[178] Karl Quinn 'Seven disputes reporter's allegation', *Sydney Morning Herald*, 27 September 2017, 6.

- Louise Milligan, ‘Channel 7 faces backlash over story of cadet journalist Amy Taeuber’, *ABC News* (online), 26 September 2017.
- Jenna Price, ‘Learn from Weinstein’, *Canberra Times*, 10 October 2017.
- Wendy Squires, ‘Predators, be afraid’, *Sunday Age*, 22 October 2017.
- Kasey Edwards, ‘Sisterhood has its limits’, *Age*, 31 October 2017.

Headlines

The *ABC News* headline ‘Channel 7 faces backlash over story of cadet journalist Amy Taeuber’[179] focuses on the effect of news coverage of the case on the respondent employer. The complainant is named, but sexual harassment is not mentioned.

The *Canberra Times* opinion piece headline ‘Learn from Weinstein’[180] makes a direct link to the case against Hollywood mogul Harvey Weinstein but does not mention Ms Taeuber, Channel 7, sexual harassment or the specifics of Ms Taeuber’s case.

The *Sunday Age* headline ‘Predators, be afraid’[181] does not name the parties, the case or sexual harassment. Chapter 8 examines the way that the case is discussed further in the article.

The *Sydney Morning Herald* headline ‘Seven disputes reporter’s allegations’[182] takes a different approach from other articles in the sample, focusing on the respondent employer’s denial of the behaviour. The headline does not name the parties or refer to sexual harassment, relying on assumed reader knowledge or curiosity about the article. This focus on the respondent employer effectively erases the complainant’s story from the headline, dismissing her sexual harassment claim.

The *Age* headline ‘Sisterhood has its limits’[183] takes the approach of suggesting women are to blame for something but not providing any further detail.

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[179] Louise Milligan ‘Channel 7 faces backlash over story of cadet journalist Amy Taeuber’, *ABC News* (online), 26 September 2017, < http://www.abc.net.au/news/2017-09-26/seven-faces-backlash-over-story-of-cadet-journalist-amy-taeuber/8990814>.

[180] Jenna Price ‘Learn from Weinstein’, *The Canberra Times*, 10 October 2017, 18.

[181] Wendy Squires ‘Predators, be afraid’, *The Sunday Age*, 22 October 2017, 36.

[182] Quinn (n 178) 6.

[183] Kasey Edwards ‘Sisterhood has its limits’, *The Age*, 31 October 2017, 18.

Leads

The *ABC News* article 'Channel 7 faces backlash …' uses the lead to focus on the respondent employer and to self-congratulate the ABC on breaking the story on its *7.30* program.[184] The article opens with the words, 'The Seven network has faced an enormous online backlash following 7.30's story …'.[185] The complainant is not named and is referred to in the second half of the lead paragraph as 'the Seven network cadet who was dismissed soon after making a complaint about sexual harassment.'[186] No further details about the case are included.

The 'Learn from Weinstein' opinion piece uses the lead and first six paragraphs to set a context of sexism, terrified victims and male entitlement. The article opens with the sentence, 'Rich and powerful men still get away with harassment.'[187] The lead continues: 'Harvey Weinstein's scalp is not enough. The much-lauded American film producer is still rich. He's still powerful. The women he hurt are none of those things. It's unlikely they ever will be.'[188] These words present a clear focus on the gendered nature of sexual harassment and the power imbalance between men and women in the workplace. There was a dash of racial stereotyping in the reference to a 'scalp', an intertextual reference to colonial imperialism where race and gender based violence serves economic interests as it does in the societies borne out of colonial invasion, and an indication of the intersectional deficiencies of White feminism.

The opinion piece 'Predators, be afraid' continues the above theme but presents a more optimistic view of the impact of the Weinstein case. The lead positions the case as the beginning of a revolution: 'The Harvey Weinstein scandal has triggered an avalanche of outrage that won't stop any time soon.'[189] The lead does not refer to Ms Taeuber, her case or Channel 7 but primes the reader to share the 'outrage' and view the case sympathetically. As is discussed in chapter 8, Ms Taueber's case is discussed later in the article.

'Seven disputes reporter's allegations' uses the lead to focus on the respondent employer's denial of the complainant's claims and to report attacks on the complainant's credibility. The

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[184] Milligan (n 179).

[185] Ibid.

[186] Ibid.

[187] Price (n 180) 18.

[188] Ibid.

[189] Squires (n 181) 36.

article opens with the statement ‘Seven has denied sacking television journalist Amy Taeuber because she lodged a sexual harassment complaint against a male colleague …’.[190]

‘Sisterhood has its limits’ takes a different approach in the lead from the other articles in the sample. This article suggests a new villain in the story: other women. The opening paragraph begins: ‘Yes, it’s important women stick together, but that’s not the whole story.’[191]

Conclusion

The headlines and leads contain the information that is deemed to have the highest ‘news value’. The headlines and leads present a range of perspectives on the parties to the case and the nature of sexual harassment. Some of the headlines and leads are sympathetic to the complainant and portray her as credible. Other headlines and leads may be read as suggesting the complainant has an ulterior motive or that sexual harassment should not be taken seriously. Some of the headlines and leads engage with the legal issues. However, the general focus in the coverage is on the ‘drama’ of the cases.

In the next chapter I analyse the body of the articles in the sample.

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[190] Quinn (n 178) 6.
[191] Edwards (n 183) 18.

8 Messages from the media—body of the article

Introduction

In the previous chapter, I looked at the framing of the messages about sexual harassment in the headlines and leads of media coverage of 14 high-profile sexual harassment cases from the years 2010 to 2017. In this chapter, I revisit the same sample and look at the aspects emphasised in other parts of the articles. While the headlines and leads include the most ‘important’ information about each case, the remaining paragraphs provide additional contextual details.

In this chapter, I concentrate on each article individually. I review the features of the case that were not considered the most significant and ‘newsworthy’ details but were still sufficiently important to include in the articles. I look at which characteristics of the cases were foregrounded and highlighted, including the portrayal of the parties, the presence of any ‘expert’ external voices, the way the harassing behaviour was described and the way the legal issues were framed.

Fraser-Kirk v David Jones (2010)

‘Are you being sued? Sordid details of $37 million DJs sex claim’[1]

Description of the behaviour

This article includes detailed descriptions of the alleged harassing behaviour, such as the respondent telling the complainant to try a dessert that was ‘like a f--- in the mouth’, and then touching her bra strap under her clothes. The article refers to the complainant’s $37 million claim for punitive damages and quotes her as promising to donate this to charity if successful—that is, the articles make it clear that the behaviour was unwelcome and that the complainant reported the behaviour to her employer.

[1] Belinda Kontominas and Simon Mann ‘Are you being sued? Sordid details of $37 million DJs sex claim’, *Sydney Morning Herald* 3 August 2010, 1.

Portrayal of respondent

The article notes that the respondent, Mr McInnes, resigned after making apparent admissions about his behaviour and was rumoured to have checked into a rehabilitation clinic with celebrity clients.

Portrayal of complainant and respondent employer

The article quotes Ms Fraser-Kirk's statement of claim describing Mr McInnes's team's 'bullying' management approach that dissuaded staff from making complaints.[2] The article also states that the respondent employer was yet to file a defence but would 'vigorously defend' the claims.[3]

'Inside Australia's biggest harassment case $37m SEX SUIT'[4]

Portrayal of complainant

This *Daily Telegraph* article focuses on the complainant's version of events, including the detailed description of the alleged harassing behaviour in her statement of claim and notes the complainant's emotional response when describing the behaviour. The article narrates the alleged harassing behaviour in an almost romantic way: 'It started with a kiss …'.

The article also reports the complainant describing the behaviour as unwelcome, her prompt complaints to management and her pledge to set up a hotline to help other David Jones employees.

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[2] Ibid.

[3] Ibid.

[4] Janet Fife-Yeomans 'Inside Australia's biggest harassment case $37m SEX SUIT', *The Daily Telegraph* 3 August 2010, 3.

Legal implications

The article recognises the legal implications of the case—noting that, if the case were successful, it would be the first time an Australian court had awarded damages to punish an employer in a sexual harassment case.[5]

Portrayal of respondent

The article briefly refers to the respondent being 'usually ebullient' but absent from a David Jones launch following his resignation[6], his 'spokesman' making no comment and his 'pregnant girlfriend'.[7]

'Nobody died, so why is she demanding a king's ransom?'

Portrayal of complainant

The *Sydney Morning Herald* opinion piece uses language such as 'playing up your victimhood' and 'greedy' to describe the complainant.[8] The article begins with an excoriation of the feminist criticism of then federal Leader of the Opposition Tony Abbott using the phrase 'no means no' when disagreeing with then-Prime Minister Julia Gillard. The Women's Electoral Lobby had criticised Mr Abbott for using a 'women's anti-violence slogan' against a female Prime Minister and said that he would not make such a comment to a man. Devine describes this critique as implying Mr Abbott was 'no better than a rapist' and describes *Fraser-Kirk v David Jones* as similar 'hysterical overreach'.

Legal implications

The article focuses on the $37 million claim for damages by comparing it to other cases. It does not distinguish between punitive and compensatory damages, between standards of proof in civil and criminal proceedings or between a tort claim and a no-fault scheme:

> Woman (sic) who are raped don't get that kind of money as victims compensation—they're lucky if they receive $100,000. A woman who was raped by a navy colleague at HMAS Cairns was awarded less than $500,000 in 2007 in a sexual harassment lawsuit. A David Jones employee who sustained a serious brain injury at work would

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[5] Ibid 2.

[6] Ibid.

[7] Ibid.

[8] Miranda Devine 'Nobody died, so why is she demanding a king's ransom?', *Sydney Morning Herald* 5 August 2010, 15.

> get less than $300,000 in compensation under WorkCover. So why does McInnes's conduct qualify for such a grand cash grab?[9]

Portrayal of respondent

The respondent is briefly described as a 'sleaze' who 'got away with much more than he should have' but is acknowledged to have already been punished by job loss, a 'comparatively paltry payoff', becoming a 'national joke' and having to 'leave the country in disgrace'.[10] The alleged harassing behaviour is described as conduct that 'would have distressed most women but should not ruin her life—unless she dwells on it.'[11]

'DJs sex shocker—Designer defence "He's hot—I threw myself at him"'[12]

This *Daily Telegraph* article devotes a single paragraph to the case itself, noting the complainant had alleged Mr McInnes was a 'serial sexual harasser' and that David Jones had breached its duty of care by not protecting her from him.[13] The article does not particularise the allegations of harassing behaviour or quote the parties to the case. While this could be explained in other cases by a lack of access to such information, in the David Jones the complainant spoke directly to the media and her statement of claim was publicly available.

Portrayal of respondent

The article focuses on fashion designer Alannah Hill's comments about the case. It quotes Ms Hill saying that she had a crush on the respondent and would have welcomed his advances. The article also quotes other fashion designers, including Alex Perry and Camilla Franks, expressing support for the respondent.

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[9] Miranda Devine 'Nobody died, so why is she demanding a king's ransom?', *Sydney Morning Herald* 5 August 2010, 15.

[10] Ibid.

[11] Ibid.

[12] Joel Christie and Annette Sharp 'DJs sex shocker—Designer defence: "He's hot—I threw myself at him"', *The Daily Telegraph* 4 August 2010, 3.

[13] Ibid.

‘David Jones lawsuit shows that boards must be kept informed in harassment cases’[14]

Legal implications

The *Sydney Morning Herald* opinion piece focuses on the legal implications of the case for the respondent employer. The article discusses vicarious liability and the responsibilities of boards to address harassing behaviour in the workplace.

The article refers to media attention on ‘the size of the claim and the events leading up to it’ but argues that ‘the power of the action lies in its claim that David Jones engaged in misleading and deceptive conduct in contravention of the Trade Practices Act.’

The article concludes that ‘directors definitely “need to know” about serious cases as they develop’ and have solid procedures in place to address sexual harassment. The article does not describe the particular sexual harassment allegations or quote the complainant.

Brief analytical summary of reportage

It is interesting that, although the complainant’s story is heard in most of these articles, the result is not necessarily a favourable portrayal of her. Negative views of the complainant are extracted from the description of her claims as ‘hysterical overreach’ in the *Sydney Morning Herald* opinion piece and comments from fashion designers supporting the respondent. While one *Daily Telegraph* article extensively quoted the complainant’s voice, this is combined with trivialising descriptions of the harassing behaviour. The coverage also has a strong legal bent, emphasising the vicarious liability of David Jones for the behaviour of its CEO.

Styles v Clayton Utz (2011)

‘Claims of sexism as young lawyer takes on top firm’[15]

This Sydney Morning Herald article focuses on the complainant’s statement of claim and version of events. The second paragraph quotes the complainant’s reasons for delayed reporting of the sexual harassment complaint: ‘She did not make an official complaint about harassment at the time because she feared it would destroy her career.’ This quote is used as a ‘pull quote’ in the article and repeated in larger text.

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[14] Malcolm Maiden ‘David Jones lawsuit shows that boards must be kept informed in harassment cases’, *Sydney Morning Herald*, Business Day Opinion and Analysis, 5 August 2010, 6.

[15] Louise Hall ‘Claims of sexism as young lawyer takes on top firm’, *Sydney Morning Herald* 8 June 2011, 3.

The article devotes significant column space to the complainant's story, including a detailed description of the harassing behaviour, her loss of employment after making a complaint and the respondent employer being described in court as having 'a culture of condoning innuendo, pranks, jokes and lewd comments.'

Legal implications

The article quotes the legal counsel for the respondent employer denying that Clayton Utz was a hostile workplace for women and dismissing the sexual harassment claim as being about '"conversations late at night in bars"', which are '"not the same as a piece of material being spread around the office"'. The article does not refer to the size of the claim for damages.

'Man in the middle of $200k claim—law firm's sexual harassment case'[16]

Portrayal of respondent

The *Daily Telegraph* article focuses on the alleged harasser, whom it describes as being subject to 'a volley of legal claims from his scorned lover' after a 'brief fling'.

Description of the behaviour

The article uses the term 'locker room banter' to describe the alleged harassment and reports that the respondent employer had investigated the sexual harassment claims and 'determined they were unfounded.' The article also includes information about the complainant's work rotation, which may imply a link to the claim. It notes that the complainant said that she felt harassed shortly after she started work in the workplace relations department 'which advises large companies and government on claims of unfair treatment by employees'.

'Sexism case dropped as lawyer reaches settlement with former employer'[17]

Description of the behaviour

The *Sydney Morning Herald* article focuses on the settlement of the case. The second paragraph of the article refers to the complainant seeking 'more than $200,000 in damages' and describes the alleged harassing behaviour is described as 'an office whispering campaign over a fling with a colleague' (even though other instances of harassing behaviour are also

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[16] Vanda Carson 'Man in the middle of $200k claim—Law firm's sexual harassment case', *The Daily Telegraph*, 4 July 2011, 17.

[17] Louise Hall 'Sexism case dropped as lawyer reaches settlement with former employer', *Sydney Morning Herald* (online at 30 November 2011) < http://www.smh.com.au/nsw/sexism-case-dropped-as-lawyer-reaches-settlement-with-former-employer-20111129-1o53k.html>.

described elsewhere in the article). The article also describes the effects of the alleged harassment on the complainant, who ‘claim[ed] she became suicidal and depressed’.

Legal implications

The article quotes judicial criticism of sexist remarks in office emails, with Justice McCallum expressing surprise that ‘the remarks were made at all (after over a century of feminism) or that a lawyer recorded them in an email (after over seven centuries of subpoenas)’.

The article quotes opposing views from the complainant and the respondent employer on whether Clayton Utz was vicariously liable for the behaviour of employees, including detailed descriptions of sexist language in emails and a Facebook group called ‘Clayton Utz Workplace Relations (Sydney) Whorebags’. The article concludes with quotes from the complainant and respondent employer saying that they were both pleased that the matter had been settled.[18]

‘Exposing a secret culture’[19]

Description of the behaviour

The *Daily Telegraph* article focuses on the complainant’s sexual harassment claim and does not refer to the settlement of the case until the final paragraph. The article refers to the complainant’s ‘claim for damages of more than $200,000’ and describes the harassing behaviour in the second paragraph as ‘allegedly offensive comments made at boozy work functions at bars around Sydney’. Later in the article, the behaviour is summarised as ‘12 incidents of unwelcome sexual conduct’, including being victimised by other solicitors in the firm and ‘Mr Izzo’s boasts to colleagues that they slept together’.

Legal implications

The article draws attention to the secrecy of the settlement, where neither party said ‘how much, if any, money changed hands’ and concludes with a quote from the respondent employer that they were pleased that a settlement had been reached.

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[18] Ibid.

[19] ‘Exposing a secret culture’, *The Daily Telegraph* 3 December 2011, 5.

'Finding the strength to fight back'[20]

Portrayal of complainant and legal implications

The *Daily Telegraph* article was written by the same journalist who wrote 'Man in the middle …' but focuses on the complainant rather than the respondent. The article quotes the complainant describing the current legal framework as 'not working' and includes some information about the objectives of the *Sex Discrimination Act 1984* (Cth) to prevent discrimination and harassment.

The article quotes the complainant as saying that she has found fulfilment in family and domestic tasks and is enjoying her new career as a barrister. The article includes a detailed description of the complainant's legal education and academic success. The article briefly quotes the complainant saying that she is 'happy' with the settlement but does not refer to any financial amounts.

Brief analytical summary of reportage

Again, it is interesting to see how differently the sexual harassment and the complainant are portrayed by different journalists—or, in the case of the two articles written by Vanda Carson, the same journalist. Some coverage portrays the complainant as strong and heroic, while other coverage minimises the harassment and portrays her as seeking money or revenge. Carson's articles portray the complainant in different, even contradictory, ways—with one article portraying her as a vengeful 'woman scorned' and the other as a crusading heroine. While this can be partly explained by one article being written while the case was ongoing and the other after the complainant received a settlement, the scepticism of the original article was disproportionate to any need to ameliorate the risk of a defamation claim from the alleged harasser (and indeed arguably defamed the complainant herself). The hyperbolic construction of the complainant as heroic presented a jarring clash of female stereotypes.

The reportage also shows how language can be used to minimise harm, with the formal 'legal' perspective from respondent's lawyer reducing the harassing behaviour to late-night bar conversation and another article describing the harassment as 'locker room banter'. Other articles emphasise the harmful effect of the alleged behaviour on the complainant's mental health.

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[20] Vanda Carson 'Finding the strength to fight back – exclusive interview', *The Daily Telegraph* 3 December 2011, 4.

Spiteri v IBM (2011)

'IBM saleswoman in $1.1m sexual harassment claim'[21]

Portrayal of complainant

The *Age* article focuses on the complainant's story, using multiple quotes from the complainant's legal representative. The article notes in the second paragraph that the complainant's legal representation 'will not name her because of her "delicate mental state"'. The quotes from the complainant's legal representative emphasise the traumatic effect of the alleged harassment on the complainant's mental health, her skill in her previous employment ('one of the top 10 salespeople globally') and her inability to work after the harassment took place.

The article also quotes the complainant's legal representative describing the David Jones case as highlighting the inadequacy of employer responses to sexual harassment and pointing to a gap between procedure and practice for IBM, which had a policy in place but allowed the alleged harassment to continue for two years.

Description of the behaviour

The alleged harassing behaviour is described in a detailed yet clinical way, as bullying and harassment—that is, the respondent rubbing against the complainant, the respondent putting his hand up the complainant's dress and the respondent making sexual comments in front of the complainant at a Christmas function and telling her that her sales would improve 'if she got her breasts out'. The article does not quote the respondent employer.

'Woman sues IBM for bullying by boss'[22]

Description of the behaviour

The *Age* article describes the alleged harassing behaviour but does not refer to the unwanted touching described in the article above. The article refers to the complainant's description of the harassing behaviour in her statement of claim as including 'screaming and abuse', 'humiliating emails', being called 'stupid' and being frequently contacted after working hours. This includes quoting alleged offensive language of a sexual nature, where the complainant was told to get sales by revealing her 'boobies'.

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[21] Ben Butler 'IBM saleswoman in $1.1m sexual harassment claim', *The Age* 16 April 2011, 3.

[22] 'Woman sues IBM for bullying by boss', *The Age*, 21 October 2011, 7.

Portrayal of respondent employer

The article quotes a spokesperson for the respondent employer saying that IBM 'did not tolerate any type of harassment' and 'would vigorously defend itself in court'. The article closes with a quote from the IBM spokesperson saying that the IBM would 'continue' to provide compensation and support to the complainant.

'Women sues IBM for $1.1m—sex pest legal fight'[23]

Portrayal of the complainant and description of the behaviour

The *Herald Sun* article uses the words 'alleged' and 'allegation' seven times, and often multiple times in the same sentence, in a 301-word article (including the lead) when reporting the complainant's view of events. The article even paraphrases the complainant's lawyer to suggest that she was calling her own client's case 'allegations'.

Portrayal of the parties

The article also quotes the complainant's legal representative, who describes the effect of the alleged harassment on the complainant's mental health and criticises the 'inaction' of the respondent employer when the complainant reported the harassing behaviour. The article concludes with a statement from the respondent employer: 'An IBM spokesman said the company took such matters very seriously, but as it had not yet seen the claim, it was unable to comment at this time.'

'Woman sues IBM for $1.1m—worker allegedly told to "get boobies out"' [24]

Portrayal of the complainant and description of the behaviour

The *Herald Sun* article focuses on the complainant's story and the effect of the alleged behaviour on her mental health, including turning into a 'different person' and making multiple suicide attempts. The article also refers to the complainant's $1.1 million claim for damages for 'sexual discrimination'. The article names the alleged harasser and quotes a detailed description of the harassing behaviour from the complainant's court documents, including the 'get boobies out' comment, unwanted touching and verbal abuse.

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[23] Marianne Betts 'Woman sues IBM for $1.1m—Sex pest legal fight', *Herald Sun*, 15 April 2011, 9.

[24] Ruth Lamperd 'Woman sues IBM for $1.1m – worker allegedly told to get boobies out', *Herald Sun*, 20 October 2011, 13.

The article also quotes the complainant as being 'too scared' to make a formal complaint, and her managers telling her not to resign because she was skilled at her job and the alleged harasser would soon leave.

Portrayal of the respondent and respondent employer

The article concludes with quotes from the alleged harasser and respondent employer. An 'IBM spokesman' is quoted stating that the respondent employer does not tolerate sexual harassment and will 'vigorously contest' the case in court. The article refers to the alleged harasser's new employer and notes that he 'would not comment'.

'IBM accused of ignoring sexual harassment claims'[25]

Portrayal of the complainant

The *ABC News* article focuses on the complainant's view of events, with quotes from her statement of claim and her interview with the ABC *AM* program. The article quotes the complainant's statement of claim to provide a first-person account of the alleged harassment, with the complainant saying that the respondent groped her, rubbed against her, touched her, put his hands up her dress and asked her to expose her breasts to get more sales.

The article refers to the complainant's professional success as 'one of the computer company's top salespeople, on a salary of $150,000' and her 'love of her job'. The article refers to the complainant's reporting of the behaviour.

Portrayal of the respondent

The first reference to the respondent employer in the article is a report that IBM lost a court action to suppress the details of the case. The article also notes that IBM had declined to be interviewed and quoted a spokesperson stating that IBM would 'vigorously defend' itself in court and was continuing to provide compensation and support to the complainant. The article concludes with a comment that the respondent 'refused to comment on whether other staff members had made complaints.'

Brief analytical summary of reportage

Compared with the other cases in the sample, the coverage of this case appears to reflect more of a consensus understanding of what constitutes bona fide sexual harassment and the actions

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[25] Sue Lannin 'IBM accused of ignoring sexual harassment claims', *ABC Premium News* (online at 20 October 2011, updated 21 October 2011) < http://www.abc.net.au/news/2011-10-20/ibm-sexual-harassment-case/3580656>.

of a good complainant. Nevertheless, this reportage includes one article that uses language (the word 'alleged') in an extraordinary manner. The coverage is dominated by the voice of the complainant, with the respondent's voice minimised. The coverage portrays the respondent employer, IBM, as responsible for any alleged harassment—suggesting a journalistic familiarity with the concept of vicarious liability.

Robinson v Rivers (2011)

'Rivers tycoon on sex assault charge'[26]

Legal implications and portrayal of the complainant

The *Sunday Age* article focuses on sexual assault charges against the respondent, which had arisen as a result of the sexual harassment case. The article reports attempts by the respondent's legal representatives to portray the complainant as less credible, such as by referring to her mental health issues, 'bipolar behaviour', 'alcohol abuse', 'nudie runs' and insistence on modelling underwear. The article also reports on the complainant's lawyer, who 'slammed the personal attacks on his client'.

Portrayal of the respondent

The article emphasises the wealth of the respondent by referring to his two adjoining Toorak mansions and 'fleet of prestige cars including a baby-blue Bentley and a red Ferrari California'.

Description of the behaviour

The article quotes the description of harassing behaviour in the complainant's court documents, noting that she alleged that the respondent asked her to model Rivers underwear and 'placed his hands on and under her bra.'[27] The closing paragraphs of the article note that the complainant had received a WorkCover settlement for 'post-traumatic stress as a result of the alleged sexual harassment' and compensation for lost income.

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[26] Cameron Houston 'Rivers tycoon on sex assault charge', *The Sunday Age*, 4 December 2011, 1.

[27] Ibid.

‘Millionaire denies woman’s harassment court claim—TYCOON SEX FIGHT’[28]

Portrayal of the respondent

The *Herald Sun* article focuses on the respondent’s denial of the alleged harassing behaviour, framing the story through the respondent’s voice. The article reports his ‘strenuous denial’ of the allegation of unwanted touching and attempts to discredit the complainant by suggesting that she ‘ha[d] a history of bipolar behaviour’ and ‘suffered from a range of conditions … including alcohol abuse’. The article also reports that the complainant denied these assertions.

Portrayal of the complainant

The article also frames the story through the complainant’s silence. The article concludes by stating that the complainant, ‘who claims she has suffered post-traumatic stress disorder, depression and panic attacks, declined to comment’ and that her legal counsel said that she was trying to re-establish her career.

‘Assault payout’[29]

Portrayal of the complainant

The *Sunday Herald Sun* article focuses on the WorkCover settlement the complainant received for the alleged sexual harassment, framing the story through the voice of the complainant’s lawyer. The article quotes the complainant’s legal representative, who said the alleged sexual harassment subjected the complainant to financial hardship and left her unable to work and suffering post-traumatic stress disorder.

Description of the behaviour

The article describes the alleged behaviour briefly in a single sentence: ‘Philip Goodman, 54, patted her on the bottom, grabbed her breast and made her model underwear for him’.

The article reports on the complainant’s reluctance to report the behaviour due to fear of losing her work visa. The article concludes with direct and indirect quotes from the complainant’s lawyer saying that future legal action would be launched against Rivers for an ‘unspecified six-figure sum.’

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[28] Shelley Hadfield ‘Millionaire denies woman’s harassment court claim—TYCOON SEX FIGHT’, *Herald Sun*, 5 November 2011, 1.

[29] Hamish Heard ‘Assault payout’, *Sunday Herald Sun*, 13 November 2011, 21.

‘Rivers boss fights sex harassment cases’[30]

Portrayal of the complainant

This *Sun-Herald* article, dated more than 12 months after the other articles in the sample, focuses on an additional complaint of sexual harassment against the respondent by a second complainant, Rivers employee Rachel Adamopolous. The article links the new case to the first complaint, by Ms Robinson. The article provides a detailed description of the alleged harassment of the second complainant and the effects on her mental health. It reports the respondent’s denial that the behaviour occurred.

The closing paragraphs of the article include information about defence attacks on Ms Robinson’s credibility, similar to those noted in the articles discussed above. The final paragraph refers to the complainant’s previous WorkCover settlement, where she was compensated for what her lawyers ‘claimed’ was post-traumatic stress, and for lost income after resigning from her job.

‘RETAIL BOSS SEX CLAIM—court told of modelling sessions and spy missions’[31]

Description of the behaviour

The *Daily Telegraph* article focuses on the complainant’s allegations of sexual harassment and the respondent’s denial of the behaviour. The article describes the complainant’s account of the alleged harassing behaviour in detail, including that he ‘patted her on the bottom and grabbed her breast’ and ‘required her to model underwear for him without anyone else being present.’ The article also reports that ‘she claims he pulled at her bra straps and on the bottom of her bra cups, placing his hands on her bust over and under her bra’, that the respondent told Ms Robinson to pretend to be his wife or girlfriend during product sample purchases and called her ‘honey bun’ and that the respondent gave her gifts and ‘insisted she call in sick so they could go to lunch together.’

Portrayal of the respondent

The article quotes the respondent and his legal representative as saying that the complainant ‘insisted on trying on underwear samples’ in front of him, denying the allegations of unwanted touching and saying that all Rivers employees were given gifts and treated to lunch.

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[30] Cameron Houston ‘Rivers boss fights sex harassment cases’, *The Sun-Herald* 10 February 2013, 10.

[31] Shelly Hadfield ‘RETAIL BOSS SEX CLAIM – Court told of modelling sessions and spy missions’, *The Daily Telegraph*, 5 November 2011, 2.

