THEOPHANOUS v HERALD & WEEKLY TIMES LTD*

STEPHENS v WEST AUSTRALIAN NEWSPAPERS LTD†

Introduction

On 12 October 1994 the High Court handed down its judgments in the cases of *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd.* Both cases concerned defamation actions brought by members of Parliament. The *Theophanous* case was brought by a member of the Commonwealth Parliament, Dr Andrew Theophanous, in relation to a letter-to-the-editor published in a newspaper which alleged that he performed his duties in a biased manner. The *Stephens* case was brought by a number of members of the Western Australian Parliament, in relation to several articles in a newspaper reporting the comments of another member of the Western Australian Parliament that the plaintiffs had been on an overseas 'junket'.

In each case the defendant newspapers argued that they had a right to publish this material because it formed an integral part of political discussion. The defendants relied on the judgments of the High Court in *Australian Capital Television Pty Ltd v The Commonwealth*[1] and *Nationwide News Pty Ltd v Wills,*[2] in which a majority of the Court recognised a constitutional implication of freedom of political discussion, derived from the principle of representative democracy that forms part of the Commonwealth Constitution.

The High Court based its judgments in *Australian Capital Television* and *Nationwide News* on the fact that the Constitution, by providing that members of Parliament be 'directly chosen by the people', establishes a form of representative democracy which requires the people to participate in government through the electoral process. There would be no representative democracy, however, if the people were denied the information necessary to make a free and informed choice of their representatives, or were denied the ability to make their views known to their representatives. The representatives of the people are only truly accountable to the people if the people are informed of how their representatives are fulfilling their roles and whether they are fit to do so. For the principle of

* (1994) 124 ALR 1. High Court, 12 October 1994, Mason CJ, Brennan, Dawson, Deane, Toohey, Gaudron and McHugh JJ (*Theophanous*).

† (1994) 124 ALR 80. High Court, 12 October 1994, Mason CJ, Brennan, Dawson, Deane, Toohey, Gaudron and McHugh JJ (*Stephens*). This note is a revised version of 'Defamation and Politicians: Fair game — or keeping the game fair?' (1994) 23 *Current Issues Brief*, Parliamentary Research Service, 17 October 1994. The views expressed are those of the author and do not necessarily reflect those of the Parliamentary Research Service.

1 (1992) 177 CLR 106 (*Australian Capital Television*).

2 (1992) 177 CLR 1 (*Nationwide News*).

representative democracy to be effective, therefore, the people must have the freedom to communicate and discuss political matters.

In *Theophanous* and *Stephens*, the defendants sought to extend this principle to the application of defamation laws which may otherwise restrict the freedom of the people to criticise and scrutinise the conduct of their parliamentary representatives.

Summary of the cases

Most of the High Court's reasoning is contained in the *Theophanous* case. The judgment in *Stephens* only refers to the distinctive aspects of that case. Accordingly, this case note concentrates on the *Theophanous* case.

In *Theophanous*, the High Court split in several directions. The Chief Justice and Toohey and Gaudron JJ wrote a joint judgment which recognised a defence in defamation actions arising from the constitutional implication of freedom of political discussion. Their Honours balanced the public interest in free political discussion with the interest in protecting the reputation of individuals, by placing the onus on the defendant seeking to rely on this defence in a defamation action to establish that he or she was neither aware that the material was false, nor reckless as to its truth or falsity, and that the publication was 'reasonable' in the circumstances.

Justice Deane wrote a separate judgment which also established a 'freedom of political discussion' defence to defamation actions, but did not place the same burdens on the defendant to show reasonableness and that the defendant was neither reckless nor aware that the material was false.

Together, these four judges make up the majority of the Court, and for the purposes of reaching a majority order, Deane J agreed with the orders proposed by Mason CJ, Toohey and Gaudron JJ.

The minority of the Court was comprised of Brennan, Dawson and McHugh JJ. Each had different reasons for rejecting the application of freedom of political discussion to defamation laws. In brief, Dawson J did not accept that there is a constitutional implication of freedom of political discussion, McHugh J accepted that such an implication exists but considered it to be confined to matters concerning elections, and Brennan J accepted that the implication exists generally, but considered it to be confined to limiting the legislative powers of Parliaments, rather than giving personal rights or affecting the common law.

