
Defamation

Introduction

[25.10] The law of defamation seeks to protect individual reputation. Its central problem is how to reconcile this purpose with the competing demands of free speech. Both interests are highly valued in our society, the one as perhaps the most dearly prized attribute of civilised man,¹ the other the very foundation of a democratic community. This antithesis is particularly acute when the matter at issue is one of public or general interest. Not surprisingly, the balance has shifted over the years, generally in favour of freer flow of information and criticism. The balance is also struck differently between different legal systems with a common origin.² What constitutes the correct balance between freedom of speech and the protection of reputation is always contestable and varies from time to time and from place to place.

The complex web of checks and balances which characterises the contemporary law of defamation can be explained in part as the law's – however inadequate – attempt to come to terms with this difficult dilemma. But it also bears the scars of old and long-forgotten battles. The upshot is a patchwork of rules, many of which had their origin in false starts and later attempts to correct previous errors. There have been ongoing attempts to reform defamation law over several decades.³ The need for such reforms in Australia was acute. Across Australia, eight substantively different defamation jurisdictions existed – some codified defamation law, some substantially modified the common law by statute⁴ whilst in others the common law largely prevailed. In a country with a relatively small population, in which national media had become a pervasive reality and in which internet technologies are not limited by geographical boundaries, such legal diversity was unsustainable. Notwithstanding several, previous, unsuccessful attempts at reform,⁵ a further attempt was made in 2004. This process culminated with all Australian States and Territories passing substantially uniform defamation laws – an historic

1 As to reputation, see Post, “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) 74 Cal LR 691; Rolph, “Dirty Pictures: Defamation, Reputation and Nudity” (2006) 10 *Law Text Culture* 101; McNamara, *Reputation and Defamation* (2007); Rolph, *Reputation, Celebrity and Defamation Law* (2008).

2 See, for example, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 614 (Kirby J), at 651 (Callinan J).

3 In post-war Britain, there have been two systematic inquiries: the Porter (1948) and the Faulks Committees (1975); in Australia the ALRC (1979) and the NSWLRC (1971 and 1995); in New Zealand, the Committee on Defamation (1977).

4 As to defamation codes, see *Defamation Act 1889* (Qld) (repealed); *Defamation Act 1957* (Tas) (repealed). As to defamation legislation, see *Defamation Act 1974* (NSW) (repealed).

5 Such as the ALRC's *Unfair Publication* (1979) and the proposal by Attorneys-General of Queensland, New South Wales and Victoria (1992).

event.⁶ The national, uniform defamation legislation significantly harmonises substantive defamation law. Importantly, though, it does not codify defamation law, but co-exists with the common law, amending it in places. As a result, defamation law remains complex and further reform may yet prove necessary.

Cause of action

What is defamatory?

[25.20] There is unfortunately no single test for what is defamatory. A defamatory statement may be defined as one which tends to lower a person in the estimation of his or her fellows by making them think the less of him or her. Frequently, it takes the form of an imputation calculated to bring the plaintiff “into hatred, contempt or ridicule”,⁷ whether by direct statement, irony, caricature or any other means; but it is not necessary that the words have the tendency to excite feelings of disapprobation, provided they cause him to be shunned and avoided. To say of a man that he is insane⁸ or of a woman that she has been raped⁹ does not arouse sentiments of animosity but rather sympathy and pity in the minds of decent people. Yet such assertions are defamatory because, without suggesting discreditable conduct, they impute to the plaintiff a condition calculated to diminish the respect and confidence in which he or she is held. A person’s standing in the community, taking people as they are with their prejudices and conventional standards, is just as likely to be impaired by an attribution of misfortune as of contemptible conduct. In this matter, it is to shut one’s eye to realities to indulge in nice distinctions.¹⁰

Defamation is thus not limited to aspersions upon an individual’s private character – his or her reputation for honour, honesty or integrity – but embraces also disparagements of his or her reputation in trade, business, profession or office. Thus it may be defamatory to attribute authorship of an inferior book to a prestigious writer¹¹ or to accuse a doctor,¹² architect¹³ or official of incompetence,¹⁴ or even a politician of having lost the confidence of his

6 See *Civil Law (Wrongs) Act 2002* (ACT), Ch 9; *Defamation Act* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA). See further Rolph, “A Critique of the National, Uniform Defamation Laws” (2008) 16 TLJ 207.

7 Parke’s B definition in *Parmiter v Coupland* (1840) 6 M & W 105; 151 ER 340 at 108 (M & W), 341 (ER). Does it include ridicule, which does not disparage reputation? Saying that a person is ugly may, given the context, just qualify: *Berkoff v Burchill* [1996] 4 All ER 1008 (CA). For positive answers, see *Boyd v Mirror Newspapers* [1980] 2 NSWLR 449; *Ettingshausen v Aust Consol Press* (1991) 23 NSWLR 443; *McDonald v North Queensland Newspaper* [1997] 1 Qd R 62. See too Watterson, “What is Defamatory Today?” (1993) 67 ALJ 811 at 818-827.

8 *Morgan v Lingen* (1863) 3 LT 800.

9 *Youssouppoff v M-G-M* (1934) 50 TLR 581.

10 *Youssouppoff v M-G-M* (1934) 50 TLR 581 at 587 (Slessor LJ).

11 *Ridge v English Illustrated Magazine* (1913) 29 TLR 592. Similarly, to publish a mutilated edition of an author’s work: *Lee v Gibbings* (1892) 67 LT 263.

12 *Mirror Newspapers v Jools* (1985) 5 FCR 507; *Drummond-Jackson v BMA* [1970] 1 WLR 688 (CA); *Rogers v Nationwide News* (2003) 216 CLR 327.

13 *Andrews v Fairfax* [1980] 2 NSWLR 225 (“building looks like a sieve”).

14 *Pratten v Labour Daily* [1926] VLR 115; *Potts v Moran* (1976) 16 SASR 284. Contra: *Boyd v Mirror Newspapers* [1980] 2 NSWLR 449 (rugby player “fat and cumbersome”).

party.¹⁵ It is vital to bear in mind, though, for the purposes of defamation law, the aspersions have to reflect upon the individual's trade, professional or business *reputation*. Disparagement of an individual's goods or business, as opposed to his or her trade, professional or business reputation, can support a cause of action for injurious falsehood, but not defamation.¹⁶

The question of what standard to apply in determining whether a statement is defamatory has not been answered uniformly.¹⁷ The criterion commanding the widest verbal support seems to be the reaction aroused in citizens of "fair average intelligence"¹⁸ or "ordinary decent folk in the community, taken in general".¹⁹ This test is not identical with "reasonable", still less with "ideal". Thus it was held defamatory to impute to a lady that she had been raped;²⁰ so also, depending on time and place,²¹ to call someone a German,²² a Communist,²³ a Jew,²⁴ an anti-Semite,²⁵ a scab²⁶ or a homosexual.²⁷ The increasing diversity of beliefs and attitudes in modern Australian society precludes an appeal to a single standard of "right-thinking" people²⁸ and suggests as sufficient that the allegation was calculated to stir up adverse feelings among a substantial and respectable group of the community, though not in other quarters.²⁹ Thus to call a doctor an abortionist would be defamatory in the estimation of all "right to life" advocates, without so much as a suggestion that she was an *unlawful* abortionist.³⁰

On the other hand, it is not sufficient that the words are regarded as prejudicial by only a small minority whose standards are so anti-social that it would not be proper for courts to recognise them. This reservation has been used to support the questionable conclusion that it is never defamatory to accuse

15 *Fairfax v Punch* (1980) 31 ALR 624.

16 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 468-469 (French CJ, Gummow, Kiefel and Bell JJ). There is no separate category of "business defamation": *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 476 (French CJ, Gummow, Kiefel and Bell JJ), contra *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 681-683 (Beazley JA).

17 See also below, [25.40] (interpretation).

18 *Slatyer v Daily Telegraph* (1908) 6 CLR 1 at 7 (Griffith CJ). See also *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 467 (French CJ, Gummow, Kiefel and Bell JJ).

19 *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at 172 (Jordan CJ). So "meaning" in general is that of "ordinary sensible" persons (see below, [25.40]).

20 *Youssouppoff v MGM* (1934) 50 TLR 581. As to whether this case would be decided in the same way today, cf *Krabe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536 at 546 (Hunt J); *Galea v Amalgamated Television Services Pty Ltd* (unreported, SC (NSW), Levine J, 20 February 1998).

21 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 109 (Kirby J).

22 *Slazengers Ltd v Gibbs* (1916) 33 TLR 35.

23 See *Cross v Denley* (1952) 52 SR (NSW) 112; *Braddock v Bevins* [1948] 1 KB 580; *Brannigan v Seafarers' Union* (1963) 42 DLR (2d) 249.

24 *Camrose v Action Press* (unreported, 1937).

25 *De Stempel v Dunkels* [1938] 1 All ER 238; *Templeton v Jones* [1984] 1 NZLR 448.

26 *Murphy v Plasterers Society* [1949] SASR 98; *Ellis v Grant* (1970) 91 WN (NSW) 920 (particulars ordered because of multiple meanings).

27 *R v Bishop* [1975] QB 274 at 281. However, see now *Horner v Goulburn City Council* (unreported, SC (NSW), Levine J, 5 December 1997); *Rivkin v Amalgamated Television Services* [2001] NSWSC 432; *Kelly v Fairfax* [2003] NSWSC 586.

28 A test endorsed by Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669 at 671.

29 *Hepburn v TCN Channel Nine* [1983] 2 NSWLR 682 (CA).

30 *Hepburn v TCN Channel Nine* [1983] 2 NSWLR 682 at 694 (Glass JA). But to call a doctor performing lawful abortions a "murderer"?: *Grundmann v Georgeson* (1996) Aust Torts Reports ¶ 81-396.

someone of giving information to the police even if the community's attitude to the particular type of informer is one of contempt – on the specious ground that to hold it defamatory would be condoning the alleged offence, like the keeping of gambling machines.³¹ Under the standard of the “right-thinking” person, the question becomes, not what most people in fact think of informers, but what they *should* think. This is not only inconsistent with the ordinary practice of deferring to actual community attitudes however prejudiced,³² but confuses the courts' duty to enforce all crimes alike with the accepted purpose of the law of defamation to protect individuals against (false) allegations calculated to lower them in the esteem of their fellows.

Defamation can be conveyed in any number of styles. What matters is the tendency of the utterance, not its form. Ridicule, for example, is a familiar weapon for attacking reputation, as by juxtaposing the plaintiff's portrait with that of a gorilla in a magazine article³³ or by publishing a photo of him in what is or appears to be an obscene posture.³⁴ On the other hand, if the expression is so extravagant that it cannot be regarded as going to character³⁵ or is made as a harmless joke and is so understood, its defamatory barb may thereby disappear, as when one smilingly greets another with the words, “How are you, you old horse thief?”

It is often said that mere vulgar abuse or insulting name-calling does not qualify as defamation. This must be understood in the sense that vituperative epithets are frequently insulting to pride rather than disparaging reputation. If intended as mere abuse and so understood by the hearer, such remarks are not actionable at common law,³⁶ unless accompanied by physical aggression amounting to assault or calculated to cause and in fact resulting in psychiatric or other physical injury.³⁷ Much, of course, depends on the manner and surrounding circumstances in which the words are spoken.³⁸ The same remark may be slander or insult according to whether it is made with due deliberation or bawled out at the height of a violent quarrel. Hence there is less occasion for drawing the distinction in cases of written, as distinct from spoken, words because they usually convey the impression of calculated reflection and are more easily understood as discrediting rather than just insulting.³⁹

Not all falsehoods calculated to injure are defamatory: defamation is confined only to those striking at character or reputation. The dividing line is sometimes delicate, and (subject to the usual judicial control) is for the jury to decide. A disparaging remark concerning the quality of merchandise may or may

31 *Rest 2d*, s 559, cmt e respects “substantial and respectable” minority views but would agree with *Byrne v Deane* [1937] 1 KB 818 and *Mawe v Pigot* (1869) 4 Ir RCL 54 which refused to condone anti-social views like contempt for police informers. The cases are criticised by Fricke, “Criterion of Defamation” (1959) 32 ALJ 7.

32 *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at 578 (Kirby J).

33 *Zbyszko v New York American* 239 NYS 411 (1930).

34 *Burton v Crowell Publishing Co* 82 F 2d 154 (2d Cir 1936); *Ettingshausen v Aust Consol Press* (1991) 23 NSWLR 443; *McDonald v North Queensland Newspaper* [1997] 1 Qd R 62.

35 *Gwynne & Small v Wairarapa* [1972] NZLR 586 (protest marchers likened to “Hitler's puppets”); *Coleman v Fairfax* [2003] NSWSC 564; *John v Guardian News and Media* [2008] EWHC 3066 (QB).

36 *Munday v Askin* [1982] 2 NSWLR 369 (“vermin”); *Hoebgen v Koppens* [1974] 2 NZLR 597 at 601 (“Dutch bastard”). See also *Bennette v Cohen* (2005) 64 NSWLR 81 at 97-98 (Bryson JA).

37 As in *Wilkinson v Downton* [1897] 2 QB 57; above, [2.xxx].

38 See *Penfold v Westcote* (1806) 2 B & P (NR) 335; 127 ER 656.

39 The point was not taken in *Theaker v Richardson* [1962] 1 WLR 151.

not import a reflection on the plaintiff's conduct of his business; to say that *all* his goods are shoddy undoubtedly would; not so, however, that one particular article was defective.⁴⁰ So, to say that someone is seriously ill is not defamatory in the absence of an innuendo that he is malingering.⁴¹ The distinction is important because non-defamatory falsehood is not actionable at common law unless made with intent to injure and actual damage be proved,⁴² whereas liability for defamation attaches irrespective of fault and mostly regardless of whether actual injury be shown. In the result, it is easier to sue for a falsehood that imputes to the plaintiff some peccadillo than for one alleging that he or she has ceased to carry on business⁴³ or ascribing to a parliamentary candidate political beliefs he or she does not profess. Formerly, the defamation codes, however, treated the last-mentioned falsehoods as defamatory by including "imputations concerning any person by which he is likely to be injured in his *profession or trade*"⁴⁴ but this has not been replicated under the national, uniform defamation laws.

Actions for defamation remain the sole remedy for vindicating reputation.⁴⁵ Thus damages for loss of reputation are not recoverable in an action for injurious falsehood⁴⁶ or for conspiracy.⁴⁷ In addition, the prevailing view in Australia is that a cause of action in negligence for pure economic loss or psychiatric harm is not available where defamatory statements are made about the plaintiff.⁴⁸

Who may be defamed?

[25.30] Any living person may be defamed, but no action lies for defamation of the dead, however distressing to relatives and friends: neither do they have a derivative cause of action for defamation nor a direct claim for injury to their feelings.⁴⁹ Indeed, reputation is regarded as so "personal" an attribute that an action for defamation does not survive for the benefit of the plaintiff's estate.⁵⁰

40 See *Drummond-Jackson v BMA* [1970] 1 WLR 688 (CA) (attack on dentist's technique may be defamatory); *South Hetton Coal v NE News* [1894] 1 QB 133 at 139; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 468-69 (French CJ, Gummow, Kiefel and Bell JJ).

41 *Grappelli v Block* [1981] 1 WLR 822.

42 *Ratcliffe v Evans* [1892] 2 QB 524; see below, [30.xxx].

43 *Dawson v Mirror Newspaper* [1979] 1 NSWLR 16.

44 This expansive construction was established in *Hall-Gibbs v Dun* (1910) 12 CLR 84; reaffirmed in *Sungravure v ME Airlines* (1975) 134 CLR 1; *Mirror Newsp v World Hosts* (1979) 141 CLR 632. See Watterson, "What is Defamatory Today?" (1993) 67 ALJ 811 at 813-817; also Chapter 28 Misrepresentation, ch 30 Economic Relations.

45 *Foaminol Laboratories v British Artid Plastics* [1941] 2 All ER 393 (Hallett J).

46 *Joyce v Sengupta* [1993] 1 All ER 897 (CA). Defamation not covered by legal aid.

47 *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489 (CA). To escape the defence of truth.

48 *Sullivan v Moody* (2001) 207 CLR 562 at 580-81 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame v New South Wales* (2002) 211 CLR 317 at 335 (Gleeson CJ), at 361 (McHugh J). See also the position under New Zealand law: *Bell-Booth Group v A-G* [1989] 3 NZLR 148; *Balfour v A-G* [1991] 1 NZLR 519. Contrast the position under United Kingdom and Canadian law: *Spring v Guardian Assurance* [1995] 2 AC 296; *Young v Bella* (2006) 261 DLR (4th) 516. The position would be different in the statements were true: *GS v News* (1998) Aust Torts Reports ¶ 81-466.

49 See *Defamation Act 2005* (NSW), s 10 and equivalent provisions in the remaining jurisdictions, except in Tasmania. As to the potential effect of this provision, see Rolph, "A Critique of the National, Uniform Defamation Laws" (2008) 16 TLJ 207 at 221.

50 Below, [29.xxx] Domestic Relations.

A defamatory statement primarily directed against a dead person may, of course, involve a slur on the living, as by impugning a person's parentage by calling his dead mother a whore.⁵¹

At common law, partnerships and corporations may vindicate attacks upon their reputations.⁵² Similarly, a professional association⁵³ or trade union⁵⁴ may vindicate its "governing" or "professional" reputation; not, however, an organ of government (whether central or local), public discussion of whose activities, as distinct from individual members' should not be impeded, for the sake of free speech.⁵⁵ The position of government trading corporations remains unclear, but they may well be able to sue for actual identifiable financial loss, or at least the probability of financial loss.⁵⁶

A non-governmental corporation may accordingly now complain of libels affecting not only property, but also its institutional reputation, though it obviously cannot recover damages for hurt feelings.⁵⁷ True, the libel must have been directed against itself rather than against its individual officers. But a corporation itself can be guilty of misconduct *through* its officers, and such an imputation may qualify as a libel actionable in its own right. Thus a trade union successfully sued for being accused of deliberately rigging a ballot of its members.⁵⁸

The common law position with respect to corporations has now been substantially altered by the national, uniform defamation laws. Corporations can now no longer sue for defamation⁵⁹ unless they are not-for-profit⁶⁰ or employ fewer than ten full-time⁶¹ employees.⁶² The right of those individuals involved with corporations to sue for defamation is specifically preserved, so long as the aspersions made against the corporation reflect upon their personal, professional or business reputations.⁶³ The stated reasons for restricting the

51 *Livingstone-Thomas v Assoc Newspapers* (1969) 90 WN (Pt 1) (NSW) 223 at 235; cf *Krahe v TCN Channel Nine* (1986) 4 NSWLR 536 at 541 (Hunt J); *Galea v Amalgamated Television Services* (unreported, SC (NSW), Levine J, 20 February 1998).

52 *Todd v Swan Television and Radio Broadcasters* (2001) 25 WAR 284 (partnerships); *Lewis v Daily Telegraph* [1964] AC 234; *Australian Broadcasting Commission v Comalco* (1986) 12 FCR 510 (corporations).

53 *Sask College of Physicians v CCF Publishers* (1965) 51 DLR (2d) 442.

54 *National Union v Gillian* [1946] KB 81 (nullified by English legislation: *Electrical Union v Times Newspaper* [1980] QB 585); *Pulp & Paper Workers v International Brotherhood* (1973) 37 CLR (3d) 687 ("Communist Front organisation").

55 *Derbyshire CC v Times Newspaper* [1993] AC 534; *Ballina Sh v Ringland* (1994) 33 NSWLR 680 (CA) (aliter, injurious falsehood); *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300.

56 See different views expressed in *Ballina Sh v Ringland* (1994) 33 NSWLR 680 (CA).

57 *Lewis v Daily Telegraph* [1964] AC 234 at 262 (Lord Reid); *Australian Broadcasting Commission v Comalco* (1986) 12 FCR 510.

58 *Willis v Brooks* [1947] 1 All ER 191; and see *National Union v Gillian* [1946] KB 81.

59 See *Defamation Act 2005* (NSW), s 9(1) and equivalent provisions in the remaining jurisdictions.

60 See *Defamation Act 2005* (NSW), s 9(2)(a) and equivalent provisions in the remaining jurisdictions.

61 See *Defamation Act 2005* (NSW), s 9(3) and equivalent provisions in the remaining jurisdictions.

62 See *Defamation Act 2005* (NSW), s 9(2)(b) and equivalent provisions in the remaining jurisdictions.

63 See *Defamation Act 2005* (NSW), s 9(5) and equivalent provisions in the remaining jurisdictions.

right of corporations to sue for defamation include the assertion that the tort was intended to protect personal reputation, which is not borne out by the history of defamation law. It was also suggested that corporations could abuse defamation law to “chill” the exercise of free speech by individuals. Corporations might also be better resourced than individuals to use extra-legal means of repairing their damaged reputations, for example through advertising campaigns. In addition, they were able to rely on other causes of action, such as injurious falsehood or misleading or deceptive conduct under the *Australian Consumer Law*, s 18 (Sch 2 of the *Competition and Consumer Act 2010* (Cth) formerly *Trade Practices Act 1974* (Cth), s 52 and cognate State and Territory fair trading legislation) which lacked the forensic advantages of a defamation action, namely the presumption of damage and the presumption of falsity.⁶⁴ This reform might have unintended consequences. For instance, if corporations cannot sue for defamation, they are not subject to the restrictive approach to injunctive relief characteristic of this tort.⁶⁵ Corporations, compelled to rely on other causes of action, will find it easier to obtain an injunction to restrain publication based on one or more of those other causes of action. The restriction on the right of corporations to sue for defamation, motivated in part by a concern that corporations can potentially inhibit the exercise of free speech, might allow corporations actually to stop that speech altogether.⁶⁶

Interpretation

[25.40] Frequently words are ambiguous or capable of being understood in several senses, defamatory in one but not another. What meaning is to be attached to them: that intended by the author? that understood by the addressee? or some tertium quid?

The first (intended meaning) was long ago disqualified: one may be liable though innocent of any intention to defame.⁶⁷ The second (comprehended meaning) seems most compatible with the purpose of damages being to compensate for actual injury, provided only that to understand the words in a defamatory sense was not unreasonable. In some respects, indeed, this test is important. The words, for example, must have been published to someone capable of understanding them in a defamatory sense, not in a foreign language he could not comprehend.⁶⁸ So also, if the words are not defamatory on their face but only with the aid of additional information, they must have been published to someone with that information.⁶⁹ Otherwise, however, the quaint dogma prevails that the words must be understood in their “natural and ordinary” meaning, in defiance of the plain semantic truth that it is futile to look

64 SCAG Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws*, [4.5].

65 Below, [x.xxx].

66 See, for example, *Beechwood Homes (NSW) Pty Ltd v Camenzuli* [2010] NSWSC 521.

67 Below, [25.xxx].

68 Below, [25.90].

69 Below, [25.90].

for any single meaning as being the “right” meaning.⁷⁰ Thus, testimony as to how the words were actually understood is irrelevant, perhaps even inadmissible.⁷¹

At one time bent on discouraging actions for slander, courts insisted that oral words be interpreted in their most favourable sense and that the plaintiff negative any innocent meaning they might bear.⁷² Thus it would not have been actionable to say of a man that he married his aunt, for she could conceivably have been his uncle’s widow. But this artificially restrictive approach has long been abandoned under the influence of the more liberal rules of libel, and all expressions however published now fall to be scrutinised for any damaging meaning that would be put on them by “ordinary sensible men [or women]”⁷³ who strike the golden mean of being neither unusually suspicious nor unusually naive.⁷⁴ “The ordinary reasonable reader does not, we are told, live in an ivory tower. He can, and does, read between the lines, in the light of his general knowledge and experience of worldly affairs. He is a layman, not a lawyer, and his capacity for implication is much greater than that of a lawyer. Especially in newspaper cases, he is understandably prone to engage in a certain amount of loose thinking. On the other hand, the reader of a book would read it with more care than he would a newspaper. But in both cases, there is also a very wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words are imprecise, ambiguous, loose, fanciful or unusual.”⁷⁵

For example, different interpretations can be placed upon the common statement that a person has been charged with crime. It might or might not carry the additional imputation that reasonable grounds exist for suspecting that he committed the offence, or the even more damaging imputation that the charge is well founded.⁷⁶ The same goes for an announcement that the plaintiff has ceased to be an employee or agent of the declarant.⁷⁷ As Lord Devlin warned, “a man who wants to talk at large about smoke may have to pick his words very

70 See *Slim v Daily Telegraph* [1968] 2 QB 157 at 171-174 (Diplock LJ). The “single meaning” rule does not apply to injurious falsehood: *Ajinomoto Sweeteners Europe SAS v Asda Stores* [2010] EWCA Civ 609.

71 *Toomey v Fairfax* (1985) 1 NSWLR 291 (on the spurious ground that it would encroach on the jury function). Cf Diplock LJ’s scornful comments in *Slim v Daily Telegraph* [1968] 2 QB 157 at 177ff. Yet allowance is made for the fact that words may have a secondary “ordinary” meaning: below, [25.60].

72 Known as the “mitior sensus” rule, it disappeared under Holt CJ in the early 18th century. Extravagant examples are *Holt v Astgrigg* (1607) Cro Jac 184; 79 ER 161; *Foster v Browning* (1625) Cro Jac 688; 79 ER 596.

73 *Lewis v Daily Telegraph* [1964] AC 234 at 286 (Lord Devlin).

74 *Lewis v Daily Telegraph* [1964] AC 234 at 259 (Lord Reid).

75 *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 (Hunt J), distilling a series of descriptions from prior case law. See also *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158 at 165 (Hunt CJ at CL).

76 *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669 at 676. Upon its precise meaning will depend how it can be justified: below, [25.190].

77 For example, *Munro v Coyne* [1990] WAR 333 (FC).

carefully if he wants to exclude the suggestion that there is also a fire. ... Loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.”⁷⁸

Meaning cannot be discovered without regard to the context of the expression. However disparaging at first blush, it may reveal its complete innocence if explained in the light of the circumstances attending its publication. The publication must be taken as a whole, not the offending passage isolated from the rest: the bane without the antidote. As when a libel was repeated in the report of a verdict the plaintiff obtained against the libeller.⁷⁹ Similarly, offending headlines must be read in conjunction with explanatory text which draws the sting of the libel, even if it be granted that a sizable number of readers would not read that far.⁸⁰ Particularly, the meaning of oral words can never be divorced from the speaker’s gesture, tone of voice and facial expression. “One recalls the instance of the lady who in a West End drawing-room accused a noble lord of being a thief, but when one is told that she said, with a smile, ‘Lord X, you are a thief, you have stolen my heart’ one recognises that to call a person a thief is not necessarily actionable.”⁸¹

Innuendo

[25.50] Conversely, an apparently innocent statement may well hide a defamatory barb. Such a secondary meaning may be derived either from the words themselves by “reading between the lines”, as it were, or with the aid only of additional, extrinsic information. For example, a report that the police are investigating a certain individual may be understood to imply that there is reason to suspect him of crime. By contrast, a newspaper notice mistakenly announcing that the plaintiff has given birth to twins is wholly innocuous, howsoever read, until it appears from elsewhere that she was married only four weeks before;⁸² an erroneous identification of a woman as “Mrs X” looks utterly harmless in the absence of an explanation that X is really married to someone else;⁸³ and displaying the model of the plaintiff in a waxwork exhibition assumes a distinctly derogatory connotation only in the light of the additional fact that the figure was juxtaposed to three criminals and immediately adjoining the “Chamber of Horrors”.⁸⁴

To lawyer and layperson alike, all types of secondary meaning have come to be known as “innuendos”. In order to be on the safe side the practice developed early of pleading an innuendo whenever the defamation was not absolutely

78 *Lewis v Daily Telegraph* [1964] AC 234 at 285. Eg *Hayward v Thompson* [1982] QB 47 (CA); *Favell v Queensland Newspapers* (2005) 221 ALR 186; (2005) 79 ALJR 1716; [2005] HCA 52. See also *Morris v Sanders* [1954] 1 WLR 67 (employees “dismissed”); *Baker v Australian & NZ Bank* [1958] NZLR 907 (cheque returned “present again”); *Church of Scientology v Anderson* [1980] WAR 71 (“evading taxes”).