The article concludes with five dot points about the Rivers company, including information about the number of employed staff, number of outlets, an upheld complaint against the company for sexist advertising and the company being 'named and shamed' in 2009 for 'refusing to comply with laws governing equal treatment of women in the workplace.'

Brief analytical summary of reportage

These articles tend to include the voices of both the complainant and the respondent, for the most part expressed through an expert legal voice. While other cases in the sample include discussion of the complainant's mental health issues to reinforce the harm she had experienced due to sexual harassment, in this case the coverage reports the respondent's attempts to use the complainant's mental health issues to undermine her credibility.

Richardson v Oracle (2012–2013)

'Demotion after sex complaint, court told'[32]

Portrayal of the complainant

The *Daily Telegraph* article describes the complainant's claim of sexual harassment and the response by her employer. The article reports her evidence in court that she had been demoted after reporting the harassing behaviour to the respondent employer. The article reports that the complainant had 'listed 11 instances in her statement of claim' of 'suggestive comments', including asking her to go on 'dirty weekends' and saying in front of staff that the two must have been married in a past life and 'I bet the sex was hot.'

Portrayal of the respondent

The closing paragraphs note that the respondent employer had given the alleged harasser a 'formal warning' and that the complainant had rejected an email apology. The last paragraph of the article quotes the respondent's lawyer describing the comments as merely 'light hearted banter'.

'Oracle to pay $18k for senior staffer's ongoing sexual harassment'[33]

Legal implications

The *Australian* article focuses on the outcome of the case, where the complainant was found to have been sexually harassed by her former colleague, and the details of the harassing

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[32] Amy Dale 'Demotion after sex complaint, court told' *The Daily Telegraph* 20 March 2012, 11.

[33] Leo Shanahan 'Oracle to pay $18k for senior staffer's ongoing sexual harassment' *The Australian*, 21 February 2013, 3.

behaviour. These include the comment in front of other employees that he and the complainant must have been married in a previous life and had a '"hot" sex life'.

The article reports that the complainant told her employers she wanted to leave a project because of the harassment but was 'told she was too important', and that an internal investigation 'upheld aspects of her complaint.'

The article also devotes a paragraph to the complainant's legal representative, Harmer Workplace Lawyers, and refers to the firm's unsuccessful representation of James Ashby in a sexual harassment lawsuit against former Speaker Peter Slipper and successful representation of Kristy Fraser-Kirk against former David Jones Chief Executive Mark McInnes.

The article concludes with quotes from the presiding judicial officer, who found that the complainant had been sexually harassed and that the alleged harasser's conduct was 'persistent and ultimately callous' and that he 'did not give honest evidence'.

'Judge criticises law firm over settlement offer'[34]

Legal implications

The *Sydney Morning Herald* article focuses on judicial criticism of the complainant's legal representatives, whose rejection of a Calderbank settlement offer from the respondent had led the court to award a lower sum of damages and the complainant paying 'a substantial proportion of her former employer's legal costs.' The article notes that the complainant was 'standing by' her lawyers even though she now had to 'foot the bill for the man who sexually harassed her'.

The article reports that the respondent employer had been found vicariously liable for sexual harassment of the complainant and describes the behaviour very briefly as 'a humiliating series of slurs, alternating with sexual advances ... which built into a more or less constant barrage of sexual harassment'.

The article reports the judicial officer describing the rejection of the settlement offer as 'disturbing' and the case as 'conducted solely for the benefit' of the complainant's lawyers. The article also notes that the complainant's legal representatives had been criticised for their handling of a previous high-profile sexual harassment case—that is, James Ashby's case

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[34] Harriet Alexander, Legal Affairs 'Judge criticises law firm over rejection of settlement offer' *Sydney Morning Herald* 29 April 2013, 10.

against Peter Slipper. The closing paragraph quotes the complainant describing her legal representatives as 'incredibly supportive' of her emotionally and legally and of the financial arrangements for her legal fees.

'Judge blasts Ashby's self-serving lawyers'[35]

Legal implications

The *Australian Financial Review* article focuses on judicial criticism of the complainant's legal representatives, even though the headline referred to a different high-profile sexual harassment case. The article notes that, although the Federal Court found in favour of the complainant, she would not benefit from the award of damages. The article describes the respondent as 'the man accused of harassing' the complainant, even though the Federal Court had found that sexual harassment had occurred. The article details 'court rules' for the complainant's lower award of damages—noting that, if a party rejected a settlement offer and a lower amount was awarded in court, 'the party that made the offer is entitled to costs on an indemnity basis'. The article provides significant detail on the financial aspects of the rejected settlement offer, noting that the complainant had rejected an offer of $55,000 and claimed $450,000 in damages and that her own legal costs were $224,475.

The closing paragraphs of the article quote Justice Buchanan describing the case as 'financially devastating' for the complainant despite the court finding that she had been sexually harassed. The final paragraph refers to judicial dismissal of James Ashby's sexual harassment case against Peter Slipper, another high-profile case handled by Harmers.

'High-octane mix of media and money backfires in court'[36]

Legal implications

The *Australian Financial Review* article does not refer to the *Richardson v Oracle* case until halfway through the 'Hearsay' column, after describing the 'eye popping' sexual harassment cases that Harmers Workplace Lawyers had run against David Jones and Peter Slipper. The case is introduced as 'another serve' for the complainant's legal representatives in that it 'initially seemed like success, with an award of $18,000'.

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[35] Hannah Low 'Judge blasts Ashby's self-serving lawyers', *Australian Financial Review* 23 April 2013, 10.

[36] 'High-octane mix of media and money backfires in court', *Australian Financial Review*, Hearsay—Legal Affairs, 26 April 2013, 36.

The article provides more detail about the legal reasons for the low award and its impact on the complainant, again citing 'court rules' that 'a party … that has its settlement offer rejected' can claim costs on an indemnity basis from the time of rejection if the damages award is lower than the settlement offer.

The column concludes its discussion of the case by quoting judicial criticism of the complainant's legal representatives—that the outcome was 'disturbing' and the case conducted 'solely for the financial benefit of her lawyers.' The article does not refer to the harassing behaviour and only briefly mentioned the respondent.

Brief analytical summary of reportage

The reportage in this sample focuses on similar issues. All but one piece uses a legal perspective to examine the impact of the rejected settlement on the outcome of the process. The remaining piece focuses on the parties' evidence in court. The focus for most coverage is not on the behaviour or the complainant or respondent but on judicial criticism of the tactics of the complainant's legal representatives.

Shea v Energy Australia (TruEnergy) (2013)

'Energy firm sued over harassment'[37]

Portrayal of the complainant

The *Age* article focuses on the complainant's claim and the corporate culture of the respondent employer. The second paragraph outlines the complainant's case, that she was suing her former employer for unlawfully terminating her employment after she reported that she had been sexually harassed by colleague Kevin Holmes and complained about the 'sexual harassment culture' in her workplace.

Description of the behaviour

The article does not provide specific details of the alleged harassing behaviour. The article details the complainant's story of reporting the behaviour to the managing director and her employment being terminated after the company claimed her position was 'redundant in its restructure.' The article quotes the opening statement of the complainant's legal representative, which condemned the workplace culture of the respondent employer, where

[37] Jane Lee 'Energy firm sued over harassment' *The Age*, Business, 29 August 2013, 24.

‘staff—both men and women were sexually intimidated in the workplace, with the director of human resources shadowing managing director Mr McIndoe at a Christmas party’.

Portrayal of the respondent

The closing paragraphs of the article report the respondent employer’s denial that the company fostered a culture of sexual harassment and denial of the Christmas party incident. The article also reports the respondent employer’s legal representative saying that the complainant was terminated for ‘real and pressing business reasons’ and that she saw Mr Holmes as a professional rival.

‘Fired Energy Australia director “out for revenge”, court told’[38]

Portrayal of the complainant

The *Age* article focuses on attempts by the respondent employer to discredit the complainant in court. The second paragraph of the article outlines the complainant’s case in a similar way to the other *Age* article (described above)—that is, that she was suing the respondent employer for unlawfully terminating her employment after she reported sexual harassment allegations and complained about the workplace culture.

The closing paragraphs of the article report conflicting accounts of the alleged harassing behaviour, with the complainant claiming that the respondent had subjected her to unwanted touching, detailed as ‘touching her back, neck and thigh’ and the respondent claiming that he had put his arm around the complainant to comfort her.

Portrayal of the respondent

The article quotes the legal representative for the respondent employer describing the complainant as having an ulterior motive for bringing the action: to ‘damage and destroy’ the managing director after he terminated her employment. The quotes from Mr Bourke SC also link the case to the high-profile David Jones case. The article quotes Energy Australia claiming that the complainant’s employment had been terminated because of a ‘restructure’ but also suggesting ‘claims Ms Shea went to Sydney with a friend on the company’s expense without taking leave were also a factor in her termination.’ The article also quotes the complainant refuting these statements, including stating that she paid for her own tickets to Sydney to visit her ill husband in hospital.

[38] Jane Lee ‘Fired Energy Australia director “out for revenge”, Court told’ *The Age*, Business, 29 August 2013, 24.

‘Sacked Energy Australia executive accusing managing director of sexual harassment has “zero credibility” and a “liar”, court told’[39]

Description of the behaviour

The article includes a brief reference to the harassing behaviour but provides very little detail. The complainant ‘accused managing director Richard McIndoe of sexually harassing a younger female employee at a staff party’ and ‘alleged she herself was groped by former chief financial officer’.

Portrayal of the complainant

The *Herald Sun* article focuses on the respondent employer’s attempts to discredit the complainant in court. The second paragraph reports that the complainant ‘says she was sacked from her $500,000 a year corporate affairs director role last February because she made an allegation of sexual harassment’, and then follows this with a scathing quote from the respondent employer’s legal representative—that the complainant used her media expertise to make ‘juicy’ allegations that she knew would attract media attention.

Portrayal of the respondent employer

The article reports the respondent employer’s denials of the behaviour and includes a number of quotes from the respondent employer’s legal counsel describing the case as ‘fanciful’, ‘payback time’ and ‘in smithereens’.

‘I’m no sleaze, executive tells Energy Australia harassment trial’[40]

Portrayal of the respondent and respondent employer

The *Herald Sun* article includes a brief description of the alleged harassing behaviour but devotes more column space to the respondent’s and respondent employer’s denials and their account of events.

The article reports the respondent’s claim that it was the complainant who had behaved inappropriately by blurting out the word ‘sex’ in the car on the way to a bar, and that she had

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[39] David Hurley ‘Sacked Energy Australia executive accusing managing director of sexual harassment has “zero credibility” and a “liar”, court told’, *Herald Sun* (online at 7 October 2013) <http://www.heraldsun.com.au/news/law-order/sacked-energyaustralia-exThe ecutive-accusing-managing-director-of-sexual-harassment-has-8220zero-credibility8221-and-a-8220liar8221-court-told/story-fni0fee2-1226734217193>.

[40] David Hurley ‘I’m no sleaze, executive tells Energy Australia harassment trial’ *Herald Sun* (online at 5 September 2013) <http://www.heraldsun.com.au/news/law-order/i8217m-no-sleaze-executive-tells-energyaustralia-harassment-trial/story-fni0fee2-1226712402546>.

been drinking.[41] The article reports the respondent's view of the events in the Hong Kong bar, noting that he had been married for 19 years, that he had put his hand on the complainant's shoulder to comfort her when she talked about her husband's illness and that 'nothing untoward happened'.

The article concludes with witness testimony from the former head of human resources for the respondent employer that Mr Holmes was not a 'sleaze' and denying that he had followed the managing director around during an office Christmas party to monitor his behaviour.

'Former mistress in court during Energy Australia sexual harassment case'[42]

Portrayal of the complainant and respondent

The *Herald Sun* article focuses on a consensual affair between the managing director of the respondent employer and his 'mistress' rather than on the allegations of sexual harassment. The article reports that the complainant and the 'mistress' had once been best friends. The article refers to the complainant suing the respondent employer for wrongful dismissal and accusing the respondent of sexual harassment but does not provide any detail about the harassing behaviour.

The article devotes 12 of its 21 paragraphs to court evidence of the affair, including the managing director admitting to giving his 'mistress' a book of oral sex tips. The article concludes with the managing director denying that 'he condoned a "culture of sexual harassment" at the company.'

Brief analytical summary of reportage

All of the articles in the sample question the veracity of the complainant's view of events. There are conflicting accounts of what occurred and the complainant's motives. The coverage is dominated by the voice of the respondent or respondent's legal representative in opposing arguments. There is some purely 'entertainment' coverage in the reporting of the 'mistress's' evidence, though this may have also been a conflation of consensual sex and sexual harassment, where the harm from the sexual harassment is minimised in the article.

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[41] Ibid.

[42] David Hurley 'Former mistress in court during Energy Australia sexual harassment case' *Herald Sun* (online at 4 September 2013) < http://www.heraldsun.com.au/news/former-mistress-in-court-during-energyaustralia-sexual-harassment-case/story-fni0fiyv-1226710868841>.

Ewin v Vergara (2013)

'Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function'[43]

Legal implications

The *Courier-Mail* article provides extensive detail of the harassing behaviour. The second paragraph describes the award of damages as 'the highest ever awarded for sexual harassment.'

The article quotes the presiding judge's finding that, while the respondent was arrested for rape but never charged, he had engaged in 'unwelcome sexual intercourse' with the complainant. The article quotes the judge's reasons for finding the conduct unwelcome, noting the complainant was 'heavily intoxicated' and had previously 'repeatedly rejected her co-worker's sexual advances'. The article provides detailed and graphic descriptions of the conduct, including the complainant feeling 'intoxicated and physically sick', being unable to remember 'what happened for two hours after Mr Vergara held her against a bar wall' and waking the next day 'bleeding from her vagina, bruised, with whiplash, painful inner thighs and aching back, neck and shoulders.'

Portrayal of the complainant and respondent

The article quotes judicial commentary on the credibility of the parties, where the complainant was described as 'an honest person respectful of the truth' and the respondent 'an arrogant individual with little or no regard for the truth'. The article notes that the complainant was recently married and that the respondent was a 'married father'. The article concludes with details of the orders made in the case.[44]

'Payout awarded after work party sex'[45]

Legal implications

The *ninemsn.com* article focuses on the judicial ruling in the complainant's favour and the details of the harassing behaviour. The third and fourth paragraphs of the article note that the

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[43] Kay Dibben 'Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function' *The Courier-Mail* (online at 13 December 2013) <http://www.couriermail.com.au/news/woman-wins-record-near500000-sexual-harassment-payout-for-unwanted-sex-following-work-function/story-fnihsrk2-1226782122290>.

[44] Ibid.

[45] Erin Tennant 'Payout awarded over work party sex' *ninemsn.com* (online at 13 December 2013) <http://news.ninemsn.com.au/national/2013/12/13/05/16/payout-awarded-over-work-party-sex>.

respondent had been arrested but never charged with sexual assault and denied the allegations to police, and that four years had lapsed since the events of the case. The article did not include any detail about why the police decided not to charge the respondent with rape. This could possibly have been omitted because of the risk of a defamation lawsuit or to avoid any suggestion of sub judice contempt, but this is pure speculation that outside the scope of the current study. The article did not include any comment from the police. This article reports virtually the same information about the case as the *Courier-Mail* article 'Woman wins record near-$500,000 sexual harassment payout …'—including quotes from the presiding judge about the behaviour being unwelcome due to the complainant's intoxication and previous rejection of the respondent's advances.

Portrayal of the complainant and respondent

The article notes that the complainant was recently married and that the respondent was a 'married father' who wanted to have an affair. The article provides a similar description of the complainant's injuries. The article concludes with the judge's comments on the credibility of the parties.

'Unwanted sex costly'[46]

Legal implications

The *Courier-Mail* article also reports similar information about the case as the article 'Woman wins record near-$500,000 sexual harassment payout …'. The complainant is named in the second paragraph, which also details the significance of the award as the 'highest ever for sexual harassment'. The article quotes the presiding judge's finding that the behaviour was unwelcome due to the complainant's intoxication and previous rejection of the respondent's advances, and that the respondent should have understood that 'no meant no.' The article also noted that the respondent had been 'accused of rape, arrested but never charged'. The article also details the complainant's injuries.

'Australia: Contractor ordered to pay half a million dollars for sexual harassment'[47]

Legal implications

The *Mondaq* newswire article analyses the legal implications of the case. The article names

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[46] Kay Dibben 'Unwanted sex costly' *The Courier-Mail* 13 December 2013, 25.

[47] Adam Salter and Lisa Franzini 'Australia: Contractor ordered to pay half a million dollars for sexual harassment' *Mondaq.com* (online at 2 January 2014)

the complainant only in a brief citation of the case at the end. The harassing behaviour is not described in detail, referred to only as an ‘aggressive and persistent’ pursuit of the complainant and alleged sexual assault. The article does not describe the complainant’s response to the behaviour.

The second paragraph details the respondent’s arguments that he was not liable for breaches of the *Sex Discrimination Act 1984* (Cth) because he was a contractor and the alleged behaviour occurred after working hours. This paragraph also details the Court rejection of these arguments and conclusion that ‘the essential requirement to be satisfied in sexual harassment cases is a common workplace’ between the parties.

The article also provides a detailed description of the reasons for the award of damages, including the complainant’s post-traumatic stress disorder and ‘other psychiatric illness’, her resignation from her job, ‘the impact of the incident on her ability to work’ and the punitive deterrent effect of the damages. The article concludes with a summary of ‘takeaways’ from the case and its legal implications for employers.

‘Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!’[48]

Legal implications

This *Mondaq* article focuses on the legal implications of the case for employers. The article does not name the parties. The article refers to the harassing behaviour as ‘allegations’, even though the Federal Court found that the complainant had been sexually harassed. The behaviour is not described in detail and is referred to as ‘multiple instances of sexual harassment’ and being ‘forced to engage in sexual acts’ following a work function.

The article details the respondent’s arguments that he was not liable for sexual harassment because he was a contractor and the conduct did not occur at a workplace, and the Court’s rejection of these arguments.[49] The concluding paragraphs of the article outline the ‘lessons for employers’ from the case, including vicarious liability for the actions of contractors, that a

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<http://www.mondaq.com/australia/x/283816/employment+litigation+tribunals/Contractor+Ordered+To+Pay+Half+A+Million+Dollars+For+Sexual+Harassment> Business Briefing.

[48] Belinda Winter ‘Australia: Accountant ordered to pay $476,000 in damages for sexual harassment – a timely reminder for Christmas functions!’ *Mondaq.com* (online at 19 December 2013) <http://www.mondaq.com/australia/x/281662/Discrimination+Disability+Sexual+Harassment/Accountant+ordered+to+pay+476000+in+damages+for+sexual+harassment+a+timely+reminder+for+Christmas+functions>.

[49] Ibid.

‘workplace’ includes ‘areas associated with the workplace such as elevator wells, corridors and entrances’ and that an employer may be liable for the behaviour of employees and contractors during work functions.[50]

Brief analytical summary of reportage

All reportage is focused on the judicial voice, legal explanation for the substantial damages and implications concerning vicarious liability. Three of the articles in the sample quote the presiding judge, including reasons for the decision and the assessment of the parties’ credibility. These articles also provide detailed descriptions of the behaviour. Two articles in the sample analyse the judicial reasoning to extrapolate lessons for employers, including the application of the legislation to contractors and the judicial characterisation of a ‘workplace’.

Ramstrom v Baldino (2013)

‘Adelaide woman loses sexual harassment case’[51]

Description of the behaviour

The *AAP Australian National News Wire* article focuses on the complainant losing the sexual harassment case. The article describes the complainant’s claim in the second and third paragraphs. The second paragraph names the parties and states their ages, and reports that the complainant claimed that the respondent had sexually harassed her when she worked as his clerk between 2008 and 2010. The article quotes the complainant’s evidence to the Equal Opportunity Tribunal of the alleged harassing behaviour, including ‘salacious and disgusting comments’, touching her breasts when pretending to look at her necklace and being slapped on the bottom with a file.

Portrayal of the respondent

The closing paragraphs of the article focus on the respondent’s denial of the harassing behaviour and suggestion that the complainant once told him that she should have sued one of her former employers for sexual harassment to get ‘a lot of money.’ The last line of the article states that the claim has been dismissed.

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[50] Ibid.

[51] ‘Adelaide woman loses sexual harassment case’ *AAP Australian National News Wire* 20 December 2013.

‘Tribunal rules out harassment claims’[52]

Legal implications

The *ABC News* article was published before the sexual harassment case was dismissed. This article reports on the aspects of the sexual harassment complaint that the Tribunal declined to hear for procedural reasons, because only the complainant’s 2010 complaint was referred to it by the Equal Opportunity Commissioner.

Portrayal of the complainant

Most of the article focuses on the complainant’s view of events, with quotes from the complainant and her legal representative. This includes detailed descriptions of the alleged ‘regular sexual harassment’, including unwanted touching, the respondent repeatedly asking the complainant to join him in his hotel room for a drink and the respondent asking the complainant if he could watch her swim in her underwear.

The article reports the complainant as saying the respondent had apologised to her during mediation. The closing paragraphs suggest that the complainant might not be credible. The article quotes ‘lawyer Marie Shaw’ questioning the complainant, presumably while acting for the respondent, asking if she had changed her story and saying the complainant gave inconsistent dates in her evidence. The closing paragraph reports the complainant’s admission that she had once sent the respondent ‘a video of monkeys having sex’, which she now ‘regretted’.

‘Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal’[53]

Description of the behaviour

The *news.com.au* article focuses on the success and vindication of the respondent. The article describes the complainant’s claim in detail, including the alleged harassing behaviour and her response, the respondent making ‘lewd and sexual remarks’ about the complainant using a spa in her underwear, the complainant’s tongue piercing and the respondent attending an Italian nudist colony that the complainant found ‘disgusting and scary’, the respondent asking

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[52] Tom Fedorowytsch ‘Tribunal rules out harassment claims’ *ABC News* (online at 4 March 2013, updated 6 March 2013) < https://www.abc.net.au/news/2013-03-04/tribunal-rules-out-harassment-claims/4551560>.

[53] Sean Fewster, Chief Court Reporter ‘Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal’ *news.com.au* (online at 20 December 2013) < https://www.news.com.au/national/south-australia/former-magistrate-joseph-baldino-wins-sexual-harassment-case-in-equal-opportunity-tribunal/news-story/10c5ef560f0a00622736dbf60b3682ce>.

to borrow a pair of the complainant's stockings after they had been 'washed between the legs' and the respondent talking about spanking the complainant and groping her breast 'on the pretense of looking at her necklace.'

Legal implications and portrayal of the complainant

The article extensively quotes the Tribunal's findings that sexual harassment did not take place, that the Tribunal doubted the complainant's credibility and that she had 'twisted' the respondent's comments with 'sexual overtones'. The article details the Tribunal's assessment of the parties' credibility as witnesses. The respondent is described as a 'reliable witness.'[54] The complainant is described as not credible, 'emotional' when giving evidence and having 'trouble focusing on questions'.

The article quotes the Tribunal assessment that the alleged behaviour did not constitute conduct of a sexual nature, and that a reasonable person would not have anticipated that the complainant would have been offended, humiliated or intimidated. The article reports that the conduct that the respondent had admitted to, such as the 'spanking' comment, was not considered by the court to be sexual harassment. The article concludes with the vindicated respondent shaking hands with his solicitor.

'BALDINO TRIAL—Clerk's trauma real, court hears'[55]

Portrayal of the complainant

The *Advertiser* article focuses on the complainant's response to harassing behaviour as conveyed through 'expert' evidence. The article quotes the complainant's psychiatrist, who corroborated the sexual harassment claim and said she had 'ongoing physical incapacity' from being 'harassed by someone who had "complete power"' over her.

Description of the behaviour

The article does not provide a detailed description of the harassing behaviour or report the respondent's view of events. The article concludes with a summary of the complainant's sexual harassment claim.

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[54] Ibid.

[55] Sean Fewster, Chief Court Reporter 'BALDINO TRIAL – Clerk's trauma real, court hears' *The Advertiser (Adelaide)* 9 March 2013, 33.

‘Court clerk’s sex claims too late’[56]

Legal implications

The *Advertiser* article focuses on the Tribunal procedural rejection of some of the complainant’s sexual harassment claims. The second paragraph of the article explains the reasons for the Tribunal rejecting the claims: because of ‘a deadline built into state law’, where ‘victims must file within six months of inappropriate conduct’. The combined effect of the headline and lead is arguably misleading reporting, giving the impression that the complainant’s claims were rejected because they were not sexual harassment, rather than because she missed a statutory deadline.

Description of the behaviour

The article provides a detailed description of the alleged harassment from the complainant’s court documents, including the respondent making inappropriate comments after watching pornographic DVDs as part of a case. The article reports submissions from the respondent’s legal representative that only the 2010 allegations should be considered, and that ‘the Tribunal agreed with Mr Baldino’s lawyers’.

Brief analytical summary of reportage

This is an interesting matter because, unlike in many of the other cases in the sample, the complainant did not succeed in the final hearing. Different articles explain the failure differently, although most of them focus on the complainant’s incredibility as a witness. The complainant’s incredibility is featured in coverage of a directions hearing, at which the Tribunal decided which claims it was able to hear, and coverage of the final hearing. The articles use the legal voice by quoting the presiding judge to comment on the complainant’s lack of credibility and praise the credibility of the respondent. The complainant’s voice is heard through extracts from her court documents and through her psychiatrist.

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[56] Sean Fewster, Chief Court Reporter ‘Court clerk’s sex claims “too late”’ *The Advertiser (Adelaide)* 5 March 2013, 14.

Richardson v Oracle appeal (2014)

'Former Oracle employee sexually harassed by manager wins increased payout on appeal'[57]

Description of the behaviour

The *ABC News* article focuses on the complainant's successful appeal of the original award of damages in her sexual harassment case. The article does not describe the harassing behaviour in detail, summarising the conduct as '11 incidents starting from the time of her first meeting with Mr Tucker in 2008', which 'included humiliating slurs and a barrage of sexual advances.'

Legal implications

The article describes the legal arguments made by the complainant's lawyers, including 'various factual and legal errors in the judgement' and the complainant being 'entitled to more money' due to 'what she had been through' and 'potential loss of income'. The article also reports the complainant's lawyers' submission that the respondent employer did not adequately address the sexual harassment, the complainant was forced to keep working with the respondent, the investigation into the behaviour was 'not handled properly' and the complainant 'resigned because of her poor health and a belief her reputation was damaged.'

The closing paragraphs quote the appeal decision, which stated that the trial judge had erred in 'not finding the necessary causal link between Mr Tucker's unlawful conduct and Ms Richardson's decision to leave Oracle'.

'IT executive Rebecca Richardson's sexual harassment win to "rock employers"'[58]

Portrayal of the complainant

The article describes the harassing behaviour in detail, including the respondent asking the complainant out on dates 'which she rebuffed strongly' and making sexual comments about the complainant's 'legs in that skirt' during a meeting.

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[57] Jamelle Wells, Court Reporter 'Former Oracle employee sexually harassed by manager wins increased payout on appeal' *ABC News* (online at 15 July 2014) <http://www.abc.net.au/news/2014-07-15/rebecca-richardson-wins-increased-harassment-payout-from-oracle/5597738>.

[58] Markus Manheim 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"' *The Canberra Times* 16 July 2014, 5.

The article notes that the complainant reported the harassing behaviour to the respondent employer, who gave the respondent 'a "first and final warning"'.[59] The article also reports that the respondent apologised to the complainant for what he thought was light-hearted banter.

Legal implications

The *Canberra Times* article focuses on the negative legal implications of the decision for employers. The article describes the new award of damages as 'more than seven times the amount a judge originally awarded last year.' The article describes the decision and its impact on the respondent employer, who now has to pay the complainant's legal costs, 'which amounted to hundreds of thousands of dollars.'

The article describes the original judgement as virtually exonerating the respondent employer and downplaying the effect of the behaviour on the complainant, where the court 'absolved Oracle of most of the responsibility for the harassment', noted the complainant had left her job 'voluntarily' and 'was skeptical of her claim the harassment had damaged her ability to earn income.'

The article provides an extract of the appeal decision, including judicial comments that the previous award 'was manifestly inadequate' and 'out of step with general standards prevailing in the community'[60] on the loss and damage of the kind Ms Richardson sustained.

The closing paragraphs of the article report an 'expert' commentary on the case from Bradley Allen Love employment law specialist John Wilson. Mr Wilson described the case as having 'wide repercussions' for employers and said that 'employers were still liable for sexual harassment in their workplaces even if they were unaware of it', erroneously suggesting that the case lowered the evidentiary bar. The article also quotes Mr Wilson as saying that potential complainants only had to prove 'hurt feelings, distress, dislocation or loss of enjoyment in life as a result, and can produce medical or other cogent evidence of that' rather than evidence of an ongoing psychological injury to be successful.

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[59] Ibid.

[60] Ibid.

‘Oracle ordered to pay $130,000 in sexual harassment case’[61]

Legal implications

The *Australian Financial Review* article focuses on the reasons for the complainant’s successful appeal. The second paragraph of the article notes the legal implications of the case, because the Court had considered the damages awarded in sexual harassment cases to be well below those awarded ‘in other areas like workplace bullying, defamation and injuries’.

