



THE AGA KHAN UNIVERSITY

eCommons@AKU

Graduate School of Media and Communications

AKU-East Africa

January 2008

How the law defines journalism

Rhonda Breit

Aga Khan University, rhonda.breit@aku.edu

Follow this and additional works at: http://ecommons.aku.edu/eastafrica_gsmc



Part of the [Journalism Studies Commons](#), and the [Mass Communication Commons](#)

Recommended Citation

Breit, R. (2008). How the law defines journalism. *Australian Journalism Review*, 30(1), 13-25.

Available at: http://ecommons.aku.edu/eastafrica_gsmc/9



How the law defines journalism

Rhonda Breit

Abstract

Studies proffering critiques of journalism and developing theories that seek to explain what it is have been dominated by research into journalists' attitudes, social structures and cultural influences and effects. Thus these studies are essentially linear and intra-professional. This paper calls for a broader examination of understandings of journalism based on Abbott's concept of occupational jurisdiction. Abbott (1988, 1993, p. 204) argues that professions cannot be studied individually, but should be examined in the context of an interacting system of professionals; that a theory of professions must take account of culture and social structure as well as intra-, inter- and trans-professional forces; and that the development of professions is necessarily a matter of complex junctures. To meet this aim, this paper uses a comparative case study involving textual analysis of the High Court of Australia's decision in ABC v O'Neill (2006) and the ABC editorial policies (2007). Judgments from the High Court of Australia in Australian Broadcasting Corporation v O'Neill (2006) are compared and contrasted with the Australian Broadcasting Corporation's 2007 editorial policies to identify and categorise how journalism is viewed within the occupational jurisdictions of law and journalism. Using an "interpretative community" framework articulated by Zelizer (2004), the paper categorises the understandings of journalism revealed in these documents. It then distils the key valorising agents in the various approaches to understanding/describing journalism. This study is strictly limited to develop a conceptual framework by which to compare and contrast intra- and inter-professional understandings of journalism and public interest.

Introduction

It is well accepted that journalism is in a state of dynamic change, with journalists, news organisations and scholars claiming journalism is under threat. While academics and professionals ostensibly agree that there is a state of change, there is little agreement on what journalism is. Zelizer (2004) attempts to make sense of this conceptual muddle in her book *Taking journalism seriously*, where she plots the theoretical heritages of divergent approaches to defining journalism. This study uses Zelizer's schema to compare and contrast professional understandings of journalism across law and journalism. Zelizer makes the case that within journalism, different kinds of knowledge (about journalism) co-exist. She uses an "interpretative communities" framework to explain how these kinds of knowledge co-exist (see also Fish, 1980; Tuchman, 1978).

Given the different “interpretative communities” within journalism, there are differing ways of abstracting knowledge to work tasks, resulting in a complex and dynamic knowledge system that can “define its problems and tasks, defend them from interlopers and seize new problems” (Abbott, 1988, p. 9). These internal tensions within journalism have contributed to a crisis of confidence that could potentially undermine journalistic authority. Zelizer’s analysis (2004) helps to identify the key approaches to understanding journalism, thereby contextualising internal tensions within the journalism academy.

Zelizer’s analysis is extremely valuable; however, this paper argues that conceptual confusion surrounding journalism is also evident in other professional fields, particularly law. It uses a case study of a recent High Court decision to map the conceptual commonalities and tensions emerging within the legal and journalistic “professional” domains. In *Australian Broadcasting Corporation v O’Neill* (2006), the High Court of Australia was called on to interpret questions about journalistic quality. In interpreting journalistic quality, assumptions are made about the role of journalism. Thus this paper seeks to compare and contrast media and legal understandings of journalism by examining the O’Neill judgements and the ABC’s editorial policies.

In Australia, in particular, considerable academic attention has been given to whether journalism is a profession (see Henningham, 1990; Richards, 2002). It is accepted that within the Australian academy and beyond, there is no consensus about the professional status of journalism. Notwithstanding these differences, this paper uses Abbott’s concept of professional/occupational jurisdiction to compare and contrast how the courts and industry interpret the role of journalism in contemporary society. Abbott’s conception of professions takes analysis beyond professional ideals, values and routines to look at how knowledge is abstracted and how professions respond to change. This focuses analysis on the dynamic socio-cultural domain of journalism rather than normative profession ideals, which are often hotly contested.

