

## THE MONEY OR THE TRUTH: DEFAMATION REFORM IN AUSTRALIA AND THE USA

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### I. THE AMERICAN IMPACT ON THE AUSTRALIAN DEFAMATION REFORM DEBATE

Until recently, significant defamation reform in Australia had not taken place for years, though it seemed always to be just around the corner. But after many instances of legislative inaction in response to reform proposals, the High Court took the lead in October 1994. By a bare majority, it ruled in two decisions, *Theophanous v Herald & Weekly Times*<sup>1</sup> and *Stephens v West Australian Newspapers*,<sup>2</sup> that the implied guarantee of freedom of political discourse that it had discerned in the Commonwealth Constitution in two leading decisions two

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1 (1994) 124 ALR 1.

2 (1994) 124 ALR 80.

years earlier<sup>3</sup> prevented defamation law from unduly inhibiting the discussion of political affairs. The specific constitutional privilege that it established within defamation law is outlined below.<sup>4</sup> Concurrently, an initiative for joint reform in the eastern States that began in 1990 was being maintained by separate endeavours in individual States, notably in New South Wales. A Discussion Paper had been released<sup>5</sup> by the NSW Law Reform Commission in September 1993: its final Report is due to come out in September 1995.

An idea persistently thrown up in the numerous debates is that the High Court and/or the legislature should import from America the 'public figure defence'. This is a rule, stemming from the 1964 US Supreme Court case of *New York Times v Sullivan*,<sup>6</sup> that 'public figures' cannot recover damages for defamation unless they can prove that the defamatory material was false and that there was "actual malice": ie that the defendant publisher either knew that the material was false or "entertained serious doubts"<sup>7</sup> as to whether it was true.

Many media representatives and other bodies concerned with defamation reform<sup>8</sup> advocate the adoption of a rule of this sort, arguing that it would dispel the 'chilling effect' of the 'draconian' defamation laws that presently apply in Australia. When Attorneys-General or other politicians reject the idea - as they have done so far in the eastern States - it is alleged that they do so because they do not want to deprive themselves or their colleagues of the chance of acquiring a 'Fairfax swimming pool' or a 'Murdoch motor-launch'. The debate goes on from there, though not necessarily with useful results. Sometimes, it degenerates into an unproductive stalemate.

In this article, which is primarily concerned with defamation claims against the media, I propose first to assess the merits of the '*Sullivan* rule' (I prefer this terminology rather than 'public figure defence' - it is not actually a 'defence' at all). This is done with reference to two considerations in particular. The first of these is the rule's current rating in its homeland. It raises questions such as how well the rule works in actual practice and how far it actually promotes freedom of debate on matters of public interest by eliminating the 'chill' of defamation laws. The second consideration is one raised in the title of the article - that is, whether the rule assists or impedes the ascertainment of truth in defamation litigation.

The article then poses similar questions regarding freedom of debate and the ascertainment of truth in relation to the defences within Australian law that come, or could come, closest to the *Sullivan* rule - ie qualified privilege and the 'constitutional privilege' created by the High Court in *Theophanous* and *Stephens*. It concludes with an outline and assessment of relevant reform measures being

3 *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

4 At Section IV, p 317.

5 New South Wales Law Reform Commission Discussion Paper 32, *Defamation*, 1993.

6 376 US 254 (1964).

7 *St Amant v Thompson* 390 US 727 at 731 (1968).

8 Examples are the Australian Press Council, the Law Institute of Victoria and (by majority) the Law Council of Australia: see Legislation Committee, Parliament of NSW, *Report on the Defamation Bill 1992*, 1992 at chapter 9. See too Free Speech Committee, *Defamation Law In New South Wales: Proposals for Reform*, September 1990 at 10-11.

debated in America and in Australia - in particular, various proposals for non-monetary remedies for defamation, such as judicial declarations and correction orders.

## II. THE SULLIVAN RULE ASSESSED

The justifications for the *Sullivan* rule<sup>9</sup> begin with the proposition that vigorous open debate on matters of public concern is an essential ingredient of the freedoms of speech and the press that are mandated by the First Amendment to the American Constitution. It is maintained that this debate, whether conducted in the media or elsewhere, will be stifled if there is no significant leeway for error. Journalists and other critical observers of public life will be unable to expose venality, corruption or incompetence by the holders of public office if inadvertent errors or inaccuracies expose them to crippling defamation litigation ending in substantial awards of damages. Defamation law will operate as a highly effective substitute for a law of sedition: that is, it will be available to those wielding significant public power as a means of punishing and stifling legitimate criticism of the ways in which they use that power.<sup>10</sup>

Furthermore, it is said that when a mistake on the media's part induces them to publish an untrue or unsubstantiated defamatory allegation about a politician or public official, or indeed about anyone in the public eye, that person will always have sufficient access to the media to respond with a denial or explanation, if not a counter-attack. Public officials or figures, when they enter public life, know or should know that they will encounter public criticism and that they must be prepared to rely on this access to the media to cure any damage to their reputation. Finally, because certain categories of public official - notably Members of Parliament - are immune from defamation claims under doctrines such as parliamentary privilege, it is not at all unfair to restrict significantly their right to sue for defamation.

It therefore follows, so the argument runs, that the *Sullivan* rule is quite justified in doing two key things to the law of defamation:

1. requiring that 'public official' or 'public figure' plaintiffs leap over a distinctly higher hurdle than anyone else if they are to succeed at all; and
2. establishing as the relevant hurdle that there be "clear and convincing" proof of known or reckless falsehood.

This logic seems both straightforward and compelling. It is persuasive for many American and Australian supporters of the rule. However, a phenomenon not fully appreciated in Australia is the existence in America of a substantial body of expert, articulate, and strident critics of the rule. These critics generally defend the

9 See generally A Lewis, *Make No Law: The Sullivan Case and the First Amendment*, Random House (1991) especially chapters 14-16.

10 See eg NL Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel*, University of North Carolina Press (1986) pp 10-11.

aspirations of *New York Times v Sullivan*, but they are distinctly less enthusiastic about its achievements.<sup>11</sup>

I will quote four examples of the widespread, though by no means unanimous, American dissatisfaction with the way in which American defamation law has developed since *New York Times v Sullivan*. First, an academic lawyer:

What the [Supreme] Court could not have foreseen was that it might have created the worst of all possible worlds, where the rules designed to free the press from a chilling effect nevertheless do not keep it warm enough, while reputational interests, recognized by other rules, remain consistently frustrated. A quarter-century of litigation since *New York Times* has led to the ironic situation where the law of libel protects neither the press nor the individual. Libel has become a lose-lose proposition.<sup>12</sup>

Another academic:

As it stands today, libel law is not worth saving... If we can do no better, honesty and efficiency demand that we abolish the law of libel... No matter how much it values speech, however, a civilized society cannot refuse to protect reputation. Some form of libel law is as essential to the health of the commonwealth and the press as it is to the victims of defamation.<sup>13</sup>

Next, a judge:

The high capacity of the post-*Sullivan* libel law to frustrate the interests of both sides has been noted by several commentators...<sup>14</sup>

Finally, two media executives and a media defence lawyer writing in collaboration:

Skyrocketing insurance costs, unrestrained damages awards, and unacceptably high litigation expenses - these phenomena have recently converged to precipitate a liability crisis that has spawned a sweeping national movement to reform significant aspects of tort law and tort litigation expenses... [T]he tort of libel is as severely afflicted as any other tort, and is in every bit as much need of reform.<sup>15</sup>

How has it all gone wrong? Why has the *Sullivan* decision, initially hailed as "an occasion for dancing in the streets",<sup>16</sup> proved ineffective, if not counter-productive, in relation to its aims? As these quotations show, the *Sullivan* rule itself is not wholly to blame. Problems arise also from the interaction of this rule with the pre-existing law of defamation and with general aspects of American tort law and procedure. In the following paragraphs, I will outline the most significant of these problems.

11 See eg LA Powe Jr, *The Fourth Estate and the Constitution: Freedom of the Press in America*, University of California Press (1991) chapter 4; J Soloski, R Bezanson (eds), *Reforming Libel Law*, Guildford (1992); WB Eberhard, "There's Got to Be a Better Way: Alternatives to the High Cost of Libel" (1987) 38 *Mercer Law Review* 819; N Strossen, "A Defence of the Aspirations - But Not the Achievements - of the US Rules Limiting Defamation Actions by Public Officials or Public Figures" (1986) 15 *Melbourne University Law Review* 419.

12 LA Powe, *ibid*, pp 120-1.

13 DA Anderson, "Is Libel Law Worth Reforming?" in J Soloski, R Bezanson, note 11 *supra* 1 at 1-2.

14 PN Leval, "The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place" in J Soloski, R Bezanson, note 11 *supra* 210 at 212.

15 HR Kaufman, HM Johnston III, AD Sackler, "Tort Reform and Libel" [December, 1988] *Communications and the Law* 15 at 15.

