WHERE DO SWALLOWS GO IN WINTER?: A ZOOLOGICAL SEARCH FOR A THEORY OF THE CAUSES OF ACTION

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I. INTRODUCTION

What are causes of action, and, perhaps more importantly, what does it matter? This paper examines a series of decisions by English, Australian and New Zealand courts in which different conceptions of the causes of action, have led to different results.[1]

In a recent article, the eminent scholar Professor Birks savaged the House of Lords' decision in *Spring v Guardian Assurance*.[2] Birks claimed that the decision exemplifies "a species of problem which disfigures the law"; one which he described as being "discreditably elementary".[3] The case concerned an employment reference which was, in effect, the 'kiss of death' for the plaintiff's career. The plaintiff sued in negligence and, on appeal, the House of Lords held that the employer was under a duty of care. Damages in negligence for pure economic loss had been available since the seminal House of Lords decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[4] Thus, at first glance, there appears nothing remarkable about the decision in *Spring*. For Birks, however, the decision is problematic because of the lack of importance it attaches to that forgotten cause of action: defamation.

Traditionally, employee references were the province of the law of defamation and, due to the operation of the defence of qualified privilege, were only

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1 *Spring v Guardian Assurance* [1995] 2 AC 296; *Sattin v Nationwide News* (1996) 39 NSWLR 32; *"GS" v News Ltd* (1998) Aust Torts R ¶81-466; *Bell-Booth Group v Attorney-General* [1989] 3 NZLR 148; *Balfour v Attorney-General* [1991] 1 NZLR 519; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (the *South Pacific* case).

2 Note 1 *supra* (*Spring*).

3 P Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *UWALR* 1 at 6.

4 [1964] AC 756.

actionable where an employee could satisfy the high standard of malice.[5] *Spring* seems to stand for the proposition that now employees can recover damages on proof of mere negligence. For this reason, the inexorable expansion of negligence could have an alarming effect upon defamation. Lord Cooke has gone so far as to say that: "[b]y a side wind the law of defamation would be overthrown".[6] The cases discussed in this paper each deal with the same question: should we allow claims in negligence in areas which have traditionally been governed by the law of defamation?

At a New York symposium entitled *Deconstruction and the Possibility of Justice*, Charles Yablon began his address by saying:

> The papers that have preceded me have all been extremely original and interesting.
>
> I must provide the missing Derridean supplement. I must be boring.
>
> This is not difficult for me. I am a lawyer.
>
> I know many boring things.
>
> I must be boring. I must bore. But in another sense, to bore is to dig, to probe under the surface, to uncover that which has been hidden, to view that which has not previously been seen.
>
> In that sense, the papers that have preceded me have been very boring, indeed, and I may truthfully say that I hope I may be only half as boring as those who have preceded me.[7]

In the same way, this essay attempts to be boring as it deals with the interaction of defamation and negligence. The "papers which have preceded me" have (fittingly) focused on the principles by which negligence should expand into new areas, or the policies upon which defamation and the law of qualified privilege has been based.[8] However, almost nothing has been written on a more fundamental level about the causes of action and how they are supposed to interact with one another. The one exception has been the brief reference by Birks to the decision in *Spring*, which appears in the introduction to his treatise on modern equity.[9] Part II of this paper looks at Birks' argument and

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5 *Clark v Molyneux* (1877) 3 QBD 237 at 246, per Brett LJ.

6 The *South Pacific* case, note 1 *supra* at 302.

7 C Yablon, "Forms" in D Cornell et al (eds), *Deconstruction and the Possibility of Justice*, Routledge (1992) 258 at 258.

8 See T Allen, "Liability for References: The House of Lords and *Spring v Guardian Assurance*" (1995) 58 *MLR* 553; A Demopolous, "Misleading References and Qualified Privilege" (1988) 104 *LQR* 191; R Fowler, "Fencelines or Welcome Signs?" [1995] *NZLJ* 120; C Hilson, "Liability for Employment References: Possible Effects of *Spring*" (1996) 25 *Anglo-American Law Review* 441; AM Tettenborn, "Negligence v Defamation - A Little Awkwardness?" [1987] *CLJ* 390; T Thawley, "Duty to be Careful When Giving Employees References" (1996) 70 *ALJ* 403; J Tiley, "Duty of Care: *Spring v Guardian Assurance plc*" (1994) 28 *Law Teacher* 88; R Tobin, "Negligence a Resurgence? *Spring v Guardian Assurance* in the House of Lords" [1994] *NZLJ* 320; T Weir, "The Case of the Careless Referee" (1993) 52 *CLJ* 376; C Wynn-Evans, "References and Negligent Misstatement" (1994) 23 *Industrial Law Journal* 346.

9 Note 3 *supra*.

explains why our conceptions of the causes of action lie at the heart of the problem. Part III briefly examines the development of the case law in the area where defamation and negligence converge, and explains that different understandings of the causes of action underpin the alternative stances on the issue. This paper then explores the nature and functions of the causes of action from both an historical and jurisprudential perspective (Parts V and VI). Part VII will then attempt to arrive at a theory of the causes of action which will shed light on the negligence/defamation question.

II. THE PROBLEM DEFINED

Birks described the problem posed by the House of Lords' decision in *Spring*, of allowing claims to be made in either defamation or negligence, as a "conundrum of disorderly categories". He writes:

> Two categories intersect. Defamation is a wrong, like inducing breach of contract or interference with chattels, which is manifestly named by reference to the interest infringed. Negligence is a wrong named by reference to the kind of fault. It follows that the two categories must intersect. In other words infringement of the interest in reputation will often be negligent. Is there then one wrong or two? My canary is yellow and eats seeds. If all birds are seed-eaters, yellow, or others, my canary counts twice. Are there two birds or one? If there come to be two birds, the double-vision is due to the bent classification. There is only one bird.[10]

The causes of action are the categories by which the law is organised.[11] This passage highlights the crucial role played by causes of action such as defamation and negligence in providing the law with its structure. The problem is that the structure is inherently predisposed towards conflict and instability. There are a limited number of ways in which this can be addressed:

Option 1: Redefining the Categories. Birks suggests that the causes of action could be redrawn as categories that do not intersect. That is, torts could all be framed solely by reference to the interests they protect (eg reputation, property or economic interests) or by reference to the conduct of the defendant (eg negligence or malice). This solution would involve the radical step of a complete codification of civil laws along the lines of continental models, and the problems attendant on those systems.[12]

Option 2: Fence-Lining. To invoke a metaphor used by Lord Woolf in *Spring*, it is possible to erect a fence around the field to which one cause of

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10 *Ibid* at 6.

