

DEFAMATION AND FREEDOM OF POLITICAL EXPRESSION IN AUSTRALIA AND SOUTH AFRICA — THE OPPORTUNITIES MISSED IN LANGE

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ABSTRACT

[79] The author discusses the decision in *Australian Broadcasting Corporation v Lange* and then examines decisions on the interaction between defamation law and freedom of expression in South Africa. The author states that it would have been useful for the High Court to refer to the reasoning in the South African cases, and argues that the balance between reputational and expressive rights would have been better struck had the Court cast the onus on the plaintiff to prove unreasonableness on the part of the defendant in defamation actions involving political discussion. The author also argues that the Court's severance of the common law from the implied freedom may have reduced the scope of protection of freedom of expression in Australia.

[80] **Introduction**

The decision by the High Court in *Lange v Australian Broadcasting Corporation*² was greeted with favour by most commentators, on the ground that the unanimity of the Court brought clarity to a vexed area of the law.³ The purpose of this article is to argue that the decision was wrong in principle (although not in outcome), that it failed to

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² (1997) 189 CLR 520.

³ See Case Note, *Lange v Australian Broadcasting Corporation* (1997) 2 *Media and Arts Law Review* 151; Des Butler, 'Lange v Australian Broadcasting Commission: Its Effect in Defamation Code States' (1998) 5 *National Law Review* 6; Michael Chesterman, 'Privileges and Freedom for Defamatory Political Speech' (1997) 19 *Adelaide Law Review* 155; Melinda Jones, 'Free Speech Revisited: The Implications of *Lange & Levy*' (1997) 4 *Australian Journal of Human Rights* 188; Andrew Lynch, 'Unanimity in a Time of Uncertainty: The High Court Settles its Differences in *Lange v Australian Broadcasting Corporation*' (1997) 6 *Griffiths Law Review* 211; Richard Potter, 'The Development of Freedom of Speech Defences to Defamation in Australia and other Common Law Jurisdictions' (1998) 3 *Media and Arts Law Review* 82; Adrienne Stone, 'Freedom of Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219; Adrienne Stone, '*Lange, Levy* and the Direction of the Freedom of Political Communication under the Australian Constitution' (1998) 21 *University of New South Wales Law Journal* 117; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, 'The Freedom of Political Communication Since *Lange*' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads — Essays in Constitutional Law* (2000) 1; Kris Walker, 'It's a Miracle! High Court Unanimity on Free Speech' (1997) 22 *Alternative Law Journal* 179; Sally Walker, '*Lange v ABC*: the High Court Rethinks the "Constitutionalisation of Defamation Law"' (1998) 5 *E-Law — Murdoch University Electronic Journal of Law*.

address the key issue of onus and, most importantly, that it illustrated an unfortunate parochialism on the part of the legal system, failing as it did to take into account recent decisions by South African courts which were directly in point. Part II of the article briefly examines the case law on freedom of communication and defamation prior to *Lange*, and then summarises the decision in that case, identifying areas which are open to criticism. Part III provides a background to the law of defamation in South Africa and then focuses on the interaction between the freedom of expression and defamation law. Part IV suggests how the balance between expressive and reputational rights in Australia could be better struck than it was in *Lange* by adopting some of the principles regarding onus of proof found in the South African decisions. Part V argues why the Court in *Lange* was incorrect to sever the common law of defamation from the implied constitutional freedom. Part VI concludes the article with some remarks about High Court judicial practice and comparative law, arguing that the Court appeared to rank a desire to achieve unanimity above doctrinal correctness, and that the Court would benefit by paying more attention to overseas authority, in particular case law deriving from courts in South Africa.

The Decision in *Lange*

Background to Lange

Lange involved an action brought by Sir David Lange, former Prime Minister of New Zealand against the ABC, in which it was claimed that a television broadcast by the ABC alleging that Lange had abused his public office was defamatory.

The ABC pleaded that the implied constitutional freedom of political communication offered a defence even where truth could not be proved. This defence was founded upon the High Court's previous majority decisions in *Theophanous v Herald and Weekly Times*⁴ and *Stephens v West Australian Newspapers*.⁵ [81] *Theophanous* followed *ACTV v Commonwealth*⁶ the first implied freedom of political communication case, in which the Court had held that Commonwealth laws could be

⁴ (1994) 182 CLR 104.

⁵ (1994) 182 CLR 211.

⁶ (1992) 177 CLR 106.

struck down if they unreasonably infringed the implied freedom of discussion of Commonwealth political affairs.

Theophanous expanded the principle in *ACTV* to hold that the freedom to discuss Commonwealth political affairs would also invalidate State statute or common law which unreasonably restricted the freedom. In addition the case was important in that it was held that the implied freedom could be pleaded as a defence to an action between individuals and could over-ride common law rules of defamation. The implied freedom operated to excuse the defendant in a defamation action even where the defendant could not prove the truth of the defamatory matter, provided that the defendant could prove that he or she had not published aware of the falsity of the defamatory matter or reckless as to truth or falsity, and he or she had acted reasonably in the circumstances.

In *Stephens*, the majority once more expanded upon *Theophanous* in the context of a defamation action, to hold that the implied freedom also protected discussion of State and local political affairs from unreasonable restriction.

The finding in Lange

In *Lange* the Court departed radically from the direction in which it had begun to move in *Theophanous* and *Stephens*. In a nutshell the Court held that the implied constitutional freedom⁷ restricted only the organs of government acting in their legislative and executive capacity and did not provide a defence in a common law defamation action, and that the appropriate balance between freedom of communication and reputation should be determined by developing the common law. The essential consequence of *Lange* was to remove from the defendants in defamation actions the protective umbrella of the implied constitutional freedom — to de-constitutionalise this area of the law — and to create instead an umbrella in the form of a new common law qualified privilege. Despite the change in the theory governing this area of the law, the practical effect of the change was minimal — as we shall see, a defendant needs to satisfy essentially the same test as under *Theophanous* and *Stephens*

⁷ The Court preferred (560) to characterise the freedom as conferring an ‘immunity’ upon people from laws which unjustifiably curtailed political discussion, rather than a ‘right’ to engage in political discussion. Although this distinction might be significant from a Hohfeldian perspective, the net effect is the same whether the rule is described as an immunity or as a right.

in order to escape liability, the only difference being that plaintiffs can overcome the defence by proving malice. Why then did the Court reach the decision it did?

The answer to this question does not admit of an easy answer. The key issue of whether the implied constitutional freedom applied between individuals was answered in the negative but with scant reasoning to support the conclusion. The Court dismissed the constitutionalisation of defamation law in the United States in two pages,⁸ on the ground that whereas the common law in the United States was 'fragmented' (in the sense that there is no single court of appeal for the common law), the High Court in Australia provides a unifying forum for the declaration of the common law, and that because one cannot talk of separate systems of State common law in Australia, there is no need to use the law of the Constitution to set limits to rights of action in the law of torts. With respect, this is a non-sequitur: Whether the judicial system provides for a nation-wide court of common law appeals is not determinative of whether the source of the rules of law balancing freedom of communication with reputational rights should be the Constitution or the common law. Certainly it is true that, not having any jurisdiction to entertain appeals on rules of State common law, the United States Supreme Court had perforce to look to the Constitution [82] to find a rule of law to set limits on the law of defamation. But that does not mean that because the High Court in Australia has a national common law jurisdiction it *must* use that law to determine questions of that kind. Rather the High Court has a choice to find rules of law either in the Constitution or the common law. Why the High Court chose the latter route, departing from *Theophanous* and *Stephens* in the process, is not articulated in *Lange* — all that appears from the judgment is the rejection of the American approach.

