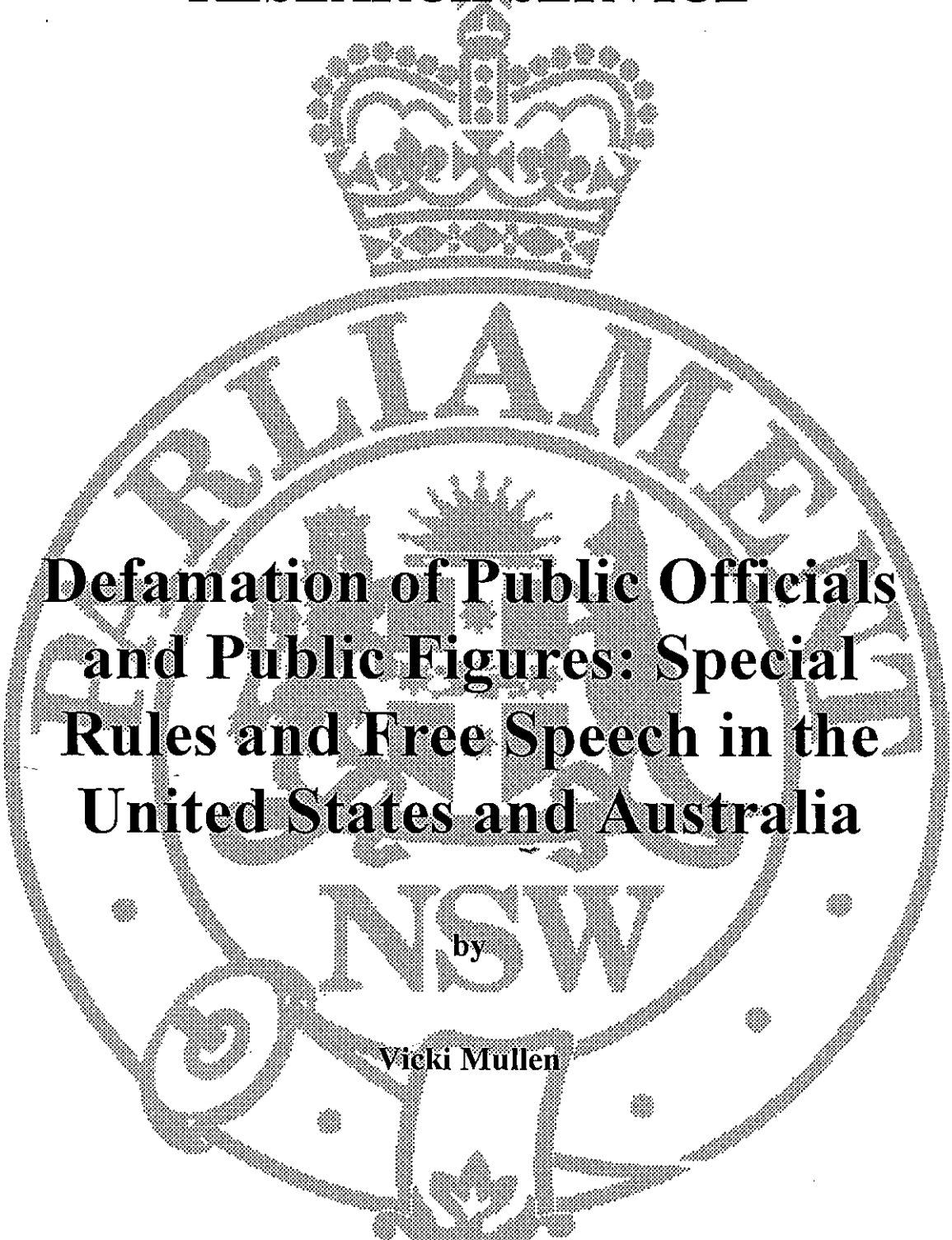


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**Defamation of Public Officials
and Public Figures: Special
Rules and Free Speech in the
United States and Australia**

by

Vicki Mullen

**Occasional Paper No 2
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INTRODUCTION

The purpose of defamation law has been described as the reconciliation of 'mutually incompatible interests of freedom of speech and protection of reputation.'¹ It could be said that freedom of speech, as a fundamental principle of democracy, should be protected primarily as a matter of public interest and that personal reputations should be protected as a matter of private interest. However, the protection of freedom of speech and the protection of personal reputations may both have a public and private purpose. As discussed below, freedom of speech has a role to play in the maintenance of personal human dignity. The reputation of a politician (for example whilst representing Australia overseas) may be crucial to the public interest. Therefore, defamation law aims to strike a balance in the protection of a complex set of public and private interests.