Description of the behaviour and legal implications

The article describes the harassing behaviour as ‘inappropriate comments’ and reports the respondent’s denial that he sexually harassed the complainant and his description of the comments he made as ‘innocuous’. The article quotes the appeal decision, which found the complainant credible and increased the award of damages due to the complainant’s ‘psychological and reputational damage’ and the role of the case in ‘diminishing the sexual relationship with her partner’. The decision also disputed the original finding that the complainant had not left her employment due to sexual harassment.

The article quotes the Court’s dismissal of arguments from the respondent employer that the harassing behaviour was not as ‘serious’ as other cases where awards of damages had been higher, saying the Court noted ‘earlier awards had been conservative’ due to ‘uncertainty about how to compensate sexual harassment victims.’

The closing paragraph quotes the judgement, which described the original award as inadequate and out of step with community standards on the value of the loss and damage experienced by people like the complainant. The final line of the article notes that the respondent employer had declined to comment.

‘How much is a sexual harassment claim actually worth?’[62]

Legal implications

The *Australian Financial Review* article focuses on the increase in the award of damages in the appeal decision. While much of the article discusses another high-profile sexual

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[61] Paul Smith ‘Oracle ordered to pay $130,000 in sexual harassment case’ *Australian Financial Review* (online at 15 July 2014) < http://www.afr.com/technology/enterprise-it/oracle-ordered-to-pay-130000-in-sexual-harassment-case-20140715-jik3s>.

[62] Misa Han ‘How much is a sexual harassment claim actually worth?’ *Australian Financial Review* 10 October 2014, 32.

harassment case, *Ewin v Vergara*, it also refers to the Oracle appeal as an additional example of a higher award of damages.

The article does not provide details of the harassing behaviour or the complainant's response to the harassment. The article refers to the complainant accruing 'more than $200,000 in legal fees' to her legal representatives prior to the hearing and commented that, without the increased award of damages, she would have been 'left out of pocket'.

The concluding paragraphs offer more general commentary on sexual harassment cases—including noting that compensation amounts were 'unpredictable', that in another case the complainant was awarded $10,000 and that a minority of sexual harassment complaints to the Australian Human Rights Commission progressed to court.

'Michael Harmer: renegade reformer'

Legal implications

The *Australian Financial Review* article is a profile of the complainant's lawyer, Michael Harmer, and his work on high-profile sexual harassment cases. He is described as a 'lawyer and ardent feminist'. The article quotes Mr Harmer describing his firm as 'renegade' and viewed as 'feral ankle-biters' but devoted to its clients. The article describes the Oracle appeal as the law firm's 'most legally significant win', where the firm 'convinced the full Federal Court to put a much higher price on damages for a woman's pain and suffering' and that 'lawyers' anticipated the case encouraging more women to make sexual harassment complaints.

The article describes the law firm as changing the landscape for sexual harassment law, with its 'eye watering' settlements' being 'a far cry from the damages of $12,000 and $20,000 that courts have traditionally awarded in sexual harassment matters'. The article describes the law firm's handling of the high-profile David Jones case as successful and leading to 'a major spike in sexual harassment complaints'. The article also describes the firm's less successful *Ashby v Slipper* case and reports criticism of the firm's tactics from other lawyers. The closing paragraph hints at future 'explosive' cases and more media attention.

Brief analytical summary of reportage

The reportage, as expected in an appeal matter, is mostly written from the legal perspective explaining how the damages had been greatly increased. Accordingly, several journalists look at how the law measures harm in sexual harassment matters. This includes commentary on

how courts have awarded damages in other sexual harassment matters, a profile of the complainant's legal representative and reporting on judicial comments about community expectations of compensation for sexual harassment.

Ewin v Vergara appeal (2014)

'Appeal rejected: woman awarded $470,000 payout over unwanted drunken sexual encounter'[63]

Legal implications

The *Herald Sun* article focuses on the respondent's unsuccessful appeal of the original decision in *Ewin v Vergara*.

Portrayal of the complainant and description of the behaviour

The article reports the harassing behaviour in graphic detail, initially referring to a 'drunken sexual encounter after a work function', and then describing the injuries the complainant received as a result of the alleged behaviour. The article notes that the complainant 'accused' the respondent of rape and reported the incident to police and that the respondent 'admitted there was sexual activity, kissing, cuddling, caressing and "consensual sex'', but denied intercourse.' The article quotes the appeal decision, which found that the respondent's behaviour was unwelcome because the complainant 'rejected outright' the respondent's advances.

The article reports the complainant's response to the harassing behaviour, quoting her as saying she felt 'frightened, shaken and bewildered'. The closing paragraphs of the article report the arguments the respondent made in court and the court dismissal of his appeal, including rejection of his claims that the complainant was the one who made sexual advances.

'Harassment can happen beyond office'[64]

Legal implications

The *Age* article describes the legal implications of the case for employers. The article describes the case as 'one of Australia's largest-ever sexual harassment payouts'. The article does not describe the harassing behaviour in detail and refers to the conduct as a 'drunken

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[63] Shannon Deery 'Appeal rejected: Woman awarded $470,000 over unwanted drunken sexual encounter' *Herald Sun* (online at 12 August 2014) < http://www.heraldsun.com.au/news/law-order/appeal-rejected-woman-awarded-470000-payout-over-unwanted-drunken-sexual-encounter/news-story/1f3a4e9fe42b62170bd0ef32dcef72e4>.

[64] Nick Toscano 'Harassment can happen beyond office' *The Age* 13 August 2014, 2.

sexual encounter after a work function'. The article notes that the complainant had 'accused' the respondent of rape and that the respondent was 'not charged by police'.

The article quotes the appeal decision, which ruled that the venue did fit the definition of a 'workplace' because the parties had 'gone there to talk about what happened at the office'.

The article includes commentary about the case from two independent experts, then Sex Discrimination Commissioner Liz Broderick and Kerryn Tredwell, a partner at law firm Hall & Wilcox. The article quotes Commissioner Broderick, who describes the case as an important reminder for employers to take sexual harassment seriously and train staff because 'sexual harassment could occur outside the physical workplace'. Ms Tredwell describes the case as significant because employers could be liable for the behaviour of contractors as well as employees and 'showed that the workplace "could be anywhere you take your laptop"'.

Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police'[65]

Description of the behaviour

The *ABC News* article focuses on the appeal decision and the complainant's criticism of the way Victoria Police investigated her sexual assault complaint. The article does not describe the harassing behaviour in detail, referring to a 'work party' where the complainant had 'sex without consent' with the respondent.

Legal implications

The article reports that the court found the complainant 'believed her drink was spiked, but could not find any evidence to support that.' It does not say the complainant believed that the respondent spiked her drink.

The article quotes the original decision, where the trial judge 'ruled Mr Vergara should have understood "no meant no" and ordered him to contribute to a record sexual harassment payout worth nearly $500,000'. The article notes that the original decision was upheld on appeal and that the respondent was 'never charged over the incident'.

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[65] 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police' *ABC News* (online at 13 August 2014) < http://www.abc.net.au/news/2014-08-12/sexual-harassment-victim-has-record-payout-upheld/5665514>.

Portrayal of the parties

The majority of the article is made up of quotes from the complainant, who was ‘relieved at winning the civil case, but disappointed with the criminal investigation.’ This includes alleging that Victoria Police had a sexist and victim-blaming attitude.

The closing paragraphs quote the respondent’s statement that he felt ‘aggrieved’ by the outcome, that he was considering a further appeal and that it was inappropriate for him to comment at this time. The final line notes that *ABC News* contacted Victoria Police for comment.

‘Record sexual harassment case upheld’[66]

Description of the behaviour

The *Sky News* article focuses on the Federal Court upholding the original Court decision on appeal. The article does not describe the harassing behaviour in detail, referring to ‘unwanted sex’, ‘sexual remarks’ and ‘unwanted sexual conduct’.

Portrayal of the parties

The article notes that the respondent appealed the original decision on ‘a number of grounds’ and that the Federal Court dismissed his appeal. The article reports that the complainant had no memory of the incident due to her intoxication. The article quotes the complainant’s description of her response to the harassing behaviour, including not working since November 2010, poor health and losing her home.

The article quotes both parties’ reactions to the Court decision. It quotes the complainant expressing support for the decision, saying it had ‘vindicated a very long five year fight for justice’.

The article notes that the respondent ‘has never been charged with any sexual offence in relation to Ms Ewin though the matter was reported to police’. The article quotes the respondent’s lawyer describing the impact of the decision as ‘financially crippling for him and his family’. The closing paragraphs of the article report the complainant’s dissatisfaction with the handling of her police complaint and calling for an independent investigation.

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[66] Caitlin Guilfoyle ‘Record sexual harassment case upheld’ *Sky News* (online at 12 August 2014) <http://www.skynews.com.au/news/national/2014/08/12/record-sexual-harassment-case-upheld.html>.

‘Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for “arduous” legal journey’[67]

Description of the behaviour

The *ABC News* article focuses on the complainant’s story. It quotes the complainant’s exclusive interview with the ABC TV *7.30* program. The article quotes the complainant’s description of the harassing behaviour in confronting detail but censors the swearing, including ‘vulgar statements’ from the respondent—including ‘he has a big d*** and he’s going to f*** me over my desk with it’, that ‘he fantasised about what he was going to do to me over my desk and masturbated in the office shower as well as in his own shower at home’. The article reports the complainant’s response to the harassment, that she ‘firmly rejected the married man’s advances and told her boss’ but the respondent ‘remained on her team’ and the complainant ‘was essentially told to “get on with it”’. The article quotes the complainant’s description of her injuries and inability to remember what happened.

Portrayal of the complainant

Much of the article focuses on the complainant’s criticism of the way Victoria Police handled her complaint of sexual assault. The article describes the forensic evidence found by police, including confirming that the respondent’s swipe card was used to enter his office at the time the complainant blacked out, establishing the complainant was in the office at the time and finding the respondent’s semen on the complainant’s shoes.

The article notes that the Federal Court found there was sufficient evidence to find that the respondent sexually harassed the complainant, but that Victoria Police declined to press charges of rape or sexual assault. The article quotes the ‘policeman of 20 years turned-lawyer’ the complainant hired to review her case, who described the original police report as ‘trying to disprove more than prove the matter’ and commented that ‘the police will probably prosecute on cases that are maybe less than what happened’ to the complainant. The article quotes the complainant’s description of dismissive attitudes from Victoria Police when she made a complaint to the Director of Public Prosecutions about the lack of criminal charges. The article also quotes the complainant’s response to her case being upheld on appeal, which she describes as a win that vindicated her ‘decision to fight’. She also described the toll of

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[67] Madeleine Morris ‘Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for “arduous” legal journey’ *ABC News* (online at 14 August 2014, updated 15 August 2014) < http://www.abc.net.au/news/2014-08-14/victim-jemma-ewin-says-record-compensation-is-vindication/5671498>.

fighting the case on her life and questioned the Victoria Police decision not to charge the respondent.

The article notes that Victoria Police told the *7.30* program that an internal investigation would be conducted in response to the attention the case had received. The article quotes an external expert on his views of the case—that is, 'leading sexual harassment lawyer' Michael Harmer said the case was one where 'the civil system has stepped up' and a 'major deterrent' for harassers and an inspiration for other women.

The concluding paragraphs refer to the respondent considering a further appeal and declining to comment, and the complainant describing the decision as vindicating and saying that she hoped to put the experience behind her.

Brief analytical summary of reportage

Again, likely due to it being an appeal, the focus of the stories is more clinical than in other matters. While some of the coverage does quote expert views on the legal implications of the outcome and the Court's decision to uphold the original decision, the dominant voices in the coverage are those of the parties. This includes the complainant's issues with the original Victoria Police investigation and her calls for an inquiry and, to a lesser extent, the financial impact on the respondent and his considering a further appeal.

Mathews v Winslow Constructors (2015)

'1.3 mil for daily sex harassment'[68]

Description of the behaviour

The *Age* article provides a detailed report on the case, including the legal reasons for the award of damages and the harassing behaviour. The second paragraph summarises the case and explains the reasons for the high award of damages for 'economic loss, pain and suffering'. The article notes that this award was 'believed to be one of the largest of its kind in Victoria.' The article describes the harassing behaviour in graphic detail, including rape threats and unwanted touching but censors the offensive language:

> Another permanent staff member repeatedly called her a 'spastic', 'f--king useless' and a 'bimbo'.

[68] Rania Spooner and Cameron Houston '$1.3 mil for daily sex harassment' *The Age* 18 December 2015, 2.

'I will take you into the container and f--k you,' another co-worker threatened.

The article describes the effect of the harassing behaviour on the complainant's mental health 'including depression and post traumatic stress disorder' and quotes the complainant as saying her employer 'ignored or laughed off' her cries for help. The article quotes the complainant's reasons for not reporting the harassing behaviour to police—that she was afraid.

Legal implications

The closing paragraph quotes the complainant's lawyer's comments on the case and its implications for employers, saying that the case 'sent a strong message' that employers 'must have a zero tolerance approach' to bullying and sexual harassment.

Portrayal of the respondent

The article also reports attempts by the respondent to discredit the complainant by showing a video of her 'walking with her mother and smiling', which were dismissed by the Court as having 'no material impact' on the complainant's credibility as a witness or the 'nature and extent of her psychiatric illness'.

The second-to-last paragraph quotes the respondent employer's website, which presented a different picture of the company from the case. The website 'claims its values include "hard work, care, self-belief, innovation, discipline, safety, productivity and team work".

'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million'[69]

Description of the behaviour and portrayal of the complainant

The *ABC News* article describes the harassing behaviour in graphic detail, including that the complainant was 'threatened with rape', touched inappropriately and mocked about 'sex toys and sexual acts'. The article reports the complainant's evidence that 'when she tried to report the abuse to her employers, nothing was done'. The closing paragraph of the article quotes the complainant, who 'advised anyone who faced workplace harassment to take action'.

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[69] Freya Michie 'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million' *ABC News* (online at 17 December 2015, updated 18 December 2015) <http://www.abc.net.au/news/2015-12-17/female-construction-worker-awarded-1.3m-sexual-harassment/7039062>.

Legal implications

The article quotes the complainant's legal representative, who commented on the implications of the case for employers as a 'strong message' that they must have 'zero tolerance' of bullying and sexual harassment. The article quotes the presiding judge describing the complainant as a 'good worker' who now suffers from a chronic psychiatric illness and is unlikely to work again.

'Melbourne sex harassment payout: worker Kate Mathews wins $1.30 million in personal injury damages'[70]

Description of the behaviour

The *Herald Sun* article focuses on the complainant's response to sexual harassment and the respondent employer not taking action to address it. The article describes the harassing behaviour as 'shocking treatment' and an 'appalling litany of sexual insults and appalling conduct' including unwanted touching, being shown pornographic material and 'called "useless", a "spastic" and a "bimbo" while co-workers also grabbed her and pretended to perform sex acts on her.'

Portrayal of the complainant

The article quotes the complainant's evidence that, when she reported the behaviour to the respondent employer, she was 'laughed at' and her complaints were ignored. The article reports that the complainant 'now suffers from a chronic psychiatric illness', including 'bipolar disorder, post-traumatic stress disorder and anxiety and depression'. The article briefly explains the reasons for the high award of damages as being for 'past and future economic loss and for pain and suffering.'

The article reports the respondent's attempts to discredit the complainant with video evidence and the Court's dismissal of this evidence as showing 'little about her mental state'. The closing paragraphs quote the complainant's legal representative describing the legal significance of the case as 'putting all employers on notice' that 'you can't sit on your hands' if an employee is being harassed and bullied.

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[70] Ian Royall 'Melbourne sex harassment payout: Worker Kate Mathews wins $1.3 million in personal injury damages' *Herald Sun* (online at 18 December 2015) <http://www.heraldsun.com.au/business/work/melbourne-sex-harassment-payout-worker-kate-mathews-wins-13-million-in-personal-injury-damages/news-story/e907ad0aa910fb1cce2d74c8a921e2c9>.

‘Female worker awarded million dollar payout over years of “hardcore filth” at Melbourne construction company’[71]

Description of the behaviour

The *Yahoo News* article focuses on the harassing behaviour and its effect on the complainant. The second paragraph of the article outlines the award of damages. The article outlines the harassing behaviour in detail, but censors the offensive language:

> One colleague told her: ‘I had a great w--k over you last night.’
>
> On a different occasion a worker told Ms Mathews he would ‘take [her] into the container and f--k [her].’

The article reports in detail on the complainant’s attempts to tell the respondent employer about the behaviour and her employer’s response—that ‘the employee Ms Mathews believed responsible for human resources’ asked her out for a drink to discuss it. The article also reports that, on another occasion, the complainant’s request to work with a different team was ‘harshly dismissed’.

The article reports that the harassing behaviour had left the complainant ‘suffering bipolar disorder and post-traumatic stress disorder, as well as serious anxiety and depression’.

Legal implications

The article quotes the complainant saying the case was ‘not about the money’ and encouraging victims of sexual harassment to come forward. The article quotes the complainant’s legal representative (though not explicitly identified as such) saying that the case put employers on notice to make sure their workers were safe. The closing paragraphs quote the judgement, including the judge’s findings that the complainant was unlikely to ever work again, and the judge dismissing video evidence from the respondent that attempted to discredit the complainant.

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[71] Ben Brennan ‘Female worker awarded million dollar payout over years of ‘hardcore filth’ at Melbourne construction company’ *Yahoo News* (online at 18 December 2015) <https://au.news.yahoo.com/vic/a/30398737/female-worker-kate-mathews-awarded-million-dollar-payout-by-victorias-supreme-court-over-years-of-sexual-harassment-rape-threat-at-winslow-constructors-in-melbourne/>

‘Bullied Vic worker receives $1.3m payout’[72]

Description of the behaviour

This *Yahoo News* article focuses on the complainant’s story. It quotes the judge describing the effect of the harassing behaviour on the complainant, noting that she was unlikely to ever work again. The harassing behaviour is described in detail, with censorship of ‘inappropriate’ language:

> Others told her that ‘anything that bleeds once a month should be shot’, showed her pornography and told her ‘you have nice t----’.

The article includes details of the complainant’s response to the harassment and her reporting the rape threat to the employer, who laughed it off. The article notes that the complainant was awarded $1.3 million in damages and then details the Court’s reasoning for the award, including findings that it was unlikely that the complainant would ever work again, evidence of psychological conditions ‘including bipolar disorder, post-traumatic stress disorder (PTSD) and severe anxiety and depression’. The closing paragraphs of the article quote the complainant’s lawyer, who said that the complainant was ‘subjected to behaviour that no one else should ever have to endure’ and that it was ‘all the more shocking’ because it happened ‘under her employer’s nose’.

Brief analytical summary of reportage

All of the news stories are presented from the complainant’s perspective. In each, the journalist describes the ongoing harassment in detail and its legacy of psychiatric disorders. The legal voice is heard in quotes from the complainant’s legal team about the case putting employers on notice. While the coverage does refer to the size of the award of damages, the reportage also provides contextual explanations for the large compensation amount, including judicial commentary.

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[72] Melissa Meehan ‘Bullied Vic worker receives $1.3m payout’ *Yahoo News* (online at 17 December 2015) <https://au.news.yahoo.com/bullied-vic-worker-gets-more-than-1m-30390910.html>.

Dr Tan v Royal Australasian College of Surgeons (2015)

‘Victim of surgeon’s harassment speaks out: “It’s not going to go away”’[73]

Portrayal of the complainant

The *Sydney Morning Herald* article focuses on the complainant’s story. The complainant is described as ‘the woman at the centre’ of Dr McMullin’s controversial statement that ‘female doctors would be better off giving into their male colleagues’ sexual advances rather than complaining’.

The article quotes the complainant saying she felt she had been punished professionally for speaking up about sexual harassment. It concludes with the complainant saying that ‘while she was initially shocked by Dr McMullin’s comments’ she was pleased ‘other female surgeons supported her point that sexism and bullying were rife and occurred within a culture of fearful silence.’

Portrayal of the respondent employer

The article positions the medical profession as a toxic employer, where ‘sexism, harassment and bullying are rife among surgeons’ and where those who speak up are punished. The article quotes the complainant’s description of her workplace as an ‘Anglo-Saxon old boys’ club’ and her call for the Royal Australasian College of Surgeons to ‘create an independent body to hear complaints about misconduct and demonstrate that complainants will be listened to and protected’.

Description of the behaviour

The article quotes the complainant’s account of the harassing behaviour and repercussions on her career, where after reporting that Mr Xenos ‘sexually assaulted her one night in 2006 by kissing her, feeling her breast and propositioning her for sex’ she experienced retaliation through ‘a concerted campaign by him and his peers to undermine her credibility’, including a delay in ‘awarding her a fellowship’ while complaints about her work performance were investigated.

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[73] Julia Medew ‘Victim of surgeon’s sexual harassment speaks out: “It’s not going to go away”’ *Sydney Morning Herald* 12 March 2015, 1.

Portrayal of the respondent

The article notes that, despite the success of the complainant's sexual harassment case, Mr Xenos was still employed at Monash Medical Centre:

> On Wednesday, a spokesman for Monash Health said after taking into account his 'exemplary record as an employee', he was given a formal warning that any future, significant misconduct would have serious consequences for him and was not allowed to continue supervising trainees.

Legal implications

The article describes the complainant's success in the Victoria Civil and Administrative Tribunal, which ordered Mr Xenos to pay the complainant $100,000 in damages and found that he 'deliberately and falsely denied the harassment' by 'exaggerating' when the complainant's work was 'sub-standard' and smearing her character.

'Neurosurgeon case is a real headache'[74]

Portrayal of the respondent employer

The *Daily Telegraph* opinion piece defends the surgical profession against criticisms of sexism. The second paragraph of the article introduces the complainant's case.[75] The article describes the discussion of the case as 'tossing a grenade' and cautions that the surgical profession should be treated with respect because it requires a 'gruelling apprenticeship', where character is tested and true selves are revealed.

The closing paragraphs of the article defend the surgical profession and introduce an additional 'attack' by the author on any suggestion that the profession support more flexible work practices. The article concludes that any critique of sexism in the medical profession could actually put lives at risk:

> Clearly, the surgical training system which has served Australians so well must be destroyed to advance the causes of gender feminism. Just pray you don't get a brain tumour …

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[74] Miranda Devine 'Neurosurgeon case is a real headache' *The Daily Telegraph* (online at 15 March 2015) < http://www.dailytelegraph.com.au/news/opinion/miranda-devine-neurosurgeon-case-is-a-real-headache/news-story/b4a78194e688b5fd42058433193l3ff0#load-story-comments>.

[75] Ibid. This bizarre tautology is apparently an intertextual reference to fellow shock jock Alan Jones.

Legal implications and portrayal of the complainant

The article summarises the case as 'her word against his' and noted that the Judge found Dr Tan 'a more credible witness'. The article details the attacks on the complainant's character in the case, despite the Tribunal finding in her favour:

> The court was told one [senior surgeon] wrote that she was the 'most difficult' trainee he had ever encountered. The other said she was a source of 'tension, dissatisfaction and friction'.

This suggests that the complainant was not credible, even though she was successful in her case.

'Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals'[76]

Portrayal of the complainant

The *Sydney Morning Herald* article positions the complainant's case as triggering an inquiry into the surgical profession.

Portrayal of the respondent employer

While the inquiry is positioned as a response to the complainant's case, the article also reports criticism of her comments, with the President of the Australasian College of Surgeons saying 'it was "a bit rich" to describe the college as an "Anglo-Saxon old boys' club"', but that 'work was underway to examine why female trainees had dropped out of the training program in the past'. This suggests a focus on the sexism aspect of Dr Tan's criticism but not the racism aspect.

Legal and policy implications

The article does not describe the complainant's case in detail but does refer to the comments on her case made by Dr McMullin and summarises the complainant's concerns about professional repercussions.

The article provides a detailed description of the process for the inquiry. It concludes with comments on the issue from then federal Minister for Health Sussan Ley, who says that it is

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[76] Julia Medew and Craig Butt 'Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals' *Sydney Morning Herald* (online at 12 March 2015) <http://www.smh.com.au/national/health/royal-australasian-college-of-surgeons-appoints-experts-to-review-bullying-harassment-in-australian-hospitals-20150312-142nao.html#ixzz48cTjJuGV>.

the responsibility of the medical profession, and not the government, to address bullying attitudes and behaviours.

‘Dr Caroline Tan speaks out about sexism in Australian hospitals’[77]

Portrayal of the complainant

The *Sydney Morning Herald* article focuses on the complainant’s story of sexual harassment and employment discrimination. The article refers to Dr McMullin’s comments about the complainant, which ‘used Dr Tan as an example of the consequences of speaking out against workplace sexism and harassment’. The article quotes the complainant as saying, ‘sexism and bullying are rife’ in the surgical profession and ‘those who try to expose it are punished.’

The article also quotes the complainant as saying she had no regrets about rejecting her colleague’s advance and pursuing the complaint in a Tribunal for ‘abuse of his power.’ The article quotes the complainant describing her profession as having a ‘fearful culture of silence’ and calling for an inquiry into the treatment of whistleblowers.

The closing paragraphs quote the complainant’s description of the effect of the case on her professional life. She said that, while she ‘cannot prove it’, she believed ‘she was shunned by other surgeons and overlooked for many positions’. The final paragraph of the article notes that the surgeon who was found to have harassed the complainant is still working at the same medical centre.

‘“Endemic bullying”: health system failed doctors and nurses, says Auditor-General’s report’[78]

Description of the behaviour

The *Age* article focuses on the findings of a report into the health sector. The second paragraph of the article reports a shocking indictment on the health system, described as ‘widespread bullying’ and ‘a culture of abuse’. The article links this finding to previous reports of sexual harassment where ‘women trainees and junior surgeons felt obliged to give supervisors sexual favours for the sake of their careers’.

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[77] Julia Medew ‘Dr Caroline Tan speaks out about sexism in Australian hospitals’ *Sydney Morning Herald* ‘Daily Life’ (online at 12 March 2015) < http://www.dailylife.com.au/dl-people/interviews/dr-caroline-tan-speaks-out-about-sexism-in-australian-hospitals-20150311-141peb.html>.

[78] Rania Spooner ‘“Endemic bullying”: Health system failed doctors and nurses, says Auditor-General’s report’ *The Age* (online at 23 March 2016) < http://www.theage.com.au/victoria/endemic-bullying-how-the-health-system-failed-our-doctors-and-nurses-20160323-gnp6od.html#ixzz48cX2Rf2B>.

The closing paragraphs of the article quote the health minister calling for a change in workplace culture to stamp out bullying.

Portrayal of the complainant

Two paragraphs in the 789-word article refer expressly to the complainant's case. The article refers to the comments from Dr McMullin about professional repercussions for speaking out about sexual harassment. The article then briefly summarises the complainant's comments to the media about her case, where she 'was overlooked for positions in at least eight public and private hospitals after she spoke out about being sexually assaulted by a senior colleague'.

Brief analytical summary of reportage

The news stories are mostly complainant-focused. One story does provide the view of the Royal Australasian College of Surgeons. The op-ed piece attempts to position the complainant as lacking credibility by quoting the evidence that was led against her and in support of the alleged harasser during the original Tribunal case, even though the article acknowledges that the complainant was found more credible by the Tribunal. The coverage does not feature the voice of the alleged harasser.

Marks v Colliers International (2016)

'"That's the girl you sold me": Colliers harassment case'[79]

Description of the behaviour

The *Age* article provides a detailed description of the alleged harassing behaviour, extracted from the complainant's court documents. The description includes that the respondent 'approached Ms Marks from behind, grabbed and twisted her head and tried to push her face into his crotch.' These documents also explain the headline:

> When Ms Marks cut her hair into a short "bob" style, Mr Unwin allegedly criticised her new appearance and compared it to a photograph of her with long hair, saying words to the effect of "that's the girl you sold me on in your interviews … that's what I want".

[79] Patrick Hatch '"That's the girl you sold me": Colliers harassment case' *The Age* 16 October 2016, 3.

The final paragraph of the article outlines the complainant's reasons for not reporting the behaviour internally—she did not report it to human resources because she had 'seen it repeatedly fail to deal with sensitive information properly'.

The article uses some guarded language when reporting on the alleged harassing behaviour, with a single sentence using the phrase 'according to a lawsuit' and the word 'allegedly'.

Portrayal of the respondent employer

A single paragraph in the middle of the article presents the view of the respondent employer, who was 'unable to confirm if mediation would proceed' but said that Colliers 'took the allegations seriously' and would 'vigorously defend them'.

'Colliers appointment'[80]

Portrayal of the respondent

As discussed in chapter 7, this *Australian Financial Review* article devotes a single line to the case, naming the alleged perpetrator as someone who 'left after a sexual harassment case'. The article does not name the complainant or provide any detail of the alleged harassment.

'Colliers agrees to negotiate over sexual harassment'[81]

Legal implications

The *Australian Financial Review* article speculates on the progress of the case. Despite the headline, the article reports different accounts of whether the parties had agreed to mediation—with the complainant's solicitor suggesting they had and the respondent employer not confirming or denying whether it had agreed to private mediation.