79 *Chalmers v Payne* (1835) 2 Cr M & R 156; 150 ER 67; *Morosi v 2GB* [1980] 2 NSWLR 418n. But mere contradiction or expressions of doubt do not necessarily justify repetition.

80 *Charleston v News Group* [1995] 2 AC 65: another illustration of the spurious single-meaning rule. See also the criticisms of Kirby J in *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at 574-575.

81 *Broome v Agar* (1928) 138 LT 698 at 702 (Sankey LJ).

82 *Morrison v Ritchie* (1902) 4 F 645; *Bell v N Constitution* [1943] NI 108.

83 *Cassidy v Daily Mirror* [1929] 2 KB 331; *Hough v London Express* [1940] 2 KB 507. For innuendo of identification see also below, [25.xxx].

84 *Monson v Tussauds* [1894] 1 QB 671.

explicit.⁸⁵ Somewhat perplexingly, however, a “true” innuendo (in the technical sense of a separate cause of action, with distinct verdict) is now confined to those derogatory implications alone which require the aid of extrinsic evidence.⁸⁶

Judge and jury

[25.60] Ever since Fox’s *Libel Act 1792* it has been looked upon as a staunch safeguard of democratic liberty that the issue of “libel or no libel” be within the exclusive province of the jury.⁸⁷ Indeed, so entrenched is this principle that the widespread scepticism regarding jury participation in civil litigation has, until recently, only partly affected their function in this respect in defamation cases. Under the national, uniform defamation laws, trial by jury in a defamation case is no longer a right. Some jurisdictions do not allow for juries at all in defamation cases.⁸⁸ In the remaining jurisdictions, either party may elect to have a jury. If no election is made, the trial proceeds by judge alone.⁸⁹ If a jury is empanelled, it determines defamatory meaning and any issues of fact relating to defences but, importantly, does not assess any damages payable.⁹⁰ Juries will continue to be involved in defamation litigation in the future, in those Australian jurisdictions where they are available, although clearly not to the extent that they have in the past.

But the exercise of this function is, as always, subject to judicial control. For not unless the court is first satisfied that the words are reasonably capable of bearing the defamatory meaning ascribed to them by the plaintiff, would the jury be allowed to pass upon whether, in their opinion, they so bear it.

The discharge of this preliminary function calls for the exercise of restraint, lest the jury be ousted from a task entrusted to it on high constitutional grounds. In the past there was, it is true, a tendency to give perhaps undue weight to a

85 The pleading would allege that the words “meant and were understood in their natural and ordinary meaning ...”. “Popular” or “false” innuendos must still be pleaded or particulars will be ordered when words are capable of multiple meanings: *Barclay v Cox* [1968] VR 664; *DDSA v Times Newspapers* [1973] QB 21; *Australian Consolidated Press v Rogers* [1971] 1 NSWLR 682; *James v NZ Tablet* [1976] 2 NZLR 545. The extent to which a plaintiff is bound by the particularised meanings he or she identified is a controversial issue, which has arisen in the context of the availability of the *Polly Peck* pleading or defence in Australian law. See below, [x.xxx].

86 *Lewis v Daily Telegraph* [1964] AC 234; *Bowles v Truth* (NZ) [1965] NZLR 768; *Reader’s Digest Services v Lamb* (1982) 150 CLR 500 at 505 (Brennan J). The “separate cause of action” theorem was criticised by the Faulks (at [104]) and New South Wales (at [50]) Committees and rejected for Queensland in *Composite Buyers v Clarke* [1988] 2 Qd R 602 (FC).

87 The Act applied in terms only to criminal cases but its principle was extended to civil claims.

88 Namely, the Australian Capital Territory (*Supreme Court Act 1933* (ACT), s 22); the Northern Territory (*Juries Act* (NT), s 6A); and South Australia (*Juries Act 1927* (SA), s 5). The Northern Territory used the occasion of the introduction of the national, uniform defamation laws to abolish juries in defamation cases: see Rolph, “A Critique of the National, Uniform Defamation Laws” (2008) 16 TLJ 207 at 226.

89 See *Defamation Act 2005* (NSW), s 21 and equivalent provisions in the remaining jurisdictions, except for the Australian Capital Territory, the Northern Territory and South Australia.

90 See *Defamation Act 2005* (NSW), s 22 and equivalent provisions in the remaining jurisdictions, except for the Australian Capital Territory, the Northern Territory and South Australia.

possible innocent meaning.⁹¹ Today, however, as already noted, the courts will only reject those “meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation”.⁹² If judges should exercise sparingly the power of withdrawing a case from the jury, appellate courts should be all the more reluctant to interfere with verdicts except in the most egregious cases.⁹³ Previously, it was only when the words were characterised as necessarily defamatory⁹⁴ or palpably innocent⁹⁵ or the jury verdict was “perverse” that a court was justified in setting aside a contrary finding. Recently, Australian courts have rejected a test cast in terms of “perversity”,⁹⁶ instead applying a test of unreasonableness. Thus, they have been more willing to set aside a jury verdict on the ground that it was one that no reasonable jury could have reached, but they remind themselves of the need for appellate restraint before they do so.⁹⁷

Reference to the plaintiff

[25.70] A defamatory statement is not actionable unless published “of and concerning” the plaintiff. True, he or she need not be specifically mentioned or identified, nor need there be so much as a “peg or pointer”,⁹⁸ so long as the tenor reasonably implicates him or her. For instance, to say that A (a married man) is a bachelor⁹⁹ or a cuckold¹⁰⁰ may defame his wife. But to allege that A’s father became a psychiatric patient does not injure A’s reputation, however it may injure his filial feelings.¹⁰¹

The test for identification is the same as for defamatory meaning: *not* “did the defendant intend to aim at the plaintiff”,¹⁰² but “would a *sensible* reader

91 For example, *Capital & Counties Bank v Henty* (1882) 7 App Cas 741 (“the principles were never better formulated nor perhaps ever worse applied”: *Slim v Daily Telegraph* [1968] 2 QB 157, 187).

92 *Jones v Skelton* [1964] NSWLR 485; [1963] 1 WLR 1362 at 491 (NSWR), 1370 (WLR) (PC).

93 *Cairns v Fairfax* [1983] 2 NSWLR 708 (upholding defence verdict).

94 *Gwynne & Small v Wairarapa Times Age* [1972] NZLR 586.

95 *Somers v Fairfax* (1879) 2 SCR (NS) (NSW) 140 at 144.

96 *John Fairfax Publications v Rivkin* (2003) 201 ALR 77 at 78 (Gleeson CJ), at 103-04 (Kirby J), at 129 (Callinan J).

97 See, for example, *John Fairfax Publications v Rivkin* (2003) 201 ALR 77; [2003] HCA 50; *Gorman v Barber* (2004) 61 NSWLR 543; [2004] NSWCA 402; *John Fairfax Publications v Gacic* (2007) 230 CLR 291; [2007] HCA 28; *Channel Seven Sydney v Mohammed* (2008) 70 NSWLR 669; [2008] NSWCA 21. See also Rolph, “Perverse Jury Verdicts in New South Wales Defamation Trials” (2003) 11 TLJ 28; Rolph, “Simple Questions, Difficult Juries: Perversity in Australian Defamation Trials After *John Fairfax Publications Pty Ltd v Rivkin*” (2004) 18(3) *Commercial Law Quarterly* 9.

98 *Morgan v Odhams Press* [1971] 1 WLR 1239 (HL). Still less is there any shelter behind pseudonyms (*J Anson v Stuart* (1787) 1 TR 748; 99 ER 1357) or the familiar blurb that the “characters and incidents in this book are fictional and have no reference to any person living or dead” (*Corrigan v Bobbs-Merrill Co* 126 NE 260; 10 ALR 662 (NY 1920)).

99 See *Cassidy v Daily Mirror* [1929] 2 KB 331; *Hough v London Express* [1940] 2 KB 507.

100 *World Hosts v Mirror Newspaper* [1976] 1 NSWLR 712 at 727 (affd 141 CLR 632) where “reflective imputation” is fully discussed. But vice versa? *Krahe v TCN* (1986) 4 NSWLR 536.

101 *Livingstone-Thomas v Assoc Newspapers* (1969) 90 WN (Pt 1) (NSW) 223 (CA). The old Code definition of defamatory matter (“concerning any person, or any member of his family” under the *Defamation Act 1958-1974* (NSW) (repealed)) is not credited with any difference.

102 Below, [25.xxx].

reasonably identify the plaintiff as the person defamed?”¹⁰³ Here also the standard of reasonableness is not high: the ordinary reader of a newspaper article, especially of the sensational variety, is not expected to read “with cautious and critical analytical care”,¹⁰⁴ he or she may read “casually and not expecting a high degree of accuracy”¹⁰⁵ and indulge “in a certain amount of loose thinking”¹⁰⁶ and even “rather far-fetched inferences”.¹⁰⁷ Evidence of witnesses that they believed the defamation to refer to the plaintiff is certainly admissible, even necessary when identification depends on special knowledge of the plaintiff, but it is of course not conclusive. There has been an increasing latitude not only in the relevant standard but also in passing the issue to the jury. Thus it was deemed sufficient to link the plaintiff with a kidnapping gang merely because he had been seen with the victim about that time,¹⁰⁸ and to link another plaintiff with a large scale wheat theft because she was engaged in the wheat business in the area and had a criminal record of dishonesty.¹⁰⁹ Since liability is not dependent on fault,¹¹⁰ this liberality imposes a correspondingly greater burden on publishers.

Because the plaintiff’s cause of action must arise at the time of the defendant’s publication, his or her naming in a subsequent publication is not ordinarily admissible, because it would be unfair to hold the defendant responsible for somebody else’s subsequent action in identifying the plaintiff. Thus an announcement by the plaintiff’s ex-agents that his concert had been cancelled because he was seriously ill was not rendered actionable by a later newspaper announcement that he was to appear elsewhere, although it suggested that he had been lying.¹¹¹ It would be different if the later publication had been the defendant’s, as where the first was defamatory on its face and the second identified the plaintiff as the person referred to¹¹² or where the first invited the reader to ascertain the plaintiff’s identity in a forthcoming television programme.¹¹³

Group defamation

[25.80] The problem of identification becomes singularly acute in cases of group defamation. The common law set its face against civil sanctions for vilification, not of individuals, but of a whole class of persons distinguishable by race, colour, creed or calling, in part because of concern over multiplicity of claims, in part for fear of unduly inhibiting political discussion and criticism. In the last resort, the criminal law of seditious libel or statutory provisions directed at racial vilification¹¹⁴ provide a residual weapon for combating the most

103 *Morgan v Odhams Press* [1971] 1 WLR 1239 (HL). If words in their natural meaning do not identify plaintiff, “true” innuendo is required: *Vadic v Ballarat News* [1981] VR 213.

104 *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1254 per Lord Morris.

105 *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1270 (Lord Pearson).

106 *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1245 (Lord Reid).

107 *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1244 (Lord Reid).

108 *Morgan v Odhams Press* [1971] 1 WLR 1239 (HL), described as a “thin case” (at 1250).

109 *Steele v Mirror Newspaper* [1974] 2 NSWLR 348 (CA).

110 Below, [25.xxx].

111 *Grappelli v Block* [1981] 1 WLR 822.

112 *Hayward v Thompson* [1982] QB 47; *Ware v Associated Newspapers* (1969) 90 WN (NSW) 180 at 184-185.

113 *Baltinos v Foreign Language Publ* (1986) 6 NSWLR 85.

114 For example, *Racial Discrimination Act 1975* (Cth), ss 18B – 18E; *Anti-Discrimination Act 1977* (NSW), ss 20B – 20C.

odious of this kind of demagoguery.¹¹⁵ At any rate, so far as civil claims are concerned, the plaintiff is up against the requirement that the words were published “of and concerning” him or her, and “the reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration”.¹¹⁶

But this difficulty the plaintiff may yet overcome by proving himself or herself to be specifically identified, either because the group is so small that the accusation can reasonably be understood to refer to any one of its members, or because the circumstances of publication permit the conclusion that it was he or she who was aimed at from amongst the group.¹¹⁷ Most relevant, though not necessarily decisive, are of course the size of the class, the generality of the charge and its extravagance. Thus while it would clearly not be actionable to say that “all lawyers are thieves”,¹¹⁸ a charge levelled against a group of seven Roman Catholic clergymen was held to point an accusing finger at every one of them,¹¹⁹ and an allegation of cruelty “in some of the Irish factories” capable of supporting a jury verdict that it referred specifically to the plaintiff’s.¹²⁰ But as always it is for the judge to rule initially whether the offending words can be considered capable of referring to the plaintiff as an individual, and the practice in this instance has not erred on the side of liberality. For example, if the defendant indulged in some unfounded generalisation, conveying imputations of disgraceful conduct to a group, but there is nothing to point to any individual member, the mere fact that the mind of some of the plaintiff’s friends turned to him or her on reading it is quite immaterial and insufficient to allow the claim to go before the jury.¹²¹

Even if only one (but unidentified) member of a small group is attacked, all may be under suspicion and thus defamed.¹²² So also, if the imputation is against “some” or “most” of a small group,¹²³ and all the more, where two persons are accused in the alternative.¹²⁴

115 See Riesman, “Democracy and Defamation: Control of Group Libel” (1952) 42 Col L Rev 727 at 1085 who argues that prohibition is less effective than correction, and often self-defeating in creating martyrs. In the US, the remedy is now of questionable constitutional validity, despite *Beaubarnais v Illinois* 343 US 250 (1950); see Arkes, “Civility and the Restriction of Speech: Rediscovering the Defamation of Groups” [1974] Sup Ct Rev 281.

116 *Knupffer v London Express* [1944] AC 116 at 122 (Lord Atkin).

117 For example, if in a television program attacking unnamed dentists a picture of the plaintiff’s surgery is shown: *Henry v TVW Enterprises* (1990) Aust Torts Reports ¶ 81-031. Also perhaps if the defendant intended to aim at the plaintiff: *Lloyd v David Syme* [1986] AC 350 at 364 (the “West Indies”).

118 *Eastwood v Holmes* (1858) 1 F & F 347; 175 ER 758 at 349 (F & F), 759 (ER).

119 *Browne v Thomson* [1912] SC 359.

120 *Le Fanu v Malcolmson* (1848) 1 HLC 637; 9 ER 910; also *Godhard v Inglis* (1902) 2 CLR 78.

121 *Knupffer v London Express* [1944] AC 116; *Dowding v Ockerby* [1962] WAR 110.

122 *Pryke v Advertiser* (1984) 37 SASR 175 (one out of four); *Forrington v Leigh* (The Times, 10 Dec 1987) (CA). But see *McCormick v Fairfax* (1989) 16 NSWLR 485.

123 *Rest 2d*, s 564A, cmt c; *Bjelke-Petersen v Warburton* [1987] 2 Qd R 465 (FC) (“some”); *Neiman-Marcus v Lait* 13 FRD 311 (SDNY 1952) (“most of the sales staff are fairies”).

124 *Albrecht v Burkholder* (1889) 18 OR 287; contra: *Chomley v Watson* [1907] VLR 502.

Publication

[25.90] The essence of tortious defamation lies in the communication of the disparaging statement to someone other than the person defamed. For unlike the common law offence of criminal defamation,¹²⁵ the civil law was concerned not so much with insult as with injury to reputation, the esteem in which one is held by others.¹²⁶ This requirement is known by the name of “publication”.¹²⁷ Publication is not a unilateral act of the defendant, but a bilateral act, depending upon receipt of the defamatory matter in a comprehensible form by a person other than the plaintiff.¹²⁸ It is not necessary that the communication be made public, in the sense of being addressed to a large audience. “Utterance” to a single individual is enough, provided he or she is someone other than the plaintiff.¹²⁹ Dictation to a secretary¹³⁰ or the handling of a telegraphic message in the course of transmission¹³¹ are sufficient. Publication may be to any third party, even to a servant of a company defamed,¹³² except that the common law exempted communications between spouses.¹³³ This exception originally rested on the threadbare fiction of identity between husband and wife, but is better explained as an absolute privilege in recognition of the confidential nature of the conjugal relation.¹³⁴

The publication must have been made to a person capable of understanding the defamatory meaning; not, for example, in a foreign language which the reader or listener is unable to understand,¹³⁵ nor on a postcard when none but a “privileged” addressee could know that it contains a reference to the plaintiff.¹³⁶ If the allegation is ex facie defamatory and refers by name to the person defamed or, without mentioning him or her by name, describes him or her in such a way that the person in the street would know to whom it referred,¹³⁷ it is unnecessary to prove that the person to whom it was published had any knowledge of the plaintiff or that the allegation led him or her to think the less of the plaintiff. But if it is not ex facie defamatory or does not clearly identify the

125 *R v Adams* (1888) 22 QBD 66. The statutory offence of criminal defamation, harmonised in most Australian jurisdictions under the reform process culminating with the national, uniform defamation laws, requires publication. See *Crimes Act 1900* (ACT), s 439; *Crimes Act 1900* (NSW), s 529; *Criminal Code 1899* (Qld), s 365; *Criminal Law Consolidation Act 1935* (SA), s 257; *Criminal Code 1924* (Tas), s 196; *Criminal Code* (WA), s 345. Criminal defamation has been abolished in the United Kingdom: *Coroners and Justice Act 2009* (UK), s 73.

126 *Dow Jones v Gutnick* (2002) 210 CLR 575 at 600 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

127 For proof see *Gaskin v Retail Credit* [1965] SCR 297.

128 *Dow Jones v Gutnick* (2002) 210 CLR 575 at 600 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

129 *Consolidated Trust v Browne* (1948) 49 SR (NSW) 86 at 88 (Jordan CJ).

130 *Riddick v Thames Bd Mills* [1977] QB 881 at 898-899. But such publication may enjoy incidental privilege: below, [25.xxx].

131 *Tobin v City Bank* (1878) 1 SCR (NS) (NSW) 267; *Williamson v Freer* (1874) LR 9 CP 393.

132 *Traztand v GIO* [1984] 2 NSWLR 598.

133 *Wennhak v Morgan* (1888) 20 QBD 635. Also, publication to the plaintiff's spouse: *Wenman v Ash* (1853) 13 CB 836; 138 ER 1432; *Howard v Howard* (1885) 2 WN (NSW) 5.

134 Below, [25.xxx].

135 *Jones v Davers* (1597) Cro Eliz 496; 78 ER 747.

136 *Sadgrove v Hole* [1901] 2 KB 1.

137 Thus, if the description is such as to identify him or her clearly to reasonably informed people, for example, by referring to the plaintiff as “the Prime Minister of Australia”, it is not necessary to call a witness to attest that he or she had read the defamatory matter and knew who the Prime Minister was.

person alleged to be defamed, and the defamatory character which is attributed to the imputation or the identity of the person defamed would be apparent only to persons who had knowledge of special circumstances, it is necessary in proof of publication to establish that it was communicated to someone with such knowledge.¹³⁸ In one such case¹³⁹ the defendants, trading under the name of “Denley Print”, printed leaflets attacking a motion picture on familiar communist lines and placed at the foot “Express Print, Auburn”. They handed the pamphlets to an emissary of the “Peace Movement”, and a quantity of them was subsequently showered into an audience at the picture theatre where the film was being shown. On the following day, a newspaper published an item reporting the incident and drew attention to the imprint. The plaintiff’s registered trade name was “X-press Printery, Auburn”, and some of his customers reading the report formed the conclusion that he was a communist sympathiser. He failed, however, to recover because, relying solely on the publication at the theatre, he was unable to produce a witness who possessed the special knowledge of being able to identify him with the person referred to in the pamphlet. But it need not apparently be shown that anyone possessing such special knowledge actually understood the imputation in the sense alleged, provided reasonable persons who knew of the special circumstances might so understand it.¹⁴⁰ Moreover, it is quite immaterial that the person to whom the communication was made did not give credence to the allegation.¹⁴¹

Every participant in the publication incurs liability, regardless of the precise degree of his or her involvement. Included is not only everyone concerned in the actual distribution or dissemination, but also those who composed the libel, such as press agencies, advertisers or even freelancers employed to prepare the script.¹⁴² So are, besides the newspaper proprietor, the printer¹⁴³ and all involved in its circulation; though as we shall see hereafter, the standard of liability has been relaxed in favour of mere mechanical distributors.¹⁴⁴ Beyond that, a person may incur liability not only for his or her own acts of publication, but also when others foreseeably publish or republish his defamatory utterances.¹⁴⁵ And although, generally speaking, a plaintiff cannot complain who has himself or herself assented to or acquiesced in the publication,¹⁴⁶ let alone happened to be the one who gave currency to the libel, it is otherwise if he or she foreseeably published it in performance of a duty, like the union secretary who passed on a member’s requisition for an executive meeting containing libels

138 *Consolidated Trust v Browne* (1948) 49 SR (NSW) 86; *Kruse v Lindner* (1978) 19 ALR 85 (Fed CA); *Fullam v Newcastle Chronicle* [1977] 1 WLR 651.

139 *Cross v Denley* (1952) 52 SR (NSW) 112.

140 *Hough v London Express* [1940] 2 KB 507 at 515.

141 *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1246, 1252 (HL). But it may affect damages: *Bekker v Wrack* [1937] NZLR 549.

142 *Webb v Bloch* (1928) 41 CLR 331 at 362-366. Advertiser and newspaper are joint tortfeasors, unlike press agency and independent newspaper: *Eyre v NZPA* [1968] NZLR 736.

143 *Eglantine Inn v Smith* [1948] NI 28 at 33.

144 Below, [25.xxx].

145 Below, [25.xxx].

146 *Chapman v Ellesmere* [1932] 2 KB 431 (stewards’ decisions to be published in “Racing Calendar”); *Kirk v Reed* [1968] NZLR 801 (consent to being photographed did not imply consent to publication of photo); and see below, [25.xxx].

on himself,¹⁴⁷ or in justifiable self-defence, like the 14-year-old who sought his older brother's advice after receiving a letter accusing him of theft.¹⁴⁸

Exceptionally, one may even become responsible for a libel by failing to take affirmative steps to prevent its publication by someone else, as when the manager of a club omitted to remove a defamatory notice pinned to a board by a member.¹⁴⁹ By knowingly permitting a libel to remain after reasonable opportunity to remove it, the person in control of the premises becomes liable as for its republication, if the inference is drawn that he has made himself responsible for its continued presence¹⁵⁰ – at all events unless its obliteration or removal would involve a great deal of trouble and expense.

However, mere passive facilitation of defamatory matter may not constitute publication. This view has crystallised in recent English cases concerning the liability of internet service providers and web-based search engines. If, through electronic processes, an internet service provider or a search engine disseminates defamatory matter, such an entity may not meet the definition of a publisher. Even if an internet service provider or a search engine has knowledge of the defamatory matter it generates, it may nevertheless avoid liability for defamation because it fails to meet the definition of a publisher. These authorities suggest that there is at least a minimal degree of knowing and voluntary conduct or general assumption of responsibility required in order to hold a person or an entity liable as a publisher.¹⁵¹

Multiple publication

[25.100] Every single copy of a book or newspaper is treated as a separate publication furnishing its own cause of action. Thus although the edition may originally have appeared ages ago, any copy procured within the period of limitation even for the sole purpose of suing thereon, will qualify.¹⁵² So also in the case of television or radio broadcasting, every reception can be sued for separately¹⁵³ and in the case of internet, every download can be sued for separately.¹⁵⁴ This could lead to plaintiffs selecting the law most favourable to their case and exposing defendants to liability in a substantial number of jurisdictions. There are some restraints imposed on plaintiffs to protect defendants from the possible abuse of the “multiple publication” rule.¹⁵⁵

147 *Collerton v MacLean* [1962] NZLR 1045. Also *Jones v Amalg TV Services* (1991) 23 NSWLR 364.

148 *Hedgpeth v Coleman* 111 SE 517 (NC 1922). Also in the case of a middle-aged woman: *Hills v O'Bryan* [1949] 2 DLR 716.

149 *Byrne v Deane* [1937] 1 KB 818.

150 *Byrne v Deane* [1937] 1 KB 818 at 838; *Urbanchich v Drummoyne MC* (1988) Aust Torts Reports ¶ 81-127.

151 *Bunt v Tilley* [2007] 1 WLR 1243 at 1252 (Eady J); *Metropolitan International Schools Ltd (t/a Skillstrain) v Designtecnica Corporation (t/a Digital Trends)* [2009] EWHC 1765 (QB) at [50]-[55] (Eady J). Cf *Godfrey v Demon Internet* [2001] QB 201 (Morland J).

152 *Duke of Brunswick v Harmer* (1849) 14 QB 185; 117 ER 75. The “multiple publication” rule poses an acute problem for internet archives and caches, where defamatory matter is readily retrievable long after first publication: *Loutchansky v Times Newspapers* [2002] QB 783.

153 For example, *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181 (ACT); *Allsopp v Incorporated Newsagencies* (1975) 26 FLR 238 (newspaper).

154 *Dow Jones v Gutnick* (2002) 210 CLR 575 at 600-01 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

155 See generally *Dow Jones v Gutnick* (2002) 210 CLR 575 at 604 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

However, damages may be assessed for the entire issue wherever published;¹⁵⁶ and in order to discourage multiple litigation, the national, uniform defamation laws now prohibit more than one action in respect of a multiple publication without leave of the court¹⁵⁷ and allow evidence in mitigation of any previous recovery of damages.¹⁵⁸ The national, uniform defamation laws also provide that, where defamatory matter is published within Australia and a plaintiff complains of publication in more than one Australian jurisdictional area, the applicable law to the whole of the plaintiff's claim is the substantive law which has the closest connection to the harm occasioned by the publication.¹⁵⁹ The substantive harmonisation of Australian defamation law and the application of a single substantive law to publication across Australia significantly curtails the attractiveness of "forum shopping" by plaintiffs, at least within Australia.

The fault element

[25.110] Reputation is so stringently protected that liability for publishing defamatory statements attaches without any showing of fault. Liability does not depend on the intention of the defamer, but on the fact of defamation.¹⁶⁰ This has not always been so. At one time, the plaintiff was put to proof that the defendant was inspired by malice¹⁶¹ but, as memory of the ecclesiastical and Star Chamber heritage faded, the pleading of malice gradually withered into a meaningless formality. In 1825, it was finally settled that absence of ill-will against the person defamed and honest belief in the truth of the allegation did not excuse.¹⁶² Malice remains of importance today only for the purpose of defeating the defences of qualified privilege and fair comment.¹⁶³

The law of defamation does not even look to the meaning intended by the writer or speaker, but to the meaning attached by a reasonable reader or listener.¹⁶⁴ "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both."¹⁶⁵ In consequence, a publisher may be held

156 *Toomey v Mirror Newspapers* (1985) 1 NSWLR 173.

157 See *Defamation Act 2005* (NSW), s 23 and equivalent provisions in the remaining jurisdictions. It is also ordinarily vexatious to prosecute more than one action simultaneously in different jurisdictions: *Maple v David Syme* [1975] 1 NSWLR 97. Judicial power to consolidate actions was conferred by the (Eng) *Law of Libel Amendment Act 1888*, since adopted in most Australian jurisdictions.

158 See below, [25.xxx].

159 See *Defamation Act 2005* (NSW), s 11 and equivalent provisions in the remaining jurisdictions.

160 *Cassidy v Daily Mirror* [1929] 2 KB 331 at 354. "If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever a man publishes, he publishes at his peril'" (*Peck v Tribune Co* 214 US 185 at 189 per Holmes J (1909)). The statement by Lord Mansfield is found in *R v Woodfall* (1774) Lofft 776; 98 ER 914 at 781 (Lofft), 916 (ER).

161 Holdsworth, "Defamation in the 16th and 17th Centuries" (1925) 41 LQR 13 at 24-26.

162 *Bromage v Prosser* (1825) 4 B & C 247; 107 ER 1051.

163 The switch from malice to privilege may have been motivated by a judicial stratagem to wrest control from the jury: see Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1992) 14 Cardozo L Rev 351.

164 A compromise formulation, best avoided, is to ask: Was the defendant reasonably *perceived* as having intended to defame the plaintiff?