This balance in Australia has shifted somewhat with recent developments concerning a constitutional implied freedom of communication with respect to political discussion and its effect on defamation law. These developments have thrown the issue of defamation law as it applies to 'public officials' or 'public figures' into sharp focus in this country. In particular, attention has been directed towards the debate as to whether a public figure defence, similar to the *New York Times Co v Sullivan* formulation in the United States, should or will be adopted in Australia. At the centre of this debate must be an analysis of the advantages and disadvantages of such a defence (or elements of the defence) for the most effective operation of democracy and a free and open society, which recognises and values the protection of both public and private interests.

The concept of 'special rules' is taken to refer to the constitutional defences that have developed in the United States and Australia that are or may be available where the plaintiff in defamation proceedings is a 'public official' or 'public figure'. It is proposed to consider the advantages and disadvantages in particular of the public figure defence in the United States and how they may relate to the developments of special rules in Australia. The fundamental consideration will always be how these 'special rules' support or damage the public and private interests prevalent in a democratic society that values free speech as well as the principle of equality and the protection of reputation.

1 New South Wales Law Reform Commission ('NSWLRC'), *Defamation*, Discussion Paper 32, 1993, p 1.

WHAT ARE THE SPECIAL RULES?

United States

The public figure defence in the United States was born of the First Amendment of the United States Constitution which protects, inter alia, freedom of speech and freedom of the press from the law-making powers of government.

It is therefore useful to consider the rationale for freedom of speech. Smolla describes the three primary justifications of free speech as being:

- the marketplace theory that supports the idea that a 'free trade in ideas' assists in humankind's ongoing search for truth²;
- free expression and human autonomy and dignity³; and
- democratic self-governance.⁴

Dworkin confines the justifications for free speech to two groups, namely the instrumental justification and the constitutive justification. The instrumental justification is based on the idea that 'politics is more likely to discover truth and eliminate error, or to produce good rather than bad policies, if political discussion is free and uninhibited' or that 'free speech helps to protect the power of the people to govern themselves.'⁵ This instrumental justification would, with respect to political discussion, cover Smolla's first and third justifications. Dworkin's second group, roughly corresponding to Smolla's second justification, is a constitutive justification. This justification recognises the inherent value of free speech 'not just in virtue of the consequences it has, but because it is an essential and "constitutive" feature of a just political society that government treat all its adult members except those who are incompetent, as responsible moral agents' who are autonomous in their capacity to decide their opinions and beliefs.⁶

It is not proposed to go into the details of the facts of the foundation decision of the United States Supreme Court in *New York Times Co v Sullivan*⁷. Suffice it to say that the case was conducted in the context of the height of the civil rights movement in the United

2 Smolla, R, *Free Speech in an Open Society*, 1992, p 6 (as reproduced in course materials).

3 *Ibid*, p 9.

4 *Ibid*, p 12.

5 Dworkin, R, 'The Coming Battle Over Free Speech', *Civil Liberty*, January 1993, 11 at 13.

6 *Ibid*.

7 (1964) 376 US 254.

States. The 'advertisement' in the New York Times included some false statements about police action against and mistreatment of demonstrating students in the southern state of Alabama, and the plaintiff (who was not named in the advertisement) in the original proceedings was one of three elected Commissioners of Montgomery, whose duties included the supervision of the Police Department.

