'THE PRIVILEGED FEW' AND THE CLASSIFICATION OF *HENWOOD V HARRISON*

Foucault, Comment and Qualified Privilege

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This article considers the treatment of one nineteenth century English defamation decision, *Henwood v Harrison*, in light of Michel Foucault's understanding of the construction of discourses. In particular, the processes of classification applied to the decision are examined. That is, the manner in which later barristers, judges, commentators and digest compilers categorised *Henwood v Harrison* is argued to be an example of an internal discursive control. The treatment of the decision as representing a precedent for either a broad privilege defence to defamatory statements or narrower defences of comment or qualified privilege can be seen as both representing the arbitrary nature of classification and as indicative of the changes taking place in English common law at the time.

To take out of context a passage from Foucault, who was citing another author, Borges, who in turn was quoting from a 'certain Chinese encyclopaedia':

> [A]nimals are divided into: (a) belonging to the Emperor; (b) embalmed; (c) tame; (d) sucking pigs; (e) sirens; (f) fabulous; (g) stray dogs; (h) included in the present classification; (i) frenzied; (j) innumerable; (k) drawn with a very fine camel hair brush; (l) etcetera; (m) having just broken the water pitcher; (n) that from a long way off look like flies.[1]

The contention is that the inaccessibility to the 'sense' of this list is similar to an outsider's disengagement from the law. Both this 'Chinese' classification and the categorisation in law may be effective, yet neither may make sense to an outsider. That the classifications are useful to those who have been trained in the ways of the system does not prevent them being unintelligible to the untrained.[2] This article is aimed at expanding on this readily apparent point. The area of law that will form the boundaries of this exploration is the various limits placed upon the defences of 'qualified

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1 Foucault (2002), p xvi.

2 The work of cognitive psychologists may suggest that the use of categories is necessary for engagement with the world (for example, see Rosch 1988); however, the argument of this article is that the scope of categories used in law may be seen to be arbitrary.

privilege' and 'comment' in defamation law with the centrepiece as the decision of *Henwood v Harrison*.[3]

The choice of *Henwood* and privilege more generally is, in part, informed by broader project on defamation law.[4] In addition, the focus on this nineteenth century case was suggested by the different ways in which the relationship between the defamation defences of 'fair comment' and 'qualified privilege' are now treated in different common law jurisdictions.[5] For example, in most of Australia and England, the two defences are considered separate.[6] In Canada, however, there is still academic discussion as to whether 'fair comment' is part of the defence of qualified privilege.[7]

The implicit argument of this article is that the processes of classification and categorisation in the common law are symptomatic of the changes taking place in the latter part of the nineteenth century law. The rise of university-based legal training and the corresponding growth in the number of commentaries available may be seen to have encouraged a particular approach to the law. *Henwood*, a high water mark in terms of the reach of defences in libel law, may be seen to have been deemed unsuitable for this new approach. From the time of its decision, *Henwood* was included in one of three categories, either one of the relatively narrow categories of fair comment or qualified privilege, or a category of 'broad privilege' — a defence which includes what is now known as fair comment and qualified privilege.

The processes of classification, however, were not smooth. There was much discussion in the literature in the 40 years after *Henwood* as to whether the libel defence was properly the broad privilege, or the narrower split defences of comment and qualified privilege. In the end, the more restrictive understanding won out, with the defences — particularly fair comment — being limited even more in the early twentieth century.[8] The restriction on the

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3 (1872) LR 7 CP 606.

4 At this point I recognise the assistance of Dr Andrew Kenyon, Director of the Centre for Media and Communications Law at Melbourne University, and the ARC which provided the funds for the project: 'Defamation Law in Context: Australian and US News Production Practices and Public Debate'. This article was initially presented as a paper at the Australia and New Zealand Law and History Society conference held in Perth in 2004. I would also like to acknowledge the encouragement provided by other conference delegates with respect to the publication of this article.

5 The term 'defence' is used loosely. Over the years, it has been considered either that 'fair comment' is a defence to a claim for libel, or that a statement that is 'fair comment' is not a libel. On the other hand, a statement made in circumstances of privilege may be libellous, but the maker of the statement is excused liability as long as she or he satisfies the other requirements of the defence.

6 In Queensland, though, there is reference to 'fair comment' in the qualified privilege defence in a statute that was first drafted in the nineteenth century: *Defamation Act 1889* (Qld), s 16(1)(h).

7 Brown (1994), p 956.

8 For example, one aspect of the fair comment defence is that the facts upon which a comment is based should be available for the reader of the statement to assess the

defences in defamation law meant that public discourse became more limited. Though some of the specifics are unclear in the reports of *Henwood*, it would seem as if the plaintiff would succeed now, where he failed in the 1870s. In order to contextualise the categorisation of *Henwood*, there will first be a brief description of Foucault's discursive controls and the law of defamation.

Foucault's Discursive Controls

The practice of classification can be analysed using the framework of Foucauldian discursive controls. Foucault argued for a breakdown of discursive controls into three groups: mechanisms internal to the discourse, external mechanisms and those mechanisms that are neither fully internal nor fully external. In this section, the three forms of control will be explored in turn.

Foucault identified three techniques as important to external control. These are 'forbidden speech, division of madness and the will to truth'.[9] For 'it is the power of institutions and not the truth of the discourse that excludes its false competitors'.[10] That is, the claim to truth of a particular discourse is not based on an objective Truth, but on the strength of its practices. These external techniques for management revolve around the capacity of members of the discourse to deny to 'outsiders' the opportunity to be heard within that formation. The ability of those with perceived power to exclude people because of their utterance of the 'forbidden', or their lack of knowledge of the 'right' speech, is in a 'society like ours ... well known'.[11] Categories such as 'the insane', 'the young' and, in less enlightened times, 'women' and 'the disabled' act as barriers for entry into discourses of power for people who fit into these categories.

The other mechanism of external discursive control, the 'will to truth', is more subtle. Within the positivist discourse of Western culture, 'the division between true and false is neither arbitrary nor modifiable nor institutional nor violent'.[12] It simply 'is'. This dichotomy between truth and falsehood is not 'natural' in the world. It can be seen as a discursive construct — a construct that 'rests on an institutional support ... [on] whole strata of practices, such as pedagogy ... books, publishing, libraries; learned societies ... [and] laboratories'.[13] That is, the discourses of the 'human' and 'natural' sciences constantly reinforce the notion of a truth and their processes further reinforce this will to truth.

'quality' of the comment. As will be seen below, in the nineteenth century it was generally sufficient that there be an ongoing public discourse on the subject. In the twentieth century, it became more important that the facts were 'truly stated' in the publication (*Joynt v Cycle Trade* [1904] 2 KB 292) unless the writer of the comment was criticising a work put out for comment, such as a film or a book.

9 Foucault (1981), p 55.

10 Shumway (1989), p 104.

11 Foucault (1981), p 52.

12 Foucault (1981), p 54.

13 Foucault (1981), p 55.

The internal techniques of discursive control include, in Foucault's words, 'principles of classification, of ordering and of distribution'.[14] These principles relate to the practices of assigning roles, or classifying individuals and objects, and are particularly evident in the sciences (for example, Linnean categorisation of animals using, *inter alia*, genus and species). More broadly, categories in general are taken to have been formed through the histories of the discourses, and have been kept as 'ritualised sets ... which are recited in well-defined circumstances'.[15]

One example of classification in law is the use of precedents. The doctrine of precedent is a form of categorisation that goes beyond the labelling of the courts and their positions. Previous cases are also differentiated, and this affects the treatment of past cases. In short, past judgments are not treated equally. Reported judgments are treated differently from unreported judgments, and official from unofficial reports. Within the category of recognised precedents, there are also those that contain statements that cannot be overlooked and those that contain statements that can be overlooked (in legal discourse, this can be understood in terms of the binding/persuasive dichotomy).

