The Impact of the High Court's Free Speech Cases on Defamation Law

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It is said that American First Amendment scholar Alexander Meiklejohn described the United States Supreme Court's decision in *New York Times Co v Sullivan*[1] as "an occasion for dancing in the streets".[2] In that case, the United States Supreme Court for the first time "constitutionalised" American defamation law by restricting its operation in the light of the guarantee of freedom of speech in the First Amendment to the United States Constitution. The recent decisions of the High Court of Australia in *Theophanous v Herald & Weekly Times Ltd* ("*Theophanous*")[3] and *Stephens v West Australian Newspapers Ltd* ("*Stephens*")[4] are at least as significant for the law of defamation in Australia as *New York Times Co v Sullivan*[5] was for American law. The High Court's decisions "constitutionalise" Australia's defamation laws by establishing a defence, derived from the Constitution, which applies where the defamatory publication is a matter of political discussion. The defence is available in all Australian jurisdictions, whether the defamation law in that jurisdiction is based on the common law or statute. As it is a defence derived from the Constitution, it is not possible for State, Territory or Federal legislation to overcome the defence or to restrict its operation. The decisions also expand the operation of the common law "duty-interest" form of qualified privilege so that it is more likely now than it was before to protect a publisher who has published defamatory material to the public at large.

It is submitted that, contrary to the views of some commentators,[6] the decisions will have a profound impact on the law of defamation in Australia, giving publishers greater freedom to publish material about political matters whilst, at the same time, encouraging responsible journalism. Indeed, in this article it will be argued that the decisions strike a better balance than *New York Times Co v Sullivan*[7] between the protection of reputation from wrongful attack and the protection of freedom of communication.

The purpose of this article is to analyse the impact of the High Court's decisions on defamation law as it operates in Australia. Except insofar as it is relevant to that analysis, it is not proposed to examine the issue of what should be the role of the High Court in relation to the Constitution or, more particularly, what role judicial policy should play in the interpretation of the Constitution.

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1 376 US 254 (1964).

2 See Brennan, W J, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment" (1965) 79 *Harv LR* 1, 17.

3 (1994) 124 ALR 1.

4 (1994) 124 ALR 80.

5 Above n1.

6 See Waterford, J, "What the experts say..." (1994) 26 *Gazette of Law and Journalism* at 10.

7 Above n1.

1. *Overview of the Cases*

Theophanous and *Stephens* were both cases stated by Mason CJ pursuant to section 18 of the *Judiciary Act* 1903 (Cth). Section 1.1 below analyses how *Theophanous* establishes the new defence. *Stephens*, which is analysed in section 1.2, confirms that the defence applies to State political material. The operation of the new defence is examined in section 2 below, which includes an analysis of the impact of the decisions on the defence of qualified privilege.

1.1 Theophanous

This case concerned a letter to the editor which was written by Mr Bruce Ruxton and published in the *Sunday Herald Sun* by The Herald & Weekly Times Ltd on 8 November 1992; at that time it was anticipated that a federal election would be held in December 1992. The letter concerned Dr Andrew Theophanous, a member of the House of Representatives and chair of both the Joint Parliamentary Standing Committee on Migration Regulations and the Australian Labor Party's Federal Caucus Immigration Committee; it was headed "Give Theophanous the shove". The letter said that it was "high time" Theophanous was "thrown off Parliament's immigration committee"; the writer said that he had read reports that Theophanous "stands for most things Australians are against. He appears to want a bias shown towards Greeks as migrants". The letter went on to say that it had been reported that Theophanous "wants the British base of Australian society diluted so that English would cease to be the major language"; the writer referred to Theophanous's "idiotic antics" and said that he hoped Theophanous would be given "the heave" by his electorate. Dr Theophanous commenced defamation proceedings in Victoria against Ruxton and against The Herald & Weekly Times Ltd, publisher of the *Sunday Herald-Sun*. The Herald & Weekly Times Ltd sought to raise a defence excusing the publication on constitutional grounds; it was pleaded that the publication was not actionable because the material was published pursuant to a freedom of expression implied by the Constitution. Upon the plaintiff moving to strike out this defence, and one based on qualified privilege, the matter was removed to the High Court.

The starting point for analysing *Theophanous* is the earlier decisions of the High Court in *Nationwide News Pty Ltd v Wills*[8] and *Australian Capital Television Pty Ltd v Commonwealth*.[9] In those cases, a majority of the High Court had distilled from the provisions and structure of the Constitution, particularly from the concept of representative government, an implication of freedom of political communication. In both cases, the High Court had held certain federal legislation to be invalid; one ground relied upon by some members of the Court was that the federal legislation in question infringed the freedom to communicate implied by the Constitution. *Theophanous* did not concern federal legislation; it concerned the laws of the various Australian States and Territories imposing civil liability for defamation. In New South Wales, South Australia, Victoria, the Australian Capital Territory and the Northern Territory

8 (1992) 177 CLR 1.
9 (1992) 177 CLR 106.

defamation law is based on the common law as modified by legislation.[10] In Queensland and Tasmania the law has been codified.[11] Western Australia's defamation law is to be found in a Code and in the common law as modified by legislation.[12]

In *Theophanous*, in a joint judgment, Mason CJ, Toohey and Gaudron JJ held that the implied freedom recognised in the earlier cases was capable of extending to freedom from restraints imposed by statute law and that it shapes and controls the common law.[13] They said:

> [A]n implication of freedom of communication, the purpose of which is to ensure the efficacy of representative democracy, must extend to protect political discussion from exposure to onerous criminal and civil liability....[14]