Abbott notes that objective and subjective factors contribute to professional change – some aid development, others undermine it. Abbott argues that professional development hinges on intra-professional relations (the subject of Zelizer’s analysis) and inter-professional relations, where competing occupations challenge professional authority. How a profession responds to these challenges can affect its professional authority. This paper argues that the legal profession is challenging journalistic authority through its interpretation of what journalism is and its evaluation of journalistic quality. Failure to respond to these challenges could have long-term implications for the future of journalism in Australia (particularly public-funded broadcasters such as the ABC and the Special Broadcasting Service), with journalists losing the authority to determine issues of quality. In the short term, the conceptual confusion surrounding journalism could directly affect the ability of media organisations to successfully defend defamation actions. In support of this argument, this paper:

- Maps the key approaches to defining journalism using Zelizer’s interpretative community framework;
- Describes the case study;
- Analyses the documents and categorises the understandings of journalism in terms of Zelizer’s framework, identifying any similarities and differences in approach;
- Discusses the implications of any tensions.

Approaches to defining journalism

As stated previously, there is no consensus on how journalism should be defined either within the industry or the academy:

Although one might think that academics, journalism educators and journalists themselves might talk about journalism in roughly the same manner, defining “journalism” is not in fact consensual. Rather, when invoked as a frame of reference, the term reveals much about those invoking it – their background, education, experience, placement in the academy ... (Zelizer, 2004, p. 13)

Zelizer (2004) gives sense to the different views of journalism by treating them as interpretative communities. These interpretative communities are characterised by a set of shared discursive strategies used to understand journalism itself rather than the text it produces. By treating journalism scholarship as an interpretative community, Zelizer is able to highlight controversies within the field and identify commonalities and differences in the conditions of journalism that are seen to be of value. Different interpretative communities value different aspects of journalism. By using Zelizer’s schema, this paper argues that there are a number of interpretative communities within the legal profession, resulting in conceptual confusion surrounding journalism both inter- and intra-professionally.

Zelizer (2004, pp. 20-29) describes terms that can be used for journalism, namely journalism or journalist; news; media; or communication and information. Each generalised term has a slightly different meaning and focus. The terms journalism and journalist are broad and hard to define. However, when using these terms the focus is on the product produced and the person producing it. Zelizer (2004, p. 21) cites Adam’s definition of a journalist as a person who “expresses a judgment on the importance of an item, engages in reporting, adopts words and metaphors, solves a narrative puzzle, assesses and interprets” (Adam, 1989, p. 73). A journalist is a news worker, whereas journalism relates to the actions associated with news work. This view of journalism implies a sense of evolving crafts, routines, skills and conventions that individuals and groups tend to employ in news-making (Zelizer, 2004, p. 22). This broad approach to understanding journalism means there is a broad range of quality indicators that must be taken into account in determining journalistic quality.

The term “news” is used to describe journalism whereby the key valorising agent is the quality of information – which must be new or of news value. The difficulties in classifying information as news has led to the development of a set of values or news values employed to determine the quality of information. These values are applied by individuals. Thus the process of news making involves value judgements. Zelizer (2004, p. 24) notes that viewing journalism as news conflates the distinction between material that is reported and the report itself. News, therefore, is defined by the product or output. Thus questions of quality are determined by the quality of the product rather than the process.

Another term used to describe journalism is media. Media refers to the mediating agencies that allow the relay of information to take place, emphasising the industrial and institutional environment in which news is produced (Zelizer, 2004, p. 26). Thus questions of quality look at the role of media institutions and professional values rather than the product or process.

A broader view of journalism sees it as communication and/or information (see Zelizer, 2004, pp. 27-29). This approach emphasises the process of news making, focusing on the effects of news. It defines journalism by identifying what it is not rather than describing what it is. Questions of quality are determined by the effect of news on audiences.