165 *Lee v Wilson* (1934) 51 CLR 276 at 278 (Dixon J). Somewhat incongruously, evidence that the defendant intended to defame the plaintiff is relevant and admissible: *Lloyd v David Syme* [1986] AC 350 at 364 (PC); *Lee v Wilson* (1934) 51 CLR 276 at 288-289; criticised in *Baltinos v Foreign Language Publ* (1986) 6 NSWLR 85.

liable for a statement, harmless on its face, which by reason of extrinsic facts unknown to him or her unhappily turns out to be defamatory. In *Cassidy v Daily Mirror*¹⁶⁶ a newspaper published a photograph with the caption: “Mr Corrigan, the racehorse owner, and Miss ‘X’ whose engagement has been announced.” Corrigan himself had supplied this information to the photographer and authorised its publication. Unknown to the publisher, however, Corrigan was lawfully married to the plaintiff, who complained that the item was libellous of her because it suggested that she was an immoral woman who had illicitly cohabited with a man who was not her husband. Armed with evidence that acquaintances had understood the words in the suggested sense, she recovered substantial damages.

Not only is the intention of the writer immaterial in considering whether the meaning of his statement is defamatory, but it is equally irrelevant that he did not mean to refer to the plaintiff at all. If the identification used is not specific but could refer to one of several individuals, the writer takes the risk that it will be understood as referring to someone other than the person he or she had in mind. “The question is not who was aimed at, but who was hit.” Thus there is a risk that a person named can be reasonably identified with someone else, as when a newspaper published a report of a police inquiry, containing allegations of bribery against a “Detective Lee”. The reference was intended for a Constable Lee of the Motor Registration Branch, but was understood by some persons to relate to each of two Detectives Lee who were attached to the CIB. Since the allegations were reasonably capable or referring to them, both succeeded in their actions.¹⁶⁷ By more detailed identification liability could have been avoided.

In the leading case of *Hulton v Jones*¹⁶⁸ this rule was applied to fiction. The defendants published a libellous narrative, intended to refer to a fictitious person, one Artemus Jones. The plaintiff who answered to this unlikely name prevailed, because the description was capable of being reasonably understood to refer to him and was actually so read by several acquaintances. Obviously, fiction must not become a shield for character assassination, but the law’s concern is with defamatory lies masquerading as truth, not with defamatory tales purported to be fiction. By ignoring the writer’s intent and indulging a latitudinal standard of identification, creative literature is unnecessarily victimised.¹⁶⁹

Nor, all the more, can liability be avoided for accidental typographical or similar errors which have the effect of conveying a meaning, or referring to a person, other than intended, for example, the mistaken substitution of “coloured” for “cultured gentlemen”,¹⁷⁰ a reference to a firm under the heading “First Meetings under the Bankruptcy Act” instead of under “Dissolutions of Partnership”,¹⁷¹ or the erroneous insertion of the plaintiff’s photograph in an advertisement for whiskey.¹⁷²

The justification for this stringent liability is presumably that it is more equitable to protect the innocent defamed rather than the innocent defamer

166 *Cassidy v Daily Mirror* [1929] 2 KB 331 (CA); foll *Hough v London Express* [1940] 2 KB 507.

167 *Lee v Wilson* (1934) 51 CLR 276; *Newstead v London Express* [1940] 1 KB 377; *Hall v Queensland Newspapers* [2002] 1 Qd R 376.

168 *Hulton v Jones* [1910] AC 20.

169 Other defences become untenable: as fiction, the matter is obviously false.

170 *Upton v Times-Democrat* (1900) 104 La 141.

171 *Shepherd v Whitaker* (1875) LR 10 CP 502.

172 *Peck v Tribune Co* 214 US 185 (1909). The portrait was that of a female teetotaller.

(who, after all chose to publish); another is that the publication, not the composition of the libel, is the actionable wrong, making the state of mind of the publisher, not the writer, relevant. On the other hand, since one does not as a rule *act* at one's peril, why should the law demand that one publish at one's peril, especially when what one says is not defamatory on its face? Does reputation deserve a higher level of protection than personal safety? Actually there is little evidence that it has imposed too onerous a burden on the publishing industry.¹⁷³ In most instances the publisher's error is avoidable with care, either by diligent checking of the proofs or by identifying the person aimed at in such a manner as to exclude the possibility of the description fitting anyone else.¹⁷⁴ It should also be remembered that in most jurisdictions an action for defamation is the sole means available to plaintiffs desirous of clearing their reputation.

Strict liability has also been modified in the following other respects.

Unintentional publication

[25.120] Another modification of strict liability is the requirement that the publication itself must have been either intended or negligent. There is no liability for intentionally defamatory matter published accidentally, unlike accidentally defamatory matter published intentionally. This perplexing result is the outcome of the one-sided emphasis on the publication rather than the composition of the libel. Functionally, the distinction has little merit because fault would rather point the other way and the victim in either case stands in equal need of vindication.

The unintentional publisher escapes responsibility only if he or she can clear himself or herself of negligence. Hence, while it is not ordinarily actionable to send a libellous letter directly to the person defamed, the writer will incur liability if he or she should reasonably have anticipated that it might well be opened by someone else, like the addressee's husband¹⁷⁵ or secretarial staff,¹⁷⁶ or even that the addressee himself or herself, in duty bound, would have to pass it on to others.¹⁷⁷ So, one who imputes a discreditable action to another's face must observe care that it is not overheard by strangers.¹⁷⁸ It is negligent to communicate defamatory matter on a postcard, and publication will be presumed if the postcard is circulated in such a manner as to make it probable that it would be read by third persons.¹⁷⁹ Nor is it an excuse that the communication was addressed to the wrong person in the mistaken belief that

173 Juries are averse to awarding large sums of money in these actions: in *Newstead v London Express* [1940] 1 KB 377, plaintiff recovered one farthing; in *Lee v Wilson* (1934) 51 CLR 276, £50. Damages and legal costs are in any event, tax-exempt: *Herald v FCT* (1932) 48 CLR 113. The ALRC recommended against any change.

174 In *Lee v Wilson* (1934) 51 CLR 276, the reporter had originally taken down the evidence correctly in shorthand, but transcribed it carelessly by altering "First Constable" to "Detective" Lee— "possibly because the statement then appeared more sensational" (!): Starke J at 286.

175 *Theaker v Richardson* [1962] 1 WLR 151.

176 *Pullman v Hill* [1891] 1 QB 524; *Gomersall v Davies* (1898) 14 TLR 430.

177 *Collerton v MacLean* [1962] NZLR 1045 (union secretary).

178 See *White v Stone* [1939] 2 KB 827; *Robb v Morrison* (1920) 20 SR (NSW) 163. To exonerate himself or herself, the defendant must prove that he or she neither knew nor had reason to expect a stranger to be within earshot.

179 *Sadgrove v Hole* [1901] 2 KB 1. The burden of disproving publication is then thrust on the defendant. It may be discharged, eg, by showing that the writing was not intelligible to persons without knowledge of special circumstances leading to an identification of the plaintiff.

he or she was privileged to receive it.¹⁸⁰ But it is not necessary to anticipate unlikely contingencies, such as that an inquisitive butler would illicitly open his employer's mail, even if the letter is unsealed,¹⁸¹ or that a sealed letter properly addressed to a son would be opened by his father.¹⁸²

Subordinate distributors and innocent dissemination

[25.130] Liability for unintentional defamation, not preventable by the exercise of due care, devolves only on primary participants in the publication, such as the writer, editor or newspaper company.¹⁸³ Persons who do not authorise publication but play the more subordinate role of mere distributors, like newsgagents,¹⁸⁴ booksellers,¹⁸⁵ libraries¹⁸⁶ and, it is suggested, printers under modern technological conditions,¹⁸⁷ are treated more sympathetically. According to the most accepted view, these escape responsibility on proof that they neither knew nor had reason to know or suspect that they were handling defamatory material and their actual or constructive ignorance was not due to negligence on their part.¹⁸⁸ Even this reduced responsibility has been criticised as too onerous. For apart from uncertainty as to precisely what precautions are required to negate negligence, the defendant is in a quandary once a claim of libel is made. More reasonable would be to require distributors to yield only to an injunction.¹⁸⁹

At common law, radio and television stations are original publishers, whether broadcasting their own or someone else's programmes and, as such, are not analogous to newsagents or video stores.¹⁹⁰ Even in transmitting live programmes or simulcasts, which may make it more difficult to anticipate defamatory episodes, the common law took the view that they play an active role in publishing to the world and must face corresponding responsibility. Moreover, according to the view adopted by judges applying the common law, broadcasting is a business, mostly for profit, and it would be invidious to discriminate in its favour as against the printed media.

However, the position has changed somewhat under the national, uniform defamation laws, reflecting technological changes. The national, uniform defamation laws provide a defence of innocent dissemination,¹⁹¹ modelled closely on the common law position, but extends the definition of "subordinate distributors" who can rely upon this defence to wholesalers and retailers, to

180 *Hebditch v MacIlwaine* [1894] 2 QB 54.

181 *Huth v Huth* [1915] 3 KB 32. Or that a trespasser would gain entrance and read a defamatory notice stuck on a wall: *Neame v Yellow Cabs* [1930] SASR 267.

182 *Powell v Gelston* [1916] 2 KB 615.

183 See *Thompson v ACTV* (1996) 186 CLR 574.

184 *Emmens v Pottle* (1885) 16 QBD 354.

185 *Bottomley v Woolworth* (1932) 48 TLR 521 (American magazines).

186 *Martin v British Museum* (1894) 10 TLR 338.

187 So held in *McPherson v Hickie* (1995) Aust Torts Reports ¶ 81-348 and see *Thompson v ACTV Pty Ltd* (1996) 186 CLR 574 at 586-587 (Brennan CJ, Dawson and Toohey JJ).

188 *Vizetelly v Mudie's Select Library* [1900] 2 QB 170 (circulating library liable for negligence, because it overlooked publisher's circular requesting return of the offending book).

189 Recommended by ALRC, at [186].

190 *Thompson v ACTV* (1996) 186 CLR 574; *Rest 2d*, s 581.

191 Although innocent dissemination was originally considered a plea of "no publication", the prevailing view appears to be that it is properly viewed as a free-standing defence: see *Emmens v Pottle* (1885) 16 QBD 354 at 357 (Lord Esher MR); *Vizetelly v Mudie's Select Library* [1900] 2 QB 170 at 178 (Vaughan Williams LJ), at 180 (Romer LJ); cf *Thompson v ACTV* (1996) 186 CLR 574 at 586 (Brennan CJ, Dawson and Toohey JJ).

broadcasters of live programmes with no effective control over the person making defamatory statements and to operators or providers of certain electronic services and media.¹⁹² Although liability for publication is broad, there are necessarily limits to it.

Damage

[25.140] The common law distinguishes between libel and slander, the former being broadly defamation in a written form and the latter being broadly defamation in spoken form. The distinction turns upon the requirement of damage. Actual injury, whether material or to reputation, is not an essential element of actionable libel. Libel originated as a crime in the Star Chamber where to insist on actual injury would have hampered the “law and order” purpose of the Tudor jurisdiction. The rule survived into the modern law of civil liability (exceptional for non-trespassory torts) primarily because proof of such damage is notoriously difficult and to require it would deprive most plaintiffs of any remedy for vindicating their reputation. It has not however passed without criticism. In the United States concern for freedom of speech ultimately prompted a constitutional requirement for proof of “actual injury”, including besides material loss, injury to reputation, anxiety or illness.¹⁹³ In Commonwealth countries, however, contemporary criticism has focused on controlling damages rather than on abandoning the rule that libel is actionable per se.

In contrast to libel, the common law did however require proof of material injury for slander. This distinction—broadly that between written and spoken defamation—calls for a digression into legal history.¹⁹⁴

History of slander

[25.150] *Slander* is the offspring of the common law courts which in the earlier part of the 16th century began to allow an action on the case for defamation, in competition with the ecclesiastical tribunals which had till then dominated the field. At first jurisdiction was claimed only over imputations of offences triable at common law, and such slanders were held actionable without proof of damage; eventually it extended over all defamatory allegations causing “temporal” damage.¹⁹⁵

Contemporaneously, the foundations of the modern law of *libel* were being laid by the Star Chamber which, in addition to punishing the crime of political libel with a view to suppressing seditious publications that had gained in prevalence since the appearance of the printing press, also attended to non-political libels in order to furnish a legal substitute for the prohibited duel. But although much concerned with defamatory writings, the Star Chamber still treated words as libels, while conversely in the common law courts written imputations were actionable as slander. The distinction was as yet primarily one of courts. After the fall of the Star Chamber, the relation between these hitherto

192 See *Defamation Act 2005* (NSW), s 32 and equivalent provisions in the remaining jurisdictions.

193 *Gertz v Welsh* 418 US 323 (1974). Limited to matters of public concern: *Dun & Bradstreet v Greenmoss* 472 US 749 (1985).

194 *Holdsworth*, vol viii, pp 333-378; Plucknett, *Concise History of Common Law* (5th ed 1956), pp 483-502; Veeder, “History of the Law of Defamation” in *Anglo American Essays in Legal History* (1907-1909), vol iii, p 446; Donnelly, “History of Defamation” [1949] *Wis L Rev* 99; Helmholz, “Select Cases on Defamation to 1600” (1985) 101 *Seldon Society*.

195 The first such case seems to have been *Davis v Gardiner* (1593) 4 Co Rep 16b; 67 ER 897.

separate bodies of law assumed its modern profile. Libel came to be fully recognised as a civil wrong and, probably owing to its former association with the criminal law, became actionable without proof of special damage. Thus the insult in defamation emerged as a more prominent element and the previous common law emphasis on pecuniary loss in slander was not translated into the new tort. Also, by a haphazard rather than systematic process, the line of demarcation between libel and slander came to be drawn according to the modern distinction between written and oral defamation.¹⁹⁶

It has been claimed that libel endures longer than slander, that more significance is attached to the written than the spoken word by the recipient, that libel conveys the impression of deliberate calculation to injure reputation while slander is usually born of sudden irritability. In addition to these psychological arguments, emphasis has also been laid on the allegedly disparate area of dissemination, libel usually contained in newspapers or other printed matter being propagated farther than oral statements addressed to a small circle of listeners. Undoubtedly, the common law requirement of special damage for slander discourages some trivial litigation, but at the cost of striking at the deserving and unmeritorious litigant alike. The criterion which makes success or defeat in an action depend on the mere form of publication ignores the fact that there is no necessary correlation between it and the policy underlying the vindication of reputation. If a distinction is to be observed at all, it should be on the broader basis of the potentiality for harm inherent in the particular circumstances of each publication rather than the prevailing arbitrary and inflexible rule of thumb.

In 1843, a distinguished Select Committee of the House of Lords concluded that the distinctions between libel and slander, and between slander actionable per se and other oral defamation, did “not rest on any solid foundation”, but their recommendation to assimilate slander to libel lapsed and was not renewed in England until 1975.¹⁹⁷ It was, however, taken up in Australia and, following its early adoption by New South Wales in 1847,¹⁹⁸ has since been enacted in several other jurisdictions,¹⁹⁹ finally being adopted across Australia under the national, uniform defamation laws.²⁰⁰ Now, all claims for defamation are actionable without proof of special damage. However, there is, across Australia, a residuary disqualification of trivial defamation which is the first of the defences to defamation which will be examined.²⁰¹

Defences to defamation

[25.160] If a plaintiff establishes that defamatory matter has been published about him or her, he or she has established a prima facie claim for defamation. The focus then shifts to the defendant and whether he or she can establish a

196 *King v Lake* (1670) Hardres 470; 145 ER 552 is usually credited as decisive, but see Kaye, “Libel and Slander—Two Torts or One” (1975) 91 LQR 524. It was finally settled in *Thorley v Kerry* (1812) 4 Taunt 355; 128 ER 367.

197 *Faulks*, ch 2.

198 11 Vic No 13; now *Defamation Act 1974* (NSW) (repealed), s 8.

199 *Defamation Act 1889* (Qld) (repealed), s 5; *Defamation Act 1957* (Tas) (repealed), s 9; *Defamation Act 1901* (ACT) (repealed), s 3; *Defamation Act* (NT) (repealed), s 2.

200 See *Defamation Act 2005* (NSW), s 7 and equivalent provisions in the remaining jurisdictions.

201 Below, [x.xxx]. For an historical analysis of the categories of slander at common law, see Fleming, *Law of Torts* (9th ed, LBC, 1998), pp xxx.

defence. There are a range of common law and statutory defences to defamation, of which the most important are truth and its variants, fair comment and honest opinion, and the forms of absolute and qualified privilege. Significantly, under the national, uniform defamation laws, common law defences co-exist alongside statutory defences.²⁰²

Triviality

[25.170] The common law requirement that slander was actionable only upon proof of special damage, subject to certain, established exceptions, was a means of controlling and minimising frivolous defamation actions. A further mechanism for achieving this end is the defence of triviality, now available in all Australian jurisdictions under the national, uniform defamation laws.²⁰³ The efficacy of the defence of triviality in achieving this end is doubtful, given its onerous requirements.

A defendant has a complete defence if he or she can prove that, in the circumstances of publication, the plaintiff was unlikely to suffer any harm. The defence is excluded by likelihood of any “harm”, not just “harm to reputation”. Actual injury need not be shown; likelihood is sufficient. That is, it is not sufficient that the defendant prove that the plaintiff would have suffered less harm as a result of the defendant’s publication. Rather, the defendant undertakes to prove that the plaintiff would have suffered no harm. This has been interpreted to mean that, in order to establish a defence of triviality, a defendant must prove the absence of a real chance or possibility of harm to the plaintiff.²⁰⁴

Moreover, the defence of triviality is directed to the likely harm to the plaintiff in “the circumstances of publication”. Not all circumstances, but “circumstances of publication” may be taken into account. Thus the narrow construction prevailed of excluding the plaintiff’s bad reputation, in contrast to evidence that, prior to the publication, the recipients already knew the allegation.²⁰⁵ The defence is peculiarly applicable to publications of limited extent, as in a jocular statement to a few people in a private home, who know the plaintiff too well to take it seriously, although simply because defamatory matter was circulated to a small group of people does not mean that the defence will apply. Generally relevant factors are the nature of the defamatory matter, and the manner in which, the persons to whom and the place where it is published.²⁰⁶ Equally, the defence is not categorically excluded from publications to a wider audience or the media. For example, when Lang, the popular Labor leader, made an offensive speech in a public election meeting, Rich (and Evatt) JJ held the jury entitled to find for him “with their knowledge of local elections and policies and their understanding of the manner in which speeches at elections are received by bystanders. They might take one view of

202 See *Defamation Act 2005* (NSW) s 24(1) and equivalent provisions in the remaining jurisdictions.

203 See *Defamation Act 2005* (NSW) s 33 and equivalent provisions in the remaining jurisdictions. As to predecessor provisions, see, for example, *Defamation Act 1974* (NSW) s 13 (repealed); *Defamation Act 1889* (Qld) s 20 (repealed); *Defamation Act 1957* (Tas) s 9 (repealed).

204 *Jones v Sutton* (2004) 61 NSWLR 614 at 624-25 (Beazley JA).

205 *King v McKenzie* (1991) 24 NSWLR 305. However, see *Jones v Sutton* (2004) 61 NSWLR 614 at 621 (Beazley JA) (dependent upon circumstances as to whether plaintiff’s prior bad reputation included in “circumstances of publication”).

206 *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749 at 800; *Chappell v Mirror Newspapers* (1984) Aust Torts Reports ¶ 80-691.

words spoken at a vestry meeting or a meeting of directors, and another where it is in the heat of a family squabble or a quarrel in a shearing shed or a taproom or bar.”²⁰⁷

Justification: truth

[25.180] At common law, truth is a complete answer to a civil action for defamation and the only defence known generally by the name of “justification”.²⁰⁸ It is not that libel must be false but that truth is in all the circumstances an interest paramount to reputation.²⁰⁹ “The law will not permit a person to recover damages in respect of an injury to a character which he or she either does not, or *ought not*, to possess.”²¹⁰ In contrast, the criminal law of libel, as formulated by the Star Chamber with the object of preventing breaches of the peace, directed its attention to the insult offered, and it was therefore no defence to a prosecution either that publication was to the person defamed or that the allegations were true. For, “as the woman said, she would never grieve to have been told of her red nose if she had not one indeed.”²¹¹ This was epitomised in the saying, attributed to Lord Mansfield: “The greater the truth, the greater the libel.”

Truth is a matter of defence or, alternatively expressed, the falsity of defamation is presumed until dispelled by the defendant.²¹² Casting the burden on the defendant rather than the plaintiff has the effect, if not the purpose, of inhibiting defamatory speech.²¹³ For in practice it acts not only as a serious deterrent against dissemination of falsehoods but, in view of the difficulties of adducing legal proof of truth in all particulars or unwillingness to reveal confidential sources of information, constitutes also a powerful brake on public debate and the flow of information by underscoring the wisdom of caution and self-censorship.²¹⁴

What is justification

[25.190] Justification must be as broad as the defamatory imputation itself.²¹⁵ The defendant must prove the truth of all material statements contained in the libel; there must be a substantial justification of the whole. A charge that the plaintiff is a habitual liar can only be justified by proof that on repeated occasions he made false statements without an honest belief in their truth.²¹⁶ An allegation that the plaintiff was convicted of a crime cannot be proved true by

207 *Lang v Willis* (1934) 52 CLR 637 at 651. Aliter, Starke and Dixon JJ.

208 In New Zealand as “truth” (*Defamation Act 1992* (NZ), s 8), also recommended by *Faulks*, at [129].

209 *Burton v Crowell Publ* 82 F 2d 154 at 156 (1936): thus it does not follow that a libel must be something that can be true or false (eg not ridicule).

210 *M’Pherson v Daniels* (1829) 10 B & C 263; 109 ER 448 at 272 (B & C), 451 (ER) (Littledale J).

211 Quoted by Windeyer, “Truth of a Libel” (1935) 8 ALJ 319 at 322.

212 See *Beevis v Dawson* [1957] 1 QB 195.

213 Other justifications are the presumption of innocence which places the burden on the accuser, and the inequity of requiring (in most instances) proof of a negative. Yet the plaintiff must prove falsity in trade libel misrepresentation.

214 In the United States the burden of proof for speech on matters of public concern lies constitutionally on the plaintiff: *Philadelphia Newspaper v Hepps* 475 US 767 (1986).

215 *Crowley v Glissan (No 2)* (1905) 2 CLR 744 at 767.

216 See *Penton v Calwell* (1945) 70 CLR 219; *Mann v Mackay TV* [1992] 2 Qd R 147 (FC).

showing that he was convicted, if the conviction was subsequently quashed.²¹⁷ Yet it is sufficient that the statement is true in substance. Justification need not conform to the exact letter of the accusation, provided the gist of it is proved to be correct: it must “meet the sting” of the libel. Erroneous details which do not aggravate the defamatory allegation may be ignored. Thus to say of someone that he has been convicted of travelling in a train without a ticket and fined £9 and three weeks’ imprisonment in default may be justified by establishing that he was sentenced to *two weeks’ imprisonment in default*.²¹⁸ But if the defamation consists of several distinct allegations, all must be justified seriatim. At common law if the defendant fails in regard to any of them, the plaintiff will be entitled to a verdict and costs, although the unproved charge could have caused no appreciable damage in view of the truth of the rest. Hence, where the plaintiff was described as a blackmailer, liar, swindling share pusher and illegal immigrant, the defendant was held liable in the amount of £50 because he was unable to prove the last, and relatively least infamous, of the charges.²¹⁹ On the other hand, if several allegations have a common sting (a question of degree), it is sufficient to justify the sting, for example, promiscuity in case of several separate episodes.²²⁰ A further amelioration of the stricture of the defence of justification is the defence of contextual truth now available under the national, uniform defamation laws.²²¹

Repetition of a libel cannot be justified merely by proving that it was a true report of what was said by someone else: otherwise too glib an excuse would be at hand for perpetuating and spreading calumnies under the facile guise of cautioning that “it is rumoured” or “I was told”.²²² Not even expressions of doubt or disbelief furnish excuse,²²³ though the unqualified refutation of a libel may draw its sting.²²⁴ The press has to bear the brunt of this rule, mitigated only by qualified privilege for good faith reporting in a narrow range of situations. A more general defence, once advocated in Australia, would protect a defendant who published, without adoption or influence, a statement attributed to a person other than his or her employee or agent, where it was reasonable to publish it, and subject to a right of reply.²²⁵

With respect to such common news items as that a prosecution has been launched against the plaintiff or that the police are inquiring into his or her affairs, the threshold question must be whether it was reasonably capable of being understood as nothing but a factual report that a charge was made (and

217 *Howden v Truth Ltd* (1937) 58 CLR 416. See also *Cross v Queensland Newspapers* [2008] NSWCA 80 at [71] (Beazley JA).

218 *Alexander v NE Rly* (1865) 6 B & S 340; 122 ER 1221; *Sutherland v Stopes* [1925] AC 47 at 79-80.

219 But he may plead justification to only parts of the allegations, if they are severable from the rest: *Becker v Smith’s Newsp* [1929] SASR 469; and see *Plato Films v Speidel* [1961] AC 1090 at 1142; in which case the jury must be cautioned not to award damages for those parts which have been proved justified: *Cohen v Mirror Newsp* [1971] 1 NSWLR 623 (CA).

220 *Polly Peck v Trelford* [1986] QB 1000 (CA); *Woodger v Fed Capital Press* (1992) 107 ACTR 1. See below [25.xxx].

221 See below [25.xxx].

222 *Truth (NZ) v Holloway* [1960] 1 WLR 997; [1961] NZLR 22 (PC); *Wake v Fairfax* [1973] 1 NSWLR 43; *Douglas v Tucker* [1952] 1 SCR 275. But see *Aspro Travel v Owners Abroad Group* [1996] 1 WLR 132 at 140. That someone else was the first defamer does not even mitigate damages, though it may help to disprove malice: below, [25.xxx].

223 *Savage v News Ltd* [1932] SASR 240.

224 *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669 (jury question whether the “antidote destroyed its bane”).

225 ALRC, at [165]ff. Contrast NSWLRC (1995), at [12.22]-[12.25].

implying at worst that there were grounds for suspicion) or of actually suggesting guilt. The former may be justified for all practical purposes by simply establishing the accuracy of the report, but the latter demands nothing less than proof of guilt in order to meet the sinister slant implanted into the story.²²⁶ This important distinction at once allows sufficient latitude for fearless reporting of “straight news”, while exacting a toll from the less responsible press for the luxury of pregnant headlines and sensational embellishments.

If a defendant seeks to justify all the defamatory matters, and these consist partly of statements of fact and partly of comment, he or she must under that plea prove not only the truth of the facts but also the comment.²²⁷ Not that he would assume the higher burden of seeking to justify comment as being true, unless the defence of fair comment was precluded, for example because the comment was inspired by malice. But how can statements of *opinion* ever be proved true? Literally this is of course impossible, but the defendant apparently acquits himself by establishing that the comment is “accurate, that is actually justified by, in the sense of being implicit in, the facts which are stated and proved to be true”.²²⁸ In other words, the facts must warrant the imputation, and they do not, unless the jury agrees with the defendant that it is a conclusion which *ought* to be drawn from those facts.²²⁹

Because of the procedural and substantive difficulties of establishing the defence of justification, defendants might prefer to rely on qualified privilege instead; though by shifting the focus from truth to malice or improper motive, the action can no longer lead to an unequivocal vindication of the plaintiff.

Public interest and public benefit

[25.200] To admit truth alone as a complete defence is open to the objection that it condones embarrassing exposures of purely private matters, lacking any countervailing public interest, which is a significant shortcoming where the common law does not recognise an enforceable right to privacy.²³⁰ As early as 1849 a distinguished Select Committee of the House of Lords therefore recommended that in both civil and criminal proceedings truth should be a defence if, but only if, the publication was for the public benefit. This proposal was embodied in Lord Campbell’s *Libel Act 1843* for criminal but not civil proceedings.

In New South Wales the Committee’s recommendation was fully adopted in 1847, presumably in order to assist the social integration of former convicts.²³¹ Until the introduction of the national, uniform defamation laws, this test

226 *Lewis v Daily Telegraph* [1964] AC 234; *Hayward v Thompson* [1982] QB 47; *Mirror Newspaper v Harrison* (1982) 149 CLR 293; *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669 at 676-679; *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158 at 166-167 (Hunt CJ at CL); *Favell v Queensland Newspapers* (2005) 221 ALR 186 at 190 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Sands v Channel Seven Adelaide* (2009) 104 SASR 452 and note *Stern v Piper* [1997] QB 123 (CA). Indeed, at common law, a conviction was not even admissible in evidence (being treated as a mere opinion of guilt): *Goody v Odhams Press* [1967] 1 QB 333; contra: *Jorgensen v News Media* [1969] NZLR 961 (CA). Statutes have made certain convictions conclusive: see *Defamation Act 2005* (NSW), s 42 and equivalent provisions in the remaining jurisdictions.