It was on this basis that they created a new defence in an action for defamation where the material is protected by the implied freedom of political discussion. In a separate judgment, Deane J also decided that the implied freedom of political discussion constitutes a limitation on State laws.[15] Accordingly, in *Theophanous*, a majority of members of the High Court (Mason CJ, Toohey, Gaudron and Deane JJ) concluded that defamation law, whether it is based on legislation or the common law, was subject to, and could be shaped by, the implied constitutional freedom of political discussion. In separate judgments, Brennan, Dawson and McHugh JJ dissented in relation to this development of the earlier decisions in *Nationwide News Pty Ltd v Wills*[16] and *Australian Capital Television Pty Ltd v Commonwealth*.[17] Brennan J was not prepared to hold that the freedom which flows from the implied limitation on power is a personal freedom; he said that the Constitution deals not with the rights and liabilities of individuals amongst themselves, but with the structures and powers of organs of government.[18] Accordingly, the notion that an implication drawn from a constitutionally prescribed structure of government is inconsistent with common law rights and liabilities of individuals inter se was, in his view, erroneous.[19] So far as State and Territory legislation was concerned, the constitutional implication could operate to limit the power to enact laws that infringe the Constitution, but, in Brennan J's opinion, it could not be said that the present defamation

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10 *Defamation Act* 1974 (NSW); *Wrongs Act* 1936 (SA) Pt 1; *Wrongs Act* 1958 (Vic) Pt 1; by the *Seat of Government Acceptance Act* 1909 (Cth) s6 and the *New South Wales Acts Application Ordinance* 1984 (ACT) s3(1), Schedule 2, Pts 11 and 12, the *Defamation Act* 1901 (NSW) and the *Defamation (Amendment) Act* 1909 (NSW) apply in the Australian Capital Territory; *Defamation Act* 1938 (NT).

11 *Defamation Act* 1957 (Tas); *Criminal Code* (Qld) s365–389 (this applies to civil actions — see *Defamation Law of Queensland* 1889 s9).

12 The *Criminal Code* (WA) s345–369, *has only limited application to civil actions (see WA Newspapers Ltd v Bridge* (1979) 141 CLR 535). The legislation is the *Newspaper Libel and Registration Act* 1884 (WA) and *The Newspaper Libel and Registration Act 1884 Amendment Act* 1888 (WA).

13 Above n3 at 15–7 and 23.

14 Id at 18.

15 Id at 44–6.

16 Above n8.

17 Above n9.

18 Above n3 at 32–3 and 36.

19 Id at 36.

laws have precluded people from exercising the political judgments required for their participation in representative government.[20] In McHugh J's opinion, the institution of representative government is not part of the Constitution independently of certain sections of the Constitution;[21] he was not prepared to imply from the terms of the relevant sections of the Constitution "the whole apparatus of representative government".[22] Accordingly, he also disagreed with the majority view that State legislation and common law principles are liable to be overturned by the principle of representative democracy.[23] Dawson J, also dissenting, said that he did not regard it as tenable to suggest that defamation laws represent a denial of representative government.[24]

Returning now to the joint judgment, having decided that the implied freedom of political communication was capable of restricting the common law and State and Territory legislation, Mason CJ, Toohey and Gaudron JJ then analysed whether the current law of defamation was inconsistent with the requirements of the implied freedom. They held that it was. The common law of defamation is, they said, balanced too far against freedom of communication; they characterised the existing law as seriously inhibiting freedom of communication on political matters.[25] The implied freedom did not, however, demand or need protection in the form of an absolute immunity. They held that there was nothing in the concept that requires protection in relation to the publication of statements that are knowingly false, or publication with reckless disregard for the truth or untruth of the material published, or for statements made irresponsibly.[26]

Deane J would have been prepared to establish what was in some ways an even wider protection for publishers than that set out in the joint judgment. He considered that the effect of the implied freedom to communicate was to preclude completely the application of State defamation laws to impose liability in damages for the publication of statements about the official conduct or suitability for office of a member of the Commonwealth Parliament or other holder of high Commonwealth office.[27] For the purpose of the answers to the case stated, Deane J did, however, lend his support to the joint judgment.[28] Accordingly, in answer to the case stated, the High Court held that:

> (1) There is implied in the Commonwealth Constitution a freedom to publish material:
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> (a) discussing government and political matters;
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> (b) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees;

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20 Id at 38–9.
21 Id at 71–2.
22 Id at 75.
23 Id at 76.
24 Id at 65–7.
25 Id at 20 and 23.
26 Id at 21.
27 Id at 61.
28 Id at 63.

(c) in relation to the suitability of persons for office as members of the Parliament.

(2) In the light of the freedom implied in the Commonwealth Constitution, the publication will not be actionable under the law relating to defamation if the defendant establishes 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.[29]

1.2 Stephens

The six plaintiffs in *Stephens* were members of the Legislative Council of Western Australia and of its Standing Committee on Government Agencies. The plaintiffs commenced an action for defamation against the publisher of the West Australian newspaper claiming that three articles published in the newspaper defamed them. The articles dealt with an interstate and overseas trip undertaken by the plaintiffs as members of the Standing Committee. The articles reported that claims had been made by another Member of Parliament that the trip was a "junket" and a "rort" and that the plaintiffs were "swanning around the world". The defence pleaded that the articles were published pursuant to a freedom guaranteed by the Commonwealth Constitution and the *Constitution Act* 1889 (WA) and that the articles were published on occasions of qualified privilege.

