HIS HONOUR: Yes, Mr Maxwell?

MR GRAHAM: Your Honour, one small point I would like to raise at this stage.

HIS HONOUR: Yes.

MR GRAHAM: It seems to happen that the courtroom door remains locked until about a minute or two minutes before Your Honour gets on the Bench, and it is a bit difficult for us to get organised in that time. Perhaps we could have a little more time.

HIS HONOUR: You want some time?

MR GRAHAM: Not now, Your Honour, but - - -

HIS HONOUR: I see. All right. I will see what I can do. Yes, Mr Maxwell?

MR MAXWELL: If Your Honour please. Your Honour, when we concluded last evening I had taken Your Honour to what, in our respectful submission, is an important precedent, being the decision of His Honour Mr Justice Ellis in the Family Court. I understand Your Honour was going to be reading it overnight.

HIS HONOUR: Yes.

MR MAXWELL: And I don't wish to rehearse it at any great length but, subject to Your Honour's convenience, I would wish to start this morning by saying a few more things about the effect of the decision and its relevance for present purposes. Your Honour will have it under tab 6 in the folder.

HIS HONOUR: Yes, I have.

MR MAXWELL: If Your Honour would turn to page 17. I didn't draw Your Honour's attention to this yesterday, but it is important, in our respectful submission, for Your Honour to note how severe the criticisms were, and how extreme

the language. I won't read the quote in full, but Your Honour can see that at page 17 His Honour is setting out the text of a document which the defendant was handing out in the forecourt of the Family Court. And if I might just refer to some of the language used, Your Honour, at the end of the first paragraph under the heading "Why did this man commit such a crime?"; reference to the Family Court, and its incompetent and immoral system of justice; reference at the end of the second paragraph to unfair and biased practices. Fourth paragraph: "The blatant abuse inflicted on fathers in this court", and its incompetence and bias.

Then there is a reference in the next paragraph to "Those", being the court, "who inflicted these atrocities on families". "The Family Court is a tool of destruction". Next paragraph, "As long as judges are allowed to make decisions on their twisted morals and are protected by the secrecy of section 121, this court's evil deeds will go unhalted." Then he refers to the court as a "feminazi court", in how the court inflicts "unbearable torment on to unsuspecting non-custodial parents". Not surprisingly, as Your Honour saw last night, paragraph 146 concluded that publication clearly implied that judges of the Family Court didn't act according to law, didn't make decisions on the evidence and were biased against men.

His Honour went on, in paragraph 48 in the fifth line, to say that in his view there is "no basis upon which I can conclude that the material published by the respondent was accurate. Reading the document as a whole, the assertions made in it do not, in my judgment, amount to fair comment, nor were they made in good faith".

Leaving out a sentence: "What is asserted amounts to a grave breach of duty by the court and its judges and is probably defamatory of the Chief Justice. Those assertions are baseless, unwarranted and unwarrantable. The material so published, in my judgment, the necessary tendency to interfere with the administration of justice."

Then His Honour makes what we respectfully submit is the critical distinction based on the authorities referred to earlier in the judgment. "The publication, however, will only constitute a contempt of court if it satisfies the test of having, as a matter of practical reality, a tendency to interfere with the due course of justice," and Your Honour will recall that is the phrase used by the High Court in the Fairfax case, which I took Your Honour to yesterday.

His Honour now refers to the kind of contextual circumstances that we deal with in our submission, some of them. "I take into account", His Honour says, in considering that question that the material published to the applicant was a printed document" - that it wasn't an oral statement. "In handing the document to the applicant, the respondent made it available to the general public in the vicinity of Marland House", the Family Court building, "even though the evidence in relation to this count establishes that it was only the applicant who was in fact handed the document". So in considering whether there is as a matter of practical reality the relevant tendency, His Honour has regard, as we respectfully submit Your Honour must, to the character, the form, the place, the extent of circulation, and we say other things as

mentioned in our paragraphs 16 and 17 and, against the defendant, His Honour concluded that it was generally available in that place, even though the evidence only showed one copy given to the informant.
But as Your Honour will have seen, in paragraph 49 His Honour concluded "In the circumstances, I am not satisfied beyond reasonable doubt that the publication had the requisite tendency to interfere with the due course of justice. The applicant has not in my judgment established beyond reasonable doubt that as a consequence of the publication there was a real risk that public confidence in the administration of justice would be undermined".
The burden of this no-case submission is that on the evidence presently before the court, Your Honour would find that it is a finding that is not open, that there is a real risk as a result of the publication of these books two years ago, that public confidence in the administration of justice would be undermined.
We don't put the test in those terms because we have drawn attention to the difficulties of imprecise phrases such as "public confidence," and we focus, rather, on what we say is implicit in these analyses, that is to say, some perceptible adverse impact on the administration of justice, that is, as a matter of practical reality, will tend to prevent the - inhibit the administration of justice from functioning as it should, and that, on the material here, that finding, in our respectful submission is not open.

HIS HONOUR: Does that test of it being a real risk - I don't say this in a pejorative way, because I want to know what the answer to it is - does that mean that the more

apparently sensible or rational a document is, the greater is the risk of it carrying the tendency to affect the administration of justice, or, put another way, if a document was to a sensible reader, informed reader, patent nonsense, would it there follow that there was a less risk of the public confidence in the administration of justice being affected by virtue of the fact that they treated it as rubbish?

MR MAXWELL: In our respectful submission, the essence of Your Honour's question is correct; that it is exactly issues of that kind, that is, what kind of writing is this, which go to the weight to be attached to it by a reader, and then to the question of real risk.

HIS HONOUR: Well, if that is a proper question, what then do you say is the standard that I should find this publication attains?

MR MAXWELL: Well, Your Honour, we say that the fact that this is, on its face, a rational and serious, though highly opinionated, book, differentiates it, plainly, from a flyer being handed out in the forecourt of the Family Court.

HIS HONOUR: So it is more likely to constitute contempt than otherwise.

MR MAXWELL: No, Your Honour; but it can't - it simply has a different analysis applied to it. With respect, as Your Honour put it to me, if something which is blatant nonsense, which is the same as saying no sensible person would take that seriously, suggesting that every Family Court judge is biased in favour of men, it is just an outlandish proposition, apart from anything else. That is one case. Here, we have one element in common, which is

that the passages complained of, or almost all of them, relate to proceedings in which this person was a defendant. He is making complaints about what happened to him, and the sensible reader in our respectful submission will discount for that factor. That is plain on the face of the book, and we say, in our submissions, 16 - I should point Your Honour to this - 17(a) on page 4, the author makes clear the perspective from which he writes. In other words, you know that he is a disgruntled, aggrieved person who was convicted, he says wrongfully, of perjury. Any sensible reader is going to say well - - -

HIS HONOUR: Actually, I am not sure that I do know that. Do I actually have evidence of that?

MR MAXWELL: You only have what we say there, the work makes clear the perspective from which he writes, which is he describes, he states the facts that he writes from that perspective. Your Honour doesn't of course have evidence from him about that; and because the prosecution haven't troubled to check any of the facts, they weren't able to confirm the accuracy of any of those matters. But in the absence of that, Your Honour should assume in the author's favour that what he says is correct.

HIS HONOUR: But I meant expressly the question of conviction. You say that I should assume that the author is writing from the perspective of someone who has been convicted of perjury. Do I assume any punishment that flowed from that, because I don't know one way or the other? I have not been pointed to anything and there is nothing in the material which I have been referred to so far. It may not be relevant, but you are saying it is relevant - - -

MR MAXWELL: Absolutely, Your Honour, and if I might take

Your Honour, because I was going to do this anyway in answer to question Your Honour asked me yesterday - there is, Your Honour will find, at page xix in book 2, if we can call it that, the one that has got the number 2 on the cover.

HIS HONOUR: Yes.

MR MAXWELL: A chronology - - -

HIS HONOUR: Sorry, xix.

MR MAXWELL: xix, Your Honour, yes. It is said to be an abridged chronology. It is nevertheless very detailed, starting in 1976. If Your Honour would go to page 37, and relevantly, Your Honour, will see 22 August 1995, Chief County Court Judge John Waldron, this is relating to some of the matters complained, refuses Hoser's application for a lawyer to represent him at the upcoming perjury trial. At the same time, he told Hoser he would not win. "4 September 1995: Neesham trial commenced. Hoser 'convicted' of perjury a month later." It is xxvii, Your Honour. I hope - - -

HIS HONOUR: Yes, I have got it. Thank you.

MR MAXWELL: Then, bottom of that page, 3 October 1995, "Hoser 'convicted' of perjury," with the words "convicted" in quotes, making it clear, we would submit, what view the author takes of his conviction. "Tape of Hoser's 28 minutes of evidence in front of Balmford (the crux of the case) was deliberately kept away from the jury by the prosecution and judge". "4 October 1995: Hoser gaoled for a minimum of four months as a result of the above conviction". 11 October, released on bail.

HIS HONOUR: Yes. Thank you.

MR MAXWELL: So we respectfully submit that - and if I might

take Your Honour further on 29, "23 April 1997: Appeal against Neesham conviction dismissed. Hoser gaoled for four months. Chris Dane (QC)" according to the book, "stated the case had been predetermined and he never had a chance. His comment is repeated to" someone else. "High Court appeal lodged". I don't think the chronology takes the matter further, but the perspective of this author is plainly self-evidently a partial interested, aggrieved perspective. He doesn't purport to be writing as a detached commentator. He wants to let it be known that in his view of what went on, and he was unrepresented in the trial - and that appears from the book - a grievous wrong was done to him.

We would respectfully submit that in the same way as Your Honour put to me yesterday about the scope of misunderstanding of references such as "not concerned with the truth" which Your Honour explained, Mr Hoser is in not an unusual position if he has taken a more adverse view of what occurred in a trial than was objectively justified. We say that it is that, in particular, which should lead Your Honour to conclude that there is no risk, no risk as a matter of practical reality, that any judge or magistrate will or has been, from the date of publication, inhibited in his or her performance of a duty in accordance with law. On the contrary, as we said yesterday, if anything, a publication of this kind would, if drawn to the attention of judicial officers, incline to make them more careful, in precisely the way Your Honour posited; not to say things which might be misunderstood by the lay people and, in particular, by an unrepresented defendant.

HIS HONOUR: I don't think it was by the solicitor on that limb, though. It was put rather on the limb of public confidence in the integrity of judges and magistrates.

MR MAXWELL: Yes, Your Honour. And that, in our submission, is where the other part of our argument becomes relevant, which is the kind of trenchant criticism made in Gilfillan, that the County Court judge in question had behaved as prosecutor and judge, is of a like character. Yes, that would undermine confidence. Somebody reading what a Supreme Court judge said would attach much more weight to that than what they would attach to Mr Hoser's remarks to the same effect. But that judge remains in office. The system continues to function. That judge continues to hear cases, and indeed, as we argue, it is inherent in our system of justice that it is self-critical in the appellate system, but also properly subject to external criticism, and this notion of public confidence is therefore so illusive as to be unhelpful to Your Honour, unfair to prospective defendants, and that that is why the test needs to be sharpened in the way we have sought to do it, that is to say, the object is to make sure that our system of justice is going to work no worse because of this publication, than without it. We want to know that the citizens of this country can depend on their cases being tried in accordance with law, and, secondly, we want to know that orders of the courts of this State will be obeyed. That is exactly how we put it in the outline. In our respectful submission, there is no basis for asserting that these books have a tendency to diminish the efficacy of the administration of justice in either of those respects. On the contrary, we

respectfully submit they are calculated to enhance the administration of justice, in the same way as His Honour's swingeing criticism of the County Court judge is calculated to improve things, because not only the judge in question, but others who read the criticism, will review their own conduct, and make any adjustments perceived to be necessary. Added to that, and this is where the serious nature of the enterprise which the book evidently assists, rather than impedes, Mr Hoser when he says at the start of the book, as I have drawn Your Honour's attention to page 18, it is not my purpose to - perhaps it is best if I use - - -

HIS HONOUR: I recall the passage.

MR MAXWELL: Again, the reader is going to read that, and there is nothing on the face of this book to suggest that that is a hypocritical statement, or disingenuous, that this is some fiction that he is creating to pretend to be somebody who believes in the system. On the face of it, it would be read literally. He is somebody who thinks "I have been done an injustice for the reasons I have given you and, on the basis of the matters I am spelling out, that is my view of it, and I think it is in the public interest that people know about these things because it shouldn't happen to other people". That is how he puts it.
In our respectful submission, it is in the public interest that people in the position of Mr Hoser be able to say those things. In any event, our system of justice is, in our submission, absolutely robust enough to cope with that kind of criticism, absolutely robust enough; and that is the thread that runs through all those discussions, going back to the start of the century, about

the necessity for and the public interest in criticism of the judicial process.
Now, you wouldn't say there was much public benefit in what the gentleman said outside the Family Court because that was of a degree of extremity and outlandishness that it would be just dismissed, as Your Honour said, as just ravings. Well, this is not to be dismissed as ravings. But nor is it to be said, "Oh, Mr Hoser said that. Maybe we shouldn't obey the next order from the court." It won't have that effect either. We respectfully submit it will be seen for what it is: an expression in, let's accept, tendentious terms, strong language, imbued with his own sense of outrage and injustice. That is the kind of book it is.
But our society depends on people being able to express strong opinions, particularly where they feel that the system which the community relies on has done them a serious injustice, and to say this man should be convicted for saying those things because he is seriously threatening the administration - - -

HIS HONOUR: Well, the question at the moment is not that. The question is whether there is a prima facie case.

MR MAXWELL: No, Your Honour, but we submit that it is so clear when Your Honour has regard to the evidence as it is, that is to say the kind of book it is, the nature of the allegations, and so on, it is so clear that Your Honour would say, "I am satisfied that it is not open to conclude" - let me start that again. That Your Honour would reach a similar conclusion to that which Justice Ellis reached at the end of the trial, even if, for the sake of argument, the words have the tendency to bring

particular judges and magistrates into disrepute, and a description of the judge as dishonest, it is open to find that the words have that tendency.
But Your Honour would then ask the critical question, that notwithstanding, is there a real risk, as a matter of practical reality, of harm to the administration of justice, and that Your Honour would say, "The material could not satisfy me of that. Not only is there no evidence of any harm to the system of justice, I take into account that I am hearing this two years after the matters were published, though the attorney has been aware of it at least since July 2000 when Mr Lee was writing letters to find out how many had been published, and the trial before Judge Neesham is now six years ago, 1995, so these are, relatively speaking, ancient matters."
Your Honour will recall that - and we rely, as I say, Your Honour can infer from the inaction on the part of the officer of the Crown, who is responsible for the administration of justice, that it was not perceived by him or those advising him that there was any serious risk or threat. Otherwise, they wouldn't have been sending out letters last year and bringing it on for trial in the middle of this year. They would have been before this court as soon as they knew this was in distribution, to say "This must be stopped, otherwise there is a serious threat of damage to our justice system".
Your Honour, just to finish on Torney, if Your Honour would go to page 20, paragraph 54 is just really another example of very extreme allegations about planned and systematic removal of children from their fathers, and responsibility for the death or abuse. So, taken

literally, the words have the strongest tendency to impair confidence in the administration of justice. Somebody is saying that this is a an evil murderous court, effectively. His Honour, in relation to that, in paragraphs 57 and 59, asks the second question, and again is not satisfied that as a matter of practical reality there is the requisite tendency to interfere with the system of justice, and the same analysis proceeds through the case.

Your Honour asked me about paragraph 16, the tendency of the publication, and I answered Your Honour that the proposition in paragraph 16 was our own formulation, drawn from the cases. I have drawn attention to some of the circumstances to which Justice Ellis had regard, and the point Your Honour put to me about blatant nonsense picks up this kind of notion, and C, the purpose of the publication. The defendant in Torney wanted the Family Court shut down because it was corrupt and murderous. This writer says, in terms, "I want to bring about an improvement in this system. I am aggrieved by what it did to me. I want to expose what I say is the impropriety in the system, so that attention will be paid to these defects".

Now, he might be wrong. He might have misinterpreted what went on. He may be completely wrong to infer that there was some bias or there was an alliance between the judge or a magistrate and the prosecutor. But he says why he had those views. He says in the book what things he complains about: the denial of the ability to tape things. He says, "As a layman, well, why can't I have a record of what goes on here so that I can check it later?

I am denied that, I am suspicious about that." There may be a perfectly good explanation as a matter of proceeding. But Your Honour can see, as in relation to the, "We are not concerned with the truth" point, how lay interpretations can create a sense of injustice, which is genuine, albeit not ultimately objectively justified.
We have drawn attention in 17 to the circumstances of the particular case which are relevant. The fact that the work is self-published is consistent with this notion of - that this is a crusading or campaigning work, somebody who is determined to get this out into the public and will publish it himself. All of that, in the relevant sense, detracts from the weight that you would attach to it. It is written by a passionate, enthusiastic, highly partisan person about what happened to him.
Limited circulation, well, that is a matter of degree, of course, but in our respectful submission 5,000 copies in a city of three and a half million people is pretty small circulation; by contrast, the publication in the daily newspapers of Melbourne, with their circulation in the hundreds of thousands, of serious criticisms by Appeal Courts of judges below.
17(c) we have already really adverted to. (d), we make the point that on the evidence before you, accepting that the books on their face - and there is nothing in the prosecution evidence to suggest they shouldn't be accepted on their face, they are tendered in their entirety as evidence in the proceeding - the author has a long-standing demonstrated commitment to investigating and exposing what he perceives to be improprieties in the administration of justice and, it should be added, in the

wildlife administration, being his area of professional interest.
In that regard, Your Honour, I drew attention in the course of the cross-examination to what was said at page 160 and thereabouts of the Hoser Files book, where there is criticism of Magistrate March. Your Honour will recall the Hoser Files is the 1995 book, and we have submitted that it is a book of the same character, that is, that it contains a highly critical review of particular proceedings in the criminal justice system. We draw attention to what the Full Court of this court, the Court of Appeal, said in ordering costs against that magistrate - not in a proceeding that Mr Hoser deals with, but in a proceeding where there is misconduct by that magistrate, so His Honour Mr Justice Brooking said - and that decision is in tab 20 - - -

MR GRAHAM: Before my learned friend deals with this, these events with which that case were concerned long post-dated the Hoser Files publication.

