Strict Liability in the Law of Defamation

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The Standing Committee of Attorneys-General is currently considering substantial reform to Australia's existing defamation laws. In earlier articles, I have suggested reform is required in relation to the multiple publication rule, and in relation to the liability of tech companies in relation to defamation. In this article, a more radical change is suggested. Defamation is traditionally a tort of strict liability, not requiring proof of fault on the defendant's part. Strict liability has a rich history in the law of tort, but has progressively become more isolated, as fault-based negligence has become more dominant. While strict liability made sense historically, in terms of the goals of the law of tort, its rationales have weakened over time as the tort landscape has changed. Defamation law has sought to accommodate, to some extent, fault-based questions through the use of convoluted defences. It is argued here that it would be simpler to define the tort in terms of fault in a reformed law of defamation, rather than introduce it through the back door of defences to a tort of ostensible strictness. American law provides a partial, but not complete, guide in this process.

Introduction

Traditionally, defamation is seen as a tort of strict liability, in the sense that it is sufficient if it is shown that the material is defamatory and that the defendant has published it. There is an historical explanation for this, as discussed below. Defences exist, but these merely ameliorate the strictness of the liability; they do not remove it. Liability is strict in that it exists in the absence of fault. The Standing Committee of Attorneys-General in Australia has recently announced a review into the existing uniform defamation law in Australia, with a view to reform. The author has already written articles suggesting reform to the multiple publication rule and clarification regarding the possible liability of tech companies for defamatory material available – for example, through their search engines. In the spirit of possible law reform, this article considers a (slightly) more radical reform – that is, whether the strictness of liability for defamation should give way to a fault basis of liability, in line with the general shift in the law of tort over the centuries away from strict liability and towards fault-based liability.

Strict Liability in the Law of Defamation

The historical context in which the law of defamation was forged is essential to an understanding of its traditional features. As with other torts, one of the underpinnings of the development of the law of defamation was a concern to dissuade those who believed they had been wronged from resorting to the blood feud.[1] In order for the law of tort, including the law of defamation, to fulfil its role in this regard, it needed to be relatively easy to obtain a remedy. This was in evidence with rules not requiring plaintiffs to prove actual loss, in contrast with most other claims, and the fact that truth was originally no defence to an action for defamation.

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[1] This is noted in the *De Libellis Famosis Case* (1606) 5 Co Rep 125; 77 ER 250 (Coke LJ): "[I]n a state of government, the party ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling or otherwise." See also *Merest v Harvey* (1814) 5 Taunt 442, 444; 128 ER 761 ("it goes to prevent the practice of dualing, if juries are permitted to punish insult"); Oliver Wendel Holmes Jr, *The Common Law* (Little, Brown, and Company, 1881) 2; Roscoe Pounds, "The End of Law as Developed in Legal Rules and Doctrines" (1914) 27 *Harvard Law Review* 195, 199.

It is true that, to the extent that defamation proceedings were at one time held in ecclesiastical courts,[2] questions were asked regarding whether the defendant had acted maliciously in order to determine liability, reflecting logical concern for the moral undertones of the defendant's behaviour. A finding that the defendant did not intend to defame the plaintiff would result in nonsuit. The 1605 decision of *Brook v Sir Henry Montague, Recorder of London* refers to an earlier case demonstrating that where there was no malice or intent to defame proven, an action was dismissed.[3] However, as the Star Chamber and royal courts gradually took over these proceedings, this requirement of malicious intent fell away, it being implied by the fact of publication.[4]

Case law from the 18th century recognised that the tort of defamation was a strict one, in the sense that it did not require fault in order to be committed.[5] Lord Mansfield's insistence upon strict liability in defamation must be seen in its historical context. English law had by then long provided for (criminal) prosecution of individuals on the basis of "seditious libel",[6] with truth as no defence, "scandalizing the court" for criticising judges,[7] and *Scandalum Magnatum*[8] for individuals daring to criticise the government or political leaders. Lord Mansfield was and remains a commercial law luminary, but his failure to uphold freedom of speech principles in trials upon which he presided has been trenchantly criticised.[9] Further evidence of the strictness with which defamation was viewed is also seen in the decision in *Day v Bream*,[10] where the Court found that a person who delivered a handbill that contained defamatory material could be held liable for it, unless they could rely on a defence. The way in which the common law crafted the definition of "publication"[11] did not embrace any notion of the defendant's culpability in publishing it – for instance, their knowledge that the material was defamatory or was likely to be defamatory, or that a reasonable person in the circumstances would know it was defamatory, or that they failed to make the investigations that a reasonable person in the circumstances would have made prior to publishing the material.

A classic example of the tort's traditional strictness occurred in *E Hulton & Co v Jones*[12] (*Jones*) where the defendant made up a witty poem about a supposedly fictional person, Artemis Jones. A real Artemis Jones in fact existed, and they sued the defendant successfully in defamation. The Court of Appeal concluded:

> It makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If

[2] The Canadian Supreme Court noted that, following the Norman Conquest of 1066, ecclesiastical courts asserted jurisdiction over defamation, which was regarded as sinful: *Hill v Church of Scientology* [1995] 2 SCR 1130, 1176 (Cory J, for La Forest, Gonthier, McLachlin, Iacobucci and Major JJ).

[3] *Brook v Sir Henry Montague, Recorder of London* (1605) Cro Jac 90, 91; 79 ER 77, 78, referring to the decision in *Greenwood v Prick* Cro Jac 91.

[4] Jeremiah Smith, "Jones v Hulton: Three Conflicting Judicial Views as to a Question of Defamation" (1912) 60 *University of Pennsylvania Law Review* 365, 371; Van Vechten Veeder, "History and Theory of the Law of Defamation" (1904) 4 *Columbia Law Review* 33, 36.

[5] *R v Woodfall* (1774) Lofft 776, 781; 98 ER 914, 916 (Lord Mansfield): "[W]hatever a man publishes he publishes at his peril: for there is no entering into the secret thoughts of a man's heart."

[6] *De Libellis Famosis Case* (1606) 5 Co Rep 125a; 77 ER 250.

[7] *De Northampton* (1344); *R v Almon* (1765) Wilm 243; 97 ER 94.

[8] *Statute of Westminster of* 1275, 3 Edw 1, c 34.

[9] Bernard Sheintag, "From Seditious Libel to Freedom of the Press" (1942) 11 *Brooklyn Law Review* 125, 133, criticising Lord Mansfield's judgment in the case of *R v Wilkes* 4 Burr 2527, 2539; 98 ER 327, 334 (K.B, 1770).

[10] *Day v Bream* (1837) 2 Mood & R 54; 174 ER 212.

[11] See, eg, *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, 527 (Lord Esher): "[M]aking known the defamatory matter after it has been written to some person other than the person to whom it was written."

[12] *E Hulton & Co v Jones* [1909] 2 KB 444 (Court of Appeal), affirmed by the House of Lords in *E Hulton & Co v Jones* [1910] AC 20, 23–24 (Loreburn LC, with the other Law Lords concurring): "[A] person charged with libel cannot defend himself by showing that he intended in his own heart not to defame or that he intended not to defame the plaintiff, if in fact he did both … a man in good faith my publish a libel, believing it to be true, and it may be found by the jury that he acted in good faith, believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention."

> upon the evidence the jury is of the opinion that ordinary sensible readers, knowing the plaintiff, would be of the opinion that the article referred to him, the plaintiff's case is made out.[13]

On one view, this case extended the strictness of the liability for defamation one step further. Past cases had established it was not necessary to demonstrate that the defendant intended to publish material that was defamatory. In *Jones*, the Court accepted it was not necessary either to demonstrate the defendant intended to defame the particular plaintiff who was in fact defamed.[14]

Over time, the law began to ameliorate the strictness of defamation liability. Special rules of privilege were recognised in relation to Parliament, in the aftermath of the standoff between Parliament and the monarch leading up to the English civil war. Then the common law and latterly statute began to ameliorate the strictness of defamation liability through the recognition of defences involving concepts such as truth and fair comment.[15] As indicated, these developments merely ameliorated, but did not expunge from the law, the notion of defamation as involving strict liability. The defences that were recognised did not map neatly onto, and were not proxies for, notions of fault that were elsewhere prevalent in tort law. In essence, they were narrower than that.

Thus, the strictness of defamation law makes sense in historical context, given it was developed at a time when governments were extremely sensitive to criticism, fearing that it would foment discontent against the government and lead, perhaps, to its overthrow. Historic events that fed this sensitivity no doubt would have included the English civil law, the Glorious Revolution, the Jacobite Rebellion and, latterly, the French Revolution. Government unease with criticism, however objectively well-founded, is understandable. This is the context in which strictness of liability in defamation law was forged. It makes sense in its historical context. It is a different question as to whether it makes sense in today's times, when the law generally recognises freedoms such as freedom of expression as being much more important than was recognised at the time the tort of defamation was crafted,[16] and with the exponential growth of fault-based negligence to become the pre-eminent tort, as discussed below.