The decision of the Supreme Court was delivered by Justice Brennan, who described the primary question before the Court as being whether the defamation law of Alabama 'as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.'⁸ In strong words Brennan stated that 'libel can claim no talismanic immunity from constitutional limitations' and that it 'must be measured by standards that satisfy the First Amendment.'⁹ In 1964, the law of defamation in the United States was, for the first time, brought within the constitutional safeguard of the First Amendment. Justice Brennan founded this development on the marketplace of ideas theory of free speech that (as quoted from Judge Learned Hand) 'right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'¹⁰ He also relied on the free speech justification of self-governance in referring to the structure of government in the United States as dispersing 'power in reflection of the people's distrust of concentrated power, and of power itself at all levels.'¹¹ The 'instrumental'¹² value of the First Amendment was recognised and the balance between official reputation and free speech (whether true or false) was thus struck: '[i]njury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error.'¹³ The high value of free speech to the public and the free exchange of ideas was given primacy and the 'special rule' in defamation law for public *officials* was formulated:

The constitutional guarantees require...a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹⁴

8 *Ibid*, at 268.

9 *Ibid*, at 269.

10 *Ibid*, at 270.

11 *Ibid*, at 274.

12 Dworkin, R, *op cit* note 5, at 13-14.

13 (1964) 376 US 254 at 272.

14 *Ibid*, at 279-280.

Brennan did not extend the First Amendment to protect an absolute right to defame. In 1964 the protection was limited to criticism of the official conduct of public officials and it could be defeated if actual malice was proved by the plaintiff. However, it is interesting to note that the two minority judgments in *Sullivan* supported an absolute immunity so that 'the people and the press [are] free to criticize officials and discuss public affairs'¹⁵ and that 'the Constitution accords citizens and press an unconditional freedom to criticize official conduct.'¹⁶

In 1967 the rule in *Sullivan* was extended beyond 'public officials' to also cover 'public figures',¹⁷ on the basis that,

differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinction between governmental and private sectors are blurred. ... This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.¹⁸

The concept of 'public figure' was further developed in 1974¹⁹ with a recognition of two categories on the basis that,

[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.²⁰

Australia

Australia has begun the journey of establishing special rules in defamation law for public officials and others who have become the subject of political discussion, with the

15 *Ibid*, at 296, per Justice Black.

16 *Ibid* at 305, per Justice Goldberg.

17 *Curtis Publishing Co v Butts* (1967) 388 US 130.

18 *Ibid*, at 163-164.

19 *Gertz v Robert Welch, Inc.* (1974) 418 US 323.

20 *Ibid*, at 351.

decisions of the High Court in *Theophanous v Herald & Weekly Times*²¹ and *Stephens v West Australian Newspapers*²².

These developments are not surprising in light of the reality of the increasing reach of the mass media and its contribution to public awareness of the political process and the functions of government. Further, with the growth of legislative and administrative mechanisms for the review of government actions and the movement towards more accountable and open government throughout the nation, the public has come to expect to be fully informed on the actions of politicians and public officials. This 'legitimate interest' was recognised by Justice McHugh in his decision in *Stephens*.²³

However, unlike the situation in the United States, the constitutional special rules in relation to defamation law that are developing in Australia are not based *directly* on the principle of freedom of speech. Rather they derive from the nature of our system of representative government as established and entrenched according to our federal Constitution.

An implied freedom of communication with respect to political discourse or matters was originally upheld in 1992 in the High Court decisions of *Nationwide News Pty Ltd v Wills*²⁴ and *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)*²⁵. However, these decisions were concerned with the implied right and its effect on the legislative powers of the federal Parliament.

The decisions in *Theophanous* and *Stephens* extend the operation of the implied freedom to provide, in certain circumstances, a constitutional defence for defamatory matter, which is derived from both the Commonwealth Constitution and State Constitutions (in particular the Western Australian Constitution in *Stephens*). It has been said that these decisions have 'constitutionalised' defamation law in Australia.²⁶

The *Theophanous* case involved the publication by the Herald & Weekly Times of a letter to the editor which made various accusations, including one of bias, concerning Dr Andrew Theophanous, a Member of the House of Representatives and chairperson of the Joint Parliamentary Standing Committee on Migration Regulations.

21 (1994) 124 ALR 1.

22 (1994) 124 ALR 80.

23 *Ibid*, at 114.

24 (1992) 108 ALR 681.

25 (1992) 108 ALR 577.

