LANGE ..... PLAINTIFF;

AND

AUSTRALIAN BROADCASTING CORPORATION ..... DEFENDANT.

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March 3-7, *July* 8 1997

Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ

Constitutional Law (Cth) — Interpretation — Implications from Constitution — System of representative and responsible government prescribed by Constitution — Implied freedom of communication concerning government and political matters — Whether law infringes implied freedom — The Constitution (63 & 64 *Vict c* 12), *ss* 1, 6, 7, 8, 13, 24, 25, 28, 49, 62, 64, 83, 128.

Defamation — Defences — Qualified privilege — Relationship between common law and Commonwealth Constitution — Interest of community in receiving communications concerning government and political matters — Reasonableness of publisher's conduct — Malice — Defamation Act 1974 *(NSW), ss* 11, 22.

Held, (1) that the Commonwealth Constitution protects that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.

Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at 187, 232; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 73; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, considered.

Per curiam. The freedom to receive and disseminate information concerning government and political matters is not confined to election periods.

(2) That the freedom does not invalidate a law whose object is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or with the procedure for submitting a proposed constitutional amendment to the people, so long as the law is reasonably appropriate and adapted to achieving that legitimate object.

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; and *McGinty v Western Australia* (1996) 186 CLR 140, referred to.

Held, further, (1) that, in proceedings for defamation, the categories of

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Reconsidering a previous decision of the Court

This Court is not bound by its previous decisions (212). Nor has it laid down any particular rule or rules or set of factors for re-opening the correctness of its decisions. Nevertheless, the Court should reconsider a previous decision only with great caution and for strong reasons (213). In *Hughes & Vale Pty Ltd v New South Wales* (214), Kitto J said that in constitutional cases "it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason". However, it cannot be doubted that the Court will re-examine a decision if it involves a question of "vital constitutional importance" (215) and is "manifestly wrong" (216). Errors in constitutional interpretation are not remediable by the legislature (217), and the Court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes. But these general statements concerning the occasions when the Court will reconsider one of its previous decisions give little guidance in this case when the judgments and orders in *Theophanous* and *Stephens* are examined.

The principal reason why these general statements provide little guidance is that it is arguable that neither *Theophanous* nor *Stephens* contains a binding statement of constitutional principle. Both cases came before the Full Court of this Court on a case stated in which particular questions were reserved. The orders of the Full Court in each case consisted of answers to those questions. Of the seven Justices who heard *Theophanous*, Brennan, Dawson and McHugh JJ held that the defences pleaded in that case were bad in law. Mason CJ, Toohey and Gaudron JJ in a joint judgment held that the defences were good in law. With two qualifications, their judgment is reflected in the answers that the Court gave to the case stated. The first qualification is that the joint judgment (218), but not the answer of the

(212) *Baker v Campbell* (1983) 153 CLR 52 at 102; *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390 at 395-396; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 610.

(213) *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 102; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 602, 620; *Jones v The Commonwealth* (1987) 61 ALJR 348 at 349; 71 ALR 497 at 498.

(214) (1953) 87 CLR 49 at 102. See also *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 501; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56.

(215) *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630. See also *The Commonwealth v Cigamatic Pty Ltd (In liq)* (1962) 108 CLR 372 at 377.

(216) *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279; *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58, 69, 83; but cf *Queensland v The Commonwealth* (1977) 139 CLR 585 at 621.

(217) *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 588.

(218) *Theophanous's Case* (1994) 182 CLR 104 at 137.

Court, gives definition to the term "reasonable" which appears in Answer 2(c) of the case stated. The second qualification is that, while the conditions of the defence contained in pars (a), (b) and (c) of the answer to the first question in the case stated suggest that the paragraphs are alternatives, or that par (a) subsumes pars (b) and (c), the joint judgment focuses on the suitability of persons for office rather than the wider discussion of government and political matters.

Deane J, the seventh member of the Court in *Theophanous*, also held that the defences were good in law. However, he took a view of the scope of the freedom that was significantly different from that of Mason CJ, Toohey and Gaudron JJ. His Honour said (219):

> "I am quite unable to accept that the freedom which the constitutional implication protects is, at least in relation to statements about the official conduct or consequent suitability for office of holders of high government office, conditioned upon the ability of the citizen or other publisher to satisfy a court of matters such as absence of recklessness or reasonableness."

His Honour said (220) that the Constitution contained an implication which precluded the imposition of liability in damages under State defamation laws to the extent to which they would cover a publication such as that involved in that case.