227 *Walker v Hodgson* [1909] 1 KB 239 at 253; *Sutherland v Stopes* [1925] AC 47 at 62-63, 73-75, 95; *Truth (NZ) v Avery* [1959] NZLR 274. Below, [25.xxx].

228 See *Goldsbrough v Fairfax* (1934) 34 SR (NSW) 524 at 530 (Jordan CJ).

229 *Hunt v Star Newspaper* [1908] 2 KB 309 at 320.

230 As to the development of the right to privacy in Australia, see Chapter 26.

231 For an historical analysis of this legislation, see Mitchell, “The Foundations of Australian Defamation Law” (2006) 28 *Sydney Law Review* 477.

applied in Queensland, Tasmania and the Australian Capital Territory,²³² while in New South Wales “public benefit” was replaced by “public interest”, a somewhat wider and more familiar concept from the defence of fair comment, which is decided by the judge rather than the jury.²³³ The remaining common law jurisdictions, however, were so opposed to the proposed adoption of this model that it became the stumbling block to a uniform defamation law for Australia.

The protection sought by the formula was really for privacy rather than reputation, and needed as much for non-defamatory as for defamatory allegations. But in the absence of an independent action for invasion of privacy against unjustifiable public disclosure of private facts, it served at least as a second best.²³⁴

Following the introduction of the national, uniform defamation laws, the common law position of truth alone as a complete defence to defamation has been enacted across Australia.²³⁵ There is no longer an additional requirement of proof of “public interest” or “public benefit” in any jurisdiction. Those jurisdictions previously requiring such proof dropped their insistence upon this element of the defence of justification as part of the negotiations towards reaching a national consensus. Non-defamatory disclosures invasive of privacy will now need to be protected by some other means.²³⁶

Polly Peck defence

[25.210] At common law, where a matter complained of contains several stings, a plaintiff can elect to rely upon one or more stings, whilst ignoring others. As, in the ordinary course, the defendant’s plea of justification has to meet the plaintiff’s pleaded case, the defendant cannot succeed by justifying upon which the plaintiff does not rely.²³⁷ The English courts have attempted to overcome the potential disadvantage this approach poses to defendants by the introduction of the *Polly Peck* plea or defence. Properly understood, the *Polly Peck* defence allows a defendant to identify meanings in the matter not relied upon by the plaintiff and, taking the plaintiff’s and the defendant’s meanings together, to extract a common sting between those meanings and to justify the common sting, rather than the plaintiff’s pleaded meanings.²³⁸ The *Polly Peck* defence is often allied to, or conflated with, another decision of the English Court of Appeal, *Lucas-Box v News Group Newspapers*.²³⁹ A *Lucas-Box* plea allows a defendant to deny the meaning pleaded by the plaintiff and to particularise and justify his or her own meaning. In the United Kingdom, *Polly Peck* and *Lucas-Box* pleas have been used to clarify the parties’ competing

232 *Defamation Act 1889* (Qld), s 15 (repealed); *Defamation Act 1957* (Tas), s 15 (repealed); *Defamation Act 1901* (ACT), s 6.

233 *Defamation Act 1974* (NSW), s 15 (repealed).

234 Rolph, “Preparing for a Full-Scale Invasion: Truth, Privacy and Defamation” (2007) 25(3/4) *Communications* LB 5.

235 See *Defamation Act 2005* (NSW), s 25 and equivalent provisions in the remaining jurisdictions.

236 As to the development of the right to privacy in Australia, see Chapter 26.

237 *Polly Peck v Trelford* [1986] QB 1000 at 1032 (O’Connor LJ).

238 *Polly Peck v Trelford* [1986] QB 1000 at 1032 (O’Connor LJ).

239 *Lucas-Box v News Group Newspapers* [1986] 1 All ER 177.

approaches to defamatory meaning, without the controversy and case law which have attended such pleas in Australia.²⁴⁰

The *Polly Peck* defence has had a decidedly mixed reception in Australia. After an initial welcome in a number of jurisdictions,²⁴¹ the *Polly Peck* defence was trenchantly criticised by Brennan CJ and McHugh J in the High Court's decision in *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519. The criticisms turned upon the inevitable and undesirable abstraction of any "common sting" identified by a defendant and the failure of such a pleading to meet the plaintiff's claim, thereby being prejudicial and embarrassing to a fair trial of the plaintiff's case.²⁴² Subsequently, the Victorian Court of Appeal sought to circumscribe the *Polly Peck* defence to take into account of the criticisms made in *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, allowing such a defence to be pleaded only in circumstances where the defendant's pleaded meaning is not substantially different from, or more injurious or serious than, the plaintiff's pleaded meaning.²⁴³ In those terms, such a defence could only ever have a very narrow scope of operation.

The question has been asked properly "whether Lord Justice O'Connor could ever have anticipated that for two decades gallons of ink would be spent in judicial and academic analysis of his judgment in *Polly Peck* to no certain conclusion".²⁴⁴ The *Polly Peck* defence has the dubious distinction of being frequently pleaded but rarely successful in Australia.²⁴⁵ Its lack of success is intimately connected with the prolixity of pleadings in defamation cases and the concern to calibrate precisely issues of fairness to both plaintiff and defendant. In the larger Australian jurisdictions where the common law largely prevailed prior to the introduction of the national, uniform defamation laws, the *Polly Peck* defence appears to continue, albeit in its highly circumscribed form.²⁴⁶ In those Australian jurisdictions, where the imputation rather than the matter complained of was the central feature of defamation pleadings prior to the introduction of the national, uniform defamation laws, there has been an outright rejection of the *Polly Peck* defence.²⁴⁷ The status of the *Polly Peck* in Australian defamation law is questionable at best. The High Court of Australia has been reluctant to take on and resolve this difficult issue of principle, because overwhelmingly this issue has been litigated at an interlocutory level, rather than to final judgment. In any event, the largely inefficacious *Polly Peck* defence may have been overtaken by the more broadly based statutory defence of contextual truth.

240 Kenyon, "Perfecting *Polly Peck*: Defences of Truth and Opinion in Australian Defamation Law and Practice" (2007) 29 *Sydney Law Review* 651.

241 See, for example, *Kennett v Farmer* [1988] VR 991 at 1000 (Nathan J); *Gumina v Williams (No 2)* (1990) 3 WAR 351 (FC).

242 *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at 527-530.

243 *David Syme v Hore-Lacy* (2000) 1 VR 667 at 673-674 (Ormiston JA), at 686 (Charles JA).

244 *Woodham v John Fairfax Publications* (2005) Aust Torts Reports ¶ 81-822 at 68,152 (Nicholas J) (SC(NSW)).

245 *Herald & Weekly Times v Popovic* (2003) 9 VR 1 at 62 (Gillard AJA).

246 *Herald & Weekly Times v Popovic* (2003) 9 VR 1 (VSCA); *Nationwide News v Moodie* (2003) 28 WAR 314 (FC); *Manock v Channel Seven Adelaide* (2006) 95 SASR 462 (FC); *West Australian Newspapers v Elliott* (2008) 37 WAR 387 (FC).

247 See, for example, *Robinson v Laws* [2003] 1 Qd R 81; *John Fairfax Publications v Zunter* [2006] NSWCA 227 at [42] (Handley JA).

Contextual truth

[25.220] The common law approach to the defence of justification can confer a forensic advantage on a plaintiff in a defamation proceeding. The plaintiff can elect to complain about certain imputations and refuse to complain about others conveyed in the same defamatory matter. A defendant cannot justify his or her publication by proving the substantial truth of the imputations of which the plaintiff does not complain. The *Polly Peck* defence may not be of great assistance to a defendant. The problem facing a defendant is most acute if the plaintiff complains only of the less serious imputations conveyed in a matter and does not rely on the more serious ones.

The national, uniform defamation laws introduce a defence which seeks to overcome the strictures of the common law's approach to the pleading of justification.²⁴⁸ The statutory defence of contextual truth allows a defendant to do precisely what the common law defence of justification and its variants forbid him or her from doing – to plead and justify imputations which are substantially different from those particularised by the plaintiff.²⁴⁹ The statutory defence of contextual truth turns upon a potentially difficult evaluative exercise for the tribunal of fact, namely whether the falsity of the plaintiff's imputations do more damage to the plaintiff's reputation than the substantial truth of the defendant's contextual imputations. In certain circumstances, the application of this test will be straightforward. For example, the damage done to a plaintiff's reputation by a false allegation that the plaintiff has been arrested and charged with a criminal offence is outweighed by a substantially true allegation that the plaintiff in fact committed the offence. However, it is not hard to envisage cases where the comparison of unlike allegations, conveyed in the same defamatory matter, would not admit of a ready resolution.²⁵⁰

Absolute privilege

[25.230] In certain situations, the law allows one to speak and write without restraint, even at the expense of another's good name and character. These are called privileged occasions. Privilege attaches not to content, but to occasion or form.²⁵¹ What a Member of Parliament says on the floor of the House is privileged, but repetition of the same words outside is not; a fair and accurate report of court proceedings enjoys immunity, but the same information cast in another form can lay no claim to special protection.

Privilege is admitted in title of a variety of individual and social interests which are deemed of sufficient importance to displace the countervailing claim to protection of reputation.²⁵² The interest may be valued so highly that policy requires the writer or speaker to be completely immune regardless of his or her motive in giving currency to the alleged defamation. More frequently, however, the interest is of lesser weight in the scale of social values, and prevails over the

248 See *Defamation Act 2005* (NSW), s 26 and equivalent provisions in the remaining jurisdictions.

249 *Jones v John Fairfax Publications Pty Ltd* (2005) 67 NSWLR 634 at 445 (Simpson J).

250 *Jackson v John Fairfax & Sons* [1981] 1 NSWLR 36 at 39 (Hunt J).

251 *Dingle v Assoc Newspapers* [1961] 2 QB 162 at 188. Nor does privilege belong to the speaker, although it is frequently referred to as an attribute of the person who avails himself of the defence: see *Minter v Priest* [1930] AC 558 at 571-572.

252 The protection given to defamation is not coincident with, though to some extent overlaps, the protection given in many cases against the disclosure in evidence of documents and oral communications: *Gibbons v Duffell* (1932) 47 CLR 520 at 529; *Minter v Priest* [1930] AC 558 at 571, 579-580.

plaintiff's only if the defendant was using the occasion to further the interest which the law regards as worthy of protection. In such cases, the privilege is not *absolute* but *qualified*, in the sense that it is forfeited by abuse.

Because of its drastic effect in foreclosing all opportunity for vindicating a traduced reputation, absolute immunity is but rarely granted, and only as an aid to the efficient functioning of our governmental institutions: legislative, executive and judicial.²⁵³ Although prevailing even in the teeth of malice and abuse, it is of course not accorded for the sake of shielding mischief-makers who have no claim whatever to the law's sympathy. Rather, so far-reaching an immunity can be justified only to protect certain highly placed persons from the harassment of having to meet unjustified charges of malice or abuse (before somewhat unpredictable juries) and to remove the dampening effect such a spectre would inevitably have on the fearless discharge of their official functions. It should be, and with rare exceptions is, matched by a high sense of responsibility in those who are its beneficiaries, like judges and Ministers of State, or by other effective safeguards against flagrant abuse, as in the case of judicial control over the conduct of witnesses.

Absolute privilege is accordingly limited to the following occasions.

Parliamentary proceedings

[25.240] A wide area of privilege is devoted to the protection of political institutions. Thus, absolute immunity attaches to anything "said or done" by Members of Parliament in the exercise of their duties in the course of proceedings of either House, because it is felt that fear of liability might induce caution destructive of the frankness that the public has a right to expect. This privilege was established in the course of the constitutional struggle between the Executive and Parliament and was confirmed by the Bill of Rights.²⁵⁴ The privilege is both the Member of Parliament's and Parliament's, and can be waived only by both.²⁵⁵ It precludes the questioning of anything said or done in Parliament, even in defence to an action by a Member of Parliament; and as such may seriously impair freedom of political debate.²⁵⁶

The privilege covers not only verbal but equally written speech, such as a document tabled in the House and its ancillary preparation.²⁵⁷ It also covers parliamentary speeches broadcast over the radio or television.²⁵⁸ But primarily

253 *Mann v O'Neill* (1997) 191 CLR 204. See too NSWLRC 75 (1995), at [11.8]-[11.9].

254 (IMP), art 9; *Parliamentary Privileges Act 1987* (Cth), s 16. See also now *Defamation Act 2005* (NSW), s 27(2)(a) and equivalent provisions in the remaining jurisdictions. This paragraph is not subject to any geographical limitation of the paragraph relating to judicial proceedings, which applies to proceedings before Australian courts and tribunals. In any event, s 27(2)(c) extends to parliamentary proceedings in other jurisdictions, where those proceedings would be subject to absolute privilege or the equivalent in those jurisdictions,

255 Reversed by *Defamation Act 1996* (UK), s 13, permitting individual MPs to waive the privilege.

256 See *Wright and Advertiser Newspaper v Lenin* (1990) 53 SASR 416; *Prebble v Television NZ* [1995] 1 AC 321; *Laurance v Katter* [2000] 1 Qd R 147; Chesterman, "Privileges and Freedoms for Defamatory Political Speech" (1997) 19 Adel LR 155.

257 *Holding v Jennings* [1979] VR 289 (dictation to typist). However, see also *Erglis v Buckley* [2004] 2 Qd R 599 (respondents who wrote letter to State Minister, knowing that the letter would be republished in parliament, could be sued for defamation, as to do so did not impeach or call into question parliamentary privilege).

258 The view expressed by Davis, "Parliamentary Broadcasting and the Law of Defamation" (1948) 7 U Tor LJ 385 that, statute apart, an MP enjoys at most qualified privilege in respect of broadcasts is untenable: see *Irwin v Ashurst* 124 ALR 997 (Ore 1938) (broadcast of

in order to ensure protection for radio and television stations, it has been specifically enacted in Australia that “no action or proceeding ... shall lie against any person for broadcasting or rebroadcasting any portion of the proceedings of either House of Parliament.”²⁵⁹ But repetition outside Parliament, of statements made inside, are not generally believed to be covered.²⁶⁰ Absolute immunity has also been conferred on petitions or submissions made to Parliament.²⁶¹

At common law, only qualified privilege attaches to fair and accurate reports of parliamentary proceedings.²⁶² An Act of Parliament authorising publication of any matter would, of course, impliedly give absolute protection to those acting upon it, but publication of reports or papers by order of either House alone does not carry similar immunity at common law.²⁶³ However, statute has conferred absolute privilege upon the publication by authority of either House of reports, papers, votes or proceedings, by persons so authorised or their servants.²⁶⁴ Qualified privilege attaches also to publication of extracts from or abstracts of papers so ordered to be published.²⁶⁵

Judicial proceedings

[25.250] Freedom of speech without fear of consequences is considered indispensable for the proper and effective administration of justice. All concerned in judicial proceedings, therefore – from judge and jury to solicitor and counsel, parties and witnesses – enjoy absolute protection for what they say,²⁶⁶ conceded “with the knowledge that courts of justice are presided over by those who from

judicial proceedings absolutely privileged). Such a conclusion would seriously impede the freedom of speech inseparably bound up with our conception of parliamentary democracy. Nor is it supportable by the decisions cited which establish merely that *re-publication* of a parliamentary speech outside the House is not entitled to absolute privilege.

259 *Parliamentary Proceedings Broadcasting Act 1946* (Cth), s 15. See also *Legislative Assembly (Broadcasting) Act 2001* (ACT), s 9; *Legislative Assembly (Powers and Privileges) Act* (NT), s 23(2); *Constitution Act 1975* (Vic), s 74AA.

260 See *Australian Broadcasting Commission v Chatterton* (1986) 46 SASR 1 (FC); *Beitzel v Crabb* [1992] 2 VR 121; *Stopforth v Goyer* (1979) 97 DLR (3d) 369 (qualified privilege). Even the adoption and confirmation outside of parliamentary proceedings of a statement made in the course of those proceedings, being a fresh publication, may not be protected by absolute privilege: *Buchanan v Jennings* [2005] 1 AC 115 (PC).

261 See *Defamation Act 2005* (NSW), s 27(2)(d) and equivalent provisions in the remaining jurisdictions.

262 Below, [xx.xxx].

263 *Stockdale v Hansard* (1839) 9 A & E 1; 112 ER 1112.

264 *Parliamentary Papers Act 1908* (Cth), s 4; *Parliamentary Privileges Act 1987* (Cth), s 11; *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW); *Parliament of Queensland Act 2001* (Qld), s 56; *Constitution Act 1975* (Vic), ss 73 – 74; *Parliamentary Papers Act 1891* (WA), s 1; *Legislative Assembly (Powers and Privileges) Act* (NT), s 10. The model is the *Parliamentary Papers Act 1840* (ENG), s 2.

265 See below, [xx.xxx].

266 As to the common law position, see *Cabassi v Vila* (1940) 64 CLR 130; *Love v Robbins* (1990) 2 WAR 510; *Marrinan v Vibart* [1963] 1 QB 528. As to the position under statute, see *Defamation Act 2005* (NSW), s 27(2)(b) and equivalent provisions in the remaining jurisdictions. By virtue of s 27(2)(c), the absolute privilege extends to judicial proceedings in other jurisdictions, where those proceedings would be subject to absolute privilege or the equivalent in those jurisdictions.

their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.”²⁶⁷

The privilege has been extended beyond courts of justice to other tribunals with “similar attributes”. The line of demarcation, however, is less than precise if only because it ultimately depends on the cumulative effect of numerous characteristics rather than on any single element. Each case, it has been suggested,²⁶⁸ must be considered in the light of four criteria: first, under what authority the tribunal acts – it *must* be “recognised by law”, though not necessarily set up by legislation,²⁶⁹ in contrast to purely domestic tribunals. Secondly, the nature of the question into which the tribunal is to inquire – whether (like ordinary courts of law) it is an issue “inter partes”. Thirdly, the procedure adopted by it in carrying out the inquiry, including such matters as its power to summon witnesses and compel testimony under oath, the prestige of the presiding officer. Finally, the legal consequences of the conclusion reached by the tribunal as a result of the inquiry. Courts of law render, of course, immediately binding decisions, but here it is sufficient if the report of the tribunal, though in form advisory to a superior authority, has in practice a major influence on the final decision that is binding and authoritative.²⁷⁰ However, a merely preliminary investigation, the report of which could only be remitted to a prosecuting authority, would not qualify.²⁷¹ In conceding the privilege to a board of inquiry into police malpractice appointed by the Victorian government, it was considered important that the tribunal was expected to make a fearless investigation of such serious allegations, that its personnel would be peculiarly vulnerable to actions for defamation in performing their function of examining witnesses for credibility, and that the procedure, atmosphere and personnel were those of courts of law.²⁷² The same conclusion has been reached regarding a military court of inquiry,²⁷³ proceedings by a justice of the peace for the reception of a lunatic,²⁷⁴ hearings by a local authority on a town planning scheme,²⁷⁵ disciplinary proceedings by the Law Society,²⁷⁶ Benchers of an Inn of Court²⁷⁷ or an ecclesiastical commission,²⁷⁸ and appeals to the Public

267 *Royal Aquarium v Parkinson* [1892] 1 QB 431 at 451 per Lopes LJ; *Clyne v NSW Bar Assoc* (1960) 104 CLR 186 at 200.

268 *Trapp v Mackie* [1979] 1 WLR 377 at 379 per Lord Diplock.

269 For example, *Lincoln v Daniels* [1962] 1 QB 237.

270 As in *Trapp v Mackie* [1979] 1 WLR 377 (statutory court of inquiry into dismissal of school teacher, reporting to Secretary of State); *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 (military court of inquiry). But unlike the EC Commission procedure in *Hasselblad v Orbinson* [1985] QB 475 (CA).

271 *O'Connor v Waldron* [1935] AC 76 (PC) (investigation under Canada anti-trust act).

272 *Bretherton v Kaye* [1971] VR 111. See also *Tampion v Anderson* [1973] VR 321. A Royal Commission might not qualify, being more investigatory than judicial: *Douglass v Lewis* (1982) 30 SASR 50, apart from statutes like the: *Royal Commissions Act 1902* (Cth), s 7; *Royal Commissions Act 1991* (ACT), s 19; *Royal Commissions Act 1923* (NSW), s 6; *Commissions of Inquiry Act 1950* (Qld), s 20; *Royal Commissions Act 1917* (SA), s 16B; *Commissions of Inquiry Act 1995* (Tas), s 8 and *Royal Commissions Act 1968* (WA), s 32.

273 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255; *Bamford v Clarke* (1876) 14 SCR (NSW) 303.

274 *Hodson v Pare* [1899] 1 QB 455. A fortiori, petty sessions: *Law v Llewellyn* [1906] 1 KB 487 (magistrate); *Munster v Lamb* (1883) 11 QBD 588 (solicitor appearing for the defence).

275 *Atkins v Mays* [1974] 2 NZLR 459.

276 *Addis v Crocker* [1961] 1 QB 11. See also *Mann v O'Neill* (1997) 191 CLR 204.

277 *Lincoln v Daniels* [1962] 1 QB 237 (CA); *Marrinan v Vibart* [1963] 1 QB 528.

278 *Barratt v Kearns* [1905] 1 KB 504.

Service Board in New Zealand;²⁷⁹ in contrast to hearings of applications for liquor or dancing licences,²⁸⁰ public examinations before building tribunals²⁸¹ and a creditors' meeting before an official assignee.²⁸²

The privilege is not confined to statements made in court, but extends to all preparatory steps taken with a view to judicial proceedings.²⁸³ It includes any communication by a prospective witness to the parties or their legal advisers,²⁸⁴ complaints addressed to the proper authority for initiating disciplinary proceedings against a lawyer²⁸⁵ and a report by an official receiver to the court.²⁸⁶ But the statement or document must be directly concerned with actual or contemplated proceedings;²⁸⁷ not just remotely so, like a factual report containing allegations which merely might provide a ground for future prosecution²⁸⁸ or a complaint to an investigating or prosecuting authority.²⁸⁹

The privilege has been said to apply only to any utterance reasonably related to the subject of the judicial inquiry, but even if so limited, "relevance" is liberally interpreted: a statement may qualify which, if false, would not justify a prosecution for perjury.²⁹⁰ A witness is not required to guess at his or her risk whether the testimony may be safely given.

Solicitor and client

[25.260] Professional communications between solicitor and client on matters fairly referable to their confidential relationship are privileged, though it is not certain whether the protection is absolute or qualified. The English Court of Appeal once chose the former, apparently on the view that the immunity was just an aspect of "judicial" privilege,²⁹¹ but the House of Lords has reserved the question for future consideration.²⁹² On principle, the lesser privilege would appear sufficient to safeguard effective communication between legal adviser and client, at any rate if it does not relate to actual or intended litigation, like the drafting of wills or conveyancing. The privilege, whatever its status, is not defeated even by the fact that eventually the solicitor does not accept a retainer.²⁹³ But the defamatory remark must have been relevant to the

279 *Thompson v Turbott* [1962] NZLR 298. Now *Defamation Act 1992* (NZ) s 14.

280 *Royal Aquarium v Parkinson* [1892] 1 QB 431; *Attwood v Chapman* [1914] 3 KB 275.

281 *Joyal-Knags v Queensland Newspapers* [2005] 2 Qd R 289.

282 *Searl v Lyons* (1908) 27 NZLR 524.

283 So it would be an abuse of process to permit a defamatory document first disclosed on discovery to found subsequent action for defamation: *Riddick v Thames Bd Mills* [1977] QB 881 (CA).

284 *Watson v M'Ewan* [1905] AC 480; *Ronald v Harper* [1913] VLR 311; *Thompson v Turbott* [1962] NZLR 298; *Hasselblad v Orbinson* [1985] QB 475 (CA).

285 *Hercules v Phease* [1994] 2 VR 411 (AD).

286 *Bottomley v Brougham* [1908] 1 KB 584.

287 It should form "an integral and necessary part of the preparation for and pursuit of the litigation": *Mann v O'Neill* (1997) 191 CLR 204 at 243 per Gummow J.

288 *Szalatnay-Stacho v Fink* [1947] KB 1.

289 *Mann v O'Neill* (1997) 191 CLR 204.

290 *Seaman v Netherclift* (1876) 2 CPD 53 at 60; doubted: *Hercules v Phease* [1994] 2 VR 411 at 446.

291 *More v Weaver* [1928] 2 KB 520.

292 *Minter v Priest* [1930] AC 558. The question of liability for defamation cannot arise unless the communication has first been admitted in evidence. If privilege from disclosure has not been waived, *cadit quaestio*. The latter privilege, however, is that of the client, not the solicitor: see *Minter v Priest* [1930] AC 558.

293 *Minter v Priest* [1930] AC 558.

discussion between the parties in their relationship of solicitor and client, not irrelevant gossip idly interjected in a professional interview, such as “Have you heard that Jones has run off with Mrs Brown?”²⁹⁴

High executive communications

[25.270] With the object of securing the free and fearless discharge of high public duty, complete protection has also been extended to the executive department of government. Its limits, however, are as yet less clearly defined.

Absolute immunity does not attach to official communications by all public servants or persons implementing statutory duties, but is confined to “high officers of State”. It undoubtedly covers communications between Ministers and the Crown, or among Ministers themselves.²⁹⁵ In *Isaacs v Cook*,²⁹⁶ it was applied to a report by the High Commissioner of Australia in the United Kingdom to the Prime Minister of Australia, but in a later case²⁹⁷ the High Court was divided on its application to the annual report furnished by the Commissioner of Taxation to the Federal Treasurer for presentation to Parliament. On one view, it stood on a higher plane than the report in *Isaacs v Cook* [1925] 2 KB 391 because it was essential that the defendant should not be deterred by fear of litigation from reporting freely, pursuant to a statutory duty, on breaches and evasions of the *Income Tax Act*,²⁹⁸ besides which the report when printed by order of Parliament would also be privileged.²⁹⁹ But on another view, the Commissioner’s functions were not of a sufficiently “high level” and the subject matter too indirectly related to the safety and security of the community to merit absolute protection.³⁰⁰

Besides the speaker being a “high” official, are there any additional limits on the *kind* of communication? When it is said that the speaker must be performing an “act of state”, is more implied than that his or her status be elevated and that he or she was acting in his official capacity? With the expansion of government, the communication may clearly relate to commercial matters, no less than to a more traditional area of governmental concern like foreign affairs or public order.³⁰¹ Nor would it be compatible with its rationale if the privilege did not cover communications to “appropriate subordinates”.³⁰²

On the other hand, the privilege would seem to be clearly confined to “internal” communications which present less of a menace to private reputation because their range of dissemination is relatively narrow and the recipient is usually in a better position to evaluate its accuracy and suppress it if found to be mischievous. In salutary contrast to American law,³⁰³ press releases are excluded: however desirable that government policy be explained to the public,

294 *More v Weaver* [1928] 2 KB 520 at 525.

295 *Chatterton v Secretary of State* [1895] 2 QB 189.

296 *Isaacs v Cook* [1925] 2 KB 391.

297 *Jackson v Magrath* (1947) 75 CLR 293.

298 Starke and Williams JJ.

299 Below, [xx.xxx].

300 Latham CJ, and Rich J (dissenting on a ground not material for the present purpose). Dixon and McTiernan JJ found it unnecessary to express an opinion, because there was no evidence of malice.

301 *Peerless Bakery v Watts* [1955] NZLR 339 (bread supply); *Isaacs v Cook* [1925] 2 KB 391 (fruit export).

302 *Peerless Bakery v Watts* [1955] NZLR 339 (Minister’s order to Wheat Board official).