Description of the behaviour

The second paragraph of the article summarises the alleged harassing behaviour, including the respondent trying to force the complainant's head down to his crotch, undressing in front of her and offering to 'arrange for her to have sex with a colleague in the office.'

The article refers to additional allegations of sexual harassment, which the complainant described in Australian Human Rights Commission documents but did not include in her court documents. These included making 'one of his subordinates stand up in a meeting room

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[80] Nick Lenaghan 'Colliers appointment' *Australian Financial Review*, 'Briefs', 15 August 2016, 33.

[81] Michael Bleby and Misa Han 'Colliers agrees to negotiate over sexual harassment' *Australian Financial Review* 10 June 2016, 2.

in front of everyone and spin around', saying every woman in the office should wear a tight dress like her, and carrying a female colleague around in a Christmas sack 'despite her protesting' and then telling her to tie his shoelace.

Legal implications

The article quotes commentary from multiple legal experts on the case on how much compensation the complainant might receive. This includes gradation of 'levels' of sexual harassment:

> DibbsBarker employment lawyer Fay Calderone put a more modest sum of $390,000.
>
> 'If 10 is rape and 1 is innuendo, he is about an 8 [if allegations are proved] and the Oracle decision was about 2,' Ms Calderone said.

The article concludes with comments from the Sex Discrimination Commissioner and the Property Council of Australia Chief Executive. The commissioner declined to comment on the case but noted that power dynamics in workplaces meant that women may not report sexual harassment in case it 'hurts their career'. The final paragraph quotes the Property Council of Australia Chief Executive praising the property industry for 'an enormous shift in the awareness of its gender gap over the past 18 months'.

'Colliers could face huge payout in sexual harassment claim'[82]

Legal implications

The *Sydney Morning Herald* article refers to speculation from legal experts on a potential monetary award in the *Australian Financial Review* article discussed above.

Description of the behaviour and portrayal of the respondent employer

The article uses guarded language to report the alleged harassment, using the phrase 'according to the lawsuit' and the word 'allegedly' in the same sentence. The article also addresses the issue of mediation, noting the different comments made by the parties on whether mediation would proceed, and quoting a spokesman for the respondent employer saying that Colliers 'took the allegations seriously' and that they would be vigorously

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[82] 'Colliers could face huge payout in sexual harassment claim' *Sydney Morning Herald* (online at 10 June 2016) < http://www.smh.com.au/business/workplace-relations/colliers-could-face-huge-payout-in-sexual-harassment-claim-20160609-gpfwii.html>.

defended. The final paragraph of the article describes the net worth of the respondent employer.

'Raunchy video revealed: "Huddo's flirty 30"'[83]

Portrayal of the respondent and respondent employer—extraneous information

While this article does refer to the sexual harassment case in the lead, the rest of the article focuses on the discovery of a video of a 'racy' party held at the offices of the respondent employer with 'all the production values of your average soft-porn film'. The article includes descriptions of the 'fun', including naming the alleged harasser:

> There's a spot of machine-gun fellatio, lots of young ladies in tight-fitting nurse's outfits, topless men, a whole lot of dry humping—and a glimpse (around the 40 second mark) of Mr Unwin himself (channelling, it seems, Richard Gere from An Officer and A Gentleman.)

The article includes excerpts of the video for the reader to enjoy at home. The final paragraph ridicules one of the employees of the respondent employer, who said that he worked to ensure 'both landlords and retailers receive exposure to the market' and that the video suggested he'd done well with the 'exposure bit'.

Brief analytical summary of reportage

The coverage provides a range of perspectives on the case, with one article quoting the complainant's voice while others featured the respondent's voice and expert legal commentary speculating on the monetary potential of the case and the relative 'seriousness' of different forms of sexual harassment. One article in the sample does not really focus on the case, except as a reason to describe a wild office party hosted by the respondent employer. It is interesting that one story reveals that the non-physical manifestations of sexual harassment, which had been part of the original complaint to the Australian Human Rights Commission but were not part of the complaint heard at Court—which implies that such behaviour is not real sexual harassment. The article that reports on the party uses joking and colloquial language, which may suggest that sexual harassment is a humorous matter as well. Two other articles in the sample use the words 'alleged' or 'allegedly' in addition to 'according to the

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[83] Bryce Corbett 'Raunchy video revealed: "Huddo's flirty 30"' *Australian Financial Review*, Rear Window, (online at 13 June 2016) < http://www.afr.com/brand/rear-window/colliers-raunchy-video-revealed-huddos-flirty-30-20160613-gpi393#ixzz4Pm9sqPN5>.

lawsuit' in a single sentence, suggesting that readers need to treat the complainant's story with extra caution.

Amy Taeuber v Channel 7 (2017)

'Channel 7 faces backlash over story of cadet journalist Amy Taueber'[84]

Description of the behaviour and portrayal of the respondent employer—situational perspective (as opposed to episodic perspective)

The *ABC News* article focuses on the effect of one of the ABC's own stories on the respondent employer, Channel 7, noting a drop in the channel's share price after the story was broadcast. The article quotes 'shareholder activist' Stephen Mayne, who commented on the financial value of Channel 7 and its 'toxic' workplace culture on 'gender issues'. The article includes commentary on the gender balance of the respondent employer, with former board members Sam Mostyn and Scheila McGregor describing the 'boys club' workplace culture.

The article does not provide any details of the alleged sexual harassment or include any quotes from the complainant but does refer to other 'current and former Seven Network staff' who contacted the *7.30* program to say they had had similar experiences to the complainant.

The article concludes with a statement from the respondent employer that the complainant was 'not sacked because she made a complaint' but because of a 'breach of contract.'

'Learn from Weinstein'[85]

Description of behaviour and portrayal of respondent employer—situational perspective (as opposed to episodic perspective)

The *Canberra Times* opinion piece places the case in the broader context of the Me Too movement. The article mentions the Channel 7 case in a single paragraph in the middle of the column, using it as an example of a case that triggered institutional change in the respondent employer, who 'finally made noises about improving its treatment of women'.

The article describes sexual harassment as a symptom of a misogynistic society—in that it was inadequately addressed by existing complaint structures, 'victims [were] too frightened to complain', dispute resolution processes were 'poorly conceived' and sexual harassment

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[84] Louise Milligan 'Channel 7 faces backlash over story of cadet journalist Amy Taeuber' *ABC News* (online at 26 September 2017) < http://www.abc.net.au/news/2017-09-26/seven-faces-backlash-over-story-of-cadet-journalist-amy-taeuber/8990814>.

[85] Jenna Price 'Learn from Weinstein' *Canberra Times* 10 October 2017, 18.

policies ‘poorly executed’. The bulk of the article examines institutional responses to high-profile sexual harassment cases.

‘Predators, be afraid’[86]

Portrayal of the complainant—situational perspective (as opposed to episodic perspective)

In the *Sunday Age* opinion piece, the author discusses her personal experience of sexual harassment and says that she didn’t report the incident when it happened for fear of losing her job. The author describes the ‘brave young journalist Amy Taeuber’ as the inspiration for writing about her experience and expresses the view that things have changed for the better.

The article does not describe the case in detail but concludes with a call to arms against sexist media employers.

‘Seven disputes reporter’s allegations’[87]

Description of the behaviour

The *Sydney Morning Herald* article focuses on the complainant’s claims and Channel 7’s response to the sexual harassment allegations in the ABC *7.30* program. The article quotes the complainant’s court documents that a senior reporter on *Today Tonight*, Rodney Lohse, made unwanted sexual comments about the complainant, suggesting that as ‘one in three women are lesbians’, the complainant ‘must be a lesbian as she is a triplet’.

Portrayal of the parties

The article describes Channel 7 refusing to allow the complainant’s chief of staff to attend a disciplinary meeting with her as a support person and handing her a list of written allegations about her performance. These include creating Facebook groups that were critical of her employer and bullying a fellow cadet. The article reports that the complainant denied these allegations.

Portrayal of the respondent

The closing paragraphs of the article quote a statement from Channel 7—that the complainant’s employment was terminated for breaches of her employment contract and not because she made a complaint about anyone. The article further quotes Channel 7 statement

[86] Wendy Squires ‘Predators, be afraid’ *The Sunday Age* 22 October 2017, 36.

[87] Karl Quinn ‘Seven disputes reporter’s allegations’ *Sydney Morning Herald* 27 September 2017, 6.

that the employer was '"surprised" by the airing of the audio on *7.30* "six months after the signing of a mutual agreement and settlement"' and that Mr Lohse had publicly apologised for 'the incident' and been transferred to another newsroom.

'Sisterhood has its limits'[88]

Portrayal of the respondent employer—situational perspective (as opposed to episodic perspective)

This *Age* article does not discuss the alleged harassment in detail. While much of the article does discuss the complainant's disappointment that her female colleagues did not support her, it also acknowledges workplace power imbalances and the need to focus on the male perpetrators not the 'female human shields'.

Brief analytical summary of reportage

All but one of these stories stand out from the reportage of the preceding 13 matters by positioning the case in the broader context of gendered power imbalances in the workplace. These articles discuss the prevalence of sexual harassment in the workplace and speculate on the potential impact of this case and the Me Too movement. The other story in the sample reports the parties' perspectives on the allegations in a similar way to other reportage in the sample.

Conclusion

The coverage in this sample features a range of voices, including the complainant, respondent and respondent employer, expert legal perspectives and journalistic commentary. Some of the reportage devotes significant space to the complainant's voice, with quotes from interviews and statements of claim. Other articles focus on the respondent or respondent employer's denial of the allegations. The coverage includes comments on the credibility of the parties, both through direct quotations of the evidence led in Court and in the use of language in the articles themselves. The legal perspective is seen in external commentary on the significance of high-profile cases and in judicial comments on the harm experienced by the complainant.

In the next chapter, I consider the themes arising from the media coverage. In chapter 10 I discuss how these themes compare with the way the courts and the legislation characterise sexual harassment.

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[88] Kasey Edwards 'Sisterhood has its limits' *The Age* 31 October 2017, 18.

9 Themes in media coverage

In this chapter, I build on the findings from chapters 7 and 8, which described the way the cases were portrayed in each article in my sample. I examine the messages that emerged from thematic analysis of the coverage in the sample on what constitutes 'real' sexual harassment, who is considered a 'good' and credible complainant and what information is communicated about sexual harassment law and relevant legal constructs. I conduct discourse analysis of the themes that emerged from the framing of the coverage in my sample, comparing the information in the headlines and leads with the material in the bodies of the articles.

The framing of (in)credibility—portrayal of the parties

The articles in the sample use a number of different framing techniques to convey information about the credibility of the parties to the cases. These techniques are described under the following sections: gender stereotyping and credibility, other ways that the complainant is seen as a credible victim, the incredible complainant, respondent/respondent employer as villain, the respondent as victim and the respondent as buffoon.

Gender stereotyping and credibility

Gender stereotyping of the parties is evident in the coverage. Some of these stereotypes are 'positive' and suggest a credible complainant. Other stereotypes are negative and suggest that the complainant is not credible.

The heroic complainant

The archetypal David versus Goliath battle plays out in four of the cases in the sample, with the complainant framed as a crusading heroine. This 'positive' stereotype is favourable to the complainant. Coverage of *Styles v Clayton Utz*, the *Ewin v Vergara* appeal, *Tan v Royal Australasian College of Surgeons* and *Taeuber v Channel 7* emphasised the complainant's strength and heroism. This message is conveyed in the headlines, leads and bodies of the articles. This coverage may be interpreted as conveying a message that a heroic complainant is a credible complainant.

Three headlines in the Clayton Utz sample invoke a David and Goliath battle: 'Claims of sexism as young lawyer takes on top firm'[1], 'Exposing a secret culture'[2] and 'Finding the strength to fight back'[3]. 'Finding the strength to fight back' continued the David versus Goliath theme in the lead and body of the article. The lead for 'Finding the strength …' refers to the complainant 'taking on' the prestigious law firm and emphasises the complainant's strength in the body of the article by quoting the complainant urging for reform of sexual harassment law and detailing her professional and academic success.[4] It is interesting to note that 'Finding the strength …' is written by the same journalist as 'Man in the middle of $200k claim—law firm's sexual harassment case', which refers to the complainant as a 'scorned lover'.[5] 'Claims of sexism …' reinforces the David versus Goliath message in the lead and body of the article by giving the complainant space to tell her story, detailing the alleged harassing behaviour and sexist workplace culture, quoting her saying she feared losing her employment if she made a complaint and describing her loss of a job.[6] 'Exposing a secret culture' conveys a different picture of the complainant in the lead. While the headline suggests that her actions were heroic, the lead reduces the case to a 'sensational' lawsuit against her employer and 'former boyfriend',[7] conveying a contradicting message about her motives and trivialising the case. The body of 'Exposing a secret culture' also deviates from the David versus Goliath theme, concentrating on the size of the claim and briefly referring to the harassing behaviour.[8]

The image of the heroic complainant is also seen in two articles about the *Ewin v Vergara* appeal. 'Record sexual harassment case upheld' conveyed this message in the body of the article by quoting the complainant saying that she was 'vindicated' in her 'fight for justice'.[9] This message is not conveyed in the headline or lead, which concentrate on the case being upheld on appeal. 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record

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[1] Louise Hall 'Claims of sexism as young lawyer takes on top firm', *Sydney Morning Herald,* 8 June 2011, 3.

[2] 'Exposing a secret culture', *The Daily Telegraph*, 3 December 2011, 5.

[3] Vanda Carson 'Finding the strength to fight back – exclusive interview', *The Daily Telegraph*, 3 December 2011, 4.

[4] Ibid.

[5] Vanda Carson 'Man in the middle of $200k claim - Law firm's sexual harassment case', *The Daily Telegraph*, 4 July 2011, 17.

[6] Hall (n 1) 3.

[7] 'Exposing a secret culture' (n 2) 5.

[8] Ibid.

[9] Caitlin Guilfoyle 'Record sexual harassment case upheld' *Sky News* (online at 12 August 2014) <http://www.skynews.com.au/news/national/2014/08/12/record-sexual-harassment-case-upheld.html>.

compensation payment is vindication for "arduous" legal journey' conveys this message through the reference to 'vindication' in the headline and body of the article and by quoting the complainant describing the court decision as vindicating her decision to fight and outlining her struggle to pursue a civil case after she failed to persuade the Director of Public Prosecutions to prosecute the matter.[10] The lead engages directly with stereotypes of victimhood, and is discussed further below.

Two of the headlines in the sample portray Dr Caroline Tan as a crusading whistleblower: 'Victim of surgeon's sexual harassment speaks out: "It's not going to go away'[11] and 'Dr Caroline Tan speaks out about sexism in Australian hospitals'.[12] The front page article 'Victim of surgeon's sexual harassment …' focuses on the complainant speaking out about sexist attitudes and quotes judicial dismissal of attempts by the respondent to attack her credibility.[13] The online *Daily Life* article 'Dr Caroline Tan speaks out …' uses the lead to reinforce the sympathetic framing of the complainant, who is positioned as taking a brave feminist stand at great professional cost.[14] The body of the article continues this focus, quoting the complainant saying that she had no regrets about taking her case to a Tribunal, even though she believed that this had led to her being shunned by other surgeons and overlooked for professional opportunities.[15] 'Victim of surgeon's sexual harassment …' uses the lead to reinforce the complainant's heroism by telling the story from her point of view, including her urging an inquiry.[16] The body of the article continues this theme by focusing on the complainant's voice and her account of the behaviour and the effect of the sexual harassment case on her career.[17]

The opinion piece 'Predators, be afraid' uses the lead to position the Weinstein case as the catalyst for a feminist revolution and the body of the article to praise the courage of the

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[10] Madeleine Morris 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for "arduous" legal journey' *ABC News* (online at 14 August 2014, updated 15 August 2014) < http://www.abc.net.au/news/2014-08-14/victim-jemma-ewin-says-record-compensation-is-vindication/5671498>.

[11] Julia Medew 'Victim of surgeon's sexual harassment speaks out: "It's not going to go away"' *Sydney Morning Herald* 12 March 2015, 1.

[12] Julia Medew 'Dr Caroline Tan speaks out about sexism in Australian hospitals' *Sydney Morning Herald* 'Daily Life' (online at 12 March 2015) < http://www.dailylife.com.au/dl-people/interviews/dr-caroline-tan-speaks-out-about-sexism-in-australian-hospitals-20150311-141peb.html>.

[13] Medew (n 11) 1.

[14] Medew (n 12).

[15] Ibid.

[16] Medew (n 11) 1.

[17] Ibid.

complainant in *Taeuber v Channel 7*. The complainant is framed as the heroine who inspired the author to write about her own experiences of sexual harassment in the workplace.[18] The complainant and her strength are not mentioned in the headline or lead. While this is very flattering for the complainant, it is unnerving to suggest that a desire for a safe working environment that operates in accordance with the law is in any way 'revolutionary'. Positioning complainants as the (s)heroes suggests that particular types of women have a platform to resist male domination, and to 'lead' and reach gender equality, when really this is a job for the systems that perpetuate the domination itself.

The David and Goliath theme is also seen in the lead for the article about the original *Richardson v Oracle decision* 'Oracle to pay $18k for senior staffer's ongoing sexual harassment'. The complainant is introduced as winning her case against a 'software giant'.[19] This theme is not continued in the body of the article.

These articles show that there is news value in supporting the complainant and framing the case as a victory for the 'little guy'. This is especially apparent in the coverage that includes the David versus Goliath struggle in the headline and lead.

Credibility and the reasonable victim

One of the articles that covers the *Ewin v Vergara* appeal, the ABC News article 'Sexual harassment victim Jemma Ewin urges inquiry into case …' uses the lead to consciously acknowledge stereotypes of how a 'good' and 'real' victim of sexual harassment should behave, with the words 'Jemma Ewin does not come across as a victim' and noting her articulate, precise expression when describing her traumatic experiences.[20] This suggests an idealised 'good victim' from previous research, who is emotional but not too emotional, able to clearly articulate her story and able to prove the effects of harassment. This assessment of the complainant's victimhood does not appear in the headline or continue in the body of the article, although the headline does refer to her as a 'victim'. While this article does deem the complainant to be a 'good' victim despite not conforming to some expected but undefined stereotype, the language may give the impression that it is a bad thing to 'come across' as a

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[18] Wendy Squires 'Predators, be afraid' *The Sunday Age* 22 October 2017, 36.

[19] Leo Shanahan 'Oracle to pay $18k for staffer's ongoing sexual harassment', *The Australian*, 21 February 2013, 3.

[20] Morris (n 10).

victim, be a victim or be the wrong kind of victim. This framing may suggest to audiences that only a particular kind of ‘victim’ of sexual harassment should be considered credible.

Other ways that complainant seen as credible victim

Five of the cases in the sample include coverage that portrays the complainant as a credible victim for reasons other than ‘strength’: the original *Ewin v Vergara* decision and its appeal, *Mathews v Winslow Constructors*, *Spiteri v IBM* and the original *Richardson v Oracle* decision and its appeal.

Credibility and judicial comments

Two articles about the original *Ewin v Vergara* decision frame the complainant as credible by quoting judicial comments that praise her reliability as a witness. The article ‘Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function’ quotes judicial comments that support the complainant’s view of events in the body of the article but does not refer to the complainant’s credibility in the headline in the lead.[21] The body of the article ‘Payout awarded over work party sex’ includes judicial comments that describe the complainant as credible and the respondent as not credible, contrasting with the flippant headline and a lead that minimises the behaviour as ‘unwanted sex’.[22] In the coverage of the appeal decision, the article on the *Ewin v Vergara* appeal ‘Woman awarded $470,000 payout over unwanted drunken sexual encounter’ quotes judicial comments in the body of the article, with the judge finding that the complainant’s reaction to the behaviour established that it was unwelcome.[23] This article does not refer to the complainant’s credibility in the headline, and the lead focuses on condemning the behaviour of the respondent.

Credibility and complainant’s response

A link between the complainant’s response to the behaviour and credibility is also made in two articles that covered *Mathews v Winslow Constructors*. While the headlines for the *Age* article ‘1.3mil for daily sex harassment’[24] and the *Herald Sun* article ‘Melbourne sex

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[21] Kay Dibben ‘Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function’ *The Courier-Mail* (online at 13 December 2013) <http://www.couriermail.com.au/news/woman-wins-record-near500000-sexual-harassment-payout-for-unwanted-sex-following-work-function/story-fnihsrk2-1226782122290>.

[22] Erin Tennant ‘Payout awarded over work party sex’ *ninemsn.com* (online at 13 December 2013) <http://news.ninemsn.com.au/national/2013/12/13/05/16/payout-awarded-over-work-party-sex>.

[23] Shannon Deery ‘Appeal rejected: Woman awarded $470,000 over unwanted drunken sexual encounter’ *Herald Sun* (online at 12 August 2014) < http://www.heraldsun.com.au/news/law-order/appeal-rejected-woman-awarded-470000-payout-over-unwanted-drunken-sexual-encounter/news-story/1f3a4e9fe42b62170bd0ef32dcef72e4>.

[24] Rania Spooner and Cameron Houston ‘$1.3 mil for daily sex harassment’ *The Age* 18 December 2015, 2.

harassment payout: worker Kate Mathews wins $1.3 million in personal injury damages'[25] focus on the size of the award, further discussion in the bodies of the articles suggests that the complainant's psychiatric illness and suffering mean that her complaint of sexual harassment was credible and that the high award of damages was justified. These articles also report the judge rejecting attempts by the respondent to attack the complainant's credibility with surveillance footage of her appearing happy. The lead of 'Melbourne sex harassment payout …' focuses on the complainant's story, the behaviour and the award, positioning the award of damages as a natural consequence of the decision.[26] The lead of '$1.3mil for daily sex harassment' focuses on the size of the award and does not name the complainant.

Similarly, two articles in the *Spiteri v IBM* sample link the complainant's credibility to her response to the alleged harassing behaviour. In 'Woman sues IBM for $1.1m—worker allegedly told to get boobies out', the body of the article portrays the complainant as credible by reporting of the way the alleged behaviour affected her mental health.[27] This contradicts the trivialising vulgarity of the headline and lead, which used jokey language like 'boobies'.[28] In 'IBM accused of ignoring sexual harassment claims', the body of the article includes details of the complainant making clear, repeated complaints to IBM management about the alleged harassment.[29] The credibility of the complainant is not referred to in the headline or the lead. This positioning suggests that issues like the credibility of the complainant are less 'newsworthy' than the high profile of the respondent employer and the colourful language used during the alleged harassment.

Credibility and unscrupulous counsel

Three articles in the coverage of the original *Richardson v Oracle* decision suggest that, while the complainant herself has a credible complaint of sexual harassment, she has been doubly victimised by the respondent and her own lawyers. These articles report judicial criticism of the complainant's lawyers, whose rejection of an earlier settlement offer led to a costs order

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[25] Ian Royall 'Melbourne sex harassment payout: Worker Kate Mathews wins $1.3 million in personal injury damages' *Herald Sun* (online at 18 December 2015) <http://www.heraldsun.com.au/business/work/melbourne-sex-harassment-payout-worker-kate-mathews-wins-13-million-in-personal-injury-damages/news-story/e907ad0aa910fb1cce2d74c8a921e2c9>.

[26] Ibid.

[27] Ruth Lamperd 'Woman sues IBM for $1.1m—worker allegedly told to get boobies out', *Herald Sun*, 20 October 2011, 13.

[28] Ibid.

[29] Sue Lannin 'IBM accused of ignoring sexual harassment claims', *ABC Premium News* (online at 20 October 2011, updated 21 October 2011) < http://www.abc.net.au/news/2011-10-20/ibm-sexual-harassment-case/3580656>.

being made against the complainant.[30] The award of damages failed to cover the complainant's legal costs and the complainant was also ordered to pay the respondent's costs. This was seen in the lead and body of the article in 'Judge criticises law firm over rejection of settlement offer',[31] in the headline, lead and body of the article in 'Judge blasts Ashby's self-serving lawyers'[32] and in the headline and lead of 'High-octane mix of media and money backfires in court'.[33] In contrast, following the appeal, the article 'Oracle ordered to pay $130,000 in sexual harassment case' refers to the complainant as a 'victim' in the lead and notes in the body of the article that the complainant had received an increased award of damages due to her experience of psychological and reputational damage.[34] As discussed in chapter 5, this case was a landmark reassessment of Court approaches to damages for sexual harassment. These articles show that the tactics of the lawyers were generally more 'newsworthy' than the complainant's credibility, or even landmark legal decisions on damages for sexual harassment.

The incredible complainant

The complainant is portrayed as lacking credibility in coverage of seven cases in the sample: *Fraser-Kirk v David Jones*, *Styles v Clayton Utz*, *Shea v Energy Australia (TruEnergy)*, *Robinson v Rivers*, *Ramstrom v Baldino*, *Tan v Royal Australasian College of Surgeons* and *Taeuber v Channel 7*.

Incredibility—challenges to complainant credibility

Two articles in the coverage of *Robinson v Rivers* question the complainant's credibility by reporting the respondent's attacks on her story and mental health: 'Rivers tycoon on sex assault charge'[35] and 'Millionaire denies woman's harassment court claim—TYCOON SEX

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[30] The complainant's legal representatives rejected a settlement offer that was higher than what she was eventually awarded, leading to the Court making a costs order against her in accordance with *Calderbank v Calderbank* [1975] 3 All E.R. 333, C.A.

[31] Harriet Alexander, Legal Affairs 'Judge criticises law firm over rejection of settlement offer' *Sydney Morning Herald* 29 April 2013, 10.

[32] Hannah Low 'Judge blasts Ashby's self-serving lawyers', *Australian Financial Review* 23 April 2013, 10.

[33] 'High-octane mix of media and money backfires in court', *Australian Financial Review*, Hearsay—Legal Affairs, 26 April 2013, 36.

[34] Paul Smith 'Oracle ordered to pay $130,000 in sexual harassment case' *Australian Financial Review* (online at 15 July 2014) < http://www.afr.com/technology/enterprise-it/oracle-ordered-to-pay-130000-in-sexual-harassment-case-20140715-jik3s>.

[35] Cameron Houston 'Rivers tycoon on sex assault charge', *The Sunday Age*, 4 December 2011, 1.

FIGHT'.[36] Both of these articles use the body of the article to report the following reasons the respondent suggested the complainant was not credible: mental health issues, 'bipolar behaviour', 'alcohol abuse', 'nudie runs' and insistence on modelling underwear. These articles also include counter-messages about the complainant's credibility in the body of the article, with 'Rivers tycoon …' quoting the complainant's lawyer criticising these challenges to his client's credibility[37] and 'Millionaire denies woman's harassment court claim …' reporting the complainant denying the claims.[38] It is also significant that these attacks on the complainant's credibility are not included in the headlines or the leads, suggesting a lower 'news value'.

The complainant is also portrayed as lacking credibility in the body of the *Ramstrom v Baldino* article 'Tribunal rules out harassment claims', which reports on the Tribunal determining a jurisdictional issue on which allegations could be heard.[39] While much of the article reports the complainant's story of harassment and her claims of distress, the closing paragraphs of the article focus on the respondent's lawyer questioning the complainant's credibility by asking whether the complainant had changed her story and noting inconsistent dates.[40] This paragraph also reports an admission from the complainant that she had sent the respondent a video of monkeys mating.[41] This credibility issue is reinforced by a headline that may imply that the complainant's entire sexual harassment case had been unsuccessful. This also created a significant ethical issue where the facts of the case were not conveyed accurately by the headline. At the time of publication, the case was still ongoing.

The opinion piece 'Neurosurgeon case is a real headache' discusses Dr Caroline Tan's original 2008 sexual harassment case, commenting on the complainant's credibility in the body of the article.[42] While the article notes that the Tribunal had found Dr Tan to be a

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[36] Shelley Hadfield 'Millionaire denies woman's harassment court claim—TYCOON SEX FIGHT', *Herald Sun*, 5 November 2011, 4.

[37] Houston (n 35) 1.

[38] Hadfield (n 36) 4.

[39] Tom Fedorowytsch 'Tribunal rules out harassment claims' *ABC News* (online at 4 March 2013, updated 6 March 2013) < https://www.abc.net.au/news/2013-03-04/tribunal-rules-out-harassment-claims/4551560>.

[40] Fedorowytsch (n 39).

[41] Ibid.

[42] Miranda Devine 'Neurosurgeon case is a real headache' *The Daily Telegraph* (online at 15 March 2015) <http://www.dailytelegraph.com.au/news/opinion/miranda-devine-neurosurgeon-case-is-a-real-headache/news-story/b4a78194e688b5fd4205843319313ff0#load-story-comments>.

‘credible witness’, the author went on to provide a detailed summary of the respondent’s attacks on the complainant’s credibility during the hearing.[43] This could be interpreted as suggesting that the complainant was in fact not a credible witness and that the Tribunal had erred in its decision. Neither the headline nor the lead comment on the complainant’s credibility.