Deane J also said (221) that, whilst the overall effect of the joint judgment and his judgment was that "the constitutional implication of political communication and discussion" precluded "an unqualified application of the defamation laws of Victoria to impose liability in damages in respect of political communications and discussion", there was disagreement within that majority as to "what flows from that conclusion for the purposes of the present case".

His Honour concluded (222) that "the appropriate course for me to follow is to lend my support for the answers which [Mason CJ, Toohey and Gaudron JJ] give to the questions reserved by the stated case". Although Deane J may have intended his concurrence with the answers in *Theophanous* to extend to the explanation of them in the joint judgment, the absence of an express agreement with the reasons in that judgment raises a question as to the extent to which he concurred with the terms of the answers. But, assuming that his Honour intended to agree with those answers as read in the light of the joint judgment, nevertheless the reasoning which gave rise to the answers in *Theophanous* had the direct support of only three of the seven Justices.

In *Stephens*, an identical division of opinion among the Justices

(219) *Theophanous's Case* (1994) 182 CLR 104 at 188.
(220) *Theophanous's Case* (1994) 182 CLR 104 at 188.
(221) *Theophanous's Case* (1994) 182 CLR 104 at 187.
(222) *Theophanous's Case* (1994) 182 CLR 104 at 188.

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occurred. Once again Deane J agreed with the answers proposed by Mason CJ, Toohey and Gaudron JJ in the case stated. He said (223):

> "In view of the division between the other members of the Court, it would, to that extent, be inappropriate for me to adhere to [my views] for the purposes of this case."

Accordingly his Honour expressed (224) his "concurrence in the answers which Mason CJ, Toohey and Gaudron JJ propose to the questions stated". In these circumstances, *Theophanous* and *Stephens* do not have the same authority which they would have if Deane J had agreed with the reasoning of Mason CJ, Toohey and Gaudron JJ in each case.

However, for the reasons set out below, *Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution. Those cases should also be accepted as deciding that, at least by 1992 (225), the constitutional implication precluded an unqualified application in Australia of the English common law of defamation in so far as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience. The full argument we heard in the present case and the illumination and insights gained from the subsequent cases of *McGinty v Western Australia* (226), *Langer v The Commonwealth* (227) and *Muldowney v South Australia* (228) now satisfy us, however, that some of the expressions and reasoning in the various judgments in *Theophanous* and *Stephens* should be further considered in order to settle both constitutional doctrine and the contemporary common law of Australia governing the defence of qualified privilege in actions of libel and slander.

Having regard to the foregoing discussion, the appropriate course is to examine the correctness of the defences pleaded in the present case as a matter of principle and not of authority. The starting point of that examination must be the terms of the Constitution illuminated by the assistance which is to be obtained from *Theophanous* and the other authorities (229) which have dealt with the question of "implied freedoms" under the Constitution.

(223) *Stephens' Case* (1994) 182 CLR 211 at 257.

(224) *Stephens' Case* (1994) 182 CLR 211 at 257.

(225) The year in which the articles, the subject of the proceedings in *Theophanous* and *Stephens*, were published.

(226) (1996) 186 CLR 140.

(227) (1996) 186 CLR 302.

(228) (1996) 186 CLR 352.

(229) *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth (ACTV)* (1992) 177 CLR 106; *Theophanous* (1994) 182 CLR 104; *Stephens* (1994) 182 CLR 211; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *McGinty* (1996) 186 CLR 140; *Langer* (1996) 186 CLR 302; *Muldowney* (1996) 186 CLR 352.

Representative and responsible government

Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate (230) the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect (231).

That the Constitution intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the Constitution itself. Thus, at the Second Australasian Convention held in Adelaide in 1897, the Convention, on the motion of Mr Edmund Barton, resolved that the purpose of the Constitution was "to enlarge the powers of self-government of the people of Australia" (232).

Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government. As Isaacs J put it (233):

> "[T]he Constitution is for the advancement of representative government."

Section 1 of the Constitution vests the legislative power of the Commonwealth in a Parliament "which shall consist of the Queen, a Senate, and a House of Representatives". Sections 7 and 24 relevantly provide:

> "7 The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.
>
> . . .
>
> 24 The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators."