Strict Liability Generally in the Law of Tort

In broad terms, the law of civil obligations has been moving from a strict liability basis to a fault basis. As legal historians have noted, initially the law of civil obligations sought to supplant the "blood feud" between the victim and the alleged wrongdoer.[17] In such circumstances, it was not surprising that the law would err on the side of generosity in providing recovery to a person who had suffered injury caused by another, by not requiring them to prove that the injury was caused by the fault of the other. Prime examples of general strict liability in English law are found in 1466's *Case of Thorns*[18] and *Lambert and Olliot v Bessey* in 1681.[19] The forms of action tended to reinforce this system, being classified according to harm done, as opposed to the defendant's culpability.

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[13] *E Hulton & Co v Jones* [1909] 2 KB 444, 454 (Alverstone CJ).

[14] William Holdsworth, "A Chapter of Accidents in the Law of Libel" (1941) 57 *Law Quarterly Review* 74. Holdsworth concludes that the *Jones* decision was wrong in not requiring proof that the defendant intended to refer to the plaintiff (84).

[15] This approach continues to be in evidence in the *Defamation Act 2013* (UK) ss 2–4 containing defences pertaining to truth, honest opinion and publication on a matter of public interest.

[16] *Curtis Publishing Co v Butts*, 388 US 130, 151 (Harlan J, for Clark, Stewart and Fortas JJ) (1967): "[T]he history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values (of freedom of speech)." See also Van Vechten Veeder, "The History and Theory of the Law of Defamation" (1903) 3 *Columbia Law Review* 546; Veeder, n 4.

[17] Francis Bowes Sayre, "Mens Rea" (1932) 45 *Harvard Law Review* 974, 977; David Ibbetson, "How the Romans Did for Us: Ancient Roots of the Tort of Negligence" (2003) 26 *UNSW Law Journal* 475, 494.

[18] "Though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it": *Hull v Orynge* (1466) B & M 327; John Wigmore, "Responsibility for Tortious Acts: Its History" (1894) 7 *Harvard Law Review* 315, 319.

[19] It was said there that civil liability "did not so much regard the intent of the actor, as the loss and the damage of the party suffering … if a man shoot at butts and hurt a man unawares an action lies … if a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged, ought to be recompensed": *Lambert and Olliot v Bessey* (1861) Raym, Sir T. 421, 423; 83 ER 220, 221.

However, gradually aspects of fault crept into this system. Estimates of the precise time when this occurred differ. It is partly obscured by the fact that many of the cases were determined by juries, who obviously were not required to provide their reasons for decision. However, some speculate that fault was routinely being taken into account in a civil obligations system that was, on its face, still largely strict in nature.[20] In any event, (somewhat ambivalent) evidence that fault had crept into torts of supposedly strict liability appears in *Weaver v Ward* in 1616: "no man shall be excused of a trespass … except it may be judged utterly without his fault".[21] An owner of an animal was held liable in 1676 because it was his "fault" to bring the animal to a busy public place.[22] It is true that pockets of strict liability persisted in the common law, particularly in relation to innkeepers' liability, the liability of common carriers (for damage to cargo only) and liability for animals. Most memorably, strict liability was said to apply in relation to the escape of dangerous substances from a defendant's land onto neighbouring property.[23] It was applied to activities that were deemed to be sufficiently "hazardous" or "extra-hazardous".[24] It was even claimed by a member of the House of Lords as late as the 1860s to be the "general" principle regarding tort liability for accidents.[25] Despite these sentiments, most scholars place the early-19th century as the birthplace of negligence.[26] In fact by the late-19th century negligence had become the predominant tort dealing with accidental personal injury,[27] and its wholesale application became axiomatic in the aftermath of the landmark decision in *Donoghue v Stevenson*.[28]

Strict liability persists today in the form of vicarious liability (though the employee must have committed a recognised tort, which will usually involve fault) and nondelegable duties (though this concept has apparently become marginalised in Australian tort law).[29] Australian tort law subsumed the formerly strict liability for escape of substances from one premises onto neighbouring premises into the law of negligence,[30] and did the same for (highway) public nuisance.[31]

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[20] Robert Kaczorowski, "The Common-Law Background of Nineteenth-Century Tort Law" (1990) 51 *Ohio State Law Journal* 1127, 1169 ("the pleading requirements of trespass vi et armis may not accurately reflect the proofs that were required to win a jury verdict. Almost a century ago Wigmore and more recently Baker and Milsom argued that as early as the sixteenth century, fault or negligence was a factual circumstance plaintiffs had to prove before juries would find defendants guilty"); John Wigmore, *Selected Essays in the Law of Torts* (Harvard Law Review Association, 1924) 66 ("the evidence seems certain that the rationalization towards the line of present standards began at a much earlier time than has been supposed … there has never been a time in English law, since (say) the early 1500s, when the defendant in an action for trespass was not allowed to appeal to some standard of blame or fault in addition to an beyond the mere question of his act having been voluntary").

[21] *Weaver v Ward* (1616) Hob 134; 80 ER 284.

[22] *Mitchil v Alestree* (1676) 1 Vent 295; 86 ER 190.

[23] *Fletcher v Rylands* (1865–66) LR 1 Ex 265; *Rylands v Fletcher* (1868) LR 3 HL 330.

[24] *Dalton v Angus* (1881) 6 App Cas 740; *Black v Christchurch Finance Co Ltd* [1894] AC 48; *Restatement (Third) of Torts* (2009) s 20.

[25] *Fletcher v Rylands* (1865–66) LR 1 Ex 265; *Rylands v Fletcher* (1868) LR 3 HL 330, 341 (Lord Cranworth): "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and attention, but whether his acts have occasioned the damage."

[26] David Ibbetson cites *Williams v Holland* (1833) 2 LJCP (NS) 190; 131 ER 848 as the birthplace: Ibbetson, n 17, 478. In *Vaughan v Menlove* (1837) 3 Bing (NC) 468; 132 ER 490, Tindal CJ, Park and Vaughan JJ refer to the duty of care that property owners owe others; see John Wigmore, "Responsibility for Tortious Acts: Its History – III" (1894) 7 *Harvard Law Review* 441, 453; Percy Winfield, "The History of Negligence in the Law of Torts" (1972) 83 *Harvard Law Review* 537.

[27] *Holmes v Mather* (1874–75) LR 10 Ex 261; *Stanley v Powell* [1891] 1 QB 86; Holmes, n 1, 66 ("supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense"); *Heaven v Pender* (1883) 11 QBD 503 (Brett MR).

[28] *Donoghue v Stevenson* [1932] AC 562; David Ipp, "Themes in the Law of Torts" (2007) 81 ALJ 609.

[29] *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 34–35 (Gleeson CJ), 54, 64 (Kirby J), 75 (Hayne J), 86 (Callinan J) (Crennan J agreeing with Gleeson CJ and Hayne J); [2007] HCA 6.

[30] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; Brennan and McHugh JJ dissenting).

[31] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (Gaudron, McHugh, Gummow and Kirby JJ; Gleeson CJ, Hayne and Callinan JJ dissenting); [2001] HCA 29.

Smolla reflects on the evolution of American law in this regard, considered highly analogous to the Australian position:

> With the industrial revolution and the birth of the law of torts as an independent doctrinal system, the lines of demarcation became quite clear. The dominant liability rule in America was negligence … the tort system did have limited areas in which strict liability displaced the negligence principle. Strict liability was principally reserved for activity that could be classified as ultrahazardous or abnormally dangerous … in an analytical structure dominated by negligence, the strict liability standard for defamation stuck out like a sore thumb, existing purely because of the inertia of history. It was an island of strict liability in a sea of negligence, out of harmony with the rest of the landscape. None of the traditional justifications for strict liability applied to defamation law … for the most part, no genuine analytic defense of strict liability for defamation was made; the practice among scholars and courts was to follow history, at times noting that history largely made no sense … people could be killed, maimed or ruined for life, yet unless the activity was ultrahazardous, the liability rule was still at least negligence. Singling out reputational injury for a special liability rule thus was illogical, for strict liability was not the dominant rule for most of the injuries compensable through the tort system, no matter how catastrophic.[32]

More generally on the law of defamation, it has been criticised for its idiosyncratic and esoteric principles, and referred to dismissively by Ipp as the "Galapagos Islands Division" of the law of torts.[33] With apologies to the gracious animals inhabiting that island, that was probably not a compliment. More seriously, it sensibly suggests merit in some broader consistency across tort principles where possible, in a nod to the value of coherence and compatibility across principles within a particular area of law, and perhaps as much as possible coherence within the law generally, if that is not too much to ask.

