THE UNITED STATES PUBLIC FIGURE TEST: SHOULD IT BE INTRODUCED INTO AUSTRALIA?

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The objective of this article is to determine whether the United States public figure test should be introduced into Australia. It first explains and critically evaluates the United States law of defamation concerning public figures and its underlying policies. The United States approach is then compared with Australia's defamation law and its underlying policies. An assessment of the reasoning of the discussion papers and reports which have previously rejected the adoption of the public figure test in Australia is then undertaken. The conclusion drawn from this analysis is that the public figure test should not be adopted by Australia. Finally, several alternative recommendations are made for the uniform reform of defamation law in Australia.

I. INTRODUCTION

In its recent report on defamation law, the New South Wales Law Reform Commission expressed its concern over the desirability of introducing the United States public figure test into New South Wales.[1] Such a finding is consistent with

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1 New South Wales Law Reform Commission Discussion Paper No 32, *Defamation*, 1993 at 176.

several earlier reports produced by various law reform bodies in Australia which have all rejected the adoption of the United States public figure test into Australia.[2]

Despite this apparent aversion to the public figure test in Australia, it remains on the reform agenda. This is largely because of the decision in the *Political Advertising Ban Case* where the High Court held that the Australian Constitution contains an implied right to freedom of communication.[3] Although this right is limited to freedom of expression on public affairs and political discussion, it has been suggested that it may potentially lead to the development in Australia of something like the public figure test in the United States.[4] Given this possibility, the object of this analysis is to determine whether this test should be introduced into Australia.

Part II locates the social context of defamation law by identifying the competing interests of an individual's reputation, freedom of expression and access to information on public affairs. Where speech relates to a matter of public concern, the balance of the law must provide it with greater protection relative to speech on a matter of private concern. Therefore, the accommodation of the varying social values of speech and the pursuit of truth are assumed to be of critical importance when assessing the effectiveness of the law in balancing these interests.

Part III then analyses the constitutionalisation of defamation law in the United States where defamation actions involving public officials, public figures or matters of public concern are subject to special limitations to encourage freedom of speech. The underlying policy of a presumption in favour of free speech is applauded. However, the procedure for implementing the public figure test, is found to be inappropriate on five grounds. It is ambiguous, it condones poor reporting, it does not restore reputation or determine truth, its focus on the status of the plaintiff is inappropriate, discriminatory and unnecessary, and the test has not decreased the number of defamation actions involving public figures or officials.

Part IV examines how the public figure test and its policies differ from Australia's defamation laws and their underlying policies. It is asserted that the Australian law of defamation does not vindicate a plaintiff's reputation. It impedes the flow of information on matters of public concern and therefore its balance in favour of reputation is considered to be inappropriate. As a result, there is a need for reform.

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2 More specifically by the Australian Law Reform Commission Report No 11, *Unfair Publication: Defamation and Privacy*, 1979 (ALRC Report No 11); the Attorneys General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law*, 1990 (Attorneys General Discussion Paper 1990) and *Reform of Defamation Laws Discussion Paper* (No 2), 1991 (Attorneys General Discussion Paper 1991); and the New South Wales Legislative Assembly Committee, *Report of the Legislation Committee on the Defamation Bill*, 1992.

3 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

4 T Blackshield, as quoted in "How Free is Your Expression?" (November, 1992) *Gazette of Law and Journalism* 2 at 3. This issue should soon be resolved by the High Court which must determine whether the implied constitutional guarantee of freedom of speech is an effective defence in defamation actions in the case of *Stephens, Cash, More, Halden, House, and Wenn v Western Australian Newspapers Ltd* (1993) 1 NLR 11; "Pollie want a Cracker?" (May, 1993) *Gazette of Law and Journalism* 3 at 3.

Part V undertakes an assessment of the reasoning of the reports and discussion papers which have previously rejected the adoption of the public figure test into Australian law. Whilst several of the initial objections raised in these reports are found to be without substance, their conclusion that the test should not be imported into Australian law is endorsed for the reasons outlined in Part II.

Finally, Part VI contains several alternative recommendations for the uniform reform of Australia's defamation laws. These include the adoption of a defence equivalent to that of the statutory qualified privilege under s 22 of the *Defamation Act* 1974 (NSW) and a provision for courts to make a declaration of the truth where applicable. The presumption of falsity should be retained for all defamation actions while strict liability should apply only when a matter is one of private concern.

The requirement of reasonableness under the defence of statutory qualified privilege will both encourage accurate reporting techniques and impose a less onerous burden on defendants in relation to publications where the recipient has an interest, or apparent interest, in receiving the information in question. Hence, this reform, when combined with a declaration of truth in actions involving statements of fact, will provide greater protection to public speech and focus a court's attention on the issue of truth.

II. DEFAMATION IN ITS SOCIAL CONTEXT

A. The Competing Interests and the Role of the Law

Historically, the law of defamation represents an attempt to reconcile two competing interests. These are an individual's interest in his or her reputation on the one hand and an individual's interest to freely express his or her thoughts and opinions on the other.[5] Both are legitimate interests which must be recognised and protected by the law. As the Australian Law Reform Commission has recognised, there is also a third interest which occupies a legitimate space within any debate concerning the law of defamation. This is the right of the public to have access to information on public affairs.[6]

In the Australian context, this latter interest will presumably become more prominent given that the decision in the *Political Advertising Ban Case* was founded on the basis that freedom of communication is indispensable to representative government.[7] The implication of the decision is that the law must

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5 Traditionally this has been expressed as follows:

> Firstly, any person is entitled prima facie to his or her good name, and imputations are not to be made without justification which are detrimental to his or her reputation. Second, any person should be entitled in a free and democratic community to publish fearlessly statements of fact and expressions of opinion however forthright or unpopular: Lloyd as quoted in ALRC Report No 11, note 2 *supra* at 17-18.

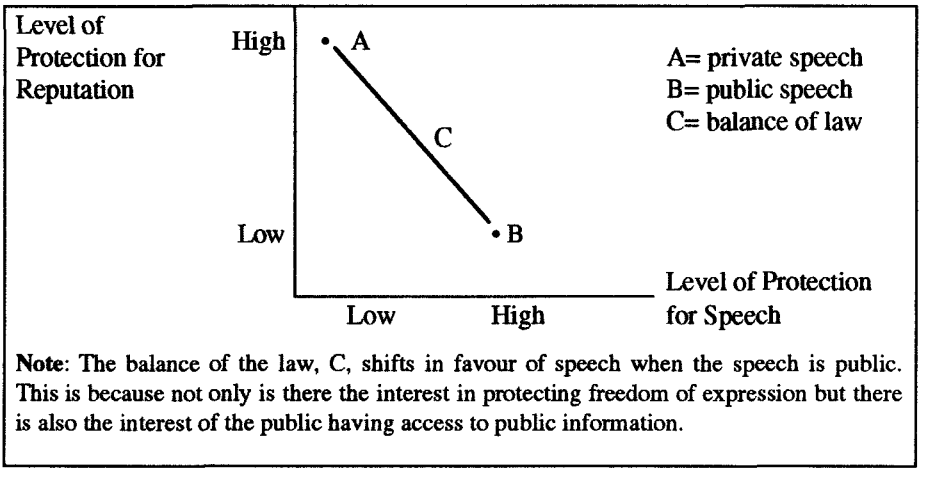
6 *Ibid* at 18.

7 Whilst the members of the High Court offered different formulations as to the nature of the constitutional right to freedom of communication, their decisions are all founded on the common notion that freedom of communication is indispensable to representative government. For example, Mason CJ explained:

now accord greater protection to speech on matters of public concern to ensure the efficacy of representative government.

The relationship between these competing interests and how they must be accommodated by the law of defamation is illustrated below in Figure 1.1. The question that arises from this relationship is, what is the appropriate means by which the law can achieve this required balance:

Figure 1.1
Interaction of Interests



Note: The balance of the law, C, shifts in favour of speech when the speech is public. This is because not only is there the interest in protecting freedom of expression but there is also the interest of the public having access to public information.