Both the *Theophanous* and *Stephens* cases also addressed the scope of the defence of qualified privilege in a defamation action, but this is beyond the scope of this note. The following discussion concentrates on the application of the constitutional implication of freedom of political discussion, as determined by the majority judgments.

The application of constitutional implications

One of the interesting questions raised by the *Theophanous* and *Stephens* cases is whether the constitutional implication of freedom of political discussion can be characterised as a personal right, or whether it is merely a limitation on legislative power. An associated question is how such an implication affects the common law.

In *Theophanous*, Mason CJ, Toohey and Gaudron JJ noted that it had not been necessary in *Australian Capital Television* or *Nationwide News* to decide whether the implication of freedom of political discussion gives positive rights to individuals. In those cases all that was decided was that the implication was a restriction on legislative and executive powers. Their Honours again held in *Theophanous* that it was unnecessary to decide whether the implication contains positive rights.[3]

Justice Deane considered that the implication provides the citizen with immunity from being affected by laws or powers limiting freedom of political discussion, but that this does not amount to a positive 'right'.[4]

Justice Brennan, in his dissenting judgment, also asserted that the constitutional implication is a limitation on legislative power, rather than a personal right, but argued that the type of orders adopted by the majority treat the implication as a personal right. He stated that the consequence of a personal right to freedom of political discussion would be that any contrary law would be ineffective to the extent that it infringed the freedom, whereas if the constitutional implication is solely a limitation on legislative power, then a law which exceeds the legislative power is invalid, unless it can be read down. In this case, he considered that what the majority have done was not to strike at the legislative validity of State defamation laws, but to make them ineffective to the extent to which they are not compatible with the constitutional right to freedom of political discussion.[5]

On the question of whether the constitutional implication can affect the common law, Mason CJ, Toohey and Gaudron JJ noted that if 'the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former.'[6] Justice Deane appears to have agreed.[7]

On the other hand, Brennan J noted that, although the Constitution prevails over the common law, the Constitution deals only with the structure and powers of government, not the rights and liabilities of individuals to each other. Accordingly, he considered that there was no conflict between the Constitution and the common law of defamation, which regulates the right of an individual to sue another for defamation.[8]

[3] *Theophanous* (1994) 124 ALR 1, 15.
[4] Ibid 48.
[5] Ibid 32-5.
[6] Ibid 15.
[7] Ibid 46.
[8] Ibid 36.

The extent of freedom of political discussion

The joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous* commenced by reviewing the implication of freedom of communication which had been recognised by the High Court in *Australian Capital Television* and *Nationwide News*. Their Honours noted that the implication does not extend to freedom of speech generally, but is limited to 'political discussion' or 'political discourse'.[9] Political discussion, however, is not limited to matters relating to the Government of the Commonwealth, but applies to political information, ideas and debate across the three tiers of government.[10] Central to the concept of 'political discussion' is criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office.[11] In *Theophanous* the impugned statements concerned the fitness of a member of Parliament to hold office and his responsibilities as the chairperson of a parliamentary committee on Migration Regulations. Their Honours held that this was clearly within the concept of political discussion.[12]

Although not necessary for this particular case, the joint judgment gave further guidance as to the extent of 'political discussion'. Their Honours stated:

> For present purposes, it is sufficient to say that 'political discussion' includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices.[13]

To attract the protection of the constitutional implication, the discussion itself must relate to matters of political relevance, such as the policies or the conduct or fitness for office of a political figure. Their Honours gave the example of an actor seeking election to Parliament. Criticism of the actor's policies or conduct would constitute political discussion, whereas discussion of the person's acting ability would not be considered political discussion.[14]

Their Honours also noted the difference between commercial speech, where 'the speech is simply aimed at selling goods and services and enhancing profit-making activities',[15] and speech on matters of public concern.[16] Although not

[9] Ibid 11.
[10] Ibid 12.
[11] Ibid.
[12] Ibid.
[13] Ibid 13.
[14] Ibid.
[15] Ibid 14.
[16] Ibid. This comment will be of relevance to the proposed constitutional challenge by Philip Morris Ltd to the validity of the Tobacco Advertising Prohibition Act 1992 (Cth).

needing to decide the point, they indicated the view that commercial speech is not protected by the implied constitutional freedom of political discussion.