16 The phrase comes from A Meiklejohn, a noted philosopher of free speech: see eg A Lewis, note 9 *supra*, p 200.

### A. Complex Categories of Plaintiff

The *Sullivan* rule, as initially formulated, covered public officials. It was later extended to 'public figures', that is (broadly speaking), to people in the public eye. To reach this result, there had to be a number of cases to establish whether public prominence, such as that which a football coach or film star might enjoy, was sufficient and if so, whether people whose prominent public profile was wholly or substantially involuntary should be treated as public figures. As a further refinement, the sub-categories of public figure "for all purposes" and voluntary or involuntary public figure "for limited purposes only" were created.<sup>17</sup> There were also periods of back-track: during one of them, the concept of public interest alone was used to determine when the "actual malice" test should be applied. Ultimately, however, the categorisation of public and private figures was firmly re-established.<sup>18</sup> Within the private figure category, different rules apply, depending on whether the issue involved is one of public or private concern: if it is the former, 'fault', in the sense of negligence at least, must be proved.<sup>19</sup>

These issues of classification have been complex and problematic throughout. They constitute one of several reasons for American libel law being labelled a "mysterious labyrinth for those seeking to clear their names and a costly and unpredictable burden for the speakers the First Amendment is designed to protect".<sup>20</sup>

### B. Dubious Merits of a 'Reverse Pecking Order' for Plaintiffs

The *Sullivan* rule creates a sort of 'reverse pecking order', in the sense that plaintiffs who are 'public officials' or 'public figures' are more vulnerable than the rest of the community to the pecking of political commentators and others, due to special limitations on their rights under defamation law. However, in singling out public officials for adverse treatment, the rule perpetuates an unduly simplistic and backward-looking view of the distinction between 'public' and 'private' and of the interplay between the public sector and the private sector in determining the conditions of life in modern society.<sup>21</sup> If the basis on which public official plaintiffs are to be disadvantaged in suing for defamation is that they are thought to have a specially influential role in determining conditions of life within the community, it is simply wrong to lump them all in the same category and to maintain the assumption that no-one outside the category has a similarly influential role. Whatever may have been the position in past times, according to a liberal-democratic theory of politics, it is clearly absurd nowadays to attribute greater power and influence within society to a relatively anonymous backbencher or a

17 See eg *Gertz v Robert Welch Inc* 418 US 323 (1974) at 345, 351.

18 See eg note 9 *supra*, chapters 17-19; F Schauer, "Public Figures" (1984) 25 *William and Mary Law Review* 90; note 13 *supra* at 8-10; S Ingber, "Rethinking Intangible Injuries: A Focus on Remedies" (1985) 73 *California Law Review* 772 at 824-9.

19 Note 17 *supra*; *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749 (1985).

20 LA Powe, note 11 *supra*, p 113; see too the criticism in J Tobin, "The United States Public Figure Test: Should it be Introduced into Australia?" (1994) 17(2) *UNSW Law Journal* 383 at 388-92.

21 See eg B Edgeworth, M Newcity, "Politicians, Defamation Law and the Public Figure Defence" (1992) 10(1) *Law in Context* 29 at 60-1.

public official of middle rank than to (for instance) a leading industrialist, such as the Managing Director of BHP, or a media magnate, such as Rupert Murdoch or Kerry Packer.

In developing the principles laid down in *Sullivan*, the American Supreme Court itself acknowledged the inadequacy of a concept of 'public official' for demarcating the range of defamation plaintiffs who should be affected by the *Sullivan* test of "actual malice". It accordingly added the category of 'public figure'. No doubt, many persons of power and influence outside the public sector do answer the description 'public figure'. But this category goes wider still: it covers people who are in the public eye for a whole range of reasons other than the exercise of public power, such as their sporting prowess. Moreover, it leaves out highly influential private sector people who (perhaps deliberately) maintain a low public profile. The extension from public officials to public figures in fact relies on a significantly different set of justifications, having chiefly to do with access to the media to present one's side of the story. It is not so obvious that this access is always so easily obtainable. It certainly might not be in a country, such as Australia, where there is a high concentration of media ownership.<sup>22</sup>

With reference to both parts of this untidy combination of public officials and public figures, the criticism is also made that the *Sullivan* rule deters people of high quality and integrity from entering public life. They do not want to be in the position of having virtually no recourse in defamation against unjustified attacks on their reputation. In the USA, the tort of privacy may come to their aid where the defamatory attack concerns their personal and private affairs, but the protection that this affords is far from comprehensive.<sup>23</sup>

### C. Difficulty and Expense of Litigating 'Fault'

To win a defamation case in the USA, a plaintiff who is a public official or public figure must prove not only falsity but also knowledge of, or reckless indifference to, that falsity. At issue therefore is the state of mind of the person or persons responsible for the defamatory publication. Complexities arise when the publication as it finally appears is the work of several people - junior reporter, senior reporter, sub-editor etc. In addition, the determination whether there really was knowledge of falsity or reckless indifference on this issue can involve close scrutiny of all the circumstances leading up to the publication and all relevant documents, tapes, videotapes etc directly or indirectly involved.

An American tradition of lengthy, sophisticated, and exhaustive discovery procedures, developed by virtue particularly of class actions, can turn this into a remarkably arduous process. The media defendant in the 1979 case of *Herbert v Lando*<sup>24</sup> argued to the Supreme Court that this investigation of its internal processes threatened editorial independence so severely as to violate the First Amendment's protection of freedom of the press. The Court held, however, that it

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22 See eg note 5 *supra* at 187.

23 *Ibid* at 180-1.

24 441 US 153 (1978); for discussion, see eg SM Matheson Jr, "Procedure in Public Person Defamation Cases: The Impact of the First Amendment" (1987) 66 *Texas Law Review* 217 at 246-57; D Cendali, "Note" (1985) 22 *Harvard Journal on Legislation* 441.

was an inevitable concomitant of the requirement in *Sullivan* that a public figure plaintiff must prove knowing or reckless falsity with “convincing clarity”. The outcome is, accordingly, that the pre-trial processes can be hugely time-consuming and expensive. In *Herbert v Lando* itself, discovery entailed taking depositions from the defendant journalist during 26 separate court sessions over a full year. There were 2 903 pages of transcript and 240 exhibits.<sup>25</sup>

#### D. Overruling of Journalists’ Privilege

In the USA, the right of a journalist to argue that he or she should not be compelled to reveal confidential sources is established by statute in many States, the Supreme Court having held that a privilege of this nature may be so established though it is not constitutionally conferred by the First Amendment.<sup>26</sup> In cases under the *Sullivan* rule, however, it will be especially hard for a defending journalist to win with this argument. This is because the existence and identity of an alleged confidential source and the content of what the source allegedly revealed are crucial evidence in determining the key issue of knowledge of, or reckless indifference as to, falsity.<sup>27</sup>

#### E. Excessive Damage Awards Resulting from Jury’s Focus on Media ‘Fault’

In a fully litigated case against a media defendant under the *Sullivan* rule, the jury (or on occasions a judge - the parties can usually opt if they wish for a ‘bench trial’) will be exposed to all the evidence that the plaintiff can produce to show that the defendant behaved recklessly, if not maliciously, in falsely defaming the plaintiff. If the evidence is believed, any prejudice against the media that the jury members already have can be given full expression through a massive award of damages. The jury, in addition to compensating the plaintiff for harm to reputation and to feelings, can display its dislike of media practices by also awarding a huge sum as punitive damages, following standard American tort rules regarding damages. A recent survey has found that the *average* jury award to successful plaintiffs against media defendants in the years 1990-91 was more than \$9 million. The median figure in that period was \$1.5 million. The highest award on record is \$58 million.<sup>28</sup>

#### F. High Incidence of Successful Appeals by Defendants

Out of concern to ensure that the First Amendment values enshrined in the *Sullivan* rule are fully adhered to in its implementation, the Supreme Court has laid down that its essential requirements, notably that of “clear and convincing” proof of known or reckless falsity, must be subjected in any appeal to independent judicial review involving an examination of the whole record.<sup>29</sup> This approach

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25 D Cendali, *Ibid* at 446-7.

26 *Branzburg v Hayes* 408 US 665 (1972).

27 See eg LA Powe, note 11 *supra*, pp 185-6.

28 Note 5 *supra* at 183-4, 196 (note 41).

29 See eg *Bose Corp v Consumers Union of United States Inc* 466 US 485 (1984); SM Matheson, note 24 *supra* at 271-84.

would seem to stem from the Court's concern in the *Sullivan* decision itself that the trial court (the Alabama Supreme Court) had interpreted and applied the libel law of the time in a manner which was both manifestly unfair to the defendants and hostile to free speech.<sup>30</sup> It is a distinctly intrusive form of judicial supervision - almost certainly more intrusive than in other appeals from jury verdicts in the USA - and arguably it involves the appeal court in 'state of mind' rulings that are inappropriate for a court that does not see or hear the witnesses.