26 Walker, S, 'The Impact of the High Court's Free Speech Cases on Defamation Law', (1995) 17 *Sydney Law Review* 43.

The leading decision in *Theophanous* of Mason CJ, Toohey and Gaudron JJ (comprising the majority decision with the support of Deane J) established the constitutional defence on the basis that 'the system of representative government depends for its efficacy on the free flow of information and ideas and of debate' and therefore the 'freedom extends to all those who participate in political discussion'.²⁷ However, the defence was clearly restricted to 'political discussion' defined as,

discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators.²⁸

This passage indicates one of the main differences between the public figure defence of the United States, which focuses on the 'identity of the plaintiff as a "public figure" or "public official"', and the constitutional defence in Australia, which focuses on the 'nature of the material which was published.'²⁹ However, the nature of political discussion means that the defence will most likely be raised where the plaintiff is a public official or a figure who is 'public' because of his or her involvement in the political process (for example, a leader of a lobby or interest group). Because of the nature of political discussion, it could be said that Australia now *effectively* has a 'public figure' defence, albeit with a different emphasis than in the United States. However, on a wider view³⁰ of the scope of the implied freedom, it is conceivable that the defence in Australia may also be available in relation to private plaintiffs who have been defamed in the course of political discussion.³¹ In this sense, it would be wrong to refer to the defence in Australia as a 'public figure defence'.

Justice Deane's formulation of the constitutional defence is interesting in this regard as it is specifically linked to particular plaintiffs. Justice Deane precludes completely the operation of State defamation laws in relation to 'statements about the official conduct or suitability of a member of Parliament or other holder of high Commonwealth office' and

27 (1994) 124 ALR 1 at 12.

28 *Ibid.*, at 13.

29 Walker, S, *op cit* note 26, at 60.

30 The debate concerning the effective scope of the constitutional defence in Australia, and whether it is restricted to candidates for public office, was considered by Sally Walker in 'The Impact of the High Court's Free Speech Cases', (1995) 17 *Sydney Law Review*, 43 at 49-51. It is apparent that the leading judgment is not as clear as it could be in relation to this issue. However, the author states a convincing case, drawn from the judgment itself, for the wider view of the scope of the implied freedom.

31 For example, if the discussion of the official conduct of a politician involved or implicated a second 'non-public' party.

'statements or comments upon those responsible for the conduct of the press and other media outlets through which such public discussion and criticism must take place.'³²

A further important difference in Australia is the criteria that were established in the leading decision in *Theophanous*, to determine whether publication of political matter is non-actionable. For the constitutional defence to be available to protect political discussion, the defendant must be able to establish that 'it was unaware of the falsity, that it did not publish recklessly (ie, not caring whether the matter was true or false), and that the publication was reasonable' in the prevailing circumstances.³³ In addition, the onus in Australia is on the defendant to show reasonable publication. In the United States, the burden is on the plaintiff to establish actual malice and falsity.

THE ADVANTAGES OF SPECIAL RULES

The enhancement of the principle of free speech

The primary purpose of the public figure defence in the United States is the protection of free speech according to the First Amendment of the Constitution through the restriction of the 'chilling effect' on free speech of a threatened action for defamation. The fervent protection of free speech in the United States arises from an inherent distrust of centralised government, which is founded in the history of the establishment of the nation as a Republic. Lewis describes the history of the drafting of the Constitution with the birth of the Bill of Rights in 1791 (in the form of the first ten Amendments) as a limitation on federal power.³⁴

The protection of free speech was given strong effect in *Sullivan*, and there seems to be little doubt that the decision has in times past, as was intended, enhanced free political speech and the freedom of the press. Lewis states that 'it is questionable whether the press could have done as much as it has to penetrate the power and secrecy of modern government, or to confront the public with the realities of policy issues.'³⁵ He gives as an example the statement by the counsel for the *New York Times* in the *Sullivan* case that if the decision had gone the other way, CBS would not have continued to do programs on the problems in the South.

The advantages of the enhancement of free speech, and in particular political speech, to an open and democratic society are obvious when one considers the levels of corruption,

32 (1994) 124 ALR 1 at 61.

33 (1994) 124 ALR 1 at 23.