11 Technically speaking, a cause of action "is simply the fact or combination of facts which gives rise to a right to sue": *Do Carmo v Ford Excavations Pty Ltd* (1983) 154 CLR 234 at 245, per Wilson J. However, today it is common for the term to be used as a shorthand reference for the substantive bodies of law (eg negligence, defamation, nuisance and contract) rather than for the facts which entitle a remedy and it is in this sense that the term will be used in this paper.

12 See G Samuel and J Rinkes, *The English Law of Obligations in Comparative Context*, Ars Aequi Libri (1991) pp 44-5. The alternative of codification will not be pursued further in this paper.

action may apply and not to allow the intrusion of another.[13] This method minimises the problems created by the fact that the causes of action have "contradictory angles of approach",[14] and is favoured by the New Zealand Court of Appeal[15] and the New South Wales Supreme Court.[16]

Option 3: Intermingling. In *Spring*, the majority embraced the notion that the causes of action should be allowed to "intermingle" or "intersect". To a certain extent this involves rejection of the contention that intersecting categories present a problem at all.

The method one prefers for dealing with the problems of intersection, this "conundrum of disorderly categories", will be largely determined by the way in which one conceives the causes of action. What role do they play in the move from facts to remedy? Does it make sense to speak of 'fencing off' causes of action, or of 'allowing' them to intermingle? A theory of the causes of action demonstrates how substantive principles act upon factual matrices to generate legal outcomes. It will be seen that the options outlined above correspond with different conceptions of the causes of action.

III. CASE LAW ON NEGLIGENCE AND DEFAMATION

Before continuing, it is necessary to pause and briefly consider the development of the law in the areas where defamation and negligence converge. A handful of cases have already begun to suggest some situations in which it may be more attractive to bring claims in negligence rather than defamation. Perhaps more importantly, it is possible to identify the ways in which judges have viewed the nature and roles of the causes of action when deciding such cases.

In *Bell-Booth Group Ltd v Attorney-General*[17] the New Zealand Ministry of Agriculture and Fisheries asserted that the plaintiffs' fertiliser was useless. Although the plaintiffs sued in negligence *and* defamation, the defamation action failed at first instance due to the defence of justification (the fertiliser was indeed useless). On appeal, the Full Court unanimously dismissed the claim in negligence, Cooke P stating:

> The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.[18]

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13 Note 1 *supra* at 351. See also, Fowler, note 8 *supra*.

14 Birks, note 3 *supra* at 5.

15 *Bell-Booth Group v Attorney-General*, note 1 *supra*; *Balfour v Attorney-General*, note 1 *supra*; the *South Pacific* case, note 1 *supra*.

16 *Sattin v Nationwide News*, note 1 *supra*; *"GS" v News Ltd*, note 1 *supra*. At present, the matter has not been considered by other courts in Australia.

17 Note 1 *supra*.

18 *Ibid* at 156.

This case in effect laid down a blanket rule denying the possibility of claims in negligence where the plaintiff also had a cause of action in defamation.

Bell-Booth was followed by the New Zealand Court of Appeal in *Balfour v Attorney-General.*[19] This concerned a teacher who claimed that his employment prospects had been damaged by a statement in his Department file stating that he was a long practising and blatant homosexual.[20] The case is a good example of why negligence actions can be attractive to certain plaintiffs. If the claim had been brought in defamation the defendant would have been able to raise the defence of qualified privilege.[21] The onus would then shift to the plaintiff to prove malice, which is constituted by an improper motive or collateral purpose.[22] This is an extremely onerous burden, and the plaintiff would almost certainly have failed. Presumably for this reason there was no mention of defamation in the statement of claim, but the Court held unanimously that there was no duty of care on the basis that: "[a]n inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame".[23]

These New Zealand decisions came to be considered by the House of Lords in *Spring*,[24] the facts of which were outlined earlier. Although Lord Keith fully endorsed the New Zealand approach, a majority of four Lords[25] held that negligence *does* have a role in defamation-type cases. As Lord Woolf stated, following the New Zealand approach "would mean that a plaintiff who would otherwise be entitled to succeed in an action for negligence would go away empty-handed because he could not succeed in an action for defamation".[26]

In Australia the issue has been squarely considered only twice. In *Sattin v Nationwide News Ltd*[27] (a case concerning an article in the social columns of the *Sunday Telegraph*), Levine J of the New South Wales Supreme Court reviewed the above decisions and endorsed the New Zealand approach. Not surprisingly, Levine J followed his own decision in the recent case of *"GS" v News Ltd.*[28] In this case, the plaintiff was the patient of a psychiatrist who was the subject of disciplinary proceedings before a Medical Tribunal. Although the tribunal had ordered her name to be suppressed, she was identified by the defendant's newspaper. This case is interesting because the plaintiff claimed damages not just for economic loss (arising out of her inability to work and medical expenses)

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19 Note 1 *supra.*

20 This allegation was assumed to be false for the purposes of the appeal.

21 This is because the comment on the file was made by a person who had an interest or duty to make the communication and the person to whom it was made had a corresponding interest in receiving it: *Adam v Ward* [1917] AC 309.

22 *Horrocks v Lowe* [1975] AC 135; *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321.

23 *Balfour v Attorney-General*, note 1 *supra* at 529.

24 Note 1 *supra.*

25 Lords Goff, Lowry, Slynn and Woolf.

26 Note 1 *supra* at 351.

27 Note 1 *supra.*

28 Note 1 *supra.*

but also for physical and psychological injury arising out of the publication.[29] It highlights the fact that damages in negligence are concerned with either physical, economic or psychological harm, whereas damages in defamation are aimed at compensating damage to *reputation*.[30] Despite the different objectives of the two causes of action, his Honour held that: "if there is to be found a claim conformable with or akin to, in some way, a claim made for injury to reputation, then the plaintiff is bound to the cause of action in defamation only".[31]

In summary, litigants have brought suits in negligence either to provide an extra opportunity for recovering damages, or to circumvent anticipated defences which would arise if the action were framed in defamation.[32] This has made many judges nervous, particularly those in the New Zealand Court of Appeal, and explains the reason for their blanket rule against liability in negligence. This is an important point. The arguments endorsed by the New Zealand Court of Appeal supporting the mutual exclusivity of defamation and negligence deny that negligence could ever play a role in defamation type cases. The arguments are tailored to protect defamation as a cause of action and will always be determinative of the issue where they are accepted.[33] Their validity turns on the nature of the causes of action and it is to that issue which I now turn.