Justice Deane also considered that the extent of 'political discussion' depends upon the degree to which it supports the constitutional principle of representative government:

> The freedom of the citizens of the Commonwealth to examine, discuss and criticise the official conduct and consequent suitability for office of persons entrusted with those powers of government such as parliamentarians, judges and leading members of the Executive, is critical to the working of a democratic system of representative government of the type which the Constitution incorporates. As regards the official conduct or suitability of persons elected to serve as members of the Parliament, that freedom of examination, discussion and criticism is also essential to the proper working of the electoral processes upon which that system of representative government is based.[17]

Freedom of political discussion in the States

The constitutional implication of freedom of political discussion is not confined to the Commonwealth sphere of government. In *Stephens* Mason CJ, Toohey and Gaudron JJ concluded that the implication of freedom of political discussion may be derived from both the Commonwealth Constitution and the Western Australian Constitution:

> [T]here is an implied freedom of communication deriving both from the Commonwealth Constitution and from the State Constitution which applies in the present case. First, we consider that the freedom of communication implied in the Commonwealth Constitution extends to public discussion of the performance, conduct and fitness for office of members of a State legislature.[18]

Their Honours then went on to address the nature of the Western Australian Constitution, concluding:

> And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are 'directly chosen by the people', a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government.[19]

Accordingly, freedom of political discussion is supported by both the Commonwealth Constitution and the Constitutions of the States.

Who will be affected by the defence of freedom of discussion?

The judgments in *Theophanous* and *Stephens* are not directed at restricting the rights of certain categories of people to bring legal actions for defamation. They

[17] Ibid 57.
[18] *Stephens* (1994) 124 ALR 80, 88.
[19] Ibid 89-90.

are directed at protecting freedom of political discussion. Accordingly, they do not single out members of Parliament by restricting their rights to sue for defamation. A member of Parliament could still successfully sue for defamatory comments made about his or her private life or other matters unrelated to his or her conduct as a politician or suitability for office.[20]

The real question is the extent to which the impugned statements are an important part of freedom of political discussion. Clearly, scrutiny of the actions, performance and character of members of Parliament will form an integral part of freedom of discussion. In *Theophanous* the Chief Justice and Toohey and Gaudron JJ noted:

> [C]riticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion.[21]

Their Honours, however, made it clear that 'political discussion' is not confined to discussion of the actions of members of Parliament, but may also concern other participants in the political debate such as trade unionists and Aboriginal leaders.[22] Does this mean that a defence of freedom of political discussion would apply if such people brought defamation actions for comments made about their activities?

The answer depends on the extent to which the comments made about the person are an integral part of political discussion. The more removed the 'defamed' person is from the Parliament or government, the more difficult it will be to establish that the impugned comments form part of 'political discussion'.

Although the notion of 'political discussion' is fairly wide, the majority of the Court in *Theophanous* showed some reluctance to extend their judgments too broadly. In discussing the American case of *New York Times Co v Sullivan*,[23] which similarly held that politicians are limited in their ability to sue for defamation, the joint judgment of Mason CJ, Toohey and Gaudron JJ noted that the test in that case has been expanded over the years to cover candidates for public office, government employees who are in a position to influence public issues and 'public figures' who do not hold official or government positions. Their Honours observed that although the case of *Theophanous* did not require the Court to address these issues as Dr Theophanous is a member of Parliament, they had reached a 'preliminary view that these extensions, other than the extension to cover candidates for public office, should not form part of our law'.[24]

The reason for this view appears to be that the criticisms of 'public figures' outside the realms of Parliament and government are not likely to be central to

[20] *Theophanous* (1994) 124 ALR 1, 13 (Mason CJ, Toohey and Gaudron JJ), 56 (Deane J). Note that material about a parliamentarian's private life might be relevant to political discussion to the extent that it reflects on his or her suitability for office.