Thus, applying a long lens to the development of the common law of tort, there has been a general shift away from notions of strict liability and towards a system of fault-based liability.[34] This is most dramatically illustrated for the purposes of Australian law in *Burnie Port Authority v General Jones Pty Ltd*,[35] where the High Court subsumed a doctrine of strict liability into the law of negligence. This was somewhat masked by that Court's embrace of the (strict liability) nondelegable duty (which would later itself be marginalised), but the trend had been occurring in the United Kingdom over centuries. It has proven to be difficult for those who adhere to strict liability doctrines to articulate the rationale for such liability.[36] It is very difficult to articulate a rationale that explains and justifies why strict liability should be applied in some cases, and not others. It was this kind of problem, among others, that turned members of the High Court against the kind of strict liability envisaged in *Rylands v Fletcher* and the nondelegable duty.[37] Various rationales have been applied to try to justify strict liability, including notions of trust, reliance and vulnerability in relation to innkeeper liability[38] and common carrier liability,[39] and notions of "extra-hazardous" activity in relation to Rylands liability[40] and nondelegable duties.[41] However, these attempted justifications have proven to be unconvincing. Obviously, principles

[32] Rodney Smolla, "Dun and Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation" (1987) 75 *Georgetown Law Journal* 1519, 1549–1551.

[33] Ipp, n 28, 615.

[34] *New South Wales v Lepore* (2003) 212 CLR 511, 601–602; [2003] HCA 4, where Gummow and Hayne JJ noted the trend in High Court decisions "rejecting the expansion of strict liabilities".

[35] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[36] Glanville Williams, "Liability for Independent Contractors" (1956) 14 *Cambridge Law Journal* 180, 180–181.

[37] *New South Wales v Lepore* (2003) 212 CLR 511, 599 (Gummow and Hayne JJ); [2003] HCA 4: "[T]he early English cases, which first identified non-delegable duties to ensure that reasonable care was taken, offered no reason for departing from the generally accepted rule that a person was not liable for an accident which occurred without the fault of that person."

[38] *Calye's Case* (1583) 8 Co Rep 32a; 77 ER 520; Percy Winfield, "Duties in Tortious Negligence" (1934) 34 *Columbia Law Review* 41, 44–45.

[39] *Coggs v Bernard* (1703) 2 Ld Raym 909, 918; 92 ER 107, 112 (Holt CJ) referred to the "necessity" of customers trusting carriers; similarly, *Forward v Pittard* (1785) 1 Term Rep 27, 33; 99 ER 953, 956.

[40] *Rylands v Fletcher* (1865–66) LR 1 Ex 265, 279 (Blackburn J, for the Court of Appeal); (1868) LR 3 AC 330.

[41] *Black v Christchurch Finance Co* [1894] AC 48, 54 (Lord Shand, for the Court).

of reliance and vulnerability are applied in the context of negligence doctrine in Australia.[42] Australian case law has (rightly) criticised notions of "extra-hazardous activity" as being inherently uncertain and ambiguous.[43] Nor has it been explained how existing negligence principles cannot already calibrate for the fact that a dangerous activity is occurring in determining the relevant standard of care against which a given defendant would be judged. It is orthodox that one relevant factor in determining the appropriate standard of care is the seriousness of the likely injury that will result from a breach of duty.[44] These difficulties perhaps explain the High Court's turn away from notions of "extra-hazardous activity".

In summary, there is little left by way of justification for the imposition of strict liability upon defendants. It is now largely a discredited concept in the law of tort in Australia. Yet, somewhat curiously, it persists in the Australian tort of defamation.[45] This is itself noteworthy.[46] Obviously, it is easier for a plaintiff to succeed under a strict liability regime, compared with one in which they must prove fault. Should it effectively be easier to claim for a non-tangible injury than it is for a tangible injury?[47] Elsewhere, the law of tort is apprehensive about non-tangible injury.[48] Witness the struggles the law of tort has had with recovery for "nervous shock" and the extent to which it has limited recovery in such cases.[49] Witness its refusal to embrace (at least, at appellate level, to date) a tort of privacy.[50] Australian law lacks the tort of intentional infliction of emotional injury that exists elsewhere.[51] The point is not to debate any of the these policy positions here. The point for present purposes is the fact that at the same time the

[42] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597 (Gummow and Hayne JJ), 570 (with whom Gaudron J agreed), 577 (McHugh J), 664 (Callinan J); [2002] HCA 54.

[43] *Stoneman v Lyons* (1975) 133 CLR 550, 564 (Stephen J), 574–574 (Mason J); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 39–40 (Mason J), 42 (Wilson and Dawson JJ). Similarly, the House of Lords was not convinced it could be the basis of a sharp division in liability principles in *Read v J Lyons & Co Ltd* [1947] AC 156.

[44] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J), 50 (with whom Aickin J agreed).

[45] For an economic argument that strict liability is not appropriate to the law of defamation, see Keith Hylton, "Missing Markets Theory of Tort Law" (1996) 90 *Northwestern University Law Review* 977. Hylton argues that free speech is a public good (in the sense that one person's use does not reduce its value to others) where the speaker generates positive externalities that they are generally not able to capture (in other words, we all benefit from free speech, not just the speaker). This situation might mean there is insufficient motivation for a person to speak. This system will produce less speech than is economically and socially desirable. As a result, a public subsidy to free speech, in the form of non-applicability of strict liability, is appropriate (987–988). Michael Passaportis, "A Law and Norms Critique of the Constitutional Law of Defamation" (2004) 90 *Virginia Law Review* 1985, 2024: "[W]hen the activity in question has significant positive externalities, the decrease in activity associated with the imposition of strict liability may generate a net social cost. For activities that generate external benefits for the community at large, it is no longer clear that full internalization of victim losses is desirable."

[46] Denis Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22 *Queen's Law Journal* 229, 268: "[W]hat is appropriate and just in the areas of abnormally dangerous activities and vicarious liability in commercial settings, for instance, may be inconsistent with principles of fundamental justice in a neighbouring sphere such as defamation."

[47] Boivin, n 46, 233 ("an individual's reputation, though vital to a free and democratic society, does not require greater protection from the law than an individual's mental or corporal integrity"); Smolla, n 32, 1557 ("the law of torts tends to treat claims for compensation for intangible injury with a healthy dose of suspicion and generally does not grant that compensation unless relatively high thresholds of fault are established. Strict liability for defamation runs directly contrary to this sensible pattern").

[48] For an early articulation, see *Lynch v Knight* (1861) 9 HL Cas 577; 11 ER 854, 898: "[M]ental pain and anxiety the law cannot value, and does not pretend to redress."

[49] *Tame v New South Wales* (2002) 211 CLR 317, 329 (Gleeson CJ) ("save in exceptional circumstances, a person is not liable, in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting psychiatric illness"), 339 (Gaudron J) ("something more than foreseeability of the likelihood of harm of the kind in issue is necessary before a defendant will be held to owe a duty of care to take reasonable steps to avoid a risk of psychiatric injury"), 349 (McHugh J); 380 (Gummow and Kirby JJ); 399 (Hayne J) ("the common law has long shown a marked reluctance to allow damages for psychiatric as distinct from physical injury"); 430 (Callinan J); [2002] HCA 35.

[50] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 225–226 (Gleeson CJ), 258 (Gummow and Hayne JJ), 278 (Kirby J), 328 (Callinan J); [2001] HCA 63.

[51] Australian law has recognised the *Wilkinson v Downton* [1897] 2 QB 57 tort of intentional infliction of emotional injury: *Bunyan v Jordan* (1937) 57 CLR 1. However, subsequent cases cast doubt on its continued existence as an independent cause of action: *Magill v Magill* (2006) 226 CLR 551, 589 (Gummow, Kirby and Crennan JJ); [2006] HCA 51; *Monis v The Queen* (2013) 249 CLR 92, 175 (Hayne J), compare 181 (Heydon J); [2013] HCA 4.

law demonstrates wariness towards non-tangible injury, it also adopts principles that effectively make it easier to claim for non-tangible injury (by not requiring proof of any fault for a defamation claim) than it would be to claim for tangible injury (proof of intent/wilfulness in the case of trespass, or proof of fault in the case of negligence). This is anomalous.

In sum, so far two important points have been made. The first is that strict liability has long been a feature of the law of defamation. This made sense in defamation law at a time when the law was not so concerned with free speech and exacted strong sanctions against libelous speech, even if true, to preserve the peace and to protect existing governments and political structures. In today's environment, where international legal instruments make clear how fundamental freedom of speech is,[52] and where democratic government and political structures are now deeply embedded in our culture and society, it makes less sense to impose strict liability for defamation.