This final set of discursive controls includes neither fully internal, nor fully external, forms of control — that is, those processes of 'rarefaction ... of the speaking subjects'.[16] As Foucault puts it:

> none shall enter the order of the discourse if he does not satisfy certain requirements or if he is not, from the outset qualified to do so. To be more precise: not all regions of the discourse are equally open and penetrable: some of them are largely forbidden (they are differentiated and differentiating), while others seem to be open to all winds and put at the disposal of every speaking subject, without prior restrictions.[17]

A principal technique for creating these restrictions is the hierarchisation of the court system. The 'speaking subjects' mentioned above can be understood to comprise everyone in society who is capable of speech or action, and not just those who are constructed within a particular discourse. Within the legal discourse, only a few 'speaking subjects' from the community at large are heard. Some claim a place as litigant. Some are encouraged to act as jurors. Some become witnesses. While these 'speaking subjects' are not refused entry to the practices of law, their access is limited. That is, subjects such as witnesses and jurors are allowed into the courts but do not speak for the law.

There are some 'speaking subjects' who have the option to participate directly in the legal profession. That is, given particular academic achievement, these 'speaking subjects' gain acceptance into the profession as lawyers. Of these, a few 'speaking subjects' are given certain privileges by

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[14] Foucault (1981), p 56.

[15] Foucault (1981), p 56.

[16] Foucault (1981), p 61.

[17] Foucault (1981), pp 61–62.

those through whom power passes within the discursive (eg Senior Counsel and judges). Positions within the legal profession are not equally open and accessible, even to the legally trained. The judicial hierarchy, therefore, can be understood to represent a form of internal control — classification and ordering — but it can also be taken to represent a form of external control, as it limits the availability of contact with those outside the profession. The focus of this article, however, is on the practices of internal discursive control — classification and categorisation.[18]

Defamation

There are a number of aspects of defamation that are important to highlight. First, defamation is aimed at compensation for reputational damage suffered. In most situations, it is assumed that the defendant in an action will have intended to cause the harm — that is, the plaintiff will not have to prove that the publisher intended to damage the plaintiff's reputation. There are a number of defences available, the most common one being justification — proving the allegedly defamatory statements to be true. Three other defences of relevance to this article are 'comment', 'duty/interest' qualified privilege, and 'fair report' qualified privilege.[19]

One of the earliest comment cases is that of *Tabart v Tipper*.[20] In his address to the jury, Lord Ellenborough was reported as saying:

> Every man who publishes a book commits himself to the judgment of the public, and anyone may comment on his performance. If the commentator does not step aside from the work, or introduce fiction of the purpose of condemnation, he exercises a fair and legitimate right... [and] does a great service to the public.[21]

An example of the 'fair report' qualified privilege is provided by the decision of *Davison v Duncan*.[22] In that case, Lord Campbell CJ held that:

> A fair account of what takes place in a Court of justice is privileged ... It is of great consequence that the public should know what takes place

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18 The focus of this article is on the impact of the processes of classification on the decision of *Henwood v Harrison*. There is no suggestion that this set of internal discursive controls is the sole cause for its varied use. There are many discursive practices that impact on the actions of discursively constructed lawyers and judges, not all of these are part of the discourse of law. This article adopts an archaeological, rather than a genealogical, approach to this history. For a more detailed discussion of Foucault's archaeological method and the common law, see Dent (2003).

19 The specificity of these classifications is a twentieth century development, but it is to be noticed that the examples used are all from the nineteenth century.

20 (1808) 1 Camp 349.

21 (1808) 1 Camp 349 at 358: it is unclear whether the reporter quoted the actual words of the judge or summarised them.

22 (1857) 7 El & Bl 229.

> in Court ... The inconvenience therefore arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity.[23]

The current classic case for 'duty/interest' qualified privilege is *Toogood v Spyring*,[24] in which Baron Parke stated:[25]

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned ...[26]

In other words, the law of defamation will limit liability when potentially harmful statements are made in the service, or in the interests, of the community as a whole, as long as the writer does it within legally defined parameters. The interest for me, then, is how (but not why) the category of 'fair comment' became separated from the category of 'qualified privilege'.[27] An examination of the decision of *Henwood v Harrison*, and its subsequent pedagogical treatment is intended to help in this regard.

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23 (1857) 7 El & Bl 229 at 231.

24 (1834) 1 C M & R 181. The phrase 'current classic' is used because it is the case most likely to be cited by modern courts, and also because its use in that manner seems to be an invention of the twentieth century. Different cases, such as *Wright v Woodgate* (1835) 2 C M & R 573, *Davies v Snead* (1870) LR 5 QB 608, *Harrison v Bush* (1855) 5 El & Bl 344 and *Whiteley v Adams* (1863) 15 CB(NS) 392, seem to be more frequently used as precedents. For example, in *Fisher's Digest* of 1870, these were three of the cases cited with respect to privileged communications, *Toogood v Spyring* was relegated to the category of 'other instances and illustrations'. In *Mews 1884 Digest*, these were the first three cases listed under 'general principles' in the section on 'matters of public interest' qualified privilege; *Toogood v Spyring* was not cited at all. W Blake Odgers, in a series of lectures on libel law, considered that *Harrison v Bush* provided a 'clear rule or canon' for qualified privilege: (1897), p 122.

25 The main judgment in *Wright v Woodgate* was written by Baron Parke, who also wrote the main judgment in *Toogood v Spyring*. A significant difference between the two judgments was that in *Wright* he did not use the word 'duty', whereas the more commonly quoted statements from *Toogood* did use 'duty'.

26 (1834) 1 C M & R 181 at 193.

27 An argument could be made that the two were always separate, but in a manner seemingly unrecognised in judicial decisions. Francis Holt, in his 1812 treatise *The Law of Libel*, discusses what would now be seen as literary criticism/fair comment case as an exception to the category 'Libels against a man in respect to his profession and calling' (pp 182–83); and he discusses employment reference cases as exceptions, on the basis of the confidentiality of communication, to the category 'Libels which tend to injure a man in his trade or employment' (p 189).

Henwood v Harrison

The plaintiff, a naval architect, had submitted plans in 1867 for the conversion of British wooden battle ships into iron-clad turret-ships.[28] Admiralty rejected the plans. In 1870, an iron-clad that had been converted under the plans of a different designer sank with all hands. A 'minute' on the tragedy was prepared by the first Lord of the Admiralty and forwarded to the defendant, the Queen's printer, for printing. Copies of the minute were then sold to the public, prior to its tabling in Parliament. Appended to the minute was a letter on the subject from the Comptroller of the Navy. In that letter, libellous reference was made to the plaintiff's plan for conversion. After the plaintiff was non-suited, a rule nisi was obtained for a new trial. The reported decision included two separate judgments.

The minority judge, Grove J, in his argument for the rule, limited himself to cases on qualified privilege as it relates to reports of proceedings of Parliament and the courts,[29] and to cases on the role of judge and jury in deciding the 'fairness' of privileged criticism.[30] Grove J argued that:

> the publication in question is capable of being considered libellous; that it is not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it is not in the nature of a fair criticism of matter before the public, or, at all events, that it is not so clearly within the limits of such privilege as to be removed from the consideration of a jury.[31]

The judge does not seem to draw a hard line between what would now be called the fair report qualified privilege and the comment defence. It is arguable, at least, that he considered that both comment and qualified privilege were two aspects of a broad privilege defence. The issue for the judge was, however, that the question should have gone to the jury; the judge at first instance was wrong to non-suit the plaintiff.[32]

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28 It may be emphasised that these facts are derived from the reports of the case. The reports do not detail whether the plaintiff's plans were included in the minute, or whether they were only referred to — a detail that would be important under current principles of the 'fair comment' defence.