Having reached this position, the High Court proceeded to divide the body of law relating to defamation into two separate parts — a 'common law question' and a 'constitutional law question'.⁹

In respect of restrictions on freedom of expression deriving from the common law, the High Court stated that:

⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–4.

⁹ *Ibid* 566.

The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.¹⁰

After reviewing the common law, the Court concluded that it gave insufficient protection to freedom of political communication in so far as it contained no privilege to protect those who published incorrect defamatory statements to large audiences.¹¹ In order to rectify this, the Court developed the common law to create a new qualified privilege, in terms of which a defendant who publishes false defamatory matter relating to political and governmental matters will escape liability if he or she can discharge the onus of proving that publication was reasonable, and not actuated by malice.¹² As a matter of practice, reasonableness would not exist where the publisher published the material knowing of its falsity or reckless as to truth or falsity.¹³ Reasonableness would be determined with reference to the adequacy of the steps which had been taken by the defendant to ascertain the truth of the defamatory matter, and would generally require that the defendant have sought a response from the plaintiff (except in cases where that was impracticable or unnecessary).¹⁴ In the context of publications relating to government and politics, malice would not be found to exist merely because the publisher wished to cause the plaintiff political damage.¹⁵

So far as restrictions on freedom of expression in the field of defamation which derived from statute law are concerned, the High Court held that such laws continue to be governed by the implied constitutional freedom. Thus once it has been determined that a law burdens the implied freedom, such a law will be valid only if it satisfies the test laid down in *ACTV* — in other words, serves an objective which is not inconsistent with the system of representative government, and intrudes upon the freedom only to such extent as satisfies the proportionality test.¹⁶

¹⁰ *Ibid.*

¹¹ *Ibid* 569–70.

¹² *Ibid* 571–4.

¹³ *Ibid* 573.

¹⁴ *Ibid* 574.

¹⁵ *Ibid.*

¹⁶ *Ibid* 562, 566 and 567–8.

Critique of Lange

My criticism of the decision in *Lange* is threefold

First, as already indicated, the Court's severance of the common law of defamation from the implied constitutional freedom was not adequately reasoned.

[83] Second, as the Court itself noted,¹⁷ because the judgments in *Theophanous* and *Stephens* had produced no statement of the law in which a clear majority of the Court had concurred, it was open to the Court in *Lange* to canvass the interaction between expressive freedom and reputation, including not just the issue of under which branch of law these competing interests should be balanced, but also the wider question of where the onus of proof should lie in relation to the various elements of defamation actions. Unfortunately, this opportunity was not taken by the Court.

Third, a disappointing aspect of the decision was the absence of any reference to the wealth of case law which had accumulated on the precise issue in *Lange* in decisions of various courts in South Africa since 1995. That these decisions were neither argued by counsel nor raised *mero motu* by the Court is indicative of an unfortunate narrowness of approach, a narrowness which contrasts with the fact that the South African judgments had paid close attention to the decisions in *Theophanous* and *Stephens*. My critique of *Lange*, and my examination of the substantive issues relating to the constitutionalisation of defamation law and the question of onus, will take place in light of a survey of the position in South Africa, to which I now turn.

Defamation and the South African Constitution

Defamation in South African law

Under South Africa's Roman-Dutch common law, reputational rights are protected by the law of civil wrongs, or delict. Unlike tort law in Anglo-American jurisdictions which identifies certain distinct types of wrong each remedied by its own particular action, the law of delict is one of general principle, traceable back to the Roman *lex Aquilia* of 287 BC which gave an action for patrimonial loss (that is, loss measurable in

¹⁷ Ibid 555–6 — the Court noted that in both the preceding cases Deane J had agreed with the order proposed by Mason CJ, Toohey and Gaudron JJ, without concurring with their reasons.

pecuniary terms), and the *actio injuriarum*, which had its origin in the Twelve Tables (circa 450 BC) and which provided a remedy for *injuriae* (that is, infringements of non-pecuniary personality rights, including physical integrity, reputation and dignity).¹⁸ Despite its Roman Law origins, the common law of South Africa was heavily influenced by English common law in the period after Britain's acquisition of the Cape Colony in 1806,¹⁹ with the result that, in so far as the law of defamation is concerned, the fundamentals of the common law in South Africa are essentially the same as those of English law.²⁰ Thus defamatory statements are presumed to be false, but the defence of justification is available where the defendant is able to prove that the statement was true and that its publication was for the public benefit.²¹ Similarly, the defence of fair comment,²² and the usual range of complete and qualified privileges,²³ are available, the onus being on the plaintiff to prove the defence on a balance of probabilities.²⁴ Although an action for damages for impairment of personality rights, including the right [84] to reputation, requires that fault in the form of intention be proved,²⁵ once the plaintiff has discharged the onus of proving that the defendant performed an act that infringed the plaintiff's rights, an inference that the defendant acted with that intention is raised.²⁶ The defendant must then rebut this presumption.²⁷ In doing so, however, the general rule, established in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*,²⁸ is that the defendant bears only an evidentiary burden, rather than an onus of proof on a balance of probabilities.²⁹ Until recently, an exception

¹⁸For the history of these actions in Roman law see J C Van der Walt, *Delict: Principles and Cases* (1979), 11–16; J Neethling, J M Potgieter and P J Visser, *Deliktereg* (2nd ed, 1991) 8–10 and 13–15.

¹⁹H R Hahlo and Ellison Kahn, *The South African Legal System and its Background* (1968) 585–6.

²⁰Jonathan Burchell, *The Law of Defamation in South Africa* (1984) 13–17.

²¹*Ibid* 207 and Jill Cottrell, *Law of Defamation in Commonwealth Africa* (1998) 147–8. It is the additional requirement of showing that publication was for the public benefit that serves to distinguish the South African law of defamation from that of the United Kingdom and the United States, where truth alone suffices to rebut the unlawfulness of the defamation.

²²*Ibid* 219–36.

²³*Ibid* 237–59.

²⁴*Neethling v Du Preez* (1994) 1 SA 708 (A) 769G–I.

²⁵See P Q R Boberg, *The Law of Delict* (1986) 18 and Cottrell, above n 21, 135–7.