34 Lewis, A, *Make No Law: the Sullivan case and the First Amendment*, Random House, New York, 1991, pp 46-47.

35 *Ibid*, p 245.

abuses of human rights and the loss of human dignity, autonomy and choice in societies where free speech is repressed and punished and the actions of government are unable to be scrutinised. When considering the extreme results that flow where free speech is not protected to any real degree, it could be said that all three primary justifications for free speech (as described by Smolla), namely, the marketplace theory of ideas, free expression and human dignity, and democratic self-governance, should be equally recognised as underlying principles when rules are formulated to protect free speech.³⁶

However, whether the public figure defence has *continued* to enhance free speech in the way intended in the United States is questionable. As discussed above, the leading judgment of Justice Brennan in *Sullivan* rested heavily on the justification of the marketplace theory of ideas. This justification has been criticised as being flawed for numerous reasons including the fact that 'the "marketplace" nowadays is simply too heavily dominated by monopoly players to produce the conflict of perceptions and the variety of investigative activity that might reliably generate "the truth"'.³⁷ It could be said that the increase in and concentration of media power has therefore damaged the enhancement of free speech. Part of the philosophy underpinning *Sullivan* may be of diminishing practical value, as a new base of centralised (private) power develops.

In addition (as discussed below), the continued enhancement of free speech has been questioned as the *Sullivan* formulation and its progeny have encountered problems of scope and practice which have confused the justifications of free speech underlying *Sullivan* and at times, limited the benefits that were supposed to flow from the decision in 1964.

In Australia, the High Court also acknowledged the 'chilling effect' of the law of defamation to the extent that it 'seriously inhibits freedom of communication on political matters'³⁸. However, it was unwilling to adopt the *Sullivan* concept of 'actual malice' when formulating the constitutional defence in *Theophanous*, primarily on the basis that it affords too little protection of an individual's reputation (as discussed below).³⁹

36 The idea that the 'current constitutional law threatens to invalidate...legitimate and even crucial democratic efforts to promote the principle of popular sovereignty' (p xviii) is discussed by Sunstein, CR, *Democracy and the Problem of Free Speech*, The Free Press, New York, 1993.

37 Chesterman, M, 'The Money or the Truth: Defamation Reform in Australia and the USA', Paper presented to the 1993 Fulbright Symposium, *The News Media: Responsibility and Power*, Sydney, October 1993, 10 at 18.

38 (1994) 124 ALR 1 at 23.

39 *Ibid*, at 22.

Fewer actions for defamation brought by public figures

An Australian commentator has stated that:

the Sullivan ruling works to deter public figures in the US from suing for the type of 'frivolous, stupid' defamation actions that we see here. 'And there is a sort of feeling among journalists in the US that they are able to pursue things a bit more rigorously and robustly without the chilling effect from politicians and some administrators that they'll seize up the story and sue'.⁴⁰

One of the practical advantages of an enhancement of free speech could be fewer actions being taken by politicians and other public figures with a consequent easing of the burdens on the legal system. However, in relation to the United States, it has been commented that 'the anticipated decreases in defamation actions and recoveries by public officials or figures clearly have not materialized.'⁴¹ This issue will be discussed further below. In addition, a limited empirical study of defamation actions by politicians in NSW has suggested that, although politicians are the most litigious group, the level of litigation is 'modest' in light of their high media exposure.⁴²

40 Quote from Richard Ackland in an article by Spruhan, T, 'Those Litigious Public Figures', December 1989, *The New Journalist* 22 at 23.

41 Strossen, N, 'A Defence of the Aspirations - but not the Achievements - of the US Rules Limiting Defamation Actions by Public Officials or Public Figures', (1986) 15 *Melbourne University Law Review* 419 at 426.

42 Edgeworth, B and Newcity, M, 'Politicians, Defamation Law and the "Public Figure" Defence', (1992) 10 *Law in Context* 39 at 42.

THE DISADVANTAGES OF SPECIAL RULES

Equality for all?

Whilst considering the application of the public figure defence in the United States, the New South Wales Law Reform Commission recognised that the defence flouts the legal principle of equality before the law.⁴³ Hughes also recognises this issue and states that

[j]ust as our rulers should not expect to be more equal than others before the law, so are they entitled to be no less equal. Under *Sullivan*, the rulers are relegated to a position of inequality.⁴⁴

In relation to the *Sullivan* formulation, Strossen rejects the claim of inequality on the basis of the immunity from defamation suits enjoyed by both State and federal government officials, where statements were made in the course of their official duties.