IV. SEARCHING FOR A THEORY: WHERE TO BEGIN?

In his Maccabaean Lecture in Jurisprudence delivered to the British Academy in 1983, Sir Robert Goff, then a Lord Justice of Appeal, delivered an

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29 Paragraph 7 of her statement of claim particularised her damage as including the aggravation of a pre-existing psychiatric disorder, shock, extreme emotional distress and bleeding from the nose caused by prolonged weeping.

30 It must be noted at this point that the concept of 'business' or 'trade' reputation in the law of defamation comes close to the negligence concept of 'economic loss'. Defamation recognises attacks on the professional reputations of doctors (*Jools v Mirror Newspaper* (1984) 56 ACTR 1) and architects (*Andrews v Fairfax* [1980] 2 NSWLR 225) and on the commercial reputations of companies (*Australian Ocean Line v West Australian Newspapers* (1985) 58 ALR 549). Corporations can only sue for injury to their trade or business reputations (*ABC v Comalco* (1986) 68 ALR 259) and Professor Fleming notes that they may be confined to recovery for actual, identifiable financial loss or allegations likely to cause such loss: see JG Fleming, *The Law of Torts*, Law Book Co (8th ed, 1992) p 529. In these cases, the concept of 'reputation' in defamation is very close to that of 'economic loss' in negligence.

31 *"GS" v News Ltd*, note 1 *supra* at 64,911.

32 As will be apparent, plaintiffs have made claims in negligence in order to avoid defamation defences such as justification (as in *Bell-Booth*) and qualified privilege (as in *Balfour*, *South Pacific* and *Spring*). As yet, there are no cases on record in which negligence has been alleged in circumstances where the defence of fair comment would apply. For example, no one has yet sued a restaurant critic for writing a critique *negligently*, rather than in a defamatory way. Nevertheless there is no reason why fair comment should be treated any differently from qualified privilege or justification.

33 In contrast, the opposing camp does not say that negligence *must always* play a role, but merely argues that negligence *can sometimes* be used as an alternative cause of action to defamation. In other words, under the English approach the defamation issue is not necessarily determinative. The principles upon which new duty situations are recognised in the law of negligence have been well documented and are beyond the scope of this paper. But see D Kwei, "Duty of Care, Aristotle and the British Raj: A Reassessment" (1997) 21 *MULR* 65 for one suggestion.

impassioned plea for principle in judicial reasoning.[34] He made it clear that awareness of history and of context are crucial to the principled development of the law. His Lordship warned against taking an "unhistorical approach to earlier authority", saying that: "[i]t is easy to read, interpret and even criticise a past opinion without taking account of the historical context in which it was expressed".[35] The example he gave is both humorous and illuminating. The eighteenth century lexicographer and poet Dr Samuel Johnson expressed his views regarding the winter habits of swallows as follows:

> Swallows certainly sleep all winter. A number of them conglobulate together, by flying round and round, and then all in a heap throw themselves under water and lie in the bed of a river.

"How perverse!" one might exclaim. How could a grown man seriously entertain such an idea? Indeed, that is precisely what Lord David Cecil wrote in his memoirs after reading of Dr Johnson's theory.[36] However, Lord Goff takes exception to Cecil's criticisms, not because he ascribes to the idea that the missing swallows are lying fast asleep on wintry river beds, but rather because it is too harsh to describe the theory as "perverse" if one takes into account that many people in the eighteenth century held similar views. An awareness of history is vital to the principled development of the law and so too is sensitivity to historical context. When thinking about the nature and role of the causes of action, it is important to be aware of two major historical shifts over the last two centuries: one procedural and the other jurisprudential.

V. THE PROCEDURAL SHIFT

Prior to 1873, a plaintiff was required to choose from a number of fairly inflexible forms of action when suing in court. In 1830, there were approximately 72 such forms, each of which involved a unique originating process, mode of pleading, trial and judgment. Today, when analysing a problem such as the relationship between defamation and negligence, these facts are relevant for two reasons. The first is that the forms of action provided the law with its structure. Large bodies of substantive law attached to each form of action, and precedents taken from one form of action had limited value in another.[37] The second is that a plaintiff could only bring an action under one form of action. There was no such thing as "intersecting categories" of substantive law because once an action was begun using one form, only precedents associated with that form were relevant.

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34 R Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169.

35 *Ibid*, p 175.

36 D Cecil, *Library Looking Glass*, Constable (1975) p 141.

37 FW Maitland, *The Forms of Action at Common Law*, Cambridge University Press (1909) p 3.

However, under this system the common law suffered from the "disease of hardening categories".[38] As Maitland observed, "[t]he plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen".[39] Plaintiffs might fail because another form of action was more appropriate. Although they had the option of starting again using the proper form, these procedures erected a practical barrier against litigants with genuine grievances obtaining remedies to which they were clearly entitled.

In response to these problems, the *Judicature Act* 1873 (UK) abolished the forms of action completely. Today, all that is required is a statement of facts which, if proved, would entitle the plaintiff to a remedy. There is no requirement to identify the legal principles upon which the remedy is claimed. For present purposes, there are three striking consequences of these reforms. First, it became possible to sue in more than one cause of action at a time. Today, writs are commonly indorsed with a number of causes of action and in this way the reforms implemented by the *Judicature Act* 1873 were a condition precedent of the "conundrum of disorderly categories". Secondly, the reforms subtly changed the way in which the law came to be developed. Thirdly, the substantive law lost the framework which had provided it with its structure. The latter two points require further discussion.

The *Judicature Act* 1873 marked a move from form to substance in the adjudication of disputes and development of the law. Although plaintiffs were responsible for framing their arguments, strictly speaking they were not required to choose the applicable form of action, nor they did have to nominate the principles upon which the court would be moved to provide the relief.[40] In *Oakley v Lyster*, Scrutton LJ declared that: "the courts find out the facts, and having done so, endeavour to give the right legal judgment on those facts".[41] The more expansive role given to the courts in the determination of disputes gave them greater freedom to focus on the broad principles underlying the cases. Actions could fail or, as *Donoghue v Stevenson*[42] demonstrated, new remedies could be fashioned using these broad principles so that, as Stable J declared in *Dies v British and International Mining and Finance Corporation Ltd*,[43] "[t]he question is not now one of the appropriate forms in which to clothe the right, but whether or not the right exists".