²⁶Thus in *Bennett v Minister of Police* 1980 (3) SA 24 (C), a case involving impairment of dignity in the form of an assault, it was held that once proof of unlawful aggression had been adduced, a rebuttable presumption of *animus injuriandi* was raised. Similarly, in *Jackson v NICRO* 1976 (3) SA 1 (A) 13A–G it was held that where an impairment of dignity takes the form of words which are injurious *per se*, the presumption of intent is raised. See also *Boswell v Union Club of South Africa* 1985 (2) SA 162 (D) 166I–167J; Neethling, Potgieter and Visser, above n 18, 327 and 333, and Burchell, above n 20, 166–7.

²⁷*Whittaker v Roos and Bateman* 1912 AD 92.

²⁸1977 (3) SA 394 (A) 403B.

²⁹The exception to this rule, established in *Neethling v Du Preez* 1994 (1) SA 708 (A) 745C–F, 769B, 769H–770J and 802D–F, is that where a defendant in a defamation action seeks to rebut unlawfulness by raising the defences of truth for the public benefit or privilege, the full burden of proof must be

to the general rule that delictual liability was founded on intent was applicable to the mass media, who, according to the decision in *Pakendorf v De Flamingh*³⁰ (since over-ruled in *National Media Ltd v Bogoshi*³¹ discussed below) were burdened with strict liability and to whom no defence rebutting intent was therefore available. The concept of 'the mass media' included owners, editors, printers and publishers. Distributors were in a separate category, being able to escape liability if they could prove that they had acted reasonably.³²

The South African Constitution

The enactment of the *Republic of South Africa Constitution Act* No 200 of 1993 was a major step along the country's transition from racially-defined rule under apartheid to full democracy. Although enacted by a Parliament elected under the apartheid system, the Constitution was the product of multiparty negotiations between all major political groupings, and came into force after the holding of South Africa's first universal suffrage elections in 1994. The 1993 Constitution was, however, expressed to be an Interim Constitution, and under its terms the newly elected Parliament, sitting as a constitutional assembly, was charged with the drafting of a final constitution. This task was completed in 1996, when the present *Constitution of the Republic of South Africa Act* No 108 of 1996 (usually referred to as the Final Constitution) came into force.

Both the 1993 Interim Constitution and the 1996 Final Constitution included a chapter on fundamental rights (the 'Bill of Rights'). Both documents protected freedom of expression in terms which, for purposes of the present discussion, can be regarded as essentially the same. Section 15(1) of the Interim Constitution provided that:

Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

Section 16(1) of the Final Constitution provides:

discharged. However, it should be noted that there is nothing in *Neethling* to suggest that it is precedent for other *injuriae* or for defences rebutting intent.

³⁰ 1982 (3) SA 146 (A).

³¹ 1998 (4) SA 1196 (SCA).

[85] Everyone has the right to freedom of expression, which includes —

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

The constitutionalisation of defamation law

The question of what impact the Constitution had on the common law of defamation first arose in the case of *Mandela v Falati*,³³ in which the Witwatersrand Local Division³⁴ justified its refusal to extend an interim injunction restraining the defendant from publishing allegedly defamatory matter concerning the plaintiff, Winnie Mandela (the then wife of President Nelson Mandela), by saying that while such an injunction was available under the common law, the protection accorded to freedom of expression by the Interim Constitution made prior restraints impermissible. Subsequently, in *Gardener v Whitaker*,³⁵ the Court held that the Bill of Rights created no hierarchy of rights, and that each case in which rights came into conflict should, therefore, be judged on its own facts. The onus of proving that one right should take precedence over another in any given case should rest with the party making that assertion — that is, with the plaintiff. In view of this, and in view of the fact that democratic processes required openness and accountability — values which were served by freedom of expression — the Court held that the onus of proving truth (and other defences) that the common law of defamation places on the defendant conflicted with the constitutional guarantee of freedom of expression. It followed that the onus should rest on the *plaintiff* to prove that the expression was not worthy of constitutional protection — in other words was published with knowledge of falsity, not under privilege and not as a matter of fair comment. In both these cases the plaintiffs were holders of public office, and so

³² *Trimble v Central news Agency Ltd* 1934 AD 43.

³³ 1995 (1) SA 251 (W).

³⁴ South Africa is divided into Provincial and Local court Divisions, each Division delineating the area of jurisdiction of the High Court, which is a superior court of original jurisdiction. Appeals from Provincial and Local Divisions lie to the Supreme Court of Appeal. A further appeal lies in respect of constitutional matters only to the Constitutional Court. See ss 166–169 of the *Constitution of the Republic of South Africa Act* No 108 of 1996.

³⁵ 1995 (2) SA 672 (E). The Court discussed the role freedom of expression had to play as a guarantee of openness and accountability, 685C–E and 687I–688C. The issue of onus was discussed, 690F and 691C–I.

the decisions left open the question of whether the same rules would apply in respect of private figure plaintiffs.³⁶

Following the decision in *Du Plessis v De Klerk*³⁷ that the 1993 Constitution was not directly applicable to the common law, *Mandela v Falati* and *Gardener v Whitaker* were no longer good law. The decision in *Du Plessis v De Klerk* meant that such changes as might occur in defamation law (at least while the 1993 Constitution remained in force) could occur only through independent development of the common law.

It was on this basis that the decision in *Holomisa v Argus Newspapers Ltd*³⁸ was handed down by Cameron J of the Witwatersrand Local Division. The plaintiff was a South African Deputy Minister who had formerly been leader of the military government of the Transkei homeland, and the defamatory material related to the plaintiff's conduct while leader of the Transkei. While acknowledging that the 1993 Interim Constitution was not of direct application to the common law,³⁹ Cameron J held that [86] when developing the common law, the Courts had to have regard to the values found in the Bill of Rights.⁴⁰ This was because of s 35(3) of the Constitution, which provided that:

In the interpretation of any law and the application and development of the common-law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.

This constituted an application of the theory of *Drittwirkung*, which originated in German constitutional law, and refers to the indirect application of fundamental rights provisions between private litigants.⁴¹ Turning to the common law as it stood, Cameron J rejected statements by the Appellate Division in *Argus Printing and Publishing Co*

³⁶For an academic discussion on this see A van Aswegen, 'The Implications of a Bill of Rights for the Law of Contract and Delict' (1995) 10 *South African Journal on Human Rights* 50, 60–2.

³⁷1996 (3) SA 850 (CC).

³⁸1996 (2) SA 588 (W). For a comment on the case see Dennis Davis, '*Holomisa v Argus Newspapers Ltd*' (1996) 12 *South African Journal on Human Rights* 328.

³⁹*Ibid* 596F–597E.

⁴⁰*Ibid* 603H.

⁴¹The concept of *Drittwirkung* was examined in some detail by the Court in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 874–5, where it was noted that under German constitutional law although the provisions of the Basic Law (that is, the Constitution) are not directly applicable to private law litigation, the courts refer to the principles contained in the Basic Law in developing and applying private law.