The pre-*Sullivan* non-mutual immunity is one factor that belies the contention, which is made by some *Sullivan* critics, that the *Sullivan* rule creates an inequality between public officials and other defamation plaintiffs. To the contrary, *Sullivan* removed such an inequality.⁴⁵

This point would be similarly relevant to the case of politicians in Australia who enjoy parliamentary privilege in respect of statements made in Parliament. However, in the United States, the argument 'is without foundation when considering the application of the test to public figures who do not have the immunity enjoyed by public officials.'⁴⁶ The arguments that may be applied to the remaining situation of public figures generally is that they are in a special situation in light of their access to the media and their consent to the risk of defamation.⁴⁷ However, these arguments assume that public figures will be given fair coverage by the media and that all public figures are 'public' because they have chosen to be. It is suggested that neither of these assumptions are always correct, and that equality before the law, whilst a difficult concept to define, is a fundamental principle of an operative democracy. It could be said that the constitutional defence in Australia, in its broad interpretation, avoids direct problems associated with lack of equality by focusing on the type of speech and not the character of the plaintiff.

43 NSWLRC, op cit note 1, p 191.

44 Hughes QC, TEF, 'Defaming Public Figures', (1985) 59 *The Australian Law Journal* 482 at 484.

45 Strossen, N, op cit note 41, at 421.

46 Tobin, J, 'The United States Public Figure Test: Should it be introduced into Australia?', (1994) 17 *UNSW Law Journal* 383 at 393.

47 NSWLRC, op cit note 1, p 191.

Reputation and truth - the deterrent to enter public life

The actual malice standard of the public figure defence in the United States provides very little protection of reputation. It has been commented that this lack of protection could have a reverse 'chilling effect' on free speech in that it may act as a deterrent to certain individuals to enter political or public life,⁴⁸ thus 'weakening political democracy.'⁴⁹ Further, where there is little protection of reputation afforded to public figures, it is possible that only very courageous or very stupid individuals would choose to enter public life, and that the diversity of individuals in public office is damaged. This is a distinct disadvantage in a representative democracy. Epstein considers this issue in terms of reputation as a valuable commodity and even suggests that the deterrent to enter public life could open the field for 'persons with lesser reputations and perhaps lesser character' who don't have as much to lose in terms of 'reputational capital'.⁵⁰

The public figure defence in the United States is considered by some commentators to have tipped the balance too far in favour of free speech, and that it has disturbed a 'delicate balance well adapted to the fair resolution of the inevitable conflicts between the competing interests with which the law of defamation is concerned: the individual's interest in the protection of his reputation and the public's interest in being informed.'⁵¹ However, as noted in the introduction, the protection of the reputation of those who hold public office may be squarely in the public interest. For example, it would not enhance Australia's international interests for our Prime Minister to be accused of racism, with no effective remedy to vindicate his or her reputation as a non-racist.

The actual malice test in the United States has also been criticised on the basis that it provides no method of establishing the truth:

[i]f a plaintiff is able to prove actual malice, the remedy he or she will receive will be an award of damages. Although his or her objective in initiating proceedings against the defendant was to restore his or her reputation, the law of defamation in the United States makes no provision for a correction order or a right of reply to achieve this aim.⁵²

The benefits of vindication of reputation and the exposure of false allegations may be financially, professionally and emotionally advantageous for the public figure or public

48 *Theophanous v Herald & Weekly Times* (1994) 124 ALR 1 at 39.