This analysis makes two fundamental assumptions which will influence the answer to this question. First, the analysis assumes that truth is the ultimate objective in a democratic society and second, that truth is optimally attained through the competition of ideas in the marketplace.[8] The appropriate balance, therefore, will be that which provides the greatest likelihood of truth. Given this, the law must make a presumption in favour of free speech with incursions only being made where it is necessary to do so in the public interest.[9]

Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion .... Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives...: *Australian Capital Television v Commonwealth*, note 3 *supra* at 138-39.

8 Such an approach is limited by the fact that it does not address the ways in which the present arrangements concerning the production, distribution and consumption of ideas bear restrictively on public debate: B Edgeworth, and M Newcity, "Politicians, Defamation Law and the Public Figure Defence" (1992) 10(1) *Law in Context* 39 at 61.

9 As Geoffrey Robertson explains in "Free Speech: Reaching the Boundaries in Australia' (October, 1988) *Australian Society* 24 at 25:

The law must also operate to encourage accuracy in reporting of information to the public to minimise the dissemination of falsehoods into the public arena. It must avoid uncertainty which would otherwise lead to self censorship because of the fear that publication will result in a defamation action. Finally, in pursuing such objectives the law must not be discriminatory. These are the criteria which shall be used in this analysis to evaluate both the law in the United States and Australia and the proposed reforms.[10]

III. UNITED STATES DEFAMATION LAW AND THE PUBLIC FIGURE TEST

A. Its Relevance to Australia's Defamation Law

The United States response to establishing the balance between an individual's reputation and free speech has been largely influenced by the explicit guarantee of freedom of speech and press under the First Amendment to the United States Constitution.[11] Despite the absence of such an explicit protection in the Australian Constitution, the United States law of defamation and the public figure test remains relevant to Australia's defamation law for two reasons.

First, while the issues are discussed in constitutional terms, they raise policy considerations equally applicable to Australia.[12] As Dawson J explained in the *Political Advertising Ban Case*, free expression "...is as much the foundation of a free society here as it is there [United States]".[13] Second, in that same case, the High Court held that there is an implied guarantee of freedom of communication under the Australian Constitution. This raises the possibility that there may also be a constitutionalisation of Australia's defamation laws as has occurred in the United States.[14]

> ...the law, whenever it deals with free speech, should apply that test of necessity: in performing the balancing act that courts so frequently have to assay, they should put in the scales a presumption in favour of freedom of information and opinion.

However, there are two reasons why the legal protection provided for free speech should never be absolute. First, to do so would impose an absolute prohibition on the right of individuals to protect their reputational interests. Second, concomitant to the absence of any restrictions on speech, there would be an increase in the level of false speech. This would then undermine both the reputation of the media and deny the truth from the public because no one would be able to distinguish between false reports and true reports: R Epstein, "Was *New York Times v Sullivan* Wrong?" (1986) 53 *University of Chicago Law Review* 782 at 800.

10 See the Appendix for a comparative table of the law of defamation in the United States and Australia and their respective proposed reforms.

11 The First Amendment of the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech, or of the press".

12 ALRC Report No 11, note 2 *supra* at 247.

13 *Australian Capital Television Pty Ltd v The Commonwealth*, note 3 *supra* at 182.

14 Note 4 *supra*.

B. The Constitutionalisation of Defamation Law in the United States

(i) Public Officials and Public Figures

The United States Supreme Court created the public official test in the landmark case of *New York Times v Sullivan.*[15] It held that the United States Constitution prohibited a public official from obtaining damages for defamatory falsehoods relating to his or her official conduct unless he or she could prove that the statement was made with actual malice,[16] that is, with knowledge that the statement made was false or was made with reckless disregard as to whether it was true or false.[17] The Supreme Court in *New York Times v Sullivan* did not expressly state that a plaintiff had the burden of establishing the falsity of the statement in question. However, in *Garrison v Louisiana,* it resolved this issue and held that a plaintiff who was a public figure or public official had the burden of proving that the defamatory material was false.[18]

In 1967, the Supreme Court in *Curtis Publishing Co v Butts*[19] extended the application of the actual malice requirement to plaintiffs who were deemed to be public figures. That is, persons who were ultimately involved in the resolution of important public questions, or by reason of their fame, shaped events in areas of concern to society at large.[20]

Justice Powell expanded on this definition in *Gertz v Robert Welch Inc*[21] where he offered three prototypes for public figures. These are first, the involuntary public figure who attains his or her status through no purposeful action of his or her own but who is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues;[22] second, the all purpose public figure who occupies a position of such pervasive power and influence, or such pervasive fame or notoriety that he or she must be deemed a public figure for all purposes and in all contexts;[23] and third, the voluntary, limited public figure who voluntarily injects himself or herself into a public issue or to the forefront of a particular public controversy in order to influence the resolution of the issues involved.[24]

(ii) Private Plaintiffs and Matters of Public Concern

In relation to private plaintiffs, strict liability was abolished as the standard of liability for defamatory statements by the Supreme Court in *Gertz v Robert Welch*

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15 (1964) 376 US 254.

16 *Ibid.* Prior to this decision, the Supreme Court had held that defamatory statements were outside the protection of the First Amendment: *Chaplinsky v New Hampshire* (1942) 315 US 568.

17 Note 15 *supra.*

18 (1964) 379 US 64.

19 (1967) 388 US 130.

20 *Ibid.*

21 (1974) 418 US 323.

22 *Ibid* at 345, 351.

23 *Ibid.*

24 *Ibid* at 351.

Inc.[25] It was held that a private plaintiff had to prove that a defendant was at fault in publishing the statement in issue before liability was established for actual damages. The Supreme Court also imposed the requirement that such a plaintiff could only receive presumed or punitive damages if he or she proved actual malice.[26]

However, in *Dun & Bradstreet v Greenmoss Builders Inc*,[27] this second ruling was restricted to private plaintiffs only when the defamation action related to a statement which was a matter of public concern.[28] This concept of public concern was later affirmed in *Philadelphia Newspapers Inc v Hepps*, where the Supreme Court also held that when a private plaintiff sued for defamation in relation to a matter of public concern, he or she could not succeed unless he or she proved that the defamatory publication was made with actual malice.[29] Therefore, the law of defamation as it applied to a public figure or public official was extended to private plaintiffs where the material in question was a matter of public concern.

C. The Policies Underlying the United States Law

There are essentially three justifications offered to support the public official test and its extension to public figures and matters of public concern. First, public officials and public figures are said to enjoy greater access to channels of effective communication relative to private plaintiffs. It is therefore assumed that this enables them to counteract any false statements directed against them.[30] Second, by entering the public domain, public officials and figures are deemed to accept that as a necessary consequence of their position they will be subject to greater public scrutiny and criticism.[31] This is seen to be analogous to the common law concept of voluntary assumption of risk.[32] That is, as public persons, they have assumed a greater risk of being the subject of defamatory statements than has a private individual.[33] Finally, speech on matters of public concern is considered to be at the heart of the First Amendment protection of freedom of speech and the press.[34] The Supreme Court in the *New York Times v Sullivan* line of cases

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25 *Ibid.*

26 *Ibid* at 346-49. The Supreme Court also held that the states were to define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual. *Gertz v Robert Welch Inc*, note 21 *supra*. In most jurisdictions fault has come to mean simple negligence or reasonable care whilst some states have adopted the standard of actual malice. For a full discussion see: B Sandford, *Libel and Privacy*, Prentice Hall (2nd ed, 1991) pp 374-78.

27 (1985) 86 LEd 593.

28 *Ibid.* The concept of public concern was adopted despite the fact that the Supreme Court in *Gertz v Welch*, note 21 *supra* at 346, had rejected a similar concept of public interest which had been enunciated in *Rosenbloom v Metromedia Inc* (1971) 403 US 29, on the basis that it would lead to ad hoc decisions.

29 *Philadelphia Newspapers, Inc v Hepps* (1986) 106 S Ct 1558.

30 *Gertz v Welch Inc*, note 21 *supra* at 344-45.