*Ltd v Esselen's Estate*⁴² and *Neethling v Du Preez*⁴³ that the common law paid due regard to the interests of freedom of expression through its recognition of the traditional defences to defamation, holding that that argument had been superseded by the coming into force of the 1993 Interim Constitution, and that the express protection of freedom of expression in the fundamental rights chapter required a re-appraisal of the common law.⁴⁴

In answering the question of what impact fundamental rights had on defamation law, Cameron J noted that the chapter on fundamental rights protected both freedom of expression and reputational rights — the former by virtue of s 15, the latter by virtue of the protection afforded to human dignity by s 10 which provided that '[e]very person has a right to respect for and protection of his or her dignity', which implied protection of reputation because under Roman-Dutch law, the concept of *dignitas* (or dignity) includes the right to *fama*, that is, reputation.⁴⁵ The case at hand thus required the balancing of two constitutional rights. Furthermore, both these rights enjoyed the highest status of protection afforded by the constitution: Section 33(1) imposed a general test, applicable to all limitations of rights, to the effect that such limitations were permissible only to the extent that they were reasonable and justifiable in a democratic society based on freedom and equality. In addition, s 31(1)(b) enumerated certain rights in respect of which limitations would be valid only if they were not only reasonable and justifiable, but also *necessary* in such a society. Among these specially protected rights were numbered dignity and freedom of expression in so far as the latter related to 'free and fair political activity'. How then was the conflict between these equally important rights to be resolved?

In addressing this issue, Cameron J pointed to the breadth of protection afforded to freedom of expression by the Interim Constitution, noting that it served not only the purpose, vital to democratic government, of enabling citizens to be informed of, and to participate in, political debate,⁴⁶ but also the non-instrumentalist value that freedom of

⁴² 1994 (2) SA 1 (A) 25B–E.

⁴³ 1994 (1) SA 708 (A) 770C–H.

⁴⁴ 1996 (2) SA 588 (W) 602F–603H.

⁴⁵ *Ibid* 606F–H.

⁴⁶ *Ibid* 608J–610C, 610G–611C.

expression should be protected as a dimension of individual self-fulfilment.⁴⁷ Furthermore, despite the equal protection afforded to expression and to reputation by the Interim Constitution, the common law rule that a defendant to a defamation action had to prove the defence of truth for the public benefit — which had been strengthened by the finding in *Neethling v [87] Du Preez*⁴⁸ that the defence had to be proved on a balance of probabilities rather than by satisfying only an evidentiary burden — meant that the right to reputation enjoyed an unjustly advantageous position in that, unlike in the case of infringements of other rights where the plaintiff had to prove that his or her rights had been infringed, a plaintiff in a defamation action needed only to allege the infringement (that is, that the defendant had published a false statement injurious to reputation), whereafter the onus was on the defendant to prove a defence such as justification.⁴⁹ On this basis, Cameron J held that the common law rule was inconsistent with constitutional values,⁵⁰ and that a defamatory statement that related to free and fair political activity was constitutionally protected even if false, unless the plaintiff discharged the burden of proving that the defendant published the defamatory material unreasonably.⁵¹ Cameron J was, however, not prepared to go as far as the Court in *New York Times Co v Sullivan*⁵² and to impose upon the plaintiff the onus of proving that the defendant acted with malice (that is intentionally) rather than unreasonably (that is, negligently), noting that the finding in *New York Times* was the product of the very high damages awarded for defamation in the United States.⁵³ Furthermore, he stated that by imposing upon plaintiff's the burden of proving malice or recklessness, United States law gave insufficient weight to reputational rights.⁵⁴

The final point to note in respect of the *Holomisa* decision was that the rule framed by Cameron J was expressly limited to speech relating to 'political activity', and that the relationship between the common law rules of defamation and the Constitution in so far as it related to speech falling outside this category was expressly left open.⁵⁵ Thus Cameron J emphasised that the availability of the constitutional defence did not depend

⁴⁷ Ibid 608G–I.

⁴⁸ 1994 (1) SA 708 (A).

⁴⁹ 1996 (2) SA 588 (W) 611D–612A.

⁵⁰ Ibid 608B–E, 611D, 612H–J.

⁵¹ Ibid 617C–E, 618E.

⁵² 376 US 254 (1964).

⁵³ Ibid 613H–614G.

⁵⁴ Ibid 615B–D.

⁵⁵ Ibid 611E, 619H–J.

upon the status of the plaintiff — whether, to use the terminology of *New York Times* he was a ‘public official’ or ‘public figure’ — but rather on the topic to which the defamatory material related.⁵⁶

This last point was emphasised in *Mangope v Asmal*⁵⁷ in which Hartenberg J applied *Holomisa* and held that that decision would offer no defence in a case where a statement defamatory of a politician was ‘aimed at [his] dignity and reputation as opposed to his accountability as a public figure and a politician’.⁵⁸ In this case the politician defendant had referred to the politician plaintiff as a ‘baboon’. The rule in *Mangope* thus meant that in order for expression to be found to relate to ‘political activity’ and thus enjoy the heightened protection afforded such speech by the Interim Constitution, it would have to be shown that it was of and concerning the plaintiff’s *political conduct* — in other words that merely because a plaintiff happens to be a politician would not shield a defendant from liability.

The reaction against Holomisa

The law established by *Holomisa* did not receive universal acceptance by other courts in South Africa. In *Bogoshi v National Media Ltd*,⁵⁹ a decision by a judge of the same division of the High Court delivered just a few days before the judgment in *Holomisa*, Eloff JP rejected the argument that s 15(1) of the [88] Constitution required an alteration of the common law, finding that the latter accorded sufficient protection to freedom of expression.⁶⁰ Subsequently in *McNally v M & G Media (Pty) Ltd*,⁶¹ Du Plessis J, also sitting as a single judge of the Witwatersrand Local Division, considered and rejected Cameron J’s decision, stating that while s 35(3) of the Constitution might require departure from long established common law precedent in the name of conformity between the common law and the values enshrined in the Constitution, such a departure was not permitted unless prior authority was found no longer to constitute binding precedent. Du Plessis J found that the Appellate Division had given adequate consideration to freedom of expression in its decision in *Neethling v Du Preez*, and that

⁵⁶ Ibid 618J–620C.

⁵⁷ 1997 (4) SA 277 (T).

⁵⁸ Ibid 289C–E.

⁵⁹ 1996 (3) SA 78 (W).

⁶⁰ Ibid 84A–D.