More significantly for present purposes, it means that only a small proportion of these jury awards of huge damages - particularly awards against media defendants - survive the appeal process. Because the appeal court frequently believes that the jury has been too ready to infer the necessary knowledge or recklessness, many of these verdicts are overturned completely. Others are massively reduced in amount because the appeal court detects an undue readiness to award heavy punitive damages. The highest award to survive appeal is \$3 million; the average 'take-home' figure has been estimated as low as \$20 000.<sup>31</sup>

Typically, therefore, the public official or public figure plaintiff will end up with total defeat or a pyrrhic victory. The defendant, even if victorious in formal terms, will have devoted enormous time and resources to conducting the defence. Under US costs rules the defendant, even if victorious, will have to pay the very expensive bill for the legal costs of the defence. The plaintiff, having most likely negotiated a contingent fee arrangement, will be better treated in this regard but will still have had to meet out-of-pocket expenses.

In view of the low success rate for these plaintiffs, it may seem surprising that plaintiffs' lawyers are prepared to enter into contingency fee arrangements. The explanation appears to be that the considerable publicity attracted through taking such a case is deemed to compensate for the relatively low prospects of financial reward out of the proceeds of judgment.<sup>32</sup> There is, accordingly, no reason to suspect that the lawyers on either side are dissatisfied with the way in which the *Sullivan* rule operates. It is their clients that have most clearly suffered.

### G. Tendency to Promote Unsatisfactory Regulatory Standard

It has been argued<sup>33</sup> that, since tort law standards inevitably affect not only the relations between private individuals but also the conduct of all forms of enterprise in public life, it is appropriate to examine the *Sullivan* rule as an aspect of the regulatory standards governing media performance. A recent comprehensive investigation of US cases under the *Sullivan* rule<sup>34</sup> does indeed show a high incidence of judicial pronouncements on the standard of professional performance of media defendants. Seen from this perspective, the rule has clear shortcomings. First and foremost, it creates "perverse incentives": it encourages sloppy

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30 See eg RA Epstein, "Was *New York Times v Sullivan* Wrong?" (1986) 53 *University of Chicago Law Review* 782 at 786-92.

31 See DA Anderson, note 13 *supra* at 17-18; LA Powe, note 11 *supra*, p 130.

32 LA Powe, note 11 *supra*, p 116.

33 MM Shapiro, "Libel Regulatory Analysis" (1986) 74 *California Law Review* 883.

34 BC Murchison, J Soloski, RP Bezanson, G Cranberg, RL Wissler, "*Sullivan's* Paradox: The Emergence of Judicial Standards of Journalism" (1994) 73 *North Carolina Law Review* 7.



journalism because the lower the standard of care that is seen as 'normal' for journalists, the harder it will be for public figure plaintiffs to prove the greater dereliction of 'recklessness' required under the *Sullivan* rule. Secondly, since it focuses on quality of process rather than performance standards, proof of a breach of standards requires (as just pointed out) an uncomfortably intrusive investigation of the inner operations of the organisation concerned. Thirdly, because it obscures the truth/falsehood issue (as elaborated in the next paragraph), it "is ill tailored to achieve one important regulatory goal, preventing injury to individuals through falsehoods".<sup>35</sup>

## H. No Resolution of Issue of Truth

Since the Supreme Court case of *Philadelphia Newspapers v Hepps*<sup>36</sup> in 1986, a public plaintiff has clearly borne the specific onus of proving the relevant defamatory allegation to be false. Even before then, it was arguable that he or she had this onus.<sup>37</sup> It does not follow, however, that a case brought under the *Sullivan* rule will always produce an adjudication on the issue of truth. A win by the plaintiff, particularly since 1986, does convey the message that the allegation was false. However, as indicated above, very frequently the plaintiff loses.

This often happens as a result of a successful motion by the defendant for summary judgment. It has in fact been estimated that some three-quarters of cases filed never get to trial.<sup>38</sup> Many of these motions succeed solely because the plaintiff cannot produce sufficient evidence of knowledge of falsity or recklessness by the defendant. A loss by the plaintiff, at least against a media defendant, is less likely at the trial because of tendencies among juries to want to punish the media. On appeal, the position changes again; as just indicated, verdicts for plaintiffs are often overturned.

The important point is that since, in most of these cases, the reason why the plaintiff loses is a failure to prove with "convincing clarity" an issue of subjective fault on the defendant's part - knowledge of falsity or recklessness as to falsity - the objective issue of truth or falsity is often not directly addressed, let alone clearly resolved. It follows that, "[w]hatever the popular view may be, truth and falsity have very little to do with libel litigation... It is now the defendant's conduct, rather than the plaintiff's reputation, that is on trial".<sup>39</sup>

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35 Note 33 *supra* at 885.

36 475 US 767 (1986); for discussion, see SM Matheson, note 24 *supra* at 241-5.

37 SM Matheson, note 24 *supra* at 242 (note 151).

38 *Ibid* at 285-302; M Franklin, "Winners and Losers and Why: A Study of Defamation Litigation" (1980) *American Bar Foundation Research Journal* 455 at 492; note 13 *supra* at 7-8.

39 LA Powe, note 11 *supra*, pp 121, 125

### III. TRUTH, TORT ACTIONS, FREEDOM OF SPEECH AND MALE VALUES

It will be apparent from these comments that I disagree firmly with any reform proposal for Australia that simply involves importing the *Sullivan* principle from the USA, lock, stock, and barrel. This is not to say that there may not be useful ideas and precepts in the package of legal principles that make up the *Sullivan* rule. However, for the moment I wish to probe a little more deeply the last in this series of criticisms of the *Sullivan* rule - viz that the rule in its actual operation does not significantly promote adjudication as to whether the defamatory material, to the extent that it comprises factual allegations, is true or false.

This part of the discussion, and indeed most of the rest of the article, will focus on factual defamatory imputations rather than those which constitute opinion or comment. This is appropriate because it is in the treatment of allegations of fact that the *Sullivan* rule most clearly diverges from Australian defamation law.

#### A. The Importance of Determining Truth

In my contention, an important yardstick by which to assess any defamation law is the extent to which it promotes the public adjudication of truth or falsity in cases of public interest. In the cases involving public officials or public figures to which the *Sullivan* rule relates, the interests of at least three parties or interest-groups will generally be better served - often, much better served - by such an adjudication. These are:

1. the plaintiffs themselves;
2. the governmental, commercial or other public entity from which their status as public official or public figure generally derives; and
3. the public at large.<sup>40</sup>

As regards plaintiffs themselves, I base this proposition significantly on numerous interviews of plaintiffs that have been conducted by the Iowa Libel Research Project.<sup>41</sup> These demonstrate reasonably clearly (even when allowance is made for *ex post facto* reconstruction of history by the interview subjects) that, at least in the immediate aftermath of the defamatory publication, what plaintiffs most want is public vindication of their reputation. If the defendant publisher would retract reasonably promptly, whether voluntarily or under threat of litigation or in fulfilment of a court order, most plaintiffs would feel vindicated and satisfied. It is when their requests for retraction are rudely fobbed off (one public figure complaining to a media organisation was told: "Fuck off, you're full of shit"<sup>42</sup>), or when lawyers whom they have consulted hold out the hope of a large

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40 For support, drawing attention particularly to the social and reputational costs of the *Sullivan* rule, see note 13 *supra* at 21-32; JG Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 *University of British Columbia Law Review* 15.

41 RP Bezanson, G Cranberg, J Soloski, *Libel Law and the Press: Myth and Reality*, Free Press (1987) pp 171-83.

42 Cited in LA Powe, note 11 *supra*, p 116.

verdict, that money starts to become more important than the truth - and even then, the wish to correct the record remains prominent.

The public entity - a government department, a local council, a trade union, a major industrial company, a professional football team - from which the plaintiff, through employment or some other association, often derives his or her status as a public official or public figure will almost inevitably be concerned to know whether the factual defamatory allegations are true or false. The exceptions will only be where the allegations relate to the plaintiff's private affairs in a way which casts no adverse light on his or her involvement with the public entity. So, for example, if a newspaper alleges that a local councillor is taking bribes from development companies, the truth or falsity of that defamatory allegation is undeniably a matter of considerable concern to the council.

This same example serves to demonstrate my third proposition - that the public at large will generally have an interest, sometimes a compelling interest, in authoritative adjudication of the truth or falsity of a defamatory allegation concerning a public official or public figure. Often that adjudication will have profound implications for the operation of public institutions. Where the plaintiff's status as a public figure is attributable to his or her involvement with a continuing public controversy instead of a public entity, the public will still generally be concerned with the truth/falsity question.

I want to reinforce this last argument, which may actually appear self-evident, in a way which appears relatively infrequently in the many contemporary critiques of the *Sullivan* rule. Much is said in these critiques about the crippling legal costs incurred by parties to defamation actions. There are only occasional mentions, however, of the cost of huge, protracted defamation proceedings - including numerous interlocutory proceedings and appeals - to the state.<sup>43</sup> Yet, it has been estimated recently in Australia that the cost of a jury trial to the state is around \$70 per minute, which works out at \$21 000 per day (assuming 5 hours of hearing per day) or \$105 000 per week.<sup>44</sup> The cost of interlocutory hearings and appeals must be added on. Taxpayers would get some return, at least, for this outlay if the proceedings delivered some sort of finding about the propriety or competence of the conduct of a person in public life.