These key descriptors, described generally as a heritage grouping, will be used to categorise how the High Court of Australia and the ABC describe journalism. To help identify how journalism is valorised within the fields of journalism and law, the different descriptors will be categorised in terms of the key approaches journalism scholars have taken to conceptualising journalism (Zelizer, 2004, pp. 32-43), namely:

- Journalism as a profession, which implies a set of activities carried out by professionals with an agreed-upon set of norms, values and practices (Zelizer, 2004, pp. 32-36);
- Journalism as an institution, which sees journalism as functioning in or as an institution characterised by social, political, economic and cultural privilege (Zelizer, 2004, pp. 36-38);
- Journalism as text, which sees journalism as news, focusing attention on the public use of words, images and sounds in a patterned way that displays a set of agreed-upon features (Zelizer, 2004, pp. 38-39);
- Journalism as people, whereby the activity is described through the people who work as journalists (Zelizer, 2004, pp. 39-42);
- Journalism as a set of practices, where journalism is described and categorised according to the practices involved such as writing the news, gathering information (Zelizer, 2004, pp. 42-43).

This category will be described as the scholarly grouping. The case study used a two-stage categorisation process: first the documents were categorised in terms of their conceptual heritage, and then they were grouped according to scholarly grounding. This process of categorisation was used to identify the key aspects of journalism seen to give it value and the type of approach taken to conceptualising journalism. This in turn was used to identify the type of evidence taken into account in determining the value of journalism.

The case study: ABC v O'Neill and the ABC editorial policies

As mentioned previously, the case study involved the textual analysis of two sets of documents. The first set of documents involves the separate judgements delivered by members of the High Court of Australia in *Australian Broadcasting Corporation v O'Neill* (2006). The second set of documents is the 2007 editorial policies adopted by the Australian Broadcasting Corporation.

Australian Broadcasting Corporation v O'Neill (2006) hinged on the question of journalistic quality. The case came before the High Court of Australia when the Australian Broadcasting Corporation (ABC) challenged a decision from the Supreme Court of Tasmania Court of Appeal restraining the broadcast of a documentary, entitled *The Fisherman*, which suggested a convicted murderer was suspected of (or guilty of) committing further crimes.

The original action was instigated by convicted murderer James Ryan O'Neill, who sought damages and an injunction to restrain further publication of *The Fisherman*, which he claimed defamed him by suggesting he was a multiple killer and a suspect in the disappearance and murder of the Beaumont children (one of Australia's most infamous unsolved crimes).

The documentary was commissioned by the ABC and produced by former police officer Gordon Davie and Roar Film Pty Ltd. Questions were raised by O'Neill about the publishers' motive. He claimed Davie had misled him about the intentions of the documentary, which he believed would look at O'Neill's work at the prison worm farm. Instead, the documentary dealt with issues relating to O'Neill's conduct before being imprisoned for murder.

The documentary was screened at the Hobart Film Festival in January 2005. The ABC was scheduled to broadcast the documentary nationally on April 28, 2005. O'Neill instituted his action for damages and permanent injunctive relief against the ABC, Davie and Roar Film Pty Ltd on April 15, 2005, when he also applied for interlocutory relief to prevent the ABC broadcasting the program pending the hearing of his claim. The case came before the Supreme Court of Tasmania, where the temporary injunction was granted. The ABC then appealed against the decision to the Supreme Court of Tasmania Court of Appeal, which upheld the decision to restrain publica-

tion of the documentary. The ABC then appealed to the High Court of Australia. This case study examines the key approaches to defining journalism in these decisions.

The ABC also has deliberated on issues of journalistic quality, resulting in the introduction of its 2007 editorial policies. The 158-page set of policies reflects on the “unique” role of the ABC in Australian society and the key values that underpin its work.

An analysis of these documents reveals there is no consistent view of journalism within the High Court of Australia and that these views differ markedly from the view of journalism underpinning the ABC’s approach in its editorial policies. This conceptual muddle could have significant implications for journalistic expression given the application of defamation law defences that hinge on interpretations of public interest and reasonable publication.

The High Court judgements

When the High Court of Australia was called on to review the decision of the Full Court of the Supreme Court of Tasmania, a majority of judges (four to two) found that the order restraining publication of the documentary by the ABC should be overturned. Chief Justice Gleeson and Justice Crennan delivered a joint judgement, as did Justices Gummow and Hayne. All four judges agreed that the primary judge and the majority in the appellant court had misapplied the principles relating to the granting of interlocutory relief in defamation actions.

Justice Kirby and Justice Heydon disagreed, finding that the court at first instance (and the appellant court) had correctly exercised its discretion in granting the injunction. This paper now looks at the approaches to determining the value of the documentary by identifying the key approaches taken by the members of the High Court.