MR MAXWELL: We accept that, Your Honour.

MR GRAHAM: That point should be made.

MR MAXWELL: I accept that. The only point that should be made is that there is simply a connection between a matter which this author, who expresses his concern about inadequacy in the system of justice, a matter has come up more recently in relation to someone identified by him in one of his earlier publications, and it is partiality, it is the kind of conduct of which complaint was made in that book. That is the only point we make: that this is a proper field of inquiry.
Your Honour, we then move to page 5 of the outline,

and I have already referred Your Honour to Mundy's case and the passages in paragraphs 18 and 19 from the judgment of His Honour Mr Justice Hope, about the appropriateness of trenchant criticism. The critical point we seek to make there is that in paragraph 20 and incorporating by reference what precedes it in 19. We submit that it is where the subject of the charge is criticism, as this is, it does not become contempt unless it is shown to have been made otherwise than in good faith.

HIS HONOUR: Well, that is the relevant issue for the question of satisfaction beyond reasonable doubt. But you keep sliding from the test that the application that you are making to me is one which you accept, as a matter of law, you are bound to take the evidence at its highest from the Crown.

MR MAXWELL: Yes, Your Honour, I accept that.

HIS HONOUR: So in putting forward the proposition that this must be taken at good faith, well, that would be accepting the Crown's case at it its highest. The Crown's case at its highest is that that should not be accepted; that the document doesn't demonstrate that there is no evidence that establishes it, and insofar as there is material there, there is material there which would suggest the contrary.

MR MAXWELL: Well, it is the last bit, Your Honour, that with respect I would take issue with. Plainly, there is no positive evidence from the defendant about that. But we start with the proposition that I think is axiomatic in the criminal sphere, and the Full Court, of which Your Honour was a member, one of whom has said this recently, that in a criminal trial, which this is, the

defendants raise the general issue. Both my clients say, "We are not guilty of contempt of court". The offence which has to be proved against them is that what they published, which was criticism, was not published in good faith. That is a defining element of the offence, because, as is apparent in the quote from Justice Hope and in Nicholls and Dunbabin and the other cases we have referred to - - -

HIS HONOUR: But are you putting it that - I thought we discussed this and you agreed to the proposition that good faith can't overturn contempt; that it wouldn't matter if something was said in good faith if it nonetheless constituted as a matter of law contempt for the various other reasons that are discussed within the authorities, having the tendency to - I gave the examples yesterday which we discussed - of, is the statement said in all good faith, that the Chief Justice receives $10,000 a week from criminals, as a bribe. It might be entirely in good faith, but you accepted that that couldn't possibly be a justification for what would otherwise be a contempt.

MR MAXWELL: Yes, Your Honour. And I would qualify that response, now, in this sense: that it would be a misuse of language to describe somebody who said, without foundation, the Chief Justice is in the pay of criminals - it is effectively meaningless to say, well, that was said in good faith.

HIS HONOUR: But you see, the question of whether it is without foundation - that is why I say the test for a submission of no case to answer, you have to accept the evidence at its highest against you. If you are putting that there is no evidence at its highest against you on which a tribunal

of fact making the ultimate decision could come to the conclusion that it was not a matter done in good faith, or even if it was a matter done in good faith the basis on which it was done could not justify what was otherwise a contempt within the definitions, then that is a different issue. The distinction between the no case test and the obligation of the Crown to prove its case beyond reasonable doubt, it seems to me to be quite vital - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: And one which you are passing by.

MR MAXWELL: Yes, Your Honour. I am not meaning to, because it is exactly as Your Honour formulated a moment ago. We do put it as high as that: that there is no evidence that these publications were made otherwise than in good faith. Alternatively, as I was submitting earlier, even if that were wrong, and that there was a basis for a finding of fact that this was not done in good faith, Your Honour would - we would say there is no evidence of the requisite tendency as a matter of practical reality to damage the system of justice. So we are accepting the rigour of the no-case test, because we say it was eloquently admitted by Mr Lee. They don't say to Your Honour that the matters in this book are false, or that he has trumped this up. They haven't bothered to check whether it is true or not.
Yet he refers to the transcript and the comments, and - so they have not set about the task of showing that this has been, that this is without foundation, that the facts are quite different from what he has set out and, accordingly, it should be concluded that he was in bad faith, that it was disingenuous, that it is a fiction,

that he is pretending to be or he is claiming to be aggrieved when he is basing it on - so we say they haven't essayed that task. Accordingly, Your Honour, would have to say, "No, there is no evidence of bad faith. All I have before me is the book which, on the face of it, there is no reason to conclude anything other than that it was in good faith, because it is written with care and trouble and detail, and with an express bona fide intent of improving the submission." Anyway, Your Honour, that is the submission.

Now, Your Honour, before moving finally - no, what I need to do on that point is refer Your Honour to the good faith test. I think a question came up yesterday as to whether that was to be found in the authorities or not, and it is. If Your Honour would go to Ambard, which is in tab 1, and at page 335 - and this is again a Privy Council case - Lord Atkin says at point 6 of the page, "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though

outspoken, comments of ordinary men" and, we would add, women.
Then if Your Honour would go to Brett's case, which is in tab 24, a decision of His Honour Mr Justice O'Bryan of this court, at page 229 His Honour cites Ambard, that passage - I think that is at the top of the page on 229, Your Honour, Lord Atkin and Ambard, I won't read it again, and then there is reference to what Chief Justice Griffiths said in Nicholls in 1911 which we have also referred to, but I do draw attention to the first sentence, "I am not prepared to accede to the proposition that an imputation of want of impartiality to a judge is necessarily a contempt of court". That is a point we have sought to make previously. It may be; it may not be. And what His Honour said there was approved by the Privy Council in Ahnee in 1999.
If Your Honour would then go on into the next paragraph, "It is clear that an untruthful statement of facts upon which the comment is based may vitiate that which otherwise might be considered 'fair' and justifiable. So, also, the motive of the write is an important element. Malice, and an intention or a tendency to impair the administration of justice are elements in contempt of the kind which scandalises the court or a judge.
In considering whether a publication of this character amounts in law to a contempt, the principal question is whether,'if permitted and repeated it will have a tendency to lower the authority of the court and weaken the spirit of obedience to the law'. In a sense, every criticism of a judge may be said to have a tendency

to lower his dignity and weaken his authority. But it is not every such criticism which is to be regarded as a contempt of court. A criticism should not be repressed which may be made on the court and its doings and the law it administers if that criticism is fair and honest and is not directed at lowering the authority of the court." That is a quote from Dunbabin.

So accepting that the qualification on Lord Atkin is that imputing improper motives is not per se a contempt, the question is: is this an exercise of the ordinary right of criticising in good faith the public act done in the seat of justice? In our respectful submission, there is no conclusion open on the evidence other than that is what this was. We don't have to establish that positively, however. It is for the prosecution to provide evidence on the basis of which Your Honour could conclude that there was a want of good faith, and as we have submitted there is no such evidence.

There is, finally, Your Honour, a decision which is not in the volume but I have got copies of the Court of Appeal of England in The Queen v. Commissioner of Police of the Metropolis, ex parte Blackburn, reported in 1968 Volume 2 of the Queen's Bench Reports at 150. And, Your Honour, it is a short passage in the judgment of Lord Justice Salmon, beginning at the foot of 155 where His Lordship says, "It follows that no criticism of a judgment however vigorous can amount to contempt of court providing it comes within the limits of reasonable courtesy and good faith. The criticism here complained of, however rambunctious, however wide of the mark, whether expressed in good taste or in bad taste seem to me to be well within

those limits". And of course, we rely on what His Honour Justice Hope said, "It doesn't need to be expressed courteously. Robust criticism, often of its nature, be impolite or discourteous." It doesn't make it, less still punishable in our respectful submission.
Your Honour, if I might, before going to the constitutional freedom point, deal at a little more length with the context or the history of the matter. Your Honour asked me which were the paragraphs that related - I beg Your Honour's pardon, the chapters which related in book 2 to Mr Hoser, and, Your Honour, they are chapters 2, 4 to 33, and 37. I think I said it was a substantial part of the book relates to him. Well, it is the majority of the book relates to him. But there are other matters dealt with.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, I have taken you to the chronology. If I might deal with, if Your Honour has the originating motion, the first of the particulars of contempt on page 1 - Comments re Judge Neesham.

HIS HONOUR: Just hold on a second. There are in effect two counts, is that right?

MR MAXWELL: Well, Your Honour, as I indicated at the commencement, we have never been clear about that. But there is - it is said that the second publication scandalises the court, so we take it to be that is a count in respect of that book; whereas the second, book 1, is said to contain material which scandalises, and we take that to be count 2.

HIS HONOUR: Right.

MR MAXWELL: Your Honour, in relation to 3(a)(i) there is a

reference to page 245 and Neesham making it clear that the matter wasn't being taped. If Your Honour would go, first, to the chronology, and at page xxiv, in Roman numerals, Your Honour will find at the top of that page, "20 July 1993: Magistrate Julian Fitz-Gerald refuses to have his", that is Hoser's "proceedings taped and convicts Hoser on Olsen/Malliaris parking matter." It is important to note what I am going to demonstrate here is that this comment to which the first particular relates is, as Your Honour said, 1993, but is not the perjury trial. This is a quite separate, unrelated matter - well, quite separate proceeding in any event, which happened to be before Judge Neesham on appeal from the magistrate. If Your Honour would go back to the previous page, and Your Honour will find the date, 24 November - - -

HIS HONOUR: So that paragraph on 245 is referring to this event in 1993.

MR MAXWELL: Yes, Your Honour, which is a parking fine case. In the middle of page xxiii, Your Honour will see, I think it is right in the middle, "24 July 1992: George Olsen and policeman Peter Malliaris improperly book Hoser for a falsely alleged parking infringement at St Kilda." That is the offence; it comes to court in July of 93. Further down that page, Your Honour, xxiv, back over to xxiv, "4 November 1993: County Court Judge Thomas Neesham refuses to have his proceedings taped. In a highly acrimonious hearing he again convicts Hoser," meaning again after the magistrate, "on the Olsen/Malliaris parking matter". If Your Honour then goes to 243 in the book, the account is given, beginning "Before the County Court trial - More Scandals", reference to Olsen and Malliaris.

HIS HONOUR: Hold on. I see. Right.

MR MAXWELL: Starting - - -

HIS HONOUR: Yes.

MR MAXWELL: And reference at the bottom of that page to the proceeding before Magistrate Fitz-Gerald, refusing "to allow me to tape the case", and it is said, but no complaint I think is made about this in the proceeding, "The moment Magistrate Fitz-Gerald" - this is four lines from the bottom of the page - "sided with the police prosecutor... and refused me to tape proceedings, the rest was a foregone conclusion". The reader will recognise that this author has a particular preoccupation with the injustice of not being allowed to tape proceedings to which he is subject.
Now, he may or may not be entitled to be as outraged as he plainly is about not being afforded that opportunity; but Your Honour knows the importance of transcript in criminal proceedings. It may be the fact that, administratively, it is impossible in the Magistrates' Court, or the cost is excessive. But the principle that a defendant have recourse to a record of evidence given by an informant against him is unassailable in our respectful submission. My learned friend, as an aside, says the Full Court has said otherwise. Well, he will no doubt point out that decision to Your Honour. As a matter of justice it is - we make the submission with no less vigour that an independent record of criminal proceedings is a safeguard for all concerned, and in our respectful submission that proposition is unassailable.
And a defendant who - - -

HIS HONOUR: As I recall, in any event, and I will no doubt be

told, the Full Court decision was not that he did not have a right to have a tape recording, but that it was a matter for a magistrate as to whether a person was entitled to tape record or not.

MR MAXWELL: Yes, Your Honour. We would accept that. But it is, with respect, helpful to know that the matter has been passed on by the Full Court. And it wouldn't be for a Full Court as it whether to make an administrative decision that there must be a tape recording. But my expectation, without knowing the case, would be that the Full Court would have accepted the desirability of an independent record.

HIS HONOUR: Well, I understand the point you are making. In a sense, the point you are making with respect to the Full Court doesn't turn on what the Full Court decided. You are putting that whatever the Full Court decided, it was his view that he should have had an automatic right to have done so.

MR MAXWELL: If the fact is he doesn't and he feels aggrieved about that, if I might ask rhetorically, who would blame him? If he feels he has been got at and he may not have any justification for feeling that, the fact that he asks for taping, and the magistrate says, "No," and he is convicted is going to leave him and other members of the community asking a question: "Given that I can be punished for these offences, why can't I have a record so that when we come to an appeal, if I want to make one, I can say to the judges on appeal, 'that is what the prosecutor said'".
The point immediately comes up, on page 245, which is where the offending passage occurs, and it is headed "Deja

vu. I knew the result of the case before any evidence had been given. You see, before I could say a thing, Reynolds was on his feet" - Reynolds was the barrister the main barrister for the DPP according to page 244 - "demanding that I not be allowed to tape the case. He wanted me strip- searched there and then. Neesham agreed with him. I was then relieved of a micro-cassette recorder and told that no taping of proceedings by any means would be allowed". Leaving out a sentence, "when I asked Neesham what he had to hide by not wanting his proceedings taped, he got extremely aggressive. He didn't change his mind though. Once Neesham had made it clear the matter wasn't being taped my being declared guilty became a mere formality. Perhaps most upsetting about the whole case wasn't Neesham's declaring me guilty at the end of the fiasco, but rather the continued wanton disregard for the truth by Malliaris, Olsen and, in turn, the judge." - and this sentence isn't in the pleading but it should be - "Malliaris only lied about the location of my parked taxi. Olsen lied about almost everything", and then he goes on to refer to contradictions in the evidence of Olsen. And next paragraph, "When I drew to Neesham's attention Olsen's obvious perjury, he expressed no interest. He said 'That's not my problem'. With an attitude like that from the magistrates and judges in Melbourne, is it any wonder that police and other government officials continue to lie in court with impugnity".
Now, the real burden of that complaint, in our respectful submission, is that Hoser was disbelieved, and witnesses who he says forthrightly were lying, were

purging themselves, were believed. He says that there is a disregard for truth by Malliaris and Olsen, the witnesses, and in turn by the judge. Now, that is open to the reading that he is saying no more than that, "Well, a judge who dismisses my appeal from the magistrate on what I say is false evidence is disregarding the truth". It is not saying the judge didn't turn his mind to whether it was true are not, but it is a typical complaint by someone who has been convicted and says "that is outrage, those lying so-and-sos, and the judge believed them. There was a total disregard for the truth, as I endeavoured to demonstrate in my cross-examination".

We say you read that and it is not, and it won't be suggested that these proceedings didn't take place and that there wasn't a denial of tape recording, and that there wasn't a conviction and these aren't the names of the informant. That is all true, or I call on the solicitor to make a submission to the contrary. And the ordinary reader would, of ordinary good sense, say, "Well, I can see what he is saying and, on the basis of what he says, I can understand he is upset about it, and I think, I am the sensible reader. I think there is a real issue here about tape recording".

It wouldn't be the first time, as the ordinary reader knows, that police or other civil informants have concocted evidence. I am not making those submissions that that was the fact here. Mr Hoser might be quite wrong. They may have been telling the truth, but his firm belief is that he was convicted on false evidence. Such assertions are the stuff which enquiries into wrongful conviction are made, and if we suppress publication of

complaints of that kind, then in our respectful submission we, as a society, run the risk that injustices will not be exposed, and the price of ensuring that injustice will be exposed - and it is perhaps the English examples that are the best, where years after the event, convictions for murder or criminal damage or terrorist related offences have been shown to be based on false evidence, they are the best, as it were, anecdotal support for the notion that someone who says "I have been done over unfairly in the criminal system" should be able to say so and say why, discourteously, even wrong-headedly. Because someone might pick up the book and say, "Well, there is a question here. Let's review whether, as a matter of fairness and justice, we should have tape recordings in the Magistrates' Courts as a matter of course".

Finally, on this, to repeat, the comment about the judge is really ancillary. It is consequential about the point that these were lying witnesses, and yet they were believed. The judge did not see the truth, and if His Honour said on the point about perjury, "That is not my problem", well again, that might create a misunderstanding at least, or a question in the mind of the ordinary lay observer. Why would a judge respond like that to a point taken by a defendant in person about defects in the prosecution evidence?

And page 246, which is 3(a)(ii), is following on from the criticism of that proceeding, the 1993 proceeding, eight years ago, and anticipating the criticisms that are subsequently made of the perjury trial. As the author says, there are - he sets out the details of those matters later in the book. For example, in relation to "knobbled

juries", which I think hasn't got a "k" at the front of it, chapter 32, page 513 - - -

HIS HONOUR: I am sorry, I have lost you, where is - - -

MR MAXWELL: Well, Your Honour, I am in the second particular.

HIS HONOUR: Yes.

MR MAXWELL: "That is perhaps the best way to describe how Thomas Neesham runs his circus at the County Court where he is judge. Knobbled juries." I was just giving Your Honour reference to material in the book which the author - - -

HIS HONOUR: What was that page?

MR MAXWELL: Chapter 32, page 513, "and then the bashing up of independent observers by police," which I think I am right in saying isn't said to have occurred in the court, "But the observer was, at the direction of the judge, so the book says, taken out of the court by police and the author says the observer was then assaulted. Chapter 21, page 363 deals with that matter.
Then, "and perjury by bent police". Well, that has already been adverted to in relation to the parking fine appeal, and the same view is expressed in the perjury appeal.
(iii), page 260, "He was one of the judges who had refused to allow me to have the case tape recorded". Well, it is has not been said that is false. The prosecution simply doesn't know. The book says it is true. There is no evidence on which Your Honour would disbelieve it.

HIS HONOUR: The reference at 260 is to which court case? Is this the perjury charge? It looks as though it is. From the previous page it appears to be.