31 *Ibid.*

32 N Strossen, "A Defence of the Aspirations - but not the Achievements of the US Rules Limiting Defamation Actions by Public Figures and Officials" (1985) 15 *University of Melbourne Law Review* 419 at 422.

33 *Gertz v Welch Inc*, note 21 *supra* at 344-45.

34 *Dun & Bradstreet v Greenmoss Builders* (1985) 472 US 749 at 758-759.

determined that the common law had an impermissible chilling effect on the freedom of the press by inducing members of the media to engage in self censorship, even of accurate information, to avoid liability.[35]

To avoid this result therefore, strict liability for defendants in defamation actions was deemed to be unconstitutional. The resultant presumption in favour of free speech and the actual malice test were thought to be the means by which to satisfy the requirements of the United States Constitution. This was despite the fact that such an approach would inevitably allow some falsehoods to enter the marketplace of ideas.[36] Consequently, in the words of the Supreme Court, the public figure test represents:

> ...a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that such debate may include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. There is first a strong interest in debate on public issues, and, second a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.[37]

D. An Evaluation of the US Law

When *New York Times v Sullivan* was first decided it was said to be "an occasion for dancing in the streets"[38] because of the supposed protection it gave to the media and free speech. However, as Epstein laments, "a generation has now passed and the dancing has now stopped".[39] An evaluation of the public figure test reveals at least five reasons for this sense of disappointment.

(i) Ambiguity

One of the criteria adopted by this analysis for adjudging the effectiveness of the law is its clarity and consistency. However, virtually all commentators agree that the public figure test is excessively vague.[40] This result is caused by at least four sources of ambiguity emanating from the jurisprudence of the US Supreme Court.

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35 For example in *Gertz v Robert Welch, Inc* the Supreme Court stated:
> [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that [common law rules] may lead to intolerable self-censorship... and [do] not accord adequate protection to First Amendment liberties: note 21 *supra* at 340.

36 Chief Justice Rehnquist in *Hustler Magazine and Larry C Flynt v Jerry Falwell* explained:
> While falsehoods interfere with the truth seeking function of the marketplace of ideas, they are nevertheless inevitable in free debate, and a rule that would impose strict liability on a publisher for factual assertions would have an undoubted 'chilling effect' on speech relating to public figures that does have constitutional value: 56 *United States Law Week* 4180 at 4181.

37 *Rosenblatt v Baer* (1966) 383 US 75 at 85 quoting *New York Times v Sullivan* (1964) 376 US 254 at 283.

38 Alexander Meiklejohn as quoted in R Epstein, note 9 *supra* at 782.

39 *Ibid* at 783. Some commentators actually argue that the media are actually worse off under the actual malice rule for reasons such as the increased litigation costs experienced under the test. For example see: R Epstein, *ibid* at 803-08.

40 P Felcher and E Rubin, "Privacy, Publicity and the Portrayal of Real People by the Media" (1979) 88(8) *Yale Law Journal* 1577 at 1580.

The first of these relates to the definition of a public official/figure. The immediate problem raised by the decision in *New York Times v Sullivan* for courts in subsequent cases was the question of what constituted a "public official". In *Rosenblatt v Baer* the Supreme Court stated that the position of the plaintiff is such that:

> ...the public has an independent interest in the qualifications and performance of all government employees... The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.[41]

However, in practice this test has not been implemented properly by lower courts with the result that all government employees, no matter how inferior their positions, have been found to fall within the rubric of the public official concept.[42]

The definition of public figure is considered to be no more certain and far too wide.[43] Chief Judge Lawerence of the United States District Court for the Southern District of Georgia has remarked that, "[d]efining public figures is much like trying to nail a jellyfish to the wall".[44]

This is a result which is difficult to reconcile with the first two justifications offered for the test because it often applies to persons who do not have access to communication channels to refute the falsehoods directed against them, nor could they be deemed to have voluntarily assumed the risk that goes with positions of high public profile. More importantly, the inability of the law to guarantee a predictable and consistent definition of a public figure creates an uncertain legal climate where it is more likely that potential publishers will engage in self censorship, "the very evil that the Supreme Court's decision sought to allay".[45]

The second source of ambiguity arises from the failure of the Supreme Court to provide any substantive definition of what constitutes a matter of public concern. The test offered in *Dun & Bradstreet v Greenmoss Builders Inc* merely states that a court must consider the "statement's form and content as revealed by the whole record".[46] This is an equivocal standard which does not provide sufficient guidance for lower courts to apply the test in a manner which will lead to consistent results.[47]

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41 *Rosenblatt v Baer*, note 37 *supra* at 86-7, per Brennan J.

42 J Eaton, "The American Law of Defamation through *Gertz v Robert Welch, Inc* and Beyond: An Analytical Primer" (1975) 61 *Virginia Law Journal* 1349 at 1376-7.

43 For a comprehensive study of when a plaintiff has been held to be a public figure under the US test see: B Sandford, note 26 *supra*, pp 321-37. Whilst it still lacks clarity, there is evidence of a trend within the Supreme Court's jurisprudence to contract the category of persons falling within the public figure concept: N Strossen, note 32 *supra* at 422.

44 *Rosanova v Playboy Enterprises* (SD Ga 1976) 411 F Supp 440 at 443.

45 B Sandford, note 26 *supra* at 242-3. See *Waldbaum v Fairchild Publications* (1990) 627 F2d 1287 at 1293 (DC Dir), 499 US 898:

> [b]ecause the outcome of future litigation is never certain, members of the press might chose to err on the side of suppression when trying to predict how a court would analyse a news story's First Amendment status.

46 *Dun & Bradstreet v Greenmoss Builders Inc*, note 34 *supra* at 761.

47 R Smolla, "*Dun & Bradstreet, Hepps, and Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation" (1987) 75 *Georgetown Law Journal* 1519 at 1540.

Third, there is uncertainty as to whether there is a media/non-media distinction under the United States law of defamation. The decision of the Supreme Court in *Dun & Bradstreet v Greenmoss Builders* implied that there was no distinction between media and non-media defendants when applying the law of defamation.[48] However, in *Philadelphia Newspapers v Hepps*, the majority confined its decision to cases involving media defendants and reserved judgement as to whether its ruling would apply equally to non-media defendants.[49] That is, it held that a plaintiff was required to prove falsity and actual malice if the alleged defamatory statement was a matter of public concern and made by a member of the media. It left open the question as to whether this less onerous standard of liability for defendants would apply when the publication was not made by a member of the media. Thus a further source of uncertainty has been created.[50]

Finally, there is an unresolved question as to when a plaintiff has the burden of proving the falsity of a defamatory statement. Under the United States law of defamation, a plaintiff must prove the falsity of a statement which is a matter of public concern. The question that remains unresolved however, is whether this requirement extends to a situation when a private plaintiff brings a defamation action with respect to a publication which is a matter of private concern.[51]

(ii) It Condones Poor Reporting Techniques

In addition to being unambiguous, the law of defamation must encourage accurate reporting techniques to minimise the dissemination of falsehoods which thwart the pursuit of truth and have no social value. The United States law of defamation however, does not guarantee this result and provides the potential for "sloppy and unprofessional journalism".[52] This is because where a statement is one of public concern or relates to a public official or figure, a reporter will only be held liable for defamation if he or she published that statement with knowledge of its falsity or with reckless disregard as to whether it was true or not.[53] This test imposes no standard of reasonableness on the conduct of a defendant when publishing the statement.[54]

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48 Arlen Langvardt has explained that the Court did not actually resolve the media / non-media issue because its decision was grounded on another basis. However, the obiter of at least five of the Justices suggested that such a distinction would be inappropriate in the constitutional law of defamation. A Langvardt, "Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order From Confusion in Defamation Law" (1987) 49 *University of Pittsburgh Law Review* 91 at 114.

49 *Philadelphia Newspapers Inc v Hepps*, note 29 *supra* at 1564.

50 This is despite the absence of any justification to deny the less onerous standard enjoyed by media defendants, from non-media defendants. Moreover, if anything the media should be subject to a more onerous standard relative to non media defendants given that they have more capacity to damage an individual's reputation due to the size of its audience. R Smolla, note 47 *supra* at 1529; A Langvardt, note 48 *supra* at 122.