The second is that, when one takes a broader lens look at tort law generally, one will note that there has been a sweeping shift away from strict liability as an organising principle of civil liability law and towards fault-based negligence. Tort principles that were formerly strict liability based have been collapsed into negligence. Supporters of strict liability, who at one time sought to assert its general pre-eminence in the law of tort, have demonstrably failed to do so. Their Plan B is to defend and advocate for the remaining little pockets of strict liability in the law of tort. However, this is an ambitious task. There is little by way of coherent legal principle to join them. It cannot be sensibly argued that defamation, for instance, is somehow equivalent to extra-hazardous activity. Further incoherence is apparent when the law is generally highly wary about compensation for non-physical injury, imposing real restrictions on plaintiffs seeking this remedy, yet in the area of defamation these concerns have not gained strong traction.

Given these difficulties, it is instructive to consider the experience of other comparable common law jurisdictions. The American jurisprudence is considered in some depth. This jurisdiction was chosen because, having inherited the English position of strict liability for defamation, it subsequently adopted a fault-based standard, though on an even higher plane than regular negligence law. It is not suggested that Australian law should necessarily go along the path taken by the American legal system. Indeed, it is in fact concluded that some of the American reforms should not be adopted here. Having said that, the American experience is considered instructive, if there is will to amend the Australian law in this area along more of a fault-based line, consistent with general trends in Australian tort law.

Introduction of Fault into American Defamation Law

Again, it must first be noted when discussing the "common law of the United States" that there is no one uniform common law of that jurisdiction. Individual States have created their own common law, so care must be taken in discussing American common law as if there were uniformity – often, there is not. There is no unified common law in the United States,[53] in sharp contrast with Australia.[54] The American restatements can provide some evidence of a typical position on a particular aspect of the common law, but there is nothing mandatory about their content, and States are free to take the position taken in restatements, or adopt another position.

Having said that, States of the United States inherited many principles of the common law of the United Kingdom. They embraced strict liability, perhaps even more so than the mother jurisdiction. The United States continues to embrace strict liability in relation to so-called extra-hazardous activity, and most of the attempted justification for strict liability in the law of torts has come from American scholars. Thus, it may fairly be observed that strict liability has its richest intellectual, if not historical, roots in American law.

[52] See, eg, *International Covenant on Civil and Political Rights* (1966) Art 19; *Universal Declaration of Human Rights* (1948) Art 19.

[53] *Erie Railroad Co v Tompkins*, 304 US 64, 78–79 (1938).

[54] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 563 (all members of the Court).

The United States originally followed principles of English defamation law, in applying a form of strict liability. A person could be held liable in the United States for defamation for the mere fact that they published defamatory material. Fault was not required.[55] Clearly, the United States differs from the United Kingdom in having a written constitution that expressly entrenches free speech. For many years, the *First Amendment* (*of the United States Constitution*) protection of the right to free speech was not interpreted to preclude States from enacting defamation laws, or in any way limiting their content. Defamation was considered one of the categories of speech that the Supreme Court identified as having such "slight social worth" as to be unworthy of constitutional protection.[56]

Yet, even in the nation that has embraced strict liability more than others, the law would turn its face against strict liability in the context of the tort of defamation. This fundamental change occurred in *New York Times Co v Sullivan*.[57] There the newspaper carried an advertisement written by others, which made serious allegations about police behaviour towards those engaged in civil protest. The events took place at the height of the civil rights movement in the United States in the early 1960s. The advertisement did not specifically name the defendant, but the defendant argued readers would associate it with him, as he was one of the three elected police commissioners in Montgomery, Alabama, where some of the protests occurred. The defendant was elected to his position by the general public. Sullivan brought action against the publisher, arguing that it had defamed him. The newspaper raised a constitutional free speech defence.

The Court reformulated defamation law in the United States. The judgment began with a strong assertion of the national commitment to freedom of speech principles, that speech about public issues should be uninhibited and robust. It may include caustic, vehement and unpleasantly sharp attacks on government and government officials. Sometimes, false statements were made. The Court noted that constitutional protection for speech did not depend upon the truth, popularity or social utility of the ideas therein expressed. A person should not be required to demonstrate the truth of what they said. The danger of such a requirement was the chilling effect it would have on speech, and not just false speech. It opined that free speech required "breathing space", so had to protect speech that included exaggeration and vilification. Even false speech could make a valuable contribution to public debate. This led them to the following landmark statement:

> The constitutional guarantees require, we think, 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 is false or with reckless disregard of whether it was false or not.[58]

The Court drew an equivalence between the protection that a public official had when expressing their views about private citizens. They enjoyed constitutional protection of such speech unless it was actuated by malice.[59] The Court applied an equivalent principle with respect to discussion about public officials, and limited its finding in the case to defamation action brought by public officials against criticism of their public conduct.[60] On the facts, the plaintiff could not show the defendants were actuated by malice – there was no suggestion they were aware of the falsity of the statements made, so the plaintiff's action failed. The case was also important in shifting the burden of proof – it would no longer effectively

[55] *Restatement (First) of Torts* (1938) ss 579–580.

[56] *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942), where Murphy J for the Court identified "libelous" speech as one of the categories of speech not entitled to free speech protection due to its lack of connection with free speech ideals such as exposition of ideas and search for truth; the Court in *Beauharnais v Illinois*, 343 US 250, 254–255 (1952) noted there had never been any suggestion at the time the *Constitution* was adopted and in the years afterward that the crime of libel was being or had been abolished (Frankfurter J, for the Court).

[57] *New York Times Co v Sullivan*, 376 US 254 (1964).

[58] *New York Times Co v Sullivan*, 376 US 254, 279–280 (1964) (Brennan J, for Warren CJ, Clark, Harlan, Stewart and White JJ; Goldberg, Black and Douglas JJ concurring).

[59] *New York Times Co v Sullivan*, 376 US 254, 282–283 (1964).

[60] *New York Times Co v Sullivan*, 376 US 254, 283 (1964).

presume malice from the fact of publication, as the common law traditionally did; it would be incumbent upon the plaintiff to prove fault on the part of the defendant.

Though they concurred in the judgment, Black, Douglas and Goldberg JJ would have gone further, supporting an absolute right of an individual to discuss public officials in their public duty.[61] They also suggested that discussion of "public affairs" would be protected by the *First Amendment*.[62] By way of contrast, defamatory comments about the private activities of public officials or discussion about a private citizen were not accorded *First Amendment* protection because they did not further the interests of self-government and democracy.[63]

Inevitably *New York Times Co* excited questions about the ambit of its principles. Was it confined to discussion about public officials? Was it confined to discussion about public affairs? Did it matter that the defendant in the case was a media corporation? Would the answer differ if the defendant were a regular citizen?

The answers to some of these questions were teased out in subsequent cases, though the answers would not always be consistent.

In *Curtis Publishing Co v Butts* (*Butts*),[64] the Supreme Court extended the *New York Times Co* approach to discussion of public figures, as well as public officials. The person being discussed in the case was a football coach, who was accused of fixing a football game. The Court found that the *New York Times Co* approach should apply to "public figures". These were "non-public persons who 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".[65]

Then in *Rosenbloom v Metromedia Inc*[66] the Supreme Court found that the *New York Times Co* approach should be applied to discussion about a private figure if the statements concerned matters of general or public interest. In so doing, the joint reasons rejected the distinction apparent in the minority judgments between so-called public figures and private figures.[67] This distinction was used by the dissentients in distinguishing the application of defamation law, and in particular the *New York Times Co* malice standard. As discussed below, the dissentients justified more protection being given to the reputation of private person defamation plaintiffs compared with public figure defamation plaintiffs on the basis that the latter were better able to access media outlets to defend themselves, and the fact that they had chosen to become public figures. The joint reasons in *Rosenbloom* rejected these arguments on the basis they were "unproved and highly improbable generalizations".[68]

Harlan J, a member of the joint reasons in *New York Times Co*, dissented on the basis that the rationale for the malice test in that case was based on two factors: that public figures were more likely to be able to access public channels to rebut falsehoods uttered against them; and that by volunteering to be a public figure they knowingly placed themselves in the public spotlight and accepted the associated scrutiny of their activities and lives. Harlan J found these rationales were not applicable to private figures. On this basis, he dissented from the extension of *New York Times Co* to private individuals discussing matters of

[61] *New York Times Co v Sullivan*, 376 US 254, 295 (1964) (Black J, with whom Douglas J concurred).

[62] *New York Times Co v Sullivan*, 376 US 254, 295 (1964) (Black J, with whom Douglas J concurred).

[63] *New York Times Co v Sullivan*, 376 US 254, 301 (1964) (Goldberg J, with whom Douglas J concurred).

[64] *Curtis Publishing Co v Butts*, 388 US 130 (1967).

[65] *Curtis Publishing Co v Butts*, 388 US 130, 164 (1967) (Warren CJ, concurring in the result).

[66] *Rosenbloom v Metromedia Inc*, 403 US 29 (1971).