Why have considerations such as these been ignored or overridden in the case-law originating with *New York Times v Sullivan*? It seems to me that the reasons have a great deal to do with three things:

1. the type of civil claim - a tort action - that a defamation claim is;
2. the Supreme Court's conceptions of freedom of speech and freedom of the press; and
3. the phenomenon of defamation as 'gendered harm'.

I will address these three matters separately.

43 See eg DA Barrett, "Declaratory Judgments for Libel: A Better Alternative" in J Soloski, R Bezanson, note 11 *supra* at 117.

44 Suggested by Mr Justice Wood, "Managing White Collar Crime", presented at *National Crime Authority Conference*, Melbourne, May 1992.

## B. The Nature of Tort Claims

In the common law, torts are civil wrongs, arising independently of any contract or trust, for which the primary, if not the sole, remedy is an award of damages to compensate for the injury suffered. They generally entail a categorisation of the defendant as a 'wrongdoer' who must shoulder the responsibility for culpable conduct that has inflicted harm on the plaintiff and must make good that harm by paying money to the plaintiff out of his or her own pocket.<sup>45</sup>

A tort action depicts the relevant wrong and its legal implications as essentially a private matter between the injured plaintiff and the wrongdoer defendant. When the action succeeds, the payment of compensation settles the score between them and brings the matter to an end as far as the law is concerned. While in some circumstances, an injunction can be obtained instead or in addition, the basic and most common remedy remains an award of damages.

In relation to many torts, however, this simple one-to-one contest with its single remedial outcome has been recognised as too simple in today's world, where social interactions are much closer and legal techniques more sophisticated than when tort claims were first developed in the common law. Nowadays, scarcely any serious injuries or wrongs affect the victim and the wrongdoer and no-one else. It is recognised within the structure of civil legal remedies, moreover, that money does not cure all injuries.

Many areas of tort law reflect these developments. For example, landowners can invoke the tort of nuisance to sue their neighbours for an injunction as well as, or instead of, damages when the neighbour's activities have interfered unreasonably with their enjoyment of their land. Such claims are quite rare, however, for the simple reason that in closely settled urban environments, such unneighbourly conduct usually affects the whole of the neighbourhood. The issues involved are settled instead by planning controls, environmental legislation and the like. Even in cases where an injury is clearly quite specific to the plaintiff - for example, when a pedestrian is run over and injured by a careless driver - the relevant tort claim, generally involving the tort of negligence, has a superstructure of statutory rules, which do such things as requiring compulsory third party insurance for drivers, regulating amounts of damages, and promoting rehabilitation of the victim. These rules are both orientated to improving the plaintiff's situation beyond what a one-to-one award of damages would achieve and indicative of the fact that many other interests are implicated - for example, those of the plaintiff's family, health carers and the social security budget.

Turning now to the tort of defamation, a 'public dimension' was clearly apparent in several of its basic concepts - notably those of reputation and 'public interest' - even before the *Sullivan* case. Moreover, as I have argued above, the plaintiff, some 'public entity' with which he or she is frequently associated, and the public at large are all likely to consider a formal adjudication of truth or falsity to be valuable. Yet paradoxically the essential tort structure remains intact. A defamation action is a one-to-one claim by an injured plaintiff against a defendant who, if found to be responsible for the harm, will be ordered to pay money

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45 See eg JG Fleming, *Law of Torts*, Law Book Co (8th ed, 1992), chapter 1.

damages to compensate the plaintiff for the injury. As far as the law is concerned, that is an end of the matter.

The *Sullivan* decision, by introducing the categories of 'public official' and 'public figure', acknowledged further the public dimensions of many defamatory publications. But it also accentuated significantly these classically tort-like features of defamation claims. It gave further prominence to fault on the part of the defendant, through requiring that dissemination of false defamatory material with knowledge of, or reckless indifference to, its falsity must be proved. Since at the same time it did nothing to restrict the amount of damages awarded, whether as compensation or as punishment, and nothing to promote the development of alternative remedies, it preserved the classic tort remedy of money damages as the sole, all-or-nothing outcome of a defamation action.

The adherence to a classic tort structure is typical of modern American tort law generally.<sup>46</sup> In other common law jurisdictions, there has been sustained criticism of the inherent 'individual responsibility' bias of tort actions in many important contexts. This criticism has on occasions led to abolition of tort claims with respect to particular types of harm: an example is the statutory no-fault accident compensation scheme in New Zealand. However, in America, such criticism has made little headway.

There are exceptions, of course. A relatively recent American article<sup>47</sup> suggested something like a state-created insurance fund to compensate the harm that defamed public figures suffer because of the state's determination, under the *Sullivan* rule, to maintain freedom of speech in public affairs. However, this is only a suggestion at this stage, and significantly, it was made nearly 30 years after *Sullivan*. Due partly, one suspects, to the prospects of huge winnings offered by class actions, contingency fees, jury trials, punitive damages and the like, the classic tort model remains prominent and relatively untouched.

### C. Freedom of Speech and of the Press

It has been pointed out more than once that in *New York Times v Sullivan* itself, and in the ensuing decisions, there was no compulsion of constitutional law requiring the Supreme Court to go down the path that it chose. On the facts of *Sullivan*, the Justices of the Court could have held, for example, that the Alabama Supreme Court had misapplied its own libel laws - particularly, the requirement that the relevant publication must sufficiently refer to the plaintiff - in a manner repugnant to the First Amendment.<sup>48</sup> In that case or later cases, they could have ruled that in defamation actions involving matters of public interest: (a) punitive damages should no longer be available; and/or (b) 'ceilings' should be imposed on compensatory damages; or even (c) no damages at all should be awarded in (for instance) cases of inadvertent or careless falsehood where the defendant had taken prompt action to restore the plaintiff's reputation by publishing a retraction in response to the plaintiff's request or demand. Arguably, any one of these

46 See eg S Ingber, note 18 *supra* at 772-4.

47 F Schauer, "Uncoupling Free Speech" (1992) 92 *Columbia Law Review* 1321.

48 See eg note 30 *supra* at 786-95.

approaches would have promoted First Amendment values through helping to thaw out the 'chill' of defamation laws and foster vigorous and robust debate and would also have safeguarded rights to reputation.

Why did the Supreme Court eschew alternatives such as these? While not wanting to make superficial pronouncements about 'American values', it does seem to me that the prime cause is a strongly individualistic element in the Court's conceptions of freedom of speech and freedom of the press, stemming from a relatively unquestioned adherence to liberal-democratic theories of society and the role of government.

Explicit in the judgments in *Sullivan* is the well-known concept of a 'marketplace of ideas', applying particularly though not exclusively to matters of political or social significance within a democratic society.<sup>49</sup> According to this concept, there must be leeway for error in public debate, and the true remedy for false speech is more speech. It follows that any law which threatens to repress "uninhibited, robust and wide-open"<sup>50</sup> debate, even when it does so on the ground of eliminating falsity, is *prima facie* an unacceptable restraint on free speech. Truth must instead emerge from the operations of the marketplace.

So far as media contributions to the marketplace of ideas are concerned, the autonomy implicit in the notion of a leeway for error is enhanced by the existence of a separate and distinct freedom of the press within the express words of the First Amendment. The element of editorial independence implicit in this freedom requires that editors should not (save in exceptional circumstances) be subjected to injunctions prohibiting in advance the publication of any matter, nor should a court or any other state agency have the power to order positively that they must publish specified matter.<sup>51</sup>

Both the importance of preserving a free 'marketplace of ideas' and the existence of this editorial autonomy were emphatically affirmed by the Supreme Court in *Miami Herald Publishing v Tornillo* (1974).<sup>52</sup> Here the Court held constitutionally invalid a Florida statute which required, on pain of criminal penalties, that if a newspaper published an attack (whether or not shown to be false) on the personal character or official record of a candidate for electoral office, it must provide equal space, free of charge, for the printing of any reply which the candidate wished to make. The Court reached this conclusion despite saying that it was well aware of the argument that media concentration and syndicated journalism threatened in actuality to reduce the 'marketplace of ideas' to "a monopoly controlled by the owners of the market".<sup>53</sup>

Although the *Tornillo* decision did not specifically deal with rights of reply as a court-ordered remedy for defamation, it seems clearly to imply that such a remedy would similarly violate the First Amendment. One might have expected the same outcome for court-ordered retractions, except that a brief and cryptic comment by

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49 See eg note 9 *supra*, chapter 14; R Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment" (1988) 76 *California Law Review* 297.

50 Note 6 *supra* at 270.

51 See eg LA Powe, note 11 *supra*, chapter 9.

52 418 US 241 (1974).