One of the *Taueber v Channel 7* articles uses a focus on the respondent’s perspective in a way that suggests the complainant was not credible. In the *Sydney Morning Herald* article ‘Seven disputes reporter’s allegations’,[44] the lead quotes the respondent employer stating the reason for the complainant’s dismissal from her employment was a ‘breach of contract’[45] and asserting that this related to ‘two websites that made fun of Seven content and personalities.’[46] The headline, lead and body of the article focus on the respondent employer’s denial that the complainant’s employment was terminated because she reported sexual harassment, suggesting alternative causes such as bullying other staff and setting up Facebook pages that criticised her employer.[47] The body of the article also quotes the complainant’s account of the behaviour from her court documents and her denial of Channel 7’s allegations.[48] However, the positioning of the respondent employer’s perspective in the headline and lead mean that this perspective dominates the article. This may have had the effect of suggesting to the reader that the complainant was not credible, and that the complaint may have been made in retaliation for the dismissal.

Incredibility—the complainant’s ‘dubious’ motives

Some of the coverage of *Styles v Clayton Utz*, *Shea v Energy Australia*, *Fraser-Kirk v David Jones* may be interpreted as positioning the complainant as having dubious motives for bringing the complaint.

Some coverage suggests scepticism of the complainant’s motives and, consequently, her credibility. The *Fraser-Kirk v David Jones* headline ‘Inside Australia’s biggest harassment

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[43] Ibid.

[44] Karl Quinn ‘Seven disputes reporter’s allegation’, Sydney Morning Herald, 27 September 2017, 6.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

case $37m SEX SUIT'[49] uses the lead to possibly suggest the complainant was playing a game to win, as she 'put herself up as a champion for women'.

The article 'Man in the middle of $200k claim—law firm's sexual harassment case' uses the lead and body of the article to portray the complainant in *Styles v Clayton Utz* as lacking credibility and having a vengeful motive, describing her as a 'scorned lover' who made a 'volley of legal claims' after a 'brief fling'.[50] The headline may be interpreted as positioning the alleged harasser as a sympathetic victim of circumstances, with an implied judgement of the complainant's motives.

Two headlines in the *Shea v Energy Australia* sample 'Fired Energy Australia director "out for revenge", court told'[51] and 'Sacked Energy Australia executive accusing managing director of sexual harassment has "zero credibility" and a "liar", court told',[52] suggest that the complainant is not credible. While the words 'court told' create the appearance of distance between the assertions and the news report, foregrounding such a scathing assessment of the complainant's credibility in the headline can be seen as colouring the remainder of the report. The lead and body of the article 'Fired Energy Australia director "out for revenge"' report a number of attacks by the respondent on the complainant's credibility, including alleging that she referred to the managing director as a 'dead man walking', claims that she travelled on unapproved leave at company expense and a denial that she was terminated from her employment for reporting sexual harassment.[53] The word 'sacked' in the second article also has the effect of questioning the complainant's professional competence. Also in 'Sacked Energy Australia executive …', the placement of this information about the complainant's incredibility in the lead positioned the attacks on complainant credibility as the most important part of the story and framed the complainant as vindictive and dishonest. The repetition of the word 'sacked' is conducive to a picture of the complainant as professionally incompetent, vindictive and dishonest. The lead and body of the article 'Sacked Energy

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[49] Janet Fife-Yeomans—additional reporting by Vikki Campion and Anna Napoli 'Inside Australia's biggest harassment case $37m SEX SUIT', The Daily Telegraph 3 August 2010, 1.

[50] Carson (n 5) 17.

[51] Jane Lee 'Fired Energy Australia director "out for revenge", court told', The Age, Business, 29 August 2013, 24.

[52] David Hurley 'Sacked EnergyAustralia executive accusing managing director of sexual harassment has "zero credibility" and a "liar", court told', Herald Sun (online at 7 October 2013) <http://www.heraldsun.com.au/news/law-order/sacked-energyaustralia-executive-accusing-managing-director-of-sexual-harassment-has-8220zero-credibility8221-and-a-8220liar8221-court-told/story-fni0fee2-1226734217193>.

[53] Lee (n 51) 24.

Australia executive accusing managing director of sexual harassment has "zero credibility" and a "liar"' includes similar attacks on the complainant's credibility, including quoting the respondent's lawyer as accusing the complainant of getting the 'juicy' idea of making a sexual harassment complaint from her media expertise and saying that the complainant's career was in 'smithereens'.[54] Including this material in the most salient parts of the coverage, the headlines and leads, as well as reinforcing these views in the bodies of the articles, shows that the complainant's (in)credibility is considered the most newsworthy aspect of the case.

Two articles in the coverage of *Fraser-Kirk v David Jones* explicitly portray the complainant as incredible and her motives as dubious. In the body of the opinion piece 'Nobody died, so why is she demanding a king's ransom?' the journalist uses language such as 'greedy', 'playing up your victimhood' and 'hysterical overreach' to describe the complainant and her case.[55] The article 'Are you being sued? Sordid details of $37 million DJs sex claim'[56] uses dismissive language in the lead to describe the complainant's actions. The complainant 'rather than leaving the matter shrouded' (an action expected of a 'good' victim'?) demonstrated some agency when she took action against her employer and 'invited the full glare of legal and public attention'.[57]

Complainant credibility and cautious language

The lead and body of the article 'Woman sues IBM for $1.1m—sex pest legal fight' imply the complainant in *Spiteri v IBM* lacks credibility through repeated use of the word 'alleged', including multiple times in the same sentence and suggesting the complainant's lawyer used this term to describe her own client's case.[58]

A similar use of excessive qualifying language is seen in two articles in the *Marks v Colliers International* coverage. The articles '"That's the girl you sold me": Colliers harassment case' and 'Colliers could face huge payout in sexual harassment claim' each contain a sentence in the body of the article which used both the phrase 'according to the lawsuit' and 'allegedly'.[59]

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[54] Hurley (n 52).

[55] Miranda Devine 'Nobody died, so why is she demanding a king's ransom?', Sydney Morning Herald, 5 August 2010, 15.

[56] Belinda Kontominas and Simon Mann 'Are you being sued? Sordid details of $37 million DJs sex claim', Sydney Morning Herald, 3 August 2010, 1.

[57] Ibid, 6.

[58] Marianne Betts 'Woman sues IBM for $1.1m—Sex pest legal fight', *Herald Sun*, 15 April 2011, 9.

[59] Patrick Hatch '"That's the girl you sold me": Colliers harassment case' *The Age* 16 October 2016, 3, 'Colliers could face huge payout in sexual harassment claim' *Sydney Morning Herald* (online at 10 June 2016)

Using either of these disclaimers would have been sufficient to establish that this was the complainant's claim in her lawsuit and not proven fact. This doubling up of cautious language, while not in the most prominent part of the article, could give the impression to readers that the complainant's account of events should be considered with extra caution.

Incredibility and shifting perspectives

The articles in the sample show that different messages can be conveyed about the reality of sexual harassment and the credibility of the parties depending on whose perspective is conveyed.

The language techniques used in the leads and headlines reporting Dr Caroline Tan's story either emphasise the complainant's role or subsume it. The *Sydney Morning Herald* article 'Dr Caroline Tan speaks out …'[60] does not mention sexual harassment or the case but uses the headline to signal a broader point about institutionalised sexism in hospitals. The complainant is named, and the word ordering could be interpreted as placing her in a position of authority as a credible source. The headline uses the phrase 'speaks out', suggesting that this was her story. In contrast, the *Sydney Morning Herald* article 'Royal Australasian College of Surgeons appoints experts …'[61] may give the impression that the college had started the inquiry on its own initiative and not in response to comments made by Dr McMullin or Dr Tan about sexism in the medical profession. This effectively erases the complainant's story in the most important part of the article.

In the *Ramstrom v Baldino* sample, two headlines use language to suggest a judgement of the complainant's credibility: 'BALDINO TRIAL—clerk's trauma real, court hears'[62] and 'Court clerk's sex claims "too late"'.[63] The latter headline also does not name the parties, refers to the complainant by her occupation and conflates sex with sexual harassment. The use of the term 'real' suggests that the complaint has substance. The use of the terms 'too late' suggests

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<http://www.smh.com.au/business/workplace-relations/colliers-could-face-huge-payout-in-sexual-harassment-claim-20160609-gpfwii.html>.

[60] Medew (n 12).

[61] Julia Medew and Craig Butt 'Royal Australasian College of Surgeons appoints experts to review bullying, harassment in Australian hospitals', *Sydney Morning Herald* (online) 12 March 2015.

[62] BALDINO TRIAL—Clerk's trauma real, court hears', *The Advertiser (Adelaide)*, 9 March 2013, 33.

[63] Sean Fewster, Chief Court Reporter 'Court clerk's sex claims "too late"' *The Advertiser (Adelaide)*, 5 March 2013, 14.

that the case has been completely thrown out of court when the case was still ongoing, suggesting that the complaint does not have substance.

The complainant disappears

There is a trend in the coverage to not name the complainant in the headlines. This can be seen in four of the five *Spiteri v IBM* headlines, downplaying the role of the complainant. Similarly, in the *Ewin v Vergara Courier-Mail* article 'Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function',[64] the parties are not named, and the complainant is referred to simply as a 'woman', giving an impersonal perspective on the case. The *Richardson v Oracle* headline 'Demotion after sex complaint, court told'[65] is even more ambiguous, leaving unclear who had made the complaint and who was demoted. These articles use a minimising technique that could be seen as removing the complainant from the story altogether.

This technique is also seen in the *Australian Financial Review Marks v Colliers International* article 'Colliers agrees to negotiate over sexual harassment'.[66] The reference to the respondent employer being willing to negotiate may present Colliers in a more positive light, distancing it from the respondent's behaviour and suggesting an attitude of goodwill towards the complainant. This headline also makes the respondent employer the key feature of the story, not the complainant's experience of sexual harassment. This use of the employer's perspective presents Colliers in a more sympathetic light.

It would be simplistic to reduce such a phenomenon to 'these newspapers are bad and sexist'. There is a confluence of factors at play that could be speculated on, including editorial conventions (such as stronger name recognition among readers for the high-profile employer giving this a higher 'news value'), systemic gender biases in society leading to a reduced interest in women's stories, (over)caution about legal risk for the media outlet and relatively recent recognition of sexual harassment as a serious issue (despite 30 years of legislation and caselaw). Yet, the overall effect mutes the complainant's story.

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[64] Dibben (n 21).

[65] Amy Dale 'Demotion after sex complaint, court told', *The Daily Telegraph*, 20 March 2012, 11.

[66] Michael Bleby and Misa Han 'Colliers agrees to negotiate over sexual harassment claim', *Australian Financial Review*, 10 June 2016, 2.

Incredibility—complainant losing the case

Two articles in the sample for *Ramstrom v Baldino* portray the complainant as lacking credibility when reporting the outcome of the case. This is not unexpected for the articles that report on the complainant losing the sexual harassment case to the respondent, especially where the Tribunal decision expressly referred to the credibility of the parties as witnesses. 'Adelaide woman loses sexual harassment case',[67] and 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal'.[68] 'Adelaide woman …' includes a quote from the respondent in the body of the article that suggests the complainant filed the claim to extort money from him.[69] 'Former magistrate …' details the Tribunal's assessment of the complainant as an unreliable witness in the lead and body of the article.[70]

Respondent/respondent employer as villain

The respondent and/or respondent employer are portrayed as villains in coverage of the following nine cases in the sample: *Fraser-Kirk v David Jones*, *Spiteri v IBM*, *Robinson v Rivers*, *Shea v Energy Australia (Tru Energy)*, *Richardson v Oracle* (original decision), *Ewin v Vergara* (original decision), *Mathews v Winslow Constructors*, *Tan v Royal Australasian College of Surgeons* and *Taueber v Channel 7*. This depiction of the respondent as villain occurs in a variety of ways, including through quoting the complainant's account of the alleged harassing behaviour, reporting judicial comments, portraying the respondent employer as ignoring the complainant's pleas for help and including comments on the respondent employer's workplace culture.

The body of the article 'Are you being sued? Sordid details of $37 million DJs sex claim' includes the complainant's description of alleged harasser Mark McInnes as a bully and as part of a bullying management culture at David Jones, where staff were afraid to make complaints.[71] This material is less prominent than the sensationalist headline and lead discussed above, which position the complainant as mercenary.

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[67] 'Adelaide woman loses sexual harassment case' *AAP Australian National News Wire* 20 December 2013.

[68] Sean Fewster, Chief Court Reporter 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal' *news.com.au* (online at 20 December 2013) <https://www.news.com.au/national/south-australia/former-magistrate-joseph-baldino-wins-sexual-harassment-case-in-equal-opportunity-tribunal/news-story/10c5ef560f0a00622736dbf60b3682ce>.

[69] 'Adelaide woman loses sexual harassment case' *AAP Australian National News Wire* 20 December 2013.

[70] Ibid.

[71] Kontominas and Mann (n 56) 6.

The article 'IBM accused of ignoring sexual harassment claims' may be interpreted as portraying the respondent employer IBM as shifty and evasive, losing a court bid to have details of the case suppressed, declining requests for interview and saying through a spokesperson that the company did not tolerate harassment and would vigorously defend itself.[72] This characterisation of the respondent employer as being deficient is seen in the headline, lead and body of the article. This is an example of powerful framing through the parts of the article with the highest news value (the headline and lead), which is supported through to the final words of the article.

The lead of the article 'Rivers boss fights sex harassment cases' reports that two allegations of sexual harassment were made against the respondent and outlines the alleged harassing behaviour in considerable detail.[73] This could be interpreted as suggesting that two multiple accusations corroborate each other and that the respondent sexually harassed both complainants.

The body of an article covering the original *Richardson v Oracle* decision, 'Oracle to pay $18k for senior staffer's ongoing harassment' reports judicial comments describing the alleged harasser's behaviour as 'callous' and his evidence in court as dishonest.[74] This material is not included in the most salient parts of the article (the headline and lead).

One article covering *Shea v Energy Australia (TruEnergy)*, 'Energy firm sued over harassment', focuses on the complainant's claims that the respondent employer had a toxic corporate culture of sexual harassment and intimidation.[75] This material is included in the lead and body of the article but not in the headline.

Just as judicial comments can play a role in conveying the credibility of a complainant, in some cases in the sample they also worked to undermine the credibility of the respondents. Three articles that cover the original *Ewin v Vergara* decision portray the respondent in a very unflattering light by quoting judicial comments questioning their credibility.[76] The body of

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[72] Sue Lannin 'IBM accused of ignoring sexual harassment claims', *ABC Premium News* (online at 20 October 2011, updated 21 October 2011) <http://www.abc.net.au/news/2011-10-20/ibm-sexual-harassment-case/3580656>.

[73] Cameron Houston 'Rivers boss fights sex harassment cases', *The Sun-Herald* 10 February 2013, 10.

[74] Shanahan (n 19) 3.

[75] Jane Lee 'Energy firm sued over harassment' *The Age*, Business, 29 August 2013, 24.

[76] A similar trend was seen in the reporting on the Geoffrey Rush defamation case against The Daily Telegraph, where the coverage reported scathing judicial comments about the credibility of Eryn Jean Norvill, e.g. Kathleen Calderwood and Julia Federer 'Geoffrey Rush judgment scathing of The Daily Telegraph's 'truth' defence' *ABC News Online* (online at 11 April

the article ‘Woman wins record near-$500,000 sexual harassment payout for unwanted sex following work function’ quotes judicial comments describing the respondent as an ‘arrogant individual’ with ‘little or no regard for the truth’.[77] The body of the article ‘Payout awarded over work party sex’ quotes judicial comments describing the respondent as not credible.[78] In ‘Unwanted sex costly’ the body quotes judicial comments criticising the respondent’s behaviour.[79] This material is not included in the most prominent parts of the articles, with the headlines and leads instead focusing on the size of the award.

One article about the court decision in *Mathews v Winslow Constructors*, ‘1.3 mil for daily sex harassment’,[80] could be viewed as portraying the respondent employer as villainous and hypocritical in the body. While the bulk of the article focuses on the court findings that the complainant was sexually harassed, including quoting the complainant that the respondent employer dismissed her claims, the second-last paragraph quotes the respondent employer’s values listed on its website—'‘hard work, care, self-belief, innovation, discipline, safety, productivity, team work’.[81]

Inaction from respondent employers is also a feature of other coverage in the sample. Two articles covering *Tan v Royal Australasian College of Surgeons* portray the complainant’s employer as failing to take sexual harassment seriously. The body of the article ‘Victim of surgeon’s sexual harassment speaks out: “It’s not going to go away”’ reports that, while surgeon Mr Xenos was found to have sexually harassed the complainant, he was still employed by Monash Health.[82] The article quotes a spokesman citing Mr Xenos’s ‘exemplary record’ as an employee, despite him receiving a formal warning and no longer being permitted to supervise trainees.[83] The article ‘Dr Caroline Tan speaks out about sexism in Australian hospitals’ reports in the body that, although Dr Xenos had been found to have sexually harassed Dr Tan and ordered to pay damages, he had had no professional

2019) <https://www.abc.net.au/news/2019-04-11/geoffrey-rush-judgment-scathing-of-daily-telegraph-truth-defence/10994500>

[77] Dibben (n 21).

[78] Tennant (n 22).

[79] Kay Dibben ‘Unwanted sex costly’ *The Courier-Mail* 13 December 2013, 25.

[80] Spooner and Houston (n 24) 2.

[81] Ibid.

[82] Medew (n 11) 1.

[83] Ibid.

consequences imposed and continued to be employed at the same medical centre.[84] The headlines and leads focus more on the complainant's story than on condemning the respondent employer, but the material condemning the respondent employer in the bodies of the articles complements this framing of the complainant as heroic and credible.

Two articles that cover *Taeuber v Channel 7* may be interpreted as suggesting the respondent employer had a problematic workplace culture. The article 'Channel 7 faces backlash over story of cadet journalist Amy Taeuber' refers to the respondent employer facing an 'enormous online backlash' for its alleged actions. In the body it quotes an external observer linking the channel's falling share price to sexism, alluding to other employees who had experienced sexist treatment and quoting two former board members describing the channel as a 'boys' club'.[85] While the article 'Seven disputes reporter's allegations' does convey messages about the complainant's allegations not being credible, as discussed above, the body includes suggestions that the complainant was denied natural justice by Channel 7, who did not let the complainant's chief of staff attend a disciplinary meeting as a support person.[86] This information is less prominent than the material in the headline and lead, which was more supportive of the respondent employer.

Respondent as victim

Media coverage of four of the cases in the sample suggests that the respondent or respondent employer is the true victim: *Ramstrom v Baldino*, *Fraser-Kirk v David Jones*, the *Ewin v Vergara* appeal and *Tan v Royal Australasian College of Surgeons*.

The article 'Former magistrate Joseph Baldino wins sexual harassment case in Equal Opportunity Tribunal' portrays the respondent as falsely accused of sexual harassment by the complainant and ultimately vindicated by the Tribunal decision.[87] The article opens with an assertion in the lead that the complainant 'twisted his words' and the body of the article quoted the Tribunal assessment of the respondent as a credible witness.[88] The article also

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[84] Medew (n 12).

[85] Louise Milligan 'Channel 7 faces backlash over story of cadet journalist Amy Taeuber' *ABC News* (online at 26 September 2017) <http://www.abc.net.au/news/2017-09-26/seven-faces-backlash-over-story-of-cadet-journalist-amy-taeuber/8990814>.

[86] Quinn (n 44) 6.

[87] Fewster (n 68)

[88] Ibid.

reports the aspects of the court decision that interpreted in the respondent's favour his admission to behaviour such as his threat to spank the complainant.[89]

The *Fraser-Kirk v David Jones* article 'DJs sex shocker—designer defence: "He's hot—I threw myself at him"' uses the lead and the body of the article to emphasise the support for the respondent Mark McInnes from Alannah Hill and other fashion designers in the wake of the complainant's sexual harassment claims.[90] These quotes presented the respondent in a positive light and may be interpreted as suggesting he did not deserve condemnation for his alleged behaviour.

One article reporting on the *Ewin v Vergara* appeal, 'Record sexual harassment case upheld', notes the financial toll the case had taken on the respondent.[91] The body of the article quotes the respondent's lawyer describing the financial effect of the case on the respondent and his family and also notes that the respondent had never been charged with a criminal offence for his actions.[92] However, this material is not as prominent as the information in the headline and lead, which focused on the complainant's successful case.

The opinion piece 'Neurosurgeon case is a real headache' is very sympathetic to Mr Xenos, who was found to have sexually harassed Dr Tan, and to the medical profession.[93] The body of the article quotes evidence from the case that was led in support of Mr Xenos.[94] The article also concludes with a suggestion that any criticism of sexism in the medical profession may lead to it being 'destroyed' and threaten the very health of Australians.[95] This is very supportive of the respondent and the respondent employer, and implies that it was them who had been truly victimised (by the complainant and by feminists).

Respondent as buffoon

Some of the coverage could be interpreted as ridiculing the respondent or respondent employer. This is seen in some of the coverage of *Robinson v Rivers*, *Marks v Colliers*

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[89] Ibid.

[90] Joel Christie and Annette Sharp 'DJs sex shocker—Designer defence "He's hot—I threw myself at him"', *The Daily Telegraph*, 4 August 2010, 3.

[91] Guilfoyle (n 9).

[92] Ibid.

[93] Devine (n 42).

[94] Ibid.

[95] Ibid.

International and *Shea v Energy Australia (Tru Energy)*. The body of the article 'Rivers tycoon on sex assault charge' describes the respondent's wealth with perhaps a suggestion of vulgarity: two adjoining mansions and luxury cars including a baby-blue Bentley and a red Ferrari California.[96] The body of the article 'Raunchy video reveals: "Huddo's flirty 30"' may be interpreted as portraying the respondent employer as having an unprofessional and tasteless workplace culture.[97] The article 'Former mistress in court during Energy Australia sexual harassment case' could be viewed as humiliating the managing director of the respondent employer by revealing details of his extramarital affair with a colleague in the headline, lead and body of the article.[98]

Summary—credibility messages

These themes suggest a black-and-white view of the parties to the case, often invoking archetypal/stereotypical characters. The headlines and leads frequently foreground gender stereotypes and used melodramatic language. A credible complainant is a crusading heroine or a genuine victim of suffering. A credible respondent or respondent employer is falsely accused and the true victim in the story. An incredible complainant is motivated by revenge or filthy lucre. An incredible respondent or respondent employer is a heartless or ridiculous villain.

There is some nuance in the body of the articles, which provides space for different sides of the story. In some of the coverage, the representations of the complainant and respondent in the body of the article differ from the portrayals in the headline and lead. However, the placement of this material in a less prominent part of the article minimises its impact on the reader.

The different portrayals of the parties and their credibility recall van Gorp's concepts of framing *by* and framing *through* the media.[99] The coverage in the sample that extensively quotes the complainant or respondent gives this source the power to use the media to put their

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[96] Cameron Houston (n 35) 1.

[97] Bryce Corbett 'Raunchy video revealed: "Huddo's flirty 30"' *Australian Financial Review*, Rear Window, (online at 13 June 2016) < http://www.afr.com/brand/rear-window/colliers-raunchy-video-revealed-huddos-flirty-30-20160613-gpi393#ixzz4Pm9sqPN5>.

[98] David Hurley 'Former mistress in court during Energy Australia sexual harassment case' *Herald Sun* (online at 4 September 2013) < http://www.heraldsun.com.au/news/former-mistress-in-court-during-energyaustralia-sexual-harassment-case/story-fni0fiyv-1226710868841>.

[99] Baldwin van Gorp 'The Constructionist Approach to Framing: Bringing Culture Back In', 57 *Journal of Communication,* (2007) 60-78, 68-69.

case, an example of framing through the media. Where the lead focuses on the complainant's view of events, quoting her court documents or legal representative, this gives her story the greatest prominence and positions her as credible. The same is true for the respondent or respondent employer.

The coverage in the sample also demonstrates framing *by* the media, with the journalist selecting particular aspects of the case to foreground and background and sources to quote to construct the story. Like the framing through the media, this is generally used to 'pick a side' and reinforce a black-and-white construction of a 'good' or 'bad' complainant and a 'good' or 'bad' respondent/respondent employer.

How framing and language are used to indicate a 'real' case of sexual harassment

The articles in the sample use different language techniques in the headlines and leads, such as word order and semantic emphasis, to present a picture of the 'seriousness' of a sexual harassment case and to specify whether the complainant experienced genuine harm.

Minimising the harm

Minimising the harm to the complainant from sexual harassment is seen in coverage of the following 11 cases: *Fraser-Kirk v David Jones*, *Styles v Clayton Utz*, *Robinson v Rivers*, *Shea v Energy Australia (TruEnergy)*, the *Ewin v Vergara* original decision and appeal, the original *Richardson v Oracle* decision and appeal, *Tan v Royal Australasian College of Surgeons*, *Marks v Colliers International* and *Mathews v Winslow Constructors*. This is done through using sensationalist language, using language to conflate the harm with something more palatable, focusing on the size of the award rather than the complainant's trauma, minimising sexual harassment in general and censoring the alleged harassing behaviour.

Minimising through sensationalist headlines

It is unsurprising that the most sensationalist material is found in the headlines, which are designed to grab the reader's attention. Some of the sensationalist headlines in the sample may be interpreted as trivialising the cases, presenting them as constituting comic entertainment rather than trauma and discrimination in the workplace. These headlines include 'Are you being sued? Sordid details of $37 million DJs sex claim',[100] 'Former

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[100] Kontominas and Mann (n 56) 1.

mistress in court during EnergyAustralia sexual harassment case'[101], 'Payout awarded over work party sex',[102] 'Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!',[103] 'Neurosurgeon case is a real headache'[104] and 'Raunchy video revealed: "Huddo's flirty 30"'.[105] These headlines reduce a serious legal action to mere entertainment. This trivialising of the case may contribute to perceptions that the complainant has not experienced 'real' harm and that sexual harassment in general should not be taken seriously. While some (but not all, as is discussed below) of these articles include more nuanced discussion of the case in the lead or body, the placement of this material in the headline represents an editorial decision to emphasise the sensationalist elements of the case as having the greatest 'news value'.

Downplaying the harm—focusing on the 'sex'

In the *Rivers* sample, two headlines use prurient sensationalist language, with phrases like 'sex claim' and 'sex fight' conflating sex and sexual harassment and trivialising the case.[106] The lead of 'RETAIL BOSS SEX CLAIM …' continues the minimisation of harm by focusing on the 'sexier' and milder allegations such as the complainant being asked to model underwear and photograph competitors' stock. The body of the article provides more detail about the more serious allegations, including sexual assault. The lead of 'Millionaire denies woman's harassment court claim …' also refers to the 'sexier' allegations of spy missions and underwear modelling. The body of the article provides further detail about the less 'appealing' aspects of the alleged harassment such as unwanted touching and psychological injury to the complainant.

In coverage of the original *Richardson v Oracle* case, the phrase 'sex complaint' in a headline ('Demotion after sex complaint, court told') conflates sex and sexual harassment, giving the impression that this was about sex and not systemic workplace discrimination.[107] The lead

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[101] Hurley (n 98).

[102] Tennant (n 22).

[103] Belinda Winter 'Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!', *Mondaq.com* (online), 19 December 2013 <http://www.mondaq.com/australia/x/281662/Discrimination+Disability+Sexual+Harassment/Accountant+ordered+to+pay+476000+in+damages+for+sexual+harassment+a+timely+reminder+for+Christmas+functions>.

[104] Devine (n 42).

[105] Corbett (n 97).

[106] Hadfield (n 36) 1, Shelley Hadfield 'RETAIL BOSS SEX CLAIM—Court told of modelling sessions and spy missions', *The Daily Telegraph*, 5 November 2011, 1 and Houston (n 73) 10.

[107] Dale (n 65) 11.

and body of the article are more descriptive of the allegations of sexual harassment. Similarly, in *Shea v Energy Australia*, the headline 'Former mistress in court during EnergyAustralia sexual harassment case'[108] could be seen as imposing a moral judgement on the case itself while not stating whose 'mistress' was giving evidence or how this evidence was relevant to the case. It also has the effect of conflating the 'sexiness' of the affair with the allegations of sexual harassment, perhaps suggesting that it occurred because of such a 'permissive' climate or that sexual harassment was the same as having a consensual affair. This preoccupation with the mistress and the affair continues in the headline and lead. This 'mistress' (itself an antiquated gendered term that recalls Ferguson's Madonna/Whore' is a completely separate person to the complainant and who was not involved in the complainant's case. Focussing on her dilutes the impact of the case and creates confusion for readers about who the parties to the case actually were.

Similarly, in coverage of the original *Ewin v Vergara* decision, the headline 'Payout awarded after work party sex'[109] characterises serious sexual assault allegations as 'work party sex' conflating consensual sex with nonconsensual violence. Combining this with the description of the 'payout' suggests that the complaint was not serious and the complainant not credible, despite the case being proven in court and leading to an award of compensation (or 'payout'). The lead describes the harassing behaviour as 'unwanted sex' and the body of the article describes the behaviour in graphic and unpleasant detail. The phrase 'unwanted sex' is used as a euphemism for sexual harassment and assault in another headline about the original *Ewin v Vergara* case, 'Unwanted sex costly'.[110] This article repeats the phrase 'unwanted sex' in the lead and provides a detailed description of the harassment and injuries to the complainant in the body of the article. Given the history of this case, which the criminal justice system made the decision not to prosecute a sexual assault case and the complainant described her resorting to a civil action for redress, the minimising of the harm is disturbing yet unsurprising.