MR MAXWELL: If Your Honour could go to the previous page, it - certainly we are leading into the perjury trial.

HIS HONOUR: Well, it starts at the top, "The commencement date for the perjury trial was set".

MR MAXWELL: Yes, Your Honour. That is so. All I wanted to point out was there was a reference in the last paragraph at 259 to the Malliaris/Olsen hearing.

HIS HONOUR: I see, yes.

MR MAXWELL: When he says "One of the judges who had refused to allow me to have the case tape recorded," he is referring back to that case.

HIS HONOUR: Yes. Thank you.

MR MAXWELL: And the inference which this author draws is that it is the judge himself who doesn't want the conduct of his court scrutinised. Well, in our respectful submission, that is an inference open from the refusal. It may be a wrong-headed inference. It may be unfair on a proper analysis. But for the reasons we have sought to submit already, there is a real question why a bona fide request for taping would be refused.

HIS HONOUR: There is, to make it abundantly clear, no complaint about a recording issue so far as the perjury trial.

MR MAXWELL: Yes, there is, Your Honour.

HIS HONOUR: There is, is there? Well, is that being referred to here or not?

MR MAXWELL: No, Your Honour. We will come to that. But the "had refused" is a reference back to 1993, and that is why Mr Hoser is saying at the bottom of 259 that, "He told McRae that Neesham couldn't hear the case because of his previous adverse finding against me (Olsen/Malliaris) and that he should find another judge, and that he retorted

'tough luck!'".

HIS HONOUR: I am sorry, where are you reading from?

MR MAXWELL: That was the last paragraph on 259, Your Honour.

HIS HONOUR: Yes.

MR MAXWELL: So the passage at the top of the next page is by way of explanation of that. At all events, the complaint is made in respect of both proceedings, there is a refusal to allow taping, and he goes on to say in the passage complained of at the top of 260 "My initial judgments of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which will be explained in the material that follows". But he has indicated on the basis of that earlier judgment: one, the refusal to allow taping; two, what he regarded as the unjustified acceptance of perjured evidence.
Then, Your Honour, 274, which is particular 3(a)(iv), - I am sorry, is at 274. I would ask Your Honour to note, beginning at 272, there is a detailed account of the conduct of this trial, and reference to the conduct of the prosecutor. At 274, at the top, the author says "One of his opening statements" that is Judge Neesham, "that was a major worry was his comment that he expected the trial to last about a week". Top of 274, "This had me worried. Would he do what Hampel", the prosecutor at the committal, "Heffey" the Magistrate "and Keating" the witness, "had done in the earlier committal to hide the truth, in particular withhold the tape recording of my evidence that was subject of this case; what was said in the Balmford case on 17 February 1994. As soon as the trial proper commenced, Neesham's bias against me commenced in earnest

and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore, these actions were separate to others which also appeared to have been taken to ensure the jury's verdict" - - -

HIS HONOUR: Can I just understand the factual matrix. You understand that I don't know it. But the reference there to "withhold the tape recording of my evidence that was the subject of this case", this is a reference to what, the hearing before Judge Balmford, as she was, at that time, and what is "the tape recording of my evidence"? Is this a covert tape or is this a tape that was conducted of the - - -

MR MAXWELL: That was a covert tape.

HIS HONOUR: Right.

MR MAXWELL: Would Your Honour go to 25 in the chronology, xxv, and this will tie it in better.

HIS HONOUR: Yes.

MR MAXWELL: This sequence begins on the left-hand page at "3 November 1993: Magistrate Susan Blashki convicts Hoser over Coburg lights incident on 8 March 1992". Does Your Honour see that?

HIS HONOUR: No, I don't, sorry; whereabouts?

MR MAXWELL: The third entry on xxiv, 3 November 1993.

HIS HONOUR: Yes.

MR MAXWELL: Then to the right-hand side, Your Honour, "17 February 1994: Hoser appeal for traffic light matter in front of Susan Blashki" - I think meaning from Magistrate Blashki - "As usual police side took steps to ensure proceedings not taped." This is a County Court appeal. He says proceedings not taped. "Also as usual

Judge Rosemary Balmford sided with police and didn't want matter taped" - same grievance.

MR GRAHAM: You should read the next sentence, I think.

MR MAXWELL: There was no need for my learned friend to intervene.

HIS HONOUR: No. I would ask you not to do so.

MR MAXWELL: I was of course going to read the next sentence, "As usual, Hoser still had matter taped. Hoser falsely accused by police and VicRoads of forging 1 February fax." So there was a tape. It was an unauthorised covert one, and one of the complaints about the - I withdraw that. He is subsequently charged with having perjured himself before Judge Balmford. "2 March 1994" - does Your Honour see that, further down that page?

HIS HONOUR: Yes.

MR MAXWELL: At the bottom, "15 April 1994: Police brief of evidence against Hoser re Balmford alleged perjury matter. Police brief hinges on 'fact'. There is no recording made of Hoser's evidence in front of Balmford. This is central to their case. Several witnesses to be called solely to confirm no tapes have been made, there by making a simple case of their word against Hoser's, unverifiable by independent means such as a tape". "2 May 1994" - this is just in passing - it is Mr Hoser's position that the policeman Mr Keating said that the perjury matter wouldn't proceed unless Hoser was represented.

HIS HONOUR: Sorry, I don't understand quite how - - -

MR MAXWELL: Only that it comes up, that is mentioned in the book. I think it is relevant to the Heffey complaints that he, at the beginning of the committal, said, "Well, I

was told by the police that they wouldn't proceed against me unless I was represented. I can't get legal aid so I am not represented" - - -

HIS HONOUR: "Therefore the charge will be withdrawn".

MR MAXWELL: It shouldn't proceed, and it did proceed, and the prosecution says no such undertaking was given and the matter went on. So that is another in the - another distinct grievance.
13 October 1994, Your Honour, on the same page, at xxvi, "Magistrate Jacinta Heffey commits Hoser to stand trial for perjury." She had upheld Keating's request not to play the tape made at Balmford's proceedings at her hearing on the basis that Keating had left it back in his office".
Now, the reader is going to, in our respectful submission, read that and say "Well, on his version, that is pretty rum stuff".

HIS HONOUR: Well, I am suffering from the fact that there is obviously a few dots here that I have not joined. Is it put that the tape, which was described as the covert tape, was seized by police and was returned doctored or something of that sort?

MR MAXWELL: Yes, Your Honour, it is.

HIS HONOUR: Where does that appear in the chronology, just so I can pick it up.

MR MAXWELL: 10th of October. If Your Honour would go back to the previous page - - -

HIS HONOUR: Well, that is not suggesting doctoring. That is suggesting a copy being made of a tape made by Mr Hoser; is that right?

MR MAXWELL: Yes, Your Honour, it is. If we might go back to

18 February 1994, which is the day after the - no, it is the very day of the proceeding before Judge Balmford.

HIS HONOUR: I see, right. Yes.

MR MAXWELL: "Hoser house raided by police. Carloads of material taken, including tapes of Balmford hearing and all relevant documents. Thousands of other tapes", et cetera, "House trashed. ". But the immediate grievance is that the tape which he had made wasn't played at the committal, and he, not surprisingly, would have said, "Well, the best evidence of whether I perjured myself is the tape which I made in the concealed tape recorder, and it should be before the court, and it wasn't." And he says that is unjust. In our respectful submission, that is well within the range of legitimate comment on that course of events, the truth of which is not challenged. And it is from that committal that Mr Hoser comes before Judge Neesham for trial.
That, I hope, Your Honour, explains better than I have done previously what is meant by the first paragraph on 274.

HIS HONOUR: Yes.

MR MAXWELL: That is the reference to "withhold the tape recording of my evidence that was the subject of this case, what was said in the Balmford case on 17 February 1994".
Your Honour, it is important also to note, as my learned junior has just pointed out, on 273 under the heading "Neesham's Opening Remarks", second paragraph, there is reference to His Honour's opening remarks, next paragraph, "In his opening, he directed the jury not to take notes. He made this point very strongly. To back up

his instruction he stated that the entire case was being tape recorded and was also being transcribed. He made it clear that this material, tape and transcript, would be available to the jury. In other court cases this most certainly occurs. To myself, Neesham's opening remarks to the jury appeared to be fairly straight down the line. He said there seemed to be nothing terribly untoward. I make this comment noting his previous adverse form in the Olsen/Malliaris case.".
The last few lines, "To myself, Neesham's opening remarks to the jury appeared to be fairly straight down the line. There seemed to be nothing terribly untoward. I make this comment noting his previous adverse form in the Olsen/Malliaris case. Among the things he told the jury were the following," and then there is reference to the way the jury should conduct themselves.

HIS HONOUR: What do you say I am to make of a statement that the tape and transcript would be made available to the jury? Am I to ignore my own knowledge about the fact that juries are not given transcript and tapes of the evidence in trials? Do I just simply treat that as if it is believed it is an illustration of some sort of misapprehension of what had been said, or do you put it to me that I should treat that as truth?

MR MAXWELL: Would Your Honour excuse me just one moment. Your Honour, it is put on this basis: that exactly as Your Honour put it to me, if it is a misunderstanding, what this writer is putting down is what he observed or recalls observing. Indeed, he goes to the extent of setting out passages from the transcript, reference to every word spoken in the trial being recorded. But it is

notable, given what Your Honour has said, that nothing in those extracts refers to the jury getting the transcript.

HIS HONOUR: Yes.

MR MAXWELL: So he may have misunderstood what went on. But the reason I drew attention to this passage in the first place is that this is giving credit to the judge - - -

HIS HONOUR: Well, it is relevant to the question you put to me earlier about the good faith, isn't it: that he is quoting passages apparently from transcript.

MR MAXWELL: Yes.

HIS HONOUR: And then, without quoting from transcript, makes a statement of what was apparently said.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Which would also have been on transcript. I mean, patently, what is being recorded there could not have appeared on transcript.

MR MAXWELL: But Your Honour, the point is that if it is a mistake, it is a mistake - - -

HIS HONOUR: It is a deliberate one.

MR MAXWELL: Favourable to the judges. This is meant to be - -

HIS HONOUR: I am looking at the question of what should I treat the statement as amounting to. If I am to treat it as a statement of fact, then it raises the question that this was in fact what he heard; then it raises a question of good faith, which said I should assume - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: To be in favour of the defendant. The question of good faith it would raise would be if that is what was said and he has quoted from the transcript, why wouldn't he quote that?

MR MAXWELL: Well, with respect, Your Honour's point would be

more adverse to Mr Hoser if what he was misremembering or misunderstanding was critical of the judge. On the contrary, in this passage, he is praising the judge for having made clear that it would all be recorded and the jury would have access to it. He says, "That seemed straight down the line to me."

HIS HONOUR: No, no, he is making that as a statement and then later criticising the fact that it doesn't occur.

MR MAXWELL: Well, it - - -

HIS HONOUR: I mean, this is not one of the passages which is alleged against you. I raise it simply because you had taken me to it, and it does, it seems to me on its face, raise that question.

MR MAXWELL: Would Your Honour excuse me. Well, in my respectful submission, if, as the transcript shows, the judge was saying the transcript would be recorded, and this is in the context of "and you don't therefore need to keep notes", it is no large leap to think, if the judge didn't say it and it is not apparent from the transcript extracts that he did, that "the transcript will supply for you, the members of the jury, what you would otherwise have in the form of your notes". Now, if that was a misunderstanding of the reference to tape recording and transcript, then it was that. But in my respectful submission, particularly because this is included - well, if it is - whether or not it is the foundation for a later criticism, and I will come to that in due course, it is again an understandable or a misunderstanding by a lay person of the tenor of what is said about recording, and that in our respectful submission it is not a basis for inferring want of good faith. Rather, it is consistent

with the inference, the irresistible inference, from the book as a whole that the author is endeavouring to give an account of what occurred, as he remembers it, from his perspective, what whatever errors of judgment, errors of fact, or law I think the cases say - maybe he got that wrong. But that one error, if it is an error, and we would respectfully submit that it is, is at worst a misunderstanding. It is not on its face redolent of bad faith and wouldn't, by itself, turn a publication which is manifestly in good faith in our respectful submission into something else.

Your Honour, the sting of the second paragraph on 274, which is particular 4, is "Bias Against Me" "His whole modus operandi was to guide the jury towards a guilty verdict". Your Honour, that kind of comment is an understandable perspective of an aggrieved, convicted person. It is the kind of - I mean, it is notorious that in the legal system comments of that kind are made, and we drew Your Honour's attention to what Mr Lewis said about Judge Ogden in court in front of the jury, saying pretty much the same, by implication, if not in so many words, and very close to insulting the judge by implying that he had put on a Collingwood jumper and batted, not batted, kicked with the prosecution. That is the kind of thing that is said. It might be wrong, it may be a misreading of, for example - Your Honour can well imagine the situation, undefended, unrepresented defendant wants to cross-examine at unnecessary length, wants to put in irrelevant evidence which he thinks is relevant, trial judge consistently has to say, "Mr Hoser, that is not going in, it is irrelevant, I don't want to hear any more

of these questions", which is a perfectly proper exercise of the judicial function of managing a trial, but in the eye of the untutored defendant, trying to keep himself out of gaol, it is seen as a one-sided view, because of course the prosecuting counsel is an expert in these matters and knows what the judge will and won't allow and doesn't press hopeless points. Applicants, defendants in person, don't know a good point from a bad point often, and that is why legal representation is so important.
Your Honour will recall the Court of Appeal decision in Phung, where the Full Court overturned a practice in the County Court. At all events, I will give Your Honour the reference in a moment, but the Full Court said that should be a presumption in favour of representation. The practice adopted in the County Court, and in the particular case by the - well, adopted by the Chief Judge, His Honour Judge Waldron and applied, it appears from the case, consistently through the County Court, was that - -

HIS HONOUR: What is the citation of that?

MR MAXWELL: This is the Phung decision of December 1999. It is reported in 1999, 3, Victorian Reports at 313, and there was - it concerned section 360A of the Crimes Act, and a statutory phrase about will the court be unable to ensure that the accused will receive a fair trial unless legally represented in the trial? And the practice that had developed in the County Court was that - I am just trying to find the passage which sets it out, the County Court had postulated that before the defendant could get the benefit of that provision, he or she had to show that there was a "triable issue"; and there is a lengthy passage from a 1993 judgment of Chief Judge Waldron

relevant saying "If an accused in truth has no defence, but nevertheless simply wishes to put the Crown to its proof in the hope, rather than the expectation, that that proof will not prevail, it cannot be said, in my view, that a lack of representation has caused the accused to lose the chance which was fairly open to him of being acquitted".
The view expressed by Justices Brooking and Charles, in Justice Brooking's, in his - - -

HIS HONOUR: Well, I presume they rejected that and said that the entitlement existed whether they are putting to proof or running a positive defence.

MR MAXWELL: Indeed, they put it even more strongly, Your Honour: that there was a presumption that a fair trial required representation, and that this presumption could be displaced only in a most exceptional case, and that is said by Justice Brooking at 317, and Justice Charles at 320.
Now, this case isn't about that, but it is about an unrepresented defendant in the criminal justice system, and it is the view of this court, for, in our respectful submission, very good reason - that justice is almost always going to be better served by a defendant being represented. When he is not, the scope for this kind of grievance about what is perceived to be one-sided conduct of the trial is considerable; and the same goes for (v), which is page 280.

HIS HONOUR: I think before you go on, that I might just take a short break - - -

MR MAXWELL: If Your Honour pleases.

HIS HONOUR: Before you go to 20, (v).

(Short adjournment).

HIS HONOUR: Yes?

MR MAXWELL: Your Honour, there is an important link which I didn't make between Phung and this book and this author. On the 22nd of August 1995, and I will take Your Honour to the place in the chronology, Mr Hoser made an application under section 360A before Chief Judge Waldron. That application was dismissed and, as a result, he did not have the benefit of court ordered legal representation. That decision occurred, it can be inferred, during the time when the triable issue question, practice was operating in the court, because as Phung demonstrates, that was first enunciated in 1993, and Phung itself is not until 1998 or 1999. I can give Your Honour the date but - this is discussed in the book at - well, let me take Your Honour to the chronology first, if I may. 22nd of August 1995, page xxvii in Roman numerals. Does Your Honour have that?

HIS HONOUR: Yes.

MR MAXWELL: If we can then go, Your Honour, to page 239, under the heading "A re-run", and reference to lodging another section 360A application immediately, reference to the Chief Judge's Associate - "After a few minor matters it was again my turn in front of Waldron." Next paragraph: "Waldron made his allegiances clear early in the piece. He made a series of hostile remarks towards me. Having said this, Waldron still wouldn't go ahead with the hearing. The reason: Ramage wasn't there. Another adjournment". "What was sought?" "Now all I wanted was just one lonely lawyer to defend me against the trumped up police charges. ... The Legal Aid Commission had a legal

dream team representing their interest. This included two highly paid barristers" - this is the last paragraph on that page.
At the top of the next page - and this is complained of in the section about Judge Waldron - "As the case re-opened at 2:15 Waldron displayed further anger and hostility towards me. I could see that there wouldn't be a fair hearing here". Just pausing there: that, Your Honour, is particular 1 of the comments re Chief Judge Waldron on page 3 of the particulars in the originating motion.

HIS HONOUR: Right.

MR MAXWELL: He says, and there is no suggestion it wasn't open to him to take this view, that the attitude of the Chief Judge was angry and hostile. That is a perception by the person who is before the court. It may have been a misreading, but the conclusion that there wouldn't be a fair hearing is one which, at least in the perception of a lay person, an unrepresented defendant, is open. If you are not experienced in the courts, and you do encounter a judge who is impatient or pre-emptory - and it is notorious that that can happen for all sorts of understandable reasons. But if that occurs, someone in person who is looking to have the court's discretion exercised in his favour will take it amiss or is entitled to. Is that scandalising the court? That is recounting a real life experience in the courts of this State. And it is, as the quote in the pleading makes clear, based only on anger and hostility. It may be a wrong-headed conclusion. But it is plainly made in good faith. "That is what I confronted and that is what I thought about it,

and I wasn't happy about it". And again, the reader is going to discount for the fact that this is not written by a dispassionate observer. This is written by the person himself.
He goes on, Your Honour, to recount at some length, and I won't take Your Honour to it, the conduct of that proceeding, or that application before Judge Waldron.
Then, the second passage complained of, and we can deal with these while Your Honour has it open because they all concern this 360A application, at 241, "Meanwhile I was about to go to trial for perjury," does Your Honour have that?