51 A Langvardt, *ibid* at 124.

52 R Smolla, note 47 *supra* at 1528.

53 Reckless disregard has been held to exist only where the defendant held serious doubts about the truth of the matters asserted. Mere indifference to the truth and failure to investigate is insufficient: *St Amant v Thompson* (1967) 390 US 727; *Beckley Newspapers Corp v Hanks* (1968) 389 US 81 at 84.

54 T Hughes, "Defaming Public Figures" (1985) 5 *Australian Law Journal* 482 at 484. When interpreting actual malice, lower courts in the US hierarchy had favoured a notion that it would be fulfilled if a defendant's actions

As a result, a defendant may act with gross negligence when publishing a matter yet avoid complete liability for any damage he or she may cause to an individual's reputation.[55] Furthermore, by placing the burden of establishing falsity upon the plaintiff, a defendant is able to publish a complete fiction when he or she is aware that the plaintiff will be unable to prove the falsity of the publication.[56] This potential does not encourage the pursuit of thorough investigative journalism which would have a greater probability of revealing the truth.

(iii) Its focus on the Status of the Plaintiff is Inappropriate, Discriminatory and Unnecessary

In the process of establishing a balance between the competing interests of an individual's reputation and freedom of expression, the law must ensure that no particular class of person is subject to a "special discriminatory rule".[57] Consequently, the fact that the public figure test imposes a higher standard on a plaintiff in a defamation action merely because of his or her status has lead to allegations that it is discriminatory.[58] In the United States however, such discrimination is justified on the basis that public officials are granted immunity for statements made in the course of their official duties.[59] This argument may be valid with respect to public officials in the United States, but it is without foundation when considering the application of the test to public figures who do not have the immunity enjoyed by public officials.

Moreover, the focus of the law on the status of the plaintiff is problematic. This is because it allows for the possibility that a public figure or official could be required to prove actual malice in relation to a private matter because it is the status of the plaintiff, rather than the status of the speech, that invokes the application of the rule.[60] Such a possibility is incongruous with the justification offered for the actual malice standard, that is, that speech which relates to matters of public concern is of a greater social value and therefore must be offered greater protection relative to speech on matters of private concern. The focus of the test therefore, should be on the status of the speech rather than on the status of the plaintiff. This is reflected in the jurisprudence concerning private plaintiffs who

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constituted an 'extreme departure' from journalistic standards: B Sandford, note 26 *supra*, p 373. However, the Supreme Court in *Harte-Hanks Communications v Connaughton* (1989) 109 S Ct 2678 at 2684, 2686 rejected the legitimacy of such an approach which could otherwise have had the effect of creating an implied requirement of reasonableness under the actual malice rule.

55 R Epstein, note 9 *supra* at 801.

56 R Smolla, note 47 *supra* at 1528.

57 T Hughes, note 54 *supra* at 484.

58 *Ibid* at 484.

59 N Strossen, note 32 *supra* at 421.

60 In *New York Times v Sullivan* the Supreme Court stated that the public official rule applied only to statements relating to matters of official conduct: note 15 *supra* at 279. However, as Bruce Sandford explains, if this was ever meant as a limitation on the application of the public official rule, the Supreme Court either abandoned it or dramatically "reformulated" it: B Sandford, note 26 *supra*, p 285. In *Garrison v Louisiana* (1964) 379 US 64 at 77 the Court stated that First Amendment protections embrace statements "concerning anything which might touch upon an official's fitness for office" [emphasis added].

are only required to prove actual malice when their defamation action relates to a matter of public concern. However, when dealing with public plaintiffs there is the possibility that the actual malice standard can be applied to both private and public speech.

Ultimately, the focus on the status of the plaintiff is unnecessary given that the Supreme Court has developed the concept that speech is a matter of public concern. This approach ensures that a court's attention is focussed on the nature of the speech in question. It also allows a court to apply the actual malice test in the situations envisioned by the public figure test. This is because speech held to be a matter of public concern will often achieve this status by virtue of the fact that it is speech relating to a public figure or official.[61]

Commentators such as Arlen Langvardt have argued that the concept of public concern can not be adequately defined and therefore should be abandoned by the United States Supreme Court in favour of an approach which focuses exclusively on the status of the plaintiff.[62] However, there are at least two reasons why such a conclusion should not be accepted. First, matters of public concern are as capable of definition as are public figures and second, to focus on the status of the plaintiff is to ignore the fact that it is the nature of the speech in relation to a plaintiff which will determine whether such speech is to be protected.

(iv) It Does not Restore Reputation or Determine Truth

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

Moreover, by focusing on a defendant's state of mind at the time of publication, *New York Times v Sullivan* and its associated jurisprudence, have transformed the law of defamation in the United States into a "constitutional issue rather than one of truth versus falsity".[63] Consequently, as Epstein concludes, "the greatest cost of the present system is that it makes no provision for determining the truth".[64]

(v) The Ineffectiveness of the Test in Practice

The aim of the public official test and its associated jurisprudence was to avail greater protection to the media in order to encourage free and robust debate without the constant fear that a publication would result in a defamation action. However, the decrease in defamation actions anticipated under the public figure test has not materialised in the United States.[65] In fact the Libel Defence Resource Center in

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61 One further advantage of diverting the focus of a court from the status of the plaintiff is that the problems associated with defining public figures and officials cease to exist.

62 A Langardvt, note 48 *supra* at 127-29.

63 N Strossen, note 32 *supra* at 431-34.

64 R Epstein, note 9 *supra* at 813.

65 N Strossen, note 32 *supra* at 426.

the United States has found that the loss rates and damages awards faced by defamation defendants are actually greater than the corresponding figures for general civil defendants.[66] This situation indicates a result quite the contrary to that envisioned by the Supreme Court when it created the actual malice test.[67]

Clearly, the effectiveness of the United States law of defamation is severely undermined for the reasons outlined above. The public figure test has simply not provided the vehicle for increased press freedom as intended. Despite this, the jurisprudence of the Supreme Court does possess several redeeming features.

It has a presumption in favour of free speech which is consistent with the primary objective of the law to allow the free exchange of ideas in the marketplace in an attempt to discover the truth. This is reaffirmed by the abolition of the presumption of falsity, at least in relation to matters of public concern, which was considered necessary by the Supreme Court to satisfy the requirements of the First Amendment. Although it was recognised that this would protect some false speech, Justice O'Connor in *Philadelphia Newspapers Inc v Hepps* explained that:

> ...where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favour of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of a *public concern*[68] (emphasis added).

It also recognises the different value of different kinds of speech and the consequent need to alter the balance of the law accordingly. That is, it avails greater protection to speech on matters of public concern because it has greater social value relative to speech on matters of private concern. This is achieved by requiring a plaintiff to establish two things where his or her action relates to a matter of public concern: first, the matter was false; and second, the defendant

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66 *Ibid* at 427.

67 A survey in the US in 1984-85 confirmed that the level of defamation litigation had in fact chilled the vigour and openness of the press. *Ibid* at 429. It has also been suggested that lengthy trials and enormous litigation costs faced by defendants have actually created a worse situation for the media under the public figure test relative to that experienced under the common law: R Epstein, note 9 *supra* at 808.

68 *Philadelphia Newspapers Inc v Hepps*, note 29 *supra* at 776. Justice O'Connor states that the presumption of falsity should be abolished only in relation to matters of public concern. The issue of whether a plaintiff should also have to prove the falsity of private matters remains unresolved by the US jurisprudence [as discussed above in main text]. Some commentators have suggested that the presumption of falsity should be abolished in all defamation actions to achieve consistency in the law. See for example: R Smolla, note 47 *supra* at 1529; N Strossen, note 32 *supra* at 432; A Langvardt, note 48 *supra* at 91. Such an approach however, is inappropriate, and the presumption of falsity should be retained for matters of private concern. There is always a possibility that a plaintiff may not be able to prove the falsity of defamatory material. This may be justified where the matter is one of public concern because it is of greater social value and hence, there is a greater interest in avoiding the self censorship which may otherwise occur where there is a presumption of falsity. But when the speech is a matter of private concern, it is of less social value and thus requires relatively less protection. As a result, on such occasions the balance of the law should favour reputation and the presumption of falsity should be retained.