Chief Justice Gleeson and Justice Crennan

The definition of journalism came into focus when Chief Justice Gleeson and Justice Crennan reiterated the principles to be applied in determining whether interlocutory injunctions should be granted. This involves three questions, namely:

1. Has the plaintiff shown there is a serious question to be tried which involves questioning the likelihood of success of the action?;
2. Has the plaintiff shown that he/she is likely to suffer injury for which damages will not be an adequate remedy (appropriateness of damages)?;
3. Has the plaintiff shown that the balance of convenience favours granting an injunction (balance of convenience), which involves consideration of the public interest in freedom of expression? It was here that the role of the ABC and the role of journalism in society were generally canvassed.

Both Chief Justice Gleeson and Justice Crennan questioned the level of discretion exercised by the judge at first instance, Justice Crawford, stressing that in defamation actions such principles should be applied with great caution because of the *public interest* in freedom of expression. Both Chief Justice Gleeson and Justice Crennan stressed:

In the context of a defamation case, the application of those organising principles will require particular attention to the considerations which courts have identified as dictating caution. Foremost among those considerations is the public interest in free speech. A further consideration is that, in the defamation context, the outcome of the trial is especially likely to turn upon issues that are, by hypothesis, unresolved. Where one such issue is justification, it is commonly an issue for jury

decision. In addition, the plaintiff's general character may be found to be such that, even if the publication is defamatory, only nominal damages will be granted. (ABC v O'Neill, 2006, par 19)

In applying his "unfettered" discretion, Justice Crawford was found to have failed to take full account of the public interest in free speech. Chief Justice Gleeson and Justice Crennan were critical of his analysis of "trial by media" and his observation that allegations of guilt or suspicions of guilt were the sole domain of police and prosecuting authorities. In fact, the judges rephrased the question in terms of "how suppression of public discussion" of such issues – such as the disappearance of the Beaumont children and the prior confessions of O'Neill – "could serve the public interest" (ABC v O'Neill, 2006, par 24). They condemned Justice Crawford's findings on public interest on a number of grounds:

- First, they rejected his finding that allegations of serious criminal conduct were the sole domain of the police and prosecuting authorities, observing that such views failed to reflect the reality in Australia and other free societies where charges were sometimes laid after media investigation and exposure (ABC v O'Neill, 2006, par 26);
- Second, they noted that it was in the public interest that the media could question police inaction in relation to criminal investigations (ABC v O'Neill, 2006, par 27);
- Third, canvassing issues outside the reporting of court proceedings did not automatically constitute trial by media (ABC v O'Neill, 2006, par 28);
- Fourth, they asked what public interest was served by keeping such allegations secret (ABC v O'Neill, 2006, par 29).

After canvassing these issues, they concluded:

It is difficult to resist the conclusion that ... the judges who decided the case ... have fallen into the error of treating the criminal trial process as the only proper context in which matters of the kind presently in question may be ventilated. More fundamentally, however, it is apparent that they failed to take proper account of the public interest in free communication of information and opinion, which is basic to the caution with which courts have approached the topic of prior restraint of allegedly defamatory matter. (ABC v O'Neill, 2006, par 30)

In the light of these findings, the judges concluded that Justice Crawford and the majority in the Full Court of the Supreme Court of Tasmania failed to take adequate account of the interests of freedom of speech and freedom of the press.

In their analysis, Chief Justice Gleeson and Justice Crennan (like Justice Crawford) did not distinguish between the ABC and other media. They treated the production of this documentary as part of the Australian *media* which played an important role in disseminating information and opinions to the public. But instead of focusing on industrial and institutional concerns such as ratings, Chief Justice Gleeson and Justice Crennan emphasised the institutional role of media organisations to investigate and report suspicions of guilt which can aid police investigations and result in charges being laid. This approach led them to look at the beneficial effect of messages being disseminated to the public. Here they saw the ABC as a conduit through which the public gained information and which thus performed social, cultural, political and economic functions. Whether the information was true was irrelevant; the most important consideration was the ability of the media to report such issues. The judges' approach draws heavily from notions of the media as the Fourth Estate.

There is consensus between Justice Crawford and the High Court's Chief Justice Gleeson and Justice Crennan in treating the production of the documentary as part of the media. Justice

Crawford, however, attributes little value to the documentary because he sees it as part of a commercialised media. He seems to be proffering an institutional jurisdictional perspective where the police and courts have sole authority over information relating to criminal actions. The commercial nature of the media (even the publicly funded media) negates any institutional privilege.