303 *Barr v Mateo* 360 US 564 (1959) (5-4), dropped the barrier both in regard to the official’s rank and the occasion, so long as the communication falls within his official function.

it is not so *necessary* to the proper functioning of government as to demand a complete sacrifice of private reputation.³⁰⁴

Army, police and foreign governments

[25.280] In England, it has been held that a report by a commanding officer of a regiment to the Adjutant-General is entitled to complete immunity.³⁰⁵ With respect to statements made in the course of naval and military duty, the public interest in permitting free exchange of confidential opinions between officers discharging responsible duties is perhaps reinforced by the necessity of maintaining discipline and unquestioning submission to superior authority. The existence of an absolute privilege in this situation, however, is still an open question, particularly in so far as its claim involves the doubtful proposition that matters of military discipline are not cognisable by civil courts.³⁰⁶ At any rate, the High Court has refused to extend it to a report by a police inspector to the Metropolitan Superintendent, because “the discipline of the Force can survive an investigation of the motives by which he is activated in detracting from the character of a subordinate”.³⁰⁷

The privilege does not ordinarily extend to communications by foreign officials, except perhaps in unprecedented circumstances, as when a foreign government has been granted asylum as an ally during war.³⁰⁸ The basis of the domestic privilege is public interest, whereas the protection of representatives of foreign governments is more appropriately founded on diplomatic immunity.³⁰⁹

Marital communications

[25.290] Communications between husband and wife enjoy absolute immunity at common law.³¹⁰ This salutary rule used to be attributed to want of any “publication” in the technical sense, husband and wife being regarded as one in the eye of the law. But this was a threadbare fiction and difficult in any event to reconcile with the rule that a defamatory statement made to one spouse concerning the other is actionable.³¹¹ More consonant with modern ideas is to ascribe the conjugal immunity frankly to an absolute privilege in recognition of the confidential relationship between spouses so as to avoid “results disastrous to social life”.³¹²

Qualified privilege

[25.300] The publication of defamatory statements is in some circumstances protected by qualified privilege, in recognition of certain necessities of social intercourse. Unlike absolute immunity, freedom of expression is here safeguarded only on condition that the publication is made to serve the legitimate purpose of the privileged occasion and not some ulterior motive, foreign to the interest for

304 They do however enjoy qualified privilege under widespread statutes: below, [xx.xxx].

305 *Dawkins v Lord Paulet* (1869) LR 5 QB 94.

306 *Gibbons v Duffell* (1932) 47 CLR 520 at 520, 526-527, 531, 534.

307 *Gibbons v Duffell* (1932) 47 CLR 520 at 528; cf *Merricks v Nott-Bower* [1965] 1 QB 57. Nor is there any longer a categorical Crown privilege to withhold such a report from evidence: *Conway v Rimmer* [1968] AC 910.

308 *Szalatnay-Stacho v Fink* [1947] KB 1; cf *Richards v Naum* [1967] 1 QB 620.

309 Cf *Wright v Cantrell* (1943) 44 SR (NSW) 45.

310 *Wennhak v Morgan* (1888) 20 QBD 635.

311 *Wenman v Ash* (1853) 13 CB 836; 138 ER 1432.

312 *Wennhak v Morgan* (1888) 20 QBD 635 at 639. See *Prosser & Keeton*, p 824, *Rest 2d*, s 592.

the protection of which the privilege is accorded. Qualified privilege may defeat the law's protection of reputation in title of a wide variety of competing interests. Initially concerned with private and confidential communications on matters of mutual interest, their range has expanded in step with developing notions of social importance.³¹³ The most comprehensive formula to describe these situations is that the occasion must be one "where the person who makes [the] communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it".³¹⁴ The underlying justification is that the defence serves "the common convenience and welfare of society."³¹⁵

The occasions qualifying for privilege can never be catalogued and rendered exact. New arrangements of business and habits of life may project patterns which, though different from well settled instances of privilege, could nonetheless fall within the flexible definition referred to. The legal concepts employed for determining the incidence of privilege, like "interest" and "duty", are sufficiently flexible to permit courts to individualise decisions somewhat reminiscent of negligence litigation, though here the judge's control is much greater than the jury's. It is for the judge alone to determine as a matter of law upon undisputed facts, or if the facts are disputed, upon facts as found by the jury, whether an occasion is privileged.³¹⁶ If answered in favour of the defendant, the questions whether the *publication* is in fact privileged or the defendant has abused the privilege are for the jury.³¹⁷

There are no rigid categories of qualified privilege, and in many cases the defence may succeed on more than one specific ground. But, for the sake of convenience, the subject can be summarised under the headings below.

Performance of a duty

[25.310] A statement made in the discharge of some public or private duty, whether legal or moral, is conditionally privileged, provided it is communicated to one who has a reciprocal interest in receiving it.³¹⁸ It was once thought sufficient that the recipient had a legitimate interest in the information even in the absence of any corresponding obligation in the publisher to impart it to him. But the scope of the privilege was considerably narrowed in *Watt v Longsdon*³¹⁹ which held that a stranger was not privileged to make disclosures to a wife reflecting on the morals and integrity of her husband. Notwithstanding the legitimate concern of spouses in each other's conduct, the law did not recognise a social obligation in a stranger to interfere, particularly when the information emanated from a doubtful source and no effort was made to seek corroboration. Moreover, the privilege fails if the recipient actually lacks the required interest

313 See Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1992) 14 Cardozo L Rev 351. The extension to matters of public interest (by statute and constitutional interpretation) are noted later.

314 *Adam v Ward* [1917] AC 309 at 334 (Lord Atkinson).

315 *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044 at 193 (CM & R 181), 1049 (ER) per Parke B.

316 *Guisse v Kouvelis* (1947) 74 CLR 102 at 116.

317 In South Australia, the Australian Capital Territory and the Northern Territory, juries are no longer used in defamation cases. See above [xx.xxx].

318 *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044 at 193 (CM & R), 1049 (ER) per Parke B.

319 *Watt v Longsdon* [1930] 1 KB 130.

though the defendant honestly and reasonably believes he has it.³²⁰ Both rules are widely felt to be unduly restrictive: their legislative reversal in New South Wales³²¹ has now been enacted across Australia in the statutory defence of qualified privilege as part of the national, uniform defamation laws.³²²

Whether there is a moral or social duty to convey the information must be determined by reference to the standard of values entertained by persons of ordinary intelligence and moral principle in the community.³²³ “Moral duty” does not imply that anyone who failed to make the communication would necessarily be regarded by his or her fellows as open to censure, but rather that it was made on an occasion when one who desired to do his or her duty to his or her neighbour would reasonably believe that he or she ought to make it.³²⁴ Occasionally, the duty to give information may be public in character, such as to give information of suspected crime to the police.³²⁵ In a leading case,³²⁶ certain charges had been preferred by a Member of Parliament against a high ranking officer. The Army Council instituted an investigation and later made a pronouncement which, in the course of exonerating him, incidentally passed defamatory strictures upon his accuser. The Council authorised its publication in the press, but was held entitled to claim privilege on the ground that the statement had been made in discharge of a public obligation. Moreover, having regard to the fact that the accusation had been made in Parliament, publication of the refutation in the press was not unduly wide to be considered abusive.

The law acknowledges more readily a duty to speak if the statement is made in answer to a specific inquiry rather than volunteered. One of the most common instances of privilege is that of a former employer giving the character of a discharged servant at the request of someone proposing to engage him or her.³²⁷ Similar protection is accorded to a report requested by an employer from one employee on another,³²⁸ to an accusation against a third party in reply to a police inquiry,³²⁹ or to a requested report from one businessman on the financial standing of a prospective customer.³³⁰

Some uncertainty remains regarding the position of commercial credit agencies and trade protection societies which supply information concerning the financial credit of others at the request of trade subscribers. In *Macintosh v Dun*³³¹ the Privy Council denied protection to an organisation conducted as a pure business venture, on the ground that it was not in the public interest to protect communications made from motives of self-interest by persons who trade for profit in the character of other people. The defendants’ *contractual* duty to supply the information desired by customers could not by itself create a

320 Below, [xx.xxx].

321 *Defamation Act 1974* (NSW), ss 21, 22 (repealed).

322 See *Defamation Act 2005* (NSW), s 30(1)(a), 30(2) and equivalent provisions in the remaining jurisdictions.

323 *Stuart v Bell* [1891] 2 QB 341 at 350; *Watt v Longsdon* [1930] 1 KB 130 at 153.

324 *Howe v Lees* (1910) 11 CLR 361 at 369.

325 *Tipene v Apperley* [1981] NZ Recent Law 110.

326 *Adam v Ward* [1917] AC 309. See also *Musgrave v Commonwealth* (1937) 57 CLR 514; *Dunford v News Media* [1971] NZLR 961.

327 *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044 at 193 (CM & R), 1049 (ER).

328 *Riddick v Thames Bd Mills* [1977] QB 881 (but for such intra-mural communications the common employer is not absolutely privileged as urged by Lord Denning (“no publication”)).

329 *Kine v Sewell* (1838) 3 M & W 297; 150 ER 1157.

330 *Robshaw v Smith* (1878) 38 LT 423.

331 *Macintosh v Dun* [1908] AC 390; 6 CLR 303.

social duty recognised by law for the welfare of the general public. This decision has been generally criticised as insensitive to legitimate business needs, especially in our modern credit economy. Its effect is now nullified by a subsection in the national, uniform defamation laws, which provides that merely because a defendant is publishing for reward does not preclude him or her from relying upon a defence of qualified privilege.³³² Moreover, later decisions both in Australia³³³ and England³³⁴ re-established the privilege for persons and organisations who are themselves interested in trade and maintain a trade protection service for their own common advantage. For example, in *Howe v Lees*,³³⁵ stock and station agents who carried on business in the Bendigo sale yards formed an association under the rules of which a member was obliged, under penalty, to report to the secretary any purchaser who did not settle his accounts within four days after sale. An honest but mistaken report regarding the plaintiff was held privileged.³³⁶ On the other hand, in the context of banker and customer, the High Court of Australia has recently held that a bank cannot rely on a defence of qualified privilege where it mistakenly informs a person presenting a cheque drawn upon a customer's account to "Refer to drawer", as there is no "community of interest" between the bank and the person presenting the cheque.³³⁷

A duty to speak may arise even when information was not solicited. Certain relations, like that of employer and employee³³⁸ or father and child,³³⁹ justify volunteered statements by one or the other relevant to their duties and interests. A parent may warn his daughter against the character of her suitor, but unsolicited interference in family affairs by outsiders is not regarded as legitimate, save in very exceptional circumstances.³⁴⁰ In general it is true to say that, while more in the way of good reason to speak is required from a volunteer, the absence of a request is merely one of the factors to be considered in determining whether the occasion warranted the defendant's conduct.

Protection of an interest

[25.320] By analogy to self-defence against physical aggression,³⁴¹ qualified privilege attaches to statements made for the protection of the publisher's own legitimate interests. Thus statements in self-defence are protected, if made by a person in reply to attacks upon his own character or conduct, or in protection of an employer against attacks on him or her, or in protection of his or her own proprietary interests or those of his or her employer against attacks upon such interests. For example, a newspaper editor may defend himself not only against attacks upon him as a person and journalist, but may also defend the reputation of the company and newspaper because of his personal interest in the

332 See *Defamation Act 2005* (NSW), s 30(5) and equivalent provisions in the remaining jurisdictions. See also *Bashford v Information Australia (Newsletters)* (2004) 218 CLR 366 at 378 (Gleeson CJ, Hayne and Heydon JJ).

333 *Howe v Lees* (1910) 11 CLR 361.

334 *London Assoc for Protection of Trade v Greenlands* [1916] 2 AC 15.

335 *Howe v Lees* (1910) 11 CLR 361.

336 The distinction thus drawn was doubted by Lord Parker in *London Assoc for Protection of Trade v Greenlands* [1916] 2 AC 15 at 42, and Scrutton LJ in *Watt v Longsdon* [1930] 1 KB 130 at 148.

337 *Aktas v Westpac Banking Corporation* (2010) 268 ALR 409.

338 *Cooke v Wildes* (1855) 5 E & B 328; 119 ER 504.

339 *Todd v Hawkins* (1837) 8 C & P 88; 173 ER 411.

340 *Watt v Longsdon* [1930] 1 KB 130.

341 *Norton v Hoare (No 1)* (1913) 17 CLR 310 at 318, 322.

enterprise.³⁴² So a daughter is entitled to vindicate her father's memory, because her filial interest makes it proper for her to give an answer to any slurs cast upon him.³⁴³ Not, however, a radio journalist interviewing the person attacked.³⁴⁴

Some latitude is granted for the reply.³⁴⁵ If in defence to an attack by A, B defames C, he or she will be protected, so long as the reflection on C is reasonably incidental to the refutation.³⁴⁶ But just as in case of physical attack, the permissible scope of self-defence is exceeded if the reply becomes a counterattack with accusations unrelated or "insufficiently related" to the original attack.³⁴⁷ The privilege is a shield, not a sword.

No privilege attaches unless the communication is made to a person with a corresponding interest or duty to receive it. Whether such reciprocity either of interest or duty exists must vary with the facts of each case, but it seems clear that where the defamatory matter is published in self-defence or in protection of an interest or by way of vindication against an attack, the concept of corresponding duty or interest in the recipient is liberally interpreted.³⁴⁸ The proper test is: "Would the great mass of Australians of ordinary intelligence and moral principle have recognised that the occasion or exigency warranted the communication?"³⁴⁹ Thus every citizen may inform the police of suspected crime³⁵⁰ or address to his or her Member of Parliament any grievance concerning a public official.³⁵¹ He or she does, however, take the risk that the addressee is the proper authority for dealing with the complaint.³⁵² In *Mowlds v Fergusson*, for example, a police inspector, in reply to serious criticism levelled against him by a Royal Commissioner in relation to a matter involving the plaintiff's conduct, furnished a report at the Premier's request which contained defamatory allegations concerning the plaintiff. He showed it to his former superior who had since retired from the service. This communication was held to be privileged, because the latter had a moral concern in knowing the

342 *Penton v Calwell* (1945) 70 CLR 219; *Norton v Hoare (No 1)* (1913) 17 CLR 310. But he or she may not claim privilege for a reply to an attack on newspapers generally.

343 *Bowen-Rowlands v Argus Press* (1926), cited by Dixon J in *Loveday v Sun Newspaper* (1938) 59 CLR 503 at 519-520.

344 *Radio 2UE Sydney v Parker* (1992) 29 NSWLR 448 (CA).

345 But no riposte is permitted to the original defamer: *Kennett v Farmer* [1988] VR 991; *Echo Publications v Tucker* [2007] NSWCA 73 at [79]-[81] (Hodgson JA).

346 *Watts v Times Newspapers* [1996] 2 WLR 427 (CA); *Loveday v Sun Newspaper* (1938) 59 CLR 503 at 520.

347 *News Media v Finlay* [1970] NZLR 1089 (CA) (a case of tit-for-tat); *Douglas v Tucker* [1952] 1 DLR 657.

348 "The law has not restricted the right within any narrow limits" (*Adam v Ward* [1917] AC 309 at 329 (Lord Dunedin)).

349 *Mowlds v Fergusson* (1940) 64 CLR 206 at 220 (Williams J).

350 Since the tort of malicious prosecution (a special form of defamation) provides additional protection in requiring lack of probable cause (plus malice) (below, [xx.xxx]), this should apply here also.

351 *R v Rule* [1937] 2 KB 375. The MP may likewise be privileged in passing it on and replying: *Beach v Freeson* [1972] 1 QB 14; *Moran v Chapman (No 2)* [1935] VLR 13.

352 *Hebditch v MacIlwaine* [1894] 2 QB 54; *Beach v Freeson* [1972] 1 QB 14. Under the statutory defence of qualified privilege, embodied in the *Defamation Act 2005* (NSW), s 30 and equivalent provisions in the remaining jurisdictions, the mistaken character of the recipient in all cases of qualified privilege is excused by reasonable belief of the defendant. The common law rule seems to confuse mistaken belief in the existence of a privilege with whether the recipient has the correct qualifications. *Rest 2d*, s 595 applies reasonable belief to both.

consequences of his own past administration and an interest to hear his former subordinate's answer to the comments made upon him. Besides, he was a person to whom the defendant might legitimately look to for support in his process of vindication.³⁵³ In certain cases, a person may even resort to the public press. If attacked in public, she is free to place her case before the body whose judgment the attacking party has sought to effect, and this may comprise the entire public, for example where she is seeking to repel an attack made on her in Parliament³⁵⁴ or the plaintiff has herself chosen the press for the purpose of giving publicity to her own animadversions against the defendant.³⁵⁵

Statements invited by plaintiff

[25.330] Resembling retorts to an attack are communications procured at the complainant's own request or contrivance. By instigating the defamatory publication himself, a plaintiff stands to forfeit his claim to protection either on the ground of consent or, more often, by conferring on the defendant a qualified privilege to reply.³⁵⁶ He will be deemed to have consented if he feeds false information to a newspaper,³⁵⁷ sets afloat compromising rumours about himself, or deliberately entraps the defendant into making or repeating a defamatory allegation for the sole purpose of suing thereon.³⁵⁸ But merely initiating a public discussion about oneself is not an invitation to defame;³⁵⁹ even a challenge "Publish if you dare" implies not consent, but defiance.³⁶⁰

If, in contrast, the defamatory reply is made to a legitimate inquiry by the plaintiff or his or her agents anxious to obtain information or trace a rumour to its source, it becomes decisive whether the calumny originated with the defendant. For if it did, he may not with impunity repeat,³⁶¹ as distinct from merely acknowledge,³⁶² his former allegation; otherwise, however, he is conditionally privileged to answer the inquiry.³⁶³

Common interest

[25.340] A communication on a subject in which the defendant and the recipient share a common legitimate interest is privileged. Although "interest" is

353 *Mowlds v Fergusson* (1940) 64 CLR 206 at 215 (Dixon J); adopting *Rest 2d*, s 594, cmt g.

354 *Penton v Calwell* (1945) 70 CLR 219; *Adam v Ward* [1917] AC 309.

355 *Loveday v Sun Newspaper* (1938) 59 CLR 503. The newspaper enjoys a corresponding "derivative" privilege: below, [25.xxx].

356 The distinction between consent and privilege is shadowy, and neither courts nor writers have contributed much to its clarification: see *Loveday v Sun Newspaper* (1938) 59 CLR 503 at 523-525.

357 As Mr Corrigan did in *Cassidy v Daily Mirror* [1929] 2 KB 331.

358 *Jones v Brooks* (1974) 45 DLR (3d) 413; *King v Waring* (1803) 5 Esp 13; 170 ER 721 at 15 (Esp), 722 (ER); *Weatherston v Hawkins* (1786) 1 TR 110; 99 ER 1001. *Rudd v Cameron* (1912) 26 OLR 154 treats this situation as one of privilege; the defendant lost on proof of malice. Note also that it is not prejudicial for one libelled in a newspaper to buy a copy to prove publication, because purchase is free to all: *Brunswick v Harmer* (1849) 14 QB 185; 117 ER 75.

359 *Loveday v Sun Newspaper* (1938) 59 CLR 503 at 513-514; *Church of Scientology v Anderson* [1980] WAR 71 (radio talk-back session).

360 *Orr v Isles* (1965) 83 WN (Pt 1) (NSW) 303 at 325. Just as one does not consent to a battery by resisting a threat and daring the other to hit him.

361 *Smith v Mathews* (1831) 1 M & Rob 151; 174 ER 52; *Griffiths v Lewis* (1845) 7 QB 61; 115 ER 411.

362 *Freeman v Poppe* (1905) 25 NZLR 529; *Griffiths v Lewis* (1845) 7 QB 61; 115 ER 411 at 65 (QB).

363 *Taylor v Hawkins* (1851) 16 QB 308; 117 ER 897; *Ryan v Newman* (1882) 3 LR (NSW) 309; but cf *Andrews v Ginn* (No 2) [1933] NZLR 1073.

not used in any technical sense, it has been narrowly construed to include only “real and direct personal, trade, business or social concern[s]”,³⁶⁴ “such as would assist in the making of an important decision or determining of a particular course of action”.³⁶⁵ It must be something more than mere curiosity in the private affairs of other people. For this reason, the law has stoutly refused to recognise any community of interest between a newspaper and the general body of its readers which could justify the communication to them of imputations against another person.³⁶⁶ Even the common link between members of a national minority group does not supply a sufficient mutual interest to permit one of them to broadcast calumnies against another among the group as a whole.³⁶⁷ Exceptionally, however, the use of a newspaper as a medium of communication is permissible, provided the paper is really only an enlarged circular³⁶⁸ restricted to the particular group which shares a legitimate common interest with the publisher.³⁶⁹ The limitation of the common law defence of qualified privilege, imposed by the requirement of complete reciprocity of duty and interest between publisher and recipient respectively, was an important reason for the development of the statutory defence of qualified privilege, which does not turn upon this element.³⁷⁰

Mutuality of interest is often encountered when there is also a moral, sometimes even a legal, duty to make the communication to the other person. Usually the common interest is pecuniary, arising from association between the parties for business purposes, as in the case of discussion of company affairs among shareholders³⁷¹ or intra-mural reports about an employee.³⁷² Again, a mutual interest arises from professional association like a trade union³⁷³ or in respect of statements made to a disciplinary body and the communication of its findings to an appellate domestic tribunal.³⁷⁴ The relationship of landlord and tenant justifies complaints by one to the other concerning the conduct of other tenants, lodgers or persons employed on the premises,³⁷⁵ while democracy demands protection for communications between electors, as well as between candidates and electors, regarding any matter which may properly affect their choice at the ballot.³⁷⁶

364 *Telegraph Newspaper v Bedford* (1934) 50 CLR 632 at 662 (Evatt J).

365 *Austin v Mirror Newspapers* [1986] AC 299 at 311.

366 *Telegraph Newspaper v Bedford* (1934) 50 CLR 632; *Antonovich v WA Newspaper* [1960] WAR 176; *Smith's Newspaper v Becker* (1932) 47 CLR 279 at 304. However, see *Carleton v Australian Broadcasting Corporation* (2002) 172 FLR 398 at 424 (Higgins J) (television broadcast on another channel's media ethics privileged occasion).

367 *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357.

368 *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749 at 779.

369 *Chapman v Ellesmere* [1932] 2 KB 431 (racing calendar); *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 365 (Croatian language); *Wells v Wellington* [1952] NZLR 312 (trade union).

370 As to the statutory defence of qualified privilege, see below [xx.xxx].

371 *Telegraph Newspaper v Bedford* (1934) 50 CLR 632 at 658.

372 *Riddick v Thames Bd Mills* [1977] QB 881 (CA); *Anderson v Ginn (No 2)* [1933] NZLR 1073; *Sun Life Assurance v Dalrymple* [1965] SCR 302.

373 *Duane v Granrott* [1982] VR 767 (FC).

374 *Thompson v Amos* (1949) 23 ALJR 98 (HC); *Allbutt v General Council of Medical Education* (1889) 23 QBD 400.

375 *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044.

376 *Braddock v Bevins* [1948] 1 KB 580 (address distributed to electors); *Fraser v Holmes* (2009) 253 ALR 538 at 545 (Tobias JA). But the privilege in this situation is narrow. Except under special conditions relating to communications on “political or government matters” (below, [25.xxx]), it cannot be claimed for publication in a general newspaper (*Jones v Bennett*

No privilege arises if the exigency of the occasion does not warrant the protection of the common interest by the means employed. In *Guise v Kouvelis*,³⁷⁷ a committeeman interfered in a dispute between members of a club who were playing cards in a room containing some 50 other persons some of whom were non-members. He charged the plaintiff with being a crook in a loud voice audible to most of those present. It was held that the interests of the defendant and the members did not justify a public accusation, because he could have simply told the plaintiff, without making any defamatory allegation, that he would report him to the committee. Any such communication would, of course, have been privileged.

At common law, it must also be reiterated that an interest solely on the part of the recipient will not qualify under this head or any other: there must additionally be either a corresponding interest or a duty on the part of the publisher. This common law principle has been modified under the statutory defence of qualified privilege, embodied in the national, uniform defamation laws³⁷⁸ where it is sufficient that the recipient had an interest or apparent interest in having information on the subject and the publisher's conduct was reasonable in the circumstances.

Government and political matters

[25.350] At common law, a defamatory publication had until recently no claim to privilege merely because it dealt with a matter of public interest.³⁷⁹ True, all privilege is based on the publication being “in the public interest”. But from this does not follow that publication of all matters of public interest is in *the* public interest. The common law does not countenance a defence of “fair information on a matter of public interest”;³⁸⁰ otherwise there would have been little need for the special defence of fair comment which, as we shall see,³⁸¹ is limited to *comment* on true facts. For false *factual* information to the general public, even on matters of public concern, there was no qualified privilege unless there was a duty or interest to impart such information. Until recently the common law denied this to the media and others except in very special circumstances, such as for replies to public attacks,³⁸² correction of previously published information,³⁸³ or a public warning against a suspected terrorist, contaminated food or unsafe gas heaters.³⁸⁴ Besides, even if some members of the public did have a

[1969] SCR 277; *Templeton v Jones* [1984] 1 NZLR 448) nor perhaps for speeches to a large undifferentiated audience: *Lang v Willis* (1934) 52 CLR 637 at 667, 672. It was virtually abolished in England by *Defamation Act 1952* (UK), s 10.

377 *Guise v Kouvelis* (1947) 74 CLR 102.

378 See *Defamation Act 2005* (NSW), s 30 and equivalent provisions in the remaining jurisdictions. See further below, [xx.xxx].

379 *Truth (NZ) v Holloway* [1960] 1 WLR 997 (PC); *Brooks v Muldoon* [1973] 1 NZLR 1; *Banks v Globe & Mail* [1961] SCR 474.

380 *Blackshaw v Lord* [1984] QB 1 (CA) (even for information emanating from the government except under statutory privilege: below, [25.xxx]).

381 Below, [25.xxx].

382 Above, [25.xxx].

383 *Dunford v News Media* [1971] NZLR 961.

384 *Camporese v Parton* (1983) 150 DLR (3d) 208 (BC); *Blackshaw v Lord* [1984] QB 1; *Bowin Designs v Joyce* (1996) A Def R 52-078.

legitimate interest in receiving the information, the publication would often be excessive to the extent that it reached others who were not qualified.³⁸⁵

Did this not unduly cramp the public's "right to know"? First, it must be remembered that there was no stopping the publication of accurate news. Moreover, as just mentioned, there is a defence of fair comment on matters of public interest, provided the comment is based on true facts. The controversial area was therefore confined strictly to false defamatory statements of fact, and comment thereon, on matters of public interest. The question boiled down to whether the free flow of information was unduly stifled by imposing the risk of good faith factual error (or inability to prove truth) on the press and letting the fear of large damages chill investigative reporting.

Legislation in Australia³⁸⁶ has to some extent addressed this concern.³⁸⁷ Between 1994 and 1997 in Australia there was also the extraction of a Constitutional defence for political discussion to ensure "the efficacious working of representative democracy". Three Justices of the High Court also declared the discussion of political matters to be an occasion of qualified privilege, thereby abandoning its traditional scope limited chiefly to private or small scale communications.³⁸⁸ Notwithstanding an accompanying dictum to the contrary, this change seemed destined in practice to overshadow the constitutional defence, being somewhat easier for defendants.³⁸⁹

In *Lange v Australian Broadcasting Commission*,³⁹⁰ however, a groundbreaking judgment of all seven Justices of the High Court both abolished the newly created constitutional defence and confirmed the extension of common law qualified privilege to cover any situation where defamatory material dealing with "government and political matters"³⁹¹ is published to a wide audience. Echoing long-established authority,³⁹² it declared that this extension advanced "the common convenience and welfare of Australian society".³⁹³ It was justifiable by virtue of "changing conditions", notably "[t]he expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media".³⁹⁴

The court attached an important new condition to the defence in this expanded range of operation, though not in situations which prior to *Lange* were already treated as privileged. An extra requirement must be met by the

385 Unless publication in the media is the "only reasonable mode of communication": *Stephens v WA Newsp* (1994) 182 CLR 211 at 263 (McHugh J). For newspapers addressed only to a narrow "special interest" group: see above, [25.xxx].

386 Below, [xx.xxx]-[xx.xxx].

387 *Faulks*, at [214(b)] remained opposed. ALRC at [146] preferred a defence for "attributed statements".