[67] The joint reasons rejected the argument that the distinction between public and private figures was justified because of the likely ability of the former to access channels of communication to rebut statements made about them as "unproved and highly improbable": *Rosenbloom v Metromedia Inc*, 403 US 29, 46 (1971) (Brennan J, for Burger CJ and Blackmun J; Black and White JJ concurring). They also rejected the argument that a public figure should be subject to different rules because they had voluntarily placed themselves in the public eye as being inconsistent with *First Amendment* values: *Rosenbloom v Metromedia Inc*, 403 US 29, 47 (1971) (Brennan J, for Burger CJ and Blackmun J; Black and White JJ concurring).

[68] *Rosenbloom v Metromedia Inc*, 403 US 29, 363 (1971).

public interest. He concluded that the States were free in such cases to determine the relevant standard of care required, provided they did not impose liability without fault.[69]

Marshall J, joined by Stewart J, also dissented on the basis that the *New York Times Co* approach inadequately protected the reputation interests of private figures. Marshall J, joined by Stewart J, suggested that States should be free to develop their own common law of defamation in relation to private figures, but drew the line at the imposition of strict liability. States could not impose liability for defamation in the absence of fault. This was because "the effect of imposing liability without fault is to place the printed or spoken word with the use of explosives or the keeping of dangerous animals".[70] This was a somewhat radical position at the time since American States had done precisely that, following the United Kingdom precedent, right up until 1964 in the *New York Times Co* decision.

The Court squarely considered these matters in *Gertz v Robert Welsh, Inc*.[71] The plaintiff was an attorney representing a family who were seeking compensation after their child was killed by a police officer. A magazine owned by the respondent featured a story suggesting that the plaintiff was part of a plan to introduce communism in the United States. It claimed the plaintiff was a socialist and/or communist and that he had a criminal record. None of this was true. The magazine editors had not attempted to determine whether their allegations were accurate. Mr Gertz commenced legal action for defamation against the newspaper. The newspaper proprietor sought to defend the action by claiming that Mr Gertz was a public figure, so the stricter *New York Times Co* standard should be applied, which Mr Gertz could not meet.

The Court took the opportunity to re-orient the law in this field to some extent. Powell J delivered the main judgment, with which Stewart, Marshall, Blackmun and Rehnquist JJ agreed. The joint reasons stated that false statements contained no constitutional value. However, it was necessary that the *First Amendment* protect them, because of the "breathing space" that the *First Amendment* required in order to function. The imposition of strict liability upon a publisher or broadcaster for publishing false material would place an undue "chill" on their freedom of speech.[72] The joint reasons affirmed the decisions in *New York Times Co* and *Butts*, but said the principles of the former should be limited to cases involving public officials and public figures.[73] Thus, it disagreed with, and overruled, the extension of the principles in *Rosenbloom* to discussion of private figures, so long as the matters involved were issues of public concern. The joint reasons affirmed the view of Marshall J (dissenting) in *Rosenbloom* that the fact that a public figure generally had much greater access to channels of effective communication, and the fact they had voluntarily agreed to accept the public spotlight, suggested they should have less of a right to seek redress for defamation than would a private figure.[74] The joint reasons suggested it was an invidious task for judges to determine, as *Rosenbloom* required, whether particular topics of conversation were of "public concern" or not.

The joint reasons concluded that, provided States did not impose liability without fault, they could define for themselves the appropriate law to be applied in respect of defamation relating to a private individual.[75] However, the reasons added that States could not provide for recovery of punitive or presumed damages where they departed from the *New York Times Co* standard. Compensation in such cases would be limited to "actual injury". The Court expressed concern that if the availability of punitive damages were not capped or limited, it could have the kind of chilling effect on free speech that the

[69] *Rosenbloom v Metromedia Inc*, 403 US 29, 64 (1971).

[70] *Rosenbloom v Metromedia Inc*, 403 US 29, 86–87 (1971), quoting William Prosser, *Handbook of the Law of Torts* (West Publishing Co, 1964).

[71] *Gertz v Robert Welsh, Inc*, 418 US 323 (1974).

[72] *Gertz v Robert Welsh, Inc*, 418 US 323, 340 (1974).

[73] *Gertz v Robert Welsh, Inc*, 418 US 323, 342 (1974).

[74] *Gertz v Robert Welsh, Inc*, 418 US 323, 344–345 (1974).

[75] *Gertz v Robert Welsh, Inc*, 418 US 323, 347 (1974).

courts wished to avoid.[76] A requirement that plaintiffs only recover for actual injury is a departure from the previous position. Typically, it was not incumbent upon plaintiffs in defamation cases to prove actual injury, partly because of the difficulty in doing so.

The dissents were of two different kinds. In one corner were Douglas and Brennan JJ, who essentially sought to uphold the law as it was expressed in *Rosenbloom*. They categorised this case as involving a private citizen in relation to a matter of public concern. Given this, in their view the *New York Times Co* standard was appropriate and, because the requirement of malice could not be proven, in their view the plaintiff was not entitled to compensation. Brennan J repeated his disagreement with the notion that private plaintiffs deserved greater reputational protection than public figure plaintiffs on the basis they had less access to means of correction and/or that they had chosen a public profile.[77] Brennan J disagreed with the opinion of the majority that permitted States to adopt a negligence rather than actual malice standard as an acceptable basis for a defamation claim in relation to private figures. He said this did not sufficiently protect freedom of speech. Defendants would be required to guess at how much they would need to do by way of background checking prior to publication in order to meet a requirement that "reasonable care" had been taken.[78]

The other dissent was primarily written by White J, with whom Rehnquist J substantially agreed. White J saw the *New York Times Co* precedent as basically "intended to forbid actions for seditious libel".[79] Because he viewed it this way, he did not believe that the precedent should be extended to cover private citizens suing for defamation. Thus, he agreed with part of the majority's position in *Gertz* in overruling *Rosenbloom*. However, he did not agree with the view of the majority that, where States have not applied the *New York Times Co* standard to defamation actions by private plaintiffs, their possible claim was limited to "actual injury".[80] He viewed this as contrary to well-established defamation principles where this had typically not been required. He also disagreed with the limits the majority placed on recovery of punitive damages.

The Court has also clarified that in order to meet the standard of actual malice – also phrased as reckless disregard as to whether particular material published is true or false or knowledge it was false – it is not sufficient for the plaintiff to show that the defendant was negligent in publishing. Further, "malice" here does not have its regular meaning as involving evil intent, but rather means knowledge of the falsity of the material or reckless disregard as to truth or otherwise.[81] It has also confirmed that no special rules should be applied merely because the defendant is involved in the media, as opposed to an organisation or individual not involved in the media.[82]

It should be observed that the growth of the internet and the kind of mass communication it facilitates has undercut the Supreme Court's reliance on arguments that different rules should apply to public figures because of the typical ease with which they could be assumed to have access to channels of communication to rebut defamatory material. While the point may have originally had some validity, these days anyone has access to mass communication channels through technology such as Twitter and Facebook. Arguably, these developments undermine arguments for special treatment of "public figures" in relation to defamation law, unless there are other arguments that can support such special treatment.[83]

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[76] *Gertz v Robert Welsh, Inc*, 418 US 323, 349–350 (1974); subsequently, the Court clarified that this principle only applied to public figures. States were free to legislate so as to permit the award of punitive damages to private plaintiffs in defamation cases in the absence of proven malice: *Dun and Bradstreet v Greenmoss Builders*, 472 US 749 (1985).

[77] *Gertz v Robert Welsh, Inc*, 418 US 323, 363–364 (1974).

[78] *Gertz v Robert Welsh, Inc*, 418 US 323, 366 (1974).

[79] *Gertz v Robert Welsh, Inc*, 418 US 323, 386 (1974).

[80] *Gertz v Robert Welsh, Inc*, 418 US 323, 392–393 (1974).

[81] *Masson v New Yorker Magazine Inc*, 501 US 496, 510–511 (1991) (Kennedy J, for all members of the Court); see for discussion Boivin, n 46, 246–248.

[82] *Dun and Bradstreet Inc v Greenmoss Builders Inc*, 472 US 749 (1985).

[83] Aaron Perzanowski, "Relative Access to Corrective Speech: A New Test for Requiring Actual Malice" (2006) 94 *California Law Review* 833, 836. Perzanoswki suggests the focus should not be on whether the plaintiff has access to fora within which they can

In summary, American law has shifted from a strict liability approach to the law of defamation, to one where fault is the overarching legal principle. While the Supreme Court will tolerate different approaches in different States, particularly in how the law regulates defamation of private figures, its baseline principle is that in no circumstances must the law of any State impose liability for defamation in the absence of fault. It has also required the plaintiff to shoulder the burden of proof in relation to the fault of the defendant, rather than the traditional common law approach of effectively presuming wrongdoing – an isolated approach to the law of wrongs generally.

