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Constitutional Defamation Defence Disappears as Theophanous Effectively Overruled

Richard Potter examines the recent High Court decision in Lange v ABC and its impact upon constitutional and qualified privilege defences to defamation actions.

Three years ago the front pages of newspapers were filled with the news that the High Court determined that the Constitution implied a right of every individual to speak freely on political or governmental issues. This was a quantum leap from previous cases which discussed the implied right within the narrow context of specific legislative provisions and whether they contravened the freedom. Theophanous extended this in one fell swoop to a personal right of immunity from all defamation law (subject to the publisher being unaware of any falsity in the material, not publishing recklessly and publication being reasonable).

Three years later the High Court unanimously dispensed with Theophanous without formally overruling it. The majority in Theophanous was a tenuous one with Justice Deane expressly stating that he did not fully agree with the reasoning of the other majority Justices, but would join them because he effectively agreed with the end result. On this basis the High Court in Lange v ABC was able to seize upon this and say that it was arguable that Theophanous did not contain any binding statement of constitutional principle.

To formally overrule Theophanous would have meant that the High Court would have to justify overruling a recent case for no other perceived reason than a change in its bench. By dealing with Theophanous in this manner, the case could simply be left hanging; no longer effective precedent, but not actually overruled.

A unanimous judgment meant that neither of the remaining majority Justices in Theophanous had to explain or justify their apparent volte face. Furthermore the show of strength provided a clear signal to recent critics of the High Court that it had returned with one voice to a more conservative judicial approach.

BACKGROUND TO THE CASE

The Lange case involved defamation proceedings following a *Four Corners* programme in 1990 which accused Lange of effectively being in the pockets of large business concerns in New Zealand by receiving political contributions in return for possible favours after the general election.

A defence of qualified privilege was pleaded pursuant to common law and also under section 22 of the *Defamation Act* 1974 (NSW) ("Act"). The defence was amended after Theophanous to include the implied constitutional defence. The case provided an ideal vehicle to challenge Theophanous as Lange had a safety parachute if the main argument was unsuccessful. If the argument that the wrong test was used in Theophanous failed then a subsidiary argument was available that the discussion involved New Zealand and not Australian politics. Foreign political discussion should not be the basis for an implied freedom in the Australian Constitution.

There was a prevailing feeling that Theophanous may be overruled and a number of media institutions intervened in the proceedings to argue against Lange, and in the alternative to argue that common law qualified privilege should be expanded to take the place of the constitutional defence to try and ensure no practical change, ie one defence substituted for the other.

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THE HIGH COURT DECISION

Judgment was handed down on 8 July 1997. The High Court unanimously accepted the argument that the wrong test had been applied in Theophanous and the correct test should be similar to the test historically applied to laws potentially contravening express rights of the Constitution.

As with express constitutional rights, the implied constitutional freedom (which was affirmed by the High Court) provided a limitation on legislative or executive powers to the extent that any laws which sought to confine or limit the freedom could be restricted or invalidated. On this basis, the implied freedom cannot confer a personal right of immunity from any law, ie provide an absolute defence to proceedings. The correct test to apply is to first look at whether the law contravenes the freedom, and if it does, whether the proposed law is reasonably appropriate and adapted to achieving its required object. It was held that even though the Act and the common law of defamation were a restriction of the constitutional freedom, these laws were still consistent with the constitutional freedom by providing a balance between freedom of speech and the protection of private reputation.

EFFECT ON COMMON LAW QUALIFIED PRIVILEGE

Having dealt with the constitutional question, the court then turned to the defamation aspect and looked at common law qualified privilege. Although not clear from the judgments, Theophanous appeared to also extend qualified privilege to run concurrently with the implied freedom. Many practitioners regarded this as a separate defence to be relied on in addition to the implied freedom defence.

The High Court affirmed the extended qualified privilege defence and declared that all Australians have an interest in disseminating and receiving information, opinions and arguments concerning governmental and political matters that affect people of Australia. The narrow defence of common law qualified privilege which requires each reader of the material to have an interest in the subject matter was therefore broadened to encompass all Australians where the subject matter is political or governmental. However this defence was tempered by the imposition of a condition of reasonableness on the part of the publisher.