Section 24 does not expressly refer to elections, but s 25 makes it plain that the House of Representatives is to be directly chosen by the

(230) *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

(231) *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56; *Nationwide News* (1992) 177 CLR 1 at 46-47, 70-72; *ACTV* (1992) 177 CLR 106 at 137, 184-185, 210, 229-230; *Theophanous* (1994) 182 CLR 104 at 146-147, 189-190, 195-197; *McGinty* (1996) 186 CLR 140 at 201-202.

(232) *Official Report of the National Australasian Convention Debates* (Adelaide), (1897), p 17.

(233) *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178.

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people of the Commonwealth voting at elections. Other provisions of the Constitution ensure that there shall be periodic elections. Thus, under s 13, six years is the longest term that a senator can serve before his or her place becomes vacant. Similarly, by s 28, every House of Representatives is to continue for three years from the first meeting of the House and no longer. Sections 8 and 30 ensure that, in choosing senators and members of the House of Representatives, each elector shall vote only once. The effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 therefore is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth.

Other sections of the Constitution establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government (234), a system of government which, "prior to the establishment of the Commonwealth of Australia in 1901 ... had become one of the central characteristics of our polity" (235). Thus, s 6 of the Constitution requires that there be a session of the Parliament at least once in every year, so that twelve months shall not intervene between the last sitting in one session and the first sitting in the next. Section 83 ensures that the legislature controls supply. It does so by requiring parliamentary authority for the expenditure by the Executive Government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth, irrespective of source (236). Sections 62 and 64 of the Constitution combine to provide for the executive power of the Commonwealth, which is vested in the Queen and exercisable by the Governor-General, to be exercised "on the initiative and advice" (237) of Ministers and limit to three months the period in which a Minister of State may hold office without being or becoming a senator or member of the House of Representatives. Section 49 of the Constitution, in dealing with the powers, privileges and immunities of the Senate and of the House of Representatives, secures the freedom of speech in debate which, in England, historically was a potent instrument by which the House of Commons defended its right to consider and express opinions on the conduct of affairs of State by the Sovereign and the Ministers, advisers and servants of the Crown (238). Section 49 also provides the source of coercive authority for each

(234) *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 114; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 364-365. See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364.

(235) *Dignan* (1931) 46 CLR 73 at 114.

(236) *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 572-573, 580-581, 590-591, 597-598.

(237) *Theodore v Duncan* [1919] AC 696 at 706.

(238) See Campbell, "Parliament and the Executive", in Zines (ed), *Commentaries on the Australian Constitution* (1977) 88, at p 91.

chamber of the Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt (239).

The requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the Executive to the organs of representative government. In his *Notes on Australian Federation: Its Nature and Probable Effects* (240), Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government (241).

Reference should also be made to s 128 which ensures that the Constitution shall not be altered except by a referendum passed by a majority of electors in the States and in those Territories with representation in the House of Representatives, taken together, and by the electors in a majority of States.

Freedom of communication

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system (242). As Birch points out (243), "it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion of a representative form of government". However, to have a full understanding of the concept of representative government, Birch also states that (244):

"we need to add that the chamber must occupy a powerful position

(239) See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.
(240) (1896), p 17.
(241) Reid and Forrest, *Australia's Commonwealth Parliament* (1989), pp 319, 337-339.
(242) Birch, *Representative and Responsible Government* (1964), p 17; *ACTV* (1992) 177 CLR 106 at 230; *Theophanous* (1994) 182 CLR 104 at 200.
(243) *Representative and Responsible Government* (1964), p 17.
(244) *Representative and Responsible Government* (1964), p 17.

in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organisation."

Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation (245). While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch. Furthermore, because the choice given by ss 7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in *Australian Capital Television Pty Ltd v The Commonwealth* (246), legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.

That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. As Deane J said in *Theophanous* (247), they are "a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense". In *Cunliffe v The Commonwealth* (248), Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said (249):

> "The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control."

(245) *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108, 109-110; *Nationwide* (1992) 177 CLR 1 at 73; *ACTV* (1992) 177 CLR 106 at 232.
(246) (1992) 177 CLR 106 at 187.
(247) (1994) 182 CLR 104 at 168. See also at 146-148.
(248) (1994) 182 CLR 272 at 326.
(249) *Cunliffe* (1994) 182 CLR 272 at 327.

If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable "the people" to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.