29 *Wason v Walter* (1868) LR 4 QB 73; *Davison v Duncan* (1857) 7 El & Bl 229; *Stockdale v Hansard* (1839) 9 A & E 1. *Wason v Walter* has been linked with the broad public figure defence in the United States based on the decision in *New York Times v Sullivan* (1964) 376 US 254. Loveland highlights that Justice Brennan, who wrote the opinion for the Court in *Sullivan*, was influenced by Alexander Meiklejohn's understanding of the role of speech in society. Loveland goes on to suggest that 'Meiklejohn's thesis seemed to be itself an elaboration of the principles drawn upon by Cockburn CJ in *Wason v Walter*': Loveland (2000), p 72.

30 *Wason v Walter* (1868) LR 4 QB 73; *Beatson v Skene* (1860) 5 H & N 838.

31 (1872) LR 7 CP 606 at 611.

32 The allocation of decision-making roles in libel law at the time was that it was for the court to decide whether a matter was in the public interest or was an occasion

The majority of the court disagreed, however. The single judgment, read by Willes J, relied on a greater range of decisions. In addition to the precedents related to fair reports used by Grove J, the majority judgment cited many cases that would now be classified as 'duty/interest' qualified privilege or fair comment decisions.[33] These included cases such as *Harrison v Bush*, *Whitely v Adams*[34] and *Toogood v Spyring*, but also many relating to employee references,[35] requests for advice,[36] literary criticism[37] and conduct of people in the public eye.[38]

The common thread amongst these cases, for the majority, is that:

> The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals.[39]

This point was repeated later in the judgment in a phrase which could easily be seen as the *ratio* of the decision: 'fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and that it is not the subject of an action, unless the plaintiff can establish malice'.[40]

Treatment of *Henwood v Harrison*

The central issue for this article can be understood to be how a decision that seems to be one of broad privilege was classified over the ensuing 40 years. The assumption underlying the approach taken in this article is that the treatment of a precedent by legal practitioners is a function of the legal practices of classification and categorisation — that is, how the decision functioned as an internal discursive control. A number of these techniques of categorisation may be brought to bear on a judicial decision. These can be

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of privilege, and it was for the jury to decide whether the limits of the defence were exceeded as a question of fact.

33 (1872) LR 7 CP 606 at 621.

34 (1863) 15 CB(NS) 392.

35 *Taylor v Hawkins* (1851) 16 QB 308; *Somerville v Hawkins* (1851) 10 CB 583.

36 *Todd v Hawkins* (1837) 8 Car & P 88.

37 *Tabart v Tipper* (1808) 1 Camp 349; *Fryer v Kinnersley* (1863) 15 CB(NS) 422.

38 *Blake v Pilfold* (1832) 1 M & R 198; *Woodward v Lander* (1834) 6 Car & P 548; *Dunne v Anderson* (1825) 3 Bing 88.

39 (1872) LR 7 CP 606 at 622.

40 (1872) LR 7 CP 606 at 625. Direct judicial support was found for this proposition in a quote from Baron Parke in *Parmiter v Coupland* (1840) 6 M & W 105: 'Every subject has a right to comment on the acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice or slander', cited (1872) LR 7 CP 606 at 628.

themselves characterised as relating to reporting, use, commentary and digests. The balance of this article will be an exploration of how *Henwood* has been categorised in each of these areas, with the focus being on the labels attached to it in the 40 years since it was handed down.[41]

Reporting

There are two processes of categorisation involved in the publishing of a report of *Henwood*. The first is the decision that the case is worthy of reporting. This decision was made by four different series: the *Law Reports*, the *Law Journal*, the *Weekly Reporter* and the *Law Times*.[42] This means it was widely, though not universally, reported. It was not, for example, reported in the general report series *Justice of the Peace* or *Weekly Notes*.[43]

The second process of categorisation involved in the publishing of law reports is the writing of the headnote, and in particular the allocation of key words to the decision. The key words are indicative of the categories of law available to the practitioners of the day. The words are not in themselves conclusive, as the key words used may vary between the series of law reports. The key words in the various reports of *Henwood* are:

- *Law Reports* — libel, privilege, fair criticism on a matter of 'public and national importance';
- *Law Journal* — libel, privilege and printed minute of Admiralty Board;
- *Law Times* — libel, privilege and fair comments on matter of general interest and national importance; and
- *Weekly Reporter* — libel, privileged occasion and discussion of matter of national importance.

It can be seen that the words across the series are similar, but not identical. Practitioners are likely to attach more weight to the *Law Reports* series, as it has the imprimatur of the Incorporated Council of Law Reporting. It is therefore the report most likely to be cited. Equally, the differences between the key words are important for this article and potentially for the use of the cases by legal practitioners.

The headnote also includes an overview of the decision. The summary of a majority judgment may be taken as indicative of the *ratio* of the decision. The analysis of a decision in terms of *ratio* and *obiter dicta* reflects another process of categorisation. Practitioners consider that some statements are more important than others — that is, some reflect 'legal principles' which may be

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41 The 40-year period was an arbitrary time that was applied across the four categories of classification. The length of time was chosen in order to gain a variety of texts to highlight without producing too much to cover in the limited space available.

42 Though it was in the *Law Times Reports*, it was not included in the *All England Report* reprints.

43 It also was not reported in the specialist series *Cox's Criminal Law Cases*, *Aspinall's Reports of Maritime Cases (New Series)* or *Hayward's Patent Cases*. This may be unsurprising: my point is that the exclusion from the specialist series is a process of categorisation.

carried forward, whilst the balance of the judgments is less important and may be given less weight.

The summary of *Henwood* in the various series includes the following phrases:

- *Law Reports* — 'it was fair criticism upon a matter of public and national importance, and therefore privileged';[44]
- *Law Journal* — 'the plaintiff was rightly nonsuited on the ground that every man has a right to discuss freely, if honestly and without malice, any subject in which the public are generally interested';[45]
- *Law Times* — 'the matter complained of was part of a fair and honest comment on a question of general interest and national importance, and as such was privileged, so as not to be actionable without proof of actual malice';[46] and
- *Weekly Reporter* — 'the subject of discussion was of national importance, the non-suit was right; but that no privilege arose merely because the publication was ordered by a public department, or because the blue-book was to be presented to Parliament'.[47]

As with the key words, there is variety amongst the summaries, but overall the reports contain very similar elements. The words used in the headnotes include 'comment', 'privilege', 'privileged occasion', 'fair criticism', 'fair and honest' and 'malice'. Under current understandings of defamation law, 'privilege', 'privileged occasion' and 'malice' are associated with the defence of qualified privilege, while 'comment', 'fair criticism' and 'fair and honest' are linked to the doctrine of fair comment.[48]

It is to be emphasised again that the purpose is not to try to argue that *Henwood* is 'rightly' a 'fair comment', broad 'privilege' or a 'qualified privilege' decision, but to examine how a single case was considered, at various times, to be part of all three categories. If *Henwood* had never been cited after it was handed down, this would be of little relevance; however, as the decision is still referred to around the world,[49] there may still be value in

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44 (1872) LR 7 CP 606 at 606.

45 (1872) 41 LJCP 206 at 206.

46 (1872) 26 LT 938 at 938.

47 (1872) 20 WR 1000 at 1000.