An important point to note about *Stephens* is that it raised the question of the operation of the implied freedom of political discussion in relation to material published about the official conduct of members of a State Parliament, rather than members of the Federal Parliament. Mason CJ, Toohey and Gaudron JJ, again in a joint judgment, held that the freedom of communication implied in the Commonwealth Constitution extends to public discussion of the performance, conduct and fitness for office of members of a State legislature.[30] Furthermore, at least so long as the Western Australian Constitution continues to provide for a representative democracy, freedom of communication must also be implied in that Constitution.[31] Deane J held that the constitutional implication extends to political communication and discussion in relation to all levels of government.[32]

In separate judgments, Brennan, Dawson and McHugh JJ dissented. Dawson J and McHugh J relied essentially on what they had said in *Theophanous*, as outlined above in section 1.1.[33] Brennan J held that the implication of freedom of discussion in the Commonwealth Constitution could not affect publications dealing with the performance by members of the Western Australian Parliament of their official functions which were irrelevant to the government of the Commonwealth.[34] Although he was prepared to accept that

29 Id at 26.
30 Above n4 at 88.
31 Id at 89.
32 Id at 108.
33 Id at 109 per Dawson J and at 110 per McHugh J.
34 Id at 91.

an implication affecting the freedom to discuss political matters could be drawn from the *Constitution Act* 1889 (WA), for the reasons he gave in *Theophanous* summarised in section 1.1 above, Brennan J held that it did not affect the common law or the *Criminal Code* (WA) dealing with defamation.[35]

As a majority held that the implied freedom of political discussion applied in relation to material published about the official conduct of members of a State Parliament, it followed that, in accordance with the decision in *Theophanous*, the implied freedom afforded a defence in respect of the publications complained of in *Stephens*, provided of course that the elements of the defence were satisfied.[36] The defence pleaded by the defendant in *Stephens* assumed, however, that the onus in respect of honest belief and reckless disregard for truth rested on the plaintiff, a view which was rejected in *Theophanous*.[37] Accordingly the defence as pleaded was held to be bad in law.[38]

The effect of the judgments in *Stephens* on qualified privilege will be analysed later in section 2.4.1.

2. *Impact on Defamation Law: A New Defence*

As explained in section 1.1 above, in *Theophanous*, the High Court decided by a four-three majority that, in the light of the implied freedom of political communication, the publication in question would not be actionable under defamation law if the defendant established 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.[39]

The following issues arise:

- in what circumstances will this new defence apply?
- will the new defence apply only to cases involving certain types of plaintiffs?
- will it be difficult to satisfy the elements of the new defence?
- will plaintiffs be able to use the new defence as a sword to require publishers to reveal their sources?
- what are the implications for other defences?
- which is better — the American law or the new Australian law?

In answering these questions, it is necessary to concentrate on the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous*. Before examining the questions, there are some general points in the joint judgment

35 Ibid.
36 Id at 90. Deane J concurred in the answers which Mason CJ, Toohey and Gaudron JJ gave to the questions stated for the Court (at 109).
37 Above n3.
38 Above n4 at 90.
39 Above n3 at 23 and 26.

which must be noted. First, the joint judgment in *Theophanous* emphasised that the underlying purpose of the implied freedom of communication is to ensure the efficacious working of representative democracy.[40] Second, the joint judgment does tell us something about the concept of "political discussion". It is made clear that this is not limited to matters relating to the government of the Commonwealth[41] (this is confirmed by the decision in *Stephens* as summarised in section 1.2 above). The joint judgment in *Theophanous* also makes it clear that criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion.[42] For the purposes of *Theophanous*, that is all that was needed to be said, in view of the fact that the plaintiff was indeed a member of Parliament and the allegedly defamatory material was published when an election was anticipated. Nonetheless, the joint judgment went on to make two further observations.

The first observation made in the joint judgment in *Theophanous* was that, given that the underlying purpose of the freedom is to ensure the efficacious working of representative democracy, "it should be possible to develop, by means of decisions in particular cases, an acceptable limit to the type of discussion which falls within the constitutional protection".[43] An example was given:

> [I]f an actor were seeking election, or even appointment, to a public office, discussion not only of his or her policies but also of his or her conduct, though not of his or her acting ability, would constitute political discussion if that conduct were relevant to fitness for public office.[44]

The second observation was that:

> The concept [of political discussion] ... includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators.[45]

2.1 *Scope of the new defence*

It is possible to consider together the first two issues referred to earlier:

- in what circumstances will the new defence apply?
- will the new defence apply only to cases involving certain types of plaintiffs?

Unlike the First Amendment to the United States Constitution, the implied freedom of communication does not extend to freedom of communication generally. In the joint judgment in *Theophanous* it was made clear that commercial speech falls outside the Australian constitutional protection, unless it also has some political content.[46] It is submitted that the defence

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40 Id at 13.
41 Id at 12.
42 Ibid.
43 Id at 13.
44 Ibid.
45 Ibid.
46 Id at 14.

operates whenever the allegedly defamatory material can be characterised as a "political discussion".

Not all commentators agree with this; some commentators assert that the defence has a narrower scope, applying only to cases in which the plaintiff is a politician or a candidate for political office. This narrower view lies behind assertions made by some commentators that "[t]he High Court has effectively introduced a public figure defence to defamation".[47] It must be acknowledged that there is one passage in the joint judgment which might suggest that the defence has this narrower scope:

> The *Sullivan* test has been criticised on two further grounds. The first is that decisions following *Sullivan* have expanded the content of the privilege by extending it to candidates for public office and government employees "who are in a position significantly to influence the resolution of [public] issues". The privilege was also extended to cover "public figures" who do not hold official or government positions. The "public figure" test has been severely criticised both in the United States and Australia. None of these extensions of the *Sullivan* test has any application to the present case. Although there is no occasion now to consider their possible application in Australia, we should indicate our preliminary view that these extensions, other than the extension to cover candidates for public office, should not form part of our law.[48]

This passage might suggest that Mason CJ, Toohey and Gaudron JJ saw the defence they were formulating as applying only to cases in which the plaintiff is a "public figure" as that term was defined by them. Their definition would include politicians and candidates for political office; it would exclude government employees, even if they are in a position to influence the resolution of public issues, and it would exclude those who do not hold official or government positions.