The association of sexual harassment with racy seasonal cheer in the headline 'Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder

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[108] Hurley (n 98).

[109] Tennant (n 22).

[110] Dibben (n 79) 25.

for Christmas functions!'[111] trivialises the events of the original *Ewin v Vergara case* and does not refer to the complainant's trauma from a violent experience of sexual harassment. The headline does not mention the parties at all, and gives the impression that the award of damages was the penalty for some holiday 'naughtiness' and should be a cautionary tale for anyone considering similar festive 'fun' at their next Christmas party. The tone in the lead and body of the article is more subdued, describing the award of damages and analysing the legal issues in the case.

Similar minimisation of harm can be seen in coverage of the appeal of *Ewin v Vergara*. In the headline 'Appeal rejected: woman awarded $470,000 payout over unwanted drunken sexual encounter',[112] harassing behaviour is softened by the description 'unwanted drunken sexual encounter'—conflating sexual harassment with consensual sex. This contrasts with the lead, which focused on the respondent and his unsuccessful appeal, and the body of the article, which describes the harassing behaviour in graphic detail. The *Ramstrom v Baldino* headline 'Court clerk's sex claims 'too late',[113] also conflates sex with sexual harassment. The lead and body of the article refer to 'sexual harassment' and not 'sex claims'.

Further downplaying of harm from sexual harassment is seen in *Australian Financial Review* coverage of *Marks v Colliers International*, which uses a humorous tone in the headline and lead in a column about the respondent employer hosting a 'raunchy' party. The headline 'Raunchy video revealed: "Huddo's flirty 30"'[114] promises a sexy story for the reader, an unexpected pleasure in the traditionally staid *Australian Financial Review*. The lead names the parties to the sexual harassment case but suggests that the article has a treat in store for readers (perhaps the 'raunchy video' mentioned in the headline). The lead does not refer to the complainant's court documents or appear to take the case seriously. The use of the terms 'august organ' may suggest a pun to match the headline. This may convey a picture of the respondent employer as an enjoyable if somewhat cheeky place to work, where sexual harassment is part of the light-hearted shenanigans (as opposed a toxic and sexist workplace culture).

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[111] Winter (n 103).

[112] Deery (n 23).

[113] Fewster (n 63) 14.

[114] Corbett (n 97).

Minimising the harm—focusing on the money

Cases in the sample also minimise the harm in sexual harassment cases by focusing on the size of the award of damages. One example is a headline on the *Richardson v Oracle* appeal, ‘Oracle ordered to pay $130,000 in sexual harassment case’.[115] The headline briefly refers to the case being about sexual harassment but provides little detail about the facts of the case. The lead describes the complainant’s successful appeal and increase in the award of damages, continuing the financial focus from the headline. The body of the article describes the harassing behaviour in more detail. The headline ‘How much is a sexual harassment claim actually worth?’[116] shows a similar level of interest in the size of the award of damages but does not specify the award, name the parties or describe the facts of the case. The lead focuses on the size of the award in another high-profile case, the *Ewin v Vergara* decision. The body of the article discusses the successful *Richardson v Oracle* appeal, focusing on the financial aspect and the complainant no longer being ‘out of pocket’.

Minimising the harm—sexual harassment is no big deal

Some of the coverage in the sample could be interpreted as either downplaying sexual harassment in general or downplaying the harmfulness of the alleged harassment to the complainant. A downplaying of the ‘harm’ aspects of sexual harassment is seen in the *Daily Telegraph* opinion piece ‘Neurosurgeon’s case a real headache’.[117] The dismissive headline and the description of patriarchal privilege as a ‘crumbling edifice’ in the lead imply that all battles have been won and that there is no need for feminists to campaign against gender discrimination in the workplace. As discussed above, the body of the article focuses on challenging the credibility of the complainant.

Two articles in the sample that report on *Fraser-Kirk v David Jones* could be read as trivialising the alleged sexual harassment. The body of the article ‘Inside Australia’s biggest harassment case $37m SEX SUIT’ introduces the alleged sexual harassment of the complainant in an almost romantic way, saying that it started with a kiss.[118] This assessment of harm is not included in the lead. This is later revealed to be a caramel kiss dessert. The lead of the opinion piece ‘Nobody died, so why is she demanding a king’s ransom’ does not

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[115] Smith (n 34).

[116] Misa Han ‘How much is a sexual harassment claim actually worth?’, *The Australian Financial Review*, 10 October 2014, 32.

[117] Devine (n 42).

[118] Fife-Yeomans et al (n 49) 2.

mention the case. The body of the article briefly dismisses the alleged harassment as the work of a 'sleaze' who 'got away with more than he should have' but had already been punished enough by adverse publicity and a less generous severance payment.[119]

Two articles in the sample that cover *Styles v Clayton Utz* could be interpreted as downplaying the seriousness of the alleged sexual harassment. The body of the article 'Man in the middle of $200k claim—law firm's sexual harassment case' dismisses the alleged harassment as 'locker room banter'.[120] As discussed above, the headline and lead focus on portraying the complainant as a scorned harridan and the respondent as her victim. The lead for 'Exposing a secret culture' refers to the allegations as 'allegedly offensive comments made at boozy work functions'. The body of the article refers to incidents of unwelcome sexual conduct but does not provide details. The article does not refer to the secret misogynist Facebook group that directly targeted women in the Clayton Utz workplace, which was mentioned in other articles in the sample.[121]

The closing paragraph of the *Robinson v Rivers* article 'Millionaire denies woman's harassment court claim—TYCOON sex fight' suggests a note of scepticism about the harm to the complainant by describing the complainant as someone who 'claims' to suffer from PTSD, depression and panic attacks.[122] This minimising of harm is not featured in the headline or lead, which focus on the respondent's denial of the behaviour and the allegations against the respondent.

The *Shea v Energy Australia (TruEnergy)* article 'Sacked Energy Australia executive accusing managing director of sexual harassment has "zero credibility" and a "liar"' downplays the alleged harassing behaviour in the body of the article as one incident that happened to someone else and one incident of the complainant being 'groped'.[123] The headline and lead focus on the (in)credibility of the complainant.

Two articles in the sample that cover the original *Ewin v Vergara* decision downplay the harassing behaviour and its effect on the complainant in the headline, lead and body of the

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[119] Devine (n 55) 15.

[120] Carson (n 5) 17.

[121] Exposing a secret culture' (n 2) 5.

[122] Hadfield (n 36) 4.

[123] Hurley (n 52).

article, instead focusing on the legal implications for employers: 'Australia: Contractor ordered to pay half a million dollars for sexual harassment'[124] and 'Australia: Accountant ordered to pay $476,000 in damages for sexual harassment—a timely reminder for Christmas functions!',[125] with the latter referring to the harassment as 'allegations' even though the case had been proven in court.

There is a similar minimising of the harm in an article about the *Ewin v Vergara* appeal, 'Harassment can happen beyond office', which refers to the harassing behaviour in the lead as the complainant being 'harassed by a colleague in a pub' and in the body as a 'drunken sexual encounter' where the respondent was not charged by police.[126] The behaviour is not described in any detail, with the only specific example referring to an unwanted kiss.

Two articles in the sample that cover the *Richardson v Oracle* appeal decision downplayed the harassing behaviour. The body of the article 'Oracle ordered to pay $130,000 in sexual harassment case' describes the behaviour as 'inappropriate comments' rather than unwanted sexual advances and quotes the respondent describing them as 'innocuous'.[127] The body of the article 'IT executive Rebecca Richardson's SH win to "rock employers"' quotes an external expert saying that it was only necessary for a complainant to provide evidence of lower-level 'harm' such as 'hurt feelings' when making a complaint and quotes the alleged harasser describing his comments as playful banter.[128] The headlines and leads do not refer to harm to the complainant, focusing instead on the size of the award and the implications of the case for employers.

The article 'Colliers agrees to negotiate over sexual harassment' quotes different legal 'expert' views on *Marks v Colliers International*.[129] The lead describes the harassing behaviour as 'lurid allegations'. The body of the article includes an express gradation of harm

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[124] Adam Salter and Lisa Franzini 'Australia: Contractor ordered to pay half a million dollars for sexual harassment' *Mondaq.com* (online at 2 January 2014) <http://www.mondaq.com/australia/x/283816/employment+litigation+tribunals/Contractor+Ordered+To+Pay+Half+A+Million+Dollars+For+Sexual+Harassment> Business Briefing.

[125] Winter (n 103).

[126] Nick Toscano 'Harassment can happen beyond office' *The Age* 13 August 2014, 2.

[127] Smith (n 34).

[128] Markus Manheim 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"' *The Canberra Times* 16 July 2014, 5.

[129] Bleby and Han (n 66) 2.

on a scale from 1 to 10, with 'innuendo' at 1 and 'rape' at 10.[130] The complainant's case, if proven, would be considered an '8' and the *Richardson v Oracle* case was declared a '2'.

Minimising the harm—censoring the harm

Some of the coverage in the bodies of the articles combines graphic descriptions of the harassing behaviour with censorship of 'offensive' language. This is seen in coverage of *Fraser-Kirk v David Jones,* the *Ewin v Vergara* appeal and *Mathews v Winslow Constructors.*

The article 'Are you being sued? Sordid details of $37 million DJs sex claim' censors the swear words used by the respondent during the alleged harassment but reports the unwanted touching in detail.[131]

The articles 'Bullied Vic worker receives $1.3m payout' and 'Female worker awarded million dollar payout over years of "hardcore filth" at Melbourne construction company' detail the violent threats and verbal abuse the complainant experienced but censor the 'offensive' language 'fuck', 'wank' and 'tits'.[132]

The article 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for "arduous" legal journey' reports the harassing behaviour in graphic and confronting detail, including the complainant's injuries and forensic details about the respondent's genetic material being found on her shoes, but censors the word 'fuck'.[133]

Recognising the harm

Recognising the harm—sexual harassment is a big deal

In contrast to the coverage discussed above, which conflates sex and sexual harassment, one article about the *Marks v Colliers International* case does not mention the word 'sexual' at all. Nevertheless, the headline '"That's the girl you sold me" Colliers harassment case'[134]:

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[130] Ibid.

[131] Kontominas and Mann (n 56) 6.

[132] Melissa Meehan 'Bullied Vic worker receives $1.3m payout' *Yahoo News* (online at 17 December 2015) <https://au.news.yahoo.com/bullied-vic-worker-gets-more-than-1m-30390910.html>; Ben Brennan 'Female worker awarded million dollar payout over years of 'hardcore filth' at Melbourne construction company' *Yahoo News* (online at 18 December 2015) <https://au.news.yahoo.com/vic/a/30398737/female-worker-kate-mathews-awarded-million-dollar-payout-by-victorias-supreme-court-over-years-of-sexual-harassment-rape-threat-at-winslow-constructors-in-melbourne/.

[133] Madeleine Morris 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for "arduous" legal journey' *ABC News* (online at 14 August 2014, updated 15 August 2014) < http://www.abc.net.au/news/2014-08-14/victim-jemma-ewin-says-record-compensation-is-vindication/5671498>.

[134] Hatch (n 59) 3.

positions the respondent as objectifying the complainant, even though the term 'harassment' was used instead of 'sexual harassment'. This conveys a suggestion of harm to the complainant. The lead and body of the article reinforce this focus, with detailed descriptions of serious alleged harassment.

In contrast to other coverage of the cases in the sample that refer to the size of the award of damages, the *ABC News* headline on the *Matthews v Winslow* Constructors case 'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 mil'[135] draws the reader's attention to the behaviour to portray the complainant in a sympathetic way so that the award of damages seems like a logical decision for the court to make. The complainant is not named but is referred to as a 'female construction worker'. This contextualises the headline, bringing to mind a brutal, masculocentric workplace. The respondent employer is not named. The lead follows a similar pattern, referring to the behaviour before the size of the award. The body of the article describes the behaviour in confronting detail.

The *Yahoo News* headlines of *Matthews v Winslow Constructors* convey similar messages about the harm to the complainant. While the complainant is not named in the headline 'Female worker awarded million dollar payout over years of "hardcore filth" at Melbourne construction company', the reference to the years of harassment means that the harm to the complainant is not downplayed.[136] The lead takes a similar approach to the *ABC News* headline discussed above, referring to the harassing behaviour at the beginning of the paragraph and award of damages at the end—suggesting a logical and just result. The body of the article describes the harassing behaviour in graphic detail. The article 'Bullied Vic worker receives $1.3m payout' uses the lead to focus on the complainant, who is described as a 'Melbourne woman'.[137] While the headline concentrates on the size of the award of damages, the lead outlines the harm in more detail, describing the rape threats and insults received by

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[135] Freya Michie 'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million', *ABC News* (online), 17 December 2015, updated 18 December 2015 <http://www.abc.net.au/news/2015-12-17/female-construction-worker-awarded-1.3m-sexual-harassment/7039062>.

[136] Ben Brennan 'Female worker awarded million dollar payout over years of 'hardcore filth' at Melbourne construction company', *Yahoo News* (online), 18 December 2015 <https://au.news.yahoo.com/vic/a/30398737/female-worker-kate-mathews-awarded-million-dollar-payout-by-victorias-supreme-court-over-years-of-sexual-harassment-rape-threat-at-winslow-constructors-in-melbourne/>.

[137] Meehan (n 132).

the complainant before mentioning the size of the award of damages[138] and positioning the award of damages as a just result. The body of the article describes the harassing behaviour and its effect on the complainant in detail.

Recognising the harm—melodramatic language and graphic detail

Some material in the body of the articles emphasises the harm to the complainant, either through melodramatic language or graphic detail. This is seen in the coverage of the following six cases: the *Ewin v Vergara* original decision and appeal, *Ramstrom v Baldino*, *Robinson v Rivers, Spiteri v IBM* and *Mathews v Winslow Constructors*.

Three articles in the sample emphasise the harm to the complainant when reporting on the original *Ewin v Vergara* decision. 'Woman wins record near $500,000 sexual harassment payout for unwanted sex following work function',[139] 'Payout awarded over work party sex'[140] and 'Unwanted sex costly'[141] provided graphic descriptions of the harassing behaviour and its devastating effect on the complainant.

Similar reporting is found in the coverage of the *Ewin v Vergara* appeal. Two articles in the sample provide very graphic and confronting accounts of the harassing behaviour and the complainant's injuries: 'Appeal rejected: woman awarded $470,000 payout over unwanted drunken sexual encounter'[142] and 'Sexual harassment victim Jemma Ewin urges inquiry into case, says record compensation payment is vindication for "arduous" legal journey'.[143].

In contrast, another article about the *Ewin v Vergara* appeal, 'Record sexual harassment payout upheld' does not describe the behaviour in detail, referring to it as 'unwanted sexual conduct' and 'sexual remarks', but reports its traumatic effect on the complainant.[144]

Similarly, while the article 'Former Oracle employee sexually harassed by manager wins increased payout on appeal' only briefly describes the harassing behaviour in general terms, it

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[138] Ibid.

[139] Dibben (n 21).

[140] Tennant (n 22).

[141] Dibben (n 79) 25.

[142] Deery (n 23).

[143] 'Sexual harassment victim Jemma Ewin has record $500K payout upheld, criticises Victoria Police' *ABC News* (online at 13 August 2014) < http://www.abc.net.au/news/2014-08-12/sexual-harassment-victim-has-record-payout-upheld/5665514>.

[144] Guilfoyle (n 9).

discusses in more detail the increased award of damages and describes it as more appropriate due to the harm suffered by the complainant.[145]

One article covering the *Ramstrom v Baldino* case, 'BALDINO TRIAL—clerk's trauma real' quotes evidence from the complainant's psychiatrist, which was led in the Tribunal to corroborate the effect of the alleged sexual harassment on the complainant's mental health.[146] The article 'Court clerk's sex claims "too late"' also provides a detailed description of the alleged harassing behaviour and its effect on the complainant.[147]

The article 'RETAIL BOSS SEX CLAIM—court told of modeling sessions and spy missions' describes the alleged harassing behaviour in extensive detail, including the allegation of sexual assault.[148]

The *Spiteri v IBM* article 'IBM saleswoman in $1.1m SH case' provides a detailed yet clinical description of the alleged harassing behaviour and its effect on the complainant's mental health.[149]

Graphic descriptions of the harassing behaviour and its effect on the complainant are also found in three articles in the sample that reported the outcome of *Mathews v Winslow Constructors*: '1.3 mil for daily sex harassment',[150] 'Female construction worker subjected to assaults, bullying and rape threats, awarded $1.3 million'[151] and 'Melbourne sex harassment payout: worker Kate Mathews wins $1.3 million in personal injury damages'.[152]

These extensive and graphic descriptions are placed in the less prominent sections of the article, not in the headlines and leads.

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[145] Jamelle Wells, Court Reporter 'Former Oracle employee sexually harassed by manager wins increased payout on appeal' *ABC News* (online at 15 July 2014) <http://www.abc.net.au/news/2014-07-15/rebecca-richardson-wins-increased-harassment-payout-from-oracle/5597738>.

[146]Fewster (n 68), 33.

[147] Fewster (n 63) 14.

[148] Hadfield (n 106) 2.

[149] Ben Butler 'IBM saleswoman in $1.1m sexual harassment claim', *The Age* 16 April 2011, 3.

[150] Spooner and Houston (n 24) 2.

[151] Michie (n 136).

[152] Royall (n 25).

Gender stereotypes and harm

A minority of the coverage in the sample invokes gender stereotypes of people other than the complainant, with the effect of assigning blame to women for the harms of sexual harassment. The *Taeuber v Channel 7* article 'Sisterhood has its limits'[153] uses the headline to suggest that the biggest problem for the complainant was not sexual harassment itself but the unsupportive attitudes of other women. The lead does not mention the complainant, the respondent employer or the man who allegedly harassed the complainant. The lead does not refer to sexual harassment or systemic discrimination. This headline relies on the reader either having knowledge of the case or curiosity about the failures of 'sisterhood'. The body of the article attempts to redress this by referring to the gender power imbalance in workplaces, but the placement of this information below the headline and lead led to the 'bad women' angle being framed most prominently.

Framing the harm—episodic versus thematic framing

Most of the articles in the sample use episodic framing, focusing on the case in isolation. The episodic framing positions any harm or lack of harm from sexual harassment as unique to the circumstances of the case. The thematic framing positions any harm (or lack of harm) from sexual harassment as a social phenomenon, which affects people beyond the parties to the case. A minority of articles in the sample attempt to place the following cases in a broader social, political or legal context: *Fraser-Kirk v David Jones*, *Tan v Royal Australasian College of Surgeons* and almost every piece on *Taueber v Channel 7*.

The opinion piece 'Nobody died, so why is she demanding a king's ransom?' attempts to place *Fraser-Kirk v David Jones* in the context of a trend of 'victim feminism', where 'overreaching' feminists could consider a politician no better than a violent criminal for using the 'wrong' words'.[154] The opinion piece 'Neurosurgeon case a real headache' expresses similar views on *Tan v Royal Australasian College of Surgeons*, linking the case to 'gender feminism' demands for more flexible working hours.[155]

One article about *Tan v Royal Australasian College of Surgeons* uses the case and an Auditor-General's report as the basis for a broader discussion about workplace bullying and

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[153] Kasey Edwards 'Sisterhood has its limits', *The Age*, 31 October 2017, 18.

[154] Devine (n 55) 15.

[155] Devine (n 42).

harassment in the health sector.[156] The articles ‘How much is a sexual harassment claim actually worth?’ and ‘Michael Harmer: renegade reformer’ examine recent high-profile sexual harassment decisions, including increases in damages and the impact of the Harmers Lawyers tactics on raising the public and media profile of sexual harassment.[157]

Three articles in the sample that cover *Taueber v Channel 7* place the case in the broader context of the ‘Me Too’ movement and gender discrimination in the workplace. The articles ‘Learn from Weinstein’, ‘Predators be afraid’ and ‘Sisterhood has its limits’ discuss power imbalances in the workplace.[158] While ‘Predators be afraid’ expresses an optimistic view, suggesting the tide is turning in favour of victims, ‘Learn from Weinstein’ and ‘Sisterhood has its limits’ are more cautious—viewing the cases as a sign that more needed to be done to address ongoing gender inequalities in the workplace.

The coverage of Caroline Tan’s case includes examples of taking harm seriously and minimising harm. The article ‘“Endemic bullying”: Health system failed doctors and nurses, says Auditor-General’s report’[159] has a broader focus than other coverage arising from Dr Caroline Tan’s sexual harassment case. The report is described as a ‘scathing audit’.[160] The lead positions the health sector as having an endemic problem with bullying, harassment and discrimination, but does not specify sexual harassment. This dilutes the impact of the language, presenting the sector as bad in general rather than specifically discriminatory towards vulnerable groups.

This sense of broader harm is also suggested in the ‘Learn from Weinstein’[161] *Canberra Times* opinion piece. The lead uses the Weinstein example to draw the reader into a discussion of the harms caused by sexual harassment. This case had had high-profile international media attention and galvanised the conversation about sexual harassment. The lead does not refer to the complainant, her case or Channel 7, but establishes a context of systemic discrimination as a lens for the reader to consider Amy Taeuber’s story. This is an

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[156] Rania Spooner ‘“Endemic bullying”: Health system failed doctors and nurses, says Auditor-General’s report’ *The Age* (online at 23 March 2016) < http://www.theage.com.au/victoria/endemic-bullying-how-the-health-system-failed-our-doctors-and-nurses-20160323-gnp6od.html#ixzz48cX2Rf2B>.

[157] Han (n 116) 32, Rachel Nickless ‘Michael Harmer: renegade reformer’ *Australian Financial Review* 30 July 2014, 41.

[158] Squires (n 18), Jenna Price ‘Learn from Weinstein’ *Canberra Times* 10 October 2017, 18, Edwards (n 152)18.

[159] Rania Spooner (n 157)

[160] Ibid.

[161] Price (n 158) 18.

example of 'thematic' framing of a story about violence against women in the broader social context of gender discrimination, rather than an 'episodic' frame where an individual story is told in isolation. Episodic and thematic framing is discussed in more detail below.

Summary—representations of harm

Much of the coverage recognises that harm to the complainant could include physical and psychological trauma. However, there is also a theme of trivialising the harm to the complainant in the headline, lead and body of the articles. This is conveyed through using minimising language such as conflating consensual sex and sexual harassment, censoring the 'bad' language used by the alleged harasser or positioning the complainant's suffering as a light-hearted warning for office Christmas parties.

Some coverage presents mixed messages, where the headline and/or the lead minimise the harm to the complainant, but the body of the article emphasises the harm in graphic detail. This suggests that minimising the harm from sexual harassment or making it 'sexy' was the most 'newsworthy' approach to take.

Legal messages

The legal aspects of the case are often downplayed in the headlines and leads but not in the bodies of the articles. As discussed above, there is often a prurient focus on the 'raciness' of the case rather than a serious examination of the legal issues involved.

Where legal messages are emphasised in the headline and lead, there is a focus on the implications of a landmark case for employers or on the tactics of the complainant's legal representation. For example, in the David Jones case, the article 'David Jones lawsuit shows that boards must be kept informed in harassment cases'[162] uses the lead and headline to focus on the legal significance of the case for employers, vicarious liability issues and problems in the current legal system. Similarly, the *Age* article about the *Ewin v Vergara* appeal 'Harassment can happen beyond office'[163] hints at the legal implications of the case. A focus on the legal ramifications of the case for employers continues in the lead, together with downplaying of the harm to the complainant as the case is reduced to 'Melbourne woman harassed by a colleague at a pub'. The successful *Richardson v Oracle* appeal gave rise to the

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[162] Malcolm Maiden 'David Jones lawsuit shows that boards must be kept informed in harassment cases', *Sydney Morning Herald*, BusinessDay liftout, Opinion & Analysis, 5 August 2010, 6.

[163] Toscano (n 126) 2.

headline 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"'[164] and a lead that suggests the increased award of damages would have a broader impact on employers beyond the case.

Coverage of the original *Richardson v Oracle* case appears to be more interested in judicial criticism and apparent tactical failures of the complainant's legal representatives than in the facts of the case itself, with headlines such as 'Judge criticises law firm over rejection of settlement offer',[165] 'Judge blasts Ashby's self-serving lawyers'[166] and 'High-octane mix of media and money backfires in court'.[167] This message changes after the complainant successfully appeals the award of damages, and her legal representative is lionised in an *Australian Financial Review* headline as 'Michael Harmer: renegade reformer' and praised in the lead for his unconventional but successful tactics.[168]

This coverage suggests a greater media interest in the legal implications of these high-profile cases for employers, such as vicarious liability for acts of sexual harassment by employees and potential large awards of damages—than for future victims of sexual harassment.

As I identified throughout the previous chapter, the legal voice is used frequently in the bodies of articles reporting on sexual harassment. This is to be expected because most stories are focused upon the outcome of a legal hearing. This allows the media to play an educative role by communicating what the Court has considered as unwelcome and how the Court has determined damages, and by explaining through the legal expert voice when a workplace or employer may be considered vicariously liable. This positive role is discussed further in the next chapter.

I note though that a minority of articles in the sample use the body of the article to report details that were irrelevant to the cases and seemed to serve a purely entertainment purpose. The article 'DJs sex shocker—designer defence: "He's hot—I threw myself at him"' seems to focus purely on a fashion designer's insensitive 'jokes' about the case and does not provide

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[164] Mannheim (n 128) 5.

[165] Alexander (n 31) 10.

[166] Low (n 32) 10.

[167] 'High-octane mix of media and money backfires in court' (n 32) 36.

[168] Nickless (n 158) 41.

readers with any new or relevant information about the legal issues in play.[169] The article 'Raunchy video revealed …' delights in descriptions of revelry in the respondent employer's office.[170] While it is unsurprising that the tabloid *Daily Telegraph* should take such an approach, this was in unexpected angle for the usually sober and serious *Australian Financial Review.*[171]

The majority of articles in the sample that cover the legal issues focus directly on the implications for employers. This was apparent in the coverage of *Fraser-Kirk v David Jones*, the original *Ewin v Vergara* decision and its appeal, the *Richardson v Oracle* appeal, *Mathews v Winslow Constructors* and *Marks v Colliers International*.

The *Fraser-Kirk v David Jones* article 'Boards must be kept informed …' positions the case as a lesson for employers about vicarious liability for sexual harassment.[172]

Two articles in the sample that cover the original *Ewin v Vergara* decision analyse the legal implications of the case for employers. These include the scope of the *Sex Discrimination Act 1984* (Cth), which applied to employees and contractors, the definition of workplace including areas associated with the workplace such as corridors and that an employer may be vicariously liable for the behaviour of employees and contractors during work functions.[173]

The coverage of the *Ewin v Vergara* appeal indicates a similar focus on lessons for employers. The article 'Harassment can happen beyond the office' quotes external experts including the Sex Discrimination Commissioner, who express the view that the main lesson of the case is that as a workplace could be anywhere you bring a portable laptop—implying that this is all the more reason for companies to eliminate sexual harassment.[174]

The *Richardson v Oracle* appeal article 'IT executive Rebecca Richardson's sexual harassment win to "rock employers"' focuses on the legal implications of the case for employers, quoting an external expert in the legal field.[175] This includes a statement that

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[169] Christie and Sharp (n 90) 3.

[170] Corbett (n 97).

[171] Although, with its demographic consisting of 65% men, mostly over 45, perhaps they know what their audience wants to hear – Nine for Brands (online) <https://www.adcentre.com.au/brands/the-australian-financial-review/>

[172] Maiden (n 163) 7.

[173] Salter and Franzini (n 124), Winter (n 103).

[174] Toscano (n 126) 2.

[175] Manheim (n 128) 5.

employers are vicariously liable for sexual harassment in their workplaces even if they are unaware of it, even though the complainant in this case did report the alleged harassment to her employer.[176] The article also quotes the legal expert saying that for a case to be successful, it was not necessary for a complainant to prove an ongoing psychiatric injury—which could be seen as implying the case lowered the evidentiary bar for sexual harassment.[177]

Four articles in the sample for *Mathews v Winslow Constructors* quote the complainant's lawyer, who describes the case as a strong message for employers to take sexual harassment seriously and to have a zero-tolerance approach to bullying and harassment.[178]

Two articles in the sample that cover *Marks v Colliers International* focus on speculation from lawyers about how much the complainant's claim would cost her employer if she won.[179]

Some articles could be viewed as conveying legal messages for potential complainants or potential respondents. For example, three articles in the sample that cover the *Richardson v Oracle* appeal provide information about the legal reasons for the increased award of damages that could be of interest to potential complainants and employers alike.[180] A fourth article, 'Michael Harmer: renegade reformer' could be interpreted as inspiring more women to launch sexual harassment claims because complainants demanded higher compensation.[181]

Summary—legal Issues

The coverage in the sample addresses the following legal issues relating to sexual harassment: vicarious liability and employers, the application of the Sex Discrimination Act to contractors, vicarious liability outside of a traditional 'workplace' and what particular harms are 'worth' for employers in damages.