48 This separation may be somewhat over-stated with respect to the notion of 'malice'. Gatley (2004), p 508 considers that the defence of qualified privilege may be lost 'by reason of the defendant's malice. Fair comment is also defeated by proof of "malice" (if the term should be used at all in that context) but it is now clear that this is narrower than in the contest of qualified privilege.' It is common to refer to the defence of 'fair comment' as requiring that the comment is 'fair', with a limited form of malice being but one factor in assessing the fairness of a comment — see, for example, Gillooly (2004), pp 60–69.

49 It was referred to in the High Court in *Bellino v Australian Broadcasting Corporation* (1995) 185 CLR 183 at 190–91, per Brennan CJ, and in the House of Lords in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 31 at para 60-1, per Lord Nicholls, where it was noted that, in *Henwood*, fair comment was still seen to be part of the defence of qualified privilege. References to *Henwood* in other

the investigation.[50] If the decision was explicitly overruled as being wrong in law, again there would be less interest in this examination. As the treatment by later courts shows, the language used to engage with the statements in *Henwood* suggests that it took a while for the categorisation of the decision to be complete.[51] The next section describes how barristers and judges used *Henwood* as a precedent between 1872 and 1912.

Use

When a barrister cites a precedent in argument, or when a judge refers to a previous decision in a judgment, there are processes of categorisation in play. The practitioner has classified the whole judgment, or just sections or sentences of the judgment, as being relevant to the point to be made. This section will highlight how *Henwood* was categorised in cases handed down in the 40 years after *Henwood.* There were only eight reported cases[52] that cited *Henwood*: *Davis v Duncan*;[53] *Purcell v Sowler*;[54] *Merivale v Carson*;[55] *Allbutt v General Council of Medical Education and Registration*;[56] *Boxsius v Goblet-Freres*;[57] *McQuire v Western Morning News*;[58] *Thomas v Bradbury*;[59] and *Walker v Hodgson.*[60] As will be seen, four of the cases (*Davis*, *Purcell*, *McQuire* and *Bradbury*) consider *Henwood* to be part of a broad privilege defence, two (*Merivale* and *Walker*) separate comment from qualified privilege and treat *Henwood* as a comment case, while the last two (*Allbutt* and *Boxsius*) treat *Henwood* as a precedent for the qualified privilege defence.

The report of *Davis v Duncan* related to an application for a rule nisi on the grounds of misdirection to the jury. The case involved a report in a newspaper about a clergyman who attended an election meeting. It was

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jurisdictions include: *Lange v Atkinson* [1998] 3 NZLR 424; *Barrett v Independent Newspapers* [1986] IR 13 and *Leers v Green* (1957) 24 NJ 239. It may be noted that this last decision, though nearly 50 years old, was just before the radical expansion of the 'public figure' libel defence in the US Supreme Court decision of *New York Times v Sullivan* (1964) 376 US 254.

50 It is, however, arguable that a more appropriate Foucauldian analysis would be to look at obscure monuments of a discourse in order to more 'clearly' see the actions of those subject to the discourse. See Foucault (1975) for an example of the exploration of an unregarded text, although Foucault's commentary does not argue that the obscure is the only place to conduct such an investigation.

51 This gradual process of categorisation of *Henwood* may be seen to reflect the slow takeover of the practices of classification in the understanding of law as a whole.

52 A search was done using the Westlaw database.

53 (1874) LR 9 CP 396.

54 (1875-6) LR 1 CPD 781.

55 (1887) 20 QBD 275.

56 (1889) LR 23 QBD 400.

57 [1894] 1 QB 842.

58 [1903] 2 KB 100.

59 [1906] 2 KB 627.

60 [1909] 1 KB 239.

counsel for the plaintiff who cited *Henwood* by name. In the context of a discussion of privilege, counsel stated that the decision 'goes as far as any decision on this subject has yet done'.[61] The two judges who gave written decisions did not refer to *Henwood* by name. One judge stated that 'if the publication did not exceed the bounds of fair discussion, it was within the doctrine of privilege; or, in other words, was not a libel'.[62] The other considered that 'if the words complained of were a fair comment on the conduct of a person at an election meeting, they were privileged'.[63] The language used by the judges suggests that they considered the relevant defence to be a broad privilege defence, encompassing what is now known as fair comment and qualified privilege. As such, they could be seen to accept the breadth of the holding in *Henwood.*

In *Purcell v Sowler*, *Henwood* was cited by both counsel and in the unanimous decision. Judgment had been entered, by consent, for the plaintiff, subject to the Court deciding whether the occasion was privileged. The action arose from a newspaper report that suggested that a named doctor had been negligent in his duties caring for the inmates of a 'workhouse'. Counsel for the defendant quoted from Willes J's *Henwood* judgment:

> The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals.[64]

Counsel for the plaintiff argued that 'the case of *Henwood v Harrison* carried the privilege as far as it reasonably can be carried: but the decision there turned upon the ground that the subject-matter was of such great national importance that a fair and bona fide discussion of it was of interest to all the world'.[65]

The court seemed to agree.[66] The court found that, in the case before it, 'neither the position of the person whose conduct is commented upon nor the subject-matter with which the libel deal is of such general and public interest and importance as to bring the defendants within the protection of privilege'.[67]

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61 (1874) LR 9 CP396 at 398, per Huddleston QC.

62 (1874) LR 9 CP396 at 398, per Brett J.

63 (1874) LR 9 CP396 at 399, per Denman J.

64 (1875-6) LR 1 CPD 781 at 784, per Edwards QC.

65 (1875-6) LR 1 CPD 781 at 786-7, per Russell QC.

66 The reference to *Henwood* was limited to a statement that: 'In *Henwood v Harrison* the comments were upon the character of a person whose character individually was of no public interest, but they were made in reference to his capacity to deal with a plan for the reconstruction of the navy of England; and it was held therefore the comments were justifiable, being made with reference to a matter of great public interest to the whole kingdom.': (1875-6) LR 1 CPD 781 at 789, per Brett J for the court.

67 (1875-6) LR 1 CPD 781 at 789.

Comments therefore were seen to be part of the doctrine of broad privilege, in keeping with the judgments in *Henwood*. It is also worth noting that the judges and counsel for the plaintiff argued their positions not by claiming *Henwood* was wrong, but because they *classified* it as not applying in the circumstances.

The summary of the arguments for the defendant in *Merivale* began: 'This being a criticism upon a matter of public interest, the occasion was privileged, and the plaintiffs were bound to prove express malice'.[68] *Henwood* was cited as authority for this. Counsel for the plaintiff did not argue that *Henwood* was wrong, only that the 'privilege' in that case 'was of a much higher nature than that of a critic of a play. The defendant had a duty to perform.'[69]

Only one of the two judges referred to *Henwood*, though both discussed whether public criticism amounted to a privileged occasion. Bowen LJ argued that:

> The present case is not, strictly speaking, one of 'privileged occasion'. In a legal sense that term is used with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys — the right of publishing a written criticism upon a literary work which is offered to public criticism. It is true that a different metaphysical exposition of this common right is to be found in the judgment of Willes J in *Henwood v Harrison* ... With great respect to Willes J, I agree with the Master of the Rolls that this is not so good an exposition of the right as that which is given by Blackburn J, and Crompton J in *Campbell v Spottiswoode*. But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view is the right one.[70]

On a broader level, the case is something of a watershed in the relationship between comment and qualified privilege. It is the first to specifically adopt the *Campbell v Spottiswoode*[71] approach — for example,

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68 (1887) 20 QBD 275 at 277, per Cocks QC. W Blake Odgers was counsel assisting.

69 (1887) 20 QBD 275 at 278, per Lockwood QC.