In addition, the presence of s 128, and of ss 6, 49, 62, 64 and 83, of the Constitution makes it impossible to confine the receipt and dissemination of information concerning government and political matters to an election period. Those sections give rise to implications of their own. Section 128, by directly involving electors in the States and in certain Territories in the process for amendment of the Constitution, necessarily implies a limitation on legislative and executive power to deny the electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution. Similarly, those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature. In *British Steel v Granada Television* (250), Lord Wilberforce said that it was by these reports that effect was given to "[t]he legitimate interest of the public" in knowing about the affairs of such bodies. Whatever the scope of the implications arising from responsible government and the amendment of the Constitution may be, those implications cannot be confined to election periods relating to the federal Parliament.

However, the freedom of communication which the Constitution protects is not absolute (251). It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is

(250) [1981] AC 1096 at 1168.

(251) *Nationwide* (1992) 177 CLR 1 at 51, 76-77, 94-95; *ACTV* (1992) 177 CLR 106 at 142-144, 159, 169, 217-218; *Theophanous* (1994) 182 CLR 104 at 126; *Stephens* (1994) 182 CLR 211 at 235; *Cunliffe* (1994) 182 CLR 272 at 336-337, 387; *Langer* (1996) 186 CLR 302 at 333-334.

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that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end. Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted.

The common law and the Constitution

A person who is defamed must find a legal remedy against those responsible for publishing defamatory matter either in the common law or in a statute which confers a right of action. The right to a remedy cannot be admitted, however, if its exercise would infringe upon the freedom to discuss government and political matters which the Constitution impliedly requires. It is necessary, therefore, to consider the relationship between the Constitution and the freedom of communication which it requires on the one hand and the common law and the statute law which govern the law of defamation on the other.

It is appropriate to begin with the Parliament at Westminster. To say of the United Kingdom that it has an "unwritten constitution" is to identify an amalgam of common law and statute and to contrast it with a written constitution which is rigid rather than fluid. The common law supplies elements of the British constitutional fabric. Sir Owen Dixon wrote (252):

> "The British conception of the complete supremacy of Parliament developed under the common law; it forms part of the common law and, indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law. But, after all, the common law was the common law of England. It was not a law of nations. It developed no general doctrine that all legislatures by their very nature were supreme over the law."

With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution.

(252) "Sources of Legal Authority", reprinted in *Jesting Pilate* (1965) 198, at pp 199-200.

The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations (253). The distinction is important for the present case and may be illustrated as follows.

The First Amendment to the United States Constitution prohibits Congress from making any law abridging "the freedom of speech, or of the press". This privilege or immunity of citizens of the United States may not be abridged by the making or "the enforcement" by any State of "any law". That is the effect of the interpretation placed on the Fourteenth Amendment (254). A civil lawsuit between private parties brought in a State court may involve the State court in the enforcement of a State rule of law which infringes the Fourteenth Amendment. If so, it is no answer that the law in question is the common law of the State, such as its defamation law (255). The interaction in such cases between the United States Constitution and the State common laws has been said to produce "a constitutional privilege" against the enforcement of State common law (256).

This constitutional classification has also been used in the United States to support the existence of a federal action for damages arising from certain executive action in violation of "free-standing" constitutional rights, privileges or immunities (257). On the other hand, in Australia, recovery of loss arising from conduct in excess of constitutional authority has been dealt with under the rubric of the common law, particularly the law of tort (258).

It makes little sense in Australia to adopt the United States doctrine so as to identify litigation between private parties over their common law rights and liabilities as involving "State law rights". Here, "[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute" (259). Moreover, that one common law operates in the federal

(253) cf *Black & White Taxi Co v Brown & Yellow Taxi Co* (1928) 276 US 518 at 533-534; *Erie Railroad Co v Tompkins* (1938) 304 US 64 at 78-79.

(254) *New York Times Co v Sullivan* (1964) 376 US 254 at 264-265; *Time Inc v Hill* (1967) 385 US 374 at 387-388, 409-410; *Time Inc v Firestone* (1976) 424 US 448 at 452-453; *Dun & Bradstreet Inc v Greenmoss Builders Inc* (1985) 472 US 749 at 755, 765-766; Tribe, *American Constitutional Law*, 2nd ed (1988), par 18-6.

(255) *New York Times Co v Sullivan* (1964) 376 US 254 at 265.

(256) *Gertz v Robert Welch Inc* (1974) 418 US 323 at 327, 330, 332, 342-343.

(257) *Bivens v Six Unknown Federal Narcotics Agents* (1971) 403 US 388.