53 *Ibid* at 251.

Justice Brennan (with whom Justice Rehnquist joined) specifically sought to put them outside the scope of the decision.<sup>54</sup> On the other hand, a statutory provision giving a media defendant the option to offer space for a reply by a defamed plaintiff, or to publish a retraction, in return for reduced or nil damages, would seem not to violate the First Amendment, at least when the damages award by itself would not be in violation.<sup>55</sup>

Is this interpretation of freedom of speech and of the press necessary? It arises in cases like *Tornillo* because the Supreme Court conceives these freedoms primarily, if not solely, as individual rights, to be enjoyed by each individual speaker and (in the case of press freedom) by each media proprietor.

Individual rights of free speech and free press can however be conceived as a means to an end - the end being a generalised freedom of expression and informed communication within the community, particularly as regards governmental issues and other matters of public concern. This view treats freedom of communication as an amalgam of various individual rights or claims - the right to ascertain information, the right to express what one has to say, the right to hear what others have to say - all of which promotes truly democratic values. It underlies many elaborations of the concept of free speech,<sup>56</sup> including parts of the High Court of Australia's judgments in the 1992 cases of *Australian Capital Television v Commonwealth*<sup>57</sup> and *Nationwide News v Wills*.<sup>58</sup> It also underlies the ethical obligation of Australian journalists (as spelled out in clause 4 of the Media and Entertainment Alliance (MEA) Code of Ethics) to respect the confidentiality of sources and is prominent in the continuing debate about protection of confidentiality. The proponents of shield laws for journalists regularly take the 'public right to know' as one of their starting-points for an argument that the effective news-gathering that this entails relies heavily on confidentiality for sources.<sup>59</sup>

I would argue that a broader, more socially-conceived freedom of communication, placing significant weight on the 'public right to know', would be well served, not jeopardised, if defamation proceedings involving issues of public interest regularly brought forth an adjudication on the truth or falsity of the relevant defamatory allegation of fact and if, to convert an adjudication of falsity into an adequate remedy for the defamed plaintiff, the defendant were required to publicise this adjudication. The inroads on individual rights of free speech and free press seem to me to be more than justified under alternative conceptions of free speech by the potential contribution to informed public opinion - quite apart

54 *Ibid* at 258. For further discussion of the issue, see *Coughlin v Westinghouse Broadcasting and Cable* 689 F Supp 483 (1988); *Kramer v Thompson* 947 F 2nd 666 (1991).

55 Cf JH Hulme, SM Sprenger, "Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation" in J Soloski, R Besanzon, note 11 *supra* at 152, 172.

56 For example, the formulation of freedom of expression in Article 19 of the International Covenant on Civil and Political Rights. See generally E Barendt, *Freedom of Speech*, Clarendon Press (1985) chapter 1; R Dworkin, "The Coming Battles Over Free Speech" [January, 1993] *Civil Liberty* 11.

57 *Australian Capital Television Pty Ltd v Commonwealth of Australia* (No 2), note 3 *supra*.

58 *Nationwide News Pty Ltd v Wills*, note 3 *supra*.

59 See eg D Flint, "Putting the Pen to the Sword" *Sydney Morning Herald*, 9 September 1993.

from the further benefit of restoring to some degree at least the reputation of an unjustly defamed plaintiff.

Once again, support can be found in the MEA Code of Ethics. Clause 10 states that journalists "shall do their utmost to correct any published or broadcast information found to be harmfully inaccurate".

This view of freedom of communication is in contradiction, however, to two tenets of the Supreme Court's interpretation of the First Amendment: (a) that it should be the 'marketplace of ideas', not the verdict of a court or other state agency, that weeds out the false from the true; and (b) that freedom of the press, whether as an independent right or as an indispensable adjunct of free speech, precludes any mandatory order by a court or state agency requiring a newspaper or broadcasting station to publish specified material. It has been observed that underlying principles such as these in First Amendment jurisprudence is a deep American distrust of 'government' in all its manifestations.<sup>60</sup> To an extent that many Australians would find surprising, the Supreme Court even mistrusts court rulings, though this may be understandable in view of the wide variety of social and legal cultures in the USA and the capacity of some State courts, such as the Alabama Supreme Court in the *Sullivan* case, to pursue their own deviant paths.

Yet it must be said in reply to the Supreme Court, invoking its own vivid description of the American media in *Tornillo*, that the 'marketplace' nowadays is simply too heavily dominated by monopoly players to produce the conflict of perceptions and the variety of investigative activity that might reliably generate 'the truth'. The press may well in times past have had the diversity, the vitality, the critical edge, the urge to make individual and original discoveries, and the willingness to debate with itself that would create the necessary true 'marketplace'. Being diverse, scattered, and composed of small enterprises, it also clearly needed protection through individual, legally-recognised rights against intolerant, repressive governments which resented its criticisms. Yet these arguments are no longer clearly compelling. Media monopoly has also brought media power - the power of the media as against government and indeed other large corporate enterprise is much greater than it used to be. As is acknowledged in the title to the Fulbright Symposium where this paper was first delivered, media power calls for media responsibility. Where concepts of free speech and free press produce rules, such as the *Sullivan* rule, which by generating "perverse incentives" encourage lower levels of responsibility in reporting,<sup>61</sup> it is time to question whether those concepts need fundamental reconsideration. To my way of thinking, the 'marketplace of ideas' concept, in the context of present-day media realities, is one such doctrine.

This is also an argument in free speech literature<sup>62</sup> that the 'marketplace of ideas' is not put under threat merely because statements of alleged fact may have legal repercussions. The counter-argument is that there must be leeway for those who express opinions or ideas in public to commit errors of fact without excessive

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60 See eg F Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge University (1982) p 86.

61 See note 33 *supra*, and accompanying text.

62 See eg E Barendt, note 56 *supra*, pp 10-14, 17, 57-8, 178-9.



sanctions being visited upon them.<sup>63</sup> Yet it is the opinions and ideas that these principles seek chiefly to protect, not the factual allegations which support them. As a sharply divided Supreme Court of Canada recently found,<sup>64</sup> allegations of fact are, at best, on the fringes of free speech theory.

There would seem, in any event, to be a distinctly different culture in Australia regarding ascertainment of 'the truth' by courts or other state agencies. A phrase of recent years - 'the Royal-Commission-led economic recovery' - is witness to the popular readiness in our society to look to judicial inquiries for resolution of the truth on controversial issues, 'once and for all'. In addition, while there is legitimate concern about the problems of using juries in complex criminal trials, there is also sustained popular support for retention of juries as final arbiters of fact in important cases. A reason for the difference from America may well be that Australian courts are more homogenous, less creative in policy terms (due in part to the absence of a Bill of Rights - though recent cases such as *Mabo v Queensland (No 2)*<sup>65</sup> foreshadow changes on this score) and more subject to appellate discipline than their counterparts in the USA. If there truly is this cultural difference, it is easier to argue in Australia that a judicial remedy confined to ascertainment and public declaration of the truth - ie without any punitive or compensatory implications - does not infringe free speech values - it in fact promotes them by making public debate better informed - and makes only limited and entirely legitimate inroads on freedom of the press.

#### D. Male Values in Defamation Law

A striking feature of defamation plaintiffs in both the USA and Australia is that very few of them are female.<sup>66</sup> In the language of many feminist critiques of law, the harm to reputation protected by the tort of defamation looks distinctly 'gendered'.

Also 'gendered' (perhaps 'macho' is a better word) are those aspects of defamation law which permit a defamation plaintiff to argue that an award of damages - even in a jurisdiction, like New South Wales, which has abolished punitive damages - should contain an element of revenge. According to Justice McHugh, dissenting, in *Carson v John Fairfax & Sons Ltd*,<sup>67</sup> the damages awarded should be enough to bring 'solace' to plaintiffs through their awareness of the 'hurt' inflicted on the defendant. Reference is made to the alternative 'self help' remedy of medieval times - ie duelling.

63 For recognition of this in the High Court of Australia, see *Nationwide News Ltd v Wills*, note 3 *supra* at 75, per Deane and Toohey JJ; cf *Australian Capital Television v Commonwealth (No 2)*, note 3 *supra* at 217, per Gaudron J.

64 See *Zundel v R* (1993) 95 DLR (4th) 202, discussed in W Akel, "Freedom of Expression or the Right to Lie" (1993) 13(2) *Communications Law Bulletin* 1.

65 (1992) 175 CLR 1.

66 See M Newcity, "The Sociology of Defamation in Australia and the United States" (1991) 26 *Texas International Law Journal* 1 at 13-17, where surveys are quoted suggesting that the proportion of female defamation plaintiffs in the USA is 14 per cent and in NSW is 8 per cent.

67 (1993) 178 CLR 44 at 104-8. The appropriateness of this in the context of modern libel insurance is highly questionable.