It is submitted that the narrower view that the defence applies only to cases in which the plaintiff is a "public figure", as defined in the joint judgment, is wrong for several reasons. First, the passage which is set out above is in a part of the joint judgment in which they were criticising the American law rather than formulating the test to be applied in Australia; perhaps what lies behind the observations in this passage is that government employees, and those who do not hold official or government positions, are not as likely as politicians and candidates for political office to be involved in political discussion. Second, the narrower interpretation is contrary to the observation made by Mason CJ, Toohey and Gaudron JJ and referred to in section 2 above, that it should be possible to develop an acceptable limit to the *type of discussion* which falls within the constitutional protection.[49] Third, the narrower interpretation is contrary to the observation (also set out in section 2) that the concept of political discussion includes discussion of the political views and public conduct of persons such as trade union leaders, Aboriginal political leaders, and political and economic commentators who are engaged in activities that have become the subject of political debate.[50] Finally, and most importantly, given that the

47 Deamer, A, "Don't jump for joy" (1994) 26 *Gazette of Law and Journalism* 3.
48 Above n3 at 21.
49 Id at 13.
50 Ibid.

underlying purpose of the freedom is to ensure the efficacious working of representative democracy,[51] it would be absurd to apply the defence by reference to who sues, rather than by reference to the subject matter of the discussion.

It may be that the narrower interpretation favoured by some commentators is traceable to Deane J's judgment. Deane J emphasised that the relevant category of political communication involved in *Theophanous* consisted of statements about the conduct or suitability for office of a Member of Parliament. Even so, it should be noted that, at the same time, he recognised that the freedom could extend beyond this category: "Considerations which may suffice to justify an abridgment of the freedom of some categories of political communication or discussion may be clearly inadequate to justify other categories".[52]

In the context of the category relevant in this case, Deane J held that the effect of the constitutional implication was to preclude completely the application of State defamation laws to impose liability in damages for the publication of statements about the official conduct or suitability for office of a Member of Parliament or other holder of high Commonwealth office.[53] Accordingly, although Deane J's analysis was based more firmly on the identity of the person about whom the material was published, his judgment assumes that other categories of political discussion would be protected by the implied freedom, although not necessarily in such absolute terms as apply when dealing with statements about the official conduct or suitability for office of a Member of Parliament or other holder of high Commonwealth office.

2.2 *Will it be difficult to satisfy the elements of the new defence ?*

Of the three elements of the defence, it is the third, that the publication was reasonable in the circumstances, which has led commentators to question whether the defence will operate in many cases to protect defendants. Thus, it has been asserted that: "The High Court has done little more than declare a relatively recent statutory change in the NSW law (section 22 of the NSW *Defamation Act* 1974) to be the common law of the nation".[54] Similarly, it has been argued that:

> When a trial judge has to decide whether the publication has been reasonable he will probably fall back on the rather restrictive tests for reasonableness that have evolved from the law on s22 of the *Defamation Act* NSW.[55]

There is no doubt that further cases will have to be decided before the reasonableness requirement in the new defence will be properly understood. Section 22 of the *Defamation Act* 1974 (NSW) establishes a form of qualified privilege which requires, inter alia, that the conduct of the publisher in publishing the material was reasonable. Most defamation lawyers would agree that section 22 has not lived up to its promise of providing protection for publishers and that it is the reasonableness requirement that has presented the greatest problem for defendants. Nonetheless, it is submitted that the new defence is

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51 Ibid.
52 Id at 56.
53 Id at 61.
54 Above n6.
55 Coleman, R, "What the experts say..." (1994) 26 *Gazette of Law and Journalism* 14.

not the same as section 22 and that, in dealing with the reasonableness requirement in the new defence, a trial judge would be wrong to simply adopt the same approach as that taken by the courts in relation to the reasonableness requirement in section 22.

Under section 22 of the New South Wales legislation, assessing whether the publication of the material was reasonable involves considering "all the circumstances leading up to and surrounding the publication".[56] In one case, the New South Wales Court of Appeal had regard to: the publisher's belief in the truth of the statement; the manner and extent of publication; the surrounding circumstances; the connection between the subject and the imputation; the reasonableness of the assertion itself; and the care exercised before the material was published. It was considered significant that the defendant did not make adequate inquiries and that the defamatory imputation was arguably based on a flimsy, or no, foundation.[57] It has been made clear that it would be difficult to establish that it was reasonable to publish a comment based on untrue facts, particularly if no proper inquiry was made to ascertain the true facts.[58] It is the inquiry into whether the publisher had a belief in the truth of what was published that narrows the scope of the reasonableness requirement under section 22. In one case, Hunt J suggested that the reasonableness requirement in section 22 had been interpreted "so that the defendant must now establish his belief in the truth of what was published".[59] Subsequently, in another case, he said that, while

> there is no inflexible rule that a defendant must call evidence of his belief in the truth of what he published ... the defendant will generally fail to establish that his conduct was reasonable in the circumstances unless he does give evidence that he believed in the truth of what he published.[60]

This approach has also been followed by the New South Wales Court of Appeal so that "in determining whether the defendant's conduct was reasonable in the circumstances, the defendant must in most cases establish his honest belief in the truth of what he has written".[61]

There is an important difference between the reasonableness requirement in section 22 and the new defence. The difference arises from the fact that the reasonableness requirement in the new defence must be read in the light of the other elements of the defence which have no counterparts in section 22. The first and second elements of the new defence set out the requirements regarding the defendant's knowledge and action based on that knowledge: the defendant

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56 *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 313 (Privy Council).