HIS HONOUR: Yes.

MR MAXWELL: "But no-one could produce a transcript for, because the police side didn't want to. But like I have already said; if the Chief County Court judge doesn't seem too concerned with the truth, then what faith can Victorians have in their legal system? Not only that, but myself and any other concerned citizen have absolutely no power to do anything about the recklessness of judges like Waldron, even then the proof is there for perpetuity in the Government's own transcripts", meaning the transcripts of what went on in that application.
Now, Your Honour, again, that needs to be understood in the context of the paragraph which precedes it, which begins "Waldron's refusal to do this", that is to say adjourn the matter, "wasn't surprising as it was in line with his immediate past form".

HIS HONOUR: What is the reference to "truth" that is referred to there? Which topic or issue is concerned? I am just looking at the top of the page, under the bold quote,

"Chief Judge is not capable of sticking to the truth. For further proof that Waldron hadn't stuck to the truth..." What is the topic? Or is it just truth in a general sense?

MR MAXWELL: It is all explained, Your Honour, by what is said at the top of page 241, "Waldron made it clear that he had no interest in the truth. Although confirming these facts...", meaning the ones set out on 240.

HIS HONOUR: Actually, can I take you to 240. It looks as though it is about whether a new application had been made on the file, or a question about when an application was made to the Legal Aid Commission. Anyway, don't stop now. I thought - - -

MR MAXWELL: Well I - - -

HIS HONOUR: If it was clear, I would go from any passage you took me to, but I need to read the lot to see what was meant.

MR MAXWELL: With respect, yes, Your Honour. I am sorry I can't be of more succinct assistance, because there is a later reference which more immediately precedes the passage complained of, which I will come to, but this, in our respectful submission, is typical of the book, that is, the passage that Your Honour is referring me to has contained in it the basis for the assertion at the top of the page, "not sticking to the truth". He says in the very first two lines of that page "Although confirming these facts in discussion, he then made a ruling that was contrary to it".

HIS HONOUR: Hold on. Which page?

MR MAXWELL: Top of 241.

HIS HONOUR: I see.

MR MAXWELL: So he says - these were the facts which I have set out at 240 - in discussion, the judge confirmed those facts, but "then made a ruling contrary to it" - so he says. Now, that might or mightn't be right, but this is not something plucked out of the air, this is consistent with giving an account of what occurred as he observed it and recalls it, and saying, "Well, that seems unfair to me. I thought the judge had understood the facts, and then he made a ruling contrary to it," the ruling which is then set out in bold.

Your Honour, having drawn attention to it, that is clearly part of the basis for the statements in the passage complained of, three-quarters of the way down, "Chief County Court doesn't seem too concerned with the truth". But if Your Honour would look at the immediately preceding paragraph, beginning "Waldron's refusal to do this wasn't surprising". The next sentence: "What I found more disturbing was when the DPP barrister, Ms Wallace, made a number of false statements from the Bar table which I brought to Waldron's attention. Like for Ramage's lies" - Ramage was a witness - "Waldron wasn't interested. That's perjury we are talking about, and perjury documented in black and white on the government's own official transcripts".

That, Your Honour will recognise, is of a piece with the criticism of Judge Neesham in respect of the parking fine matter: the sense of outrage that what the defendant perceives is perjured evidence is accepted by the court. This is ignoring of the truth, so the defendant says, because the truth didn't come out. "I know what happened", and that is a statement which every defendant

will say repeatedly, "I know what happened. It happened as I say it happened, not as the prosecution said. How can it possibly be the case that the falsehoods have been accepted?"
And 243 is the last particular in relation to Chief Judge Waldron. Under the heading "Waldron's Form"; does Your Honour see that?

HIS HONOUR: Yes.

MR MAXWELL: Four lines from the top of 243: "While Waldron was hostile on a known corruption whistleblower like myself and has been similarly harsh on others like me by ensuring we don't get a fair trial, his has simultaneously got a reputation for apparently looking after hardened criminals. One example was" - and then he gives an example of an armed robber, and it goes on to state the basis of the rearresting of the person whose appeal had been reinstated and the granting of bail by the Chief Judge. It is argued by the author that Waldron's judgment had been in error; in other words, he had unreasonably favoured this armed robber, because when it came on for the reinstated appeal the convicted man didn't show up and another judge of the court re-issued a warrant for his arrest.
Now, that is fair comment in our respectful submission. It mightn't be right but, if that is the sequence of events, and it is not suggested by the prosecution that it is not, then that is fair comment. Any journalist, critic, commentator on the courts could say, "Well, there is a question here as to why that favourable exercise of discretion was made by the judge." You would need to know all the circumstances to form a

judgment about it, but there is enough there, in our respectful submission, to demonstrate that this is criticism in good faith, on material put forward for inspection, examination, scrutiny, investigation, and disagreement. It may be that when the Crown or the responsible officers investigated these matters, they would say, "Oh, this is a misunderstanding by a layman of what went on. Yes, those steps happened, but you need to understand this and that and the other, and the criticism is unfounded."

So that deals with the second part of that particular about apparently looking after hardened criminals. The earlier bit about "hostile on a known corruption whistleblower like myself," well, on what is in the book that is just a statement of fact. He got a hostile reception when he went into that judge's court; those things do happen. It may not have been as hostile as Mr Hoser perceived it to be, but we have already said more than once that he views these things through a particular declared perspective.

If I might then, Your Honour, go back to the matters concerning Judge Neesham. There is a very important concession which I need to withdraw, and it is my fault in not reading closely enough the bits of the transcript at pages 273 and 4. 273, Your Honour - and Honour was asking me, "Well, how could he have said in good faith that the tape and transcript would be made available to the jury if that wasn't in the transcript? And I conceded that it wasn't. But, Your Honour, the first passage in bold type says, as Your Honour can see, "Every word spoken in this trial is recorded and at the end of the day is reduced to

type. The result is that at any time anything that is said can be recalled should it be required". So the basis is there for an understanding that it will be available for the jury if they need it; and the importance which this author attributes to that statement, and it is not suggested this wasn't said by the judge, is apparent from his repetition of it on page 274 at point 9.

In our respectful submission, those words are well open to the reading; indeed, in my respectful submission a lawyer perhaps. In other words, that there is nothing on the face of those words to suggest that it is not a reasonable inference that if there is a matter of evidence which needs to be adverted to, the transcript will be made available. If, as a matter of the knowledge of a criminal practitioner, that would never happen, that is another matter, but - and that is significant, because if Your Honour would go to 352, there is another extract from the transcript, 352, about point 8. Your Honour will note this is 80 pages on in what is a very lengthy treatment of the trial. The extract from the transcript records Mr Hoser saying "Your Honour, there is another matter I wish to raise. I think we all agree the trial has gone longer than we expected and I think the jury may be disadvantaged by not having the transcript of evidence. I now make application that at some stage prior to deliberations, or whatever, the jury is provided with a complete transcript of proceedings".

The judge then asked the prosecutor: "Do you have anything to say about that Mr Perry?" The prosecutor: "I would be very much opposed to that." "Neesham also didn't want to give the jury a hand at coming to the truth." This

is not a passage complained of, but Your Honour can see the context in which the comment is made. "He was dead against me. It thus came as no surprise when he trumpeted 'I am not going to have the jury provided with a copy of the transcript in this case'".

Now, it would be an act of sophistry, in our submission, for someone to say, "Well, although the court told the jury that the transcript would be available, that couldn't have the whole of it. It would only be if a particular thing, at the request of the foreman of the jury, required confirmation, in which case that page would have been made available." That is the finest of fine distinctions, in our respectful submission, and a very odd one if that is indeed the distinction which operates from in those trials. But in any event, the person in Mr Hoser's position was entitled to feel aggrieved in view of what had been said about it being available, when his application to have it provided to them was refused, and again, Your Honour, it is consistent, there is a consistent concern that he is having his guilt consistently without the independent verbatim record of what has gone on being available to those who were making the decision.

That is what he complains about before Judge Neesham the first time on the parking fine. That is what he complains about fundamentally in the perjury trial, that his own tape of what he said before Judge Balmford wasn't before the magistrate at the committal, and he is now saying, "I want this jury, about to be asked to convict me of perjury, to have a full record of what I said and what the prosecution witnesses said. 'No, Mr Hoser your

application is refused'".
Your Honour, on page 2 of the originating motion we have got I think up to 280, (v) in the particulars. The two paragraphs complained of are the second and third on that page, Your Honour. "Throughout the case he," that is the judge, "gave prosecution witnesses an advantage by asking me, in their presence, what evidence I sought to get from them and what questions I sought to ask". Well, to a lay person, and indeed to a non-criminal lawyer, that would seem an odd procedure if that was what occurred - to have the witness there, ask the person proposing to cross-examine "What is it you want to get out of these witnesses?"
It is a cardinal rule - I withdraw that. It is of the essence of cross-examination that one has the benefit of surprise. Fairness of the trial depends on it. That, we would respectfully submit, is axiomatic. If that occurred, and it is not suggested that this is false, and Your Honour would infer from the nature of this publication and the detail of it that this is an honest account of what occurred as perceived by the defendant, if that occurred, then it gives rise to a very real question, in our respectful submission, certainly in the mind of the author and probably in the mind of the sensible reader, about whether that is a proper way to conduct a trial. It doesn't mean they are not going to obey, that is to say the members of the community aren't going to obey the next County Court order they are subject to. It is just going to mean that the court is accountable to the community because if that is what went on, in our respectful submission it is not fair.

He goes on to make the comment - and this is part of what is complained of - "From Neesham's and the prosecution's point of view this was designed to allow these witnesses time to think of the best answers they could give knowing in advance the answers I sought". That is, in our respectful submission, a fair comment. If I had been asked yesterday to inform Your Honour what I wanted to ask Mr Lee, what issues I wanted to pursue, then that would have been, with respect, an improper request in the sense of not one which I should have been obliged to answer, because I wasn't entitled and one is never required - I wasn't required and shouldn't be required, to give notice of topics for cross-examination. So the comment, in our respectful submission, is well justified or well within the range of justified comment on the basis that that occurred.

Finally, it is said, "When doing this, Neesham made sure that the jury was hurriedly shifted from the courtroom so that they'd never know how he was actively aiding and abetting the prosecution witnesses". Now, if that's right, the jury was removed when these issues were raised, and one could understand why that would occur, Your Honour, because if there is a debate about whether a line of questioning can be pursued, one would understand that would be conducted in the absence of the jury. If the tendency of the practice was, as Mr Hoser argues, to assist the prosecution witnesses by forewarning, then he draws the inference, maybe wrong-headedly, but not in bad faith, that the judge wanted them out of the way so that they wouldn't know how unfairly the prosecution witnesses were being assisted by being told in advance of topics.

304, Your Honour, is (vi). And Your Honour, that is at the foot of 304, under the heading "No Concern for the Truth", "Neesham's attitude to the truth, or perhaps more correctly his desire to ignore it, came out throughout Keating's evidence and later in the trial through various uncalled for outbursts." He gives one example from the transcript. "The truth of the allegations I do not propose to have enquired into before this jury!" "And later when I asked about finding out 'the truth' he replied 'That's not going to be followed and enquired into in this court'. He repeatedly stressed the only thing of importance to his side was whether or not the jury would convict me, not the truth or otherwise of police/VicRoads evidence. I suppose that's the only reason why he never let the jury hear the 28 minutes of tape-recorded hearing that was central to the charge!".

So Your Honour, I was wrong before in saying there was a refusal by the judge to have the instant proceeding tape recorded. It was, as Your Honour has seen, tape recorded in the usual way. So that complaint applies only to the matter before November 1993, that separate proceeding. But the grievance is that at the trial, as at the committal, there is a covert tape recording of what he said before Judge Balmford, was not before the jury, and we have already made submissions about how he would be entitled to feel aggrieved about that, as any party in any court would, if a critical piece of evidence on which they wanted to rely was denied to them.

Your Honour has already - we have discussed how statements about not enquiring into the truth of the allegations might come to be made, properly, by a judge,

and how they might well be misunderstood by a defendant who here, as previously, is very aggrieved that lying witnesses, as he perceives them to be, have been believed. If Your Honour would go to 319, this is on my point about lying witnesses. Again, this is not some wild allegation. It is a serious one, that here, as elsewhere, Mr Hoser makes out his case under the heading "The 20 Counts of Perjury", and says "I will here document 20 counts of perjury by him," that is Keating "in the witness box, as identified in this account". "I will then cite the source by which this is proven. In many cases there are multiple sources but I have not cited all. Statements and other material referred to here was all given on oath". I won't take Your Honour through them all, but there are, as he promises, 20 instances of false statements, and he, in each case, refers to the evidence on which he, Hoser, relies, to say it was false.
Now, Your Honour, I understand, and with respect accept, that the question of whether this proceeding should have been brought is a question for elsewhere. But we made that submission and simply refer to it again now, because when Your Honour has had the chance, which we have been endeavouring to some extent to provide by this analysis, to see the nature of this work, this is so far from the kind of publication which should attract the attention of a contempt prosecution, because it is so obviously written by someone who is passionately aggrieved about what had occurred and is setting out to say why. It is so different from the Family Court case, which was thrown out for its own reasons, and so not calculated to damage the system of justice, that one is disbelieving

that it has been prosecuted, but it is being prosecuted and Your Honour has to try the issue.
But we want to - this is why we make a no-case submission, because we say Your Honour could not conclude, on the basis of seeing how this is done that there was any risk of this having the requisite damaging effect on the system of justice, and that it is squarely within the field of legitimate, stringent, trenchant, discourteous criticism which the cases recognise as being necessary and in the public interest.
Let me ask the question differently. The point we make about no investigation by the prosecution of the facts is this: what if this is all true? What if this was perjured evidence? Has anyone bothered to check whether these 20 allegations of perjury are made out? No indication that they have. What if that's right? What if Judge Neesham, as a matter of practice, does require defendants in person to state in the presence of prosecution witnesses what questions they want to ask? Far from prosecuting this man, you would think there would be a few investigations going on about whether these well documented complaints are in fact well founded, or whether, on analysis, they are misguided misunderstandings and have no reasonable foundation.
Your Honour, the next particular is 329; and the passage complained of is - - -

HIS HONOUR: The top of the page?

MR MAXWELL: The top of page 329, and this is of a piece with the complaint about assisting prosecution witnesses, and again, the author gives the basis for his criticism, beginning on 328, and again, these words are put before

Your Honour out of their context. The context begins, "Judge telling the witnesses how to answer questions. Neesham then detailed how he wanted me to present the collection of documents to Connell. He then said that if Connell claimed not to have seen them", the documents, "then he (Neesham) wouldn't allow me to take the matter further. Meanwhile, Connell had been sitting in the witness box hearing all this. As he didn't want to help my case, Neesham had now effectively told him how best to answer the questions to stop the truth coming out".

As Your Honour can see, the suggestion is that in Connell's presence the judge says, "Well, if the witness says he hasn't seen them, then I won't let you ask him any more" and the suggestion is, well, that is a hint that an answer to the effect of "I haven't seen them" will stop the cross-examination. "Now it is important here to note that with previous documents put to Connell he'd freely admitted they were his, VicRoads letters, or whatever. Now things suddenly changed. To the first letter he was given, the response was 'Can't recall it'. His very next response, 'I can't recall it'. The Marles report; 'I don't think I've read it', and so on. All were probably false statements, but in the words he'd used, he could never go down for perjury on those answers. 'I can't recall' isn't 'no', even though Connell would probably have hoped that the jury would interpret it that way. Of course Connell had been doing effectively what Neesham had told him. It was a classic case of bent judge improperly helping a prosecution witness".

Well, it is either right or it is wrong as matter of fact, and the comment, as I say, of a piece with the one

we have just immediately dealt with, is open in the sense that if - well, is open, because a witness might well take advantage of exactly that kind of ruling to adopt the easy course of saying, "No, I don't recall seeing them".
Then 350, (viii) in the particulars - and Your Honour has seen that that appears about two-thirds of the way down the page in the paragraph beginning: "Then there was the jury itself". "While I was preoccupied asking questions, listening to the answers and working out my next questions, it had been a totally different ballgame on the other side of the court. The prosecution team lead by Perry had spent most of the day apparently chatting to jurors. I hadn't been aware of the extent of this until it was brought to my attention. What it probably meant was that while I was systematically destroying the credibility of the police side and various aspects of their case, the jury was being deliberately sidetracked by the prosecution side so none of it really mattered. Of course the judge, Neesham, should have stopped this carrying on by Perry's side, but no, he'd been green-lighting the whole lot".
We make two points about that, Your Honour: it is principally an attack on the conduct of the prosecutor and, as I understand it, it is improper for prosecution counsel, or defence counsel for that matter, to have communication with jurors in an informal way. Obviously they address them - and this is said by the aggrieved, convicted person to have been improper conduct - separately, he criticises the judge for allowing it to go on. Well, that is a distinct criticism. We accept that. But in our respectful submission, if that was going on in

the court, and was observable to a judge managing his courtroom, and it wasn't stopped, then it is a matter of fair comment.

HIS HONOUR: What is being put here? That there was some conversation going on in the courtroom while everyone was present, including the defendant?