49 NSWLRC, op cit note 1, p 189.

50 Epstein, RA, 'Was *New York Times v Sullivan* Wrong?', (1986) 53 *University of Chicago Law Review* 782 at 799.

51 Hughes QC, TEF, op cit note 44, at 482.

52 Tobin, J, op cit note 46, at 394.

official concerned. However, the 'adjudication' of truth has also been identified as serving the interests of the 'public entity from which their status as public official or public figure generally derives' as well as the public at large.⁵³ The reputation of a public entity or organisation is only as good as the people it employs, so its interest in the truth is obvious. For example, allegations of fraud on the part of an individual can seriously damage the commercial or public reputation of a body, and could lead to loss of public and/or political support. Such allegations could also lead to financial loss, with competition policies being introduced into the public sector. Thus, the adjudication of truth is also in the public interest as 'that adjudication will have profound implications for the operation of public institutions.'⁵⁴

Public figures and free speech

With the decision of the Supreme Court in *Gertz v Robert Welch, Inc* (discussed above), the issue of the exact scope of the concept of 'public figure' in the United States for the purposes of the *Sullivan test* has not been a clear one. A problem of this uncertainty has been identified as the creation of 'an uncertain legal climate where it is more likely that potential publishers will engage in self censorship, "the very evil that the Supreme Court's decision sought to allay"'.⁵⁵

An additional criticism of the category of 'public figure' has been that it does not always reflect the First Amendment goals of the actual malice standard set by *Sullivan*. Whilst recognising that many public figures (who are not public officials) have an enormous potential influence on public policy matters, Schauer raises the issue of those public figures 'whose involvement in or influence on public policy matters is either attenuated or nonexistent.'⁵⁶ He states that the disadvantage of not recognising the '[i]mportant factual and theoretical differences [that] exist between commentary about public figures and commentary about public officials' when 'designing the constitutional rules' is that important speech (the type of speech in mind when *Sullivan* was decided) may be underprotected and the less important speech overprotected.⁵⁷

If the constitutional defence in Australia, as established according to the decision in *Theophanous* is to be linked strictly to political discussion, instead of being confined to

53 Chesterman, M, op cit note 37, at 10.

54 *Ibid*, at 11.

55 Tobin, J, op cit note 46, at 391.

56 Schauer, F, 'Public Figures', (1984) 25 *William and Mary Law Review* 905 at 917.

57 *Ibid*, at 935. The problems of distinguishing between the politically influential public figure and the nonpolitical public personalities were discussed in a reply to Professor Schauer by Ashdown, GG, 'Of Public Figures and Public Interest - the Libel Law Conundrum', (1984) 25 *William and Mary Law Review* 937. Ashdown advocates a 'subject matter approach limited to core first amendment interests' (at 955).

particular classes of public officials or public figures, the uncertainty will rest instead with the scope of the concept of 'political discussion'. Some guidance has already been given in the leading judgment with an indication that the distinction should be developed between political discussion and other forms of expression 'by means of decisions in particular cases'.⁵⁸ It was also indicated that the concept 'is not exhausted by political publications and addresses which are calculated to influence choices.'⁵⁹ The future in Australia in this regard is uncertain. However the guidance given as to the meaning of 'political discussion' recognises the complexities and the issues of degree that will be involved. It would have been a bold move to give definitive boundaries to the concept at such an early stage in its development.

Self-censorship and the problems of litigation and damages

The focus on the defendant's state of mind with the requirement that the plaintiff show actual malice under the *Sullivan* test has led to various practical problems such as the length and technicality of defamation litigation where public figures are concerned and the rise in the amount of damages that are being awarded where the plaintiff is successful.

In considering the *Sullivan* standard in his judgment in *Theophanous*, Justice Deane noted that 'the investigation of subjective motivation is one of the areas in which our legal procedures are most likely to be found wanting'.⁶⁰

This inadequacy of the law is a real problem in the United States. The proof of actual malice has led to the need to closely scrutinise the journalistic and editorial processes so that they are,

now subject to intense and prolonged evaluation. Largely due to this painstaking dissection of how a story was prepared, contemporary defamation litigation is characterized by protracted pre-trial discovery as well as lengthy trials. Consequently, defamation defendants face very large attorneys' fees and other litigation costs.⁶¹

A further problem is the rise in defamation actions by public figures which could be attributed to the fees system in the United States where 'an unsuccessful litigant is almost never required to pay the victorious party's attorneys' fees'⁶² and the plaintiff, under the

58 (1994) 124 ALR 1 at 13.

59 *Ibid.*

60 *Ibid.*, at 61.