70 (1887) 20 QBD 275 at 82–83. On the words used in the judgments in *Merivale*, it could just have well turned out that artistic criticism was dealt with differently to comment on matters of public importance, thereby leaving artistic criticism available to all subjects, and restricting comment on matters of public importance to those who have some responsibility to the public, such as newspapers during election campaigns.

71 (1863) 3 B & S 769. Crompton J, in that case, held that: 'The first question is, whether the article on which this action is brought is a libel or no libel — not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and bona fide write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged communications, in which the malice of the writer becomes a question

both judges refer to the fact that *Spottiswoode* had 'never been over-ruled'[72] rather than the law as applied in *Henwood*.[73] The continuation of the *Spottiswoode* approach may also partially be explained by the fact that the headnote to *Merivale* states that the decision overrules *Henwood*, though the judges do not state that.

The next decision to refer to *Henwood* was *Allbutt*. In this case, the plaintiff was a doctor who was complaining about a report of the proceedings of a medical registration board. Counsel for the defendants repeated that part of Willes J's decision quoted by the defendant's counsel in *Purcell*.[74] The sole judgment in *Allbutt* repeated the same part in its entirety.[75] The statements of *Henwood* relating to the balancing of the interests of the plaintiff and those of society were seen as 'good law'. There was nothing in the words of the judgment to counter the view of *Henwood* as representing a broad privilege defence. However, given the practices of legal classification, the facts in *Allbutt* may be seen to limit the use of *Henwood* to the category of 'fair report' qualified privilege decisions.

Henwood was next used as a precedent for 'duty/interest' qualified privilege, in a case that centred on a claim for libel based on a solicitor dictating a letter containing statements defamatory of the plaintiff to a clerk.

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for the jury ... But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true ... Though the word 'privilege' is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not there was no privilege.' (1863) 3 B & S 769 at 778–79.

72 (1887) 20 QBD 275 at 279, per Lord Esher MR.

73 One potential reason for this is that both *Spottiswoode* and *Merivale* are Queen's Bench decisions, whereas *Henwood* is a Common Pleas case. The Queen's Bench courts were not 'superior' to the Court of Common Pleas. The history of the highly political relationship between the Courts of Queen's Bench, Common Pleas and Exchequer is long and complex; however, by 'the eighteenth century it was customary to speak of the 'twelve judges' (of the three courts) as a body equal in status and authority and function': Baker (1990), p 59. The reforms of 1875 and 1880 left Queen's Bench Division of the High Court of Justice as the 'sole representative of the old courts of common law': Baker (1990), p 60. Pollock, in the first edition of his Torts text, stated, in reference to *Spottiswoode* and *Henwood*, that the latter judgment was of 'co-ordinate authority': (1887), p 221.

74 'The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals': quoted at (1889) LR 23 QBD 400 at 405, per Sir RE Webster AG. Lopes LJ offered his opinion at this point that 'no case lays down the principle better than *Harrison v Bush*', one of the cases cited by Willes J in *Henwood*.

75 (1889) LR 23 QBD 400 at 410, per Lopes LJ in a unanimous decision.

Counsel for the defendants in *Boxsius* argued that the facts in question meant that the 'communication was made in discharge of a private duty, and was fairly warranted by a reasonable exigency, and honestly made, and is therefore privileged',[76] a claim for which *Henwood* was cited as support.[77] The court did not comment on *Henwood* specifically, but did find that qualified privilege applied in the circumstances.[78] Again, there was nothing to limit *Henwood* to anything less than a broad privilege precedent, but the practices of legal classification may be applied to argue that *Henwood* was only a duty/interest qualified privilege defence.

The next case contemplated is the Court of Appeal decision of *McQuire*. This case was based on a review of a play, but the focus of legal argument was whether it was for the judge to decide the case, or whether the matter should have been left to the jury. It was held, following *Henwood*, that it was for the court to decide whether 'the document is capable in law of being a libel'.[79] The Master of the Rolls also discussed the tension between *Henwood*, *Merivale* and *Spottiswoode*. In referring to *Henwood*, he said:

> The decision, so far as I know, has never been questioned, though exception has been taken to the use of the word 'privilege' to describe the public right of fair comment, and some eminent judges have preferred not to use a word which, according to its technical etymology, denotes the special right of an individual, as extending to cover the common rights of the whole community at large. In *Merivale v Carson* Bowen LJ treats this difference of view as one rather concerned with the 'metaphysical exposition' of its origin of the right itself rather than with the limits of its exercise ... Indeed, since the time of Lord Ellenborough, there does not seem to have been any difference as to the extent and limits of the right itself in the case of literary criticism, and it was more commonly than not treated as resting on the principle explained by Willes J in *Henwood* ...[80]

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76 *Boxsius v Goblet-Freres* [1894] 1 QB 842 at 844, per Montague-Lush. Blake Odgers QC was senior counsel for the plaintiff.

77 *Toogood v Spyring* was also offered as authority for the claim.

78 [1894] 1 QB 842 at 846, per Lord Esher MR; at 846, per Lopes LJ; at 847, per Davey LJ.

79 [1903] 2 KB 100 at 111, Collins MR, with whom Stirling and Mathew LLJ concurred. The Master of the Rolls added: 'In my opinion, there is in this case, in the language of Willes J above cited [from *Henwood*], no evidence on which a rational verdict for the plaintiff can be founded, and the defendants are therefore entitled to have judgment entered for them.' [1903] 2 KB 100 at 112–13. In other words, Collins MR considered that if the trial judge considered that the allegedly defamatory matter was comment, then it was available to the judge to not leave it to the jury to see if the publisher went beyond the limits of the 'defence', if the judge considered that there was no evidence to support a claim that the comment was not 'fair'.

80 [1903] 2 KB 100 at 111–12.

Collins MR seems to consider the qualified privilege expounded in *Henwood* to be the same as comment[81] — that is, for him *Henwood* was rightly to be seen as a broad privilege case.

Counsel for the defendants raised *Henwood* in *Thomas v Bradbury*, in terms of *Henwood*'s relationship with *Merivale* and *Spottiswoode*. *Bradbury* was another case of what may be described as literary criticism. Collins MR, who again wrote the judgment of the court, referred back to what he said in *McQuire* with respect to the differences in 'metaphysical exposition' between *Henwood* and *Spottiswoode*.[82] The Master of the Rolls argued:

> The words of the note [in *Merivale*] seem to suggest a difference of right, under the general law of libel, in respect of communications made on a privileged occasion and communications made in the shape of a criticism on a matter of public interest. In cases of privilege, properly so called, nothing that falls outside the privilege is protected by it ... The occasion being privileged, the extent of the privilege may vary according to the nature of the case and the limits of the right or duty which is the basis of the privilege. But this is precisely the position in the case where the right exercised is one shared by the rest of the public, and not one limited to an individual or a class ... Now the head-note might possibly suggest, at first sight at all events, particularly when it adds '*Henwood v Harrison* dissented from' ... that there was a difference of substance in the bearing of malice in the two cases with respect to communications or criticisms falling prima facie within the right or privilege.[83]

Collins MR therefore may be seen to accept the 'broad privilege' categorisation of *Henwood*.

The last decision before 1912 that referred to *Henwood* was *Walker v Hodgson*. The earlier decision was not cited in argument,[84] but was referred to by Vaughan Williams LJ in his description of the relationship between comment and privilege:

> Ever since *Merivale v Carson* the doctrine laid down by Sir James Shaw Willes that fair comment is a branch of the doctrine of privileged occasion, under which the publication is protected if the judge rules that the occasion is privileged and that there is no evidence of express malice, has been disapproved.[85]

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81 This treatment may be seen to raise a question of the difference between 'comment on' and a '*discussion* of' a matter of public importance.