[21] Ibid 12.

[22] Ibid 13.

[23] 376 US 254 (1964).

[24] *Theophanous* (1994) 124 ALR 1, 21.

the notion of political discussion which the Commonwealth Constitution seeks to protect. It must always be remembered that the 'underlying purpose of the freedom is to ensure the efficacious working of representative democracy.'[25] In the United States, in contrast, the Constitution provides a general right of freedom of speech which is not restricted to political discussion, and therefore may be extended to cover statements about other public figures.

Justice Deane also referred to the principle of representative democracy in determining who would be affected by the creation of this defence. His Honour considered that it included discussion and criticism of the official conduct and consequential suitability for office of 'parliamentarians and other holders of high public office, or candidates for such positions'. He noted that his use of the phrase 'holders of high public office' was intended to refer to people who 'have, or appear to the public to have substantial responsibility for or control over the conduct of governmental affairs'.[26] His Honour also noted that it was unnecessary to consider whether this extends to political discussion about persons 'who "have thrust themselves to the forefront" of political contests or controversies in order to influence the outcome thereof.'[27] Nevertheless, Deane J's reasoning gives some idea as to how he would approach this question.

Justice Deane seemed to recognise two elements in determining whether the defence of freedom of political discussion is to apply. The first is that it must relate to essentially political matters, such as the performance of a person's official duties or his or her suitability for official office. The second element involves a balancing of the interests of the 'legitimate claims of individuals to live peacefully and with dignity' in society and the public interest in effective political communication and discussion. Justice Deane noted that there may be some categories of political discussion, such as statements about the character or competence of junior government employees, where a person's privacy or reputation deserves greater protection than the political discussion generated. Where, however, the political discussion concerns 'parliamentarians, judges or other holders of high office' and relates to the performance of their official functions, then the public interest in the discussion may be greater than the interest in protecting the reputation of the individual.[28]

In balancing the interest in protecting personal reputation against the interest in maintaining free political discussion, Deane J noted that there are several reasons why the balance should tip in favour of protecting political discussion when members of Parliament are involved. The first reason is that, in taking up the position of a member of Parliament, the member makes herself or himself accountable to the people. Justice Deane observed:

> As has been said, all powers of government ultimately belong to, and are derived from, the people. It is not unreasonable that those who undertake the ex-

[25] Ibid 13.
[26] Ibid 62, referring to *Rosenblatt v Baer* 383 US 75 (1966), 85.
[27] Ibid, referring to *Gertz v Robert Welch Inc.* 418 US 323 (1974), 345.
[28] Ibid 55-6.

> ercise of those powers, ordinarily for remuneration from the public purse, should be required to bear the burden of whatever is necessary to ensure full accountability to, and open scrutiny by, those whom they represent and whose powers they exercise.[29]

Justice Deane noted that a second reason is that members of Parliament and other people in high office have access to the media and other forums to refute defamatory allegations, while ordinary people have no such access. He concluded:

> There are, of course, weighty reasons which support the common law's protection of personal reputation by the imposition of liability to pay damages for defamation. Strong though they remain, however, those reasons are less powerful in the case of those who undertake the exercise of the powers of government in high public office in that the holders of such office, particularly parliamentarians entitled to be heard in the public and privileged forum of parliamentary proceedings, are likely to have greater access, by reason of their office, to the means of communication to refute or answer an untrue or unfair statement of fact or comment.[30]

A third reason noted by Deane J is that politicians and judges are protected by absolute privilege in parliamentary or court proceedings, even when their statements are unjustifiably and inexcusably defamatory. The reason for this privilege is 'to encourage the fearless, vigorous and effective exercise of public power for the general good.'[31] His Honour considered that this principle applies to the other side of the coin: that citizens should have the right to fearlessly and vigorously discuss and criticise government and government policies.