⁶¹ 1997 (4) SA 267 (W).

therefore Cameron J had been incorrect in finding that s 35(3) of the Constitution mandated a departure from the rule on onus of proof contained in that case.⁶²

In *Buthelezi v South African Broadcasting Corporation*⁶³ Thirion J too rejected the approach in *Holomisa*, and specifically Cameron J's characterisation of falsity, lack of fair comment and absence of privileged occasion *et cetera* as elements of the action which had to be proved by the plaintiff. Instead Thirion J held that once a plaintiff had proved publication of defamatory matter, the onus lay on the defendant to prove a defence. The key reason advanced by Thirion J appears from the following excerpt from the judgment:

Now, a plaintiff would not normally know beforehand what the circumstances were under which the publication was made. The plaintiff would therefore have to launch his action without any knowledge of his prospects of success. Furthermore the plaintiff would not know what steps the defendant had in fact taken to ascertain the truth or falsity of the statement before publishing it or even whether the circumstances were such as to create an obligation to make enquiries. Nor would he know what steps the particular defendant could have taken to ascertain whether the statement was true. Presumably whether the defendant should have been placed on his guard or should have taken steps at all to ascertain whether the information was true, and if he should have, the extent of the investigations which he should have made in any particular circumstances would depend on the reliability of the source of his information. The extent of the enquiries which he should have made, would to an extent also depend on the facilities for enquiry available to the defendant. These matters would ordinarily all be within the peculiar knowledge of the defendant. They would not be within the knowledge of the plaintiff and it would be difficult for the plaintiff to obtain the necessary information. The variation in the circumstances which would make the publication reasonable or unreasonable, is endless.⁶⁴

The issue of the appropriate balance between reputational rights and freedom of expression reached the Supreme Court of Appeal in *National Media Ltd v Bogoshi*.⁶⁵

⁶² Ibid 276B–G.

⁶³ 1997 (12) BCLR 1733 (D).

⁶⁴ Ibid 1744B–E.

⁶⁵ 1998 (4) SA 1196 (SCA). For a comment on the case see Jonathan Burchell, 'Media Freedom of Expression Scores as Strict Liability Receives the Red Card: *National Media Ltd v Bogoshi*' (1999) 116 *South African Law Journal* 1.

The Court firstly examined the common law rule imposing strict liability on the mass media and, over-ruling the decision of its predecessor (the Appellate Division) in *Pakendorf v De Famingh*,⁶⁶ changed the common law to state that the mass media could avoid liability if they showed that they were not negligent. On the question of onus, however, the Court affirmed the traditional common law position (that is, that absence of fault needed to be proved by the defendant), and over-ruled *Holomisa* on that point, adopting the reasoning of Thirion J in *Buthelezi* [89] — namely that acts supporting absence of negligence would lie peculiarly within the knowledge of the defendant. The Court also held that in its view, its new formulation of the common law was consistent with the protection afforded to freedom of expression by s 15(1) of the Interim Constitution, although it should be noted that that finding was strictly obiter because, as the Court emphasised, it was developing the common law rather than applying the Constitution.

Although, as an emanation of the Supreme Court of Appeal, the decision in *Bogoshi* over-rules that in *Holomisa*, two key factors indicate that it is unlikely to provide the final word on the issue in South Africa: The first is that all the decisions discussed above were given under the 1993 Interim Constitution, and a key feature of that document was the uncertainty of its applicability to cases involving individual litigants as distinct from those involving actions between citizens and organs of the state (this issue is addressed below). The second is that the Constitutional Court, as the highest court in the country, has yet to pronounce on the issue of the correct balance between defamation law and freedom of expression under the 1996 Final Constitution. The field therefore remains open for a re-evaluation of the critical issue of onus where defendants seek to advance constitutional defences to defamation actions.

Horizontality of the Bill of Rights

A vexed question which engaged the attention of both the courts and the constitutional assembly during the period 1993–1996 was whether the Bill of Rights applied only ‘vertically’ (that is, only to actions between private persons and organs of the state) or both ‘vertically’ and ‘horizontally’ (that is in litigation between private persons as well as in cases between private persons and the state).

⁶⁶ 1982 (3) SA 146 (A).

Section 7(1) of the Interim Constitution stated that the Bill of Rights bound 'all legislative and executive organs of state at all levels of government'. In *Du Plessis v De Klerk*⁶⁷ the Constitutional Court interpreted this as meaning that the Bill of Rights was not of horizontal application, on the ground that the omission of any reference to the judicial branch in s 7(1) reflected a conscious decision on the part of the drafters of the Interim Constitution to leave to the courts the development of the common law as between private persons (albeit having 'due regard to' the spirit of the Constitution as mandated by s 35(3), as has already been discussed).

The Final Constitution was enacted after *Du Plessis v De Klerk* was reported. In light of that decision, the difference between its provision relating to the applicability of the Bill of Rights and the equivalent provision in the Interim Constitution are striking. Section 8(1) of the Final Constitution provides as follows:

Section 8 Application

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court —
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).⁶⁸

[90] The significance of the revision of his section of the Constitution in the wake of *Du Plessis v De Klerk* was highlighted by Heher J in *Protea Technology Ltd v Wainer*,⁶⁹ who stated that the re-drafting was indicative of a radical legislative change of intention

⁶⁷ 1996 (3) SA 850 (CC).

⁶⁸ Section 36 is the limitations section of the Bill of Rights. Under it, rights can be limited only to the extent that limitations can be shown to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

⁶⁹ 1997 (9) BCLR 1225 (W).

to ensure that the judiciary was bound by the Bill of Rights when applying the common law, noting that

(i) the Bill of Rights now applies to ‘all law’ (which includes the common law) and it binds the judiciary (section 8(1)); (ii) a provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (section 8(2)); (iii) the obligation to promote the spirit, purport and objects of the Bill of Rights ‘in the application and development of the common law’ in section 35(3) of the Interim Constitution has become ‘when developing the common law’ in section 39(2) of the 1996 Constitution ...⁷⁰

The re-casting of the applications provision in the Final Constitution has profound implications for the scope of freedom of expression. Given that the decision in *Du Plessis v De Klerk* has now been over-ridden, and that the Bill of Rights is *directly* applicable to the common law, the way lies open for a re-evaluation of the interaction between freedom of expression and defamation law. Furthermore, as noted above, the Constitutional Court has yet to pronounce upon the divergence of views represented by decisions of the courts subordinate to it in the hierarchy, and so when the issue is litigated for the first time under the Final Constitution, it will be up to that court to decide whether to follow *Holomisa* or *Bogoshi*.

A summary of the position in South Africa

It is convenient now to summarise position as it now stands in South Africa: Whereas in *Holomisa* the elements of intention, falsity, absence of privilege and absence of fair comment were all held to be elements of the delict required to be proved by the plaintiff, the decision in *Bogoshi*, although agreeing that the strict liability of the media should be removed, returned the law to the traditional position regarding onus — namely that intention was to be presumed and truth, privilege and fair comment had to be proved by the defence — but added a new defence which served to relieve a defendant of liability where publication related to political matters and the defendant could prove that publication was reasonable in the circumstances. Neither case was decided on the basis that the Bill of Rights was directly applicable to the common law.

⁷⁰ Ibid 1238.

The Crucial Issue of Onus

The position accepted in Lange

The issue of onus was not specifically addressed in *Lange*. However, by continuing to place the onus on the defendant to prove the new qualified privilege in the same way as the defendant had had the onus of proving the defence in *Theophanous* and *Stephens*, the Court in *Lange* can be taken to have given implicit re-affirmation of the dictum of Mason CJ, Toohey and Gaudron JJ in *Theophanous* that the onus should rest upon the defendant because the facts supporting that defence were ones which would be 'peculiarly within the knowledge of the defendant'.⁷¹ This reasoning is of course the same as that of Thirion J in *Buthlezi*. But what of the countervailing argument of Cameron J in *Holomisa* that in setting the balance between expression and reputation, political speech deserved heightened protection and that this should be reflected in the placing of onus? Should the Court in *Lange* have taken the opportunity presented to it to alter the balance between expressive and reputational rights?