Whilst it may be possible to justify the abolition of the presumption of falsity in defamation actions involving matters of public concern in the US, it will be shown in part VI that it is inappropriate and unnecessary to adopt this approach in Australia.

had actual malice. On the other hand, where the action relates to a matter of private concern, in most states, a plaintiff need only establish a degree of fault on behalf of the defendant.[69]

Finally, it counteracts the possibility of self censorship by the media which previously existed under the common law due to the onerous standard of strict liability imposed on defendants in all defamation actions.[70]

IV. AUSTRALIA'S DEFAMATION LAW

A. How does Australia's Defamation Law Differ from that of the US ?

There are essentially three fundamental characteristics of Australia's defamation law which differentiate it from that of the United States. First, there is no public figure test in Australia at present. Second, defamation remains a tort of strict liability. Thus, a publisher may be liable for publishing defamatory material even though he or she did not know and could not reasonably have been expected to know the facts and circumstances that made the material defamatory.[71] This contrasts with the situation in the United States where at least some degree of fault must be established where an action concerns a private plaintiff and a matter of private concern, while actual malice must be established in actions involving public officials and public figures or matters of public concern. Finally, it is presumed that defamatory material is false, whilst in the United States a plaintiff must prove falsity where he or she is a public plaintiff and at least in relation to matters of public concern where he or she is a private plaintiff .

The law of defamation in Australia does not entertain an explicit public plaintiff / private plaintiff dichotomy.[72] Nor does it entertain differing standards of liability based on the status of a plaintiff or the status of the speech, as exists in the United States. It does however acknowledge that both the status of a plaintiff and speech are relevant considerations in a defamation action. The question therefore, is how this occurs and whether or not it is an effective means of achieving an appropriate legal balance.

First, the status of a plaintiff is relevant to the issue of whether the material in question, or more accurately the imputation arising from the material, is capable of

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69 In some states however, the standard of actual malice is retained for private plaintiffs when suing for defamation in relation to matters of private concern. See note 24 *supra.*

70 S Walker, *The Law of Journalism in Australia*, Law Book Company (1989) p 38. Unfortunately, this favourable result has been undermined by the uncertainty of the test which has substituted for strict liability as a cause for self censorship.

71 *Ibid*, p 135.

72 The phrase 'public plaintiff' is referred to in the sense of an individual who has attained a public profile or is a public figure under the United States public figure test. This is to be distinguished from the use of the term public plaintiff where it refers to a public body. It is in this sense that the New South Wales Supreme Court recently held that a publicly funded local council did not have a right to sue for defamation: *Council of the Shire of Ballina v Ringland* (unreported, New South Wales Supreme Court, Gleeson CJ, Kirby P, Mahoney JA, 16 December 1993).

bearing a defamatory meaning[73] and is in fact defamatory.[74] When resolving these issues regard is had to the meaning ordinary reasonable people would place upon the material, and it is assessed according to the standards adopted by these 'hypothetical referees'.[75] This process involves an examination of the subject matter of the material in question as it may influence the way in which ordinary people respond to the publication. Therefore, as people in public office are often the subject of criticism and comment it is assumed that such remarks have relatively less impact than similar criticism made of other people.[76]

Consequently, the fact that a plaintiff is a public official will by implication be relevant to the issue of whether the material is capable of being, and is in fact, defamatory. It will actually make such a finding less likely and in doing so impose a less onerous burden on defendants when publishing matters in relation to public officials.

The problem associated with such an approach is that whilst it is necessary and appropriate, it is not a sufficient means of ensuring that matters of public concern are given more protection relative to matters of private concern. The focus is on the status of the plaintiff and therefore does not necessarily accommodate all speech of public concern. Furthermore, there is a high degree of uncertainty for potential publishers in predicting whether or not a court or jury would consider their criticism or comment to be defamatory.

Second, the status of the plaintiff is of relevance when assessing the defences available to a defendant. Whilst truth alone is a full defence in several states,[77] in New South Wales, Tasmania, Queensland and the Australian Capital Territory, a defendant must not only show that the imputation was true, but that it was published for the public benefit, or in the case of New South Wales, it was a matter

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73 This is an issue of law for a judge to determine.

74 This is a question of fact to be determined by the jury (if present) once a judge is satisfied that the material in question is capable of bearing a defamatory meaning. In Australia there are two sources of law for what constitutes a defamatory imputation: the common law position (which applies in New South Wales, South Australia, Victoria, Western Australia, the Australian Capital Territory and Northern Territory) and the Code definitions (which apply in Tasmania and Queensland). Under the common law there are three cumulative tests which are used to determine whether an imputation is defamatory: first the hatred, contempt or ridicule test, second the lowering of estimation test and third the shun or avoid test. The Code definition of defamation is wider than the common law in that it also includes imputations that only injure a plaintiff in his or her profession or trade. In determining whether the material is defamatory, the motive of a defendant is of no relevance.

75 S Walker, note 70 *supra*, p 150. See for example: *Readers Digest Services Pty Ltd* (1982) 150 CLR 500 at 505-6, per Brennan J; *Australian Broadcasting Corporation v Comalco Ltd* (1986) 68 ALR 259 at 263-4, per Smithers J.
It is not necessary that everyone must agree that the material conveyed a defamatory meaning nor enough that a particular group held the material to contain defamatory imputations. According to Glass JA of the New South Wales Court of Appeal, it is sufficient that "an appreciable section of the community" would find that a defamatory imputation arose from the material: *Middle East Airlines Airliban SAL v Sungravure Pty Ltd* [1974] 1 NSWLR 323 at 340.

76 *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181 at 189.

77 More specifically, South Australia, Victoria, Western Australia and the Northern Territory. When establishing truth as a defence it not sufficient that a statement is literally true because it is the imputation arising from the statement which must be true / justified for the defence to be available.

of public interest.[78] In determining what constitutes a matter of public benefit, a court must weigh the right to privacy against the public interest in free discussion of matters of public concern.[79] As a result, if a publication for example, relates to the conduct of a public official in the performance of his or her duties it will most likely be held to be a publication made for the public benefit. Hence the defence will be available.

However, this approach employs the dual requirements of truth and non privacy to avoid liability. Truth in itself is an onerous burden for a defendant to prove and as such may tend to create self censorship. By adding the notion of public benefit, the burden becomes even more onerous. Ultimately, the law of defamation should not be required to perform the dual functions of protecting an individual's reputation and his or her privacy.

The defence of fair comment also accommodates the status of the speech explicitly and the status of a plaintiff by implication. This is due to its requirement that the comment must be on a matter of public interest.[80] This includes matters such as government policy and the actions of politicians and public servants with respect to the performance of their public duties. However, public interest has been given a broad interpretation and includes matters which, "affect people at large, so that they may be legitimately interested in or concerned at what is going on; or what may happen to them or to others".[81] Consequently, not only is the status of the plaintiff relevant to the availability of the defence of fair comment, but so too is the status of the speech.

Furthermore, the defence only operates where the facts upon which the comment is based are true[82] or absolutely privileged. Consequently, there is the possibility of self censorship when there is uncertainty as to whether or not the facts can be proven in court. More importantly, its application is limited to defamatory imputations arising from comments and not statements of fact.

Under the common law defence of qualified privilege, the requirement of reciprocity of duty and interest between the communicants has effectively excluded both the media from reliance on this defence and any publications made to the public at large.[83] However, its statutory formulation in Queensland and Tasmania

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78 *Defamation Act* 1974 (NSW), s 15(2). Similar provisions appear in the *Criminal Code* (Qld), s 376; *Defamation Act* 1957 (Tas), s 15; *Defamation Act* 1901 (ACT), s 6.

79 *Cohen v Mirror Newspapers Ltd* [1971] 1 NSWLR 623 at 628.