388 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 140. Brennan and McHugh JJ, dissenting in the accompanying case of *Stephens v WA Newsp* (1994) 182 CLR 211 at 246-255, 264-266, approved extension, albeit more guarded, of qualified privilege on matters of public interest emanating from a source with "special knowledge".

389 See, for example, *Peterson v Advertiser Newsp* (1995) 64 SASR 157 (FC).

390 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

391 The court did not define this phrase, except to refer to "the activities of government or politics" (*Lange* at 566) and to make it clear that it was broad enough to include "matters concerning the United Nations and other countries" (at 571). Presumably, the affairs of commercial enterprises would be excluded, even when they affected the lives of many people.

392 Above, [xx.xxx].

393 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 571.

394 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 565.

defendant, that of proving “reasonableness of conduct” in publishing the material. This, said the court, was justifiable because of the much greater damage to reputation that can be inflicted by a publication to “tens of thousands, or more, of readers, listeners or viewers”.³⁹⁵

This requirement of reasonableness will be satisfied, “as a general rule”, when 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 material to be untrue”.³⁹⁶ The defendant must also have “sought a response from the person defamed and published the response made (if any)”, unless this was “not practicable” or it was “unnecessary” to provide this opportunity to the plaintiff.³⁹⁷ The response of a number of media representatives and media lawyers to this requirement of reasonableness has been that it would make the defence difficult to invoke successfully. From their point of view, it would be no better than the statutory privilege then extant in New South Wales and now exported nationwide under the national, uniform defamation laws (discussed in the next section, [25.xxx]).

It would appear that this defence has been further narrowed so as only to apply to matters relating to the legislative and the executive branches of government. Matters relating to the judicial branch of government would appear to be specifically excluded from its ambit.³⁹⁸

By contrast, in New Zealand, in a case involving the same plaintiff,³⁹⁹ it has been held that defamatory material published to the community at large in the course of political discussion should be protected by qualified privilege *without* any extra requirement of “reasonableness of conduct” or any adjustment of the rules permitting defeat of the defence on grounds of malice. “Political discussion” was said to be “discussion which bears upon the function of electors in a representative democracy by developing and encouraging views upon government”.⁴⁰⁰ It clearly included discussion of the performance while in office of a former Prime Minister and political party leader.⁴⁰¹

395 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 572. As to the court’s finding of “conformity” between this version of qualified privilege and the constitutional implication of freedom of political communication, see below, [xx.xxx].

396 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 574. These ingredients were familiar to the court, as they form part of the test of “reasonableness” under the *Defamation Act 1974* (NSW), s 22 (repealed), the forerunner to the defence discussed in the next section, [25.xxx]. See also *Obeid v John Fairfax Publications* (2006) 68 NSWLR 150 at 165 (Hoeben J).

397 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 574. This is almost wholly new in the common law, though Brennan J (dissenting) incorporated it in his suggestions for expanding qualified privilege in *Stephens v WA Newsp* (1994) 182 CLR 211 at 252-253. He indicated that the publication of the plaintiff’s response should be contemporaneous, if possible, with that of the defamatory material and should be able to “reach the same audience with the same ease”.

398 Cf *John Fairfax Publications v O’Shane* (2005) Aust Torts Reports ¶ 81-789 at 67,466-67,469 (Giles JA), at 67,481-67,488 (Young JA) (CA(NSW)); *Herald and Weekly Times v Popovic* (2003) 9 VR 1 at 10-11 (Winneke ACJ), at 51-53 (Gillard AJA), at 103-105 (Warren AJA) (CA(Vic)).

399 *Lange v Atkinson* [1997] 2 NZLR 22.

400 *Lange v Atkinson* [1997] 2 NZLR 22 at 46 per Elia J.

401 The New Zealand Court of Appeal twice upheld the approach of the trial judge, once after a successful appeal to the Privy Council. The Privy Council invited the New Zealand Court of Appeal to consider the House of Lords’ decision in *Reynolds v Times Newspapers* [2001] 2 AC 127, which rejected a special variant of qualified privilege for government or political information, instead preferring a more broadly based extension of the defence. Cf *Lange v Atkinson* [2000] 1 NZLR 257 (PC) and *Lange v Atkinson* [2000] 3 NZLR 385.

Significantly, in the United Kingdom, the House of Lords rejected a specific, political form of qualified privilege, holding that there was no reason in principle to distinguish between political matters and other matters of public concern.⁴⁰² Instead, United Kingdom courts have developed a form of qualified privilege intended to protect and foster responsible journalism. This is similar to the statutory defence of qualified privilege under Australian defamation law, and indeed influenced its development.⁴⁰³ The United Kingdom defence has been notably more successful than the Australian one.⁴⁰⁴

Abuse of privilege

[25.360] Qualified privilege is a conditional defence. It affords immunity to those alone who use the privileged occasion for the purpose which the law deems of sufficient social importance to defeat the countervailing claim to protection of reputation. In other words, the immunity is forfeited by an abuse of the occasion, and there must be no improper motive on the part of the publisher.

Excessive communication

[25.370] Some reference has already been made to the rule that the privilege is lost if the method of its exercise exceeds the reasonable needs of the occasion.⁴⁰⁵ Thus it is not ordinarily permissible to resort to the press for communicating privileged information. It is true that a person attacked in public may legitimately vindicate himself before the same wide audience which has become aware of the charges made against him,⁴⁰⁶ but in general the individual or group who have an interest in receiving the information is more limited. The method of publication must never exceed what is reasonably appropriate for protecting the particular interest which the defendant is entitled to assert. If, for example, the occasion is privileged on account of a common interest, the selected medium of communication must be such as will reasonably ensure that the statement is not circulated beyond those who share that interest.⁴⁰⁷ This rule has been somewhat relaxed under the statutory defence of qualified privilege.⁴⁰⁸

The inclusion of material outside the ambit of the privilege and therefore itself unprotected does not necessarily destroy the privilege covering the rest;⁴⁰⁹ however, it may do so,⁴¹⁰ or it may suggest an improper purpose for the whole.

Immunity covers all incidents of communication conforming with the reasonable and usual course of business or necessary for the effective exercise of

402 *Reynolds v Times Newspapers* [2001] 2 AC 127 at 204 (Lord Nicholls of Birkenhead).

403 Cf *Reynolds v Times Newspapers* [2001] 2 AC 127 at 205 (Lord Nicholls of Birkenhead); *Defamation Act 2005* (NSW) s 30(3) and equivalent provisions in the remaining jurisdictions. As to the statutory defence of qualified privilege, see below [25.xxx].

404 See, for example, *Bonnick v Morris* [2003] 1 AC 300 (PC); *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 (HL); *Roberts v Gable* [2008] QB 502 (CA); *Charman v Orion Publishing Group* [2008] 1 All ER 750 (CA). Cf *Seaga v Harper* [2009] 1 AC 1 (PC); *Flood v Times Newspapers* [2010] EWCA Civ 804.

405 Above, [25.xxx].

406 *Penton v Calwell* (1945) 70 CLR 219; *Adam v Ward* [1917] AC 309.

407 Contrast *Chapman v Ellesmere* [1932] 2 KB 431 with *Cookson v Harewood* [1932] 2 KB 478n.

408 As to the statutory defence of qualified privilege, see below [25.xxx].

409 *Dunford v News Media* [1971] NZLR 961.

410 *Marks v Construction Union* (1995) 14 WAR 360.

the privilege. Nowadays dictation of a letter to a typist⁴¹¹ or telegraphic communication,⁴¹² if appropriate, is protected to the same extent as the publication to the addressee. According to the generally accepted view, this is a derivative privilege ancillary to that covering the resulting message, though attaching immediately and therefore unimpaired by the fact that the message is eventually not sent at all or lost.⁴¹³ More neatly disposing of these complications would be Lord Denning's view that the privilege is original, based on a common interest between the typist and his or her employer in the writing of the letter, and not dependent at all on the person to whom it is intended to be sent.⁴¹⁴

Lord Denning's view would also be helpful where the defamatory letter is addressed to the plaintiff himself or herself and therefore could not technically qualify as a "publication" for a derivative privilege to attach. But the more commonly accepted explanation is that qualified privilege covers all "fairly warranted" communications between parties to a dispute, including ancillary incidents of transmission.⁴¹⁵ So also where the defendant makes a defamatory accusation to the plaintiff in the presence of a disinterested witness: since it is in the plaintiff's interest to know what accusation is being brought against him or her, the confrontation constitutes a privileged occasion, and it does not matter that it would not in any event have been actionable because lacking the element of publication. Once this reasoning is accepted,⁴¹⁶ it is easy to conclude that the presence of a disinterested witness, as a reasonable precaution, does not defeat the privilege.⁴¹⁷

In cases where a secretary or other agent thus participates in a privileged communication, the latter is also protected, since a privilege would be of no value if the means for exercising it were not also protected. Such a derivative privilege may occasionally even be available to the press, for example when a person publicly attacked is justified in replying through a newspaper.⁴¹⁸ This, however, must be clearly distinguished from the more usual situation of a newspaper speaking for itself, when it must stand or fall on an independent privilege of its own.⁴¹⁹

411 *Osborn v Boulter* [1930] 2 KB 226; *Holding v Jennings* [1979] VR 289 (absolute privilege).

412 *Edmundson v Birch* [1907] 1 KB 371.

413 *Bryanston Finance v de Vries* [1975] QB 703 (CA).

414 *Bryanston Finance v de Vries* [1975] QB 703. Alternatively, why not treat dictation to an employee as "no publication" analogous to marital communications?

415 *Bryanston Finance v de Vries* [1975] QB 703 at 745 (Lawton LJ); *Osborn v Boulter* [1930] 2 KB 226 (CA).

416 Thus Goodhart, "Defamatory Statements and Privileged Occasions" (1940) 56 LQR 262; contra: *White v Stone* [1939] 2 KB 827.

417 *Toogood v Spyring* (1834) 1 Cr M & R 181; 149 ER 1044 (although this case contains the classical exposition of qualified privilege by Parke B, reciprocity of interest was not then as strictly demanded as it is today); *Taylor v Hawkins* (1851) 16 QB 308; 117 ER 897. Also, when an unwanted stranger is negligently permitted to eavesdrop, as in *White v Stone* [1939] 2 KB 827; *McNichol v Grandy* [1931] SCR 696; or when a shopkeeper publicly accuses a stranger of shoplifting: *Bonette v Woolworths* (1937) 37 SR (NSW) 142.

418 *Loveday v Sun Newspaper* (1938) 59 CLR 503; *Adam v Ward* [1917] AC 309 at 320 (secretary); *Bass v TCN Channel Nine* (2003) 60 NSWLR 251 at 253 (Spigelman CJ). For the effect of malice see below, [25.xxx].

419 *Echo Publications v Tucker* [2007] NSWCA 73 at [91] (Hodgson JA) (media outlet will lose benefit of privileged occasion if it endorses attack).

Improper purpose

[25.380] The privilege will be lost if the defamatory statement is published for an improper purpose.⁴²⁰ This is commonly expressed by saying that the publication must not have been “malicious”. But the indiscriminate use of the term “malice” in this context is apt to mislead, because the immunity is defeated not only by spite or a desire to inflict harm for its own sake, but by the misuse of the privileged occasion for some other purpose than that for which it was given by law. Examples are to cover up a previous misstatement, to discredit a particular religious or political doctrine avowed by the plaintiff, to compound a felony rather than pursue an honest inquiry into suspected crime,⁴²¹ or deliberately to distort and sensationalise a news story in order to heighten its reader appeal.⁴²² The burden of proof is on the plaintiff.⁴²³

Evidence that the defamatory statement was published for a purpose foreign to the privileged occasion may be extrinsic or intrinsic. Extrinsic evidence may be supplied by facts existing before, at, or after the time when it was made.⁴²⁴ The existence of personal animosity may be one such fact, though only if it supports an inference that the dominant motive for the publication was spite and not a sense of duty or the promotion of a legitimate interest.⁴²⁵ In the context of communication on government or political matters, the motive of causing political damage does not of itself constitute malice.⁴²⁶ Evidence must make it probable that the defendant not only harboured a desire to serve some ulterior purpose, but also that it actuated the making of the defamatory statement.⁴²⁷ If antagonism were of itself sufficient to defeat privilege, the defence would be of little value; besides involving the startling consequence that, where the defendant has been himself or herself abused by the plaintiff, the

420 In so far as the cause of action or defence involves the defendant’s belief it may depend on confidential sources of information. Disclosure is opposed by the Journalists’ Code of Ethics, but, at common law, there is no legal privilege to maintain confidentiality (*McGuinness v A-G* (1940) 63 CLR 73; *A-G v Mulholland* [1963] 2 QB 477), though most jurisdictions recognise a discretionary “newspaper rule” of excusing media from disclosing their sources in pre-trial interrogatories or discovery of documents: *Fairfax v Cojuangco* (1988) 165 CLR 346; also, *Broadcasting Corp v A Harvey* [1980] 1 NZLR 163 (CA) (matter of course). The *Contempt of Court Act 1981* (ENG), s 10 and widespread “shield laws” in the United States offer protection against disclosure. Several attempts have been in Australia made to introduce a satisfactory professional confidential relationship privilege, adequately covering journalists. See *Evidence Act 1995* (Cth), Pt 3.10, Div 1A; cf *Evidence Act 1995* (NSW), Pt 3.10, Div 1A.

421 *Hooper v Truscott* (1836) 2 Bing NC 457; 132 ER 179; *Collerton v MacLean* [1962] NZLR 1045.

422 Cf *Broadway Approvals v Odhams Press (No 2)* [1965] 1 WLR 805.

423 *Horrocks v Lowe* [1975] AC 135 at 149 (Lord Diplock).

424 See *Mowlds v Fergusson* (1939) 40 SR (NSW) 311, particularly at 328-330, 332, for the evaluation of evidence relating to the defendant’s state of mind prior to or after the publication. After publication: *Griffiths v Qld Newsp* [1993] 2 Qd R 367 (CA).

425 Note the contrast between cases where the defendant is under a duty by reason of his or her position to report on the plaintiff, eg because he or she is his supervisor, and cases where there is no duty to express any opinion about the other except by virtue of some moral or social obligation. If the existence of strained relations automatically attached the stigma of malice, the supervisor would not dare furnish any report at all. In such a case, there must be clear evidence that it was ill-will, not genuine belief, which prompted the adverse criticism: *Oldfield v Keogh* (1941) 41 SR (NSW) 206.

426 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 574. Compare the use of the phrase “dominant motive” in *Howell v Haines* (1997) Aust Torts Reports ¶ 81-409.

427 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

grosser the attack the easier it would be to prove malice.⁴²⁸ The jury should not be permitted to speculate on abuse of privilege at all, unless there is sufficient evidence which definitely, and as a matter of common sense, points to the inference that an improper motive existed and that it induced the publication of the libel. It is not sufficient that the evidence gives ground merely for speculation or conjecture.⁴²⁹ There is a danger that the protection of privilege becomes illusory, unless stringent judicial control is maintained over the permissible function of the jury in these cases.

The contents of the defamatory statement itself may furnish intrinsic evidence of an improper motive, for example the extravagance of the allegation or the language in which it is expressed. But here again, “no nice scales”⁴³⁰ should be used in weighing the defendant’s expressions for traces of malice. Particularly when a person has been attacked abusively, the terms of his or her reply must be measured with some latitude: “it would be singular if an attacked person could defend himself only if he abated the spirit of his reply to a degree that satisfied the aggressor”.⁴³¹ In the context of communication on government or political matters, neither “the vigour of an attack” nor “the pungency of a defamatory statement” is enough of itself to discharge the plaintiff’s onus of proof.⁴³² Indeed, it has been said that where the only evidence relied on is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the requirement that the plaintiff must show affirmatively that the defendant did not believe it to be true. The exception relates to irrelevant matter: not that the mere introduction of objectively irrelevant matter destroys the privilege; it must support the inference that the defendant either did not believe it to be true or realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant matter to vent his or her spite or for some other improper motive. But again, such an inference should not be drawn lightly.⁴³³

Finally, and most importantly, want of genuine belief in the truth of the statement puts the publisher beyond the pale of privilege because, save in exceptional circumstances,⁴³⁴ one who knowingly asserts a falsehood must be

428 *Horrocks v Lowe* [1975] AC 135 at 151; *Sinclair v Bjelke-Petersen* [1984] 1 Qd R 484 (FC). Still less is the defendant’s refusal to apologise evidence of malice (*Loveday v Sun Newspaper* (1938) 59 CLR 503 at 513).

429 *Davies v Kott* [1979] 2 SCR 686; *Oldfield v Keogh* (1941) 41 SR (NSW) 206; *Godfrey v Henderson* (1944) 44 SR (NSW) 447.

430 *Adam v Ward* [1917] AC 309 at 330 per Lord Dunedin; *Calwell v Ipec* (1975) 135 CLR 321; *Pinniger v Fairfax* (1979) 53 ALJR 691. See also *Lindholdt v Hyer* (2008) 251 ALR 514 at 551 (McColl JA) (CA).

431 *Muller v Hatton* [1952] QSR 150 at 182 (Stanley J).

432 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 574.

433 *Horrocks v Lowe* [1975] AC 135 at 150-151.

434 For example, urgent warning to public of suspected poison (*Blackshaw v Lord* [1984] QB 1 at 27); also perhaps where defendant affords a forum to rival speakers and believes in *their* bona fide belief in the truth: *Australian Broadcasting Commission v Comalco* (1986) 12 FCR 510 at 547-48 (Smithers J). While the High Court in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 defined malice in terms of “improper purpose”, in the context of communication on government or political matters, it did not specifically confirm that this was constituted by proof of lack of genuine belief in the truth of the statement. See also *Roberts v Bass* (2002) 212 CLR 1.

using the privileged occasion for a dishonest and improper purpose.⁴³⁵ By analogy to deceit,⁴³⁶ reckless indifference as to whether the aspersion is true or false is equated with lack of belief in its truth. But otherwise recklessness, for example, in the sense of gross and unreasoning prejudice, is not sufficient if the defendant nevertheless believed the accusation to be true.⁴³⁷ Still less is mere want of reasonable grounds: carelessness is not malice.⁴³⁸

If the publication is made, not in the course of exercising a privilege but to furnish the other party with a cause of action upon which he or she is challenged to sue, the defence might well have been regarded as forfeited on the ground that the object of the publication was unrelated to the interest which is entitled to protection.⁴³⁹ Also it could be argued that as the defendant has invited the plaintiff to sue upon the statement, he or she should not be allowed to rely on any other defence than justification in order to test the truth of the defamatory assertion. It has been held, however, that such a challenge is no more than an invitation to take proceedings following the normal course.⁴⁴⁰

Imputed malice

[25.390] Notwithstanding some earlier authority to the contrary,⁴⁴¹ the malice of any one participant in the defamatory publication cannot be imputed to another, himself or herself innocent, so as to defeat his or her claim to qualified privilege⁴⁴² or warrant an award of aggravated damages against him.⁴⁴³ The only apparent exception arises in ordinary cases of respondeat superior, when the malice of an employee or agent who had a hand in the libel is imputed to his or her principal.⁴⁴⁴ On the other hand, in cases of joint publication, as by trustees or partners, the malice of one in no way prejudices the independent privilege of the others.⁴⁴⁵ Not even subordinates, like secretaries or printers, who have in a sense only a derivative privilege, are at the mercy of their superiors. There may be some theoretical force in the argument that they depend

435 *Clarke v Molyneux* (1877) 3 QBD 237 at 247. There is a presumption at common law, but not in proving “reasonableness” under statutory privilege in New South Wales, that the defendant believed in the truth: *Morgan v Fairfax* (1990) 20 NSWLR 511 at 542.

436 Below, [xx.xxx].

437 *Horrocks v Lowe* [1975] AC 135; *Fraser v Holmes* (2009) 253 ALR 538 at 552 (Tobias JA) (CA); *Roberts v Bass* (2002) 212 CLR 1 at 10 (Gleeson CJ).

438 *Lange v Atkinson* [1997] 2 NZLR 22 at 50 per Elias J.

439 Cf *Strang v Russell* (1905) 24 NZLR 916 where it was held that although A may have leave to enter B’s property, yet if he in fact enters not in pursuance thereof but in the exercise of presumed legal right adverse to B’s claim as owner and with the intention of contesting B’s right as alleged owner, he cannot set up leave and licence in an action for such entry as a trespass.

440 *Penton v Calwell* (1945) 70 CLR 219. “Such a challenge [is but] an invitation to the adversary to substitute for methods of unregulated and desultory combat a duel to be fought in legal form with every weapon which the law allows and involving no promise that if it is accepted the challenger will fire in the air” (Rich J at 248).

441 *Smith v Streatfeild* [1913] 3 KB 764 (printer); *Adam v Ward* [1917] AC 309 at 320, 331, 340 (secretary).

442 *Egger v Chelmsford (Viscount)* [1965] 1 QB 248 (CA); *Sun Life Assurance v Dalrymple* [1965] SCR 302; *Stephens v WA Newsp* (1994) 182 CLR 211 at 253-255 per Brennan J.

443 *Egger v Chelmsford (Viscount)* [1965] 1 QB 248 at 265; *Dougherty v Chandler* (1946) 46 SR (NSW) 370.

444 *Webb v Bloch* (1928) 41 CLR 331 (solicitor employed by committee to draft circular); *Riddick v Thames Bd Mills* [1977] QB 881 at 907-910. But the primary publisher is not prejudiced by malice of a mere distributing agent: *Hay v Australian Institute* (1906) 3 CLR 1002; *Longdon-Griffiths v Smith* [1951] 1 KB 295 at 303.

445 *Longdon-Griffiths v Smith* [1951] 1 KB 295; *Meekins v Henson* [1964] 1 QB 472.

on the privilege of their superiors and, when that is gone, there is nothing left to shield them. Still, the view eventually prevailed that such a principle of “*respondeat inferior*” would be altogether too harsh and could be avoided by treating as wholly independent the questions whether, in the first place, the occasion was privileged and, secondly, whether any individual’s defence was defeated by malice.⁴⁴⁶ Accordingly, even if *all* his or her principals are disqualified, an innocent agent would still be entitled to acquittal.

Statutory qualified privilege

[25.400] New South Wales in 1974, after abandoning its earlier defamation code, created an additional statutory privilege to protect the informational role of the media and others. It arose where “(a) the recipient has an interest or 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 the matter is reasonable in the circumstances”.⁴⁴⁷ The earlier New South Wales defamation code and the defamation codes in Queensland, Tasmania and Western Australia (the latter in relation to criminal defamation) all had a defence of qualified protection.⁴⁴⁸ When the national, uniform defamation laws were enacted, it was the statutory defence of qualified privilege embodied in the *Defamation Act 1974* (NSW), s 22 (repealed), not the codified defence of qualified protection, which prevailed and was exported across Australia.

“Interest” is here construed in the broadest popular sense. At common law, it will be recalled, it is confined to “an interest material to the affairs of the recipient of the information such as would assist in the making of an important decision or determining of a particular course of action”.⁴⁴⁹ Here, however, it includes information of any matter of genuine interest to readers of a general newspaper, such as comment on the manoeuvres of a national politician⁴⁵⁰ or the training regime of a Rugby League team.⁴⁵¹

The principal accent is on reasonableness, in the belief that only a careful and honest publication deserves protection. The standard has been interpreted rather strictly so that few attempts to use it have been successful.⁴⁵² It generally requires honest belief in the truth⁴⁵³ (although it has been questioned whether such belief is necessary for reporting statements by third parties). Relevant matters, it has been said, include also the manner and extent of publication, the extent of inquiries made, the degree of care exercised and any knowledge that a

446 *Egger v Chelmsford (Viscount)* [1965] 1 QB 248.

447 *Defamation Act 1974* (NSW), s 22 (repealed). This “conforms” with the implied constitutional freedom of political communication: see below, [xx.xxx].

448 *Defamation Act 1958* (NSW), s 17 (repealed); *Defamation Act 1889* (Qld), s 16 (repealed); *Defamation Act 1957* (Tas), s 16 (repealed); *Criminal Code Act 1913* (WA), s 357 (repealed).

449 *Austin v Mirror Newspapers* [1986] 1 AC 299 at 311 (PC); above, [25.xxx].

450 *Calwell v Ipec* (1975) 135 CLR 321.

451 *Austin v Mirror Newspapers* [1986] 1 AC 299.

452 See, for example, *John Fairfax Publications v Zunter* [2006] NSWCA 227. Cf *O’Hara v Sims* [2009] QCA 186. See also *Seary v Molomby* (1999) Aust Torts Reports ¶ 81-536.

453 *Morgan v Fairfax (No 2)* (1991) 23 NSWLR 374 (CA). It is not necessarily required in cases involving a telecast: *Barbaro v Amalg TV* (1989) 20 NSWLR 493 (CA).

misleading impression was likely to be conveyed.⁴⁵⁴ The courts have been particularly insistent on care in verification.⁴⁵⁵ Failure to mention the plaintiff's denial of the allegations against him may be prejudicial;⁴⁵⁶ and disclosure of informants has been compelled even prior to trial, thus considerably diminishing the attractiveness of the defence.⁴⁵⁷ But a lesser standard of investigative care has – rightly – been demanded for stories about the public conduct of politicians than for imputations of sexual impropriety of private persons.⁴⁵⁸ Ultimately, however, “reasonableness is not a concept that can be subjected to inflexible categorisation”.⁴⁵⁹

In case of a newspaper article, if written by a staff journalist, the latter's reasonableness is in issue; if written by an independent author, the reasonableness must be that of the paper's staff who decided to publish it.⁴⁶⁰ The business environment in which media outlets operate, if proven by relevant evidence, is also a consideration courts may assess in determining the reasonableness of a publisher's conduct.⁴⁶¹

Constitutional considerations

[25.410] The preceding discussion of common law privileges revealed the resistance of the common law, even as amended by statutes, to making any major allowance for free speech on matters of public interest.⁴⁶² In several countries, including the United States and (for a time) Australia, this shortfall of democratic values was eventually rectified by resort to their Constitutions.⁴⁶³ In the great case of *New York Times v Sullivan*,⁴⁶⁴ the United States Supreme Court first enunciated the constitutional privilege of denying public officials, later extended to public figures, the right to complain of defamation unless they could establish that the defendant knew the allegation was false or that he or she was reckless, not caring if it was true or false.

Unlike the United States Constitution, the Australian Constitution does not contain an explicit guarantee of free speech. But in 1992 the High Court distilled

454 *Morgan v Fairfax* (1989) per Mathews J, unrep; (No 2) (1991) 23 NSWLR 374 (CA). See now *Defamation Act 2005* (NSW), s 30(3) and equivalent provisions in the remaining jurisdictions. For the progenitor of this subsection, see also *Defamation Act 1974* (NSW), s 22(2A) (repealed) and *Reynolds v Times Newspapers* [2001] 2 AC 127 at 205 (Lord Nicholls of Birkenhead).

455 Criticised by Henskens, “Defamation and Investigative Journalism in NSW: The Evolution of Statutory Qualified Privilege” (1990) 6 Aust B Rev 267. Guidelines are suggested by the ALRC Report, at [105].

456 *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 (CA). Also, illegal or irrational conclusions will disqualify (at 705).

457 *Fairfax v Cojuangco* (1988) 165 CLR 346.

458 *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749.

459 *Rogers v Nationwide News* (2003) 216 CLR 327 at 339 (Gleeson CJ and Gummow J).

460 *Austin v Mirror Newspapers* [1986] 1 AC 299.

461 See also *Rogers v Nationwide News* (2003) 216 CLR 327 at 339-340 (Gleeson CJ and Gummow J).

462 See *Derbyshire CC v Times Newspaper* [1993] AC 534, holding that the common law was in conformity with art 10 of the *European Convention on Human Rights*.

463 Comparative: Fleming, “Libel and Constitutional Free Speech”, in (Cane and Stapleton (eds), *Essays for Patrick Atiyah* (1991), ch 14. Notably, Canada construes the Charter as inhibiting only government action and therefore inapplicable to private law relations: *RWDSU v Dolphin Delivery* [1986] 2 SCR 573; *Hill v Church of Scientology* [1995] 2 SCR 1130.