[91] *Philosophical considerations and the First Amendment in the United States*

In order to address the above question it is necessary to devote some attention to the philosophical underpinnings of free speech. The classic argument advanced for the protection of freedom of expression is that offered by John Stuart Mill, whose *On Liberty*⁷² contains a defence of freedom of expression based on a scepticism of human ability to be certain of the truth. Mill argues that freedom of expression ought not to be suppressed because to do so is tantamount to claiming infallibility.⁷³ According to this theory, because it is always possible that truths discovered by human reason are in fact errors which, if able to be challenged, may be replaced by a new 'truth',⁷⁴ one can never

⁷¹ (1992) 182 CLR 104, 138.

⁷² John Stuart Mill, *On Liberty* (first published 1859, 1912).

⁷³ Thus Mill (ibid 24) states.

..the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to oppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.

And similarly (ibid 29) that

To call any proposition certain while there is anyone who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side.

⁷⁴ Frederick Schauer, *Free Speech: A Philosophical Inquiry* (1982) 24–9.

say with absolute certainty that one has attained ‘the truth’, and thus it can never be legitimate to suppress what may (for the moment at least) appear to be ‘false’. On the other hand, even if absolute truth is unattainable, the chances of coming close to it are maximised if there is freedom of thought, expression and inquiry.⁷⁵ This illustrates what is perhaps the greatest strength of Millian theory — that it is compatible not only with those philosophies that assert the existence of truth, but also with those that emphasise uncertainty and scepticism as to the existence of truth.⁷⁶ Indeed, one could argue that the less certain one is about either the existence or content of truth, the less justification one has for suppressing ideas. Finally, Mill stated that even assuming one does discover ‘the truth’ about any particular matter, it does not follow that false statements are without value, as falsity brings about a ‘clearer perception and livelier impression of truth, produced by its collision with error’.⁷⁷ Of course, success in the market place will not *necessarily* lead to ascertainment of the truth — a majority of people may, after hearing all points of view, choose that which is, in fact, not correct, but the market is necessary simply in order to create the *opportunity* for truth, or what *may* be truth, to be aired. Furthermore, unless one claims infallibility, one must concede the pragmatic argument that if some ideas are excluded, and there is even a chance that those ideas may embody the truth, their restriction diminishes the likelihood of discovering the truth.⁷⁸

Millian scepticism is one of the major foundations of First Amendment theory in the United States, making its appearance in *Abrams v United States*⁷⁹ where, in his dissenting opinion, Holmes J made his famous statement that ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’.⁸⁰

⁷⁵ Rodney Smolla, *Free Speech in an Open Society* (1993) 8.

⁷⁶ See, eg, the discussion of uncertainty in Nancy Levit, ‘Ethereal Torts’ (1992) 61 *George Washington Law Review* 136, 136–8.

⁷⁷ Mill, above n 72, 24.

⁷⁸ Although here it must be noted that some writers argue that free speech can itself sometimes have the effect of excluding ideas from debate, as for example in the case of hate speech which deters racial minorities from voicing their opinions (see Richard Delgado, ‘Words that wound: A tort action for racial insults, epithets and name calling’ 17 (1982) *Harvard Civil Rights — Civil Liberties Law Review* 133) and in relation to pornography which, it is argued, similarly silences women (see, in general, Catherine MacKinnon, *Only Words* (1993)).

⁷⁹ 250 US 616 (1919).

⁸⁰ *Ibid* 624.

[92] Concern for the free flow of ideas has led the American courts to view with suspicion not only laws that regulate speech directly, but also those that do so incidentally in the pursuit of some other aim. The primacy Millian theory accords to the free flow of ideas thus underpinned the United States' Supreme Court's decision in *New York Times Co v Sullivan*⁸¹ where, as has already been mentioned, the Court cast the onus on the 'public official' plaintiff in a defamation action to prove falsity and that the defendant published either with knowledge of falsity or reckless as to truth or falsity. The rule in *New York Times* thus requires plaintiffs to prove two issues: falsity and intention, and so rolls what are two separate elements of the tort into one. The common law requirement that the defendant prove defences, and in particular that of truth, was found to be an unacceptable abrogation of expressive rights, in that it placed the burden of avoiding liability on the party seeking to initiate debate rather than on the party seeking to restrict it. As Brennan J stated in *New York Times*:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognise an exception for any test of truth — whether administered by judges, juries or administrative officials — and especially not one that puts the burden of proving truth on the speaker.⁸²

The Court further held that placing the burden of proving truth on the speaker would cause them to be

deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. [Speakers will] tend to make only statements which 'steer far wider of the unlawful zone'.⁸³

The rule in *New York Times* was subsequently extended in *Curtis Publishing Co v Butts*⁸⁴ to cover all 'public figure' plaintiffs. Clearly while the rationale for the *New York Times* rule was the protection of political debate, the rule articulated by the Court did not entirely match that rationale, given that its criterion of operation was the identity

⁸¹ 376 US 254 (1964).

⁸² *Ibid* 271.

⁸³ *Ibid* 279.

⁸⁴ 388 US 130 (1967).

of the plaintiff (public figure or non-public figure) rather than the substance of the defamation (political or non-political speech). Nevertheless this defect was to some extent remedied by the decision in *Gertz v Robert Welch Inc*⁸⁵ where the Court held that where a *private* individual was defamed by material addressing a *public* concern, the First Amendment required that the plaintiff bear the burden of proving fault on the part of the defendant (although that could be a degree of fault lesser than ‘actual malice’),⁸⁶ and in *Philadelphia Newspapers, Inc v Hepps*⁸⁷ where it was held that such a plaintiff also bears the onus of proving that the material is false. Where however the defamation involves matters of only private (that is, non-political concern), the Constitution requires no changes to the common law.⁸⁸ Thus it can be seen that through development of the case-law after *New York Times*, the Courts in the United States have made the subject matter of the material the determinative criterion of the operation of the constitutional rule, in respect of both public figure and private plaintiffs.

From a purely epistemological point of view then, placing the onus on the defendant to prove the truth of his or her statement is objectionable. This has been argued with particular force by Smolla, who [93] emphasises that the marketplace of ideas theory requires that in cases of doubt, that is where truth or falsity cannot be established, it is better that the law err on the side of freedom of expression.⁸⁹ But there are also practical arguments why the onus should be placed on the plaintiff rather than on the defendant.

Practical considerations

First, as was pointed out by Cameron J in *Holomisa*, it is anomalous that while falsity is an element of the tort of defamation to the extent that it is the publication of false defamatory material that the tort seeks to remedy, the common law requires the defendant to negative the falsity of the material rather than the plaintiff to prove that fact. This argument has been noted by commentators in the United States such as

⁸⁵ 418 US 323 (1974). The decision in *Gertz* was reaffirmed and applied in *Time Inc v Firestone* 424 US 448 (1976).