Strict Liability for Defamation in Australia

Australia inherited the approach of the United Kingdom in recognising that, generally, liability for defamation was strict in nature.[84] It was actionable without proof that the defendant was at fault in some way for publishing the defamatory material. The strictness of the liability has traditionally been ameliorated by the availability of defences such as truth, fair comment or innocent dissemination. Statutory defences now appear in the Australian national uniform defamation legislation, to complement rather than override the common law defences. Both the common law and statutory defences of course require defendants to establish the elements of such a defence; the onus is upon them, in contrast with the position to which the American law moved. Some might view this as not being particularly important in civil cases, given that the standard of proof is (only) on the balance of probabilities. However, as leading defamation lawyer David Rolph pointed out in a criticism of the existing laws, it has not always proven to be easy for defendants to meet this burden of proof in defamation cases.[85]

In terms of preliminaries, it is noteworthy that to some extent the existing statutory defences pick up on aspects of negligence, in considering whether the defendant has acted reasonably. This is evident in ss 30 and 32, as demonstrated below. Again, there is a muddying of the waters, with a tort that is strict in its nature, but then ameliorated by defences that are based on evidence of a lack of fault.

Further, there are uncertainties in the precise scope of the statutory defences, just as there were difficulties and limitations on the common law defences. For instance, it is not entirely clear whether a tech company can rely on the statutory defence of innocent dissemination in s 32 of the uniform defamation legislation.[86] However, s 32 contemplates consideration of whether a distributor has acted reasonably in the circumstances, in terms of whether they ought to have known the material was defamatory. Section 31 provides a defence of honest opinion, where the relevant material is opinion rather than fact, relates to a matter of public interest and is based on "proper material". Proper material is defined as material that is substantially true or published on an occasion of absolute or qualified privilege.[87] There is serious doubt over what will be considered to be a matter of public interest, and what "proper material" means.[88] There

rebut the allegedly defamatory material (because they undoubtedly will), but rather on the extent of disparity of access to such fora between the plaintiff and the defendant (861–862).

[84] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 600 (Gleeson CJ, McHugh, Gummow and Hayne JJ); [2002] HCA 56 ("the tort of defamation, at least as understood in Australia, focuses upon publications causing damage to reputation. It is a tort of strict liability in the sense that the defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care"); Patrick George, *Defamation Law in Australia* (LexisNexis Butterworths, 2nd ed, 2012) 411 ("it has since been generally accepted as a matter of principle that liability is imposed strictly without fault, whether or not the words are defamatory on their face. It has been no defence at common law that the defendant did not intend to injure the plaintiff's reputation and acted with reasonable care").

[85] David Rolph, "A Critique of the National, Uniform Defamation Laws" (2008) 16 *Torts Law Journal* 207, 233: "[G]iven the rigorous, if not restrictive, defence of qualified privilege, being more akin to a counsel of excellence or perfection, rather than one of reasonableness, it is difficult to be optimistic about media defendants' prospects of success under (s 30 of the uniform defamation laws)."

[86] Department of Justice, "Statutory Review: Defamation Act 2005" (NSW Government, 2018) 32.

[87] Department of Justice, n 86, s 31(5).

[88] Department of Justice, n 86, 27: "[S]takeholder submissions and academic commentary suggest there is a lack of clarity as to when an opinion relates to a matter of public interest and what constitutes proper material upon which an opinion must be based." The Victorian Court of Appeal has interpreted the requirement of "based on proper material" to mean that it must be specified in the publication itself (*The Herald and Weekly Times Pty Ltd v Buckley* [2009] VR 661, [84]; [2009] VSCA 75), though the "Statutory Review" noted others disagreed with this interpretation of the section (27).

is argument that the existing approach to "proper material" ill-suits the modern online environment.[89] The complexity of the defence and difficulties for defendants in seeking to rely on it have been criticised by experts.[90]

Section 30 contains a defence of qualified privilege where the defendant has published material to a recipient who has an interest or apparent interest in a subject, where the defendant's conduct in publishing the material was reasonable in the circumstances.[91] The defence is defeated if it is shown that publication was actuated by malice. It is not entirely clear how it is determined whether a recipient has an interest or apparent interest in a subject, beyond the fact that they have accessed material. Again, this section has been heavily criticised.[92] Judge Gibson notes that "the need to redraft or replace the statutory defence (referring to s 30) seems to be universally acknowledged"; the defence was apparently crafted in terms of "old media" reporting of issues, and again the challenges of the online environment have placed strain on the concept.[93] Rolph points to an example where the defence has been construed strictly.[94] Obviously, the section considers the reasonableness of the defendant's actions in publishing the relevant material, so it is not entirely remote from a newly crafted tort of defamation; however, under the suggested new approach, the reasonableness of the defendant's action would be inherent in the tort itself, rather than as a part of a technical defence.

Although these defences – as imperfect as they are – do exist, it is argued that they do not sufficiently protect the "innocent" defendant in a case of defamation, particularly one who did not act negligently. As has been pointed out, they do not *remove* the strictness of the liability. Leading defamation practitioner Patrick George concludes:

> The defence of qualified privilege at common law or in its statutory form is an ill-fitting defence to cases of accidental defamation. Where there was no intention to attack the plaintiff or defame the plaintiff, there seems growing acceptance that a defendant who has acted with reasonable care in using the name or the description of the plaintiff unwittingly should not be held liable for damages. It may be preferable for an expanded innocent dissemination defence or a defence of honest mistake to be provided to newspapers and the media where they have otherwise acted with reasonable care.[95]

In essence, the acknowledged existence of statutory defences to a defamation action does not preclude an argument that there is a need to re-orient defamation law towards a fault basis. The existing defences do not already in fact achieve this position. They cast the onus of proof on the defendant and are of uncertain scope. Having said that, re-orientation of defamation law to more of a fault basis would not work for a radical alteration of the law, since existing defences in defamation law to some extent take into account questions of reasonableness and negligence.

Developments elsewhere in the law, perhaps surprisingly constitutional law, also hold lessons for a reconsideration of defamation law, and it is to relevant constitutional law decisions in the area of freedom of speech that the article now turns.

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[89] Department of Justice, n 86, 28; Judith Gibson, "Adapting Defamation Law Reform to Online Publication" (2018) 22(2) *Media and Arts Law Review* 119, 140.

[90] Rolph, n 85, 236.

[91] In determining whether or not the defendant's conduct in publishing the material was reasonable, relevant factors include: (1) the extent to which the subject matter is of public interest; (2) the extent to which the matter published relates to the performance of the person's public functions or activities; (3) the seriousness of the defamatory imputation conveyed by the publication; (4) the extent to which the published material distinguishes between suspicions, allegations and proven facts; (5) whether it was in the public interest for the material to be published expeditiously; (6) the nature of the business environment in which the defendant operates; (7) the sources of information in the material published and their credibility; (8) whether the published material included the plaintiff's side of the story and if not whether reasonable efforts were made to obtain it; (9) any steps taken to verify the material; and (10) any other relevant matter (s 30(3)).

[92] Rolph, n 85, 233, suggests that the courts have applied the concept of "reasonable" here in an unreasonably narrow way as requiring "more akin to a counsel of excellence or perfection, rather than one of reasonableness".

[93] Gibson, n 89, 140.

[94] David Rolph, *Defamation Law* (Thomson Reuters, 2016) 249 (*John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227).

[95] George, n 84, 411–412.

In the 1990s, the High Court discerned in the *Australian Constitution* an implied freedom of political communication.[96] This was implicit in the system of representative government contemplated by the *Australian Constitution*. The implied freedom is narrower than the kind of freedom of speech that exists elsewhere. It is confined to political communication, as opposed to general speech, though it can be hard to define precisely what is "political" and what is not.[97] It is a negative freedom, in terms of a protection from interference, rather than a source of positive rights that would ground a right to damages for breach.

Of most importance for the purposes of current discussion is the High Court's consideration of how the implied freedom interacted with the law of defamation.[98] One of the foundation implied freedom cases involved legislation somewhat analogous to defamation, but not defamation law per se. It concerned a provision of industrial relations legislation making it an offence to use words calculated to bring a member of the Industrial Relations Commission into disrepute. All members of the Court found the legislation invalid. Three members of the Court found the legislation invalid because of its impact on the implied freedom of political communication. They were evidently satisfied that criticism of judges was relevantly "political", otherwise the freedom would not have been applicable. They found it breached the implied freedom because it was not limited to comments that were unreasonable.[99]

The first case in which the implied freedom was directly considered in the context of defamation law per se was *Theophanous v Herald and Weekly Times Ltd*.[100] The case involved the alleged defamation of Mr Theophanous, then an Australian political figure. Bruce Ruxton had written a letter to the defendant newspaper, which it published, claiming that Mr Theophanous was biased towards Greeks as migrants, was in favour of things most Australians were against and was an "idiot". The case considered the extent to which, if at all, the existing law of defamation had to adapt given that the High Court had a couple of years earlier recognised that Australians had an implied constitutional freedom to political communication. On one view, what Mr Ruxton said, whatever else might be said about it, was a political communication, given Mr Theophanous was a politician.