In the USA, these 'macho' elements in the law of defamation are further enhanced by decisions, based on First Amendment principles, such as the *Tornillo* case. Such decisions confer the respectability and legitimacy of free speech values on aggressive individualistic responses by journalists and press proprietors when they are accused of having published a defamatory allegation of fact. As already quoted from the findings of the Iowa Libel Research Project, one defamation plaintiff making this accusation received the reply: "Fuck off, you're full of shit". By seemingly blocking off compulsory retraction remedies, *Tornillo* encourages a gladiatorial view of defamation litigation, in which it is worse to be compelled to admit that you were wrong, on account of 'the threat to freedom of speech', than to be ordered to pay massive damages at the end of a long and costly legal battle.

These suggestions about the gendered nature of defamation law and litigation provoke at least one question. Is it really appropriate for the whole population, male and female, to continue to support a legal regime for defamation cases in which a heavily male-dominated form of litigious combat takes place at huge public expense?

#### IV. AUSTRALIAN DEFAMATION LAW AND THE IMPACT OF QUALIFIED PRIVILEGE AND 'CONSTITUTIONAL PRIVILEGE'

##### A. The Defences Outlined

One of my principal themes so far has been that the *Sullivan* rule as laid down and developed in America has combined with enduring American traditions of tort law to stifle the development of alternative defamation remedies which would promote ascertainment of 'the truth'. I now want to argue that two comparable features of Australian defamation law - the defences of qualified privilege and (since the *Theophanous* case<sup>68</sup> in 1994) of constitutional privilege - have rather less obviously had a similar effect.

Qualified privilege can be crudely classified into three species:

1. the privilege attached to fair and accurate reporting of specified proceedings and documents ('fair report privilege');
2. the privilege attaching at common law to statements made by a person having a legal, social, or moral duty to communicate on a subject (or an interest in so communicating) to a person with a corresponding interest or duty to receive the communication ('common law qualified privilege'); and
3. statutory versions or extensions of common law qualified privilege ('statutory qualified privilege'), generally involving proof by the defendant that it acted reasonably and/or in good faith.<sup>69</sup>

Each of these forms of privilege can be defeated if the plaintiff establishes malice or, in some versions of fair report privilege, lack of good faith against the

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68 Note 1 *supra*.

69 *eg Defamation Act 1974* (NSW), s 22; *Criminal Code 1899* (Qld), s 377(1)(h).

defendant. Malice is constituted by an improper motive or a lack of honest belief in the truth of what is published.<sup>70</sup>

Constitutional privilege arises when, in the context of 'political discussion' (broadly defined), a Member of the Commonwealth Parliament, a parliamentary candidate, or (it would seem) any other 'public official' or candidate for public office is allegedly defamed. The defendant will not be liable where it can show that "(a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and (c) the publication was reasonable in the circumstances".<sup>71</sup> It is possible that the defence is also available where, in the context of 'political discussion', the plaintiff falls outside the categories just mentioned, but on this important issue the principal judgment in the *Theophanous* case (that of Mason CJ, Toohey and Gaudron JJ) is far from clear.<sup>72</sup>

Deane J, although concurring with the result in this judgment in order to produce a majority, took the view that Members of Parliament and other "holders of high Commonwealth office" should not be able to claim damages *at all* for any defamatory publication occurring in the course of 'political discussion'.<sup>73</sup> Deane J thus clearly adopted, in somewhat extreme form, the *Sullivan* concept of a 'reverse pecking order': those who exert the most power, nominally or actually, within government should in his view be wholly deprived of normal defamation remedies. As just indicated, Mason CJ, Toohey and Gaudron JJ *might* have adopted a *Sullivan*-type demarcation of Members of Parliament, public officials, and candidates for such positions (but explicitly not 'public figures') as specially disadvantaged plaintiffs, but their judgment does not clearly resolve this issue.

In contrast to the various forms of qualified privilege, this new notion of constitutional privilege does not permit a plaintiff to defeat a privilege once established by proving malice or some comparable form of fault against the defendant. Instead, it is for the defendant to disprove culpability in the first place, by establishing lack of awareness of falsity, lack of recklessness, *and* reasonableness.

This last requirement makes the defence comparable to typical versions of statutory qualified privilege.<sup>74</sup> Indeed, the creation of constitutional privilege, immune as it is from legislative interference, has probably rendered statutory qualified privilege irrelevant (in most of its incarnations) except in situations outside political discussion.

70 See eg *Waterhouse v Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 62-4.

71 Note 1 *supra* at 26.

72 *Ibid* at 21. The narrower interpretation is supported by (for example) A Deamer, "Don't Jump for Joy" (1994) 26 *Gazette of Law and Journalism* 3. For the contrary view, see eg S Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 *Sydney Law Review* 44 at 49-51, and (by implication) *Hartley v Nationwide News Pty Ltd* (unreported, Supreme Court of NSW, Allen J, 4 May 1995), noted in (1995) 2 *Media Law Reporter* 94.

73 Note 1 *supra* at 61.

74 *Ibid* at 24-5, per Mason CJ, Toohey and Gaudron JJ.

## B. Common Law Qualified Privilege and the Media

During the last 20 or 30 years in particular, in cases before the courts in Australia and in the defamation reform debates, the media have consistently argued for the extension of common law qualified privilege or (as a second best) statutory qualified privilege to cover, in effect, virtually everything that they publish without malice on a matter of public interest.

Until some striking developments in *Theophanous* and its companion case *Stephens v West Australian Newspapers*,<sup>75</sup> the media generally lost this argument<sup>76</sup> in relation to common law qualified privilege. Only in limited situations was it consistently acknowledged to be available to media defendants.<sup>77</sup> However, the speeches of both majority and minority judges in *Theophanous* and *Stephens* maintain, albeit in very different ways, that it should have distinctly wider scope in discussions of public affairs.

In two short, almost casual passages, the principal majority group of judges in *Theophanous*<sup>78</sup> and *Stephens*<sup>79</sup> (Mason CJ, Toohey and Gaudron JJ) put forward the view that because citizens all have an abiding interest in any matter within the scope of 'political discussion', the requirement of reciprocity of duty and/or interest that determines the availability of common law qualified privilege is satisfied whenever the defamatory matter in issue is shown to have been published in the course of 'political discussion'. This principle seems indeed to have been the basis of the Court's decision in *Stephens*. Since 'political discussion' is defined very broadly in these two cases<sup>80</sup> and in a further companion case, *Cunliffe v Commonwealth*,<sup>81</sup> to cover not just discussion of government institutions and their operative but "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about",<sup>82</sup> it gives enormous breadth to common law qualified privilege. Despite a comment to the contrary by their Honours,<sup>83</sup> it appears to make this defence much more important in practice for the media (because it is a good deal easier for a defendant to invoke) than both the defence of constitutional privilege that their Honours were simultaneously creating and most if not all versions of statutory qualified privilege. At least one decision since then, a Victorian County Court case<sup>84</sup> arising out of an ongoing battle between pro- and anti- gun groups,

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75 Note 2 *supra*.

76 eg *Morosi v Mirror Newspapers Ltd*, [1977] 2 NSWLR 749; cf *Australian Broadcasting Corporation v Comalco Ltd* (1986) 68 ALR 259, per Smithers J.

77 eg *Adam v Ward* [1917] AC 309; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503.

78 See note 1 *supra* at 25-6.

79 See note 2 *supra* at 90.

80 See in particular *Theophanous*, note 1 *supra* at 11-14, per Mason CJ, Toohey and Gaudron JJ.

81 (1994) 124 ALR 120: see eg 131-3, per Mason CJ.

82 *Theophanous*, note 1 *supra* at 13, per Mason CJ, Toohey and Gaudron JJ, citing E Barendt, note 56 *supra*, p 152.

83 In *Theophanous*: see note 1 *supra* at 25.

84 *Sporting Shooter's Association of Australia (Vic) v Gun Control Australia and Crook* (unreported, County Court of Victoria, Shelton J, 2 March 1995), noted in (1995) 2 *Media Law Reporter* 83. An appeal has been lodged: see (1995) 2 *Media Law Reporter* 137.

has indeed been determined in accordance with this very broad version of common law qualified privilege.

Two of the minority judges in *Stephens*, Brennan J<sup>85</sup> and McHugh J,<sup>86</sup> also separately advocated a widening of common law qualified privilege in the context of public debate on matters of public interest. However, neither of them goes as far as the majority group. With different nuances, the principal extension of particular relevance to the media that they recommend is that it should be available when the media report to the public allegations about matters of public interest that have been made by persons with "special knowledge". Such persons may, according to McHugh J,<sup>87</sup> include an investigative journalist employed by the media defendant; they may also include bureaucrat 'whistleblowers' and scientists. Brennan J would only allow the defence to be invoked by a media defendant in this role of purveyor to the public of the statements of such persons if the defendant also showed that it had offered the defamed plaintiff a right of reply.<sup>88</sup>

Given this divergence of views in a divided High Court, it is safe to say only that the availability of common law qualified privilege to the media has been enhanced significantly by these 1994 decisions. It is less safe to try to predict how far the extension has gone. The wider view advanced by Mason CJ, Toohey and Gaudron JJ may be so wide that, in terms of practical impact, the defence will supersede statutory qualified privilege, and even the newly-born constitutional privilege will be stifled at birth. This would mean (amongst other things) that it might never be significant whether or not constitutional privilege applies (like *Sullivan*) only to cases brought by specially limited classes of plaintiffs such as 'public officials'. The lesser extensions suggested in the dissenting judgments of Brennan and McHugh JJ leave scope for constitutional privilege (immune from legislative interference but with a requirement of proof of reasonableness) and common law qualified privilege (susceptible to legislative interference but defensible only on proof by the plaintiff of malice on the part of the defendant) both to offer protection to media defendants within their different, though significantly overlapping, spheres of operation.