82 [1906] 2 KB 627 at 639.

83 [1906] 2 KB 627 at 639–40.

84 It is worth noting that Hugh Fraser was counsel for the defendant.

85 [1909] 1 KB 239 at 250. Vaughan Williams LJ did not, however, refer to *Thomas v Bradbury* or *McQuire*. Kennedy LJ did refer to Collins MR's judgments in those two cases, but considered Collins' statements to be limited to cases of fair comment (at 256).

Therefore, by 1910 it seemed clear — at least to some — that comment was separate from qualified privilege, notwithstanding a hold out Master of the Rolls, and that *Henwood* was to be treated as an authority limited to matters of comment. The reason for that is still not necessarily clear, particularly given that the other decisions that referred to *Henwood* cited it, in turn, as a case on 'fair discussion on a matter of public interest', 'comment on a matter of public interest', 'fair report qualified privilege', 'duty/interest qualified privilege' or 'literary criticism'.

Commentary

This section on commentary relates to the publication of textbooks and articles on defamation. Together, these publications can be seen to operate as important sites of classification in law. The categorisation of *Henwood* in these publications mirrors the lack of clarity about the compartmentalisation of the decision in the case law.

Textbooks

There were only three dedicated defamation law textbooks published by 1910 that discussed *Henwood.* These were *A Digest of the Law of Libel and Slander* (1881) by William Blake Odgers, Sir Hugh Fraser's *Principles and Practice of the Law of Libel and Slander* (1893) and George Spencer Bower's *A Code of the Law of Actionable Defamation* (1908). There were other texts that related to libel law; however, these three may be seen to be case books in the style as used in legal instruction today.[86] There were also a number of broad torts texts that included detailed commentary on the law of defamation. These included books by well-known authors as Sir Frederick Pollock, Sir John Salmond and Messrs Clerk and Lindsell.[87] All these texts operated under pedagogies of

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[86] Two other texts dealt with the law of libel generally — one by Odgers (1897) and one by W Valentine Ball (1912). The first discusses the cases of *Campbell v Spottiswoode* and *Merivale v Carson* under 'fair comment on a matter of public interest'. Of interest in this discussion are two statements. The first is that: 'a clearer reason why a fair comment does not create a privileged occasion. The right to comment upon the public acts of public men is the right of every citizen. It is not the peculiar privilege of the press ... Now a privilege is a right which I possess because I am I ... a right which every citizen possesses merely because he is a citizen of the State is no privilege at all.' (p 42) The second relates to the limits of comment: 'In order to relieve the defendant from liability, (a) the words he published must be fairly relevant to some matter of public interest; (b) they must be the expression of an opinion, and not the assertion of a fact; (c) they must not exceed the limits of a fair comment; and (d) they must not be published maliciously.' (Ball refers to the same requirements at pp 49–50). These days, the last two are conflated into 'the comment must be fair'. The separation of the two by Odgers may reflect the tension in the relationship between comment and privilege in the nineteenth century.

[87] Perhaps the most frequently cited libel casebook is currently that of Gatley, the first edition of which was not published until 1924. As an aside, it is worth noting that *Henwood* was discussed under the heading of 'fair comment' (pp 333, 355 and 363). Further, the relationship between comment and qualified privilege was

categorisation, that is law is *necessarily* broken up into 'compartments' with specific statements of law, cases, being allocated to particular holes in the grand scheme.

The first dedicated text on libel law to be published after *Henwood* was decided was that of Odgers.[88] *Henwood* is only referred to twice in his text.[89] First, it is used by Odgers as an example under the category 'affairs of state' as a 'matter of public interest'.[90] The next reference to the decision is to treat the facts of the case, rather than the judgments, as an example of duty/interest qualified privilege.[91]

Fraser also refers to *Henwood* twice only in the third edition of his text.[92] The first reference is in the section on 'fair and bona fide comment on a matter of public interest', where it is used as an example of 'public interest', a 'state matter: everything which concerns government, either House of Parliament, or

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highlighted, with reference to *Henwood*, with the tension apparently being resolved in *Thomas v Bradbury* (p 333).

88 The understanding of Odgers in this area is enhanced by his work as a barrister in the field (as mentioned above, he was counsel in *Merivale* and *Boxsius*), in the sense that his capacity to impact on the law is greater than that of a lawyer who only acts in the courtroom, or an academic who only writes textbooks. Again, given the premise of the paper, Odgers' experience does not make him more right than other members of the legal profession — he just gets talked about more. His expertise was also recognised by other legal text writers. Pollock, in his treatise on torts, suggested with respect to libel that 'those who desire full information will find it in Mr Blake Odgers' excellent and exhaustive monograph': see (1887), p 205.

89 In terms of the defences, Odgers considers 'comment' when discussing whether a libel has occurred, and he discusses qualified privilege as a defence — and therefore only to be dealt with if there were defamatory words published.

90 Odgers (1881), p 44. Odgers makes the point earlier in the text that 'it has often been said in *nisi prius* cases, that fair and honest criticism in matters of public concern is "privileged". But this does not mean that such words are "privileged by reason of the occasion" in the strict legal sense of that term. The defence really is that the words are not defamatory; that criticism is no libel.' (p 35) Odgers refers to *Spottiswoode* as evidence, but does not cite *Henwood*. Perhaps to do so would weaken his suggestion that the confusion is the result of misguided lower court judges sitting in *nisi prius*.

91 Odgers cites the judgment of Grove J that a report of the Comptroller to the Board of Admiralty would be an example of a privileged report, as a communication made in discharge of a duty arising from a confidential relationship existing between the parties: (1881), p 211. It is worth noting that it was Grove J's judgment referred to and not that of Willes J, despite the fact that both included a description of the facts that gave rise to the action.

92 The first two editions are unavailable for loan in Australia. The third edition was published in 1901.

any committee thereof'.[93] The second reference to *Henwood* is in the section on qualified privilege,[94] under the heading of 'statements in discharge of duty'.[95]

Bower's *Code of the Law of Actionable Defamation* was seen by its author as a codification of the law, in the sense that it was intended to 'constitute an analytical exposition in logical order of the principles of the law' of defamation.[96] The volume is broken into two broad parts: the Code itself and a number of appendixes that more fully explain some of the legal difficulties that are apparent in the relationship between the Code and the case law. *Henwood* is cited a number of times; in Part IX of the Code — 'The Defeasible Immunity Attaching to Comment';[97] and in Appendixes VI, VIII and XII.[98]

The references to *Henwood* in the Code proper are, as with other precedents, cited as examples for the principles laid down. For example, the first reference is to the use of the phrase 'subject of public interest'.[99] The decision is also used as authority for the allocation of decision-making roles between judge and jury.[100] Appendix VIII contains a detailed exposition of the case law around the variable use of the word 'privilege'. *Henwood* was referred to a few times. Bower's understanding of the decision is explained thus:

> Willes J most distinctly applies the term 'privilege' to comment, as one amongst other species of defeasible immunity, but, in so doing, that eminent judge uses language which, on the face of it, shews that by 'privilege', he means, not privilege in its proper sense, but a *right* common to any and every person.[101]

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93 Fraser (1901), p 96.

94 Fraser makes it clear that he considers that fair comment and qualified privilege are two separate categories in libel law: (1901), pp 90–91.

95 The decision is here used as the example of a communication 'made honestly, and on reasonable grounds ... by an official in the army or navy or any Government office to his superior': (1901), pp 146–47.

96 Bower (1908), p iv.

97 There is a separate Part X — 'The Defeasible Immunity Attaching to Defamation by Reason of the Occasion of the Publication ("Qualified Privilege")'.