(258) *Northern Territory v Mengel* (1995) 185 CLR 307 at 350-353, 372-373.

(259) Dixon, "The Common Law as an Ultimate Constitutional Foundation", *Australian Law Journal*, vol 31 (1957) 240, at p 241, reprinted in *Jesting Pilate* (1965) 203, at p 205. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487.

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system established by the Constitution. The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments (260). The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence" (261). Covering cl 5 of the Constitution renders the Constitution "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.

Conversely, the Constitution itself is informed by the common law. This was explained extra-judicially by Sir Owen Dixon (262):

> "We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may ... The anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history."

And in *Cheatle v The Queen* (263), this Court said:

> "It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history."

Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it" (264). The common law torts of libel and slander are such exceptions. However, these torts do not inhibit the publication of defamatory matter unless the

(260) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268.

(261) *McArthur v Williams* (1936) 55 CLR 324 at 347; cf *Thompson v The Queen* (1989) 169 CLR 1 at 34-35.

(262) "Sources of Legal Authority", reprinted in *Jesting Pilate* (1965) 198, at p 199.

(263) (1993) 177 CLR 541 at 552. See also *Theophanous* (1994) 182 CLR 104 at 141-142.

(264) *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 283.

publication is unlawful — that is to say, not justified, protected or excused by any of the various defences to the publication of defamatory matter, including qualified privilege. The result is to confer upon defendants, who choose to plead and establish an appropriate defence (265), an immunity to action brought against them. In that way, they are protected by the law in respect of certain publications and freedom of communication is maintained.

The issue raised by the Constitution in relation to an action for defamation is whether the immunity conferred by the common law, as it has traditionally been perceived, or, where there is statute law on the subject the immunity conferred by statute, conforms with the freedom required by the Constitution. In 1901, when the Constitution of the Commonwealth took effect (266) and when the Judicial Committee was the ultimate Court in the judicial hierarchy, the English common law defined the scope of the torts of libel and slander. At that time, the balance that was struck by the common law between freedom of communication about government and political matters and the protection of personal reputation was thought to be consistent with the freedom that was essential and incidental to the holding of the elections and referenda for which the Constitution provided. Since 1901, the common law — now the common law of Australia — has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901. To this question we shall presently return.

The factors which affect the development of the common law equally affect the scope of the freedom which is constitutionally required. "[T]he common convenience and welfare of society" is the criterion of the protection given to communications by the common law of qualified privilege (267). Similarly, the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society. That requires an examination of changing circumstances (268) and the need to strike a balance in those circumstances between absolute freedom of discussion of government and politics and the

(265) cf as to waiver of the right or privilege with respect to trial by jury, which is conferred by s 80 of the Constitution, *Brown v The Queen* (1986) 160 CLR 171 at 180-182, 190-191, 195-196, 204-205, 214-215.

(266) Covering cl 3 of the Constitution.

(267) *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1050].

(268) *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.

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LANGE v AUSTRALIAN BROADCASTING CORPORATION

Brennan CJ
Dawson J
Toohey J
Gaudron J
McHugh J
Gummow J
Kirby J

reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics.

Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives (269). The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.

In any particular case, the question whether a publication of defamatory matter is protected by the Constitution or is within a common law exception to actionable defamation yields the same answer. But the answer to the common law question has a different significance from the answer to the constitutional law question. The answer to the common law question prima facie defines the existence and scope of the personal right of the person defamed against the person who published the defamatory matter; the answer to the constitutional law question defines the area of immunity which cannot be infringed by a law of the Commonwealth, a law of a State or a law of those Territories whose residents are entitled to exercise the federal franchise. That is because the requirement of freedom of communication operates as a restriction on legislative power. Statutory regimes cannot trespass upon the constitutionally required freedom.

However, a statute which diminishes the rights or remedies of persons defamed and correspondingly enlarges the freedom to discuss government and political matters is not contrary to the constitutional implication. The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution. Statutes which purport to define the law of defamation are construed, if possible, conformably with the Constitution. But, if their provisions are intractably inconsistent with the Constitution, they must yield to the constitutional norm.

The common law may be developed to confer a head or heads of privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower. Laws made by Commonwealth or State Parliaments or the legislatures of self-governing territories which are otherwise within power may therefore extend a head of privilege, but they cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the Constitution.

Constitutional text and structure

Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of "representative govern-

(269) *Theophanous's Case* (1994) 182 CLR 104 at 140.