### C. Privilege Versus Truth

My principal concern about the case-law in Australia having developed in this way is that, as in America, both the truth/falsity issue in particular cases and the creation of statutory non-monetary remedies (such as judicial declarations or correction orders) which would highlight this issue have been pushed to one side. Indeed, the majority judges in *Theophanous* seemed unhappy with the notion that a plaintiff should have to prove falsity.<sup>89</sup> The argument in both the courts and in many of the law reform discussions has focused almost entirely on the availability of various forms of qualified privilege as a defence for the media in their coverage of matters of public interest so as to determine whether the plaintiff obtains an

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85 Note 2 *supra* at 97-106.

86 *Ibid* at 111-16.

87 *Ibid* at 114-15.

88 *Ibid* at 105.

89 Note 1 *supra* at 23.

award of damages from the media defendant or is turned away with no remedy at all. As in America, a 'damages-or-nothing' assumption underlies the contentions on both sides.

The fair report privilege in the modern law can be explained as the media's derivative privilege to convey the privileged deliberations and publications of state agencies to their popular constituency. The relatively limited extensions proposed by Brennan and McHugh JJ to common law qualified privilege have a similar character; indeed, McHugh J<sup>90</sup> specifically treated the media's privilege to disseminate the allegations of persons with "special knowledge" as "ancillary" to the privilege enjoyed by those persons themselves. In the version of 'instrumental' free speech theory that underlies the High Court 'free speech' decisions of September 1992<sup>91</sup> and October 1994,<sup>92</sup> this serves an informing function, which in turn promotes accountability of governments and government agencies to the people.

By contrast, in some versions at least,<sup>93</sup> the claim of the media to broad, sweeping versions of common law qualified privilege, asserted as an essential dimension of free speech, has had very different overtones. In contrast to early instances of qualified privilege, which marked off enclaves of privileged speech, the forum of debate is society at large. The argument seeks to 'privilege' the media themselves as communicators to this forum, on the grounds that their claimed special status as the watchdog of democratic rights and liberties endows them with a special 'duty' to cater for the public 'right to know'. When we bring into account the power of large media corporations in these times of intense media concentration - involving the capacity not only to sway the public mind but also to squeeze out smaller competitors - the conclusion emerges that an essentially democratic, egalitarian value - that of free speech, with its particular concern for the accountability of powerful state agencies - is being invoked in support of an essentially inegalitarian claim for privileged status in public debate.<sup>94</sup>

It must be said that, in their express terms, neither constitutional privilege nor the expanded version of common law qualified privilege suggested by the majority in *Theophanous* and *Stephens* confers any special favours on the media. There is little doubt, however, that the powerful mass media will be the chief beneficiaries of these new protections against liability for defamation.

In seeking a proper accommodation of the competing claims, it is legitimate, in my view, to apply to the media themselves and to other comparable defendants to defamation claims the principle underlying 'instrumental' versions of free speech doctrine that, in a democratic society, power demands accountability. Translated into the specific context of qualified privilege in defamation law, this requires that any 'qualification' on the privilege should be a significant one. An 'absence of

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90 Note 2 *supra* at 115.

91 ie *Australian Capital Television v Commonwealth (No 2)*, note 3 *supra*; *Nationwide News Ltd v Wills*, note 3 *supra*.

92 ie *Theophanous*, note 1 *supra*; *Stephens*, note 2 *supra*; *Cunliffe v Commonwealth*, note 81 *supra*.

93 See eg the arguments canvassed in *Morosi v Mirror Newspapers Ltd*, note 76 *supra* at 775-92.

94 cf F Schauer, "Free Speech in a World of Private Power" in T Campbell, W Sadurski (eds), *Freedom of Communication*, Dartmouth (1994) p 1.

malice' requirement, such as exists in common law qualified privilege, is a very weak qualification. In constitutional privilege and in some versions of statutory qualified privilege (for example, s 22 of the *Defamation Act* 1974 (NSW)), there is a significantly stronger one - the publication must have been "reasonable" in all the circumstances. In theory at least, this conveys the message that the media should not have the privilege to defame falsely unless they have practised responsible journalism, though in practice, s 22 has provoked considerable opposition from the media because of unsympathetic judicial interpretation resulting in unacceptably high standards being imposed.<sup>95</sup>

Yet whether or not a 'reasonableness' limit on qualified privilege should apply to protect a media defendant from an award of damages, my suggested qualification, in fulfilment of the idea that power and 'privilege' require accountability, would operate differently. In line with the general arguments in this article, it would be that one or more non-monetary remedies specifically highlighting the truth/falsity issue should be available against the defendant *even when constitutional privilege, common law or statutory qualified privilege applies*.<sup>96</sup> Such remedies could include judicial declarations accompanied by provisions for publicity, mandatory correction orders or (following the lead given by Brennan J in *Stephens*<sup>97</sup>) rights of reply for defamed plaintiffs. On this view, the various forms of privilege would be 'qualified' defences in a new sense; they would only operate when the remedy claimed was the traditional one of damages.

## V. NON-MONETARY RELIEF FOR UNSUBSTANTIATED DEFAMATORY ALLEGATIONS OF FACT

In this final section of this article, I will elaborate on the proposition just discussed by outlining some current versions, actual and proposed, of court-ordered non-monetary relief for defamation.

First, back to America. Accompanying the criticism of the *Sullivan* rule in that country have been numerous proposals (including one Bill- the Schumer Bill- brought to Congress) involving retraction, correction, vindication, right of reply, and judicial declarations. The most prominent in recent years are two collective exercises bringing together numerous experts, entitled respectively the Annenberg Libel Reform Proposal and the draft Uniform Defamation Act.<sup>98</sup>

These proposals have stayed within the limits that are clearly or almost certainly imposed by the First Amendment: no mandatory orders requiring publication of corrections or retractions and no mandatory rights of reply. It has been argued also that a provision that unsuccessful defendants (in the absence of a finding of 'fault', which, in cases brought by public officials or figures, means known or reckless falsity) may be ordered to pay attorneys' fees or to purchase space for publicity for

95 Notably by the Privy Council in *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299; (1985) 63 ALR 149.

96 For the early beginnings of this idea in Australia, see Australian Law Reform Commission Discussion Paper 1, *Defamation Options for Reform*, 1977, discussed in JG Fleming, note 40 *supra*.

97 Note 2 *supra* at 105.

98 See generally J Soloski, R Besanzon, note 11 *supra*, chapters 2-6, 8.

a declaration would also be 'off limits'; however, these elements do appear in some of the American proposals. Some of them also envisage eliminating common law qualified privilege (while also expanding fair report privilege) in cases where only non-monetary relief is obtained.

The debate between the various proponents has focused particularly on three matters. These are: (a) whether non-monetary relief should be obtainable at the plaintiff's option, or only if the defendant agrees; (b) whether a demand for retraction should be a pre-requisite to suing; and (c) what role, if any, should be left for damages where non-monetary relief is granted (eg whether damages for proven pecuniary loss should also be available).

There has as yet been no implementation of any of these proposals, despite numerous attempts. A study published in 1992 cites more than 65 unsuccessful Bills since 1989, nearly all of which "died in committee".<sup>99</sup> Opposition from the media, from lawyers and (to an extent) from potential high-profile plaintiffs has been too strong.<sup>100</sup> There are, however, numerous State voluntary retraction statutes.

Other US reform proposals attack what is on any view a major problem of the current law: the huge size of jury awards of damages. Elimination or restriction of punitive damages and statutory caps on damages have been advocated for fairly obvious reasons.<sup>101</sup>

Next, a brief look at Europe. An article published in America in 1986<sup>102</sup> identified no less than 13 European countries which had mandatory rights of reply in libel cases. These rights were mostly conferred by statute. Several of the countries concerned, notably Germany, also have express constitutional guarantees of freedom of speech. The rights of reply survive nonetheless because European constitutional jurisprudence seems generally readier than the American Supreme Court to countenance 'positive' free speech rights despite the inroads that these may make on individual free press rights. While implementation of rights of reply in European countries poses a number of problems, there is no evidence of fundamental disagreement with the concept.