98 'Canons of Construction in Relation to the Meaning of Matter Published', 'History and Criticism of the Expression "Privilege"' and 'Comment and Criticism' respectively.

99 Bower (1908), p 107. The second reference was as an example of a 'scientific' work 'which is publicly sold, distributed, circulated, produced, advertised, exhibited or in any manner whatsoever ... communicated to the public' (p 111).

100 Bower (1908), pp 121, 122.

101 Bower (1908), pp 348–49, emphasis in original. Bower further suggests that Willes' use of the phrase 'a privilege attaching to such right of free discussion' is 'an obvious contradiction in terms, if "privilege" means a special indulgence in excess of the common right, and an obvious and most cumbrous pleonasm, if it means neither more nor less than this common right.' (p 349)

At risk of labouring the point, even at this late stage commentators thought it important to discuss the classification of cases such as *Henwood* and were not in agreement about where to place this decision.

General torts textbooks of the time also included chapters on defamation. Frederick Pollock, in the first edition of *Law of Torts*,[102] breaks his description of defamation into three sections: Slander, Defamation in General and Exceptions. He has two references to *Henwood*, both in the third section. Pollock devotes an entire paragraph to *Henwood* in the section on 'fair comment on a subject fairly open to public discussion', immediately after he discusses the decision of *Spottiswoode*. The paragraph reads:

> It is true that a later judgment of co-ordinate authority, delivered by one of the most learned of modern judges, has spoken of 'the privilege of every subject of the realm to discuss matters of public interest honestly and without actual malice', as being on the same footing with the right of free communication on occasions which are privileged in the exact sense. But, although many authorities are cited, *Campbell v Spottiswoode* is not. And to say of a technical criticism, such as was before the court in this case, that there is no evidence of malice, is practically equivalent to saying there is no evidence of its being otherwise than fair; the form of statement, therefore, can hardly be deemed necessary to the actual decision that no cause of action was shown. At all events, this dictum cannot overrule what was decided in *Campbell v Spottiswoode*.[103]

Pollock's second reference to *Henwood* is in the context of his discussion of the fair report subcategory of the separate defence of qualified privilege. The decision is referred to in a footnote, a reference for the distinction between the fair report and comment defences. Pollock adds an aside to the reference: 'I confess myself unable to reconcile much of the language used in that case with *Campbell v Spottiswoode*, which was not cited.'[104]

Salmond, in his text *The Law of Torts*,[105] still considers 'fair comment' to be part of qualified privilege: a 'statement is privileged if it is a fair comment on a matter which is of public interest or is submitted to public criticism'.[106] *Henwood* was used as an authority for this sentiment. He incorporates two other references to *Henwood*, both as examples of fact, rather than as a

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102 Published 1887.

103 Pollock (1887), p 221.

104 Pollock (1887), p 231.

105 First edition 1907.

106 Salmond (1907), p 407. Salmond emphasises his position on the categorisation with the statement: 'The true nature and meaning of the defence of fair comment was long obscured by certain unfortunate dicta in the case of *Merivale v Carson*; but the law has been once more put on a sound and intelligible basis by the decisions of the Court of Appeal in *Thomas v Bradbury* and *McQuire v Western Morning News*.' (1907), p 412, n 17 As noted above, these two Court of Appeal cases referred, with approval, to *Henwood*.

statement of law. In the first, Salmond cites it as an example for the statement: 'it is actionable to say of a solicitor that he is ignorant of the law, or to say of a physician that he has ill-treated a patient, or of an artisan that he does bad work'.[107] The second is an example of 'privileged comment [on a] matter of public interest'.[108]

Clerk and Lindsell stated baldly there are two defences: privilege and truth.[109] The discussion of *Henwood* is placed at the beginning of the section on 'comment and reporting', and therefore at the end of the discussion of privilege as it is now understood. According to the authors, the decision 'treated comment on the footing of ordinary privilege, leaving it to the judge to decide not merely as to the occasion, but as to the fitting use of the occasion'.[110] The final reference to the case is as an example of a 'matter of church and state', where 'free comment is held allowable [because] the public interest arises out of the subject matter itself'.[111]

Articles

In addition to textbooks, there were a number of other pedagogical publications released at the time. Journal articles, then as now, do not operate under the same strict schema of categorisation as commentaries, but authors of articles still contribute to the processes of classification. There were not many English journal articles that mentioned *Henwood* in the first 40 years. There was a case note of it in 1872, a case note of *Merivale*[112] and a note on *Bradbury*.[113]

The note in the *Law Times* for *Henwood* disagreed with the decision.[114] As it is a comment on the case itself, the note does not engage with the process of

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107 Salmond (1907), p 383.

108 Salmond (1907), p 409.

109 (1906), p 572. Comment, even artistic criticism is discussed in the context of defences, not at the stage of ascertaining whether a matter is defamatory.

110 Clerk and Lindsell (1906), p 596. The first reference to *Henwood* is as one in a 'long chain of authorities' relating to the role of the judge in deciding the 'occasion' and the role of the jury with respect to 'malice' (p 582).

111 Clerk and Lindsell (1906), p 607.

112 'Notes' (1888).

113 Radcliffe (1907). Worth noting, in addition, is a piece by Fraser (1891), the focus of which is the statutory protections with respect to the reporting of courts, Parliament and public meetings. The introduction, however, states the defences that the press shares with other citizens. These include 'that the words complained of are true [and] that they are a fair comment on a matter of public interest' (p 158).

114 The concern was on two fronts. First, the finding with respect to role of the judge in deciding the defence: 'we cannot help thinking that this decision very largely and unduly extends the province of the Judge in actions of libel': 'Privileged Criticism' (1872), p 310. Second: 'we do not think it can be possibly be said that when a man comes to discuss any matter of public importance and general interest, the occasion is sufficient to rebut the ordinary legal inference of malice in a case where his remarks are false and defamatory of an individual. The question is

classification. It does not explicitly categorise *Henwood* as comment or privilege, nor does it directly engage with whether comment is part of the broad privilege defence.

The note on *Merivale* considers that:

> the Court of Appeal has confirmed what we have always thought the true view of the ground on which fair criticism of matters fairly open to the public comment is not actionable; namely not that it is in the nature of a privileged occasion, but that it is not a libel at all ... On the whole, the law declared in *Campbell v Spottiswoode* is maintained, and whatever is contrary to it in *Henwood v Harrison* is over ruled.[115]

The note on *Bradbury* opens with 'it is to be hoped that ... *Thomas v Bradbury* will be taken on appeal to the House of Lords so that the whole question of the defence of 'fair comment' ... may be reviewed and placed upon some logical basis'.[116] The tension between the holdings in *Henwood* and *Spottiswoode* was highlighted, with Collins MR's judgment in *Thomas* being added to the mix. The author asks: 'What then would seem to be the logical solution of the matter? That the true basis of the defence of 'fair comment' is that laid down in *Henwood v Harrison.*'[117] As to the use of the word 'privilege': 'is not 'qualified privilege' the equal right of all the world? It is the occasion which is privileged and not the man'.[118] The reason for privilege to exist is that 'it is to the public advantage that public matters and the actions of public men should be freely discussed, and, therefore, although in such discussion defamatory language may be used, it is privileged.'[119] Therefore, the note may be seen to categorise *Henwood* as a broad privilege decision, rather than comment or qualified privilege.

Digests

Digests relate to the 'use' of precedents in that they can be one of the first places a practitioner may look for the appropriate past decision to cover a particular set of circumstances. Digests also function as 'commentary' in that decisions are classified and comments are added by the compiler of the digest. Given this dual role, digests are considered separately in this article. This section will examine how *Henwood* was classed in digests after the decision

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whether the discussion is in the nature of fair criticism on such a matter, and that surely is a question for the jury.' (p 310).