464 *New York Times v Sullivan* 376 US 254 (1964). For criticism see Chesterman, “The Money or the Truth” (1995) 18 UNSWLJ 300.

an implied freedom of political communication and discussion from provisions mandating a system of representative government.⁴⁶⁵ Two years later, in *Theophanous v Herald & Weekly Times*⁴⁶⁶ it took the bolder step of holding that this freedom spelled not only a limitation on the powers of the Commonwealth, but conferred in effect a personal privilege on the individual to publish defamatory matter of a political nature notwithstanding inconsistent State laws of defamation.

“Political discussion” was defined very broadly in *Theophanous*.⁴⁶⁷ It clearly covered a letter in a newspaper, questioning the fitness of a chairperson of a committee on migration of the House of Representatives, alleging bias towards Greek immigrants. In a companion case it was applied to allegations of impropriety against members of a State legislature.⁴⁶⁸

The constitutional defence required the defendant to establish that: he or she was unaware of the falsity of the published material; did not publish the material recklessly, that is, not caring whether it was true or false; and the publication was reasonable in the circumstances. It thus differed from the traditional rule of qualified privilege which places the burden of proving malice on the plaintiff. There were, however, difficulties of interpretation.⁴⁶⁹

In addition, as already noted, the judgment establishing the constitutional defence may have had a secondary enlarging effect on the scope of common law qualified privilege, though this too was unclear.⁴⁷⁰

In the 1997 case of *Lange v Australian Broadcasting Commission*,⁴⁷¹ the High Court changed direction dramatically. It abolished the constitutional defence, deeming this to be a legitimate step because it had only had the clear support of three of the seven members of the court in *Theophanous*. But as already outlined,⁴⁷² the court established similar qualified protection for defamatory statements made to the public at large in the course of communication on government or political matters, through expanding the scope of common law qualified privilege and attaching a condition of “reasonableness”.

The court indicated that the constitutional implication of freedom of communication on political or government matters will continue to set limits to the extent to which defamation law can restrict freedom of political discussion. It declared that the new expanded version of common law qualified privilege was “in conformity with” the implied freedom, as also was statutory privilege under s 22 of the *Defamation Act 1974* (NSW) (repealed).⁴⁷³ The extent to which defamation legislation in other Australian jurisdictions achieved

465 *Nationwide News v Wills* (1992) 177 CLR 1; *ACTV v Commonwealth (No 2)* (1992) 177 CLR 106.

466 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104. A precarious majority was attained with support from Deane J who favoured absolute privilege. See Walker, “The Impact of the High Court’s Free Speech Cases on Defamation Law” 17 Syd L Rev 43 (1995).

467 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 124.

468 *Stephens v West Australian Newspapers* (1994) 182 CLR 211.

469 On a narrow reading of *Theophanous*, the defence was confined to claims brought by members of Parliament, public officials and candidates for either group. According to a broader reading, no such restriction applied.

470 Above, [xx.xxx].

471 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

472 Above, [25.xxx].

473 Some of the implications of this notion of “conformity” are discussed in Chesterman, “Privileges and Freedoms for Defamatory Political Speech” (1997) 19 Adel L Rev 155.

“conformity” could be determined as and when the need arose, a task now made easier by the introduction of the national, uniform defamation laws. It would have to be found to be “reasonably adapted and appropriate” to a legitimate object, the fulfilment of which is compatible with “the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes”.⁴⁷⁴ Elsewhere in the *Lange* judgment, the court warned that “[t]he common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution”.⁴⁷⁵

The judgment also redefined the implied constitutional freedom, confining it to what the “text and structure”⁴⁷⁶ of the Constitution necessarily require in order that electors, when choosing their representatives in the Commonwealth Parliament or voting to amend the Constitution, should be able to make free and informed choices. It indicated that because the Constitution makes the executive branch of government responsible to the legislature and because political issues at Commonwealth, State, Territory and even local government level are increasingly bound up with each other, the range of subject matters covered by the implied freedom remains very broad.⁴⁷⁷

Privileged reports

[25.420] As already noted, ordinarily it is not a defence that one merely reported, rather than asserted of one’s own authority, something defamatory said by somebody else⁴⁷⁸ even if it related to a matter of public interest.⁴⁷⁹ However, an important exception is allowed for fair and accurate⁴⁸⁰ reports of certain official proceedings open to the public and considered deserving of qualified or even absolute privilege because of the public interest in full information on the administration of public affairs. Which of these so qualify depends both on the status of the body in question and the public concern in the matter reported. From these points of view, courts and legislature stand in a class apart, both being treated as conclusively engaging the public interest in fullest publicity. In contrast, public meetings have not generally been credited with the same peremptory importance, because they lack the same safeguards

474 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 562.

475 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 566.

476 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 566; see too *Levy v Victoria* (1997) 189 CLR 579.

477 Not as broad, however, as the range covered by the phrase “government or political matters” in the newly expanded defence of qualified privilege. These include “matters concerning the United Nations or other countries”, which might be outside the scope of the implied freedom: *Lange* at 571. For an application of *Lange*, see *Brander v Ryan* (2000) 78 SASR 234 (FC).

478 Above, [25.xxx]. If not protected by privilege, the report must be “justified”, that is, it must be shown that what is reported is not only an accurate account of the proceedings but that any allegation made in the proceedings and reported was itself true (and for the public benefit): *McCauley v Fairfax* (1933) 34 SR (NSW) 339. In contrast, a privileged report need not be accurate in the latter sense: *Burnett & Hallamshire Fuel v Sheffield Telegraph* [1960] 1 WLR 502.

479 But the ALRC (at [165]ff) recommended a privilege for “attributed statements” on topics of public interest, for the sake of less inhibited media coverage of current affairs. The NSWLRC disagreed: Report 75 (1995), at [12.22]-[12.25].

480 Both at common law and under previous legislation in certain jurisdictions, the privilege adheres to “fair and accurate” reports. The national, uniform defamation laws postulate only “fair” but this presumably implies substantial accuracy: *Anderson v Nationwide News* (1970) 72 SR (NSW) 313 (CA).

against abuse and irresponsibility, and not all deal with matters of genuine civic concern. Accordingly, in this residuary field there is no blanket protection for any whole class, but each instance may and must qualify individually in support of the conclusion that publicity outweighs in social importance any incidental injury to individual reputation. The value which democratic communities increasingly attach to public interest and involvement in the processes of government is amply reflected in the considerable expansion of the range of privileged reports by modern statutes. The national, uniform defamation laws now provide a broad-based defence for a “fair report of proceedings of public concern”.⁴⁸¹

Parliamentary proceedings

[25.430] As already mentioned, Members of Parliament enjoy absolute immunity from civil and criminal liability for anything said in the course of parliamentary proceedings. This protection, however, does not extend to re-publication or re-affirmation by Members of their speeches outside the House, even when made in order to correct a false version which had previously appeared in the same newspaper.⁴⁸²

However by 1866 it was finally clarified that fair and accurate reports of parliamentary proceedings were at least entitled to qualified privilege just like those of judicial proceedings.⁴⁸³ The report must be fair in the sense of not being tendentious, slanted or distorted; but it need not be a précis of the whole debate, and can be selective, like the familiar “parliamentary sketch” in modern journalism.⁴⁸⁴ Indeed, the privilege is not confined to the press or even the printed word, but may be claimed just as well for a verbal report over the dinner table. The report itself must also be substantially accurate, although of course the speech that is being reported may well be riddled with falsehood.⁴⁸⁵

Judicial proceedings

[25.440] Fair and accurate reports of public judicial proceedings, whether published in a newspaper or otherwise, receive qualified privilege at common law. The privilege extends to all courts of justice, irrespective of status, but is coextensive only with the right of public admission. Since its rationale is the public benefit to be derived from the fullest publicity of what goes on in court, it is unconcerned when the proceedings themselves are not considered suitable for

481 See *Defamation Act 2005* (NSW), s 29 and equivalent provisions in the remaining jurisdictions.

482 *R v Lord Abingdon* (1794) 1 Esp 226; 170 ER 337; *R v Creevey* (1813) 1 M & S 273; 105 ER 102; *Beitzel v Crabb* [1992] 2 VR 212.

483 *Wason v Walter* (1868) LR 4 QB 73; cf *Givens v Syme* [1917] VLR 418. See now *Defamation Act 2005* (NSW), s 29 and equivalent provisions in the remaining jurisdictions, covering parliamentary proceedings at all levels of government in Australia and including overseas legislatures.

484 *Cook v Alexander* [1974] QB 279 (CA); *Jones v Fairfax* (1986) 4 NSWLR 466.

485 Thus publication of an inaccurate extract from a public register or other official document is not privileged even if officially supplied and believed by the publisher to be an accurate copy: *Woodger v Federal Capital Press* (1992) 107 ACTR 1.

general admission.⁴⁸⁶ Nor is there any privilege if the court has prohibited publication⁴⁸⁷ or for pleadings, affidavits and other documents filed but not brought up in open court.⁴⁸⁸

Under the national, uniform defamation laws, the defence of fair proceedings of public concern now extends to include reports on public proceedings of courts and tribunals of other countries, as well as public proceedings of international courts and tribunals.⁴⁸⁹ This marks a departure from the common law position, which extended the privilege only to domestic courts.⁴⁹⁰

The protection covers “what pertains to the processes of law rather than what occurs in the place where it is being administered; more specifically, to what is said in the presence of a judicial tribunal then in session, in the course of proceedings before it for consideration or determination, by those who have some right, duty, or privilege to attend or appear, or to take part therein and be heard, provided that what is said is in some way related to such proceedings. ... The protection does not extend to a mere interrupter or by-stander, even if occurring in court, and while the proceedings are in progress; but it does cover the matters first mentioned, even though the action or application or process is misconceived or irregularly brought on, or outside the jurisdiction of the court”.⁴⁹¹

The report needs to be identifiable as such. Direct quotation is not essential, but attribution and reference to the proceedings is necessary.⁴⁹² The report need not be in full, because otherwise the protection would be virtually illusory. A condensed summary of the proceedings or judgment is sufficient, provided the omissions do not prevent it from giving a fair account. The report must not be garbled or coloured, and headlines must give a fair idea of what follows. And above all else, it must be substantially accurate: a fair report must have its facts right, just as (we shall see)⁴⁹³ a fair comment must be based on true facts.⁴⁹⁴ Subject to the usual controls, the question of fairness is for the jury.⁴⁹⁵ As a rule, the report must be contemporaneous.⁴⁹⁶

Miscellaneous

[25.450] The statutory defence of fair report of proceedings of public concern has a wide ambit, extending beyond domestic and international parliamentary and judicial proceedings. It extends to public inquiries, proceedings of learned societies and sport, recreation and trade associations, shareholders’ meetings of

486 *Kimber v Press Assoc* [1893] 1 QB 65.

487 Being generally also in contempt of court.

488 *Stern v Piper* [1997] QB 123 (CA); *Smith v Harris* [1996] 2 VR 335. Contra: *Hill v Church of Scientology* [1995] 2 SCR 1130 (under Charter).

489 See now *Defamation Act 2005* (NSW), s 29(4) and equivalent provisions in the remaining jurisdictions.

490 See, for example, *Webb v Times Publications* [1960] 2 QB 535; *Thompson v Consolidated Press* (1968) 89 WN (Pt 1) (NSW) 121.

491 *Hughes v WA Newspapers* (1940) 43 WALR 12 at 13-14 (Dwyer J).

492 *Rogers v Nationwide News* (2003) 216 CLR 327 at 336 (Gleeson CJ and Gummow J).

493 Below, [25.xxx].

494 *Thom v Assoc Newspapers* (1964) 64 SR (NSW) 376; *Jones v Fairfax* (1986) 4 NSWLR 466.

495 *Leslie v Mirror Newspaper* (1971) 125 CLR 332; *Kingshott v Assoc Newspapers* [1991] 1 QB 88 (CA).

496 See *Bunker v James* (1980) 26 SASR 286; *Whear v NT News* (1981) 8 NTR 13.

public companies, proceedings before law reform bodies and ombudsmen and any public meetings related to a matter of public interest.⁴⁹⁷

Abuse

[25.460] Unless upgraded to absolute privilege, reports must be made in good faith. The publisher need not believe the imputations to be true, but his motive for publication must be legitimate.⁴⁹⁸ To insist on the reporter's belief in the accuracy would withdraw valuable information from the public, which should be free to make its own assessment as to the credibility of what is reported and its source. Here the case for protecting the media is even stronger than for "letters to the editor".⁴⁹⁹

The report must be "accurate": it need not be verbatim or complete but must be neutral and balanced.⁵⁰⁰ Thus the report of an incriminating statement by one witness would not be fair if exculpatory evidence by another is suppressed.

Fair comment

[25.470] Fair comment on matters of public interest is deemed of such surpassing social importance in a democratic community as to outweigh the competing claim to unqualified protection of individual reputation. "In the case of criticism in matters of art, whether music, painting, literature or drama, where the private character of a person criticised is not involved, the freer the criticism is, the better it will be for the aesthetic welfare of the public."⁵⁰¹ Likewise, untrammelled discussion of public affairs and of those participating in them is a basic safeguard against irresponsible political power. The unfettered preservation of the right of fair comment is, therefore, one of the foundations supporting our standards of personal liberty.

In the United States, the constitutional protection of free speech has been construed to require an absolute privilege for opinion, in the belief that actionable defamation must be false and that there is no such thing as a false opinion.⁵⁰² Our law has been less permissive, the privilege being limited only to fair comment on matters of public interest.

Comment and statements of fact

[25.480] For the defence to be available,⁵⁰³ it must be indicated with reasonable clarity by the words themselves, taking them in their context and the circumstances in which they were published, that the imputation conveyed by them is to be understood as comment, not statements of fact.⁵⁰⁴ The latter, however fair, are not protected by this defence: if defamatory, they must either be proved true or be privileged. Comment alone may claim indulgence, in its

497 See *Defamation Act 2005* (NSW) and equivalent provisions in the remaining jurisdictions.

498 See *Waterhouse v Station 2GB* (1985) 1 NSWLR 58; *Salmon v Isaac* (1869) 20 LT 885.

499 Below, [25.xxx].

500 *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274 at 309.

501 *Lyon v Daily Telegraph* [1943] KB 746 at 752 (Scott LJ).

502 *Gertz v Welsh* 418 US 323 at 339 (1974); *Milkovich v Lorain Journal* (1990) 110 S Ct 2695; *Rest 2d*, s 566.

503 In addition to the common law defence of fair comment, there are now statutory defences of honest opinion under the national, uniform defamation laws. See *Defamation Act 2005* (NSW), s 31 and equivalent provisions in the remaining jurisdictions.

504 See *Radio 2UE Sydney v Parker* (1992) 29 NSWLR 448 (CA). Ordinarily the question is for the jury.

primary sense of “something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation”, as distinct from a “direct statement concerning or description of a subject of public interest”.⁵⁰⁵

Distinguishing between fact and comment is often elusive. Much depends upon the context of the impugned expression. If it purports to be a criticism of a published work or public performance, it is *prima facie* comment, however dogmatically expressed.⁵⁰⁶ If the facts are set out and an opinion is then expressed upon them, or an inference drawn from, then the statement is comment. On the other hand, bare inferences or allegations without reference to the facts on which they are based will generally be treated as statements of fact. “To say that a man’s conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.”⁵⁰⁷ But if the expression is ambiguous, the writer or speaker runs the risk that it will not be understood as comment, and that he or she will be called upon to justify. In particular, the defence of fair comment will rarely⁵⁰⁸ protect defamatory newspaper headlines, because it is difficult to achieve the sensational effect desired by modern journalism and at the same time maintain a clear separation of facts from defamatory expressions of opinion.⁵⁰⁹ The test is not what the defendant meant, but what the ordinary unprejudiced reader would take it to mean:⁵¹⁰ the law of defamation being concerned not with intended, but ordinary, meaning, that is, the meaning that would be attached to the utterance by the ordinary hearer or reader.⁵¹¹ It is for the jury to decide what is fact and what comment, unless there can be only one answer.⁵¹²

The defence, it is sometimes said, cannot succeed unless the opinion stated is based on facts actually presented, or in fact present, to the minds of the readers or listeners, so that they may be in a position to judge whether it is such as might be fairly formed on the facts.⁵¹³ The sting of the allegation is, of course, largely minimised if the reader is given an opportunity to form his or her own judgment on whether the suggested inference is supported by the facts proffered.⁵¹⁴ Taken literally, however, such a stringent requirement would make the freedom of the critic illusory. It is impracticable to confine criticism of a literary work to passages actually set out in the review, nor can it be genuinely assumed that a

505 *Clarke v Norton* [1910] VLR 494 at 499 (Cussen J).

506 *Whitford v Clarke* [1939] SASR 434.

507 *Myerson v Smith’s Weekly* (1923) 24 SR (NSW) 20 at 26 (Ferguson J); *Bartrop v CBC* (1978) 86 DLR (3d) 61.

508 Such a rare instance was *Kemsley v Foot* [1952] AC 345 (“lower than Kemsley”).

509 *Smith’s Newspaper v Becker* (1932) 47 CLR 279 at 303-304. Here, in contrast to *Dakbhl v Labouchere* [1908] 2 KB 325n calling the plaintiff a “quack” was held to be a statement of fact, not comment. In the one case, the expression was contained in a headline, but in the other was preceded by an assertion that the plaintiff was associated with a certain institute alleged to be carrying out a system of medical imposture and the article then concluded: “*In other words, he is a quack of the rankest species.*”

510 *Clarke v Norton* [1910] VLR 494 at 501 (Cussen J).

511 Cf Williams, “Language and the Law-IV” (1945) 61 LQR 392ff. See also above, p 586.

512 *Pervan v North Queensland Newspaper* (1993) 178 CLR 309 (also under Codes); *Jones v Skelton* [1964] NSW 485 (PC); *London Artists v Littler* [1969] 2 QB 375 (CA).

513 *Goldsbrough v Fairfax* (1934) 34 SR (NSW) 524 at 530-531.

514 *Hunt v Star Newspaper* [1908] 2 KB 309 at 319.

published work is “present to the mind” of all readers of the criticism, since the whole object of the comment may be to advise whether the particular work is worthy of their consideration.⁵¹⁵

The law has accommodated itself to this difficulty and, rather than insist on a requirement which could only “result in absurdity”,⁵¹⁶ recognises that the facts necessary to justify comment may be implied from the terms of the impugned utterance. “The inquiry ceases to be – Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes – Is there subject matter indicated with sufficient clarity to justify comment being made?”⁵¹⁷ Thus comment may be understood to refer to facts which are notorious, such as the conduct of politicians.⁵¹⁸ And in the case of criticism of literary or artistic work, the public have at least the opportunity of ascertaining for themselves the subject matter on which the comment is founded. The reader need not be able to see exactly the grounds of the comment, provided the subject which, *ex hypothesi*, is of public importance is sufficiently indicated.⁵¹⁹ In *Kemsley v Foot*,⁵²⁰ an article criticising the conduct of the Beaverbrook Press described it as “lower than Kemsley”. Though no details were contained to substantiate the charge against Lord Kemsley, it was held that there was a sufficient substratum of fact indicated in the libel to warrant the allegation being treated as comment. The subject matter implied was that the plaintiff was in control of newspapers and that the conduct of the publishers was in question. The defendant could say: “We have pointed to your Press. It is widely read. Your readers will, and the public generally can, know at what our criticism is directed. It is not bare comment.”⁵²¹

Basis of true facts

[25.490] Comment cannot be fair if based on facts which are distorted or invented.⁵²² There must be a sufficient basis of true fact to warrant the comment.⁵²³ Hence truth is material in this context, not to *justify* such allegations of *fact* as are defamatory (that being the function of the distinct defence of justification), but as one step in establishing that the comment itself is fair. At common law, all the facts set out in the alleged libel had to be proved for this purpose, and failure to justify one, however unimportant, defeated the defence of fair comment.⁵²⁴ Under the statutory defences of honest opinion, a statement of comment needs to be based on “proper material”, which is, in turn, defined as material which is substantially true or published on an occasion of absolute or qualified privilege.⁵²⁵

515 *Gardiner v Fairfax* (1942) 42 (SR) (NSW) 171 at 179-180.

516 *Gardiner v Fairfax* (1942) 42 (SR) (NSW) 171 at 180.

517 *Kemsley v Foot* [1952] AC 345 at 357 (Lord Porter).

518 *Bjelke-Petersen v Burns* [1988] 2 Qd R 129 (“corruption”, “hands in the till”).

519 *Kemsley v Foot* [1952] AC 345; but cf *Telnikoff v Matusevitch* [1992] 2 AC 343.

520 *Kemsley v Foot* [1952] AC 345.

521 *Kemsley v Foot* [1952] AC 345 at 357 (Lord Porter).

522 *Sutherland v Stopes* [1925] AC 47 at 62-63; *Thompson v Truth Ltd* (1932) 34 SR (NSW) 21, 25; *Antonovich v WA Newspaper* [1960] WAR 176 at 180.

523 *London Artists v Littler* [1969] 2 QB 375 (CA).

524 *Kemsley v Foot* [1952] AC 345 at 357-358; *Gooch v NZ Financial Times* [1933] NZLR 257. Also, where the relevant facts are found, not in the libel itself, but in the particulars delivered to support the defence: *Kemsley v Foot* [1952] AC 345.

525 See *Defamation Act 2005* (NSW), s 31(5) and equivalent provisions in the remaining jurisdictions.

Public interest

[25.500] The comment must have been on a matter of public interest. This has recently been defined by the High Court of Australia⁵²⁶ to mean the “conduct or work” of a person engaged in public activities which expressly or impliedly invite public criticism or discussion. It does not refer to broad abstractions such as “the administration of justice” or “political and state matters”.

Activities of this sort fall into two broad categories. First, those in which the public in general has a legitimate interest: for example, national and local government,⁵²⁷ public services and institutions; secondly, matters submitted to public attention and criticism: for example, public displays of works of authors and artists, theatrical performances and productions at places of public entertainment.⁵²⁸ In relation to these any member of the public is entitled to express himself or herself freely, whether by way of praise or blame; and the critic himself or herself is as much exposed to comment for his or her criticism as the author or producer criticised.⁵²⁹ Moreover, “people who fill public positions must not be too thin-skinned in reference to comments made upon them. It must often happen that observations are made upon public men which they know to be undeserved and unjust. Yet they must bear with them, as a matter of public policy. Freedom to criticise is the best security for the proper discharge of public duties”.⁵³⁰

The critic must, however, confine himself or herself to the conduct or work which is of public interest. Merely being a politician is not enough to make his or her private life a matter of public interest,⁵³¹ nor may an artist be denounced for his or her private morals or manner unrelated to his or her works.⁵³² Since this qualification principally serves to protect the plaintiff’s interest in privacy, it would become largely unnecessary with the recognition of an independent cause of action for invasion of privacy.⁵³³

Fairness

[25.510] The comment must be fair in order to qualify for protection: it must express a view which an honest-minded person might hold on the facts on which the comment was made. Previously, it was held that the comment need not be reasonable – far from it: it may be exaggerated, obstinate or prejudiced, provided it is honestly held. “The basis of our public life is that the crank, the enthusiast may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech if a jury were to apply the test of whether it agrees with the comment.”⁵³⁴ “A critic is entitled to dip his pen in gall for the purpose of legitimate criticism, and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord. English literature would be the poorer if Macaulay had not been

526 *Bellino v ABC* (1996) 185 CLR 183 at 214-219 per Dawson, McHugh and Gummow JJ.

527 *Slim v Daily Telegraph* [1968] 2 QB 157 (CA).

528 *London Artists v Littler* [1969] 2 QB 375 (CA).

529 *Turner v M-G-M* [1950] 1 All ER 449 (HL).

530 *Whitford v Clarke* [1939] SASR 434 at 439 (Napier J).

531 *Mutch v Sleeman* (1928) 29 SR (NSW) 125 at 137 (MP called a wife-beater). Whether this case would be determined in the same way today is questionable.

532 *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at 174.

533 As to the protection of privacy in Australian law, see Ch XXX.

534 Diplock J’s summing-up to the jury in *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743 at 747. See also *Turner v MGM* [1950] 1 All ER 449 at 462 (HL).

stirred to wrath by the verses of Mr Robert Montgomery.”⁵³⁵ The High Court of Australia has recently emphasised that the applicable test is whether the view is one an honest-minded person might reasonably hold.⁵³⁶ To the extent that the inquiry as to reasonableness marks the outer limits of the range of views an honest commentator might hold, the requirement of reasonableness might not prove too onerous. To the extent that a comment must now be honestly and reasonably held, such a requirement of reasonableness arguably distorts the common law defence of fair comment, as it has been traditionally understood and applied, and has the potential to curtail the commentator’s exercise of free expression, the very basis upon which the defence is granted.

The statutory defences of honest opinion under the national, uniform defamation laws instead turn upon whether the comment honestly represent the speaker’s opinion.⁵³⁷

Malice

[25.520] At one time, fair comment was considered a branch of “privilege”, but eventually the view prevailed that it constitutes a defence *sui generis*.⁵³⁸ Thus it became settled that the defence is forfeited even in the absence of malice, if the comment exceeds the limits of fairness.⁵³⁹ In *Thomas v Bradbury*,⁵⁴⁰ however, the Court of Appeal partially reverted to the older view by holding that comment which is *prima facie* fair may lose its protection by proof of malice. This conclusion is hard to justify, since fairness would seem to have reference to the criticism, not the state of mind of the critic. Against this, however, it has been urged that if there is malice, the mind of the writer would not be that of a critic⁵⁴¹ and that, from a policy point of view, while it is undoubtedly in the public interest that public matters should be open to comment, it is not in the public interest to allow dishonest comment or comment warped by spite.⁵⁴²

Although the principle is frequently expressed as if malice conclusively destroys the plea of fairness, the only point decided in *Thomas v Bradbury*, and the better opinion, is merely that evidence of malice is admissible: “It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment *distorted* by malice cannot be fair on the part of the person who makes it.”⁵⁴³ To establish malice, it must be shown that the comment was designed to serve some purpose other than that of expressing the commentator’s

535 *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at 174 (Jordan CJ).

536 *Channel Seven Adelaide v Manock* (2007) 232 CLR 245 at 290 (Gummow, Hayne and Heydon JJ).

537 See *Defamation Act 2005* (NSW), s 31(4) and equivalent provisions in the remaining jurisdictions. See further below [xx.xxx].

538 *Merivale v Carson* (1887) 20 QBD 275. The term “privilege” is here used in the technical sense assigned to it in the law of defamation. In Hohfeldian terminology, fair comment is, of course, also a privilege, and the analytical argument relied on to show that it is *sui generis* is probably based on faulty reasoning.

539 *Merivale v Carson* (1887) 20 QBD 275.

540 *Thomas v Bradbury* [1906] 2 KB 627; followed, though not without reluctance, in *Falcke v Herald Ltd* [1925] VLR 56.

541 *Merivale v Carson* (1887) 20 QBD 275 at 281-282 (Lord Esher).

542 *Falcke v Herald Ltd* [1925] VLR 56 at 72.

543 *Thomas v Bradbury* [1906] 2 KB 627 at 642 (Collins MR); *Cawley v Australian Consolidated Press* [1981] 1 NSWLR 225.

real opinion, for example, that of satisfying a private grudge. But while mere hostility or ill will is not by itself sufficient for malice, neither is honest belief in the truth a conclusive reply.⁵⁴⁴

While it is clear that no comment can be fair unless it expresses the defendant's honest opinion, it remains disputed whether this requirement goes to the question of fairness or malice. The answer will affect the burden of proof. On one view,⁵⁴⁵ it is sufficient for the defendant to establish that the statement was comment rather than factual and that it was objectively fair, that is, that it is one which an honest-minded person could make. But just as with other types of malice, lack of subjective honesty (which would defeat the defence) falls to proof by the plaintiff. The opposing view holds subjective honesty to be an essential ingredient in the defence of fair comment, for proof by the defendant.⁵⁴⁶

Differing views persist regarding the publisher of someone else's comment. A commonly held position was to identify the publisher with the writer. Thus if the writer had a good defence, it also availed the publisher; while, conversely, if the writer had none, neither did the publisher. Both propositions have been challenged: the second, after a recent decision on qualified privilege held that a writer's malice is not imputable to the publisher unless he or she was his or her employee or agent under ordinary principles of vicarious liability.⁵⁴⁷ This is the case for the reason that the defence attaches to the individual publisher, not to the comment.