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[176] Ibid.

[177] Ibid.

[178] Spooner and Houston (n 24) 2, Michie (n 134), Brennan (n 137) and Meehan (n 132).

[179] Bleby and Han (n 65) 2 and 'Colliers could face huge payout in sexual harassment claim' *Sydney Morning Herald* (online at 10 June 2016) < http://www.smh.com.au/business/workplace-relations/colliers-could-face-huge-payout-in-sexual-harassment-claim-20160609-gpfwii.html>.

[180] Wells (n 146), Smith (n 34), Han (n 116) 32.

[181] Nickless (n 158) 41.

Legal information is generally imparted by 'expert' legal voices, such as judicial officers, lawyers working in the field of employment law and counsel for the complainant, respondent or respondent employer.

The legal messages in the sample are generally accurate, due to the use of expert legal sources, as they convey useful information about what behaviour constitutes sexual harassment, employer responsibilities under vicarious liability and what may be considered a 'workplace'. While the legal information was often one-sided, focusing on minimising risk for potential respondent employers rather than on providing information for potential complainants, it had the potential to inspire or direct employers to change their practices to improve gender equality in the workplace.

Conclusion

The articles in the sample convey a range of messages about 'good' complainants and 'real' sexual harassment. This coverage presents a range of viewpoints, some suggesting that the reader 'think about' the parties or the cases in a particular way. Some coverage links the complainant's strength to her credibility, while other coverage links her suffering to her credibility. The 'realness' or authenticity of sexual harassment is seen in coverage that focuses on the details of the harassment and its psychological effect on the complainant, but the message is muddled when bad language is censored for the delicacy of readers. The credibility issue also highlights examples of framing through the media, where the parties or their lawyers are able to shape the narrative, and framing by the media, where the story is constructed by the journalist.

I did not notice a large difference between representations of sexual harassment across different media outlets or between print and online coverage. While sensationalism and graphic detail is a predictable feature of the coverage of tabloids such as the *Daily Telegraph* and *Herald Sun,* the *Australian Financial Review* also provided an account of a sexual harassment case that focused on entertaining rather than informing readers.

I also did not notice any considerable difference in the representation of sexual harassment by male and female journalists. Sensationalist coverage and gendered mythology is present in articles by male and female journalists alike.

There is coverage that overuses cautious language like 'alleged' to give the impression of incredibility. Some articles in the sample present the respondent and/or respondent employer

as purely villainous, but others suggest that the alleged harasser or employer is the real victim in the case—even in situations where the allegations were proven in court. The articles present the legal issues accurately, strengthened by quoting legal expert sources. Much of this information is directly addressed to potential respondent employers rather than complainants, suggesting that it is not intended to educate the general community about legal issues. However, these messages have the potential to improve understanding in the community of sexual harassment and remind employers of their responsibilities. While this may not of itself cure gender inequality in the workplace, it is a positive development.

The thematic focus of the coverage in *Taueber v Channel 7* may be an indication of changing journalistic and editorial attitudes towards sexual harassment in the wake of Me Too. However, as this is the only case in my sample that emerged after the Weinstein allegations hit the headlines, it is too early to tell whether Me Too will have a significant impact on coverage of sexual harassment cases.

10 Discussion

Introduction

In this chapter I provide a feminist analysis of the way my findings align with previous scholarship about the way the media and the courts characterise violence against women. I expand on my findings and compare these data and themes to what has been found in previous scholarship about 'real' sexual harassment and credible complainants in the media and the courts. I discuss the way that the media coverage in my sample promotes particular interpretations of sexual harassment to create a 'perceived reality' for readers.[1] I discuss the messages from the cases in the sample about gender stereotyping of the complainant and respondent and the way harm is minimised and emphasised. I also discuss the representation of legal information in the context of previous scholarship.

Portrayal of the female complainant

'Positive' strong

In my framing and discourse analysis of the media coverage, I found that portrayals of the complainant often linked her credibility to her strength. The emphasis on the complainant's strength echoes the awkward 'empowerment' narratives identified in previous studies of media representations of violence against women. We could see a 'positive' view of the complainant in the coverage of *Styles v Clayton Utz*, *Richardson v Oracle*, the *Ewin v Vergara* appeal, *Tan v Royal Australasian College of Surgeons* and *Taueber v Channel 7*, in which the case is framed as a David and Goliath battle and the complainant as a crusading whistleblower.

The news stories about the brave and strong complainant taking on a powerful organisation aligned with several of the news values described by Harcup and O'Neill.[2] These included powerful organisations (which covered the respondent employer in all cases in my sample), magnitude (in both the size of the respondent employer and the size of the amount claimed/award of damages) and unfolding drama (stories about ongoing court matters including the initial filing of the claim).

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[1] See Robert M. Entman 'Framing Bias: Media in the Distribution of Power' (2007) 57 *Journal of Communication* 163, 164.

[2] See Tony Harcup and Deirdre O'Neill 'What is News? News values revisited (again)' (2017) 18(12) *Journalism Studies* 1470, 1482.

While these are validating portrayals of complainants, such coverage does not necessarily translate into the portrayal of a feminist message. Positioning the complainant as sympathetic and credible also has the effect of implying that individual heroic women carry the responsibility to challenge sexual harassment. It also suggests that sexual harassment is a problem for individual complainants and not society as a whole. This echoes Nettleton's observation that coverage of domestic violence that 'empowers' women and suggests where they can seek help conveys an anti-feminist message that the appropriate social response to sexual harassment is that the individual takes action.[3] While Nettleton is discussing domestic violence, I found a similar trend in media representations of sexual harassment that turned the complainant into a heroic role model.[4] This coverage positioned the cases as individual situations of injustice that needed to be solved by a brave individual taking action. This individual focus can be explained to an extent as a product of sexual harassment legislation itself, which requires an individual to bring a claim. The individual focus is also reflective of the fact that the stories in my sample were chosen because of their reporting on individual sexual harassment cases.

The coverage that linked complainant strength and complainant credibility also presents another example of a 'good' and reasonable victim, which may not accord with other women's experiences of sexual harassment in the workplace. Associating a complainant's assertive actions with credibility may have the consequence of positioning less 'strong' complainants who delay reporting sexual harassment or taking legal action as being less credible.

These media representations, while presenting the complainant in a good light, also create a 'reality' for readers that fails to recognise the systemic nature of sexual harassment and gender discrimination in the workplace or the reasons why victims may not 'come forward'.

'Negative' and vengeful

As discussed in chapter 9, the complainant was portrayed as lacking credibility in coverage of seven of the 14 cases in the sample. A particularly powerful example of this occurred in the coverage of the four cases that invoked a stereotype of a vengeful or gold-digging woman:

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[3] Pamela Hill Nettleton 'Domestic Violence in Men's and Women's Magazines: Women Are Guilty of Choosing the Wrong Men, Men Are Not Guilty of Hitting Women' (2011) 34 *Women's Studies in Communication* 139, 48.

[4] This parallels media portrayals of Rosie Batty as a crusading heroine battling family violence, and the late Allison Baden-Clay as a heroic victim of domestic violence.

Fraser-Kirk v David Jones, *Styles v Clayton Utz*, *Shea v Energy Australia* and *Ramstrom v Baldino*. This coverage was reminiscent of the inflammatory sexist archetypes observed by Mead in coverage of sexual harassment, such as the 'seductress' and 'man-hating woman'.[5] For instance, the complainant in *Styles v Clayton Utz* is portrayed in this coverage as being motivated by potentially high awards of damages, taking revenge against an employer who terminated her employment and setting out to punish a former colleague/lover. In *Fraser-Kirk v David Jones* the target is depicted as 'overreacting' and seeking financial gain. The complainants in *Shea v Energy Australia* and *Ramstrom v Baldino* are also portrayed as being motivated by revenge and money. The complainant in *Shea* extended the 'mad woman' trope to the alternative meaning of 'mad' as an irrational angry female.

A less overt example of this was seen in the article about *Marks v Colliers International* 'Colliers could face huge payout in sexual harassment claim', with its focus on the employer and dismissal of the complainant as a 'former assistant' who 'claims' harassment from a 'senior executive' of sexual harassment.[6] The overall effect was a gendered discursive construction of the victim as a less authoritative or powerful underling lying about her boss.

These stories about the incredible complainant with dubious motives engaged with a number of Harcup and O'Neill's news values. Similar to the 'strong complainant' discussed above, these stories featured powerful organisations and covered the 'unfolding drama' of the courtroom. These stories often focused on the 'entertainment' aspects of the case and the 'magnitude' of the damages sought by the greedy and vengeful complainant. These stories also used a powerful framing device, placing the material about the greedy and vengeful complainants in the headline and lead.

An incredible complainant can also be suggested through hyper-cautious language. While the excessive uses of the word 'alleged' in 'Woman sues IBM for $1.1m – sex pest legal fight'[7] may have been included to insulate the newspaper against any prosecutions for sub judice contempt or defamation actions from IBM, a single 'alleged' or statement about these being

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[5] Jenna Mead 'Introduction—Tell it Like it Is,' Jenna Mead (ed) *Bodyjamming—Sexual Harassment, Feminism and Public Life* (Allen and Unwin, 1997) 1, 6.

[6] 'Colliers could face huge payout in sexual harassment claim', *Sydney Morning Herald* (online), 10 June 2016 <http://www.smh.com.au/business/workplace-relations/colliers-could-face-huge-payout-in-sexual-harassment-claim-20160609-gpfwii.html>

[7] Marianne Betts 'Woman sues IBM for $1.1m – Sex pest legal fight', *Herald Sun*, 15 April 2011, 9

the claims one party to the case was making, would have had the same effect. Instead, this hyper-caution presented the complainant as lacking credibility while her case was ongoing.

These vengeful complainants are portrayed as incredible in the media in the same way that feminist scholars such as Scutt have found that the legal system has viewed women in general as lacking credibility.[8] As discussed in chapter 5, this includes gendered mythology about incredibility, such as community and judicial assumptions that women often lie about sexual assault.

The reinforcement of patriarchal attitudes about women and sexual harassment in this coverage recalls Herman and Chomsky's concept of the media modelling dominant values, beliefs and codes of behaviour to integrate readers into the institutional structures of larger society.[9] In reinforcing ancient discourses about female incredibility, this coverage played the role of perpetuating sexism in the workplace.

'Reasonable' versus 'unreasonable'[10]

The coverage in the sample showed that, in the media, some complainants in sexual harassment cases are 'reasonable' while others are 'unreasonable' (and therefore incredible). The ideas underlying this dichotomy of 'reasonable/unreasonable' victim can be seen in how the complainants are portrayed in coverage of the *Ewin v Vergara* appeal, *Robinson v Rivers*, *Mathews v Winslow Constructors* and *Spiteri v IBM*.

While it was not a direct parallel, the coverage that made judgements on the reasonableness of the complainant shared some similarities with the attitudes of the legal system to 'reasonable' victim behaviour in sexual assault and sexual harassment cases.

For example, in the coverage of *Robinson v Rivers*, the respondent is seen as attempting to impugn the complainant's credibility with a heavy focus on her mental health and a suggestion of 'unreasonable' drunken behaviour. In the reporting, the journalists used source

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[8] See, for example Jocelynne A Scutt *The Incredible Woman—Power & Sexual Politics Vol 1* (Artemis Publishing, 1997), xi, Kathy Mack 'You should scrutinise her evidence with great care', in Patricia Easteal (ed) *Balancing the Scales—Rape, Law Reform & Australian Culture* (The Federation Press, 1998) 59,

[9] See Edward S. Herman and Noam Chomsky *Manufacturing Consent—The Political Economy of the Mass Media* (Vintage, 1994), 1.

[10] The terms 'reasonable' and 'unreasonable' are used here to recall previous feminist scholarship on female credibility and are not analogous to the legal concepts of reasonableness used in legislation such as the *Sex Discrimination Act 1984* (Cth) or the common law 'reasonable person' test.

quotes to paint a picture of what had happened. The coverage of the case reflected a familiar sexist trope of humiliating a woman via her body, then using the impact of this trauma as an example of her 'madness'.

The coverage of *Mathews v Winslow Constructors* reports on attempts by the respondent employer to discredit the complainant with video evidence of her 'happiness' as indicating a lack of trauma. The respondent employer tried to position this as a sign that the complainant was not a 'reasonable victim'. This is reminiscent of previous studies of media portrayals of sexual assault and sexual harassment, where the behaviour of the victim was scrutinised and extraneous details reported to suggest that the complainant's behaviour did not align with that of an 'ideal' victim.[11] However, the coverage also presents counter-messages, with the complainant's legal representative in *Robinson v Rivers* quoted as condemning the attacks on his client's credibility, and the judicial dismissal of the attempts to discredit the complainant in *Mathews v Winslow Constructors*.

Interestingly, one *ABC News* article in the reportage of the *Ewin v Vergara* appeal directly acknowledges that the complainant did not fit the victim stereotype but went on to present her as credible. This type of coverage demonstrates the persistence of gendered mythology about ideal complainant behaviour but also shows that these myths may be challenged. This kind of reporting could be seen as a positive development, because this article did not simply repeat sexist assertions uncritically. This would be an example of the media challenging dominant power structures and being a positive force for change. However, this story could also simply be another way to be a 'reasonable' victim that may not always align with every complainant's experience.[12]

Portrayals of the complainant as credible are seen in coverage of the original *Ewin v Vergara* decision, *Spiteri v IBM* and *Mathews v Winslow Constructors*. While this is positive in the sense that the media is not perpetuating the gendered mythology that women lie about sexual harassment, these credibility assessments also have the unintended consequence of

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[11] Georgina Sutherland, Angus McCormack, Jane Pirkis, Patricia Easteal, Kate Holland, Cathy Vaughan "Media Representations of violence against women and children: *State of knowledge paper*", Australia's National Research Organisation for Women's Safety (ANROWS), *Landscapes*, State of Knowledge, November 2015, 17 Keziah Judd and Patricia Easteal 'Media Reportage of Sexual Harassment: The (In)credible Complainant' (2013) 25 *The Denning Law Journal* 2013 1, 14.

[12] As discussed in Chapter 2, reforms to reasonableness test in the Sex Discrimination Act to consider the subjective characteristics of the 'target' has allowed the law to consider a wider range of complainant experiences.

reinforcing narrow gendered stereotypes of how a 'reasonable' complainant should behave. Complainants who do not report immediately or convey the 'right' emotional response to harassment may be viewed as less credible. For instance, coverage of *Ewin v Vergara* includes judicial comments on the credibility of the complainant as a witness and on her reaction to the alleged behaviour being consistent with the behaviour being unwelcome sexual harassment. Similarly, in *Spiteri v IBM* and *Mathews v Winslow Constructors*, evidence of the complainants' physical and psychological suffering and their reporting of the behaviour are linked to their credibility.

The coverage also showed the way that overly cautious language can make a complainant appear unreasonable and undermine her credibility. This was apparent in the article *Styles v Clayton Utz*, with excessive use of the word 'alleged' and the 'belt and braces' combination of 'allegedly' and 'according to the lawsuit' in two articles that covered *Marks v Colliers International*.

The only article in the sample in the *Ramstrom v Baldino* case that portrayed the complainant in a credible way[13] linked her credibility to corroboration by 'official' (patriarchal?) institutional sources (her psychiatrist).

Summary—the real complainant

The media coverage in my sample correlates with the way, as I showed in chapter 5, a 'reasonable' victim of violence has been found to be a powerful gendered archetype in the legal system. The 'good' complainants are also able to perform an 'ideal' victimhood, demonstrating the appropriate levels of strength or 'reasonable' behaviour. This scrutiny of the complainant—her character and her response—echoes previous findings about the gendered interpretation of elements of sexual harassment by the courts, with feminist critics arguing that concepts including 'reasonableness,' 'ideal' victimhood and 'unwelcome' are considered from a masculocentric perspective.[14] The vengeful 'gold digger' stereotype is certainly a misogynistic cliché from a bygone era. These portrayals certainly do not accord

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[13] Sean Fewster, Chief Court Reporter 'BALDINO TRIAL – Clerk's trauma real, court hears' *The Advertiser (Adelaide)* 9 March 2013, 33.

[14] See Gail Mason and Anna Chapman 'Defining sexual harassment: a history of the Commonwealth legislation and its critiques' (2003) 31 *Federal Law Review* 195, 218, Phillip Tahmindjis 'Sexual Harassment and Australian Anti-Discrimination Law' (2005) 7 *International Journal of Discrimination and the Law* 87, 97, Patricia Easteal 'Tips: The Iceberg and Global Warming Metaphor' in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis Butterworths Australia, 2010) 482, 486.

with the reforms to the Sex Discrimination Act that require consideration of the subjective characteristics of the target of the harassment.

Portrayal of the male respondent and the respondent employer

Some coverage suggests that the respondent or respondent employer is the true victim in the case. This includes the respondent in *Ramstrom v Baldino* being described as 'vindicated' when the complainant's case was unsuccessful, describing the complainant's former colleague/lover in *Styles v Clayton Utz* as victimised by a vengeful ex-girlfriend, quoting a fashion designer's adoration of the respondent in *Fraser-Kirk v David Jones*, which gave him more social capital and therefore more credibility than a 'lying' complainant, describing the financial impact of the decision on the respondent in the *Ewin v Vergara* appeal and devoting column space to sympathetic portrayals of the original respondent in an account of Dr Tan's sexual harassment case against surgeon Mr Xenos.

Such depictions echo Mead's concept of the 'victimised man'.[15] They are also reminiscent of previous scholarship on media portrayals of violence against women, which has identified cases where the alleged perpetrator is portrayed sympathetically, and significant space is devoted to denials that the behaviour occurred. For example, the archetype of the 'victimised man' has been found in 1990s US studies of media portrayals of date rape on college campuses.[16] It has also been identified in a recent study of media representations of the Luke Lazarus sexual assault case, as discussed in chapter 5.[17]

Other stereotypes of respondents may reinforce the stereotypical message that violence against women was an act of an aberrant individual and not a systemic social problem. This seems to be true when the respondent or respondent employer is presented as a villain or buffoon. (See for instance *Fraser-Kirk v David Jones*, *Spiteri v IBM*, *Robinson v Rivers*, *Shea v Energy Australia (Tru Energy)*, *Richardson v Oracle* (original decision), *Ewin v Vergara* (original decision), *Marks v Colliers International*, *Mathews v Winslow Constructors*, *Tan v Royal Australasian College of Surgeons* and *Taueber v Channel 7*).

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[15] Mead (n 5) 6.

[16] Martha T. McCluskey "Fear of Feminism—Media stories of feminist victims and victims of feminism on college campuses" in Martha A. Fineman and Martha T. McCluskey (Eds.), *Feminism, Media and the Law* (Oxford University Press, 1997) 57, 61.

[17]Michelle Dunne Breen, Patricia Easteal, Kate Holland, Georgina Sutherland, Cathy Vaughan 'Exploring Australian journalism discursive practices in reporting rape: The pitiful predator and the silent victim' (2017) *Discourse & Communication* 1, 14.

While not exactly the same, this is reminiscent of previous findings that an 'ideal' masculine perpetrator of violence is an 'outsider' and not part of mainstream society[18] and that a perpetrator can be a 'body without a mind' who is not committing harm consciously.[19]

Summary—the real respondent/respondent employer

The media coverage in the sample positioned the respondent or respondent employer as 'unusual'. The news value of the cases can be partly attributed to the 'large organisation' dealing with issues of sexual harassment and vicarious liability.

Similar to previous scholarship about media portrayals of violence against women, the sample included portrayals of the male respondent as the 'true victim' in the case, reinforcing gendered mythology about vengeful women accusing innocent men. This also echoed ancient stereotypes from the legal system about incredible women in sexual assault cases.

The portrayals of the respondent and respondent employer as villains or buffoons also invoked previous scholarship about the media's 'othering' of violent male perpetrators. Like the individualised focus on the complainants, this focus on specific 'unusual' men and employers obscured the systemic nature of gender discrimination in the workplace. However, this individualised focus is also a feature of sexual harassment legislation, which is based on individual complaints.

'Real' sexual harassment?

Harm is minimised

The legal system has been found to persistently minimise and trivialise violence against women.[20] This is seen in continued beliefs that domestic violence is a private matter,[21] attitudes that the only 'real' and 'harmful' sexual assault is committed by a stranger and involves physical injury[22] and perceptions that the only 'real' sexual harassment mimics

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[18] Kellie E Carlyle, Michael D Slater, Jennifer L Chakroff 'Newspaper Coverage of Intimate Partner Violence: Skewing Representations of Risk', *Journal of Communication* 58 (2008) 168, 180-181, Janine Little 'Filicide, journalism and the "disempowered man" in three Australian cases 2010-2016'(2018) *Journalism* 1, 12.

[19] Deb Waterhouse-Watson 'Playing Defence in Sexual Assault 'Trial By Media': The Male Footballer's Imaginary Body' (2009) 30 *The Australian Feminist Law Journal* 109, 119.

[20] See for example Rosemary Hunter 'Narratives of Domestic Violence' (December 2006) 28(4) *Sydney Law Review* 733, 737.

[21] Anna Carline and Patricia Easteal AM *Shades of Grey—Domestic and Sexual Violence Against Women* (Routledge, 2017) 60.

[22] Patricia Easteal *Less Than Equal—Women and the Australian Legal System* (Butterworths, 2001)

stereotypical heterosexed activity between an active male and passive female.[23] When a victim's reality does not match these narrowly defined scenarios, the harm is often not recognised.

In this study, I found the same to be true with some media reports about sexual harassment with the headline and/or leads used in reportage to minimise the harm to the complainant and trivialise sexual harassment.[24] For example, the use of terms like 'unwanted sex' in the coverage of the *Ewin v Vergara* case to describe allegations of violence, obscuring the power and domination aspects of the case, aligns with wider gendered cultural constructions of violence against women. Minimising techniques in the headlines included conflating consensual sex and harmful sexual harassment, using comic or sensationalist language to belittle the case and focusing on the size of the damages award rather than the complainant's trauma. This prurient focus on the 'sexiness' of the case is similar to previous findings about sensationalism in the headlines of high-profile sexual harassment cases.[25] Furthermore, reducing the cases to comic entertainment also translates into sexual harassment as a harm not to be taken seriously. As discussed in chapter 9, some coverage presented mixed messages about harm from sexual harassment, with the headline and lead belittling the trauma, and the body providing graphic descriptions of the complainant's injuries. These articles were of particular concern because the information in the body demonstrated that, while the journalist was aware of the complainant's trauma, belittling the complainant's pain was considered the most 'newsworthy' and important angle to take. Many articles used the term 'sex' rather than the more legally accurate 'sexual harassment'. This may be an unfortunate unintended consequence of editorial conventions – 'sex' is a shorter word than sexual and takes up less space in a headline, even though the use of this term suggests a consensual encounter rather than workplace violence.

As discussed in chapter 9, direct minimising of the harm also occurred in the body of the articles in coverage of the cases *Fraser-Kirk v David Jones*, *Styles v Clayton Utz*, *Robinson v Rivers*, *Shea v Energy Australia*, the *Ewin v Vergara* original decision and appeal,

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[23] Margaret Thornton 'Sexual harassment losing sight of sex discrimination' (2002) 26 *Melbourne University Law Review* 422, 425.

[24] Some coverage of the cases *Robinson v Rivers*, the original *Richardson v Oracle* decision, *Shea v Energy Australia*, *Fraser-Kirk v David Jones*, *Ewin v Vergara*, *Ramstrom v Baldino*, *Tan v Royal Australasian College of Surgeons*, *Marks v Colliers International*.

[25] Keziah Judd and Patricia Easteal 'Chapter Four—Media Reportage of Sexual Harassment: The (In)Credible Complainant", Patricia Easteal AM (ed) *Justice Connections* (Cambridge Scholars Publishing, 2013) 88, 98.

the *Richardson v Oracle* appeal and *Marks v Colliers International*. One article about *Fraser-Kirk v David Jones* began like a Harlequin romance novel, 'It started with a kiss…'[26] This was a journalistic choice to use popular storytelling conventions to engage the reader, but highly problematic in the context of a report on allegations of workplace violence. Perhaps 'Once upon a time' would have been a more tasteful opening.

Indirect minimising of the harm is seen in the censorship of 'bad' language in the body of the articles covering *Fraser-Kirk v David Jones*, the *Ewin v Vergara* appeal and *Mathews v Winslow Constructors*. This makes the direct value judgement that any 'bad' language used during sexual harassment is somehow more serious, upsetting and harmful than gender discrimination in the workplace. A similar technique of writing was found in a recent study of media coverage of the Luke Lazarus sexual assault case.[27]

This matches other researchers' findings of persistent trivialising of violence against women in media reports, where news reporting uses minimising techniques such as downplaying the role of the perpetrator and the suffering of the victim.[28] Such trivialising of the harm from sexual harassment in the coverage is unsurprising, given that the courts themselves have traditionally viewed the harm from sexual harassment as minimal. This has been apparent in the historically low awards of damages to complainants when compared with other civil actions.[29] It can also be seen as a reflection of patriarchal values, where 'low-level' violence against women is not acknowledged and becomes almost background noise.[30]

Emphasising the harm

The coverage of the *Ewin v Vergara* original decision and appeal, *Ramstrom v Baldino*, *Robinson v Rivers*, *Spiteri v IBM* and *Mathews v Winslow Constructors* that emphasised the harm to the complainant may be considered in several ways.

The use of melodramatic language and reporting of the harassing behaviour and effect on the complainant in prurient detail could be viewed as a straightforward recognition of these

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[26] Janet Fife-Yeomans 'Inside Australia's biggest harassment case $37m SEX SUIT', *The Daily Telegraph* 3 August 2010, 3.

[27] Dunne Breen (n 17) 14

[28] See chapter 4. One example of such a study is Nettleton (n 3) 149.

[29] See Beth Gaze 'The Sex Discrimination Act at 25: Reflections on the Past, Present and Future', in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 107, 112, Therese MacDermott 'Reassessing sexual harassment: it's time' (2015) 40:3 *Alternative Law Journal* 157, 158.

[30] Carline and Easteal (n 21) 3, 7 citing F. Wilson and P. Thompson, 'Sexual Harassment as an Exercise of Power', *Gender, Work and Organization* 8(1), 2001, 61–83, p. 61.

elements of the case as 'newsworthy' and thus able to attract buyers or clicks. This would align with the classic news values of 'magnitude' and 'bad news'.[31] A prurient focus on graphic descriptions of sexual harassment satiates a public desire for voyeurism, presenting this violence as an entertaining if sordid diversion for readers. The value judgements made of the complainant and the harassing behaviour in the coverage also reflect Thornton's observation of the moralising and trivialising effect of key aspects of sexual harassment legislation as it existed at the time of writing her 2002 article—that it is unwelcome and that the complainant is offended humiliated or intimidated—which focus on the effect of harassment on the individual and conceal the systemic discriminatory nature of sexual harassment.[32] They do not reflect the revised test that asks whether a reasonable person would have anticipated the possibility that someone in the complainant's situation would have been offended.

In an alternative, more heartening view, this coverage can be viewed as recognising the serious harm that sexual harassment in the workplace does to complainants. The coverage recognises the physical and psychological trauma caused by sexual harassment. However, the focus on the most overt and violent subject matter obscures the systemic and insidious nature of gender discrimination in the workplace and may give the inadvertent impression to readers that only cases that meet the threshold of physical violence are considered 'real' sexual harassment by the legislation and the courts. This would be similar to MacDermott's finding that workplace cultures 'tolerate' sexual harassment until it reaches a threshold of apparent seriousness that is above what the law considers to be sexual harassment.[33]

The graphic descriptions of the alleged harassing behaviour also recall Thornton's observation that the more 'sexual' the behaviour is, the more likely it is that the courts will consider it 'genuine' sexual harassment.[34] As noted in chapter 9, a hierarchy of perceived harm from sexual harassment was directly acknowledged in an *Australian Financial Review*

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[31] See Harcup and O'Neill (n 2) 1482.

[32] Thornton (n 23) 429.

[33] Therese MacDermott 'Reassessing sexual harassment: it's time' (2015) 40(3) *Alternative Law Journal* 157, 158, 159.

[34] Thornton (n 23) 425.

article about the *Marks v Colliers International* case, with more 'sexualised' behaviours at the top of the list.[35]

Some of the articles in the sample conveyed contradictory messages about harm in the headline, lead and body of the article. This demonstrates the competing interests of journalists, editors and sub-editors, and can be explained in part by journalists not writing the headlines for their own stories. For example, one case about the *Mathews v Winslow Constructors* case had the sensationalist headline '1.3 mil for daily sex harassment' and the more sympathetic subheading 'Workplace abuse – a filthy experience'.[36] The factual narrative subheading was a mini-lead that reflected what actually happened, while the headline telegrammed the shock value part for a general news audience (the money). A similar example can be seen in the contrasting messages in the headline 'Female worker awarded million dollar payout…' and the lead focussing on the complainant's traumatic experience.[37] The journalist can often be simply reporting on what happened, then a sub-editor chooses a dramatic headline. When applied to reporting of violence against women, these apparently neutral editorial practices can combine with the inherent sociolegal dynamics of gendered abuse of power to create a cocktail of misleading sexism.