57 *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 712 per Reynolds JA; see also at 700–1 and 705 per Moffitt P (Glass JA agreed with Moffitt P and Reynolds JA). See also *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 390 per Glass JA; *Australian Consolidated Press Ltd v Bond* (1984) 56 ACTR 14 at 25 (failure to make inquiries whether there was any truth in an allegation is relevant to a finding that conduct was not reasonable) and *Smith v John Fairfax & Sons Ltd* (1987) 86 FLR 343 at 360–6.

58 Above n56 at 313 and 317–8.

59 *Kaiser v George Laurens (NSW) Pty Ltd* [1982] 1 NSWLR 294 at 298.

60 *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 44–5 per Hunt J.

61 *Morgan v John Fairfax & Sons Ltd [No 2]* (1991) 23 NSWLR 374 at 385–6 per Hunt AJA (with whom Samuels JA agreed). See also *Barbaro v Amalgamated Television Services Pty Ltd* (1989) 20 NSWLR 493 at 500 per Samuels JA (with whom Hope and Priestley JJA agreed).

must have been unaware of the falsity of the material and must not have published the material recklessly, that is, not caring whether the material was true or false. Thus, the first element deals with the issue of belief, and requires only that the publisher was unaware of the falsity of the material; it does not require that the publisher had a positive belief in the truth of the material. Accordingly, so far as they focus on the defendant's positive belief in the material, the cases dealing with section 22 of the *Defamation Act* 1974 (NSW) are not relevant to the reasonableness requirement in the new defence. To incorporate into the new defence a requirement that the defendant had an honest belief in the truth of the material would be to make the first and second elements of the new defence redundant.

In *Theophanous*, Mason CJ, Toohey and Gaudron JJ gave some indication of what they considered to be relevant considerations in assessing reasonableness under the new defence:

> The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate.[62]

Later they said:

> Whether the defendant has acted reasonably will involve consideration of any inquiry made by the defendant before publishing ... Whether a publisher has acted reasonably must be a question of fact in every case. It will depend upon the standards and expectations of the community as to whether the allegations needed to be investigated.[63]

Accordingly, in assessing reasonableness under the new defence, the courts should focus on whether adequate and appropriate steps were taken to check the accuracy of the material rather than on the defendant's belief in the truth of the material.

2.3 *Will plaintiffs be able to use the new defence as a sword to require publishers to reveal their sources?*

Like the position regarding all other defences, the defendant can choose whether it will raise the new defence. If the defendant chooses not to raise the defence, the plaintiff cannot use the defence to require anything. If the defendant does choose to raise the defence, the identity of a source may be relevant in deciding whether the publication of the material was reasonable. It may be argued that it was not reasonable to publish the material because the source could not reasonably have been believed. In most cases where this issue is raised, the defendant will be a media organisation or journalist. The defendant bears the burden of proving the elements of the defence. If the defendant refuses to reveal the identity of its source, it may be harder to prove the reasonableness element but can this be taken further so that the plaintiff can require the defendant to identify its source? The answer to this question depends on an understanding of the attitude of the courts to journalists' sources.[64]

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62 Above n3 at 23.
63 Id at 24.
64 See Walker, S, "Compelling Journalists to Identify their Sources" (1991) 14(2) *UNSWLJ* 302.

The "newspaper rule" has the effect that, in defamation actions, a journalist or media organisation will not be compelled in interlocutory proceedings to disclose the sources of information on which the published material was based.[65] The immunity relates both to interrogatories and to the production of discovered documents for inspection.[66] The most satisfactory rationale for the newspaper rule is that put forward by Dixon J in *McGuinness v The Attorney-General of Victoria* who suggested that the rule is founded on:

> the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matter contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity.[67]

It is unlikely that the courts will depart from the "newspaper rule" in cases in which a defendant who is a media organisation or journalist relies on the new defence. The "newspaper rule" applies, however, only to the pre-trial, interrogatory and discovery process. When the matter comes to trial, the "newspaper rule" no longer operates. At this point, refusing to identify a source when required to do so may amount to a contempt of court. Australian courts have not recognised an evidentiary privilege entitling journalists to refuse to disclose evidence on the ground only that it would reveal the identity of a source of information.[68] Nonetheless, a witness who refuses to answer a question will not be guilty of contempt of court unless the information that is required is relevant to the proceedings[69] and, as the High Court has observed, in cases involving journalists' sources,

> the courts have acted according to the principle that disclosure of the source will not be required unless it is necessary in the interests of justice ... even at the trial the court will not compel disclosure unless it is necessary to do justice between the parties.[70]

While the identity of a source may be "relevant" for the purpose of deciding whether the publication of the material was reasonable, a court may take the view that, in the circumstances of the case, it is not "necessary" to require disclosure. For example, it may not be necessary to identify the source because there is sufficient evidence that the defendant checked the accuracy of the material to satisfy the court that it was reasonable to publish the material even if the source were to be shown to be someone who was not reliable. In other circumstances, the court may decide that the failure to identify the source simply makes it more difficult for the journalist to prove reasonableness. In a case dealing with the reasonableness requirement under section 22 of the *Defamation Act* 1974 (NSW), Hunt J suggested (obiter) that:

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65 *McGuinness v The Attorney-General of Victoria* (1940) 63 CLR 73 at 85–6 per Latham CJ, at 87 per Rich J, at 92 per Starke J, at 104–5 per Dixon J and at 106–7 per McTiernan J.

66 *Hope v Brash* [1897] 2 QB 188; *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 at 165–6 per Woodhouse J, at 173 per Richardson J and at 176 per McMullin J.

67 Above n65 at 104.

68 Id at 85–6 per Latham CJ, at 87–8 per Rich J, at 92 per Starke J, at 102–4 per Dixon J and at 106 per McTiernan J.

69 *Attorney-General v Clough* [1963] 1 QB 773 at 785–6; *Attorney-General v Mulholland* [1963] 2 QB 477 at 487 per Denning MR and 492 per Donovan LJ (Danckwerts LJ agreed).