Chief Justice Gleeson and Justice Crennan, on the other hand, attribute greater value to the documentary because it deals with information of public interest. Thus an institutional function of the media is to disseminate information which has inherent public interest. Chief Justice Gleeson and Justice Crennan emphasised linkages between journalism (the documentary) and the public sphere. Justice Crawford emphasised the intersections between journalism and business (a category not explicitly set out in Zelizer's schema). These different emphases resulted in the emergence of two patterns of thinking about journalism.

Chief Justice Gleeson's and Justice Crennan's approach also brings into focus the process of news making, which Zelizer sees (2004, p. 28) as delivery of information and the substance of the relay. Here, the two judges placed considerable weight on the substance of the relay, claiming that it was of such social significance that such information could not be the sole domain of the courts. This reflects a utilitarian approach to responsibility, where the end (the message) can justify the means by which the information is gathered, and reinforces the utilitarian role of journalists as information providers (Zelizer, 2004, p. 28).

Justices Gummow and Hayne endorsed the approach of Chief Justice Gleeson and Justice Crennan in attributing value to the documentary by conceptualising it as information in the public interest. Thus the majority of judges saw the media as a social institution, the duty of which was to publish information in the public interest and where the subject matter was more important than the process by which it was obtained, suggesting a rule utilitarian approach to determining journalistic quality. The majority also prioritised public interests over private interests.

Justice Kirby, on the other hand, viewed the documentary as an information process. Its value was determined by the *quality of that process*, and here he stressed the effect of this process on the different stakeholders. He observed:

(Mr O'Neill) said he was induced into taking part in the film by an assurance that it would be confined to his activities at the worm farm and would not be about the crime for which he was convicted or any other allegations against him of a criminal nature. Confirmation that this was how Mr Davie represented himself to the respondent is apparent from the letters that passed between the two men from 1999 onwards. (ABC v O'Neill, 2006, p. 28)

He went on to suggest that Davie formed a relationship with O'Neill to test his possible involvement in the deaths of eight children and not to portray his activities at the worm farm (ABC v O'Neill, 2006, p. 28). Therefore, the film was developed through a "false relationship". Because of this, Justice Kirby concluded that the primary judge and the majority in the Full Court were correct in their approach whereby the "balance of convenience" was weighed in favour of O'Neill, who was the victim of grossly defamatory imputations arising from a publication that amounted to "trial by media" or, more significantly, "conviction by media".

Different judges might take different views about the dangers of trial by media and the need to protect particular individuals against it. However, dangers certainly exist. In the absence of the tender by the ABC of the film itself (or excerpts and transcripts) it was open to the primary judge, drawing on the established extrinsic materials, to infer that the film in issue in these proceedings would not present a fair picture of potentially inflammatory material concerning (O'Neill). (ABC v O'Neill, 2006, par 155)

For these reasons, Justice Kirby rejected the majority's findings that the primary judge and the majority in the Full Court conflated the concepts of public benefit and public interest. This reasoning suggests Justice Kirby sees journalism as a set of practices encompassing how news is gathered, presented and disseminated. The value of news is determined by the quality of each of these practices, and flaws in one or all of those practices can undermine the quality of news. Implicitly, Justice Kirby is requiring these processes to meet professional standards.

Justice Heydon also conceptualised the documentary as a process of news-making that involved both the gathering of information and its dissemination. But he reasoned that the legal obligations of the ABC placed it in a different position from commercial media in Australia. He observed:

The corporation is a body corporate funded by the tax revenues raised by the Federal Government. For these reasons, it might be thought that the Corporation, like the Federal Government itself, should conform to higher standards and ideals than may be current in society at large – and in the Corporation's case, higher standards than its commercial rivals. It might be thought that this should be so both in the material it broadcasts and the means it employs to get that material. (*ABC v O'Neill*, 2006, par 180)

Thus the interpretation of the documentary's value was framed by the institutional environment in which it was produced. Therefore, Justice Heydon evaluated the quality of the information process in the light of the ABC's unique obligations to Australia's taxpayers. He adopted an institutional frame for evaluating the quality of journalism whereby the professional standards expected of the ABC were greater than expected of commercial media. Thus he proffers a deontological-oriented approach, where the value of the documentary is determined by the legislatively prescribed roles of the ABC, resulting in different standards of quality for different media institutions.