But how was this substantive law to be organised if there were no longer any forms of action into which it could be pigeonholed? To a certain extent, although the forms of action were now dead, the law retained the shape of their fossilised remains.[44] Yet, as Atiyah has observed, "the boundaries of a legal

38 G Williams and BA Hepple, *Foundations of the Law of Tort*, Butterworths (1976) p 28.

39 Note 37 *supra*, p 4.

40 A recent example of a judgment given on principles other than those nominated by the plaintiff is that of Lord Goff in *Spring*, note 1 *supra* at 319.

41 [1931] 1 KB 148 at 151.

42 [1932] AC 562.

43 [1939] 1 KB 724 at 738.

44 Hence Maitland's famous epithet, that: "[t]he forms of action we have buried, but they still rule us from their graves", note 37 *supra*, p 1.

subject are not set by divine prescript",[45] so the organisation of precedents into coherent bodies fell to that new breed of English lawyer: the academic. At first, the attempts were woefully inadequate. In his inaugural lecture as Vinerian Professor of Common Law at Oxford in 1883, AV Dicey lamented this state of affairs. The leading contemporary texts tended to be annotated anthologies of leading cases, which "for absolute uninstructiveness, may be compared to an attempt to classify animals by dividing them into dodos, lions and those which are not dodos or lions".[46]

However, the late nineteenth century saw the appearance of many seminal texts which are still used to this day.[47] This proliferation of legal texts prompted Maitland to observe in 1909 that: "a rational, modern classification of causes of action is what we are gradually obtaining".[48] Birks has highlighted the instrumental role played by commentators in the development and *creation* of new legal doctrine in such areas as tort, contract, administrative law, private international and criminal law.[49] Harlow, too, confirms the instrumental role played by academics who:

> searched in the mass of common law cases for principles which they could use to replace the scaffolding previously supplied by the forms of action. They set out to re-classify the common law, abandoning the old compartments formed by the forms of action and choosing instead to mark out boundaries between criminal law, contract and tort.[50]

These observations point to the dynamic influence exerted by academic commentary on the law's development. Interestingly, it is also possible to identify a static effect which persists in tension with the dynamic:

> In course of time, as textbooks have multiplied and university law courses have been built around the textbooks, the boundaries of the subjects appear to have become immutably fixed, and this tendency has been reinforced by attempts to define the scope of the subject at any given period.[51]

In this passage, Atiyah has identified a fundamental shift in the paradigm by which the law operates to deny certain claims brought by litigants. This shift is particularly evident in the New Zealand approach to the negligence/defamation cases where liability in negligence is denied on the basis that it would undermine the law of defamation. Initially the modern causes of action such as contract and

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45 PS Atiyah, *Accidents Compensation and the Law*, Weidenfeld and Nicolson (1970) p 41.

46 AV Dicey, "Can English Law be Taught at the Universities" (1883) p 13; quoted in quoted in Birks, note 49 *infra* at 162.

47 See *Anson's Law of Contract* (with 26 editions) which first appeared in 1879. Odgers' *Libel and Slander* was in its first edition in 1881, while Pollock published *The Principles of Contract* in 1876 and *The Law of Tort* in 1883. *Clerk and Lindsell on Torts* (presently in its 17th edition) first appeared in 1889.

48 Note 37 *supra*, p 7.

49 P Birks, "Adjudication and Interpretation in the Common Law" (1994) 14 *Legal Studies* 156 at 159-60.

50 C Harlow, *Understanding Tort Law*, Fontana (2nd ed, 1995) pp 11-12.

51 Atiyah, note 45 *supra*, p 41.

negligence arose from an attempt to synthesise and organise large bodies of substantive law which could no longer be related directly to the abolished forms of action. They focused attention on the general abstract principles for which cases could be said to stand by providing a classificatory grid for such principles. In cases embodying the New Zealand approach, the classification can be seen to have become an element of the substantive law itself. Liability is denied on the basis that the integrity of one or more of the categories would be undermined rather than upon a consideration of the optimal social outcome which was encouraged by the *Judicature Act* 1873. It could be said that the procedural limitations which were abolished by the Act have been replaced by a limitation stemming from the taxonomy developed by academic lawyers.

These observations are crucial when thinking about the role of causes of action. If one thinks of their structure as being largely determined by academic convention (rather than being designed to protect a substantive principle) guarding their integrity seems to be of less importance. This is particularly the case if such vigilance could be seen to be contrary to the spirit of the reforms of the *Judicature Act* 1873. However, it does not follow that because the established structure of the law may be determined in part by academic texts, the structure is not important, or should be changed at will. There may still be compelling reasons to treat the classification as a substantive principle. These reasons require us to turn our attention from the realm of procedure to that of jurisprudence.

VI. THE JURISPRUDENTIAL SHIFT

The effect of the abolition of the forms of action has been well documented. However, there is very little literature which attempts to develop a theory of the causes of action as they are today. When developing such a theory, it is important to bear in mind the jurisprudential shift from the position where laws were once viewed solely in terms of their *prescriptive* function to the position today, where laws are seen in terms of both their prescriptive *and cognitive* dimensions.

A. The Prescriptive Function of Law

Laws prescribe standards which must not be breached. If those standards *are* breached, certain legal consequences flow from that circumstance. The prescriptive function of the law can be illustrated with a brief example. In *Boyd v Mirror Newspapers Ltd*,[52] the defendant newspaper published an article about the plaintiff, a successful rugby player, under the heading: "BOYD IS FAT, SLOW AND PREDICTABLE". The article went on to say that Boyd, who had recently suffered an injury, "waddled into the sunshine" and implied that he did not deserve his place in a first grade club. For an action in defamation to succeed, a plaintiff must be able to prove three elements at the very least, namely: (a) the

52 [1980] 2 NSWLR 449.

publication of (b) defamatory material, which (c) identifies the plaintiff as the person defamed. There was no dispute about the fact that there was a publication that identified the plaintiff and therefore no question arose with respect to requirements (a) and (c). However, the defendant contended that the article was not defamatory. Generally, a statement is defamatory if it is "calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule", or if it would tend to lower the person in the estimation of others.[53] It was alleged that the words were defamatory because they contained imputations, inter alia, that Boyd was so fat as to appear ridiculous and that he could not properly play in first grade rugby league football. Hunt J held that the use of the word "waddled" was capable of displaying Boyd in a ridiculous light, and could therefore be defamatory. However, he held that a statement that he was "fat and slow" could not be defamatory, as it could not lower Boyd in the estimation of others unless there were also some allegation that he was personally responsible for this condition (rather than it being due to his condition per se). Defamation is designed to protect a person's personal reputation, and although being described as "fat and slow" may make people think less of Boyd as a player, it did not affect his personal reputation.