70 *John Fairfax & Sons Ltd v Cojuangco* (1988) 82 ALR 1 at 6.

"[T]here is no inflexible rule that a defendant must call evidence ... of the nature and the sources of the information which he possessed at the time of the publication."[71] Accordingly, it should not be assumed that journalists and media organisations who rely on the new defence will inevitably be required to identify their sources.

2.4 What are the implications for other defences?

In both *Theophanous* and *Stephens* the defence of qualified privilege was raised. The impact of the High Court's decisions on this defence will be analysed in section 2.4.1. The importance attached to the implied freedom of political discussion by the majority in *Theophanous* will have an impact on the application of all those defences which include a requirement that the material was published for the "public benefit" or for the "public interest". This will be examined in section 2.4.2.

2.4.1 Qualified privilege

A statement made in the performance of a legal, social or moral duty or to protect some interest of the publisher is accorded qualified privilege at common law. This is, however, subject to the proviso that the statement must be made to a person who has a corresponding interest or duty to receive it.[72] The common law "duty-interest" form of qualified privilege operates in all jurisdictions except Queensland and Tasmania where qualified privilege is accorded to the publication of material in a wider range of circumstances.[73] In the case of material published in New South Wales, both the common law defence and a statutory form of qualified privilege[74] are available.

In the past, the common law requirement of reciprocity of duty or interest between the publisher and those to whom the material is published has severely limited the operation of the common law "duty-interest" form of qualified privilege. On some occasions the publication of material to a limited audience has satisfied this requirement,[75] but the defence has rarely been applied where the material is available to the public at large. If the material is generally available, all members of the public to whom the material is published will not have the requisite interest.[76] In the joint judgment of Mason CJ,

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71 Above n60 at 44 per Hunt J.

72 *Adam v Ward* [1917] AC 309 (see in particular Lord Atkinson at 334); *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 790–2 cf *Toyne v Everingham* (1993) 91 NTR 1 at 14.

73 *Criminal Code Act* 1899(Qld) s377; *Defamation Act* 1957 (Tas) s16. Section 357 of the *Criminal Code Act* 1913 (WA) does not apply to civil actions for defamation*The West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535 at 541 per Barwick CJ, at 543–5 per Jacobs J (with whom Stephen J agreed); at 541–2 Gibbs and at 550 Aickin J dissented.

74 *Defamation Act* 1974 (NSW) s22.

75 *Chapman v Ellesmere* [1932] 2 KB 431 (publication of a decision of Jockey Club stewards in the *Racing Calendar* was privileged, but publication in *The Times* was not); *Duane v Granrott* [1982] VR 767 at 779–82 (letters published in *The Teachers' Journal*, the organ of the Victorian Teachers' Union, concerning matters of interest to members of the Union were privileged where the circulation of the Journal was essentially limited to members of the Union); *Brown v Federated Miscellaneous Workers Union of Australia* (1981) 9 NTR 33 at 48 (article in a union newsletter published to union members).

76 See, eg, *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 790–2; *Australian*

Toohey and Gaudron JJ in *Theophanous* it was held that this form of common law qualified privilege must now be viewed in the light of the constitutional freedom. The joint judgment held that the public at large has an interest in the discussion of political matters such that each person has an interest, of the kind contemplated by the common law, in communicating her or his views on those matters and each and every person has an interest in receiving information on those matters.[77] In *Stephens*, Mason CJ, Toohey and Gaudron JJ held that, in circumstances where the constitutional implication applies, in pleading common law qualified privilege, it is unnecessary to allege a duty on the part of the defendant to publish the material to its readers.[78] Deane J concurred with this result. This will significantly widen the scope of the common law "duty-interest" form of qualified privilege where a publisher has published defamatory material to the public at large. The discussion of political matters will be an occasion of qualified privilege.

The protection accorded by common law qualified privilege is lost only if the plaintiff establishes that the publication of the material was actuated by malice. "Malice" means that the publisher either had an "improper motive" for publishing the material or did not have an honest belief in the truth of what was published.[79] Although these are stated to be alternatives, it has been suggested that there may be extreme cases where a publisher is under a duty to pass on defamatory information in which the publisher has no honest belief, or even information which the publisher positively disbelieves, and the privilege will not be lost.[80] The example commonly given to illustrate this is where there is danger to the public from a suspected terrorist.[81] Malice is not necessarily established simply because the defendant's belief in the truth of what was published resulted from carelessness.[82] "Improper motive" means that the dominant purpose for publishing the material is a purpose other than that for which the privilege is given.[83] If the defendant relies on the implied constitutional freedom to satisfy the court that the material was published on an occasion of qualified privilege, the purpose of the qualified privilege must be to ensure the efficacious working of representative democracy.[84] Accordingly, a plaintiff who argues that the publisher had an improper motive will have to show that the dominant purpose for publishing the material was a purpose other than one related to the advancement of representative democracy. Even a positive belief in the truth of what is published will not negative malice if the publisher acted out of personal spite or ill will.[85] Account is taken

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Consolidated Press Ltd v Bond (1984) 56 ACTR 14 at 25.

77 Above n3 at 25–6.

78 Above n4 at 90.

79 *Webb v Bloch* (1928) 41 CLR 331 at 368 per Isaacs J; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 50–1 and *Loos v Robbins* [1987] 4 WWR 469 at 476–80.

80 *Blackshaw v Lord* [1984] QB 1 at 27 per Stephenson LJ.

81 See the discussion in *Australian Broadcasting Corporation v Comalco Ltd* (1986) 68 ALR 259 at 282–3 per Smithers J; see also at 343–4 per Pincus J, but compare at 328 per Neaves J.