⁸⁶ The only exception to the rule that actual malice did not need to be proved would be where the private plaintiff sought punitive damages, in which case proof of this higher degree of fault *would* have to be present.

⁸⁷ 475 US 767 (1986).

⁸⁸ *Ibid* 775.

⁸⁹ Rodney Smolla, ‘*Dunn & Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*’ 75 (1987) *Georgetown Law Journal* 1519, 1529–31.

Dienes,⁹⁰ who goes so far as to argue for an extension of the *New York Times* rule through the imposition of the onus on all plaintiffs (both public and private) in order to remedy this inconsistency.

This formal aspect of litigation aside, the key argument that has engaged the attention both of courts and commentators is that presented in the quote from the judgment of by Thirion J in *Buthlezi* (reproduced in Part III above), and in the judgment by Mason CJ, Toohey and Gaudron JJ in *Theophanous*, to the effect that because the facts which might provide a defence in an action for defamation — in both Australia and South Africa whether the publisher acted reasonably — are 'peculiarly within the knowledge' of the defendant, practicalities indicate that that party should bear the onus of proving them.

But is this correct? In the first place, as the American commentators Franklin and Bussel point out in respect of the defence of truth, the *plaintiff* is surely better placed to prove the falsity of a fact relating to him or her self than the defendant is to prove its truth.⁹¹ Furthermore, the argument adopted by the courts in *Buthlezi* and *Theophanous* melds together the questions of *accessibility* of evidence and *burden of proving* evidence. For it is surely the case that the accessibility of a fact is unaffected by who bears the onus of proving that fact — if the defendant bears the onus of proving the facts supporting reasonableness he or she must put before the Court the facts he or she knows, but if the plaintiff bears the onus he or she is equally able to access those facts by means of discovery from the defendant. This is what happens in every case in which the *New York Times* principle operates in the United States — in the classic case where a newspaper or broadcaster is sued, the plaintiff obtains discovery of all documents pertaining to the journalistic processes by which they story came to be published, and it is up to the plaintiff then to prove falsity and that the publisher published knowing the material was false or reckless as to falsity. Exactly the same test could be applied in respect of proving unreasonableness in Australia or South Africa. The key difference between the onus being on the plaintiff rather than on the defendant is thus *not* whether

⁹⁰ C Thomas Dienes, 'Libel Reform: An Appraisal' 23 (1989) *University of Michigan Journal of Law Reform* 1, 5 and 14–15.

⁹¹ Marc Franklin and Daniel Bussel, 'Defamation and the First Amendment: New Perspectives: The Plaintiff's Burden in Defamation: Awareness and Falsity' 25 (1984) *William & Mary Law Review* 825, 859–65.

the facts can still be accessed — clearly they can — but rather *who is to bear the effort of making a case from them*. Given the philosophical arguments advanced in the preceding section, and despite the fact that compliance with discovery imposes a cost burden on parties to a defamation action (including defendants),⁹² I would argue that if adequate weight is to be given to freedom of expression, that burden should be placed on the plaintiff.

If the placing of a full burden of proof on the plaintiff is seen as tipping the scales too far in favour of freedom of expression, then a suitable compromise might be that suggested by Burchell who, in [94] discussing the law in South Africa in the wake of *Bogoshi*, suggests that imposing only an *evidentiary* burden on defendants might strike the appropriate balance.⁹³ Under this formulation, the defendant would simply need to adduce facts sufficient to raise the defence as an issue and, having done so, the onus would then pass to the plaintiff to negative the defence. To draw an analogy from defences in criminal law, although the prosecution must prove each element of an offence, defences — such as provocation or self-defence — need only be negated once the defence has put the matter in issue by laying the groundwork for the defence.⁹⁴ If this rule was translated into defamation law, even if the onus was on the plaintiff to prove unreasonableness, the defendant would still be required to discharge an evidentiary burden (not a full onus on a balance of probabilities) of adducing evidence to the effect that steps were taken to verify the truth of the defamatory matter. It would then be up to the plaintiff to discharge the full onus of proving that those steps did not meet the standard of reasonableness.

The analysis of defamation law in *Holomisa* illustrates with particular clarity the fact that the placing of the burden of proof in defamation actions is a matter of degree. The law of each jurisdiction can be represented along a continuum: At one extreme lies the common law, which allows a plaintiff to recover damages by proving publication of defamatory matter. Since the common law presumption is that such matter is false, the

⁹² See Roselle Wissler *et al*, 'Resolving Libel Disputes out of Court: The Libel Dispute Resolution Programme' in John Soloski and Randall Bezanson (eds), *Reforming Libel Law* (1992) 286, 287–8 and Anthony Lewis, '*New York Times v Sullivan* Reconsidered: Time to Return to The Central Meaning of the First Amendment' (1983) 83 *Columbia Law Review* 603, 609–11 and 614.

⁹³ Jonathan Burchell, *Personality Rights and Freedom of Expression — the Modern Actio Injuriarum* (1998) 267.

⁹⁴ Peter Waight and C Williams, *Evidence — Commentary and Materials* (1998) 69–70.

defendant then bears the burden of proving its truth. The next point is that occupied by the Australian cases of *Theophanous* and *Lange*, and now the South African case of *Bogoshi*, which still place the onus on the defendant, but which allow him or her to escape liability when, although unable to prove the truth of the matter, he or she can nevertheless prove that its publication was reasonable in the circumstances. *Holomisa* occupies the next point, shifting the onus onto the *plaintiff* to prove that the defendant published false matter and did so unreasonably. Finally one comes to *New York Times*, which provides the most favourable environment for defendants, imposing as it does the onus on the plaintiff to prove that false material was published with malice or recklessness.

I would argue that because defendants burdened with the onus of proving truth are inevitably deterred from publishing material which they believed to be true (and which might, in fact, be true) but which they could not prove to be true,⁹⁵ the onus placed in *Lange* gives insufficient weight to freedom of expression. I would argue that the position taken by Cameron J in *Holomisa* or, at the very least, the compromise relating to the evidentiary burden, should be adopted.

Constitutional law or tort law?

In *Lange*, the Court effectively severed the common law of defamation from the implied constitutional freedom, preferring to address the balance between freedom of expression and reputational rights through the creation of a new common law qualified privilege.

The scant reasoning provided by the Court as to why this was done has already been critiqued in Part III above. But this aside, the decision is also regrettable in that it may curb the operation of the implied freedom. There are conceivably many circumstances in which the exercise of a common law power by a government could limit that freedom — it is trite law that governments act not only under statutory authority, but also under common law (that is, prerogative) powers.⁹⁶ Although the Court in *Lange* said [95] that

⁹⁵ 1996 (2) SA 588 (W) 616A–G.