61 Strossen, N, *op cit* note 41, at 430.

62 *Ibid.*, at 431.

contingency fees system, may not even have to pay their own fees. In addition, it has been suggested that the changing character and the increasing power of the media, and a public perception that this power is 'exercised in an unaccountable, even arrogant way'⁶³ has led to the proliferation of defamation suits as a way of 'challenging a new power in American society.'⁶⁴

The rise in defamation litigation, the costs and technicalities of the trial and large damages that have been awarded where malice is proved, have been said to lead to a further chilling effect on free debate through self-censorship⁶⁵ by the media where the 'law of libel protects neither the press nor the individual.'⁶⁶

Tabloids and falsehoods

It has been recognised that the public figure defence in the United States

places little or no value on truth or care, and in fact encourages the dissemination of totally false information, which the media need not even investigate. The test thus encourages careless and irresponsible journalism and does not satisfy the public interest in fairness and accuracy.⁶⁷

Whilst the marketplace theory recognises that the dissemination of false information is inevitable in the search for truth, the standard of actual malice that must be proved by a plaintiff under the *Sullivan* test can practically damage the search for truth in the public interest as it 'does not encourage the pursuit of thorough investigative journalism which would have a greater probability of revealing the truth.'⁶⁸ In addition the rise of tabloid journalism surrounding public figures can surely not be supportive of other primary justifications of free speech. Mere gossip and scandal are hardly necessary for democratic self-governance or for the promotion of human dignity and autonomy.

Accountability and private power

Finally, the point has been made that if the public figure defence is aimed at making those with power over society accountable, it overlooks the fact that it is often powerful

63 Lewis, A, op cit note 34, p 207.

64 Ibid, p 208.

65 Strossen, N, op cit note 41, at 429.

66 NSWLRC, op cit note 1, p 182, as quoted from Powe, LA, *The Fourth Estate and the Constitution: Freedom of the Press in America*, University of California Press, Berkeley, 1991 at 120-121.

67 NSWLRC, op cit note 1, p 186.

68 Tobin, J, op cit note 46, at 393.

but private individuals who wield much power in society,

as the countless studies of white collar crime and organised crime have suggested, the real abusers of power and perpetrators of public harm are at least as likely to be in that private realm. In capitalist societies these people are generally less subject to processes of accountability than the public sector. The public figure defence as presently defined seems unsuited to address adequately this state of affairs.⁶⁹

It is likely that the political discussion defence in Australia, drawn as it is from the nature of representative government, could not extend far enough to protect defamatory comments concerning powerful but private individuals, unless they had become the subject of political debate. However, other defences in Australia such as common law or statutory qualified privilege or common law or statutory 'truth', could cover the gap.

69 Edgeworth and Newcity, *op cit* note 42, at 60.

CONCLUSION

Whilst the protection of free speech is fundamental to the operation of a democracy, it is clear that there are numerous disadvantages for public and private interests with the current operation of the actual malice standard of *Sullivan* as it applies to public officials and public figures in the United States. The application of this defence in Australia in its full 'glory' has been strongly rejected by many commentators.

Lawyers contemplating the import of US free speech jurisprudence should remember that much of it rests on a distinctive set of controversial principles, in particular, the concept of the 'market-place of ideas' and a deep distrust of government intervention, no matter how beneficent it may appear.⁷⁰

The High Court itself has ventured an opinion that the defence is not to be followed in Australia. The constitutional defence as formulated in the leading judgment in *Theophanous* has clearly attempted to avoid the main problems associated with the *Sullivan* defence, while at the same time providing further protection of free speech than is currently afforded by the common law rules of defamation in Australia. It could also be said that the constitutional defence in Australia, linked as it is to the concept of representative government drawn from the text of the Constitution, has a clearer political purpose than the *Sullivan* defence.

The *Sullivan* defence was of course derived from the First Amendment protecting free speech and a free press. However, the justifications of free speech are varied and cover a range of political and social philosophies that deal with complex notions of truth, democracy and human dignity. It has frequently been commented that the decision in *Sullivan* was primarily concerned with the justification of the marketplace of ideas as a means of discovering the truth. However sound this justification may be in theory, practical problems of the scope of the defence, human nature and the realities of media ownership concentration have stood in the way of its practical value as a justification of free (political) speech. These problems have thus clouded the original purpose of the *Sullivan* decision, and confused the relationship between the First Amendment and defamation law in the United States.

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