The prescriptive function of defamation law is clearly evident in this familiar process of reasoning. Personal reputation must be protected; conduct which has the tendency to damage reputation, and only that conduct, attracts liability. This has a number of ramifications when the law's relation to the facts of any given case is analysed. As demonstrated above, laws are seen as a series of a priori or transcendent propositions which are applied to the facts in a fairly simple, mechanical way. Lord Simon of Glaisdale explains this view succinctly in *Lupton v FA & AB Ltd*:

> A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a *pre-existing rule of law* (either statutory or judge-made) and with the minor premise consisting of the material facts of the case under immediate consideration.[54]

Justice Hunt's decision in *Boyd v Mirror Newspapers Ltd* which was discussed above can therefore be expressed in the following terms:

Major premise: Stating that a player "waddled" onto the field is defamatory because it has the tendency to make the plaintiff appear ridiculous.

Minor premise: The defendant stated that the plaintiff "waddled" onto the field.

Conclusion: The defendant defamed the plaintiff.

Having ascertained the relevant rule (expressed in the major premise), it is a fairly simple process to determine whether the facts (stated in the minor premise)

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53 *Parmiter v Coupland* (1840) 6 M & W 105 at 108; *Dunlop Rubber Co Ltd v Dunlop* [1921] 1 AC 367.

54 [1972] AC 634 at 658 (emphasis added).

fall inside or outside of the rule.[55] The conclusion follows as a matter of course.[56] This is the most important aspect of the prescriptive function of law: if one wishes to prescribe acceptable standards of conduct by which to protect reputation (for example), one must be able to label any given statement as defamatory or not. In *Boyd v Mirror Newspapers Ltd*, Hunt J was able to label the statement that the plaintiff "waddled" as defamatory, but would not label the statement that the plaintiff was "fat and slow" as defamatory.

B. The Cognitive Function of Law

The Austrian legal philosopher Hans Kelsen identified another role performed by laws when he stated that: "the norm functions as a scheme of interpretation".[57] Kelsen's observation goes over and above the idea that law is a set of norms which are mechanically applied to facts. He argues that the legal significance of human action is not a phenomenon which can be perceived by the senses. Seeing an act as the execution of a death penalty rather than murder "results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure".[58] Similarly, viewing a resolution of a particular body of people as a statute results from conformity with various constitutional norms. Thus, Kelsen argues that laws have an *interpretative* or *cognitive* function as well as a prescriptive one. The law not only regulates what we do but also the way we see the world.

Those from the 'modernist' school tend to view laws only in terms of their prescriptive function.[59] The shift in the paradigm where we view law in terms of both the prescriptive and cognitive functions has been mirrored in other fields of thought and is referred to as being a shift from the modern to the postmodern:

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55 A legal judgment is usually expressed with the legal rule forming the major premise, the facts constituting the minor premise and a statement of liability in the conclusion. However, to a certain extent, major premises involve mixed issues of facts and law. It will also be evident that the syllogism rests on the (once prevalent) legal fiction of the declaratory theory. This is the idea that the rule "stating that a player waddled onto the field is defamatory" existed in the abstract before it was applied to the facts at hand. Nevertheless, the reliance on the defunct declaratory theory does not detract from the illustrative power of the syllogism: it is still a useful method of showing how part of the process of legal reasoning is to determine whether facts fall outside of or within a legal rule.

56 This is an (intentionally) simplified explanation of how the syllogism works. The conclusion in fact never *follows* from the premises. American instrumentalist philosopher and professor of law John Dewey makes it clear that in formal logic "the conclusion does not follow from premises; conclusions and premises are two ways of stating the same thing. Thinking may be defined either as development of premises or development of a conclusion; as far as it is one operation it is the other": J Dewey, "Logical Method and the Law" (1924) 10 *Cornell Law Quarterly* 17 at 23. Dewey describes the thinking process not as a scientific and linear realisation, but as a more confused and global process: "namely, that thinking actually sets out from a more or less confused situation, which is vague and ambiguous with respect to the conclusion it indicates, and that the formation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of prior rules". To this extent, the reference to the syllogism in this paper is overly simplistic and this has been done for the sake of convenience and clarity.

57 H Kelsen, *Pure Theory of Law*, University of California Press (1967) p 4.

58 *Ibid.*

59 G Samuel, *Foundations of Legal Reasoning*, Maklu (1994) p 137.

> The goal of the sciences is a description as accurate as possible of facts .... But facts are never self evident. They never directly thrust themselves upon one, and it can be said that they exist neither *a priori* nor separately. Facts have sense only in relation to a system of thought, through a pre-existing theory.[60]

Focusing solely on the prescriptive function of law leads one to the philosophical problem of essentialism. In the present context, this is the notion that there is an essential link between the facts of any given case and the label the law chooses to attach to it. The assertion that a statement is 'really' a defamatory one (and therefore not actionable in negligence) ignores the cognitive dimension of the cause of action.

When the problem of essentialism is acknowledged, some of the arguments proposed by those favouring the New Zealand approach, the fence-liners, lose their force. In *"GS" v News Ltd*, Levine J observed that:

> The question begged of course is whether the cause of action is defamation. The available position for the defendant assumes that it is. This case is concerned ... with whether or not it is safe to make that assumption.[61]

His Honour admits that the question is "exquisitely difficult of resolution",[62] but fails to recognise that the inquiry is in fact nonsensical because it ignores the interpretative or cognitive function of the causes of action.

Hardie Boys J has stated that: "[a]n inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame".[63] In other words, Hardie Boys J is saying that this statement is really a defamatory statement and cannot be called a negligent misstatement. Similarly, those in favour of fencing off defamation have argued that imposing a duty of care "involves an extension of the law of negligence which flies in the teeth of express statements that anything less than malice in the making of a *privileged statement* cannot engage liability".[64] Again, this argument supposes that a label given to a factual circumstance can attach to its essential nature in some way so that it has meaning within another cause of action. However, a statement can only ever be seen as "privileged" when viewed through the lens of defamation. It is only when the prescriptive dimension of law is allowed to dominate that the cognitive is forgotten; and it is the need to label, a need which stems from the prescriptive dimension, which makes one forget.

It may be thought that the same arguments are used (but in reverse) by those favouring intermingling. Lord Woolf has declared that fencing off the law of defamation illegitimately transfers the defence of qualified privilege into the law

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60 J-P Astolfi and M Develay, *La Didactique des Sciences*, Presses Universitaires de France (1989) pp 25-7, quoted in G Samuel, *Sourcebook on Obligations and Legal Remedies*, Cavendish (1995) p 85.