The Court confirmed that the implied freedom shaped the common law in Australia.[101] The Court had to consider to what extent it did this. It considered whether it should adopt the *New York Times Co* position that political communication would be protected from a possible action for defamation provided the defamatory matter was not published with malice. The joint reasons[102] found that the *New York Times Co* position, together with its subsequent extensions to public figures, tilted the balance "too much" in favour of free speech at the expense of individual reputations.[103] The precise meaning of "malice" was also subject to great conjecture.[104] The joint reasons noted that the existing (common law) defences to a defamation action, which at that time included fair comments and qualified privilege, had their

[96] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[97] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ), quoted with apparent approval the view of leading free speech scholar Eric Barendt that it meant "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".

[98] Sally Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17(1) *Sydney Law Review* 43; Anthony Cassimatis, "Defamation – The Constitutional Public Officer Defence" (1996) 4 Tort L Rev 25.

[99] In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 78, Deane and Toohey JJ observed that the legislation purported to criminalise "well-founded and relevant" criticism of members of the Commission; Brennan J noted the criminal provision was not limited to "unfair or unreasonable" criticism of its members. All three found the provision invalid because it infringed the implied freedom of political communication.

[100] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

[101] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 136 (Mason CJ, Toohey and Gaudron JJ).

[102] The joint reasons comprised Mason CJ Toohey and Gaudron JJ. Deane J wrote a separate judgment favouring a broader protection of freedom of speech with respect to discussion of political figures than proposed by the joint reasons. He would not condition it upon notions of reasonableness. However, for the purposes of obtaining a majority, he expressed agreement with the result reached by the joint reasons (*Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 188).

[103] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 134 (Mason CJ, Toohey and Gaudron JJ).

[104] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 136 (Mason CJ, Toohey and Gaudron JJ).

limitations and were not always available when engaged in political communication.[105] Rejecting both the status quo of the common law defences and adoption of the *New York Times Co* malice test, the joint reasons settled on something like a negligence test:

> The defendant should be required to establish that the circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false. The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate … in other words, if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (not caring whether the matter was true or false), and that the publication was reasonable in the sense described.[106]

The dissenting justices did not find it necessary to modify the common law of defamation in light of the implied freedom of political communication.[107]

The High Court subsequently developed an accommodation of the different views expressed in *Theophanous*. This occurred in *Lange v Australian Broadcasting Corporation*,[108] involving alleged defamation of the former Prime Minister of New Zealand. In *Lange* a unanimous Court found that the common law of defamation did unacceptably impinge on the implied freedom of political communication in relation to the discussion of political figures, as the majority had found in *Theophanous*, and thus required adjustment. The common law had to comport with the *Constitution*. In the view of all members of the Court in *Lange*, the adjustment was as follows:

> A defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant had sought a response from the person defamed and published the response made (if any) … except … where the seeking or publication of a response was not practicable or it was unnecessary.[109]

In terms of future reform of the law of defamation, the suggestion is that either the legislature or the courts adopt something like this reasonableness standard in the definition of defamation, rather than as a part of a possible defence. At present, as the authorities stand, the High Court has adopted it in the limited context of discussion of political figures, including politicians and ex-politicians, and in the case of three judges in *Nationwide News Pty Ltd v Wills*,[110] in relation to discussion of judges. Though this has been a limited adoption, it demonstrates that the High Court believes that a reasonableness standard is workable in relation to defamation law. That fact is reiterated by the further fact that notions of negligence appear to some extent in existing statutory defences.

Given that the High Court has adopted a reasonableness standard relating to defamation of political figures, there is no reason why it should not adopt it in relation to defamation generally. It would greatly simplify the law of defamation to adopt this doctrine in the definition of defamation itself, rather than as part of a defence to an otherwise strict tort. Thus, for example, the law could be that it is actionable for a person to defame another, defined as to publish material that is defamatory of another person. In

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[105] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 133 (Mason CJ, Toohey and Gaudron JJ): "[T]he common law defences of fair comment and qualified privilege are not always available. Fair comment is available only for the expression of opinion and then only if the comment is based on facts that are notorious or truly stated. Qualified privilege depends on the absence of malice and on the person who makes the communication having an interest or duty in its making and on the recipient having a corresponding interest or duty in receiving it. The requirement for reciprocity of interest has the effect that common law qualified privilege is usually not available where the information has been disseminated to the public generally."

[106] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 137 (Mason CJ, Toohey and Gaudron JJ).

[107] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 153–154 (Brennan J), 192–193 (Dawson J), 194–195 (McHugh J).

[108] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

[109] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 574 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[110] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

addition, the plaintiff would need to show that publication was not reasonable in the circumstances.[111] Examples of how a plaintiff could show this include that: (1) the defendant failed to do due diligence or make reasonable inquiries regarding the material before publishing it; or (2) that the defendant knew, or a reasonable person would have realised, that the material was defamatory and not true. The law should also take into account, in assessing whether the material should be actionable as defamatory, whether the material published made a contribution to a matter of public debate, and other matters referred to in the existing statutory defence would be relevant in this consideration.[112] In the author's view, this would better balance defamation in terms of focusing on the culpability or otherwise of the defendant's behaviour in publishing the material in framing the tort, rather than almost as an afterthought in a defence. As indicated above, defamation expert Patrick George favoured a re-orientation of Australian law along negligence lines.

This reform would cast the onus on to the plaintiff to show the unreasonableness of publication, rather than casting upon the defendant to show that the publication was defensible using one of the existing complicated and wordy defences. For that reason, and because the equivalent statutory defence in s 30 of the uniform defamation laws is limited to publication on matters of interest or apparent interest in a subject, a reconfiguration to include a requirement of unreasonableness as an element of the definition of wrongdoing, rather than perpetuating it as a defence, would be an improvement to the law.

Such a change can be supported conceptually, as well as practically. There is a significant literature on the debate as to whether there is any principled distinction between things that should be included in the definition of the wrong and things included in any defence. For instance, Campbell said that matters that properly belong in a defence are "exonerating conditions".[113] Williams said that the one accusing another of wrongdoing should in principle have to negative matters of justification.[114] Saltzman said that the one accusing another of wrongdoing should have to prove any matter "which relates to the defendant's culpability".[115] While these observations were made in the context of the criminal law, and its distinction between definitional elements of an offence (which the prosecution must prove) and those relating to a defence (on which a defendant must lead some evidence, depending on whether they have an evidentiary or legal burden), they are considered appropriate to the related area of which matters a person accusing another of wrongdoing in relation to a civil law principle should have to prove, and which matters a defendant should have to prove. And it is suggested that if a person is accusing another of improperly publishing defamatory material, the question of the reasonableness of the publication relates to "justification" in the words of Williams, so should be proven by the accuser, and relate to matters of culpability as Saltzman alluded to, again suggesting that, in principle, it is something that the accuser should have to prove, rather than the defendant having to negative.

It is not suggested that the focus on what is "political" in the implied freedom cases in Australia, and the concept of "public figure" in the United States, be utilised in the reformed Australian defamation law. It is not entirely clear who will be categorised as a "political figure" as related to what is "political communication" in terms of the position arrived at in *Theophanous* and *Lange*. Clearly, politicians fit the category. What about the head of the trade union movement? The head of the business council? What about judges?[116] The American *First Amendment* jurisprudence is instructive here, where the Court

[111] The kinds of factors noted by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201; [2000] EMLR 1, and those nominated in s 30(3) of the uniform defamation legislation, would be relevant in determining whether or not the defendant's conduct was reasonable in the circumstances.

[112] For example *Defamation Act 2005* (NSW) s 30(3).

[113] Kenneth Campbell, "Offence and Defence" in Ian Dennis (ed), *Essays from the WG Hart Workshop* (Sweet & Maxwell, 1986) 73.

[114] Glanville Williams, "Offences and Defences" (1982) 2(3) *Legal Studies* 233, 236.

[115] Alan Saltzman, "Strict Criminal Liability and the United States *Constitution* Substantive Criminal Law Due Process" (1989) 24 *Wayne Law Review* 1630.

[116] Some have argued that criticism of judges falls within the implied freedom: Enid Campbell, "Contempt of Parliament and the Implied Freedom of Political Communication" (1999) 10 PLR 196, 208; Enid Campbell and HP Lee, *The Australian Judiciary* (CUP, 2001) 183; Anthony Gray, "Contempt and the Australian Constitution – Part I" (2017) 27 JJA 3, 14. This is consistent with the approach taken by three members of the Court in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

had similar difficulties in identifying who was a "public figure" for the purposes of defamation law in that country. When these concepts are utilised to sharply distinguish how the law operates in different situations, great strain is placed on them. It is not always obvious that the concepts themselves can bear this strain, given their unclear meaning. In the United States, one original rationale for the "public figure" distinction was that it was assumed such figures would have greater access to the media to respond to allegations made. That may have made sense at one time, but in the age of social media, where everyone has access to Twitter and Facebook, it is of much lesser importance, and arguably no longer a basis for such a sharp distinction in the law.