The ABC approach

Soon after this decision, the ABC endorsed a new set of editorial policies committing the ABC to "fundamental democratic principles including the rule of law, freedom of speech and religion, parliamentary democracy and equality of opportunity" (ABC, 2007, p. 5). The Director of Editorial Policies emphasised the aim of the ABC to provide news and information "of all people for all people" (ABC, 2007, p. 6), committing ABC staff to being honest, fair, independent and respectful. Thus the ABC is treated as a mechanism for disseminating news and information for the public. Implicit in this approach is a conflating of the journalistic process to encompass both the material being reported and the report itself (Zelizer, 2004, p. 24). The question of value is determined by what is being reported rather than who communicates it (Zelizer, 2004, p. 25). The ABC, like members of the judiciary, refrains from categorising journalism through the descriptors journalism or journalist, preferring to look at the quality of the information and the processes of information gathering, assimilation and dissemination.

The ABC policies distinguish between four types of content, namely:

- News and current affairs;
- Opinion;
- Topical and factual information; and
- Performance (Australian Broadcasting Corporation, 2007, Editorial Policies Clause 1.5).

Thus there is an emphasis on journalism as text, with the policy attributing different standards of responsibility to each type of information/text being disseminated. News is defined as the process that records what happens where facts and context dominate reportage (Australian Broadcast-

ing Corporation, 2007, Editorial Policies 5.1.4). Current affairs is seen as providing more detail than news, featuring fact-based analysis and debate on issues. If the documentary were treated as news and current affairs, then Section 3 of the ABC Code of Practice requires that the content be accurate, impartial, objective and unbiased. The code also obliges the ABC to investigate issues of public interest affecting society and individuals.

Topical and factual content reflects a wide range of audience interests and beliefs presented in a variety of formats including documentary (Australian Broadcasting Corporation, 2007, Editorial Policies 7.1, 7.1.2). However, it does not include news and current affairs or opinion content. If conceptualised as topical or factual content, then Section 5 of the code of practice requires that the ABC present this information impartially, reflecting the spectrum of views on the subject, and that every reasonable effort be made to ensure the information is accurate, is reported in context and does not misrepresent the various viewpoints.

Opinion content is described as opinion that is commissioned to provide a particular point of view or perspective on matters of contention or public debate and includes documentary (Australian Broadcasting Corporation, 2007, Editorial Policies 6.1, 6.2, 6.3). If the documentary were treated as opinion, the code of practice requires it to be signposted as opinion. Section 4 of the code also commits the ABC to impartiality and accuracy, requiring the corporation not to misrepresent viewpoints.

Without viewing the documentary it is difficult to categorise the program. It is possible it would have been categorised as topical or factual content if it canvassed O'Neill's activities in the prison worm farm, but, given the nature of the issues canvassed in *The Fisherman*, it is more likely to be categorised as news and current affairs.

The ABC editorial policies highlight responsible publication involving a prioritising of professional, legal and ethical values. In order to fully evaluate the competing values, it is important to examine the role of the ABC. The editorial policy and statutory duties (Australian Broadcasting Act 1983; ABC, 2007, Editorial Policies Clause 3.2.1) of the ABC state that it must provide an *independent* news and information service, which includes broadcasting news and information relating to current events:

The ABC holds its power to make decisions on its content and services on behalf of the people. By law and convention neither the Government nor Parliament seeks to intervene in those decisions. The ABC is independent of any private interest and control. The ABC exercises complete editorial control over all its content decisions.

Thus the ABC is vested with a wide discretion to publish information in the public interest. The guarantee of independence means freedom from external pressures, including pressure from sources of information (discussed in more detail later in this section).

The editorial policies specifically acknowledge that "the media do not have an unrestricted right to say what they like". Laws such as defamation apply to the ABC, and it directs staff to the ABC Legal Service for assistance (Clause 4.2.1). However, responsible reporting also involves an ethical dimension. Therefore, the process of gathering *and* disseminating information should reflect the core values of honesty, fairness, independence and respect (Clause 2.1). These documents therefore acknowledge that journalists employ a number of professional values, such as news values, which determine the quality of information.

The corporation's editorial policies stress that the decision to publish material should be free from external interference (including pressure from a source) and the value of an interview will be determined by "news values" (Clause 5.3.5). Thus the value of the documentary is framed by journalistic interpretations of news value rather than the quality of the information-gathering process, the public interest of information or the unique role of the ABC in Australian society.