61 Note 1 *supra* at 64,912.

62 *Ibid.*

63 *Balfour v Attorney-General*, note 1 *supra* at 529.

64 A Demopolous, note 8 *supra* at 194 (emphasis added); quoted with approval in *Bell-Booth Group v Attorney-General*, note 7 *supra* at 156; and in *Spring*, note 1 *supra* at 311, per Lord Keith (dissenting).

of negligence.[65] However, in contrast to the fence-liners' arguments, this sort of claim does not rest on any notion of the essence of a factual scenario and therefore embraces the cognitive dimension of the law.

VII. LAW AS DISCOURSE

Having explored the procedural and jurisprudential shifts since the abolition of the causes of action, we now turn to the central issue: our search for the theory of the causes of action. If it is accepted that causes of action do not have an essential link to material phenomena, how are we to think of them? One way of understanding the causes of action is to think of them as forms of legal discourse.[66] In his book *The Order of Things*, Michel Foucault examines the development of the discourses of biology, linguistics and economics. He challenges the notion that there is an inherent link between the structure of these disciplines and the "real world" and emphasises the cognitive role that they play in perceiving it. In the preface to *The Order of Things*, Foucault retells a short story by Borges which quotes a fictional Chinese Encyclopaedia. He describes how his laughter, which was inspired by the passage, shattered his idea of the relation between patterns of thought and the material world; how it broke up "all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things". The encyclopaedia read:

> animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camel-hair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that look from a long way off like flies.[67]

The beauty of this story is that it encapsulates many of the ideas which are fundamental to Foucault's theory of discourse. There are five main attributes of discourse theory which are relevant to the causes of action. Each of these attributes helps to shed light on the defamation/negligence question.

A. Anti-Essentialism

The first thing to note is that Foucault's idea of discourse is *anti-essentialist*. The story from Borges made Foucault compare what could be described as two zoological discourses. He laughs at the "exotic charm" of the Chinese

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65 *Spring*, note 1 *supra* at 351.

66 Discourse is a wide ranging, multi-disciplinary theory which is used in linguistics, cultural studies, history and sociology. Goodrich takes a robust view of the discipline by stating that "[i]n the broadest and loosest of terms, the concept of discourse can be applied to any sequence of utterances at the level of the sentence or above": P Goodrich, *Legal Discourse*, MacMillan (1987) p 125. For a useful summary of some of the many conceptions of discourse, see A McHoul and W Grace, *A Foucault Primer*, Melbourne University Press (1993) pp 26-31. The sense in which it is used in this paper is based on the ideas of historian and philosopher Michel Foucault.

67 M Foucault, *The Order of Things*, Tavistock Publications (1970) p xv.

classification, but not because he believes that the Western zoological taxonomy inherently corresponds with reality. Indeed, the overriding goal of *The Order of Things* is to displace such notions. It shows that the structure of intellectual discourses, such as economics and biology, might have been different. Thus, one of the main advantages of viewing causes of action as forms of discourse is that they avoid the notion that certain facts inherently fit into one cause of action or the other. In this way they acknowledge the validity of the cognitive dimension of law.

B. Functional Similarity

Another considerable advantage of seeing causes of action as forms of discourse is that they function in very similar ways. Foucault uses the concept of discourse to show the relationship between systems of thought (amongst other things) with material phenomena. Discourses can be thought of as a filter or a lens through which we identify facts as either significant or irrelevant. They "provide 'grids' for perception, that is, impose a framework of categories and classifications within which thought, communication and action can occur".[68] Foucault emphasises the importance of the system of classification in determining what facts can be regarded as significant and what ideas can be considered logical. The fictional Chinese taxonomy is seen as ridiculous partly because it utilises observations which are excluded or marginalised by the prevailing Western discourse or the accepted categories of thought (eg, animals "that look from a long way off like flies").

As Macdonell has argued, "any discourse concerns itself with certain objects and puts forward certain concepts at the expense of others".[69] When viewing a set of circumstances which has provoked an aggrieved plaintiff to seek redress in the courts, more significance will be attached to certain factors within one cause of action than in others. In this way, it is easy to see defamation as a legal discourse which privileges the concept of the plaintiff's reputation, while negligence can be seen as one which is concerned with the fault of the defendant. For example, in defamation, generally the fault of the defendant is irrelevant. In *Lee v Wilson & McKinnon*, Dixon J stated that: "the cause of action consists in publication of the defamatory matter of and concerning the plaintiff" and that "liability depends upon mere communication of the defamatory matter to a third person".[70] In *E Hulton v Jones*,[71] a writer who gave a fictitious character an unusual name was held to have defamed a person who actually bore that name. It was held that a defendant cannot avoid liability "by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff".[72] By contrast, the law of negligence is manifestly concerned with the

68 A Hunt and G Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance*, Pluto (1994) p 9.

69 D Macdonell, *Theories of Discourse*, Basil Blackwell (1986) p 3.

70 (1934) 51 CLR 276 at 288.

71 [1910] AC 20.

72 *Ibid* at 23, per Lord Loreburn LC.

fault of the plaintiff; that is, measuring the plaintiff's conduct against that of the reasonable person.

This point was emphasised by the Judicial Committee in *Spring*. Lord Woolf stated that: "[a]n action for defamation is founded upon the inaccurate terms of the reference itself. An action for negligence is based on the lack of care of the author of the reference".[73] Allowing the causes of action to intermingle is like choosing a discourse through which to construe the facts of a case, one which privileges a different criterion of liability.[74] This certainly seems to accord with Lord Lowry's judgment in *Spring*:

> The existence of ... foreseeability and ... proximity between the plaintiff and the defendant is a justification ... for bringing into play a *different* principle of liability according to which, in a restricted class of situations, a plaintiff can rely on *negligence* as the ingredient of the defendant's conduct which is essential to the existence of that liability.[75]

In contrast, when Levine J favoured the New Zealand 'fencing off' approach in *Sattin v Nationwide News*, he stated that it prevents the "distortion" of each cause of action.[76] By this, it was meant that it keeps the concept of negligence free from defamation, and the concept of reputation away from negligence. As far as the reference to distorting defamation with notions of negligence goes, this argument certainly relies on the preconception that the case was 'really' a defamation case.[77] But more than this, it may also involve a misconception of how intellectual disciplines function in order to produce meaning. The Lords in *Spring* clearly accepted that allowing claims in negligence would not affect defamation.[78] For them, it was (implicitly) the acceptance of a different discourse to produce a different outcome.