MR MAXWELL: Yes, as I understand it, Your Honour, yes. And in that regard, Your Honour will note that the book contains, at page 404, something to which I took Mr Lee yesterday, being a statement of a Professor Sawyer, in which, at point 2, Dr Sawyer says when he was in the County Court on 21 September, during this trial, for one hour - and it can be put no higher than that - he was concerned by two matters: apparent communication between members of the jury, and in particular derisory expressions in regard to Mr Hoser - well, that is irrelevant to what is occurring in this court; two, the apparent communications between the prosecutor Mr Perry and the jury".
Now, it may be said, "Well, that is just a fabricated letter." Well, you would, in our respectful submission - let me put this differently: in our respectful submission this book has a ring of truth about it. But to use another metaphor, because of the person by whom it is written, namely the aggrieved defendant, the reader takes it with a grain of salt. But ring of truth and grain of salt are compatible concepts: it is theoretically possible that Mr Hoser has gone and written a letter attributing it to someone who in fact exists, which happens to suit his purposes. But that is, in our respectful submission, wildly improbable. It would be a very easy way to discredit yourself to embark on such fabrication, so

again, Your Honour would say, "Well, here is someone who is said to have been in the courtroom, independently of and unconnected with Mr Hoser, who observed communications between Mr Perry and the jury.

HIS HONOUR: Well, the statement is that as between the period of 10:30 to 11:30, this person says he observed "apparent communications" - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: "Between the prosecutor Mr Perry and the jury." That then in the text becomes "the prosecution team led by Perry had spent most of the day apparently chatting to jurors".

MR MAXWELL: No, Your Honour it doesn't become that.

HIS HONOUR: Well what is - - -

MR MAXWELL: It is simply that - - -

HIS HONOUR: It is quoting that as support for the statement which appears at 350.

MR MAXWELL: No, Your Honour, I am putting it simply on this basis: that there is in the book what appears to be corroboration of the assertion that in the course of the trial there was inappropriate communication between the prosecution and the jury. I mean, it is only an hour and we can't put it any higher than that. But it is consistent with the presentation of the material and saying, "Well, I wasn't the only one who observed communications between the prosecution and the jury. Someone else who was there for a short time observed it as well". It is no more than that.

HIS HONOUR: Well, what he says is "I hadn't been aware of the extent of this until it was brought to my attention".

MR MAXWELL: Yes, Your Honour. Well, it doesn't say - I don't

think it says by whom it was drawn to his attention, and I am not saying that Your Honour infers that it was Mr Sawyer. He is the - the author is saying, and there is no reason to doubt it, that it was drawn to his attention, but he was focusing on cross-examining, that these communications had been going on, and Your Honour could understand how that would happen while the defendant is cross-examining, that these communications might occur. Indeed, as my learned junior points out, taking the comment under Professor Sawyer - I am sorry, Dr Sawyer's statement at face value, Mr Hoser was unaware at the time of the lodging of the complaint by Dr Sawyer; though it might equally be assumed that before writing the book he had become aware of it, and that that was at least one of the matters on which he based his statement that apparently these communications were going on.
I notice the time, Your Honour.

HIS HONOUR: Yes, right.

MR MAXWELL: I have almost finished the matters on Judge Neesham, and I will be able to deal more quickly with Judge Balmford and Magistrate Heffey, because they all concern single, short incidents, and Your Honour knows where those episodes fit into the chronology. Then I need to deal finally, and I hope fairly briefly, with the implied freedom, and that will be the conclusion of the submission.

HIS HONOUR: All right. Thank you. 2:15.

LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15:

HIS HONOUR: Yes, Mr Maxwell?

MR MAXWELL: If Your Honour pleases. Your Honour, we, in what is a laborious process but nevertheless in our respectful submission necessary, and we hope it assists - - -

HIS HONOUR: No, it is very helpful. You are up to number 8.

MR MAXWELL: We were up to number 8 which is at page 350, and the following words were published; and although we have, as my learned junior says, pretty much dealt with that, Your Honour - - -

HIS HONOUR: Yes, yes.

MR MAXWELL: (viii) in the particulars, 350, that is, to say there was a separate but, as it were, ancillary criticism that what was going on in the court was wrong and should have been stopped, and it wasn't. And, Your Honour, we will, in a moment, draw attention, in relation to one of the other particulars, to the consistency of that theme, that is to say, the criticism of the judge is secondary or ancillary to the primary complaint about the misconduct of someone else, and the logic of the assertion by the author is, well, that was wrong, and it shouldn't have been allowed to go on in the court, and it is the judge's fault that is it was allowed, and so he is therefore to be criticised for allowing the giving of false evidence, in the case of improper contact between the jurors and the prosecution and the jurors.
Your Honour, there is just - I draw attention to the reference to Dr Sawyer at 404. Would Your Honour also note that at 430, Mr Hoser records or attributes to a Keith Potter, former president of the Victorian Branch of Whistleblowers Australia, which is an extant organisation,

outrage when he entered the court, at the time, "and saw DPP barrister Raymond Perry having conversations with jurors as Raymond Hoser was giving evidence from the witness box".
Now, that is a different observation from the one referred to because, as Your Honour will recall, at 350 Hoser is saying "I was focusing my attention on cross-examining witnesses", and meanwhile this was going on. But I am simply drawing attention to, another fragment only - it is a fragment of evidence, but attributed to someone who, if necessary, could be interviewed about it; corroborative of the general assertion that there were, in the course of this trial, improper contacts between the prosecution and the jury. Your Honour, number 9 is at 353 - and this, again, is in the course of the perjury trial, and an issue was raised in the proceeding about whether Mr Hoser had been strip-searched at Broadmeadows Court after the raid on his house. Page 353, and Your Honour, what follows is - and Your Honour, I was right in saying the reference to "the raid" is the raid on the day of the Judge Balmford hearing, February 1994, when the tapes were seized, and in the course of that, so Mr Hoser alleges, he had been strip-searched. So "Back to the Lies", the section begins. Porteglou denying seizure of tapes - I beg Your Honour's pardon, "had passed seized tapes on to anyone". And there is a reference to evidence in another place at another time, on which Mr Hoser would found his assertion that Porteglou lied. "Porteglou falsely denied I was strip-searched at Broadmeadows Court after the raid. His evidence was contradicted by Brown, whom incidentally

Porteglou said he had been with at all material times. When I raised this inconsistency, Perry jumped up and said 'There is no evidence whatsoever that he was strip-searched, except out of his own mind and own mouth', to which Neesham erroneously replied, 'Yes, quite right'. There is no doubt this was a deliberate ploy by both to mislead the jury. I directed them both to the previous day's transcript where Brown had confirmed the Broadmeadows strip-search. Neesham attempted to write it off saying 'That is another matter altogether'. That Neesham had got it wrong is another matter altogether'. That Neesham had got it wrong didn't matter to him. However, it would be hard to believe that both he and Perry would be that stupid. Neesham had then improperly made sure that the matter was now effectively closed. Another rule of the Bar is not to mislead the court. However, it obviously didn't apply to Perry. It was as Porteglou's lies were being exposed that Perry again got up to his usual tricks of communicating with the jury. This time it included Perry making strange noises and pulling faces at them. Neesham even recorded this incident on the 'official' transcript".

Now, Your Honour, that, again, is the context, the particular context, in the broader context of the book, in which (ix) needs to be viewed. It is, on Mr Hoser's account, a complaint he makes about inconsistency between prosecution evidence being dismissed. He says, "Just a minute. This denial is not consistent with what Mr Brown said yesterday. See the transcript". The prosecutor says "No, the only evidence is what Hoser himself has said about the strip-search". The judge agrees with that.

Once again, the perception in the mind of the defendant is that he can't take a trick in this court.
Now, whether he can in an objective sense, if he were an impartial independent bystander, assert that this was a deliberate ploy by both to mislead the jury may be debated. That may be said to be an extravagant inference to draw. But the fact that it is in the context of a trial where, as spelled out in exhausting and exhaustive detail in the pages starting way back in the 200s, it is in the context of a trial where this defendant perceives that the odds are stacked heavily against him, unfairly against him, liars are being believed, the jury is being spoken to, or signalled to in the form of facial expressions by the prosecutor, and the judge is making adverse findings or ruling adversely on his attempts to bring out the truth.
The next is 367, Your Honour. Your Honour, this part of the book deals with a tape recording of the search, the raid made of his house, when the tapes were seized. "February 1994", and he says at about point 2 of page 367 "Perhaps I should note here that in this case I applied for the tapes played to be transcribed on to the court record. That is, what is said put on to the official transcript. Neesham even formally ordered this. However, for reasons best known to those who made the transcript this never eventuated. On the official transcript, all that is recorded for 53 minutes of police tape is 'Tape played to court'. Before the tape was started, I had also asked that the taped be stopped and started so that I could replay key bits to the jury. Neesham tried to be difficult and insisted that the tape be played

continuously". Once again, can't take a trick. Not an unreasonable request, one would have thought: rejected. "Perhaps I should have asked for the opposite and got what I wanted".

His perception was that his applications were almost not worth making. "This didn't stop Neesham from stopping the tape and making comments himself when it suited him", and we now to the get relevant bit complained of: "During the search of my office, the police retrieved a file marked 'allegations of perjury 1993'. When that part of the tape was played Neesham ordered it to be stopped and said is following, 'Members of the jury, you heard one of the members of the search party refer just a moment ago to hear'" - I am not sure what that means - '"allegations of perjury 1993", reference to the title of the particular file. "You should not think anything but, and it is agreed that, those allegations relate to the very matter you are hearing, not something else'".

In fact, His Honour was in error, and we will come to the part in the book where there was a correction subsequently made. But what is said is that a file which Mr Hoser himself had in his office, marked "allegations of perjury 1993", which had been seized, was a file dealing with allegations against him, Hoser, being the allegations before the court. The fact is the file had no connection whatsoever with the alleged perjury before Judge Balmford, and this book goes on to say, "In fact Neesham was wrong. The file in question referred to a complaint", made by Hoser, "about VicRoads officers Schofield and Olsen committing perjury. Anyway" - and we would interpolate, not unreasonably, the author asks rhetorically - "how

could a file marked allegations of perjury 1993 relate to an alleged perjury in February 1994? And if Neesham had bothered to ask me about it, he would know that I wouldn't have agreed with him".

He goes on to say - and this is complained of - sorry, Your Honour, I am on the wrong page. And this, I should say, is the only bit complained of on this page - the prosecution, of course, has eschewed contextualising any of these remarks. We don't understand why, but we would have thought it was encumbent on the prosecution to tell Your Honour what we have had to tell you, which is what these proceedings were, how one related to the other, and the context in which each of these remarks was to be led. To view them in isolation is, with respect, to divert the court, has the effect of diverting the court from the task which it, in our respectful submission, must undertake. The words cannot be viewed in isolation.

At all events, we finally get to the bit complained of. "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate campaign to sew the seeds of doubt in the minds of the jurors". That is the bit complained of.

Well, in our respectful submission, it is not an unreasonable comment to say that it is illogical to have thought that a file referring to 1993 allegations of perjury could have anything to do with something that didn't occur until 1994, on the prosecution case. Whether someone standing outside the position of an aggrieved defendant would say it was probably a deliberate mistake

may be debated; different views would be open. But again, you would only come to that conclusion, in our respectful submission, if you were a defendant who couldn't take a trick. You end up thinking "I just can't win in this court", and it is such an obvious thing to get wrong. "How could it possibly be got wrong that this would be allegations of perjury, that I would have a file in the year before I perjured myself dealing with my future perjury?" So on the material which the book presents - -

HIS HONOUR: Of course, the other explanation which immediately springs to mind is that the trial judge was trying to avoid the jury thinking that there was a prior conviction for perjury.

MR MAXWELL: Well, that is so. But - I accept that; though if any proper account had been given - - -

HIS HONOUR: I understand the point you are making.

MR MAXWELL: But Your Honour - - -

HIS HONOUR: That is how it was perceived by the person who heard it, and you say, in the context of how he was perceiving everything that occurred in the court, it all took on the character of, as it were, a deliberate campaign to get him convicted. But to read that passage without that - - -

MR MAXWELL: Perspective.

HIS HONOUR: Perspective, there is a pretty obvious explanation for what might be occurring.

MR MAXWELL: I accept the force of that, with one proviso, and that is when we come to page 371 we get an account which would tend to make Your Honour's alternative inference less likely, in our submission. It begins under the heading "Back to the Consored" - presumably censored -

"Tape".

HIS HONOUR: Where are you referring to?

MR MAXWELL: 371, about point 2 on the page. "When I finally got a chance to raise the matter about Neesham's wrong statements about the 'allegations of perjury 1993' with Neesham showing his error, he wasn't remorseful. He instead blamed me for not tipping him off about the matter on the tape earlier! Of course the truth was, if it had in fact occurred to me to try to do that, he would have ruled me out of order anyway. In other words I was damned no matter what I did. Then again, the tape had been in the hands of the prosecution for nearly two years", that is to say, the tape of the raid referring to this 1993 file. "Surely it was incumbent on them to raise the matter with Neesham, particularly as it was a legal one". Well, in our respectful submission, fair enough. If the prosecution knew that what His Honour was - or ought to have known that what His Honour was stating was innocently mistaken, the prosecutor should have been on his feet saying "Well, Your Honour, that is not correct. We have the transcript, and we know that it relates to the seizure of a pre-existing file relating to other persons altogether, and the jury should be told that". For the prosecution not to make that correction, it is inconsistent with what we understand to be the duty of a prosecutor.
He says in, the next paragraph, that he had made an application under Freedom of Information for all documents tapes and other material, but hadn't got them. "I can say unlawfully as there is no provision within the FoI Act that allows police to withhold material on the basis that

it may expose perjury and misconduct". And then he concludes in relation to this 1993 file, "As for the 'allegations of perjury 1993', Neesham did give a half-baked explanation to the jury which in reality probably did more to confuse the issue rather than clarify things. But like I said, that was a hallmark of the way he chose to run the trial". That last sentence picks up the word "perspective" that Your Honour and I were agreeing on a moment ago, that this is all about the perspective of the author. That is why it is so important that, in judging its likely effect or otherwise on the administration of justice, that it be perceived that it be read as such.

Then, Your Honour, this is the last on Judge Neesham, (ii), page 3 of the originating motion, at page 435. Now, Your Honour, there is a - this whole section, beginning at 431, if Your Honour would go to the heading "Lies, Lies, and More Lies", it is dealing at length and in detail once again with the prosecution summing up; so to understand the context in which the remarks complained of are made, the whole of this section would need to be read.

The character of the criticism - this is primarily a criticism of Mr Perry, the prosecutor, for not summing up the evidence as he was supposed to do, but "resorted to a litany of red herrings, lies and irrelevancies in order to ensure that the jury was confused". This is the top of 431. "By rights Neesham should have restrained him, but this wasn't to be. However by this stage none of this surprised me" - same point.

Then reference in the fourth paragraph to the "next pack of lies from Perry", and Your Honour will see,

without my going through it, that this is a trenchant attack on Mr Perry. Next page, 432 - and this is important as a sign of good faith on the part of this author - the short second paragraph beginning "As this was too much to stomach. I stood up and complained along the lines of above", about something that Mr Perry was doing. "In a rare sign of support Neesham actually sided with me on this one. Perhaps part of the reason was that on this day there were about 20 independent observers in the court and Neesham perhaps feared that one or more may have been with the media. In any event by that stage the result was known to all. When upholding the complaint, Perry still remorselessly tried his best to keep the jury confused". Then there is an extract from the transcript in which His Honour upholds the point made by Mr Hoser, saying "The point is well made. Yes. Confine yourself to the evidence, Mr Perry", and Perry saying, "Well, I keep getting interrupted". Neesham: "Yes, well the point was well made. Go on". Then I think it is Hoser who - no, I am sorry, "Mr Perry. There is no evidence that Mr Hoser enquired", and so forth, and then - so this is an exchange which the writer puts in, which doesn't support his thesis that the judge - he can't take a trick. This is a trick which he did take, and he, in good faith, sets it out, albeit with a cynical remark about why, in the setting, the judge was with him. The fact is he sets it out. If this was in bad faith then he could easily have left that out. And then the complaint is that Perry disregarded the ruling, and kept going with the same falsehood.
Your Honour will see over the page at 434, it is all about Perry with - the top of 434 - "a cock-and-bull

theory that I hadn't forged the fax". He deals with that. "The fraudulent thing here", it is said in the second paragraph on 434, "was that it had been Neesham himself who had prohibited me from calling Brygel", who might be have been a witness, "after Perry", the prosecutor, "had asked him to ban him as 'irrelevant'". So there is a useful cross-reference to, again, the foundation for the complaint.
"Again Perry was using the tactical move that he knew I was unlikely to interrupt, and if I did then he could make further mileage out of my allegedly constant interruptions. But more importantly, it should have been Neesham who stopped him in his tracks", which, as we have submitted, was the theme of this part of the remarks. No complaint about that statement: "It should have been Neesham who stopped him in his tracks". Why not? Well, because it is a perfectly reasonable comment about what the defendant perceived as inappropriate latitude allowed to the prosecution, and is of the same type as that which is complained of on 435, which begins - after the transcript extract Your Honour will see it says: "Neesham again should have stepped in, stopped Perry's lies. The fact that they had themselves prevented the letter from going to the jury was significant. Furthermore, both knew that the letter was addressed to Martin Smith, my then lawyer, not myself. Both knew it never went to the crown thus both knew that Perry was lying to the jury".

HIS HONOUR: What is the letter from the Attorney-General to lawyer Martin Smith? It is put that this all arose from statements made in the address - - -

MR MAXWELL: Yes.

HIS HONOUR: That he falsely told the jury he had never received it. What is that about?

MR MAXWELL: Your Honour, I don't know. I will inform Your Honour in a moment or two about that. But what is important is that, whatever the materiality of the material, the relevant sequence of events is self-contained on the page. That is to say, there is false evidence - well, there is a false statement given by the prosecutor - knowingly false, it is said - that the defendant had never received the Dowd letter, and Mr Hoser, he says, had sought to tender the document but Perry objected and Neesham had disallowed, that is - I am paraphrasing, or I am interpreting the statement Neesham and Perry had refused to allow to go through. The significance here is having declared this letter as irrelevant Perry had no right to raise it in his summary; particularly when, knowing he was making a false statement about it.
So, as we would understand the sequence, Hoser seeks to tender the letter; Perry objects that it is irrelevant; the objection is upheld by the judge; letter doesn't go in, and then Perry, having made the objection, raises it in the course of his address saying, according to Hoser falsely, that Hoser had never received the letter. And, in our respectful submission not unreasonably, he says "Well, that is a bit rough. He stood up and prevented me getting it into evidence and is now standing up and saying, about a supposedly irrelevant letter, that I never got it, and I did". If that's right it wouldn't be an over-statement to say that is outrageous conduct.