In addition to this, the practice of focussing on the dramatic and prurient details is hardly unique to reporting on sexual harassment. Attracting attention from readers and advertisers has always been part of the news 'business', and with the challenges of the digital environment, this is unlikely to change.

Sexual harassment is framed episodically

The majority of the coverage in the sample was framed in an episodic rather than thematic way. The cases were generally presented as isolated incidents and not in the broader social context of gendered power relations in the workplace. This parallels previous findings about representations of 'real' sexual harassment in the workplace, where even if the coverage was

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[35] Michael Bleby and Misa Han 'Colliers agrees to negotiate over sexual harassment' *Australian Financial Review* 10 June 2016, 2.

[36] Rania Spooner and Cameron Houston '1.3 mil for daily sex harassment', *The Age*, 18 December 2015, 2.

[37] Ben Brennan 'Female worker awarded million dollar payout over years of 'hardcore filth' at Melbourne construction company', *Yahoo News* (online), 18 December 2015 <https://au.news.yahoo.com/vic/a/30398737/female-worker-kate-mathews-awarded-million-dollar-payout-by-victorias-supreme-court-over-years-of-sexual-harassment-rape-threat-at-winslow-constructors-in-melbourne/>

favourable to the complainant, the articles did not recognise the systemic nature of sexual harassment as a form of workplace discrimination.[38]

This technique was also seen in an article about *Taeuber v Channel 7* which used the headline 'Sisterhood has its limits'.[39] This headline provided no detail about the case, effectively decontextualising sexual harassment from patriarchal violence. The headline also failed to acknowledge that patriarchal values are often not confined by gender.

This also accords with previous findings about representations of violence against women generally, where a woman's murder is reported as an individual tragedy and not part of an epidemic of patriarchal violence in Australia[40] and where courts address domestic violence as an incident-specific crime.[41]

In addition, such an individualised focus could also be explained as a reflection of the individualised focus of sexual harassment legislation in itself. The legislation relies on individual complaints and has been criticised for its piecemeal approach to achieving gender equality in the workplace.[42]

The legal messages

The coverage in the sample included engagement with the legal issues. As discussed in chapter 9, this was more apparent in the bodies of the articles than in the headlines and leads. The coverage of cases including *Fraser-Kirk v David Jones*, the *Ewin v Vergara* original decision and appeal, the *Richardson v Oracle* original decision and appeal, *Marks v Colliers International* and *Mathews v Winslow Constructors* that engaged with legal issues can be interpreted as having feminist and non-feminist messages. These legal messages illustrate the techno-legal discourse found by MacDonald and Charlesworth in their study of the framing of sexual harassment cases, where the messages focus on 'vicarious liability and immunity from

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[38] Paula McDonald and Sara Charlesworth 'Framing sexual harassment through media representations' (2013) 37 *Women's Studies International Forum* 95, 99.

[39] Kasey Edwards 'Sisterhood has its limits', *The Age*, 22 October 2017, 26.

[40] Janine Little 'Domestic violence beyond representation: finding a feminist subject in the Allison Baden-Clay murder case' *Feminist Media Studies* (online 9 December 2018) <https://doi.org/10.1080/14680777.2018.1546214> 8.

[41] Evan Stark 'Rethinking *Coercive Control*' (2009) 15(12) *Violence Against Women* 1509, 1510.

[42] Thornton (n 23), 424.

lawsuits' and provide 'an analysis of a legal or procedural anomaly which demonstrated the case as unusual and (presumably) newsworthy.'[43]

The legal messages in the sample are conveyed by sources external to the complainant: the complainant's legal representative, the respondent or respondent employer's legal representative, external legal experts and the Sex Discrimination Commissioner commenting on the ramifications of decisions and direct quotes from the presiding judicial officer. This could be seen as an overt emphasis on 'official' legal sources, although the complainant's own legal representative is conveying the voice of the complainant.

A reliance on a 'police/law enforcement frame' has been previously found to have the effect of concealing the systemic nature of violence against women and suppressing the voices of victims.[44] However, quotes from expert sources do also add authority and legitimacy to the discussions of vicarious liability in the articles, providing an excellent source of legal information for potential complainants and respondents and a direct warning to employers to change their practices. The focus on employers avoiding vicarious liability does remind us of Charlesworth's finding that sexual harassment policies appear to take a 'risk management' approach, with the complainant being the risk.[45]

However, the coverage of the cases in the sample provides an important public message to employers about the financial consequences of allowing sexual harassment to occur, giving readers something to 'think about'. As previously observed by McDonald and Charlesworth, the majority of sexual harassment cases do not proceed to a public hearing and any mediated outcomes are confidential. Compliance cannot be monitored.[46] The media publicity for these high-profile cases means that sexual harassment is more prominent in the minds of the public, including potential complainants and respondents. This is the power of the media to tell people 'what to think about'.[47]

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[43] McDonald and Charlesworth (n 38) 101.

[44] Cathy Ferrand Bullock 'Framing Domestic Violence Fatalities: Coverage by Utah Newspapers' (Spring 2007) 30(1) *Women's Studies in Communication* 34, 46.

[45] Sara Charlesworth 'Risky Business—Managing Sexual Harassment at Work' (2002) 11 *Griffith Law Review* 353, 373.

[46] Paula McDonald and Sara Charlesworth 'Settlement outcomes in sexual harassment complaints' (2013) 24(4) *Australasian Dispute Resolution Journal* 259, 267, 269.

[47] Maxwell E. McCombs and Donald L. Shaw 'The agenda-setting function of mass media', (Summer 1972) 36(2) *Public Opinion Quarterly* 176, quoting Bernard Cohen *The Press and Foreign Policy*, (Princeton University Press, 1964,) 13, 177.

Many of the cases in the sample attracted media attention because of the large awards of damages. This was especially apparent in the headlines for *Mathews v Winslow Constructors*. The size of the award aligned with news values of novelty and magnitude, suggesting that these headlines were following typical editorial conventions rather than making a gendered ideological statement. Interestingly, recent feminist legal scholarship has identified a significant shift in the way courts award damages for sexual harassment.[48] It is also reflected in the most recent (at the time of writing) case law. The media coverage of *Hills v Hughes* [2019] FCCA 1267 reported the judicial condemnation of the seriousness of the harassing behaviour and the award to the complainant of $120,000 in general damages and $50,000 in aggravated damages.[49] Damages in cases heard under the Sex Discrimination Act do appear to be on the rise.

The coverage in the sample showed that many legal practitioners have used the media, either to present their clients' cases or to comment on legal issues as an external expert. The former is an example of framing through the media, where the legal representative takes control of the narrative to present their client's side of the story. The latter is an example of framing by the media, where the journalist chooses different sources to construct the narrative. This coverage of legal issues may also show a mediatisation trend in the Australian legal system, where legal practitioners test out the legal issues in the media.

However, the 'real' complainant in the media must align with a narrow range of acceptable gendered behaviours, that go beyond the legislative standards of being offended, humiliated or intimidated by unwanted sexual conduct.

Implications for audiences

The media coverage in the sample has helped to construct a 'reality' about sexual harassment for audiences. While we must be wary of considering this a simplistic, 'one-way' hypodermic

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[48] See Catherine Van Der Winden 'Combatting sexual harassment in the workplace: policy vs legislative reform' (2014) 12(1) *Canberra Law Review* 203, 215, Therese MacDermott 'Reassessing sexual harassment: it's time' (2015) 40:3 *Alternative Law Journal* 157, 158.

[49] Fay Calderone and Veronica Lee 'When a judge calls out a "very grave example of sexual harassment"' *Women's Agenda* (online) 12 June 2019 < https://womensagenda.com.au/latest/when-a-judge-calls-out-a-very-grave-example-of-sexual-harassment/>.

transaction where audiences are told what to think and accept without question, media coverage certainly contributes to audience understanding of the law.

The media coverage in the sample presents certain ideas about what sexual harassment is and the kinds of people involved in sexual harassment cases (whether credible or not credible). While it is heartening to note that the actual legal issues are presented accurately, I am concerned about the cultivation effect of the gendered mythology perpetuated in the media coverage. The questioning of complainant credibility and minimising of the harm from sexual harassment might have contributed to dismissive community attitudes about sexual harassment and a failure to recognise harassing behaviour by respondents in the Australian Human Rights Commission surveys. The way the media coverage maximised and sensationalised the harassing behaviour that involved violent threats and physical injury might also have contributed to a failure in the community—in people recognising 'low-level' workplace sexual harassment. However, this remains a matter of conjecture. There is no way to know for sure. The newspaper article form, with the most sensationalist details in the headline in the lead, meant that the more thoughtful legal commentary was less prominent for a casual reader taking a glance at the newspaper in a café. To recall Cohen, in the 24-hour digital news cycle and a mediatised world, it is important that this legal commentary is still there as one of many things a reader should be 'thinking about'.

Conclusion

Many of the findings in chapters 7 to 9 align with previous scholarship on media portrayals of violence against women, commentary on Australian sexual harassment legislation and feminist critique of the characterisation of women in the courts. This is apparent in the gender stereotyping of the parties, the use of 'empowerment' narratives, the use of episodic rather than thematic framing in the majority of the coverage in the sample, the trivialising of the harm to complainants from sexual harassment and the use of 'official' voices to frame the narrative where legal issues were discussed.

However, other findings from previous scholarship, such as victim blaming and an implied mutuality in the behaviour, did not appear in the coverage. Where a complainant was considered credible and the harassment 'real', the coverage did not hold her responsible for what happened to her. The coverage seemed to 'pick a side' when a sexual harassment case entered the public eye, perhaps because this approach had the greatest 'news value'.

The coverage conveys a plethora of messages about the 'good' victim and 'real' sexual harassment. This illustrates the power of the media to both subvert and support dominant power relations. Much of the coverage conveyed messages about 'good' victimhood and genuine complainant trauma similar to what has been found in previous research about gender stereotypes of victimhood and the persistent trivialisation of violence against women. However, other coverage in the sample also recognised and challenged stereotypes of ideal victimhood and recognised the physical and psychological nature of complainant suffering.

The legal messages in the sample were framed as direct warnings to employers about vicarious liability and the financial risks of not taking sexual harassment seriously. While addressed to employers, if heeded these messages show the potential for the media to educate employers to improve gender equality in the workplace.

Indeed, the media can play a major role in both maintaining the status quo and effecting changes in how law and the community regard sexual harassment. As I wrote several years ago (with Easteal and Holland):

> These problematic representations have a profound effect on how perpetrators and the wider community perceive violence against women. This then affects women's reluctance to report a crime, and also may re-traumatise victims given the inference that they are at least in part responsible. We see this as evidence of the tension between the 'transformative potential' of media and the conservative attitudes that tend to be promulgated across different media. Consequently, media can act to obstruct or delay feminist aims of removing gender from 'harm' and from access to justice. … Harm continues to be minimized and the offender/victim dichotomy blurred. As a result, the efficacy of law reform is limited with obstacles remaining for victims and targets of violence attempting to access justice.[50]

I look in the final chapter at some ideas for effecting these changes.

[50] Patricia Easteal, Kate Holland and Keziah Judd 'Enduring themes and silences in media portrayals of violence against women' (2015) 48(1) *Women's Studies International Forum* 103, 112.

11 Conclusion

In my study, I examined the messages from the media, the legislation and the courts about what constitutes ‘real’ sexual harassment and a ‘good’ victim to explore how these might shed light on findings from the 2012 and 2018 Australian Human Rights Commission surveys that many participants did not recognise their own experiences of sexual harassment. I conducted an in-depth qualitative study of 14 high-profile sexual harassment cases, and compared my findings with previous scholarship about the characterisation of sexual harassment and other forms of violence against women by the media and the legal system.

I undertook this research with the awareness that the legal system is already an imperfect mechanism for achieving gender equality in the workplace. The recognition of sexual harassment as a form of workplace discrimination was a milestone in feminist legal history and its significance should not be understated. However, the legislation relies on the making of individual complaints and legislative reform has not changed the attitudes of those responsible for interpreting the law.

I investigated the media coverage of sexual harassment cases with an awareness of the power of the media to shape ‘realities’ for its audiences. I reviewed the academic literature on the role of the media in affecting audience attitudes and beliefs and the academic literature on the attitudes of the legal system to violence against women. I identified one of the key debates in media studies scholarship: between the ‘media influence’ theorists, who conceptualise the media as a powerful shaper of attitudes and beliefs in a one-way exchange with the audience, and the ‘active audience’ theorists, who consider that the audience has more agency when engaging with the media and can create its own resistant interpretations of media information. I also reviewed the literature on the rise of digital media, and the changes this has made to the role of journalists and the nature of news.

While there is significant debate over the extent to which audiences have their own agency to accept, reject or transform messages from the media, there is a level of consensus among media scholars that the media do indeed convey ideas to the people who consume its products. Media coverage of high-profile sexual harassment cases is therefore a significant source of information for the public about this important legal issue. I was concerned that

inaccurate representations of sexual harassment may present a barrier to access to justice for people who were given misleading information about their rights at work.

From the feminist perspective adopted in the literature, the media have the potential to both challenge and subvert dominant patriarchal attitudes. Taking the 'media influence' approach, the mainstream news media could be conceived as a propaganda tool of the patriarchy, conveying sexist messages about an unattainable ideal of genuine and credible victimhood and validating only the suffering that has reached the necessary threshold to be considered sufficiently 'real'. However, this is a simplistic view that does not take into account the agency of readers to resist messages or its power to promote positive reform. In my study, I found a 'mixed bag' of messages that cannot be reduced to gendered propaganda.

In my study, I found that the coverage conveyed a range of messages about 'real' sexual harassment and ideal victimhood. Some of this was similar to what has been found in previous scholarship about genuine sexual harassment and ideal victimhood in the legislation and the courts, including gender stereotyping of the parties and minimising the harm caused by sexual harassment. Other aspects were similar to what has been found in previous studies of media portrayals of violence against women, including sexual harassment. This included awkward empowerment narratives about the complainant's strength, portrayals of the complainant as incredible, sensationalising the coverage, linking credibility to 'ideal' complainant behaviour and gender stereotypes of the parties. I also found some thoughtful commentary on the legal issues. On the subject of active audiences and 'resistant' readings, I noticed that individual articles often portrayed mixed messages about the cases, with a discrepancy in portrayals of the parties when comparing the headlines, leads and bodies of the articles. This makes it difficult to discern which 'message' the reader is able to encode, decode or resist.

While much of the coverage emphasised the complainant's view of events and there was some thoughtful commentary about the legal issues, the presence of sexist messages about greedy, vindictive women and sexual harassment being 'trivial' remains a cause of concern. These messages are important to critique from a feminist perspective, because they show the persistence of medieval attitudes about women—which have no place in the 21st century. Media stories that trivialising the harm from sexual harassment and dismissing the stories of complainants who come forward might deter potential complainants from seeking help.

While Courts and Tribunals have a long history of low awards of damages for sexual harassment,[1] many of the cases in my sample attracted media attention because the complainant claimed a very large award of damages (such as Ms Fraser-Kirk's claim for $37 million) or was awarded a sizeable amount by the Courts (such as the near million-dollar award for Jemma Ewin). The fact that these large amounts of money attracted media attention meant that there was a sufficient level of 'magnitude' (and therefore news value) to them that made the cases newsworthy. It may also have contributed to a public perception that sexual harassment must meet a high threshold of physical and psychological harm to be considered 'real'. Commentary on the legal issues focused on vicarious liability and the implications of the cases for employers.

It was not surprising to find gendered mythology about complainant credibility and trivialising of sexual harassment in my sample of high-profile cases similar to the attitudes found in studies of legal system responses to violence against women. I found evidence of sensationalism and gender stereotyping in the headlines and leads. Some headlines and leads focused on the strength of the complainant and positioned these cases as David versus Goliath battles. This was the gender stereotype in the complainant's 'favour', where she was viewed as a credible victim of sexual harassment. Other headlines and leads stereotyped the complainant as an incredible woman with dubious motives (such as money or revenge) or used language techniques such as overusing the word 'alleged' to subtly (or not so subtly) question her story. This invoked the sexist tropes of dishonest women that are seen in judicial and media perspectives on sexual harassment and other forms of violence against women.

I identified similarities to previous studies of media portrayals of violence against women and attitudes in the legal system about 'genuine' sexual harassment. These included gender stereotyping, 'empowerment' messages for women, episodic rather than thematic framing and narrative reliance on 'official' expert sources for the 'serious' legal issues. In the framing of the legal issues, the coverage included quotes from employment lawyers and the Sex Discrimination Commissioner about sexual harassment and the legal significance of the case.

It was interesting to note the ways that the coverage both challenged and subverted dominant social attitudes about sexual harassment, with some reports recognising the genuine harm to

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[1] See Beth Gaze's study, which included Federal Magistrates Court cases from 2000 to 2009 awarding successful complainants a range of 750 to $100,000—Beth Gaze 'The Sex Discrimination Act at 25: Reflections on the Past, Present and Future', in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, Canberra, 2010) 107, 112.

complainants and moving beyond stereotypes of ideal victimhood. For example, the coverage of *Matthews v Winslow Constructors* and *Robinson v Rivers* quoted refutations and judicial dismissals of attempts by the respondent employer to discredit the complainant because her behaviour did not match the image of how a 'genuine' victim of harassment should behave.

Some headlines and leads used language that trivialised the harm to the complainant from sexual harassment or sensationalised it in prurient detail. The more 'entertaining' aspects of the cases were emphasised, often at the expense of more nuanced legal analysis. Where the legal issues were discussed, either the language was muted or they focused on the 'daring' tactics of the complainant's legal representatives. This accorded with previous studies of judicial and media attitudes to sexual harassment, including conflation with consensual sex and trivialising and minimising the harm to complainants.

There was greater nuance in the less 'prominent' content in my sample—that is, the messages from the body of the article. This coverage featured a range of voices, including the complainant, respondent and respondent employer. Some coverage focused on the complainant's voice, quoting her statement of claim. Other articles focused on the respondent or respondent employer's denial of the allegations. The coverage included comments on the credibility of the parties. There was a significant 'legal' perspective in much of the coverage, including journalistic commentary on the significance of the cases and judicial comments on the harm to the complainant.

Giving a voice to the complainant and her view of events helped to temper the sexist messaging in the headlines and leads. It was also heartening to find some commentary on the legal issues raised in the cases, including discussion of employer obligations and vicarious liability. This gave the cases a grounding in legal accuracy and provided information for the reader about sexual harassment law and by extension their rights at work. However, the placement of this more nuanced information in the less obvious and 'important' sections of the article meant that this more thoughtful commentary was concealed from the casual reader.

Overall, the media coverage of high-profile sexual harassment cases portrayed a range of messages about 'real' sexual harassment and the 'good' complainant. It is important to recognise that these were not always retrograde sexist messages about evil women victimising men, or pornographic trivialisations of grotesque violence (though this was certainly present in the coverage of *Ewin v Vergara*, which juxtaposed headlines and leads about 'work party sex' with graphic descriptions of the complainant's injuries, and *Shea v Energy Australia*,

which portrayed the complainant as the 'woman scorned'). In coverage that portrayed messages about the credibility of the parties, I found themes of sensationalism, stereotyping of the complainant as heroic, vulnerable or incredible and stereotyping of the respondent or respondent employer as a villain, victim or buffoon. The coverage used language techniques to convey messages about the credibility of the parties.

The coverage in the sample used different framing techniques to indicate a 'real' case of sexual harassment. This included using language to minimise the harm and trivialise sexual harassment, emphasising the harm by using melodramatic language or reporting graphic detail and censoring the harm if the allegations included swear words. The censorship of 'bad' language but not bad violence certainly raises questions about editorial perceptions of the selective delicacy of readers and why naughty words are more shocking than systemic employment discrimination.

Much of the coverage used episodic framing, conveying sexual harassment as an individual event and not an example of systemic discrimination against women in the workplace. This echoed previous scholarship that critiqued the courts and the media alike for treating sexual harassment as an individual aberration and not a product of patriarchal attitudes. This can be explained in part by the nature of sexual harassment law itself, which is based on individual complaints, and by my sample selection, which focused on media representations of particular high-profile sexual harassment cases. However, the coverage of *Taeuber v Channel 7* and other examples of thematic analysis showed that it was possible to provide commentary that placed these cases in a social, political or legal context.

The legal messages were often downplayed in the headlines and leads but detailed in the body of the article. Where the legal messages were emphasised in the headline and lead, the focus was on the implications of a landmark case for employers or the tactics of the complainant's lawyers. The coverage also showed the legal representatives for the parties using the media to put their client's case to the public and to frame the case through the media.

In the body of the articles, there was often significant analysis of the legal implications of high-profile cases for employers. These articles provided thoughtful discussion of vicarious liability and the significance of the cases for employers, including the changing nature of employment and work in an age where contractors are becoming more common and a 'workplace' can mean anywhere someone can plug in a laptop. It was heartening that this information was accurate and potentially very useful to both employers who wanted to

minimise their risk of litigation and transform the workplaces of employees, who deserve to be in a workplace free from discrimination. However, it must be reiterated that this information was often not ‘prioritised’ in the more prominent areas of the article—again placing it out of reach of casual readers.

Previous scholarship has found that the legal system continues to convey retrograde messages about genuine violence and ideal victimhood. While the development and implementation of legislation prohibiting sexual harassment was a significant step in the legal recognition of women’s injuries in the workplace, feminist critics have noted that the focus on individual incidents and the more ‘heterosexed’ conduct has meant that anti-discrimination law is an imperfect mechanism for achieving gender equality. Set against this background, the media coverage of high-profile sexual harassment cases in my sample conveyed a range of messages about ‘real’ sexual harassment and ‘good’ victimhood, which in some instances challenged the myths but in others supported gendered mythology. For example, some of the coverage of *Fraser-Kirk v David Jones* and *Styles v Clayton Utz* portrayed the complainants as gold-digging scorned harridan and were dismissive of the harmful nature of sexual harassment. In contrast, coverage of *Taueber v Channel 7* included thematic framing that placed the case in the context of gendered power imbalances in the workplace.[2]

The inability of survey respondents to recognise their own experiences as sexual harassment may be explained by the differences between their own experiences and what the media defines as ‘real’ sexual harassment. The cases in the sample attracted media attention for reasons including high awards of damages, the size of the respondent employer and the ‘severity’ of the alleged conduct—including physical violence. For many Australian Human Rights Commission survey respondents who had experienced sexual harassment, this portrayal of ‘real’ sexual harassment may not correlate with their own experiences. The cases in the sample included behaviour at the more ‘serious’ end, including violent sexual threats and unwanted touching. Sexual harassment includes a broader spectrum of behaviour, including unwanted sexual advances, unwanted sexual comments and displaying unwanted sexual material in the workplace. These more ‘subtle’ and insidious examples may not be as inherently newsworthy as a big dramatic event.

[2] Perhaps this can be explained by this case being about a workplace culture that is familiar to the authors of the articles themselves?

Coverage that questions the credibility of victims who do not behave in an 'ideal' way may contribute to targets such as those in the Australian Human Rights Commission survey questioning their own responses to conduct they experienced at work. Survey participants who did not report immediately or consider the experience sufficiently 'traumatic' may not have recognised their experience as being unacceptable and unlawful discrimination.

Further, coverage that refers to sexual harassment euphemistically as 'unwanted sex' or a 'sex scandal' may contribute to public perceptions that even the high-profile cases are not particularly 'serious'. In turn, this minimising could affect the ability of sexual harassment targets to recognise that the behaviour they are experiencing is sexual harassment and therefore a serious example of unlawful workplace discrimination. No doubt other subtle contributors play a role in the inability of targets of sexual harassment to name their experiences in national surveys.

In this thesis I have sought to illustrate the importance of accurate and sensitive reporting on sexual harassment for the parties to these matters and for audiences who may be unfamiliar with the law. Following are some recommendations for implementing best practices.

Recommendations

It is important to recognise that much of the coverage in the sample was thoughtful, accurate and informative when explaining the legal issues. It is also important to recognise that journalists are often under the pressure of deadlines, resource limitations and editorial constraints, particularly in this brave new world of a competitive digital environment and 24-hour news cycle. Given the need for reporting to attract audiences and have news value it is unrealistic to expect sexual harassment cases to be reported in thesis-level depth. However, I believe that there are some practical and positive changes that can be made to improve the quality of reporting on sexual harassment cases.

The recommendations here reflect what was positive in the coverage in my sample as well as what I argue needs to be improved. I recommend that guidelines be developed for the reporting of sexual harassment by the media and to assist 'experts' such as lawyers, judges

and advocacy organisations to interact with the media. These could be similar to those prepared by Our Watch for reporting on sexual assault.[3]

The guidelines should include the following suggestions for journalists:

1) Use the correct legal terms—that is, 'sexual harassment', not 'sex', 'sex harassment' or 'unwanted sex'. Using these euphemistic terms obscures the discriminatory nature of sexual harassment and conflates unlawful workplace discrimination with consensual sex. This may contribute to a lack of community understanding of the seriousness of the behaviour. Using the correct terms reduces the possibility of misunderstanding the nature of sexual harassment.

2) Quote the experts such as employment lawyers and the Sex Discrimination Commissioner when describing the legal issues, where possible explaining the broad range of conduct that could be considered sexual harassment. Media coverage is a major source of legal information. It is important that this legal information is informative and accurate.

3) Train victim/target advocates to be used as experts in reportage. In my study, I found that reporting sexual harassment from the perspective of the complainant meant that the coverage was more nuanced and not marred by gender stereotypes of how an 'ideal' victim should experience and respond to sexual harassment. Making victim/target advocates central experts centres the experiences of women and helps them to tell their own stories. This training could be conducted by organisations such as Our Watch, which conduct this training in other areas of law.

4) Train journalists about sexual harassment in the same way as Our Watch has trained them about violence against women. Our Watch has recognised the importance of accurate media representations of violence against women, and describes the following as the key drivers of violence against women—violence being condoned (by trivialising it, making jokes or justifying it), gender inequality, gender stereotypes and disrespect towards women.[4] Our Watch in consultation with key stakeholders has developed training and

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[3] Our Watch 'Reporting on Sexual Violence', September 2014, https://www.ourwatch.org.au/MediaLibraries/OurWatch/Images/ourwatch_reporting_on_sexual_violence_aa_v1.pdf.

[4] Our Watch 'The media's role in preventing violence against women', Our Watch—Making Media Change, <https://media.ourwatch.org.au/media-home/understand-the-issue/the-medias-role-in-preventing-violence-against-women>.

guidelines for the media to help journalists 'understand the drivers and report accurately, safely and respectfully'.[5] Similar training on sexual harassment—to help journalists recognise it as systemic and a form of discrimination—would be beneficial.

5) Represent the allegations in a non-sensationalised and respectful way. I was disappointed to find that some of the coverage in the sample treated sexual harassment as gossip column fodder and entertainment. Recognising that sexual harassment is a damaging form of discrimination against women and not a 'sexy' story would improve its media coverage and enable more accurate legal messages to be conveyed to readers.

6) Continue to be careful when reporting ongoing cases to explain that the matters are still before the courts and allegations have not been proven. However, it is important not to report these matters in a way that suggests that the allegations have already been proven untrue. I recognise that this can be a difficult line to tread, and it is important to be mindful of the presumption of innocence and avoid falling foul of defamation law. However, some of the coverage in the sample demonstrated the opposite extreme—with overcautiousness in language leading to framing the complainant's claim as a dishonest account of an event that did not happen rather than an event that had not been proven.

Directions for future research

As discussed in chapters 1 and 6, only one of the cases in my sample was reported on after the Me Too movement gained worldwide momentum. I would be interested in future research on media coverage and social media discussion of sexual harassment cases to see whether there had been any changes to what is considered 'real' sexual harassment and a 'good' victim. The persistence into the 21st century of ancient mythology about incredible, gold-digging females suggests that these attitudes are difficult to shift. I was heartened to read analysis of the *Taeuber v Channel 7* case that placed the case in the context of Me Too and recognised the systemic nature of gender discrimination. However, whether this trend will continue remains to be seen. I have already heard whispers of a backlash, including suggestions that Me Too has gone 'too far', in comments on news articles on sexual harassment.

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[5] Our Watch 'Training for journalists' < https://media.ourwatch.org.au/media-home/professional-development/training-for-journalists/>.

I note that there has been some initial academic discussion of the possible impact of the Me Too movement on sexual harassment law[6], and I await future scholarship on this topic.

My research concentrated on 'classic' forms of sexual harassment, with a female complainant and male alleged harasser. I would be very interested to see whether media representations of sexual harassment cases where the complainant was male or identified as non-binary would convey similar messages about 'real' sexual harassment and ideal victimhood. Future research that takes a more intersectional approach and focuses on the combined impact of other forms of oppression such as racism, ageism, LGBTIQ discrimination and classism on sexual harassment complainants would also provide a valuable contribution to the understanding of sexual harassment in Australia.

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[6] See for example Elizabeth Tippett 'The Legal Implications of the Me Too Movement' (2018) 103 *Minnesota Law Review* 229, with speculation that Me Too may lead to employers taking a more punitive approach to sexual harassment in the workplace to avoid vicarious liability.

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