This suggests the ABC views journalism as an information process delivered to the public to serve a “unique” purpose in Australian society. The policies also reveal strong influences from the scholarly view of journalism as a profession, and these values are ultimately what will determine the value of journalism.

The above discussion reveals a range of approaches to conceptualising journalism. Interestingly, journalism is not used as a descriptor in any of these documents. It is viewed as “the media” or an information delivery process. The conceptual confusion increases when attempting to categorise the scholarly grouping. The ABC and a majority of judges took an institutional approach to interpreting journalism. Only Justice Kirby adopted an alternative view of journalism as a set of practices. The major area of confusion arises in the key valorising indicators. The key approaches to conceptualising journalism are summarised below in Table 1.

Table 1: Approaches to conceptualising journalism

Origin	Heritage grouping	Scholarly grouping	Key value indicators	Categorisation of approach
Justice Crawford	Media	Institutional: economic	Motive for publication	Utilitarian
Chief Justice Gleeson	Media	Institutional: relationship with public sphere	Substance of relay	Rule Utilitarian
Justice Crennan	Media	Institutional: relationship with public sphere	Substance of relay	Rule Utilitarian
Justice Gummow	Media	Institutional: relationship with public sphere	Substance of relay	Rule Utilitarian
Justice Hayne	Media	Institutional: relationship with public sphere	Substance of relay	Rule Utilitarian
Justice Kirby	Information process	Set of practices	Professional standards	Deontological
Justice Heydon	Information process	Institutional; economic & social obligation	Economic role and professional values	Deontological
ABC editorial policies	Information process	Institutional (public sphere) Journalism as text Journalism as profession	Professional values Substance of relay	Deontological

Different values

By tracking conceptual origins and influences in understanding journalism, this paper has attempted to identify key indicators of value. As Table 1 above reveals, four of the High Court judges emphasised the substance of the relay, while Justices Kirby and Heydon emphasised professional values. The ABC also emphasises professional values. But the question of value is also affected by loyalty and the question of to whom the media owe the greatest responsibility. Table 2 (below) sets out the key relationships emphasised when determining questions of value relating to journalism.

Approach	Value	Loyalty
Justice Crawford	Motive for publication	Public
Chief Justice Gleeson, Justices Crennan, Gummow & Hayne	Substance of relay	Public
Justice Kirby	Professional standards (legal & ethical)	Subjects (rights of individual)
Justice Heydon	Professional standards (legal & institutional)	Public vis a vis rights of individual
ABC	Professional standards (ethical & news values) & substance of relay	Sources, the organisation and the public

Conclusion

The above discussion reveals considerable confusion about the role of journalism in contemporary society. Australia's public broadcaster, the ABC, has a very different approach to conceptualising its unique role. This conceptual confusion surrounding journalism has considerable implications for media defendants seeking to justify publication of defamatory material.

Australia's defamation laws place a hefty burden on defendants. Any publication which has a tendency to harm an individual's reputation by:

- Lowering his/her reputation in the eyes of right-thinking members of society;
- Exposing a person to hatred, contempt or ridicule; or
- Causing a person to be shunned or avoided without moral blame

is presumed to be false. Such publications are presumed to be harmful, thus defendants must adduce evidence that rebuts these presumptions by proving the publication was true, privileged (absolute or qualified) or an honest opinion. The defences of qualified privilege and honest opinion require proof of reasonable publication and/or public interest.

Where different emphasis is given to the different aspects of journalism and different weight attributed to the different relationships within journalism, different evidentiary burdens could arise for journalists (and media defendants) seeking to defend publications as reasonable or satisfying public interests. For example, if Justice Crawford's conception of journalism is adopted, then the question of quality will focus on the motive for publication. Thus evidence must be adduced that negates the inference that ratings are the primary motivation for publication. His judgement also suggests certain types of information are not appropriate subject matter for public discussion in the media, suggesting economic factors will negate social significance of information.

On the other hand, the majority of the High Court judges agreed that the social significance of information will and should justify publication of information and should be the key determinant when granting injunctive relief. Thus defendants seeking to prove reasonable publication and public interest would have to focus on the quality of information published, and it would be sufficient to show that the information was of a quality that would be of interest to the public. The information itself would not have to be of a high quality; it must deal with an issue of social significance. Justice Kirby's approach, however, focuses on the integrity of process, and the evidence needed to prove the integrity of the news process will differ from the type of evidence needed to show the information is important to the public.