A less desirable corollary would be to deny the publisher the defence, as the Supreme Court of Canada did in relation to a letter on the correspondence page of a newspaper,⁵⁴⁸ unless the comment expressed his own honest opinion not merely in the writer's integrity, but also in the substance of the comment. But to require the editor to share the view of all correspondents would seriously erode the role of the press as a "sounding board for the free flow of new and different ideas". The decision was accordingly reversed in Canada. It was also legislated against in New Zealand,⁵⁴⁹ before being repudiated by the High Court of Australia.⁵⁵⁰

Malice, broadly defined, does not constitute discrediting conduct for a defence of honest opinion under the national, uniform defamation laws. The statutory defences of honest opinion operate in three different circumstances. The applicability of a defence turns upon the relationship between the defendant and the person expressing the opinion. If the defendant is the person expressing the opinion, the statutory defence can only be defeated if the plaintiff proves that the defendant did not honestly hold the opinion at the time at which it was published.⁵⁵¹ If the person expressing the opinion is an employee or an agent of the defendant, the statutory defence can only be defeated if the plaintiff proves that the defendant did not believe that the employee or the agent honestly held

544 *Renouf v Federal Capital Press* (1977) 16 ACTR 35.

545 *Telnikoff v Matusevitch* [1992] 2 AC 343; *Hawke v Tamworth Newspaper* [1983] 1 NSWLR 699.

546 *Cherneskey v Armadale* [1979] 1 SCR 1067 (narrow majority); *Defamation Act 1992* (NZ), s 10.

547 *McLeod v Jones* [1977] 1 NZLR 441; *Egger v Chelmsford (Viscount)* [1965] 1 QB 248 at 265.

548 *Cherneskey v Armadale* [1979] 1 SCR 1067.

549 *Defamation Act 1992* (NZ), s 10.

550 *Pervan v North Queensland Newspaper* (1993) 178 CLR 309.

551 See *Defamation Act 2005* (NSW), s 31(1), 31(4)(a) and equivalent provisions in the remaining jurisdictions.

the opinion at the time at which it was published.⁵⁵² Finally, if the person expressing the opinion is a “stranger”, being neither the defendant himself or herself nor an employee or an agent of the defendant, the statutory defence can only be defeated if the plaintiff proves that the defendant had reasonable grounds to believe that the commentator did not honestly hold the opinion at the time at which it was published.⁵⁵³

Remedies

[25.530] As already pointed out, the law of defamation has evolved around the remedy of damages. This has left a fateful imprint on much of substantive law, besides forcing all persons desirous of vindicating their reputation in public into pursuing a form of redress not necessarily or precisely adjusted to their needs. At present, however, the law offers no other means for wringing a retraction from a defamer.⁵⁵⁴ The latter, it is true, may mitigate his or her damages by timely apology, and in some cases may even escape all liability by retracting.⁵⁵⁵ New Zealand has so far gone furthest in short-circuiting proceedings: a person defamed in a news medium may within five days request the publisher to publish a retraction or a reasonable reply by himself or herself. Alternatively, he or she may seek a judicial recommendation that the defendant publish a correction or a judicial declaration that defamatory matter was published. If heeded, the former is entitled to costs but not damages; a refusal however is taken into account in assessing damages.⁵⁵⁶ In the various law reform processes, including the one leading up to the introduction of the national, uniform defamation laws, alternative remedies, such as court-ordered retractions, corrections or rights of reply have been canvassed but none have been enacted. But nowhere can retraction be forced on a recalcitrant defendant,⁵⁵⁷ nor has the plaintiff any right of reply in the defendant’s media.⁵⁵⁸ The national, uniform defamation laws state, amongst their objects, the provision of “effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter” and the promotion of “speedy and non-litigious methods of resolving disputes about the publication of defamatory matter”.⁵⁵⁹ Subject to the offer of amends regime,⁵⁶⁰ the efficacy of which is open to question, the focus of defamation law still remains firmly upon an award of damages.

552 See *Defamation Act 2005* (NSW), s 31(2), 31(4)(b) and equivalent provisions in the remaining jurisdictions.

553 See *Defamation Act 2005* (NSW), s 31(3), 41(4)(c) and equivalent provisions in the remaining jurisdictions.

554 Many successful plaintiffs, however, are content with seeking only damages to cover their legal expenses. Settlement may be facilitated by agreeing to a statement in open court for vindication: see *Barnett v Crozier* [1987] 1 WLR 272.

555 Fleming, “Retraction and Reply: Alternative Remedies for Defamation” (1978) 12 UBCL Rev 15.

556 *Defamation Act 1992* (NZ), ss 25, 26.

557 *Burnett v R* (1979) 94 DLR (3d) 281. *TV 3 Network v Eveready* [1993] 3 NZLR 435 (CA) refused to strike out such a claim.

558 Except that under the expanded defence of qualified privilege (above, [25.xxx]), the plaintiff must generally be given the opportunity to have a response published, and that privilege for certain reports is contingent on a right of reply. A reply is clothed with qualified privilege: above, [25.xxx].

559 See *Defamation Act 2005* (NSW), s 3(c), (d) and equivalent provisions in the remaining jurisdictions.

560 See below [xx.xxx].

Injunction

[25.540] From many a plaintiff's point of view, prevention of defamation must seem infinitely preferable to any redress after the damage has once been done. But injunctions to enjoin threatened attacks have been only grudgingly admitted for fear of introducing controls amounting to advance censorship and because of judicial reluctance to usurp the jury function which, since Fox's *Libel Act of 1792*, has been regarded as a basic guarantee of free speech.⁵⁶¹ An interlocutory injunction to restrain publication of a libel⁵⁶² is therefore highly unlikely to be granted unless the plaintiff can establish that (1) a finding by the jury that the complaint is *not* defamatory would be set aside as unreasonable, (2) there is no real ground for supposing that the defendant may succeed with a defence of justification, privilege or fair comment, and (3) he or she is likely to recover more than just nominal damages.⁵⁶³ It is also most unlikely that an injunction will issue if its effect is to restrain public discussion on matters of public interest.⁵⁶⁴ Where otherwise appropriate, though, injunctions are not confined to enjoin the publication or repetition of libels calculated to injure the plaintiff in his or her property interests.⁵⁶⁵

Damages

[25.550] The commitment of our law to damages as the principal remedy for defamation has been a mixed blessing. Perhaps its foremost ill is that it exacerbates the tension between the two competing interests of individual reputation and freedom of speech. For on occasions where freedom of speech is most highly valued, there was no alternative to creating an immunity (privilege) and depriving the defamed of all right to vindication. On the other hand, the spectre of heavy damages has a decidedly chilling effect on speech.⁵⁶⁶

Previously, the problem was aggravated by the rather free hand juries play in assessing damages, which were said to be "at large", ranging from

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- 561 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 72-73 (Gleeson CJ and Crennan J), at 86-87 (Gummow and Hayne JJ). See also Hayes, "Injunctions before Judgment in Cases of Defamation" (1971) 45 ALJ 125 at 181; Ford, "Protection of Reputation in Equity" (1954) 6 Res Jud 345; Pound, "Equitable Relief against Defamation" (1916) 29 Harv L Rev 640. In the United States injunctions are regarded as categorically prohibited by the First Amendment guarantee of free speech.
- 562 A losing defendant ordinarily undertakes not to repeat publication; if unwilling to give such undertaking, an injunction to restrain him or her from repeating the libel will usually be granted: *John v MGN* [1996] 2 All ER 35 at 47.
- 563 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 67 (Gleeson CJ and Crennan J); *Bonnard v Perryman* [1891] 2 Ch 269 (CA); *Church of Scientology v Reader's Digest* [1980] 1 NSWLR 344. Cf *Chappell v TCN Channel 9* (1988) 14 NSWLR 153 and *Nat Mutual Life v GTV Corp* (1988) Aust Torts Reports ¶ 80-192. The majority in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 stressed that defamation was not a special case and that general equitable principles applied to applications of interlocutory injunctions to restrain defamatory publications but equally emphasised that the way in which these principles would apply to defamation cases would be informed by factors peculiar to defamation cases. See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 68-69 (Gleeson CJ and Crennan J), at 81-84 (Gummow and Hayne JJ). See also Rolph, "Showing Restraint: Interlocutory Injunctions in Defamation Cases" (2009) 14 *Media and Arts Law Review* 255 at 290.
- 564 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 69-73 (Gleeson CJ and Crennan J).
- 565 *Monson v Tussauds* [1894] 1 QB 671; *Swimsure (Laboratories) v McDonald* [1979] 2 NSWLR 796.
- 566 This fear is also widely exploited by less scrupulous plaintiffs by means of "gag" or "stop" writs: see ALRC 8, at [52]-[56]; *Brych v Herald* [1978] VR 727; *Goldsmith v Sperrings* [1977] 1 WLR 478. A deterrent to litigation is the denial in England of legal aid.

“contemptuous” or “derisory” (reflecting on the weakness of the plaintiff’s reputation)⁵⁶⁷ to exemplary (reflecting on the defendant’s outrageousness). What is more, the tolerated level of awards bore no comparison with those for serious personal injury: reputation and privacy seemed to be considered of much greater value than life or limb, dishonour an infinitely greater injury than agonising and protracted physical suffering. Both of these issues have been addressed under the national, uniform defamation laws. Whether these changes have been wholly beneficial is debatable.

There are a number of reasons for the difficulty of assessing damages for defamation. First and foremost is the libel rule that, aside from actual pecuniary damage, injury to reputation and feelings is itself compensable. Even in cases of slander, once “special damage” has been proved, the plaintiff has established his credentials for general damages.⁵⁶⁸ What is more, injury to reputation by libel is presumed and does not have to be established by evidence.⁵⁶⁹ Of course, the person defamed does not really get compensation for his or her damaged reputation as such. Rather, damages serve “as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money”⁵⁷⁰ – indeed, just like damages for pain and suffering in case of personal injury. Included are his or her injured feelings, indignation and the psychological need for satisfaction. To the extent that the plaintiff’s subjective hurt has been increased by the outrageous nature of the defendant’s manner or motives, it may be reflected in “aggravated damages” (to be distinguished from “punitive damages”, as will appear below).

Finally, there is the function of damages in vindicating the plaintiff’s reputation. Its focus is on the attitude of others to the plaintiff. The gravity of the libel, the social or professional standing of the plaintiff and the availability of alternative remedies also have a bearing on this. A small sum awarded to a public figure for a serious libel could be interpreted as trivialising the incident, and in the absence of an unequivocal apology substantial damages may be the only means of vindication.⁵⁷¹

None of these elements can be measured on any objective monetary scale.⁵⁷²

The national, uniform defamation laws seek to overcome the unreliability of juries by reposing the responsibility for damages with judges.⁵⁷³ Previous attempts had been made, both at common law⁵⁷⁴ and legislatively,⁵⁷⁵ to address the proper relationship between damages for non-economic loss for defamation and personal injury. The national, uniform defamation laws attempt

567 For example, *Dering v Uris (No 2)* [1964] 2 QB 669 (1 sh); *Pamplin v Express Newspaper* [1988] 1 WLR 116 (denying order for costs).

568 Above, [25.xxx].

569 This rule can be defended on the ground that harm to reputation is difficult to prove and that libel is likely to cause anguish. In contrast, the United States Constitution no longer permits damages for other than actual injury: *Gertz v Welsb* 418 US 323 (1974); *Dun & Bradstreet v Greenmoss* (1985) 472 US 749 (only on matters of public concern).

570 *Uren v Fairfax* (1966) 117 CLR 118 at 150 (Windeyer J); *Rogers v Nationwide News* (2003) 216 CLR 327 at 349-50 (Hayne J).

571 For a striking example involving a medical practitioner, see *Crampton v Nugawela* (1996) 41 NSWLR 176.

572 *Rogers v Nationwide News* (2003) 216 CLR 327 at 349-350 (Hayne J).

573 See *Defamation Act 2005* (NSW), s 22(3) and equivalent provisions in the remaining jurisdictions. There are no juries in defamation cases in the Australian Capital Territory, the Northern Territory and South Australia. See above [25.xxx].

574 See, for example, *Carson v John Fairfax* (1993) 178 CLR 44; *John v MGN* [1997] QB 586.

to overcome this tension by capping the damages payable for non-economic loss in defamation claims.⁵⁷⁶ Indeed, the impetus for this reform was, in part, the capping of damages for non-economic loss in personal injury claims in some jurisdictions.⁵⁷⁷ There are several features to be noted about the capping of damages for defamation. First, the legislation provides a mechanism for the annual indexation of the cap.⁵⁷⁸ Secondly, the cap expressly excludes aggravated damages and impliedly excludes damages for economic loss in defamation cases.⁵⁷⁹

In addition to general damages such as the preceding, a plaintiff whose reputation has been disparaged can also recover for any consequential loss as specially pleaded.⁵⁸⁰ This may include personal injury⁵⁸¹ no less than business losses.

Exemplary and aggravated damages

[25.560] The decision of the House of Lords in 1964, in *Rookes v Barnard*,⁵⁸² to renounce exemplary, as distinct from aggravated, damages initially had a significant impact on defamation. It became necessary to distinguish more clearly between a defendant's contumelious conduct and its effect, if any, on the plaintiff's feelings: the former may deserve reprobation, but the latter alone compensation. One exception of peculiar relevance to defamation was retained: where the defendant sought to profit from his or her tort (tort must not pay!). That the libel was published in the course of a business (publishing) would not be sufficient; it must have been with guilty knowledge and the calculation that the chances of economic profit outweighed those of economic or physical cost.⁵⁸³ Australian and most other Commonwealth courts declined to follow the English example and have retained exemplary damages for defamation (and other torts),⁵⁸⁴ mindful of the general disuse of criminal proceedings.

However, the common law position in Australia has now been overturned under the national, uniform defamation laws, which proscribe exemplary damages for defamation,⁵⁸⁵ following the earlier example of New South Wales.⁵⁸⁶ The distinction between exemplary and aggravated damages

575 See, for example, *Defamation Act 1974* (NSW), s 46A (repealed). As to its reading down, see *Rogers v Nationwide News* (2003) 216 CLR 327.

576 See *Defamation Act 2005* (NSW), s 35(1) and equivalent provisions in the remaining jurisdictions.

577 See, for example, *Civil Liability Act 2002* (NSW), ss 16, 17.

578 See *Defamation Act 2005* (NSW), s 35(3) – (8) and equivalent provisions in the remaining jurisdictions.

579 See *Defamation Act 2005* (NSW), s 35(2) and equivalent provisions in the remaining jurisdictions.

580 *Calvet v Tomkies* [1963] 1 WLR 1397.

581 *Sattin v Nationwide News* (1996) 39 NSWLR 32.

582 *Rookes v Barnard* [1964] AC 1129. Above, [xx.xxx].

583 See *Cassell v Broome* [1972] AC 1027; *Riches v News Group* [1986] QB 256; *John v MGN* [1997] QB 586 (CA). But damages are not limited to amount of profit, as they would be in action for unjust enrichment.

584 *Uren v Fairfax* (1966) 117 CLR 118; above, [25.xxx].

585 See *Defamation Act 2005* (NSW), s 37 and equivalent provisions in the remaining jurisdictions.

586 *Defamation Act 1974* (NSW), s 46 (repealed).

necessitated by *Rookes v Barnard* remains vitally important because the national, uniform defamation permit recovery of aggravated damages.⁵⁸⁷

Aggravated damages have emerged from this reorientation as a new category in all jurisdictions. The defendant's conduct is generally relevant only in so far as it affects the plaintiff's feelings.⁵⁸⁸ Damages may be aggravated by conduct in the publication⁵⁸⁹ or thereafter as in the conduct of the defence,⁵⁹⁰ but according to the prevailing view, it must be "unjustifiable, improper or lacking in bona fides".⁵⁹¹ Thus the defendant may with impunity raise any bona fide legitimate defence, including truth, even if it causes distress to the plaintiff, since the law cannot "at once permit and forbid, invite and punish".⁵⁹²

Character evidence

[25.570] In assessing damages, the law seeks to compensate the plaintiff for injury to the reputation he or she previously enjoyed. Though it may be shown that his or her reputation was not what he or she claimed it to be, it is irrelevant that he or she did not deserve it.⁵⁹³ This may occasionally confer an unmerited reward upon a hypocrite who has succeeded in hiding a shameful career behind a screen of unblemished repute, but on balance it would be too unfair to expect every plaintiff to show a uniform propriety of conduct throughout his or her life, besides unduly lengthening trials.

Accordingly, the defence is free to lead evidence of the plaintiff's general bad repute, but not of specific discreditable conduct.⁵⁹⁴ Not that it must actually content itself with such general evidence only as that the plaintiff's reputation was high or low, for it is permissible to elicit that "he was *known* to have had a criminal record".⁵⁹⁵ Rumour of course, cannot claim audience in a court of law and testimony must therefore be confined to a person's *settled* reputation.⁵⁹⁶ Also, a character witness may be questioned as to the grounds of his or her

587 See *Defamation Act 2005* (NSW), s 35(2) and equivalent provisions in the remaining jurisdictions.

588 Thus a corporation, if it can now recover at all, cannot recover aggravated damages for loss of feelings, though it may perhaps for loss of reputation: *Andrews v Fairfax* [1980] 2 NSWLR 225 at 265; *Comalco v Australian Broadcasting Commission* (1985) 64 ACTR 1 at 81. Above [xx.xxx].

589 Even failure to make inquiry may be sufficient: *Andrews v Fairfax* [1980] 2 NSWLR 225; but cf *Bickel v Fairfax* [1981] 2 NSWLR 474 at 487.

590 *Triggell v Pheeny* (1951) 82 CLR 497 at 514; *Sutcliffe v Pressdram* [1991] 1 QB 153 at 184. But rigorous defence does not, without more, aggravate damages: *Coyne v Citizen Finance* (1991) 172 CLR 211.

591 *Bickel v Fairfax* [1981] 2 NSWLR 474 at 497; *David Syme v Mather* [1977] VR 516 at 530, 535 (FC); *Coyne v Citizen Finance* (1991) 172 CLR 211 at 237 per Toohey J.

592 *Herald & Weekly Times v McGregor* (1928) 41 CLR 254 at 267.

593 Subject to the qualification that justification is a defence.

594 *Plato Films v Speidel* [1961] AC 1090; *O'Hagan v Nationwide News* (2001) 53 NSWLR 89 at 91 (Meagher JA), at 93-94 (Stein JA). Plaintiff may lead evidence of good repute to increase damages: *Bickel v Fairfax* [1981] 2 NSWLR 474.

595 *Wishart v Mirror Newspaper* [1963] SR (NSW) 745 (FC). Convictions are now admissible (*Goody v Odhams Press* [1967] 1 QB 333) provided relevant: *Jorgensen v NZ Newspapers* [1974] 2 NZLR 45.

596 Before it was put under a cloud by the instant libel. Accordingly, a previous or concurrent publication of the same libel by others, even if privileged, is no ground for mitigation (*Dingle v Assoc Newspapers* [1964] AC 371), though a defendant is of course liable only for the damage done by his or her own publication: *Harrison v Pearce* (1858) 1 F & F 567; 175 ER 855.

belief;⁵⁹⁷ but according to the prevailing view, he or she should desist from mentioning specific incidents even if sufficiently notorious to permit the inference that the plaintiff's current reputation has thereby suffered.⁵⁹⁸ Moreover, the evidence must be relevant to the nature of the allegation made against him or her; it must be directed to that aspect or sector of his or her character which was maligned. If the libel imputes fraud, his or her reputation for honesty is open to scrutiny, but not his or her sexual habits.⁵⁹⁹

This compromise has not passed without criticism. For one thing, it is "difficult to combine an aversion from rumour with an indulgence for general evidence of reputation which, unvouched, is virtually the same thing".⁶⁰⁰ It would be fairer all around to admit evidence of particular incidents that contribute to the plaintiff's current reputation.⁶⁰¹ Secondly, the prohibition can be circumvented by luring the plaintiff into the witness box and cross-examining him or her as to credit. Nor does it preclude reduction of damages on the basis of evidence of particular incidents otherwise properly admitted, such as on a plea of justification that failed.⁶⁰² Reform has therefore been urged by several bodies.⁶⁰³

Inquiry into the "damages-worthiness" of the plaintiff is also to some extent stultified by the rule in common law jurisdictions that evidence tending to justification cannot be adduced in the absence of a plea of truth. The reason for this is to acquaint the plaintiff with the defence he or she will have to meet, and once more to prevent furtive admission in evidence of particular facts as distinct from general reputation.⁶⁰⁴ On the other hand, it can give the plaintiff a lever for outmanoeuvring the defendant by not relying on one of several libellous allegations: if clearly severable, the defendant cannot adduce facts in justification of that one, and may thus stand to lose the benefit of highly prejudicial evidence.⁶⁰⁵ However, a defendant must still be aware of the operation of the defence of contextual truth.⁶⁰⁶

Mitigation

[25.580] Although, as we have seen, it is no defence even in reduction of damages that the calumny was originally or concurrently published by others,⁶⁰⁷ a partial modification at least allows evidence in mitigation that the plaintiff has already recovered, or brought actions for, damages or received or agreed to receive compensation in respect of a libel to the same effect as that sued

597 *Plato Films v Speidel* [1961] AC 1090 at 1138-1140.

598 *Plato Films* [1961] AC 1090, passim; *Chappell v Mirror Newspapers* (1984) ATR 80-691.

599 *Plato Films v Speidel* [1961] AC 1090 at 1140; *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749 at 801; *O'Hagan v Nationwide News* (2001) 53 NSWLR 89 at 91 (Meagher JA), at 95 (Stein JA); *Australian Broadcasting Corporation v McBride* (2001) 53 NSWLR 430 at 435-447 (Ipp AJA).

600 *Plato Films v Speidel* [1961] AC 1090, Lord Radcliffe, at 1131.

601 *Plato Films v Speidel* [1961] AC 1090, Lord Radcliffe, at 1131.

602 *Pamplin v Express Newspaper* [1988] 1 WLR 116 (CA); *Burstein v Times Newspapers* [2001] 1 WLR 579 at 600-01 (May LJ).

603 *Porter* (1948), at [146]-[156]; *Faulks*, at [363]-[372]; ALRC 8, at [265].

604 *Watt v Watt* [1905] AC 115 at 118.

605 See *Plato Films v Speidel* [1961] AC 1090; *S & K Holdings v Throgmorton* [1972] 1 WLR 1036 (CA).

606 See above [xx.xxx].

607 *Dingle v Assoc Newspapers* [1964] AC 371; and see above, [xx.xxx].

upon.⁶⁰⁸ With the same object of at once alleviating the lot of defendants and preventing a plaintiff from recovering several times over for the same elements of damage common to each libel, most jurisdictions encourage consolidation of actions brought in respect to the same or substantially the same libel and consequential apportionment of damages between the several defendants.⁶⁰⁹

The plaintiff's conduct, before or after the publication, may also provide ground for mitigating damages, although contributory negligence as such is not a recognised defence.⁶¹⁰ Damages have been reduced, for example, because the plaintiff provoked the publication or "behaved badly" in some other way.⁶¹¹

Turning to apology, in any action for defamation the defendant may, provided he gives notice in writing at the time of delivering his defence,⁶¹² give evidence in mitigation that he made or offered an apology before commencement of the action or at the earliest opportunity thereafter if he had none before.⁶¹³ A retraction or a correction is relevant for the purpose of showing that the plaintiff has sustained less damage to his reputation than he claims and tends to negative malice.⁶¹⁴ Of course, it must be unequivocal and unconditional. To say that a person has manners not fit for a pig and then to correct it by saying that his or her manners *are* fit for a pig, is an aggravation, not a retraction.⁶¹⁵ Nor does a newspaper make amends for a defamatory attack on a politician by offering him the opportunity of replying in kind⁶¹⁶ or by merely reporting other people's exculpations instead of frankly putting its own authority and regrets behind the required vindication.⁶¹⁷ A refusal or failure to apologise may be a ground for increasing ordinary compensatory damages (because it enhances the likelihood that the defamatory imputation will spread within the community) or aggravated damages (because it aggravates the hurt of the plaintiff's feelings).⁶¹⁸

Declaration of falsity

[25.590] Aside from the defence of justification, the common law does not provide a means for a judicial determination of the truth raised by a defamatory allegation. A court presumably has the power to grant declaratory relief in a defamation case but there is, as yet, no Australian precedent for this.⁶¹⁹ In many cases the issue is pre-empted by one of the several "privileges" which allow a defendant to succeed, whatever the truth; for another, even failure of the defence of justification does not positively prove the falsity of the allegation.

608 See *Defamation Act 2005* (NSW), s 38(1)(c) – (e) and equivalent provisions in the remaining jurisdictions. As to whether separate defendants can, by their separate publications, be liable "in respect of the same damage", see *Bracks v Smyth-Kirk* (2009) 263 ALR 522 (NSWCA).

609 See generally *Defamation Act 2005* (NSW), s 38 and equivalent provisions in the remaining jurisdictions. Also *Isaacs v Fairfax* [1980] 2 NSWLR 651.

610 For a form of *volenti* (invited statements) see above, [25.xxx].

611 See *Roux v ABC* [1992] 2 VR 577 at 662-663.

612 Not in his or her defence. Matters in mitigation of damages cannot be pleaded: *Wilson v Dun's Gazette* [1912] VLR 342.

613 See *Defamation Act 2005* (NSW), s 38(1)(a) and equivalent provisions in the remaining jurisdictions.

614 See *Defamation Act 2005* (NSW), s 38(1)(b) and equivalent provisions in the remaining jurisdictions.

615 *Winfield & Jolowicz* 297.

616 *McRae v SA Telecasters* (1976) 14 SASR 162 at 167.

617 *Dingle v Assoc Newspapers* [1964] AC 371 at 400.

618 *Herald & Weekly Times v McGregor* (1928) 41 CLR 254 at 263; *Humphries v TWT Ltd* (1994) 120 ALR 693 at 699; *Clark v Ainsworth* (1996) 40 NSWLR 463.

619 *Bracks v Smyth-Kirk* (2009) 263 ALR 522 at 554-555 (Young JA).

Yet, many a plaintiff may be primarily concerned with clearing his or her name by an unequivocal judicial declaration, rather than seeking an award of damages which does not speak unequivocally to the truth. Besides, there is a public interest in ascertaining the truth, at least in matters of public concern. With this in view, a reform mounted in New South Wales would allow a plaintiff to seek a judicial declaration that the allegation is false, coupled with an order that the declaration be published by the defendant. Only absolute privilege or privileged report would be a defence.⁶²⁰

During the law reform process leading up to the introduction of the national, uniform defamation laws, alternative remedies, such as declarations of falsity and court-ordered corrections and apologies were again canvassed but none managed to end up in the legislation as enacted.

Offer of amends

[25.600] This long-standing usage has been reinforced in several jurisdictions in an effort to stem the flood of trivial damage claims and encourage non-litigious settlements. Thus in England an “offer to make amends” (publish correction and apology, and pay compensation, if necessary determined by a court), even if not accepted, furnishes a defence if the offeror neither knew nor had reason to believe the allegation to refer to the complainant and was both false and defamatory of him.⁶²¹

An offer of amends regime has been introduced across Australia under the national, uniform defamation laws,⁶²² as part of that legislation’s stated aim of promoting “speedy and non-litigious” dispute resolution.⁶²³ It is modelled on that which existed in New South Wales from 2002 onwards.⁶²⁴ The offer of amends regime has not yet been widely used, possibly because it involves the publication of a correction or an apology in terms satisfactory to the plaintiff – something to which a publisher might be resistant, or possibly because less cumbersome means of settling disputes are available to parties. In any event, the attempts to introduce and promote alternative means of resolving defamation disputes have had mixed success. The award of damages persists in occupying a central place in defamation law.

620 *Defamation Bill 1996*, Part 6. See Chesterman, “The Money or the Truth” (1995) 18 UNSWLJ 300, esp at 324-326; NSWLRC 75 (1995), at [6.1]-[6.24].

621 *Defamation Act 1996* (UK), ss 2 – 4.

622 See *Defamation Act 2005* (NSW), Pt 3 and equivalent provisions in the remaining jurisdictions.

623 See *Defamation Act 2005* (NSW), s 3(d).

624 *Defamation Act 1974* (NSW), Pt 2A (repealed), introduced by *Defamation Amendment Act 2002* (NSW), Sch 1, cl 6.