C. The Focus on Underlying Ideas and Outcomes Rather than Categorisation

A further advantage of viewing the causes of action as legal discourse is that discourse theory focuses on *outcomes*:

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73 Note 1 *supra* at 347.

74 Two differences between Foucault's discourse and legal discourse become apparent at this point. First, individual actors are never so self-aware as to be in a position to consciously 'choose' between discourses. Secondly, and more importantly, in discourse theory even an omniscient individual actor would not be able to choose between discourses because the structure of discourses are the product of power relations within a society or discipline, not that of individual choice. Despite these differences, discourse theory still has much to offer those analysing the legal causes of action.

75 Note 1 *supra* at 325 (emphasis in original).

76 Note 1 *supra* at 44.

77 Refer to Part VI B for the comments regarding essentialism.

78 Note 1 *supra* at 337, per Lord Slynn; and at 350, per Lord Woolf.

> Discourses have real effects; they are not just the way that social issues get talked and thought about. They structure the possibility of what gets included and excluded and what gets done or remains undone.[79]

Discourse theory concentrates on the way in which the underlying principles and assumptions produce concrete social meanings and outcomes. This sort of focus is vital to those involved with the law, which must be seen as a tool for producing social outcomes and not an end in itself. Harris and Veljanovski argue that: "we should not be blinded by legal categorisations and forms as to the true nature of the underlying problem",[80] but this is what the New Zealand approach tends to encourage. In this respect, it is worth repeating the earlier conclusions about the abolition of the forms of action.[81] The *Judicature Act* 1873 implemented reforms which favoured substance over form by making courts consider cases in terms of their underlying problems and the law in terms of general principles. The causes of action, as they are conceived today, set the law's structure and are determined in part by the shape of the old forms of action and in part by academic convention. However, to the extent that they now deny liability in the negligence/defamation cases, it can be seen that this categorisation has become a substantive principle of the common law. This leaves the law open to charges that it has indeed been "blinded by legal categorisations"; a charge which, since 1873, the law has sought to avoid.

D. The Acceptance of "Discontinuous Practices"

The problem with which this paper is primarily concerned, the "conundrum of disorderly categories", is embraced comprehensively by discourse theory. The fence-liners tend to view causes of action in the same way as Birks, who asked about his yellow, seed eating canary: "are there two birds or one?". In *Bell-Booth Group v Attorney-General*,[82] the Court of Appeal observed:

> we share the Judge's reservation about whether defamation or injurious falsehood was the appropriate cause of action .... In the end it is a question largely of fact in one of the grey areas of the common law.[83]

There is only one bird, and clearly the Court shared Birks' opinion that there is only one way of viewing that bird.

Birks certainly makes a compelling case when he states that the presence of intersecting categories shows the discreditable intellectual untidiness of the law. However, Foucault would be very suspicious of his call for tidier categories: the call for better taxonomy. For Foucault, any categorisation within a discipline

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79 Hunt and Wickham, note 68 *supra*, p 8.

80 D Harris and C Veljanovski, "Liability for Economic Loss in Tort", in M Furmston (ed), *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss*, Duckworth (1986) p 47.

81 See Part V.

82 Note 1 *supra* and text accompanying note 17.

83 *Ibid* at 153.

has specific historical, linguistic and cultural biases which privilege certain concepts and marginalise or exclude others. As the structure of any discipline is not rooted in an ultimate reality, there will inevitably be pressure to restructure as the discourse changes society and is changed by it. Many medieval forms of action such as trover, assumpsit and case are only loosely reflected in the industrial age causes of action such as negligence and contract.[84]

The alternative offered by discourse theory is to embrace the untidiness and the discontinuity of the common law. As Hunt and Wickham have observed, Foucault conceives of discourses as being dispersed and unruly: "they proliferate, clash, compete and collide".[85] Foucault himself said:

> Discourses must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other.[86]

The disorder embraced by discourse theory matches the inevitable untidiness in the common law. Perhaps it is true to say that: "any system of law in which legal rules are always created ad hoc must at its best lack form and symmetry",[87] and a theory which does not require a precise demarcation of the law's categories may be more realistic. It must be remembered that: "[t]he grounds of action may be as various and manifold as human errancy",[88] and discourse theory provides a powerful intellectual framework within which the law can respond to the multi-layered complexity of real life:

> [T]here are a multitude of different documents, statutes, decisions, various formal things like interrogatories and writs, and many discourses ... all interacting at different stages and in diverse dimensions of the legal process. Law then, is a concrete demonstration of the heterogeneity of meaning.[89]

Defamation itself has existed alongside the tort of injurious falsehood (which deals with false statements concerning goods or businesses which lead to actual loss)[90] for decades. In the world of contract, any law student is aware of the multiple layers of legal responsibility created by the interaction of legal and equitable doctrines, as well as statutes such as the various State *Sale of Goods* Acts and the *Trade Practices Act* 1974 (Cth). Each of these discourses privilege a different dimension of the legal conscience and interact with the others, complementary (though few would argue perfectly so) in their effect. It is in the rich texture of concurrent and multi-layered liability that the law has been able to meet the changing demands and expectations of twentieth century society.

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84 Samuel and Rinkes, note 12 *supra*, p 8.

85 Note 68 *supra*, p 8.

86 Hunt and Wickham, note 68 *supra*, p 9.

87 T Weir, *International Encyclopaedia of Comparative Law*, Tübingen (1972) vol II, ch 2, part III, para 82.

88 *Donoghue v Stevenson*, note 42 *supra* at 598, per Lord Macmillan.

89 M Davies, *Asking the Law Question*, Law Book Co (1994) p 247.

90 *Ratcliffe v Evans* [1892] 2 QB 524.