Elsewhere, the author has been critical of the use of the concept of "political communication" as a limit to the implied freedom of communication in Australia.[117] There have been similar attempts to limit the *First Amendment* in this way. In the United States, these attempts have been unsuccessful,[118] unlike in Australia. The idea that such a distinction is useful in the context of free speech and defamation was rejected by all members of the House of Lords.[119]

An advantage of what is proposed here – which is the effective adoption of the reasonableness standard in all cases rather than merely those involving allegedly political communication about political figures – is that Australian law would no longer need to make this somewhat arbitrary and uncertain distinction,[120] at least in the context of defamation law. And in the realm of constitutional law, this might in turn create momentum for the High Court to abandon the concept of "political communication" altogether, which many constitutional law scholars would surely welcome.[121]

It is not suggested that Australian defamation law takes on the requirement that the plaintiff prove "actual malice" in publishing. Rather, as outlined above, a reasonableness standard is preferred. The actual malice requirement has been, in the author's view, justifiably criticised elsewhere.[122] For example, it has proven to be very difficult for plaintiffs to demonstrate actual malice. This might leave the law

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[117] Anthony Gray, *Freedom of Speech in the Western World: Comparison and Critique* (Lexington Books, 2019) 145–147.

[118] *Time, Inc v Hill*, 385 US 374, 388 (Brennan J for the Court) (1967) ("The guarantees for free speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government"); *Thornhill v Alabama*, 310 US 88, 102 (Murphy J, for the Court) (1940) ("freedom of discussion, if it would fulfil its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period")

[119] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 203 (Lord Nicholls), 210 (Lord Steyne), 219–220 (Lord Cooke), 234 (Lord Hope), 237 (Lord Hobhouse); [2000] EMLR 1.

[120] A definition of "political communication" has proven to be elusive. In *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124, Mason CJ, Toohey and Gaudron JJ referred to Barendt's description of "speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about", as well as Meiklejohn's reference to speech which bears directly or indirectly upon issues with which voters have to deal; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 565 (all members of the court) ("what is for the common convenience and welfare of society"), 571 ("matters that could affect their choice in federal elections, or constitutional referenda, or that throw light on the performance of Ministers of State"). In *Hogan v Hinch* (2011) 243 CLR 506, 544; [2012] HCA 4, French CJ said that the definition of political matters was broad, "not limited to matters concerning the current functioning of government. They arguably include social and economic features of Australian society. For these are, at the very least, matters potentially within the purview of government".

[121] Geoffrey Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *Melbourne University Law Review* 581, 606 ("the definition of political matters leaves much to be determined … there is clearly room for argument about the matters to which the freedom extends"); Adrienne Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *Melbourne University Law Review* 374, 388 ("a difficulty that has attended other attempts to define the concept of political communication (is that) if the concept is infinitely expandable, it becomes meaningless. Partly because of this problem, many *First Amendment* scholars have criticised attempts to justify freedom of speech solely with the argument from democratic government"); Jeremy Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Federal Law Review* 37, 53 ("any public communication is potentially a political matter, at least where it involves the communication of ideas. As every area of human activity is potentially subject to government intervention, communication on any subject could be covered"); Tom Campbell and Stephen Crilly, "The Implied Freedom of Political Communication: Twenty Years On" (2011) 30 *University of Queensland Law Journal* 59, 60 ("twenty years on, there is little progress in defining what is 'political communication' … the High Court has consistently dodged this question").

[122] *Hill v Church of Scientology* [1995] 2 SCR 1130, 1182–1183 (Cory J, for La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ); David Anderson, "Is Libel Law Worth Reforming?" (1991) 140 *University of Pennsylvania Law Review* 487.

of defamation inadequate, in that individuals suffer reputational injury, but have no remedy because of the difficulties of proof. It requires that more resources are devoted to either making or defending defamation claims in terms of proving the existence of malice, or its absence. Some argue that the actual malice standard moves the court too far away from the truth or otherwise of the allegations published. And that in sum, it moves the needle "too far" in favour of defamation defendants, at the expense of plaintiffs with damaged reputations.

A useful middle ground to protect freedom of speech further but also to protect reputations is suggested to be the negligence reasonableness standard.[123] This is in contrast to the one extreme of strict liability (which Australia currently has, subject to defences) and the other extreme of proof of actual malice (which exists in the United States, as least for public figures). Thus, consideration of the United States' case law is useful to consider an example of how a country moved from a strict liability standard in defamation to a fault-based standard. This is what is suggested for Australia. However, it is not suggested that Australian law take the further step of introducing a requirement to prove actual malice, or that the distinction between public figures and private figures be introduced.

Conclusion

The Standing Committee of Attorneys-General in Australia has many suggestions for possible reform to the law of defamation to consider. Although the uniform defamation laws were only introduced in 2005, the media landscape has changed substantially over time, and the use of technology has increased exponentially. Frankly, some aspects of Australia's defamation law are showing their age. In the author's first article,[124] it was argued that the time had come to jettison the multiple publication rule, as has occurred in the United Kingdom and United States. In the second,[125] it was argued that the law should be clarified so that tech companies should not generally be seen as publishers of material that is later shown to be defamatory, and the mere fact they have received a complaint that their services are being used to access defamatory material should not render them culpable in the event that subsequently the material is shown to in fact be defamatory.

This article has suggested another way in which defamation law is showing its age – in its clinging to notions of strict liability. This is explained by the tort's ancient roots and the former concern in the law about criticism of government and government officials. It is much less defensible now in a democracy that thrives upon a general freedom of speech. Further, the law of tort generally has moved from a strict liability approach in favour of a fault-based system, and doctrines of strict liability with their lack of flexibility have become isolated in the law of tort. The response of the law of defamation to these trends has not been to reform the essential tort itself, but to remove some of the "sharp edges" of the strictness of the tort through common law and statutory defences under which fault considerations enter the picture, in some ways through the "back door", and only when the defendant meets a burden of proof in relation to a defence sometimes drafted in convoluted terms.

It has been argued that the law should be simplified. Rather than trying to accommodate a strict liability tort that then takes the edges off by considering questions of fault in a defence to the tort, the law should start afresh. The definition of the tort must be amended. It must include questions of whether the given material is defamatory and whether it has been published, as it does currently. However, a third element should be added – that of whether publication was reasonable in the circumstances. The plaintiff, as the one alleging wrongdoing, would need to prove that publication was unreasonable in the circumstances. This would not present a radical shift in the law, because the courts already do consider to some extent the question of the fault of the defendant in relation to some of the existing statutory defences. However, it would avoid the kind of intellectual mess we have at present, where the law tries

[123] This has been suggested in the Canadian context (Boivin, n 46) and the American (Gerald Smith, "Of Malice and Men: The Law of Defamation" (1992) 27 *Valparaiso University Law Review* 39, 79–84).

[124] Anthony Gray, "The Single Publication Rule and Australian Defamation Law" (2019) 27(1) *Tort Law Review* 3–17.

[125] Anthony Gray, "The Liability of Search Engines and Tech Companies in Defamation Law" (2019) 27(1) *Tort Law Review* 18–36.

to ameliorate some of the harshness and inflexibility of a strict liability tort by considering fault through the "back door", if a defendant can fit into the sometimes convoluted and complex defences. Instead, fault needs to be considered through the "front door". It should be an element of the tort, not a defence. There is philosophical support for a position that the one accusing another of wrongdoing, including lack of justification, should have to prove this, rather than the one accused of wrongdoing proving innocence. The placement of the burden of proof can be important in terms of outcomes.

In making this suggestion, some support has been derived from developments in American law. The Americans moved defamation from a tort of strict liability to essentially a fault-based approach. The Supreme Court has taken the principled position that State defamation laws must not waver from a fault-based system, even where they have flexibility in crafting their own positions. This is the baseline that the Court has set such legislatures. This article has suggested that this is the fundamental principle that Australian legislatures must also adopt – a re-crafting of the tort of defamation from a tort of strict liability to a fault-based tort. It has not been suggested that Australian law adopt other aspects of American law, such as the malice standard, attempted distinctions between public figures and non-public figures, and a difference in treatment if the defendant is a media company.

A further benefit of these reforms in the law of tort is that the High Court might reconsider its distinction between political communication and non-political communication in the field of constitutional law. Thus, a reform in the private law must also lead to reform in the public law, just as the High Court's pronouncements in the public law decision in *Lange* heralded change in the private law of defamation. Coherence across private and public law should at least in most cases be considered a positive.