In summary, it is clear that the defence of freedom of political discussion recognised in *Theophanous* and *Stephens* will apply to defamatory statements made about members of the Commonwealth and state Parliaments, where the impugned matter forms part of 'political discussion'. It is likely that the defence would also apply to defamatory statements about the conduct or suitability of federal and state judges. The extent to which it might apply to government officials, and participants in the political debate who do not hold any official position, is less clear, and will remain to be determined in any given case.

How will defamation law be affected?

The joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous* rejected the notion that freedom of political discussion is absolute and that no action in defamation can be taken where it involves a matter of political discussion.[32] Their Honours noted that the basis of the freedom is the 'efficacious working of representative democracy' and that this does not require the protection of people who deliberately make defamatory statements knowing them to be

[29] Ibid 59.
[30] Ibid 58.
[31] Ibid.
[32] Ibid 21.

false, or being reckless as to whether they are true or false. Their Honours concluded that '[t]he public interest to be served does not warrant protecting statements made irresponsibly.'[33]

In adopting such a view, their Honours substantially followed the logic of the United States Supreme Court in *New York Times Co. v Sullivan*.[34] However, their Honours did not accept the severity of the malice test set out in *Sullivan*, which requires that the plaintiff prove the falsity of the impugned statement as well as malice. Instead, the majority judgment placed the onus on the defendant to prove that he or she was unaware of the falsity of the statement and did not publish it with reckless indifference as to whether it was true or false. Their Honours also added the extra burden of establishing that the defendant had acted 'reasonably' in publishing the impugned material. To show 'reasonableness', the defendant must establish that he or she either took steps to check the accuracy of the material or was otherwise justified in publishing it. Their Honours summed up the test as follows:

> In other words, if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (ie, not caring whether the matter was true or false), and that the publication was reasonable in the sense described. These requirements will redress the balance and give the publisher protection, consistently with the implied freedom, whether or not the material is accurate.[35]

Justice Deane, on the other hand, considered that the tests of unreasonableness and absence of recklessness or awareness of falsity are still too great a burden on freedom of political discussion. He noted how difficult it would be for a person to prove that he or she did not believe their statement to be false, or was not reckless as to whether it was true or false, and that the consequences of failing to establish this could be financial ruin. Accordingly, he concluded that the limitations on defamation law set out by Mason CJ, Toohey and Gaudron JJ 'would do little to abate the chilling effect of a perceived risk or actual threat of defamation proceedings'.[36]

Justice Deane preferred absolute protection for political discussion, concluding:

> In the result, I would hold that the effect of the constitutional implication is to preclude completely the application of State defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office.[37]

[33] Ibid.
[34] 376 US 254 (1964).
[35] *Theophanous* (1994) 124 ALR 1, 23.
[36] Ibid 61.
[37] Ibid.

His Honour also extended this to the media organisations which publish such discussion and criticism.

Although Deane J's judgment extended beyond the joint judgment of Mason CJ, Toohey and Gaudron JJ, he joined in their orders so that there would be a clear majority decision. Accordingly, he accepted the burdens that the majority placed on defamation defendants who seek to assert their constitutional freedom of political discussion.

Conclusion

Although the majority judgments of the High Court in these two cases amount to a significant development of the constitutional implication of freedom of speech, their practical consequences may not be so radical. The fact that the Court has placed the onus on the defendant to establish that he or she did not believe the impugned material to be, however, for the statements they make about the basis of our political society, and the role and rights of the people in our Australian democracy. Freedom of speech has been claimed as an absolute right by members of Australian Parliaments on the grounds that it is necessary for them to exercise their democratic functions freely and vigorously. However, the Parliaments have never granted this same right to the people to allow them to fulfil their functions in the democratic system. In *Theophanous* and *Stephens* the High Court has recognised that it is fundamental to the nature of our democracy, as established by the Constitution, that the people have at least some degree of freedom of speech, so that they too can exercise their important functions in the democratic process in a free and informed manner. This recognition of the role of the people in the democratic process is important not only for the development of the constitutional implications deriving from the principle of representative democracy, but also for the way we characterise and shape our political system.

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