The ABC's editorial policies also emphasise the integrity of the editorial process, however, Justice Kirby and the ABC arrived at very different conclusions about the quality of the documentary because Justice Kirby emphasised the relationship between the news organisation and the subject matter of news, whereas the ABC emphasised the relationship with the Australian public. Justice Heydon also took into account professional standards in determining the quality of the documentary, but he reasoned that the professional standards expected of the ABC went beyond those expected of commercial journalists; he thus linked the standards back to the institutional role of the ABC.

Based on the analysis presented in this paper, two key approaches to conceptualising journalism emerge: journalism as media and journalism as information process. By further categorising these approaches in terms of scholarly approaches to defining journalism, this paper has tracked greater disunity in the patterns of thinking. From this process of categorisation, it is possible to distil the key valorising agents within these approaches. The majority of the High Court of Australia took a rule utilitarian approach to determining the value of the documentary *The Fisherman*, where the message was the most important aspect of the information gathering and dissemination process, and the substance of the relay overcame any problems associated with the means by which it was published.

The minority judges, on the other hand, reflected a deontological approach to conceptualising responsible journalism, where the duty to report fairly was an overriding consideration. In interpreting fairness, the minority judges looked at the effect of the publicity on the rights of an individual, the power of contemporary media, the likely impact of publication and in whom the power to report allegations of guilt is invested. Justice Kirby emphasised the obligations of fairness to the subject matter of a story, whereas Justice Heydon emphasised the concept of fairness in the light of the unique role of the ABC in society. The emphasis given to professional values was thus limited to legal and ethical values and did not go to news or organisational values.

The ABC editorial policies also emphasised professional values and the substance of the relay in determining the quality of information. In determining questions of value, reference was made to legal ethical, organisational and professional values such as news values.

Obviously, there is considerable disagreement within the judiciary about what journalism is. There is no consensus between any of the judicial understandings of journalism and how the ABC conceptualises journalism. Thus the "thinking" about journalism when media organisations prepare their defences and the judicial expectations of what amounts to quality journalism could be different. This paper has attempted to position these different conceptions in order to map the similarities and differences in approaches. These findings will form the basis of a wider study that attempts to map the conceptions of journalism and public interest within other judicial decisions and compares these approaches to both commercial and non-commercial media.

References

Abbott, A. D. (1988). *The system of professions: an essay on the division of expert labor*. Chicago: University of Chicago Press.

Australian Broadcasting Corporation. (2007, March). *Editorial policies*.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199.

Australian Broadcasting Corporation v O'Neill. (2006) HCA 46 (28 September 2006). Retrieved February 14, 2007, from <http://austlii.edu.au>.

David Russell Lange v ABC. (1997). HCA 25. Retrieved February 2, 2007, from <http://www.austlii.edu.au>.

Dow Jones & Company Inc v Joseph Gutnick. (2002). HCA 56. Retrieved February 2, 2007, from <http://www.austlii.edu.au>.

Fish, S. (1980) *Is there a text in the class? The authority of interpretative communities*. Cambridge MA: Harvard University Press.

Henningham, J. (1990) Is journalism a profession? In J. Henningham (Ed.), *Issues in Australian journalism*. Melbourne: Longman Cheshire

O'Neill v Australian Broadcasting Corporation, Roar Film Pty Ltd and Davie [2005] TASSC 26 (22 April). Retrieved May 28, 2007, from <http://www.austlii.edu.au>.

Richards, I. (2002). *Leading parallel lives: journalism and professional ethics*. Proceedings of IPE/AAPAE 2002 conference "Reconstructing 'The public interest' in a globalising world:

business, the professions and the public sector". Retrieved from <http://www.iipe.org/conference2002/papers.Richards.pdf>.

Tuchman, G. (1978). *Making news: a study in the construction of reality*. New York: Free Press.

Zelizer, B. (2004). *Taking journalism seriously: news and the academy*. Thousand Oaks: Sage Publications.

Author

Rhonda Breit is a senior lecturer in the School of Journalism and Communication at the University of Queensland, Brisbane. She would like to acknowledge the valuable feedback from Associate Professor Michael Meadows, who commented on early drafts of this paper.