HIS HONOUR: Just so I am picking this up, where is this

reference to the letter being received was stopped from being used by Crown objection? I just missed it in the passages you took me to.

MR MAXWELL: Well, Your Honour, it is - - -

HIS HONOUR: It is not in that particular section, is it?

MR MAXWELL: It is what I have read in the first paragraph on 435, and the second paragraph.

HIS HONOUR: Yes, I hadn't seen the sense. You see, that being one of the documents he had sought to tender - - -

MR MAXWELL: That Neesham and Perry had refused to allow to go through, and that is reinforced by the first sentence of the next paragraph, "The significance...

HIS HONOUR: That is presumably dealt with somewhere earlier on.

MR MAXWELL: Yes, Your Honour. We will try and find that letter. But he says having declared the letter as irrelevant Perry had no right to raise it as, we infer, Perry's objection to the tender by Hoser was that it is irrelevant to the proceedings. The judge upholds the objection. In that sense Neesham and Perry refused to allow it to go through, and then the prosecutor turns around, having successfully objected to its tender, and seeks to make a point against Mr Hoser that he didn't receive it. And the transcript shows that.

HIS HONOUR: But do I read into that that the objection then, from the prosecutor, that the letter was irrelevant must have been overruled and the letter did go in.

MR MAXWELL: No, Your Honour. You would read that it was upheld and the letter didn't go in.

HIS HONOUR: And so, in his address, he referred to a document which wasn't evidence.

MR MAXWELL: Correct. Which wasn't evidence because of an

objection he, the prosecutor, had successfully made to its going in. In our respectful submission, that is the correct reading of those passages. If the actual event in the course of the trial is dealt with in more detail we will draw Your Honour's attention to that.

Then the transcript quotes what Perry allegedly said to the jury, "Who might you suspect would have a letter from the Attorney-General of New South Wales? Mr Hoser or the Crown? It is his sneaky way" - meaning sneaky of Hoser to suggest that he got it rather than the Crown having got it - "I had to stop him", and then this transcript extract records the objection made. And Hoser wants to say "That particular letter is in the files here". "Mr Hoser, you will get your opportunity". Hoser" "He has lied, his whole story". And then the judge allows the prosecutor to go on. Perry: "Thank you. If you're going to put me off, he's not. What I am putting to you is quite plainly that the Attorney-General's letter that contained his prior history is not likely to be in his hand. Mr Dowd, or his Honour Mr Down is not going to send that down to Mr Hoser and say 'hello, Mr Hoser I want you to have this letter'". So there is the assertion that Hoser never got the letter. And, on the face of it, that would at least be characterised as unfairness in the conduct of a criminal trial, in our respectful submission, and accordingly, for the unrepresented defendant to have a strong sense of grievance about that episode is not surprising.

It is in that context in which Your Honour would read the start of the passage complained of: "Neesham again should have stepped in and stopped Perry lies". Well, if

it is right that His Honour had ruled the document out as being irrelevant and not admissible, then one would have thought, with respect to His Honour, that he would have said to the prosecutor "But you wouldn't let that get in, Mr Prosecutor. How can you now be making submissions about it in your summing up to the jury? There is no evidence; you are meant to be summing up the evidence". It goes on - and this is part of the passage complained of, which is the whole of the, this bottom half of the page, "Significant again" - the fact which Hoser asserts is at the end of the paragraph under the transcript extract. "Both knew", meaning the judge and Perry - and we assume that both had seen it in order for there to be a ruling that it not be admissible - "knew that the letter was addressed to Martin Smith, my then lawyer, not myself. Both knew it never went to the Crown" because it was addressed to him, not to the Victorian Crown, "and thus both knew that Perry was lying to the jury. Significant again was that Perry was flagrantly lying and violating all his rules of conduct in order to gain an improper conviction. Neesham's so-called management of his court was similarly tainted", and that is the proposition that we foreshadowed before and which recurs, that if one of the participants, in this case the key participant, being the prosecutor, is misbehaving in the ways alleged, then it is a failing on the judge's part not to intervene and prevent that occurring, and a defendant would look to the judge for protection if what he perceived - if he raised objections about unfairness, and lying, he would expect protection from the judge. Whether it is a reasonable expectation in the particular

instant is a matter which requires investigation.
This is still part of the matters complained of in the brackets: "(Oh and by the way, when I raised the letter in my reply address, Neesham jumped in at once and said I couldn't talk about it or introduce the letter - yet more double standards)". Again, fair comment, in our respectful submission, on the account which Perry gives - I beg your pardon, Hoser gives. The prosecutor can refer to the letter, it having been ruled out of court on grounds of relevance. The defendant tries to deal with it and, on the account he gives, isn't allowed to talk about it let alone introduce it. "This was deliberate", he says, "as Neesham and Perry were evidently trying to ensure that the jury's imagination ran wild as to what the contents of this now mysterious letter were. Furthermore the Dowd letter didn't contain my 'prior history' as Perry had falsely asserted. But like he said himself, he wasn't interest in the truth".
Now, we would respectfully submit that the last statement is properly to be read as a statement about Perry. In context, it follows immediately on from the previous sentence: "The Dowd letter didn't contain my 'prior history' as Perry had falsely asserted. But like he said himself, he wasn't interested in the truth". In our respectful submissions, that is not open to a reading that that is a comment about the judge at all.

HIS HONOUR: Well, where was it that Perry said himself he wasn't interested in the truth? I mean, I understand the broad thrust of what you are saying as to that, but that particular sentence seems to be identical with the ones which have been previously quoted, which unambiguously

refer to the judge.

MR MAXWELL: I accept that, Your Honour, and that - we are seeking to find a reference to that being said by Perry, Your Honour. I accept the force of what Your Honour says about that echoed statements made by the judge in other setting, mostly based on - let me start this again - based initially on the refusal to let the parking fine appeal be tape recorded, as Your Honour will recall, and secondly, on the statements to which reference has been made about not being concerned with the truth.
Would Your Honour note that in addition to 304 to 5, which are the statements about "we are not enquiring into the truth of those allegations", there is the statement at 445 in respect of which Your Honour took me to task yesterday. That is one about criminal trials not being concerned with getting to the truth. We have no need to recap the discussion about that.

HIS HONOUR: All right.

MR MAXWELL: Then that is all on Judge Neesham.

HIS HONOUR: Did you deal with all of Judge Waldron's - - -

MR MAXWELL: We did, Your Honour, yes. Then, comments re Judge Balmford, as she then was. If Your Honour would go to 140, just so we - before we leave the Neesham matters, would Your Honour go to 418? This is the reference to Perry not being concerned with the truth.

HIS HONOUR: Just one second. Sorry, what page?

MR MAXWELL: 418: in the middle of the page. This is when Hoser is being cross-examined, and says "I am telling you the facts and these are acknowledged by VicRoads in writing. Perry: I am not interested in the facts". And then there is a further assertion at the foot of the page by Hoser in

evidence. "I wasn't licenced to drive on that day, I might add, so had I been driving a car I would have been breaking the law, which I try to avoid doing. Perry: I am not concerned about that". But the first one is sufficient as a foundation for the later reference at 435. We invite Your Honour to find, as a matter of fact, that the "he" at the end of the last Neesham particular is a reference to Perry, in its context.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, I was going to take you to the Balmford matters. At 140, the first matter complained of comes under the heading "No Taping. Judge's Mind Already Made Up". That is the fact and conclusion in Mr Hoser's mind, and we have already debated whether that is a reasonable inference or not. But it is plain on the face of it that he draws the conclusion, and it is clear from the sentence in the passage complained of. "After Balmford had stated that she would not allow the case to be tape recorded, it was obvious that I would be losing this one. Like the case in front of Blashki" - that was the traffic lights matter - "the only question was the penalty". Then Keating was the deponent, and this goes on to deal at length with the proceeding before Judge Balmford. The next particular is to the same effect, at 142, Your Honour.

HIS HONOUR: I see at the bottom of that page there is reference to the letter from the New South Wales Attorney, which we were discussing before.

MR MAXWELL: Yes, Your Honour. I am indebted to the court. At the foot of 141, as Your Honour points out, "Ellwood accused me of forging three documents. Namely the two

incoming faxes from Vic-Roads relating to traffic lights, along with a letter sent from the former New South Wales Attorney-General John Dowd to Martin Smith, solicitor at Herbert Geer and Rundle. This letter was allegedly a forgery, because I was unable to produce an original. I reminded Ellwood that the letter had been about me but not addressed to me" - which is consistent with what he says later at the trial - "rather, having been sent to the lawyer and that as matter of course, I had only been given a photocopy. It has always amazed me how an innocuous activity by myself is always deliberately misinterpreted by the prosecution as part of some major criminal plot". He says in this case "a photocopied letter innocuously passed on to me becomes some major criminal conspiracy involving forgery".

Then the next matter complained of - this is (ii) under Judge Balmford, on page 4 of the pleading, under the heading "A 'Lost' Witness": "Brygel", who was going to be a witness for Mr Hoser, "was late to court, and he was nowhere to be seen at 10:30. He is the sort of bloke who would probably be late to his funeral if it were possible. Balmford refused to stand down proceedings while I attempted to locate him. Of course, had the police side had trouble finding a witness, it is probably been a different story. Like I have noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all she had obviously made up her mind before the case even started. Recall, she had refused to allow the matters to be tape recorded". So it is the same stream of - it is the same logical sequence in the writer's mind, and the foundation for the imputation

of predetermination is the refusal to allow taping. Your Honour will see that in this proceeding the judge went on to announce "that she had found the policemen, Keating and Daffy, as 'credible witnesses' and that she didn't believe a word I said. She further accepted Ellwood's" - that is the prosecutor - "assertion that the contents of the VicRoads letter was doubtful, even if it wasn't forged".

It is worth noting in that context, Your Honour, an exchange with the judge at point 3 of the page, 142: "In terms of my alleged forgeries", says Hoser, "Ellwood was wrong on all counts. When I complained to Balmford, she retorted that I had to expect such dirty tricks in the course of court case, and that 'it's all part of the game'". Well, that is the account he gives of what occurred and what was said to him.

Now, Your Honour is not asked to investigate the status of the Dowd letter, and whether the photocopy should have been, whether there should have been any doubt as to its authenticity or not; but there is a thread of consistency - I am indebted to Your Honour for drawing attention to the reference to it - from the County Court appeal in respect of which ultimately he was charged with perjury, to the trial of perjury, when the Dowd letter, and whether it was or wasn't a falsehood, was raised against him.

It was, it would appear, a matter would which he relied on for evidentiary support in defence to the charge before Judge Balmford. He was challenged that he had forged it. He said, "No, I just had a photocopy from my solicitor". Then he tries to bring it up at the trial for

the same reason, to say, "Well, I wasn't lying before Judge Balmford. I had these letters, including one from Mr Dowd, and here it is". "Objection, Your Honour", from the prosecution. "Not relevant". "Objection upheld. Yes, Mr Hoser?" And then in the address, "Would you seriously think that somebody like Mr Hoser would get a letter from Mr Dowd?" - a very rum sequence of events, in our respectful submission, assuming it to be accurately described, and it has not been suggested, because the prosecution haven't investigated it, that anything said is false.

Your Honour, (iii) under Judge Balmford, on page 4, 144 at about point 8 of the page. I would like just to read to Your Honour what is under the other side before we come to the matter complained of, because this, again, emphasises the good faith in which this book has been written. On the other side, "There is no doubt that after this book is published both Blashki and Balmford will deny any impropriety or wrongdoing. They will probably assert that they are perfect and claim what I have written (above) to be false. However readers should bear in mind that the proceedings in front of both were taped by myself (from where this account can be corroborated) and the police (read Leo Keating) have by their own admission confirmed that they copied the tapes". So the police have copies of the tapes which Hoser made of those proceedings. "This note here can be taken as written authorisation (permission) from myself to anyone to access these tapes (uncensored) under FoI legislation". So he is prepared to stand behind his allegations and say "Well, I made a tape. I wasn't allowed professional tape but I

have made one. They have got it. Listen to it". Someone who has trumped things up isn't going to expose himself in that way, in our respectful submission.

"However," he goes on, "in the event these are withheld to those who seek them, there is just one simple question that needs to be asked of both Blashki and Balmford. That is, why didn't you allow your cases to be taped when asked. For that question, neither have a credible answer".

And then we come to the passage, the last passage complained of, under the heading "Another Balls-up".

"Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact, three Supreme Court judges have noted it as well".

Now, we object to the fact that the prosecution did not include, in the particulars, the next paragraph. It is self-evident that the next paragraph refers to the three judges mentioned. It puts things in a different light when this is not just a throw-away line about bias, but there is actually a Court of Appeal decision to which reference is made, where the Court of Appeal overturned the conviction saying that Her Honour had "misdirected the jury in a way that helped guide it to a guilty verdict". That ought to have been included in the pleading, and we draw Your Honour's attention to the fact that there is a decision of the Crown and De Marco. On our research it is unreported Court of Appeal, 26 June 1997. The book says 27 June. My note is 26; but at all events we will - I have actually got it here, Your Honour, in an unreported form. It is 26 June, and I think in those days there wasn't a VSC number. The catchwords or the description

says "Trial Judge directing jury that an omission by the applicant to tell police certain facts could be used by jury to demonstrate a consciousness of guilt. Held to be misdirection which in the circumstances could not be cured by the application of the proviso".

HIS HONOUR: The use of the word "guide" couple with the word "bias" would plainly suggest a deliberate exercise rather than an error made by the trial judge, would it not?

MR MAXWELL: Your Honour, we wouldn't concede that it is, it goes as far as that. It is - - -

HIS HONOUR: Well, is it open to be read that that is what the two passages are in fact doing?

MR MAXWELL: No, Your Honour. We would draw the distinction there between - - -

HIS HONOUR: I mean, bearing in mind that the passage which has the word "guide" is not one relied on by the Crown.

MR MAXWELL: No, indeed. But if it was taken as you suggest, it puts it in context. If it was added to the passage before, you have got the combination of "Balmford's bias" and "guiding it to a guilty verdict", being the finding of the Court of Appeal. Given, again, the test of an application made at this stage, that there is no case to answer, the question would be whether it was open to read that as saying "not merely got it wrong", but "deliberately got it wrong" - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: And that the Court of Appeal agreed that it was a deliberate exercise in securing a conviction.

MR MAXWELL: Yes, Your Honour. And the Court of Appeal doesn't say that, as Your Honour will see in examining the judgment.

Our answer would be in two parts, Your Honour. We would say that, at worst, this is an allegation about apprehended rather than actual bias. That is to say, it is not asserting that Her Honour was actually improperly biased in favour of, but that in the conduct of her court she favours police and the DPP - the kind of comment that is made elsewhere in the book: the prosecution get a dream run or that is my phrase but, or as we will come to it, immediately, "Magistrate Heffey, a police Magistrate", someone in front of whom the police get an easier time than they do elsewhere. And again, in our respectful submission, it is a matter of notoriety that the same case can be dealt with differently by Judge A as compared to Judge B, Magistrate A Magistrate B, without suggesting that either of them is doing anything other than his or her duty; but that the assertion is, prosecutors get a better run in front of Judge A than they do in front of Judge B, who tends to be more rigorous in putting them to their proof - something along those lines. That is a comment which is not suggesting either of them is actually biased and is making a decision otherwise than in accordance with the facts, but rather, that there is an impression in the eye of the fair-minded observer in court that there is favouritism. So it is in that sense, we would say only in that sense, that the word "bias" could be read. The word "guide", is certainly open to the meaning that there is active intent involved. I concede that, as a matter of the ordinary use of the word, it could. We respectfully submit that it doesn't here, but carries the connotation that there is guidance going on from the Bench. A neutral word would be "lead" - "lead"

or "cause" - "lead the jury to a guilty verdict" or "cause the jury to reach a guilty verdict". But "guide" - I don't submit, Your Honour, it is not capable of that more serious imputation which is that there was a conscious guidance going on.

HIS HONOUR: How do you say I should treat that paragraph, because you have put it that it was wrong of the Crown to leave that paragraph out, and it should be expressly taken into account in considering the two lines which the Crown did rely on? I mean, on one view it might be said that - - -

MR MAXWELL: It gets worse.

HIS HONOUR: The Crown weakenss its own case by leaving that paragraph out. It would have strengthened it, had it added it.

MR MAXWELL: Yes, Your Honour. But we don't shrink from reference to the following paragraph, because we have endeavoured to make clear from the outset none of these words can be taken in isolation; and if it is an admission against my clients it is one that has to be made, that it is perfectly clear that what is referred to in the sentence complained of is what is explained by what follows, and no sense of reading could leave any other conclusion. We are stuck with that, because that is the way this book is written. He doesn't make unsupported allegations. He supports them.
Now, Your Honour or an informed reader might say "Well, I don't think the Court of Appeal went quite that far. Yes, they set aside the conviction. Yes, they said that it was such a miscarriage of justice that a retrial wasn't possible" - and Your Honour knows better than I do

about what that says the quality of the direction in the particular circumstances. But at least is he saying what he relies on in vindication of himself, and he says - though the Court of Appeal would not say it, except in the clearest case - "Well, there you are. She pointed the jury in a particular direction by making an anti-defendant ruling, that being the inevitable effect of the ruling, if not its intent; and the Full Court was persuaded that the conviction could not stand.
So I accept what Your Honour puts to me. If the word "guide" makes it worse, well, so be it, because we say that this is - this is that kind of book, where the foundation, in every instance, is provided for the reader to see and to check.
Your Honour, we move finally, second but finally, to Magistrate Heffey, particular (i) on page 4. If Your Honour will go to 205.

MR MAXWELL: Your Honour, it is convenient to start at the beginning of the section, where - and this is, as Your Honour will recall, the committal on the perjury charge, and it begins "His criticism of the Magistrate" in the third paragraph. "She is perhaps best described as an extremely rude and stroppy old thing". Those are offensive things to say; that is accepted.