Although concurrent liability is a familiar concept, it has been resisted in certain areas. The most notable example is cases which deal with the so-called 'contract-tort divide'. In *Groom v Crocker*,[91] the plaintiff sued in tort for damages for injured feelings and reputation. The defendant was the plaintiff's solicitor, and it was clear under the House of Lords' decision in *Addis v Gramophone Co Ltd*[92] that such damages were not recoverable under their solicitor/client contract. The Court of Appeal denied recovery on the basis that the appropriate cause of action was in contract not tort. In England, the expansion of the law of negligence into the field of pure economic loss has also had implications for the law of contract. In *Lister v Romford Ice and Cold Storage Co Ltd* it was stated that:

> [s]ince in modern times the relationship between master and servant ... is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.[93]

In applying this dictum in *Tai Hing Ltd v Liu Chong Hing Bank*,[94] the Privy Council denied that tortious liability in negligence could ever exceed that in contract, at least where the relationship was "inherently" contractual. The English ambivalence to recovery for pure economic losses in negligence was typified in the House of Lords decisions in *Caparo Industries Plc v Dickman*[95] and *Murphy v Brentwood DC*,[96] which prompted Markesinis and Deakin to state that there is a perception that such loss was so fundamentally different that there was a "bright line rule" of no recovery.[97]

In stark contrast to this is the Canadian position outlined in *Central Trust Co v Rafuse* which guarantees that a plaintiff "has a right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence".[98] This case has received the approval of the Australian High Court with respect to the contract-tort problem,[99] and that of Lord Goff in *Henderson v Merrett Syndicates Ltd.*[100] The New South Wales Court of Appeal has cited *Spring* itself as authority for the proposition that there may be concurrent contractual and tortious liability which, perhaps most significantly, goes further than supporting the narrower proposition that it only stands for possible concurrent liability in negligence and defamation.[101] This growing

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91 [1939] 1 KB 194.
92 [1909] AC 488.
93 [1957] AC 555 at 587, per Lord Radcliffe.
94 [1986] 1 AC 80 at 107.
95 [1990] 2 AC 605.
96 [1991] 1 AC 398.
97 BS Markesinis and S Deakin, "The Random Element in their Lordships' Infallible Judgment" (1992) 55 *MLR* 619 at 623-7.
98 (1986) 31 DLR (4th) 481 at 522, per Le Dain J.
99 *Bryan v Maloney* (1995) 182 CLR 609 at 620-2, per Mason CJ, Deane and Gaudron JJ. See also *Hawkins v Clayton* (1988) 164 CLR 539 at 575, per Mason CJ and Wilson J.
100 [1995] 2 AC 145 at 191.
101 *NRMA Insurance Ltd v AW Edwards Plc* (unreported, NSW CA, Kirby P, Mahoney and Powell JJA, 11 November 1994).

acceptance of the plaintiff's right to choose between contractual and tortious actions lends weight to the argument that the causes of action are best seen as forms of overlapping legal discourse.

E. Internal Dynamism

This talk of untidiness in legal doctrine refers chiefly to the overlapping of various tortious causes of action. It relates to the external. In an internal sense, however, it can be argued that defamation *has* struck a neat equilibrium between competing values. Judges ascribing to the New Zealand approach frequently point out that:

> The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other.[102]

One major problem behind this argument is that it posits a stagnant role for the common law. The common law should not shy from change when the change is made to mirror evolving societal expectations,[103] and this is particularly true of the law of negligence. In *Donoghue v Stevenson*, Lord Macmillan argued forcefully that: "the conception of legal responsibility may develop in adaptation to altering social conditions and standards".[104] For this reason, judges must be wary of the complacency which assumes that the process of compromise in which the courts have engaged has culminated in an ideal or perpetual equilibrium. In *Spring*, Lord Woolf argued that despite the existence of the well recognised defence of qualified privilege, "[i]t by no means follows that so far as references are concerned the same view should be taken of public policy as was taken when *Whitely v Adams* was decided [in 1863]".[105]

In Australia, the argument that the common law with respect to defamation has struck an ideal balance has lost some impact in the light of the recent High Court case of *Lange v ABC*.[106] In that case, the defence of qualified privilege was changed as it related to communication about government and political matters. In a unanimous joint judgment, the Court recognised that the common law had struck an acceptable balance between the interest in reputation and the freedom of political communication as those interests were perceived at Federation. However, the Full Court further recognised that:

> [t]he expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern

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102 *Bell-Booth Group v Attorney-General*, note 1 *supra* at 156; *Sattin v Nationwide News*, note 1 *supra* at 36; *Spring*, note 1 *supra* at 311. See *Balfour v Attorney-General*, note 1 *supra* at 529 for a similar statement.

103 See *The Commonwealth v Oliver* (1962) 107 CLR 353.

104 Note 42 *supra* at 598.

105 Note 1 *supra* at 351.

106 (1997) 189 CLR 520.

development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901.[107]

VIII. CONCLUSION

Viewing causes of action as legal discourse makes sense because discourse theory accurately describes the way in which causes of action operate. In doing so, discourse theory suggests that the doctrinal arguments raised by fence-liners against imposing liability in negligence are not as strong as the arguments of those who prefer the English approach. Discourse theory recognises the cognitive dimension of the law and thereby dispels the notion that there are certain grievances which should or must be actionable solely in defamation. It also helps those involved with the law to focus on substantive principles and underlying grievances over legal forms, as was encouraged by the great nineteenth century procedural reforms. The theory shows how causes of action work by privileging different criteria of liability (such as the plaintiff's reputation or the defendant's fault) and how causes of action can be brought into play to produce differing but complementary solutions by working on distinct dimensions of the factual scenarios of cases. In this way, the argument of the fence-liners that allowing claims in negligence will contaminate or undermine defamation is discounted. Furthermore, by recognising the way in which causes of action privilege some criteria and exclude or marginalise others, discourse theory provides a sound demonstration of how intellectual disciplines, including the law, operate to create meaning and generate outcomes. By using discourse theory, the problems associated with the inescapable untidiness of the real world and of the common law are unravelled like a difficult knot. The "conundrum of disorderly categories" ceases to be a conundrum, and the interwoven texture created by the causes of action becomes one of the law's strengths. Finally, discourse theory reminds us that the balances struck by the courts are never permanent, and that the strength of accepted policy arguments must be evaluated every time a litigant demands it.

However, the solution provided by discourse theory is only a partial one: it only says that defamation and negligence should be allowed to cover the same ground. It remains to be considered whether, on any given set of facts, liability in negligence should be imposed.[108] Although discourse theory only provides a partial answer, its contribution can still be significant. It is primarily the doctrinal arguments that are used by the fence-liners to justify the blanket rule of no negligence liability in cases where the plaintiff may have a cause of action in defamation. The doctrinal arguments have been stated by both camps and therefore must be evaluated and balanced, and the conclusion must make sense. Like the search for swallows in winter, no doubt it will take a long time and much effort to find the solution; but discourse theory does provide a good

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107 *Ibid* at 110-11.

108 As stated earlier, this inquiry, which involves consideration of the general principles by which duties of care are recognised in novel situations, is beyond the scope of this paper.

starting point. Although we may not have found all of those swallows in winter, perhaps we've sighted a couple ... and perhaps we've found a few in *Spring*.