82 Above n60 at 51.

83 *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock and *Loveday v Sun Newspapers Limited* (1938) 59 CLR 503 at 516 per Starke J.

84 Above n3 at 13.

85 *Horrocks v Lowe* [1975] AC 135 at 149–50 per Lord Diplock (with whom Lords Wilberforce, Hodson and Kilbrandon agreed).

also of the extravagancy of the allegation and the language in which it is expressed.[86] Thus, it is evidence of malice that the words published are "utterly disproportionate" to the facts.[87]

The joint judgment seems to assume that the fact that malice can defeat qualified privilege makes it too narrow:

> It follows that the discussion of political matters is an occasion of qualified privilege. Even understood in this light, the common law defence does not conform to the constitutional freedom. As already explained, the freedom requires no more than that the person who publishes defamatory matter in the course of political discussion does not know that it is false, does not publish recklessly, and does not publish unreasonably.[88]

Mason CJ, Toohey and Gaudron JJ suggest that the availability of the new defence will

> inevitably have the consequence that the common law defence of qualified privilege will have little, if any, practical significance where publication occurs in the course of the discussion of political matters.[89]

It is submitted that the judges may have overestimated the impact of the fact that malice can defeat the defence and underestimated the circumstances in which defendants will rely on the expanded common law "duty-interest" form of qualified privilege. In some situations a defendant may find that it cannot establish reasonableness, as is required by the new defence, and therefore the defendant prefers to rely on qualified privilege where the plaintiff bears the burden of proof regarding malice. It is not suggested that "malice" is narrower than "lack of reasonableness", but rather that the two are qualitatively different in ways which may be relevant in view of the facts of particular cases. Malice directs attention to the motives of the publisher and, in some cases, to whether the publisher had an honest belief in the truth of what was published. In section 2.2 it was suggested that the test of reasonableness should focus on whether adequate and appropriate steps were taken to check the accuracy of the material. It is important to emphasise that the burden of proof is also different. To rely on the new defence, the defendant must establish that the publication was reasonable. The protection accorded by the expanded common law "duty-interest" form of qualified privilege is not lost unless the plaintiff proves that the defendant was actuated by malice.

In *Stephens*, only Dawson J took the traditional, narrow view that there was no qualified privilege as there was no information which the defendant had a duty or interest to impart and the recipients had a corresponding duty or interest to receive.[90] Two of the other dissenting judges were prepared to widen the scope of the common law "duty-interest" form of qualified privilege. Both of these dissenting judgments focused on the publication of a report

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86 *Calwell v Ipec Australia Limited* (1975) 135 CLR 321 at 333 per Mason J (with whom Barwick CJ and Gibbs and Stephen JJ agreed) and 335 per Jacobs J.

87 Id at 332–3 per Mason J (with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed). See also *Turner v Metro-Goldwyn-Mayer Pictures, Ltd* [1950] 1 All ER 449 at 455 per Lord Porter.

88 Above n3 at 26.

89 Id at 25.

90 Above n4 at 109.

of a defamatory allegation made by a third party. McHugh J held that reciprocity of interest or duty is essential to a claim of qualified privilege at common law, but that it is now appropriate for the common law to declare that it is for the common convenience and welfare of Australian society that the existing categories of qualified privilege be extended to protect communications made to the general public by persons with special knowledge concerning the exercise of public functions or powers or the performance of their duties by public representatives or officials invested with those functions and powers.[91] He said that the media have an ancillary privilege to publish in good faith apparently reliable information obtained from a person who has an apparent duty or interest in making the information available to the public.[92] The existing categories would not, however, be extended to cover what he described as "bare defamatory comment", that is, comment not based on, and published with, facts.[93] In *Stephens*, the imputations arose from comment and the basis of the comment was generally not disclosed; accordingly, qualified privilege did not apply.[94]

In his dissenting judgment, Brennan J held that, where a newspaper publishes its own defamatory allegation, it would be an exceptional case in which a newspaper would be under a duty to publish to its readers some matter defamatory of an individual.[95] Where a newspaper publishes a report of a defamatory allegation made by a third party, Brennan J suggested that a different approach should be taken so as to give greater protection to the publisher. Unlike McHugh J, Brennan J did not draw a distinction between bare defamatory comment and comment based on published facts, but he did place weight on the party defamed having an opportunity to make a reasonable response to the defamatory matter. Accordingly, Brennan J held that, if:

> publication of a fair and accurate report of a defamatory statement made on a matter of public interest by a third party who is reasonably believed to have particular knowledge of the defamatory matter is accompanied by publication of any reasonable response which the party defamed wishes to make, the report is published on an occasion of qualified privilege.[96]

It is uncertain whether the suggestions by McHugh and Brennan JJ in their dissenting judgments in *Stephens* will be taken up by lower courts in cases dealing with the publication of a report of a defamatory allegation made by a third party. Their views are consistent with a move towards expanding the common law "duty-interest" form of qualified privilege.[97]

2.4.2 Other defences

Many of the defences available to defendants in defamation actions require that the material was published for the "public benefit" or in the "public interest". For example, to take advantage of the defence of justification in respect

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91 Id at 114.
92 Id at 115.
93 Id at 115–6.
94 Id at 117–8.
95 Id at 98.
96 Id at 105.
97 See *Toyne v Everingham* (1993) 1 NTR 1 at 21–2.

of material published in New South Wales, Queensland, Tasmania or the Australian Capital Territory, a publisher must show that the imputation was not only true, but also that it was published for the "public benefit" or, in New South Wales, that it relates to a matter of "public interest" or is published under qualified privilege.[98] It is not enough that information is of interest to the public: the publication of the imputation must be shown to be for the benefit of the public or to be in the interests of the public. The motive of the publisher is immaterial in deciding this issue.[99]