HIS HONOUR: Your client doesn't seem to think so. It seems to be a matter of great mirth. Yes, go on.

MR MAXWELL: But it is not, and it is not said to be, scandalising the court. Your Honour would have appeared before judges or magistrates to whom the description "extremely rude" would be applicable. Those things happen in the course of the administration of justice for

all sorts of different reasons.
He goes on to say, "She also seems to have an innate ability to bend and break rules as she sees fit" - that is not complained of - "But sometimes this seems to occur because she doesn't seem to know what she's up to and she instead appears to muddle her way through things. Her muddled up nature was evident early in the piece when she made it clear she had no idea about the court's own procedures and protocols of taping proceedings. When I raised the issue of the non-provision of the earlier transcript, she said that the tape recording was a 'private' matter between me and private company and 'it's up to you, Mr Hoser, to pursue that and pay for it.' When I explained to her that it wasn't and that the government paid for it and had through Coate" - who was then a Magistrate, now a County Court judge -"ordered I get a copy, Heffey wrote it off saying 'That doesn't matter' and 'I'm not going to hear you further on it'. With her callous attitude to the truth when it came to the simple matter of the earlier tape proceedings" - I think I am right in saying none of this is complained of - "and the similar way she ruled against me, I could see that anything resembling a fair trial/committal in front of her was effectively impossible. Whenever she got her knickers in a knot over the facts, which was quite often, she would try to get over it by moving proceedings along with comments like 'OK, now move on'. You could describe it best as the 'wipe your shortcomings under the carpet mentality'. Another of her bad habits was misquoting, or quoting out of context, although this habit seemed deliberate on her part". And then we come to the part

complained of: "Although at the time the committal started I didn't know of Heffey, I was quickly told by Ben Piper and others that she had a long-standing reputation as 'a strongly pro police Magistrate'".
We say, of that, exactly what we said before, Your Honour, about the perception which does, as a matter of notoriety, develop about particular judicial officers, that they appear to favour, that is to say, give an easier time to prosecutors and prosecution witnesses than defence counsel and defence witnesses. "In hearings in front of her, it can come out" - and he is here relating what he has been told - "that police have committed the most serious of crimes and it seems she would still not do anything about it. Readers may also seek to refer to the police shootings section of Victorian Police Corruption" which is book 1, and the relevant part is chapter 23, at pages 395 to 438. In other words, he draws attention in that other book to the conduct of Magistrate Heffey in dealing with investigations into police shootings.
Another example of calling in aid evidence which the author says supports the assertion that he makes. "Complaints about Heffey's running of courts and her decisions have also appeared in the mainstream media. These usually follow her routine siding with police after shootings, or death in custody matters", and the submission about routine siding with police is just the same as before; that is, a perception which lay people in particular, but lawyers as well, can and do sometimes form about certain judicial officers, based on observation of them over a period of time.
If it is right, in our respectful submission, for all

the reasons that the courts of this country apprehended, bias is examined so carefully, if it is right that certain judicial officers behave in a pro-police way, it should stop, as a matter of public policy. And if someone has been a defendant before such an officer, says that that is what his perception was and for reasons which he gives, that is a matter for investigation, not prosecution. Further, by way of further substantiation, Mr Hoser deals at the top of 206 with - sets out two examples of matters where he says the magistrate went badly wrong, one concerning a death in custody, and what the author says in the second half is "In spite of overwhelming evidence at the inquest to show that correctional services and human services department staff were implicated in the death, Heffey as coroner dismissed this possibility...". "Then there is a reference to the death of a 16-year-old girl that died as a result of a high speed police chase", and the mother condemned Magistrate Heffey "after she handed down her coronial finding that cleared police of any blame for causing her daughter's death.

Your Honour, against that background, will then see at the foot of 20 the second paragraph complained of - this is (ii) at the top of page 5. We have already dealt with the notion of a policeman's magistrate; indeed that is the heading of the whole section. And then the confused and scatterbrained, and the questioning of the selection criterion, we have already referred to the introductory section in which Mr Hoser says what is for him the basis of that assertion, that she seemed muddled, she doesn't seem to know the rules and rather than deal with matters of difficulty she says, "Well, let's move

on". Again, that is not scandalising the court. That is a comment on observed behaviour of a judicial officer, and if it were true, as it is asserted, that she - let me start that again. If she appeared to a defendant in court not to know the rules, not to be in control of the proceeding in her court, that would be a matter of legitimate concern to that defendant. If in truth she didn't mow the rules, that would be a matter of legitimate concern to the system. Again, it is a matter proper for investigation, not prosecution.

Page 208, and this concerns the last paragraph, yes - again, before I deal with that, Your Honour, we might make this point: these are little bits in a continuous narrative, as Your Honour has now seen at great length. Indeed, for the readers of this book it is a somewhat awesome task even to find those passages, that is to say, this is so long and so dense, and detailed as only a person narrating his own grievances can do, that it is calculated not, we would say, to - or those features reduce or minimise any tendency to affect the administration of justice, because you have got to be patient enough to get to page 470 or whatever it is to find - you have got to wade through enormous detail, which is of great interest to Mr Hoser, and he hopes of great interest to readers, in order to get to the bit which will enable you to understand why it is said, ten pages later, that this was a wrong ruling.

This is needle in a haystack stuff. This is not a big banner saying "Corrupt judges. Sack them". This is a book which says "Victoria Police Corruption", on the cover. To find out about the criticism of the judges you

have got to read the whole exhausting narrative of these various proceedings and work out, as Your Honour is having to do, which bit of this drama, the particular concerns, and how it relates to other bits of the drama, and exactly who the players in the drama are.
So at 208 we are looking at a passage at the foot of the page, but dealing with, once again, a series of events which is described earlier on the page. I am not sure that I am quite correct about that, Your Honour. There is an issue discussed on those pages about the bag of tapes and would Mr Hoser sign an indemnity in respect of them; and he ended up with the tapes and no indemnity was signed, so it is not correct that what follows relates to that. As I would understand it, the ruling to which reference is made in quotes at the foot is a ruling that there would be no adjournment to enable Mr Hoser to seek legal aid; and the magistrate, according to this account, said "She was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's files" - she was the prosecutor - "and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a predetermined outcome".
Your Honour will - - -

HIS HONOUR: So the lie was what proposition?

MR MAXWELL: The lie was that he had not notified the other side of his intention to seek an adjournment. He had sprung this adjournment application on the prosecution then and there, and the magistrate said "Well, I am not going to

adjourn it. You didn't give notice of this." Your Honour, this is dealt with not on 208 as I suggested, but 206, under the heading "No Lawyer".

HIS HONOUR: Yes, I see.

MR MAXWELL: "I opened by seeking the matter be dropped or adjourned until the Legal Aid Commission came up the goods in terms of funding a lawyer for me. You see, they still refused to fund a lawyer. And then, "I referred to Keating's words to me on 2 May 1994 and quoted from the transcript of the taped phone call." That is, as we have seen elsewhere, the alleged assurance by Keating. It was mentioned in the chronology that the committal wouldn't go ahead if he wasn't represented. Then, through his counsel, Ms Hampel, "Keating denied having made such an undertaking and argued that the case go to committal (and trial) there and then. In violation of accepted procedure, Heffey accepted Hampel's word from the Bar table that Keating had not made such statements" - his point being that, at the bottom of the page, "Heffey took Hampel's word and dictated that the committal proceed. I asked for Keating to go into the witness box to state that he had never made such an undertaking (re me being represented). Heffey refused".
Then he makes a point earlier on 208: "Heffey insistence that the committal go ahead in spite of my non-representation also flew in the face of accepted protocol, particularly as I had made it known I sought it" meaning legal aid. "For example on 12 June 1987 another man facing a committal at the same court fronted" a different magistrate. "Like in my case, the LAC had, without a reasonable explanation, withdrew legal aid

funding for the defendant. Cotteral stated that should could not imagine how the upcoming case ... 'could proceed without legal aid'". And it didn't proceed. So he is saying, "Well, I was told it wouldn't go ahead if I didn't have a lawyer; now they are denying that undertaking. Then in any event, undertaking or not, it shouldn't have gone ahead because it is a serious charge and I should have legal aid, and look what happened in another court," where someone was treated as, he would say, fairly.
Then thirdly, is the point that there was no prior notification, and, as I put to Mr Lee yesterday, Your Honour, it would have been an easy matter to check whether there were letters in the prosecution file giving notice of an application, or in the court records.
Mr Hoser asserts that he did give notice, or his solicitor did, and if that's right, Your Honour would understand his disbelief at it being said that he hadn't given notice. But as you know, Mr Lee said that that matter hadn't been investigated.
If it is right, as asserted, and it is not said that it is false, then there was evidence which meant that the learned magistrate's ruling was simply wrong on the facts. He had given notice, but the magistrate concluded that he hadn't. And his comment is, "Well, don't let the truth get in the way of a predetermined outcome." That is a strong statement to make, that one who feels, in our respectful submission, not unreasonably aggrieved about being required to go on unrepresented in a committal on a very serious charge.
Then the last matter about Magistrate Heffey is at 212. Again, it is the line at about point 7 of the page,

beginning, "Oh, and just in case you haven't worked it out, my committal to stand trial had clearly been well determined before a word of evidence was given". That needs to be read in the light of everything that has gone before, starting at 205, but in particular, specifically, what appears up the page under "One Charge Down", where there is a reference to one of the charges being falsely swearing "that a set of lights were stuck on red. Keating's admission in the witness box, reported in perpetuity on an official transcript, effectively cleared me of that charge". And there is a criticism of the Magistrate, last sentence in that section, "But perhaps I should make known that while myself and the DPP side were aware of this, Heffey, by her improper refusal to demand to hear the tape wasn't, and like for the other charges, she eventually committed me to stand trial on the lot". Then he goes on: "Minor Obstacles" "In terms of ordering of witnesses, it is usual for the informant (in this case Keating) to go first. That wasn't to be. Instead it was a DPP clerk ... When I objected to this improper ordering of witnesses, Heffey sided with the police. They could do as they pleased", and that is an example of the apprehension that I was referring to before: I, the defendant, take what I think is a reasonable point, that is, the informant should go first. The informant says no. The prosecutor says no. Someone from the DPP will go first, and the Magistrate "sides with the police" or rules in favour of the police. If that happens repeatedly, then the perception can be created that there is an undue favouring or undue latitude given to the prosecution. It is only in that context that the matter complained of then appears

about "my committal to stand trial had clearly been predetermined". In other words, that is a conclusion based on a series of matters about which complaint is made in the course of this section on that Magistrate. We lastly come to Magistrate Adams, and there are two matters - - -

HIS HONOUR: Madam, I will ask you to leave the court if you wish to continue making a joke. I will ask you to control yourself then, please. Yes, go on.

MR MAXWELL: Your Honour, Magistrate Adams: there is the photograph and the comment on the back cover of book 2, and this is the last particular of book 2, on page 5 of the pleading. It is the whole of the passage underneath the photograph -the photograph is complained of - "The Magistrate that the Cop said he Paid Off". "Following the 1995 publication of policeman Ross Bingley's confession that he had paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner, which police falsely alleged was suicide." Now, the reference there to the 1995 publication is to the book, the Hoser Files, and Your Honour will find the relevant discussion at pages 70 and 71 in the transcript of what Mr Bingley said. Does Your Honour see the transcript?

HIS HONOUR: Yes.

MR MAXWELL: And Hoser asks a question - - -

HIS HONOUR: Sorry, what is this that is being quoted?

MR MAXWELL: Well, this is - - -

HIS HONOUR: This is not a transcript. This is a conversation,

is it?

MR MAXWELL: I beg Your Honour's pardon. It is a conversation, yes. It is not - but as I am instructed, it is this, this is the 1995 publication - - -

HIS HONOUR: And is this a conversation between - - -

MR MAXWELL: Hoser and Bingley.

HIS HONOUR: Hoser and Bingley, yes.

MR MAXWELL: And Bingley says, Hoser, at point 2 of 71, asks Bingley, "Did you know I'd get found guilty from the word go?" Bingley: "Well, I paid him off, didn't I, so of course I did." Hoser: "The penalty was a bit severe." Bingley: "We worked it out before. Three months, six months, nah, bit too much. We settled for one." "Bingley repeatedly asserted that he had paid off the magistrate".

HIS HONOUR: Sorry, you are on page?

MR MAXWELL: 71, it is towards the end of the conversation. Now, as Your Honour knows, and I don't think I have emphasised this in the course of submissions, no charge was ever laid in respect of the Hoser Files. It records a conversation, as Your Honour has just seen, in which a person purportedly says "I paid the magistrate to reach a certain result". It is hard to imagine a more serious allegation of corruption than that. Your Honour, just to fit this matter into the already complicated chronology, would Your Honour go to page xx.

HIS HONOUR: Of?

MR MAXWELL: Book 2. Your Honour will see in the middle of xx, "21 December 1988" - so this is a long time ago - "Hoser convicted and gaoled for six weeks on charges of assault and theft over the Bingley/O'Shannessy matters. Policeman Ross Bingley admits to paying off Magistrate Hugh Francis

Adams to fix a case. Court transcripts and associated documents corroborate Bingley's confession. Conviction overturned on 27 February 1990."
Would Your Honour note at the top of that page, "7 March 1988: , "Policeman Ross Bingley tells Hoser he is falsifying charges ..."

HIS HONOUR: Sorry, you have lost me again. On what page - - -

MR MAXWELL: xx.

HIS HONOUR: In fact, there is a reference to it on page xx. Yes, xx, which - - -

MR MAXWELL: Right in the middle, Your Honour. "21 December 1988, "Hoser convicted and gaoled ... Policeman Ross Bingley admits to paying off Magistrate Hugh Francis Adams to fix case. Court transcript and associated documents corroborate Bingley's confession. Conviction overturned on 27 February 1990", and that is mentioned in its place in the chronology on xxii, and I was just going to draw Your Honour's attention to the entry at the top of page xx, "7 March 1988: Policeman Ross Bingley tells Hoser he is falsifying charges of assault and theft against Hoser. Key witness to be a police protected criminal named Phillipa O'Shannessy as well as two other police protected criminals". Hence the name, hence the description, Bingley/O'Shannessy matters."
As far as the solicitor having conduct of this proceeding was aware, Mr Adams took no defamation action in respect of that publication.
Then, Your Honour, at the top of page 6 of the pleading is the last particular, and the only one arising out of book 1 - - -

HIS HONOUR: That particular passage on the back of the page?

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: In stating "Following the publication of Bingley's confession", the statement being read is not that there was a document which constituted a confession, which was published somewhere in 1995; rather than being read as "it is my own publication in which I assert that I have had a conversation with him in which he made the confession", it would be open to that interpretation. Indeed, that would probably be the more natural interpretation of it, would it not?

MR MAXWELL: In our respectful submission, is this page were viewed in isolation, possibly. But read where it should be read, as the last page of the book, the reader would know, having started with the chronology - - -

HIS HONOUR: But unlike all the other passages you have referred me to, it is deliberately not put in a context. It is highlighted as the very last item on the document, given a page to itself.

MR MAXWELL: I accept that, Your Honour. It doesn't, by itself, direct you to anything. But in our respectful submission, it has to be assumed, or it ought, in fairness, be approached on the basis that the book is read from cover to cover, and that the reader gets to the comments about the magistrate being informed by everything that has gone before, including the references in volume 1 to the same matter, being that which we are about to come to.

HIS HONOUR: I would have thought the fact that it was the inside cover, front or rear, of a publication, would mean it was a document, a particular passage, which would be highly likely to be read by people who may well not read the contents in the text; and so it would be then seen to

be a conclusion which is reached which may well be capable of being read by the casual glancer, as it were, in the way that I have suggested.

MR MAXWELL: Yes, Your Honour. I don't dissent from that proposition, with respect. What I do say is that, accepting that it might be read as such by the casual observer, because it is not apparent on the face of it to what confession reference is being made, no inference would be drawn, or that is to say it would be a matter of - it invites inquiry, is what I am trying to say. What confession? In what context?

HIS HONOUR: Well, does that help you, because if it invites speculation as to what it means, it might well lead the reader to the conclusion that there has been some sort of official document in which the statement by the police officer constituted a confession, which had some sort of official status in declaring the magistrate had in fact been paid off.

MR MAXWELL: Yes, Your Honour. I understand exactly how that is put, with respect. Our submission, however, is that there is no reason for, or no basis for drawing any conclusion about the status or character of the confession. When I said "invites inquiry", it means that you would not know, without looking in the book or books, where the reader would naturally go, to find out what kind of confession it was, and that you wouldn't, on the face of it, assume that it was an official tape recorded confession. But this is a bald assertion by the author, and it is calculated to excite the reader's interest because of the seriousness of the allegation and its implications, and the reader wouldn't be able to jump to any conclusion about what kind

of confession it was, but would rather, if interest is attracted in the first place, go to the book to find out - in other words, it is a trailer; it is something that is intended to, on this view, catch the eye, but only for the purpose of getting the reader into the book. Once in the book, the chronology will make clear the people involved, and then the careful reader, who is trying to find out what sort of confession this was in order to make some judgment about it, will find that it is a confession mentioned in an earlier book of Hoser's consisting of a conversation.

HIS HONOUR: Does that not make it calculatedly misleading?