115 'Notes' (1888), p 240.

116 Radcliffe (1907), p 97.

117 Radcliffe (1907), p 98.

118 Radcliffe (1907), p 99.

119 Radcliffe (1907), p 99. It may be noted that the Editor of the *Review* added a footnote to this note which read, in part: 'With regard to *Henwood v Harrison*, it may be observed that there was no suggestion of malice, and the question which was argued, and on which the Court was not unanimous, was whether in all the circumstances the plaintiff's plans ... were open to public comment.' (p 99)

was brought down. The Digests highlighted are Mews, the *Law Reports Digest* and the first edition of *Halsbury's*.

The first *Digest* of these published after 1872 was Mews edition of 1884.[120] *Henwood* was referred to twice. The first was under the sub-section 'general principles' in the section of 'matters of public interest',[121] within the category of 'qualified privilege'.[122] Qualified privilege was itself filed under 'defamation'. The summary given under 'general principles' was 'the fair and honest discussion of, or a comment upon, a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice'. The second reference to *Henwood* was in the sub-section 'other cases' in the section of 'matters of public interest'.[123]

In the *Law Reports Digest* (1865–90), *Henwood* was included under 'fair comment — fair criticism — matter of public and national importance'. The 'ratio' was written as 'the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice'.[124] As with the *Mews Digest*, the *Law Reports Digest* summary of the case reads as a combination of what is now considered to be qualified privilege and fair comment.[125] In other words, the *Digests* appear to classify *Henwood* under a broad privilege category.[126]

Halsbury's Digest was first published in 1911. *Henwood* was referred to four times in the section on 'fair comment' under the category of 'libel'. The name of the section no longer had the qualification of 'matters of public importance/interest'. Two of those references were in the context of *Merivale*,[127] and the headnote in that case suggested that *Henwood* had been

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120 *Mews* (1911) contained virtually identical references. The significant difference in the later edition is that, instead of the categorisation being 'defamation — qualified privilege — matters of public interest', it is 'defamation — comments on matters of public interest'. In other words, the understanding of what the decision of *Henwood* 'meant' remained the same; however, its classification changed.

121 *Mews* (1911), 229.

122 There was no section or category labelled 'fair comment', but there were sub-sections of 'literary criticism' and 'criticism upon public men and matters' under the section of 'matters of public interest'.

123 *Mews* (1911), 248.

124 *Law Reports Digest* (1892), col 1927.

125 The connection to comment is evident in the reference to 'fair and honest discussion of or comments upon a matter of public interest', while the links to the current defence of qualified privilege may be seen in both the use of the word 'privilege' and the suggestion that the defence is defensible by evidence of malice.

126 Though *Henwood* is not referred to under the category of qualified privilege in the *Law Reports Digest*. This reference highlights that *Henwood* was dissented from in *Merivale*. It is worth repeating that the report of *Henwood* in the *Law Report* series uses the key words 'privilege' and 'fair criticism on a matter of public and national importance'. It was also referred to in the entry for *Merivale* under 'fair comment — matter of public interest — newspaper criticism of stage play — question to be left to the jury privilege'.

127 *Halsbury's* (1911), vol 18, pp 699, 702.

dissented from. The third reference to *Henwood* was in the sub-section 'essentials of defence',[128] where examples of the breadth of the defence were given as it was 'impossible to give a definition of public interest'. *Henwood* was also cited as a precedent for the principle that 'literary criticism can rarely be protected in practice if it imputes wicked motives to the plaintiff'.[129]

Conclusion

The nineteenth century was a time of change in the English common law. Major disruptions in the causes of action, the relationships between the different courts and the practices of reporting are some of the changes that may have impacted on the classification concerns highlighted in this article. The concern here is not the cause and effect, but only the practices as evident in the products of the legally trained.

One particular area of change is the growth in the number of textbooks and commentaries.[130] The processes of classification may be linked with this growing body of pedagogical publications.[131] What seems to be apparent from the treatment of *Henwood* described here is that the categorisation of decisions was not always effective. Yet what can be drawn from these examples is the practices of repetition that, when seen together, can be taken to affect the operation of the law. The practices are also mutually reinforcing: if a case contains certain statements of law, it will be classified by the writers of headnotes in a particular way and will therefore be categorised in digests in a similar way, and will in turn be used by future lawyers and judges in a way that is consistent with its classification.

What has been shown is that there is a case, *Henwood v Harrison*, which may be considered to be — and was later treated as — a broad privilege case, but which went on to be limited to being either a qualified privilege or a comment case. The decision has never been overruled, though it has had some strange language applied to it — for example, 'metaphysical exposition' — to describe the distinction drawn in *Merivale*.[132] It has not even merely been ignored. *Henwood* still gets cited: it has been twice in the past ten years by judges of the High Court — *Bellino v ABC* and *Bashford v Information*

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128 *Halsbury's* (1911), vol 18, p 704.

129 *Halsbury's* (1911), vol 18, p 709.

130 Linked no doubt to the changing practices of legal education, including the introduction of law degrees to university curricula.

131 It is possible that the effects of the processes of categorisation have changed in more recent times. The introduction of large-scale databases of cases from multiple jurisdictions — CaseBase, Westlaw, Lexis — enables a much broader search for cases than was possible before. The use of Boolean searches and searches for specific phrases within decisions has perhaps made the boundaries between categories of cases more porous. Whether this changes the content of judicial decisions remains to be seen.

132 Articles that fell outside the chronological parameters of this paper have used phrases such as 'lexicographical quibble' (Fifield 1942, p 413) and 'fatuous distinction' (Green 1935–36, p 335).

Australia.[133] *Henwood*, therefore, is a decision that illustrates the lack of consistency, and logical sense, in the categorisations of the common law.

The purpose of the article is, in part, to demonstrate that the process of legal classification is not always internally consistent. Other examples of legal categorisation that were alluded to include reported/unreported decisions, *ratio decidendi/obiter dicta*, majority/minority judgments and binding/persuasive precedents. These categories are not objective, rationally demonstrable groupings, they are only the product of the rules and practices of the legal profession — perhaps arbitrary, but nonetheless useful in the operation of the law. To labour the point further, here is a list found in the sub-category of 'Publication' under 'Defamation' in *Fisher's Digest* (1870):

> (1) In newspapers; (2) In other ways; (3) By several parties; (4) Proof of proprietorship; (5) In affidavits; (6) Within 6 years; (7) Restraining by injunction; (8) Privileged communications; (9) Character of servants; (10) Public & official communications; (11) Observations in the course of judicial proceedings; (12) Reports of judicial proceedings; (13) Parliamentary papers; (14) Proceedings of public meetings; (15) Public records; (16) Literary criticism; (17) Criticism allowable to the press upon public men and matters; and (18) Exhibiting inscriptions.

As process of categorisation it rivals the apocryphal Chinese encyclopaedia, and while it was a useful tool for lawyers, judges and academics, it was also likely to be incomprehensible to the non-legally trained. As such, the processes of classification may be seen as a form of Foucauldian discursive control — a control that limits the conduct of those within the discourse, and excludes those without.

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133 In *Bellino*, Brennan CJ used it twice — repeating the words of Willes J with respect to the broad purpose of the privilege defence and as authority for the division of roles between judge and jury: (1996) 185 CLR 183 at 190, 191. In *Bashford, Henwood* was used as an example of a duty/interest qualified privilege — 'a class of case where the defendant is entitled to volunteer defamatory information to a third party... where a confidential relationship exists between the defendant and the third party and the defendant has a duty to protect the interests of that person': (2004) 204 ALR 193 at 215, per McHugh J.

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