80 As Sally Walker explains a matter may be of public interest either because it invites comment or because it is of concern to the public: S Walker, note 70 *supra*, p 178. See also: *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 173-4, per Jordan CJ. Matters which are considered to invite fair comment include literary, artistic and other works that are displayed publicly.

81 *London Artists Ltd v Littler* [1969] 2 QB 375 at 391, per Lord Denning MR. The common law principle is embodied in the New South Wales legislation: *Defamation Act* 1974 (NSW), s 31. By contrast, in Queensland, the Northern Territory and Tasmania the matters on which the defence of fair comment is available are proscribed: *Criminal Code* (Qld), s 375(1); *Defamation Act* 1957 (Tas), s 14; *Defamation Act* 1938 (NT), s 6A.

82 *Pryke v Advertiser Newspapers Ltd* (1984) 37 SASR 175 at 192-3, per King CJ.

83 *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA); *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749. The common law persists in Victoria, South Australia and the ACT whilst Queensland, Western

provides protection to the publication of material in a wide range of circumstances[84] without the requirement of a reciprocity of duty between the publisher and recipient. In doing so it provides scope for the possibility that publications concerning public officials will be of public interest and hence protected by the defence.

Moreover, the defence of statutory qualified privilege under s 22 of the *Defamation Act* 1974 (NSW) may provide even greater freedom to publish material in New South Wales if it involves matters of public concern.[85] It provides a defence for a defendant where he or she can establish that: the recipient had an interest in receiving the information; the publication was made in the course of giving the information and that the conduct of the defendant was reasonable in all the circumstances.[86] In order to satisfy the first element, the status of the speech will be of fundamental importance because if it is a matter of public interest, the application of the defence will be invoked. The status of the plaintiff, while not explicitly recognised, will often determine the nature of the speech by implication. The effectiveness of this approach is discussed below.

B. An Evaluation of Australia's Defamation Law and its Underlying Policy

Unlike in the United States where there is a presumption in favour of free speech under defamation law, the underlying policy of the law of defamation in Australia is often said to be a presumption in favour of reputation.[87] This arises because of the assumption that an individual is prima facie entitled to his or her reputation and if another individual causes damage to his or her reputation, then that individual must have solid grounds for doing so. The translation of such a philosophy into Australian law has led to a presumption of falsity and strict liability for all defamation actions regardless of the status of the speech in question. These two characteristics impose a more onerous burden on a defendant when seeking to

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Australia and Tasmania have listed the cases in which qualified privilege is available in their Codes: *Criminal Code* (Qld), s 377; *Criminal Code* (WA), s 357; *Defamation Act* 1957 (Tas), s 16. In New South Wales both the common law qualified privilege and statutory qualified privilege are available. This latter defence is examined below. For a discussion of qualified privilege see: ALRC Report No 11, note 2 *supra* at 72-8.

84 Such circumstances include: the protection of the interests of the person making the publication, or some other person, or for the public good; for the purpose of giving information to the person to whom it is made with respect to some subject on which the person has, or is believed, on reasonable grounds, to have, such an interest in knowing the truth as to make the publication reasonable under the circumstances: *Criminal Code* (Qld), s 377(3), (5), (7) and (8); *Defamation Act* 1957 (Tas), s 16(1)(c), (e), (g), and (h).

85 S Walker, note 70 *supra*, p 137.

86 *Defamation Act* 1974 (NSW), s 2 enacts:

(1) Where in respect of any matter published to any person-

(a) the recipient has an apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,

there is a defence of qualified privilege.

For a discussion of the operation of this defence see: S Walker, *ibid*, pp 192-4. The defence is lost if the plaintiff proves that the defendant was actuated by malice, unless the defendant proves that the imputation was substantially true.

87 ALRC Report No 11, note 2 *supra* at 18.

defend material which is defamatory relative to that experienced under the United States law.

Consequently, potential publishers in Australia may be forced to engage in self censorship, even of accurate statements, to avoid any potential liability when they are unable to prove that the material in question is true.[88] This 'chilling effect' may be justified with respect to private matters. However, it unduly impedes the flow of information to the public in relation to matters of public concern. The result, therefore, is that the balance struck by the law in Australia is inappropriate. As Wilcox QC explains:

> ...[t]here is nothing self evident or sacrosanct about the balance currently struck by Australian law... Historically, in the English experience, the former value (reputation) has been recognised at the *expense* of the latter[89] (emphasis added).

The defence of statutory qualified privilege under s 22 of the *Defamation Act* (1974) NSW, does however, provide the potential to avail greater protection to speech on matters of public interest than that offered by the common law.[90] This occurs by virtue of the fact that an individual may publish a false statement yet still escape liability if he or she can establish that the recipient had an interest in the publication and his or her conduct was reasonable in all the circumstances. Such a result effectively creates a legal balance similar to that arrived at under the United States law.[91]

Unlike the common law, it recognises that the social value of speech is greater when it relates to a matter which the public has an interest in receiving (a matter of public concern under United States law) and that the balance of the law must be altered accordingly. Furthermore, it has two advantages over the United States law. First, it avoids the public plaintiff / private plaintiff dichotomy and focuses exclusively on the status of the speech, and second, by adopting a standard of

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88 This is to import the logic used by the US Supreme Court in *New York Times v Sullivan*, note 15 *supra*, in its assessment of the US common law of defamation, into the Australian context.

89 As quoted in E Whitton, "Reputation Versus Free Speech" (1990) *Australian Author* 26 at 26.

90 B Edgeworth and M Newcity conducted a study to determine the extent to which Australia's defamation laws benefited Australian politicians and restricted freedom of speech. Their conclusion was that politicians as a group faired poorly in comparative terms in defamation litigation and that public scrutiny of public figures was relatively unhampered by Australia's defamation laws. They extrapolated their findings based on an examination of results taken from New South Wales and concluded that a public figure test was not warranted in Australia. This procedure however, is inappropriate given that the law in New South Wales is not the same as that in other Australian states. Nevertheless if their findings are confined to the law in New South Wales as would seem appropriate, it is possible to accept their conclusion that a "de facto public figure element is already present in the structure of defamation litigation in New South Wales": B Edgeworth and M Newcity, note 8 *supra* at 57.

91 Ted Hughes has explained how the decision of the US Supreme Court in *New York Times v Sullivan* could have also been achieved under s 22: T Hughes, note 54 *supra* at 485-7.
A notable difference between the two approaches is that under s 22, a defendant has the burden of establishing that the requirements of the defence are made out, whereas under the public figure test, the burden is on a plaintiff to prove that the publication was made with actual malice.

reasonableness[92] in relation to a defendant's conduct, it encourages accurate reporting techniques.[93]

It is however not without its weaknesses. First, when a defendant escapes liability for the publication of a false statement, it makes no provision for a declaration of falsity to restore a plaintiff's reputation. Second, even if a plaintiff is successful, just as with the common law and United States law, no order for a correction order or right of reply is made to restore reputation, as damages are the only remedy available.[94]

Most significantly it has been suggested by Alister Henskens that the defence "has operated in practice as virtually a toothless tiger".[95] This allegation stems largely from the courts' insistence to focus on the issue of truth. For example, in *Austin v Mirror Newspapers Ltd*[96] the Privy Council adopted a restrictive analysis of s 22 and effectively required the truth of every element in the relevant article to be established by the defendant.[97] The Court commented that:

> ...(a) newspaper with a wide circulation that publishes defamatory comments on untrue facts will in the ordinary course of events have no light task to satisfy the judge that it was reasonable to do so.[98]

The issue of truth should obviously never be abandoned when determining whether a publication was reasonable in all the circumstances. As Henskens explains however:

> ...the Privy Council's opinion in *Austin's* case seemed to amount to the proposition that if any errors of fact are made within a publication then the defence of statutory qualified privilege will usually not be available.[99]

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92 Factors which have been considered by the courts when determining whether a publisher's conduct was reasonable include the publisher's belief in the truth of the statement, the manner and extent of publication, the surrounding circumstances, the connection between the subject and the imputation, the reasonableness of the assertion itself, and the care exercised before the material was published: *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 700-01.