⁹⁶ According to Dicey, the prerogative consists of all non-statutory powers of the Crown (see A V Dicey, *The Law of the Constitution* (10th ed, 1959), 425). However, according to Blackstone (W Blackstone, *Commentaries on the Laws of England* (first published 1765, 12th ed 1978) vol 1, 232), whose views were adopted by Wade (see H W R Wade, *Administrative Law* (6th ed, 1988), 241–2), the prerogative is

‘Of necessity the common law must conform with the Constitution’,⁹⁷ rules of common law which infringe the implied freedom will have to be changed through piecemeal development of the common law, as occurred in respect of defamation law in *Lange*. That was the obvious result of having expressly stated that the implied constitutional freedom was not able to be pleaded by the defendant in *Lange*. Thus under the *Lange* formulation it appears that common law rules might not *automatically* be restricted by the implied freedom — everything will depend upon the Court’s determination of whether the common law is deficient. This is hinted at by Chesterman who states that:

Since, as already stated, the freedom operates in conformity with, rather than over-riding the common law, it will not invalidate those ‘established exceptions’ to freedom of speech which arise under the common law. It may however render invalid legal restraints on such communication imposed by statute law, whether enacted by the Commonwealth or by a State or Territory Parliament.⁹⁸

To take a recent example, in June 2000 the Commonwealth government reportedly paid a premium to Channel 9 television for prime-time advertising slots in order to exclude brewing industry adverts critical of the GST.⁹⁹ On one level this might be seen simply as a normal commercial contract, taking advantage of a powerful position in the market in order to capture an audience, but on another level it arguably represented the use of a government contract (entered into under the prerogative) for the purposes of suppressing a particular viewpoint. Another example one might think of is where, as part of an employment contract, an employer restricts the matters on which employees may express themselves either publicly or privately, or the viewpoint which they may adopt when speaking on those matters. Would the employee succeed in defending an action to enforce that term, given that the action would be a private or ‘horizontal’ one

defined as a sub-set of the non-statutory powers of the Crown, being only those powers which by their nature are of a type which only the Crown can exercise. Thus Dicey would have said that the relationship between the Crown and its servants is governed by the prerogative simply because it does not derive from statute, whereas Blackstone would have said that it is not a prerogative power because any person can employ servants just as the Crown does, and that only powers to do things such as issue passports or declare war are true examples of the prerogative. In this article the broader, Diceyan, definition is accepted, and so any common law action taken by the Crown, such as entering into a contract, which is not governed by a statute, is taken to be an exercise of the prerogative.

⁹⁷ *Ibid.*

⁹⁸ Chesterman, above n 3, 166.

⁹⁹ See Phillip Hudson, ‘Brewers Claim Ads Blocked’ *The Age* (Melbourne) 6 June 2000, 8, and Mike Seccombe, ‘No Canberra beer party? That’s a bit strange, mate’ *Sydney Morning Herald* (Sydney) 6 June 2000, 6.

(to use South African terminology)? Perhaps these doubts are unjustified and it is the case that after *Lange* no rule of the common law can unreasonably impair freedom of communication, as indeed is stated by Stone.¹⁰⁰ On the other hand, in her comment on *Lange*, Walker qualifies her statement that the common law cannot be inconsistent with freedom of communication by saying that this is true 'at least in so far as the law of defamation is concerned'.¹⁰¹ This issue will no doubt arise in litigation at some point in the future. At the moment it is certainly true to say that since it is no longer a rule *of the Constitution* that the common law is invalid to the extent that it is inconsistent with the implied freedom, but rather now only a rule *of the common law* that the common law should conform to the implied freedom, the status of the implied freedom has clearly been reduced.

For this reason I would argue that the High Court ought not to have de-coupled defamation law from [96] the implied constitutional freedom, as this may leave a wide swathe of governmental action beyond the protective scope of the constitution in the absence of specific development of the common law. It would have been far wiser for the Court to have left the position as it was in *Theophanous* and *Stephens* — namely to say that the implied constitutional freedom could be pleaded as a defence even in actions governed by the common law.

Conclusion

As already stated, the decision in *Lange* was regrettable both in regard to its failure to address the issue of onus in defamation actions and in its separation of defamation law from the implied constitutional freedom. This concluding section contains remarks relating to judicial practice in the Court as illustrated by the case.

Although one might think the decision in *Lange* praiseworthy if only for the fact that it represented a rare unanimous decision of the Court, it seems that the quest for unanimity was the cause of the Court's rejection of a constitutional defence in defamation cases, and was thus productive of one of its major shortcomings. A notable

¹⁰⁰ Adrienne Stone, 'Law Needs to Ensure Full, Free and Fair Political Debate' *Canberra Times* (Canberra) 17 June 2000, 4 argues that the ruling in *Lange* means that the entirety of the common law would be subject to the constitutional requirement of free political communication, but this begs the question as to why, if the end result was to be the same, the Court was at such pains to divorce the common law of defamation from the implied constitutional freedom.

feature of *Lange* is that McHugh J had dissented from the Court's extension of the implied freedom to the common law of defamation in both *Theophanous* and *Stephens*. The over-ruling of *Theophanous* and *Stephens* and the majority's retreat to a position where the implied constitutional freedom can no longer be pleaded in common law actions raises the possibility, as stated in the previous section, that the freedom might not automatically apply to the exercise of common law powers by the Crown. Although the Court's desire to settle a contentious area of the law was understandable, it appears that in doing so those members of the Court who had in the past been supportive of the implied freedom accepted a diminution in its scope in order to obtain the concurrence of McHugh J who had been unreceptive to it.¹⁰² If this interpretation is correct, it would represent an unfortunate triumph of unanimity over doctrinal purity.

Finally, the decision in *Lange* is significant for the contrast between it and the South African decisions discussed in this article. Whereas the latter are replete with references to overseas decisions, and in particular to *Theophanous* and which was referred to in *Holomisa, Bogoshi* and *Buthlezi*, the Court in *Lange* made no reference to the South African decisions despite their obvious relevance as comparative materials. Of course while it is counsel that largely determines the scope of legal argument in a case, it is not unusual for the Court to request that it be addressed on particular issues arising from relevant cases decided both in Australia and overseas. That neither counsel for the parties nor any members of the Court itself made reference to the South African decisions evinces an unfortunate narrowness of approach which deprived the Court of a valuable source of material that would have been of assistance in its decision-making. It is noticeable that, even in anticipation of the *Human Rights Act 1998* (UK) coming into force, courts in the United Kingdom have increasingly referred to overseas case-law, a trend which is likely to increase as cases arise under that Act.¹⁰³ The South African Constitution contains the newest Bill of Rights in the international Commonwealth. Cases decided under that document will no doubt provide a significant body of human

¹⁰¹ Kris Walker, above n 3, 181.

¹⁰² In this regard see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 673–4 and Twomey, above n 3, 89.

¹⁰³ See, eg, citation of South African authority in *R v Governor of Brockhill Prison, Ex parte Evans* (No 2) [2000] 4 All ER 15, and of authority from Canada and Australia in *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673.

Harris, 'Defamation and Freedom of Political Expression in Australia and South Africa'

rights law in years to come. It would be unfortunate if our own High Court did not take advantage of this rich source of jurisprudence.