MR MAXWELL: No, Your Honour, in our respectful submission, no, because it is a proper use of words to say of the conversation recorded in the Hoser Files that Bingley confessed that he had paid the magistrate and that the Hoser Files was a 1995 publication on that confession. In my respectful submission, the word "confession" may be regarded more as a term of art to lawyers; but to ordinary people it means that someone has "fessed up", admitted, which is exactly what the earlier book records. That is exactly what he did do. He told Hoser, according to Hoser's version "Yes, I paid him. We worked it out between us". That is not, in our respectful submission misleading. It is accurate.
Your Honour, then the final particular concerns page 57 of book 1. It is the same picture of the Magistrate, and reliance is placed on the first three sentences of the passage. Again, that appears, in our respectful submission, to be unaccountable given that, for reasons we have already said, this must be read in context. It is

plain that the author is referring to a number of matters which, in his view, throw into question the performance of that Magistrate. The first of those is described as a controversial decision. That could hardly be scandalising the court. "In a controversial decision he let corrupt policeman Paul John Strang walk free from court after he pleaded guilty to charges relating to planting explosives on an innocent man. He then puts an suppression order on the penalty". If the words don't have the requisite tendency, Your Honour wouldn't get to the question whether there was any practical, as a matter of practical reality, any likelihood of damage to the system. It is just, on the material there, said it is open for someone to describe it as a controversial decision.
There is plenty of comment, every day, in the press about what are perceived to be lenient decisions about those convicted of serious crimes.

HIS HONOUR: When it says "in a separate matter" that rather suggests a separate case, does it not?

MR MAXWELL: Yes, Your Honour, and it was a separate case.

HIS HONOUR: Well, did the policeman admit to paying a bribe to Adams in the case?

MR MAXWELL: That is the same matter.

HIS HONOUR: Yes, I know. But that is not an accurate statement, is it, of what is asserted in the passage to which you took me, namely, that a conversation which was not part of the proceedings occurred between the two of them in which an admission was made by Hoskins? On that passage, as it reads at page 57, would it not be open to a reader to conclude, it having just referred to a controversial decision, that "in a separate" matter refers

to another court matter?

MR MAXWELL: Your Honour, again, we would respectfully rely on and ask Your Honour to discount the lawyer's familiarity with the term "matter"; that is to say, to Your Honour and to me, if someone says "in a matter", that is a term of art and means "in a proceeding". "I am in that matter". "I had a matter before Judge so-and-so". But in ordinary parlance, and in the pen of a lay person, it just means a topic, subject matter. It doesn't mean, as you, Your Honour, and I would understand it to mean - "in the course of a separate proceeding a policeman admitted". In our respectful submission it just means "I am going to refer to a separate matter".
That is a proper use of English, in our respectful submission, and it means no more than that "I am going to refer to something else, a separate matter, not connected with what I have just talked about". "A policeman admitted to paying a bribe to Adams to have an innocent man sentenced to gaol". But, with respect, even if that were capable of the interpretation, the sting is that there was an admission. He has published that four years earlier. He hasn't been prosecuted for it, hasn't been served for defamation on it. He is just referring back, he is republishing the same matter. If it wasn't calculated to damage the administration of justice in 1995 how can it be calculated, in 1999, prosecuted in 2001, to damage the administration of justice?

HIS HONOUR: Well, it would have been put in part of the way beyond doubt as to what it was in fact saying if it says "A policeman admitted to me ..."

MR MAXWELL: I accept that, Your Honour, and it may be a fair

criticism of this book that there is a want of precision of language.

HIS HONOUR: Well, that might also go to the bona fides, mightn't it?

MR MAXWELL: It might.

HIS HONOUR: If it is drawn in a way so as to give an impression which you say is quite wrong.

MR MAXWELL: Yes, Your Honour. Well, I can't put it any differently than to say in our respectful submission it isn't to be read in that way, and accordingly, it is not to be read as having disingenuously been intended to create an impression of a different setting for the admission from that which is in fact deposed to in the book. What is important, in our respectful submission, on the good faith point, is that the book, where the admission or confession is set out, doesn't overstate it. As Your Honour pointed out to me, it is just recorded as a conversation, and that is on the public record. It is on sale. It is available.

HIS HONOUR: But it is not in this book.

MR MAXWELL: I think Your Honour is correct, that that is not repeated verbatim in this book. But in our respectful submission it would be imposing a high burden on an amateur author to require that things he has previously said, and have not been challenged, have to be rehearsed in another book dealing with subsequent events already at great length; that it is a proper - it is just an academic referring back to something that he or she had written in an earlier article.
He refers at length in his introductory pages to these other books, and in our respectful submission there

can be no criticism of, as it were, incorporating by reference what has been said fairly, that is to say not in an overstated way, in the place where it is; and that is made more, even clearer, on the back cover where there is the reference to the 1995 publication. In other words, he is expressly directing the reader to something written in 1995 and the reader will want to find out what that was and where it is, and accordingly, there is no basis, in our submission, for an inference of bad faith or trying to make this more than deliberately overstating things. Your Honour, the balance of the discussion of Magistrate Adams deals with separate matters; one concerning the Jennifer Tanner inquest, and his finding in that matter having been quashed and overturned. That is a proper matter for comment. Those Tanner proceedings have been matters of extensive public discussion.

HIS HONOUR: Well, those matters are not alleged as part of the Crown - - -

MR MAXWELL: That is so. They are not. But it is to be seen that this is part of a sincere endeavour to identify those persons, which in the view of the author should be called into question for their discharge of their duties. And then finally, a reference to criticism of the same Magistrate for his handling of other cases. In our respectful submission, as we have said on other points, if there is credible evidence of a policeman having paid off a Magistrate, that is a matter of great seriousness and worthy of investigation. It is, in our respectful submission, paradoxical that, it not having been investigated, as we understand it, equally not prosecuted at the time when the substantive allegation is made, there

is now, effectively six years after the original publication of the Hoser Files, a prosecution for the re-publication of that serious allegation.
Your Honour, those are all the submissions on the context.

MR GRAHAM: Your Honour, if Your Honour pleases, before my learned friend turns to his submissions based upon the decision of the High Court in Lange and the Australian Broadcasting Corporation, I would seek to put to Your Honour a submission that this is not the time for that matter to be dealt with by Your Honour.
I say that for two reasons: one is the very nature of the argument. It is not a suitable matter to be dealt with by Your Honour in this context of a no-case submission. Secondly, it is a matter going to a defence to the charges, which should be dealt with by Your Honour in the context of the whole case, and not at this stage.

HIS HONOUR: If I was persuaded, though, that Lange meant that criticisms of courts and the judiciary in these contexts were covered by a constitutional protection, then it would follow that there could not be a case to answer on that basis, wouldn't it?

MR GRAHAM: Well, Your Honour, I take you back to my first point, that Your Honour should look at the question of the applicability of the Lange principle in the context of the whole case, not in the context of half of it. If Your Honour pleases.

HIS HONOUR: Yes. What do you say, Mr Maxwell?

MR MAXWELL: Your Honour, we respectfully adopt what just fell from Your Honour. There is no basis in logic or principle for the distinction my learned friend seeks to draw about

the whole of the case. With respect, Your Honour has absolutely understood how we put the Lange point, which is that it goes to the scope of this offence, and we have put the case in two ways. Properly defined, contempt is only committed if there is a real likelihood of damage to the administration of justice - - -

HIS HONOUR: Can I just interrupt to say this: it seems to me that the answer to it is that what we are concerned with, at the moment, is the Crown case at its highest.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: If you have to accept the Crown case at its highest in determining the Lange test, then it must follow that on any proposition that the Crown would want to argue, insofar as Lange is concerned, and whether it should or should not apply, this would be a time when the Crown case was most likely to demonstrate that there could be no immunity by virtue of Lange.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Yes. I will hear you on it. It may well be that, depending on what occurred in the case, it was an issue that might well re-emerge. I don't say that - - -

MR MAXWELL: No, Your Honour. I accept that.

HIS HONOUR: It follows that it could only be relevant at the time of a no-case submission.

MR MAXWELL: Yes, Your Honour. Well, Your Honour, if I might then start the submission. It wasn't intended to be lengthy. I will try and finish this afternoon on the point.
As I was saying a moment ago, our primary submission, as set out in the summary at the start, is that the offence is narrowly defined at common law, and it is only

committed if there is a real risk of actual damage to the system of justice. If we are wrong about that, and the common law definition is broader and would allow - sorry, and we say on the first limb, this publication or these publications don't meet that requirement so the charge should be dismissed - if the test is broader, and something less than a real and definite, or an imminent danger, to use the American language, of actual damage to the legal system is too strong - I beg Your Honour's pardon - if the common law offence is not as stringent as that, but you can commit it by conduct which falls short of that, then we say Lange requires that it be limited to that because that, in the words of the High Court, is the extent to which the law is "appropriate and adapted", to the legitimate object, which is to protect the administration of justice, and that you would only intrude on the freedom to the extent necessary to prevent actual damage about to occur.

In that way, applying what Lange said about defamation, to contempt, the law of contempt pro tanto is invalid because it offends the freedom and is not appropriate and adapted to the object that the particular law is designed to serve.

If I might, in that regard, take Your Honour immediately to Lange, which is in the folder at tab 17, and at tab 17, Your Honour, if I might shortly Your Honour refer to the headnote - this was a matter which had gone to the High Court. It was removed from the court of first instance under the Judiciary Act, and then a question was stated. The question was, the case was reserved for the Full Court about the defence made by the Corporation, and

Your Honour will see on the right hand page, 521, about point 6 of the page, "By paragraph 10 of the its amended defence, the Corporation pleaded the matter complained of was published pursuant to a freedom guarantee", et cetera, and the question was is that a good defence in law? "Held" - as Your Honour can see from the headnote, "The constitution protects that freedom of communication". I won't read that in order to save time. "That freedom is not confined to election periods". And then 2 - and this is really the critical point - that "the freedom does not invalidate a law whose object is compatible with the maintenance of the constitutionally prescribed system of representative government, so long as the law is reasonably appropriate and adapted to achieving that legitimate object".

If Your Honour would then go to 561, in the joint judgment, and Their Honours say at the beginning of the last paragraph on the page "The freedom of communication which the constitution protects is not absolute", referring to Nationwide News which is in Your Honour's volume at tab 22, and also to Theofanous which is not. "It is limited to what is necessary for the effective ... (reads)... by the constitution". The last two lines: "The freedom ... (reads)... if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of government or the procedure" - leave that out. "The second is that the law is reasonably appropriate and adapted to achieving that legitimate object and end".

To respond to what Their Honours say, we respectfully

submit as follows: on the first condition, the law of contempt is, to the extent that its object is the protection of the administration of justice, compatible with the maintenance of the system of government. So the law survives the first test. There might be something which was just incompatible with that system and would be wholly invalid. We accept that the object of the law of contempt, in this instance to protect the administration of justice against damage, is compatible with the system of government. Indeed, given that the judicial system - and we have in mind here, of course, the State Judges exercising federal jurisdiction - that is the judicial arm of government. It is essential to the system of government that the administration of justice be protected.

The second condition is that the law is reasonably appropriate and adapted. In our respectful submission, the law of contempt is only reasonably appropriate and adapted to that end to the extent that it does that, and no more; that is to say, it operates to punish or deter publication, the effect of which would be to damage the system of justice in the way we identify in paragraph 25 of our outline, that is, preventing judges and magistrates doing their job because they won't be able to decide cases fairly and free of external pressure; or (b), having the result that members of the community won't obey orders of court.

Those are the critical matters in the integrity of the justice system, and the law of contempt by scandalising is valid only to the extent that it applies to publications which have that tendency as a matter of

practical reality.
If the common law, as I submitted earlier, goes beyond that, such that my clients would otherwise be liable to conviction for scandalising the court in respect of these publications, then in its application to them, or to conduct of this kind, the law is invalid because it is not appropriate and adapted to the legitimate end; that is, it is not an application of the law which is necessary to prevent that damage, because we say, in 26, the conduct in question here has no such tendency.
The words may have a tendency to bring individual persons into disrepute, but our case, throughout, has been that the conduct has no tendency, as a matter of practical reality, to cause either of the effects referred to in 26, and the justice system functions as well today, as perfectly or imperfectly today, as it did in 1995 when the first book was written, and in 1999 when the relevant books were written.
Now that Your Honour knows what kind of book it is, and the way it is written, put together, justified, and the perspective from which it is written, we invite Your Honour to hold that it is not open, as a matter of fact, to find that it has any such tendency to cause damage as a matter of practical reality. And that conclusion means either that no offence is committed because the offence is properly defined narrowly; or, if it would otherwise be committed, the offence has to be read more narrowly because of Lange.
I should draw Your Honour's attention, in Colina v. Torney, to the judgment of Justice Ellis. At paragraph 33 this argument was made and - - -

HIS HONOUR: Does the statement of law in Lange really, though, add anything to what is already the law with respect to contempt, and the balancing of the two factors? I mean, if you inserted the principles stated in Lange into some of the early judgments which referred to the dichotomy between freedom of speech on the one hand and maintaining the court's administration, you don't really need to be referring to Lange at all, do you? It is just part and parcel of the same principle.

MR MAXWELL: With respect, Your Honour is absolutely correct. But what Lange has done is to give added force and legal status to the freedom of speech part of the - it is easy enough to say, well, there are competing interests here. The courts have said that. Indeed, they have gone further and, as we have pointed out, emphasised the freedom. In that respect what Your Honour puts to me is right. What they have really done is they have said the law should deal with this, but it should than trespass into the area of debate. As Your Honour says, Lange says that. We only make the Lange argument against the possibility that the common law, taken by itself, would apply no conduct, whereas we say, applying a stricter Lange test, it wouldn't.

HIS HONOUR: I say that without considering the question of whether the reference to government and political matters should be extended to include legal matters - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Or the operation of the courts, and that may well be a separate issue. But if you are right that government and political matters should be taken to extend, then in a sense Lange is saying nothing else. If it doesn't extend

to that, then you fall back to the original statements which were made in the courts without a constitutional basis.

MR MAXWELL: Absolutely so, Your Honour, with respect. And the House of Lords or the Privy Council in Ahnee said as much.

HIS HONOUR: They agreed.

MR MAXWELL: We don't need to worry about what the Constitution says about freedom of speech because that is taken into account in defining the offence. So this is an alternative submission and, Your Honour, the conclusion reached by Justice Ellis is very much to the effect of what Your Honour just put to me.
I will just give Your Honour the reference - paragraph 33 in Torney, tab 6. It doesn't affect His Honour's dealing with the matter, and he concludes that the law of scandalising doesn't infringe the freedom of communication within the Constitution.

HIS HONOUR: Paragraph 33.

MR MAXWELL: 33, bottom of page 12.

HIS HONOUR: Right.

MR MAXWELL: We say that you don't ask the question about the law of scandalising in general. You test it, more accurately, by saying the law of scandalising in its application to this conduct. But the answer, in all probability - well I withdraw that.
On our first submission, it is unnecessary to get to Lange because the offence, properly characterised, is defined as narrowly as Lange would have it and, for that reason, the offence has not been committed.
There should be a reference, for completeness, to Hammersley, which is in tab 12 - not a case we put in, but

there is a discussion in the context of contempt of court about the implied freedom, a decision of the Full Court of Western Australia, and - - -

HIS HONOUR: Sorry, what tab is that? Or don't I - - -

MR MAXWELL: That is tab 12 and, Your Honour, that concerns a contempt of a quite different kind, being breach of the implied undertaking with respect to discovered documents. So Your Honour should know that it is there.
The last matter I wanted to give Your Honour, before the adjournment, is a copy of the extract from Pennekamp, which is footnoted. It is only an extract about the clear and present danger notion, which we say is a useful guide in trying to define what is critical about the vice of scandalising publications, and I want to give Your Honour copies of the Crown and Kopyto, which is in the list but not in - - -

HIS HONOUR: What is the name of that case?

MR MAXWELL: Kopyto, K-o-p-y-t-o, a decision of the Ontario Court of Appeal. It is referred to in tab 29, and I will hand both of those up to Your Honour, that is, Pennekamp and Kopyto. If Your Honour what permit me, because this will be the end of my submissions - - -

HIS HONOUR: Yes.

MR MAXWELL: To refer Your Honour just to two parts of Kopyto. Your Honour, at 52 - and this is relevant to our - might I mention, first, what Justice of Appeal Corey says at 14 to 15. There is a discussion similar to those to which - - -

HIS HONOUR: Sorry, pages 14 to 15?

MR MAXWELL: 14 to 15, "The importance of freedom of expression and hyperbole" - this is point 7 on page - - -

HIS HONOUR: Don't take me through it at this stage; just

identify the passages.

MR MAXWELL: Thank you. There is a reference at page 52, in the middle of the page, to surrounding circumstances. As we say in paragraph 16 of other outline - does Your Honour see the paragraph - "The social, economic and political conditions existing ..."?

HIS HONOUR: Yes.

MR MAXWELL: All of that paragraph. Then there is discussion, finally, in the minority at 78, the first full paragraph, about the need to show, for the offence, serious, real or substantial risk or prejudice to the administration of justice. 78, in the first paragraph on the left-hand side "It was essential for the Crown ..." - that paragraph.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, for those reasons, in our respectful submission, Your Honour should be satisfied that there is no case to answer.

HIS HONOUR: Mr Graham, this was originally, I noticed, listed as five days. It was then changed to two days. What is the likely timetable?

MR GRAHAM: I would have thought this case would go into next week, Your Honour. But I had not expected there to be a submission of no-case that lasted for over a day on one side, which will take me a day to respond to, followed by such evidence or further evidence, evidence as may be led by the respondents, followed by final addresses, which perhaps will more shortly cover a good deal of the ground covered in relation to this submission.

HIS HONOUR: Well, the first issue was the no-case submission. You would expect to take the better part of tomorrow in responding to that?

MR GRAHAM: Yes, Your Honour.

HIS HONOUR: All right. The question of the timetable after that, I will obviously - matters of substance have been raised. I will obviously have to rule on that. The question of how long I would take to rule on that is a matter which I will turn my mind to when I am closer to the end of the submissions on the no-case. But it may well be that we will all need to come along armed with diaries as to where we go from here.
I should just mention that, tomorrow morning, there is a Council of Judges meeting which I don't expect will go beyond 10:30; but for the convenience of parties, I advise that it is possible that it might go a bit past 10:30, in which case I will start just as quickly as I can. There may be a ten minute delay, or something of that sort, but I will try to avoid that.

MR GRAHAM: Thank you, Your Honour.

HIS HONOUR: All right. We will adjourn now until 10:30 tomorrow morning.
ADJOURNED UNTIL 10:30 A.M., THURSDAY, 25 OCTOBER 2001.