93 It has been suggested by McHugh J that the application of s 22 is not confined to matters of public concern. He argues that:

> [i]t extends to any information in which the recipient has an interest or apparent interest in receiving. Consequently, the publications which s 22 protect go beyond those protected by the First Amendment.

McHugh J, "First Amendment Freedom in the United States and Defamation Law in New South Wales" (1986) 1(3) *Gazette of Law and Journalism* 10 at 11.

However, it is both probable and preferable that those matters envisioned by Justice McHugh would be included within the definition of a public concern/interest because this would ensure a result which is consistent with the rationale for having a less onerous burden on a defendant re matters of public concern/interest. That is they have greater social value and thus there is a greater interest in encouraging their publication.

94 It is not within the scope of this analysis to embark on a detailed evaluation of the remedies available under the present law and any possible reforms. Suffice it to say that an award of damages for a defamatory publication has more to do with punishing the defendant than restoring the plaintiff's reputation.

95 A Henskens, "Defamation and Investigative Journalism in New South Wales: The Evolution of Statutory Qualified Privilege" (1990) 6(3) *Australian Bar Review* 267 at 268.

96 [1984] 2 NSWLR 749.

97 For a more detailed discussion of the courts' response to section 22 and their interpretation of reasonableness, see A Henskens, note 95 *supra* at 269-73.

98 *Ibid* at 360.

99 *Ibid* at 270.

To adopt such an interpretation of s 22 is to effectively equate reasonableness with truth and in so doing deny the defence any form of practical operation.

This should not and need not be the case. The notion of reasonableness implies the need to consider all the circumstances surrounding a publication. Accordingly, the courts should be more prepared to exploit the potential within s 22 to develop jurisprudence which provides a reliable defence for a potentially defamatory publication, the publication of which was reasonable in all the circumstances. Furthermore, the legislature could assist this development by providing the courts with policy guidelines as to the matters to be considered when addressing the issue of reasonableness.[100] As a result, s 22 represents a potentially significant improvement to the common law of defamation in Australia which is otherwise in need of reform.[101]

V. AN ASSESSMENT OF THE DISCUSSION PAPERS AND REPORTS WHICH HAVE REJECTED THE PUBLIC FIGURE TEST

In responding to the need for reform of Australia's defamation laws, numerous groups have explored the possibility of adopting the United States public figure test, most notably the Australian Law Reform Commission (ALRC), Attorneys General of New South Wales, Victoria and Queensland, the New South Wales Legislative Assembly Committee and the New South Wales Law Reform Commission. The conclusion arrived at by each of these groups is that the test should not be adopted.

There were several objections initially raised by the ALRC and Attorneys General, however each is found to be illegitimate for the following reasons. First, it was argued that the test should not be adopted because of the inability to adequately define the position of a public figure.[102] Certainly the US jurisprudence relating to the definition of public figures and officials is ambiguous. However, as Robert Pullan recognises there is:

> ...no reason why what is essentially a simple statutory drafting technique can not be done...once set in statute the demarcation line between public figures and others will not be subject to change in the same way as in the US.[103]

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100 It is beyond the scope of this analysis to provide an exhaustive account of the content of such guidelines. However, as Alister Henskens has pointed out a useful starting point for reasonableness would be the guidelines prepared by the New South Wales Law Reform Commission: *ibid* at 274.

101 The process of law reform is influenced by the underlying political agendas of those involved. In the case of defamation law this includes politicians and the media. This article recognises the vested interest of politicians in maintaining the status quo - to pass laws which allow more free speech runs the risk of greater investigation into the activities of politicians. By the same token, as Geoffrey Robertson explains "one problem in advocating media law reform is that much of it is perceived to be in the interests of the media moguls who already exert an overwhelming influence on our society and politics": G Robertson, note 9 *supra* at 26.

102 ALRC Report No 11, note 2 *supra* at 247; Attorneys General Discussion Paper (1990), note 2 *supra* at 10.

103 R Pullan, "Unfairness is the Rule" (1989-90) 21(4) *Australian Author* 35 at 36.

Second, the test was said to act as a disincentive to involvement in public affairs. The Attorneys General in their 1990 Discussion Paper concluded that that this would occur because of the diminution in legal protection offered to public figures.[104] In fact this objection is underlined by a belief held by the Attorneys General, that a plaintiff who is subject to the test is denied any form of legal redress.[105] This is clearly incorrect. Public figures are still able to achieve legal redress for defamatory statements if they can establish actual malice. Certainly, the burden imposed on such plaintiffs is more onerous, but given that they are involved in public affairs , they should be subject to more scrutiny and criticism.[106]

Third, there was a concern that the test would extend to individuals who became involved in public affairs involuntarily, such as the immediate family members of public figures and officials.[107]

This concern however, is unwarranted. The United States Supreme Court in *Time Inc v Firestone* held that:

> ...any person who does not thrust himself voluntarily into the forefront of any public controversy does not equal a public figure even though their activities attract publicity.[108]

Even in the absence of this decision, such a problem could at least be minimised by excluding such persons from the application of the test in any statutory formulation.

Finally, the diminution in the legal protection for public figures under the test was considered to be an unjustifiable erosion of an individual's privacy.[109] This objection, however, misinterprets the role of defamation law, which is to protect an individual's reputation and not his or her privacy. In response to this criticism and those mentioned above, the Attorneys General produced a second Discussion Paper which also rejected the adoption of the public figure test.

The reasons offered to justify this conclusion however, are not without substance. They included first, the fact that the United States experience under the test has not been satisfactory because there has been no significant decrease in litigation by public figures;[110] and second, the possibility that the defence of statutory qualified privilege already constitutes a de facto public figure test in New South Wales with the advantage that its requirement of reasonableness promotes accurate reporting techniques.[111]

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104 Attorneys General Discussion Paper (1990), note 2 *supra* at 11.

105 *Ibid.* This is also a belief which permeated the ALRC's analysis of the public figure test: ALRC Report No 11, note 2 *supra* at 247.

106 There is judicial support for the proposition that politicians at least should be prepared to accept more criticism than other members of the public. For example the comments of Windyer J in *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 210.

107 Attorneys General Discussion Paper (1990), note 2 *supra* at [4.6], p 10.

108 *Time Inc v Firestone* (1976) 424 US 448.

109 Attorneys General Discussion Paper (1990), note 2 *supra* at 11.

110 Attorneys General Discussion Paper (1991), note 2 *supra* at 16.

111 *Ibid* at 18.

A further report prepared by the New South Wales Legislative Assembly Committee also rejected the adoption of the test because of "the absence of an available forum to many who had been held to a be public figure",[112] a finding which was shared by the New South Wales Law Reform Commission.[113]

These conclusions are consistent with the evaluation of the public figure test as discussed in Parts III and IV. But both the Attorneys General and Legislative Assembly Committee must be criticised for their failure to discuss the merits of the United States law in its abolition of the presumption of falsity. Aside from this limitation, however, the conclusion drawn from this analysis is that the United States public figure test should not be adopted in Australia by either the High Court or any state legislatures. Furthermore, there are two additional arguments for the rejection of the test which were both fully explained in Part III. First, the focus of the test on the plaintiff is discriminatory, inappropriate and unnecessary. Second, the lack of a requirement of reasonableness under the test, condones reporting techniques which do not minimise the likelihood of inaccurate publications.

VI. RECOMMENDATIONS

Whilst the public figure test is not an effective legal device to achieve the increased level of protection for free speech required under the Australian law of defamation, it is submitted that the following four reforms will achieve this result.