The condition requires the publisher relying on the defence to establish that it had reasonable grounds for believing the material to be true and took all reasonable steps to verify the accuracy of the material beforehand with the person defamed. This state of affairs has been in place in NSW since the commencement of the Act in 1974. Section 22 of the Act provides a statutory defence of qualified privilege which is available in addition to the defence of qualified privilege at common law. The statutory defence broadens the interest group of people viewing/reading the material, but contains an express condition of reasonableness. In the 23 years the provision has been in existence, only three reported decisions have been

successful as the courts have traditionally taken a narrow view of this condition. The real test will therefore come when common law jurisdictions such as Victoria or South Australia interpret reasonableness under the common law and ultimately the High Court is provided with an opportunity to look closely at this question once more.

So far as the Lange defence was concerned, the particulars provided did not bring the publication within the extended defence. The matter was remitted back to the Supreme Court with an opportunity provided to the ABC to amend its defence in view of the High Court's comments on extended qualified privilege.

The Lange case has recently been settled and this case will not therefore provide a further vehicle for determination of "reasonability" under the common law defence. In view of the specific comments made by the High Court as to what would constitute reasonable conduct on the part of the publisher, the expanded common law defence may well be narrower than the NSW statutory defence. It will therefore be interesting to see how other states interpret and apply this defence in future.

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Diana, Privacy and Media Corporations

Kathe Boehringer examines the role of media corporations in the context of invasive media practices and proposes new models of corporate governance to raise corporate and individual responsibility.

The indoor sport that everyone loves to play is bashing the media, particularly when it can be readily viewed as "out of control". Public outrage fuelled by the perceived "hounding" of Princess Diana has fastened on easy targets: lower forms of media life - "irresponsible" hirelings, like editors, journalists and photographers - and despised categories like "the hacks of Fleet Street", "ghoulish" royal watchers and the now-infamous "paparazzi". Unfortunately, the sleaze dimension of these usual suspects has diverted attention from the systemic corruption that lies at the heart of the erosion of privacy.

The symbiosis between the political system and the media-entertainment system is obvious: politics demonstrably takes place in and through the media, and politicians are only as good as their last media appearance. It is only a matter of time before being a good media performer will be regarded by both parties and politicians as more valuable than being a good parliamentary performer. Indeed, the emphasis is on "performance" rather than on plain old hard work in the constituency or parliamentary committee rooms.

ROLE OF THE MEDIA IN SELF-GOVERNANCE PROCESS

For its part, the media-entertainment system serves largely as a publicity amplification service for politicians. An increasingly concentrated media busies itself with brokering acclamation[1] rather than in providing the institutional basis within which critical public opinion may be formed, yet still claims Fourth Estate status. But that view of the media - as a vital forum in which citizens debate and form opinions crucial for self-governance - is belied by the High Court's characterisation of the media's role in the 1992 free speech cases. The High Court's protection of freedom of political communication relates to a specific and limited activity - citizen engagement in the *electoral process only*. The wide array of self-governance opportunities in which citizens might become engaged were active citizenship genuinely contemplated - i.e. beyond the realm of "official" politics - was not canvassed. Judicial recognition of the Australian media's "vital" role is therefore restricted to the field of representative politics.

Mr. Justice Mahoney's view of the media is refreshingly far-ranging:

> *"It is the power of the media which alone remains, in the relevant sense, arbitrary. ...The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And it is, in the relevant sense, subject to no laws and accountable to no-one; it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it."*[2]

LAW REFORM PROPOSALS AND RESPONSES

Given the cosy relationship between the representative political order and the media-entertainment system, it is perhaps not surprising that law reform attempts to protect individuals from media invasions of privacy have been largely unsuccessful. Raymond Wacks provides a detailed and depressing account of the numerous attempts at law reform since 1945 in a Britain notorious for a tabloid press that has plumbed new depths of sensationalism, irrelevance and outright lies.[3] Law reform, in seeking to vindicate dignity- and autonomy-based privacy interests arguably undermined by invasive media practices, runs up against the carefully cultivated image of the media as the guardians of free speech.

In these circumstances, strong privacy protection measures like criminalising particular journalistic conduct is bound to be represented *by and in the media* as "interference". Providing individuals with remedies in tort is a cure that may be worse than the disease: redress is contingent upon a costly, prolonged and *public* court process. At another level, administrative measures - say, the creation of an independent press council - are inherently unsatisfactory: to the extent that such councils are given strong disciplinary powers, they will be accused of "do-gooding" as well as political interference; if their powers are weaker, then their "toothless tiger" actions will be viewed as largely beside the point.