A recent Report of the Law Reform Commission of Ireland<sup>103</sup> contains detailed proposals for correction orders, judicial declarations (with provision for mandatory publicity) and rights of reply. In England, a Private Member's Bill to similar effect was put to Parliament in 1990 by Tony Worthington MP.

Returning finally to Australia, non-monetary relief, taking the specific form of court-ordered corrections, was a prominent feature of the Australian Law Reform

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99 J Soloski, "Legislative Efforts to Reform Libel Law" in J Soloski, R Besanzon, note 11 *supra*, chapter 9, p 352.

100 For a discussion of the politics of reform in the USA, see DA Anderson, note 13 *supra* at 39-43.

101 See eg S Ingber, note 18 *supra* at 832-9; LA Powe, note 11 *supra*, pp 128-39.

102 C Danziger, "The Right of Reply in the United States and Europe" (1986) 19 *International Law and Politics* 171; see too Law Reform Commission of Ireland, *Report on the Civil Law of Defamation*, 1991 at [470]-[471].

103 Law Reform Commission of Ireland, *Ibid* at [365]-[383]. A Private Member's Bill presented to the Irish Parliament in 1995 follows up on this: see Defamation Bill 1995, clauses 8, 13, 14.



Commission's recommendations in 1979.<sup>104</sup> All forms of privilege were, however, retained as defences even when only non-monetary relief was sought. The Discussion Papers issued by the Attorneys-General of the eastern States in 1990 and 1991 referred to mandatory correction orders, but expressed a preference for voluntary corrections coupled with reduced damages awards. In a low-key way, one provision of the NSW Defamation Bill 1991 which followed the second of these Papers incorporated the notion that, even when statutory qualified privilege has been established, non-monetary relief should be available if the defamatory imputation was false and one of fact. Clause 25(4) provided that in these circumstances, the court might order the defendant to "publish a reply approved by the court or by a mediator appointed by the court". Also relevant here is the requirement of Senate procedure that any citizen whose reputation has been attacked during Senate proceedings should have a right of reply.<sup>105</sup>

The Discussion Paper of the NSW Law Reform Commission, issued in September 1993, gave significant prominence to non-monetary relief. The Paper, after discussing the public figure test, stated that "[t]he preliminary view of the Commission is that a formal public figure test, requiring a focus on the defendant's mental state, is undesirable".<sup>106</sup> The principal proposals put forward or canvassed in it include alternative dispute resolution procedures; a reduced role (or possibly no role at all) for the jury; statutory limits on damages; the recognition of truth alone as a defence but only after the question of privacy intrusion has been separately examined; and reformulation of the statutory qualified privilege conferred by s 22 of the *Defamation Act* 1974 (NSW) (or possibly its replacement by a simple standard of 'due care', as in the tort of negligence).

As to non-monetary relief, a possible approach is set out at the end of Chapter 2 of the Paper.<sup>107</sup> In its application to defamatory imputations of fact, its salient features are as follows:

1. There should be two recognised remedies, a judicial declaration and damages. (A third, existing remedy, injunction, is not specifically dealt with in the Paper.) The plaintiff should be able to choose between them or seek both together.
2. A declaration should be available as relief for a defamatory imputation of fact unless a defence *other than* common law or statutory qualified privilege is successfully maintained. This leaves potentially available the defences of truth, contextual truth, absolute privilege, fair report, and 'triviality', as well as general tort defences such as consent.
3. On the basis that in proceedings for a declaration the onus of proof of truth lies on the defendant, the court, unless a defence applies, should make a declaration, according to its finding, that the imputation is false *or* that it is not substantiated by the defendant. A third available declaration, pending

104 Australian Law Reform Commission Report 11, *Unfair Publication: Defamation and Privacy*, 1979 at chapter 11, Draft Bill, Part III.

105 See too Australia, House of Representatives Standing Committee on Procedure, *Report, A Citizens' Right of Reply*, June 1991.

106 Note 5 *supra* at 193.

107 *Ibid* at 40-3.

the introduction of remedies to deal with privacy intrusions, should be that the imputation is true but not published in the public interest. To the extent that the plaintiff requires, the court should order that the defendant publicise the declaration to an extent comparable with the original publication of the defamatory matter, or that it pay for such publicity.

4. Costs orders should extend, if the court thinks fit, to cover full indemnity costs.
5. If the plaintiff seeks damages (whether in addition to or instead of a declaration), *all* the established defences, except 'triviality', should apply, and there should be two further hurdles for the plaintiff. Instead of the defendant, the plaintiff should bear the onus of establishing falsity, and the plaintiff should also have to prove publication in circumstances likely to result in harm to reputation.
6. Where a declaration is obtained and publicised or where a correction was published before the verdict (and within seven days of the plaintiff's request), the amount of the damages should be appropriately reduced. As outlined elsewhere in the Paper, measures designed to limit and control the amount of damages should also apply.

This is of course only one version of a possible combined declaration-and-damages structure that could apply in NSW. I would myself suggest three variations, as follows. First, 'fast-track' or alternative procedures should be specifically made available for declaration rather than damages proceedings. Secondly, a right of reply for the plaintiff should be bracketed with declaration as an alternative form of non-monetary relief. Thirdly, a plaintiff seeking damages should also have to prove 'fault', in the sense of negligence or, in media cases, failure to observe the standards of professional journalism, where the matter is one of public interest.<sup>108</sup> These concepts are relevant when constitutional privilege or the statutory qualified privilege established by s 22 of the *Defamation Act* 1974 (NSW) is pleaded. However, the important difference is that under these defences the onus of proving 'reasonableness' lies on the defendant.

All in all, this proposal would bring some of the spirit of American defamation law's treatment of public figure cases into NSW law - particularly in the requirement that, to obtain damages, the plaintiff must prove falsity and, if the third variant were adopted, fault.<sup>109</sup> The notion that in cases involving public interest issues damages should be harder to obtain is also present, though it operates through the concept of public interest itself (as retained in the defences of truth, qualified privilege and comment), rather than through the separate and often troublesome classification of plaintiffs as public officials, public figures or private figures. On the other hand, the main argument of this article - that truth or falsity should be 'upfront' in the litigation - is maintained. Plaintiffs are encouraged to

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108 This idea was submitted by Mr Stuart Littlemore QC to the Legislation Committee of the NSW Parliament (see its Report, note 8 *supra* at chapter 8). It is discussed in the NSWLRC Discussion Paper, note 5 *supra* at 167-71.

109 The final 'package' is close to reforms advocated in UN Raifeartaigh, "Fault Issues and Libel Law - A Comparison Between Irish, English and United States Law" (1991) 40 *International and Comparative Law Quarterly* 763.

seek declarations or rights of reply because they are easier, cheaper, and faster to get and because restraints on the amount of damages obtainable reduces the 'pot of gold syndrome'.

In essence, therefore, this article proposes a 'truth remedy' as the primary remedy for defamation. This serves both private and public interests by acknowledging that where a defamatory allegation of fact is made relating to a matter of public interest, both the defamed plaintiff and the public at large are concerned with the truth of the allegation. As secondary relief, a 'money remedy' is retained but with greater restriction on both availability and the amount obtainable.

As shown earlier in the article, the principal alternative to legislative reform of defamation law in Australia is now reform by the High Court, as an aspect of giving specific content to the implied guarantee of freedom of political discussion in the Commonwealth Constitution. The recommendations for legislative reform discussed in this final section adopt, however, a distinctly different approach to that of the majority of the Court in *Theophanous* and *Stephens*. They could indeed encounter constitutional problems because an important element of the recommended action for a judicial declaration is that constitutional privilege should not be available as a defence. Given, however, that the rulings in *Theophanous* and *Stephens* related to actions for defamation damage of the traditional kind, it is clearly open to argument that a new form of action leading to the wholly different, and ultimately less painful, remedy of declaration should not necessarily be governed by them. A dictum of Deane J in *Theophanous*<sup>110</sup> goes some way towards acknowledging this.

There are, it is submitted, at least two reasons why a legislative 'truth remedy', as outlined above, should not in fact be held to fall foul of the implied constitutional guarantee of freedom of political discussion, despite the absence of any defence of constitutional privilege.

One is that, on the grounds advanced in this article, it pays as much respect to the fundamental values of freedom of speech and informed democratic participation in government, from which the constitutional guarantee derives, as do the laws governing claims for damages for defamation when they include a defence of constitutional privilege.

The other is that, even if this first proposition cannot be affirmatively demonstrated, the 'truth remedy' represents a legitimate form of statutory protection of reputation, falling within the concept of 'proportionality' which the High Court itself accepts in all the 'free speech' cases.<sup>111</sup> The cause of defamation reform in Australia will be best served, from the point of view of both citizens generally and the media in particular, if constitutional and legislative endeavours operate in dialogue with each other rather than in confrontation, it being recognised that there is more than one path to finding the best adjustment between protection of reputation and freedom of speech.

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110 Note 1 *supra* at 62.

111 See eg *Australian Capital Television v Commonwealth (No 2)*, note 3 *supra* at 157-9, per Brennan J.