(i) The uniform adoption of an equivalent to the defence of statutory qualified privilege as presently exists under NSW law should be available to both media and non media defendants alike.[114]

The effect of adopting this defence would be threefold. First, it would represent a recognition by the law that speech on matters of public concern and interest, is of greater social value and hence the balance of the law must be altered accordingly to provide such speech with greater protection relative to private speech. Second, this required balance would be achieved by focussing on the status of the speech rather than on the status of the plaintiff, and in so doing, the law would avoid a discriminatory rule. Finally, the requirement that a publisher's conduct be reasonable will ensure that publishers employ reporting techniques which will

112 NSW Legislative Assembly Committee, note 2 *supra* at 104-5.

113 New South Wales Law Reform Commission, note 1 *supra* at 185-6.

114 This reform was also recommended by the Attorneys General Discussion Paper (1990), note 2 *supra* at 17, and the ALRC Report No 11, note 2 *supra* at [148]. The ALRC however, was not prepared to extend the application of this defence to media defendants because it believed that to do so "would invisit grave injustice upon persons whose reputation is falsely assailed and who would be without redress simply because their activities are of public importance": *ibid* at [147]. This assertion however, should not be accepted for two reasons: first determination of the availability of the defence on the basis of the defendant's status is discriminatory, and second, a plaintiff is still able to achieve redress if the defendant's conduct is unreasonable.

maximise the likelihood of accuracy thus decreasing the dissemination of falsehoods.

As discussed above however, the present jurisprudence relating to s 22 does not provide a reliable defence for a potentially defamatory publication, the publication of which was reasonable in all the circumstances.[115] This trend could be reversed if the courts adopt a less restrictive interpretation of what is reasonable in all the circumstances and the legislature provides guidelines in relation to those matters to be considered by the courts when addressing the issue of reasonableness.

(ii) The Retention of the Presumption of Falsity

Much deliberation has gone into this recommendation. Initially it was thought that the present presumption of falsity was inappropriate and represented an unnecessary incursion on the presumption in favour of free speech. As a result its abolition would ensure that the law of defamation in Australia would reflect a presumption in favour of free speech.[116] However, the effect of such an approach would be to impose an onerous burden on all plaintiffs and there would be occasions when the falsity of a publication could not be proven.[117] This would leave such plaintiffs with no means of redress at all, and would create the potential for publishers to publish defamatory fictions where they knew that their falsity could not be proven. These possibilities are both unacceptable.

Consequently, it is considered necessary to maintain the presumption of falsity in all defamation actions. It is acknowledged that this creates the potential for self censorship of accurate information because a publisher may suppress information where he or she is unable to prove its truth.

However, this concern is only relevant to private speech. This is because where a matter is one of public interest a defendant need not rebut the presumption of falsity because he or she will escape liability if his or her conduct is reasonable, irrespective of whether the matter is true or false.[118] Moreover, the potential for self censorship of private speech is deemed more appropriate than the alternative, the possible denial of redress for defamatory imputations and dissemination of falsehoods. Private speech is of less social value relative to public speech and therefore warrants relatively less protection. Furthermore, a publisher has an awareness of the consequences of his or her publication and can take measures to ensure that it is not defamatory. On the other hand, a plaintiff normally has no

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115 Note 94 *supra* and accompanying text.

116 This is the case under the US law of defamation as discussed in Part III.

117 As Rodney Smolla explains: "[t]here will always be cases in which the crucible of litigation fails to melt away the lies unconvincingly and leave a dispositive core of truth about the events giving rise to the lawsuit": R Smolla, note 47 *supra* at 1527.

118 It would be difficult however, for a defendant to prove that his or her conduct in publishing the material was reasonable if there was no evidence to suggest that the matter was true. Consequently, the stronger the evidence is to support a belief that the material was true, the greater the likelihood that the defendant's conduct will be considered reasonable.

control over the publication of material that will be injurious to his or her reputation.[119]

(iii) A Declaration of the Truth where Appropriate

This reform is suggested to ensure that the law is better able to achieve its truth seeking function, and more importantly to vindicate a plaintiff's reputation in matters of public concern where the matter is false but the defendant's conduct is held to be reasonable.[120] A declaration of truth could operate in conjunction with existing remedies for defamation and would actually provide a means of vindicating a successful plaintiff's reputation, something an award for damages is unable to do.

Justices Brennan and White of the United States Supreme Court have in fact advocated the need to provide an unsuccessful plaintiff under the United States public figure test with the opportunity to obtain a declaration as to the truth or falsity of statements published about him or her.[121] However, from a practical perspective the use of such a procedure would be limited to defamation actions involving statements of fact rather than comment or opinion.

(iv) Strict Liability is to be Retained in Relation to Matters of Private Concern

Strict liability should be retained in relation to matters of private concern, that is, matters where there is no interest in the recipient receiving the information. To abolish strict liability in relation to matters of private concern alleged to be defamatory, as has occurred in the United States, would create an onerous burden for a plaintiff. This burden is deemed to be inappropriate given the nature and value of the speech.

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119 It is essential to recognise that this analysis is contingent on the state legislatures and courts developing a consistent and unambiguous definition of what constitutes a matter of public concern/interest. It is not simply a matter which the recipient is interested in and relates more to matters that are of concern to a recipient. For example matters relating to representative government. A defendant will have the burden of proving that the matter is one which the recipient had an interest or apparent interest in receiving in order to fall within the defence of statutory qualified privilege. It is suggested that a court be required to ask the question: did the defendant have an honest belief when publishing the matter that it was in the interests of the recipient(s) that he/she/ they receive the information? This subjective standard would then be subject to a bottom line objective standard such that a reasonable person in all the circumstances could believe that it was in the interest, or apparent interest, of the recipient(s), that he/she/they receive the information in question.

120 While it has already been acknowledged that it is beyond the scope of this analysis, it is recommended that the merits of alternative remedies, such as a right to reply or correction order, be examined to determine whether they are more effective means of vindicating a plaintiff's reputation than damages.

121 418 US 323 at 368, per Brennan J; at 401, per White J.

VII. CONCLUSION

Shakespeare may have written that "[r]eputation is an idle and most false imposition; oft got without merit and lost without deserving",[122] but in contemporary society it does represent a legitimate interest of an individual which must be protected by the law. Its protection represents a justified incursion on the presumption in favour of free speech. In affording this protection, however, the law of defamation in Australia has done so at the expense of freedom of expression. More specifically speech on matters of public interest does not receive adequate protection.

The consequent need for reform to redress this imbalance will not be satisfied by the adoption of the United States public figure test. Rather, what is required is the uniform adoption of an equivalent to the New South Wales defence of statutory qualified privilege, combined with a provision for courts to make declarations as to the truth where appropriate. This reform will encourage accurate reporting techniques, provide a less onerous burden for defendants regarding matters of public concern and focus the court's attention on the issue of truth.

122 W Shakespeare, *Othello* (1963) Signet Classic Act II Scene iii, lines 267-269.

Source of Law	Status of Plaintiff	Status of Speech	Burden of Establishing Falsity	Standard	Burden	Media or Non Media Defendant[1]	Declaration of Truth if Applicable
UNITED STATES	public	public	plaintiff	actual malice	plaintiff	uncertain	none
		private	uncertain[2]	uncertain[3]	plaintiff	uncertain	none
	private	public	plaintiff	actual malice	plaintiff	uncertain	none
		private	uncertain	degree fault[4]	plaintiff	irrelevant	none
AUSTRALIA • Common Law	not explicitly recognised	not explicitly recognised[5]	presumption of falsity	strict liability	not applicable	irrelevant	none
• NSW s 22	not explicitly recognised	public	presumption of falsity	reasonableness	defendant	irrelevant	none
		private	presumption of faslity	strict liability	not applicable	irrelevant	none
REFORMS	not explicitly recognised[6]	public	presumption of falsity	reasonableness	defendant	irrelevant	Yes
		private	presumption of falsity	strict	not applicable	irrelevant	Yes

1 Considered here only from the perspective of the relevance of a defendant's status to the question of establishing liability.
2 Potentially the plaintiff. See discussion in main text at note 51.
3 At least fault and probably actual malice given that the US Supreme Court favours the approach that it should be the status of the plaintiff rather than the speech, that invokes the application of the test.
4 At least fault in most US states but actual malice in some states.
5 Outside the context of qualified privilege and the defence of fair comment.
6 The status of the plaintiff will by implication, often determine whether the speech is a matter of public concern/interest.