One of the elements of the defence of fair comment at common law is that the material must comment on a "matter of public interest".[100] The common law principle is embodied in the defence of comment in the New South Wales legislation.[101] In Queensland, Tasmania and the Northern Territory the matters on which fair comment may be made are prescribed.[102] The Western Australian code contains a similar list. In the case of material published in Western Australia, a defendant has a choice of relying on either the common law or the code; the list restricts the matters on which a comment may be made if the defendant relies on the code provision.[103] Where public interest is required for the purpose of the defence of fair comment, it is established that a matter may be of public interest either because it invites comment[104] or because it is of concern to the public.[105]

One of the consequences of *Theophanous* and *Stephens* is to make it likely that a defendant will find it easier to establish that there was public benefit or public interest if the material was "political discussion" as that concept is explained in section 2 above.

2.5 *Which is better — the American law or the new Australian law?*

In *New York Times Co v Sullivan*[106] the United States Supreme Court restricted the operation of the American law of defamation in the light of the guarantee of freedom of speech in the First Amendment to the United States Constitution. It was decided that, to recover damages in respect of false and defamatory material relating to her or his official conduct, a "public official" must prove that the statement was made with "actual malice". Actual malice means knowledge that material is false or reckless disregard for truth or falsity.[107] This standard was subsequently applied also to actions by "public figures" against the media.[108] If a

98 *Defamation Act* 1974 (NSW) s15; *Criminal Code* (Qld) s376; *Defamation Act* 1957 (Tas) s15 and for the ACT the *Defamation Act* 1901 (NSW) s6 applies.

99 *Crowley v Glissan (No 2)* (1905) 2 CLR 744 at 763–4 per O'Connor J.

100 *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR(NSW) 171 at 173–4 per Jordan CJ.

101 *Defamation Act* 1974 (NSW) s31.

102 *Criminal Code Act* 1899 (Qld) s375(1); *Defamation Act* 1957 (Tas) s14; *Defamation Act* NT s6A.

103 *Criminal Code Act* 1913 (WA) s355(1).

104 Above n100.

105 See Fleming, JG, *The Law of Torts* (8th edn, 1992) 589; Neill, B and Rampton, R (eds), *Duncan and Neill on Defamation* (2nd edn, 1983) para 12.04.

106 Above n1.

107 Id at 279–80 and 283.

108 *Curtis Publishing Co v Butts*, 388 US 130 (1967) at 163 per Warren CJ, at 170 per Black and Douglas JJ and at 172–3 per Brennan and White JJ. It is uncertain whether the *New York Times Co v Sullivan* standard applies to non-media defendants in actions brought by "public figures" see Christie, J, "The Public Figure Plaintiff v The Nonmedia Defendant in

media organisation publishes false and defamatory material regarding a person who is not a public official or public figure, the plaintiff may recover for actual damage suffered upon proving negligence on the part of the publisher.[109] If the material involves matters of public concern, the private plaintiff must prove actual malice to recover punitive or presumed damages, that is, damages other than those for actual pecuniary loss.[110] Thus, a more demanding standard is required of a plaintiff who is a public official or public figure or, if the material involves matters of public concern, a private figure plaintiff who wishes to recover for more than actual damage.

Three factors distinguish the High Court's new defence from the American law:

1. malice does *not* defeat the new defence;
2. the *defendant* bears the onus of proving the three elements of the new defence; and
3. the new defence operates in relation only to "political discussion".

It is submitted that it is wrong to assert that the Australian cases establish a "public figure-style defence in political matters".[111] Under the American law, a plaintiff who is a "public figure" or a "public official" cannot succeed unless the *plaintiff* proves that the defamatory material was published with actual malice. This has added to the length and cost of pre-trial discovery procedures as plaintiffs try to find evidence of malice. Another problem with the American law is the way it attaches to the identity of the plaintiff as a "public figure" or "public official", rather than to the nature of the material which was published. This gives the impression that, rather than facilitating discussion about important matters, the American law discriminates against certain people. In section 2.1 it has been argued that this is not the position in relation to the new Australian defence. These differences indicate that the Australian decisions strike a better balance than *New York Times Co v Sullivan*[112] between the protection of reputation from wrongful attack and the protection of freedom of communication.

3. *Conclusion*

It must be remembered that neither *Theophanous* nor *Stephens* has reached trial. It will be of great interest to see how the answers to the cases stated will be applied to the facts of each case. It is, however, possible that the material in question will be held not to be defamatory or that some defence other than the new defence formulated by the High Court will protect the defendants from liability in these cases. Indeed, it may be some time before the precise boundaries of the protection afforded by the new defence formulated by the High

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Defamation Law: Balancing the Respective Interests" (1983) 68 *Iowa L R* 517.

109 *Gertz v Welch*, 418 US 323 (1974) at 347.

110 In *Dun & Bradstreet v Greenmoss Builders*, 472 US 749 (1985) at 758–61 it was decided that if the material does not involve matters of public concern, a private figure plaintiff may recover damages without proof of malice.

111 *Australian Defamation Law and Practice Bulletin* 8 (November 1994) at 2.

112 Above n1.

Court in *Theophanous* and *Stephens* will be fully understood. Later cases will define more fully what is meant by "political discussion" and give life to the concept of "reasonableness". Nonetheless, it is submitted that the decisions have the potential to have a profound impact on the law of defamation in Australia.

The new defence will give publishers greater freedom to publish material about political matters, but, to rely on the defence, publishers will have to establish that they acted reasonably. This will encourage responsible journalism. It is hoped that the retirement of Mason CJ and the appointment of his replacement will not have the effect of overturning these important decisions.