##### Theophanous v. Herald & Weekly Times Ltd. and Anor.

(1994) 124 ALR 1 (High Court of Australia)

Theme: defamation

Sub-Issues: defamation defences, public figures

Test:

Penalty:

Decision: violation of freedom of expression (implied Constitutional right to freedom of political communication); four votes to three

Jurisdiction: Australia (High Court)

Summary:

The petitioner sued the defendant newspaper for publishing a letter by a co-defendant questioning the capacity of the petitioner as an MP. The defendant claimed an implied Constitutional right to freedom of political communication.

Facts:

The petitioner sued the defendant newspaper for publishing a letter by a co-defendant, shortly before an expected election, questioning the capacity of the petitioner as an MP. The defendant claimed an implied Constitutional right to freedom of political communication and the matter was referred to the High Court to assess the legitimacy of this defence. The High Court had found that there was such a right some two years earlier in a series of cases.

Held:

The Court reaffirmed its earlier rulings to the effect that there was an implied constitutional freedom of communication, at least in relation to public affairs and political discussion, but not a general right to freedom of expression. That freedom was not found explicitly in the Constitution, but derived from the structure of government it provided for, and, in particular, from the concept of representative government, which was impossible without open debate. That freedom included, among other things, discussion of the fitness for office of government, political parties and those seeking public office. The freedom operated at least as a restriction on legislative and executive power (the Court declined to decide, as irrelevant to the present case, whether it might also include positive rights).

The Court also held that the freedom applied to the common law, even in the sphere of relations between individual:

It is also clear that the implied freedom is one that shapes and controls the common law. At the very least, development of the common law must accord with its content. (p. 15)

The Court also noted a general tendency of defamation law to exert a chilling effect on freedom of expression:

The statements…speak eloquently of the tendency of the law of defamation to inhibit the exercise of the freedom of communication – “the chilling effect” – in the United States and the United Kingdom. In Australia also the existence of that tendency has been noted. (p. 18)

Although a number of defences to defamation have been developed by the courts over the years – including truth, fair comment and privilege – they did not take into account the importance of freedom of communication:

[T]he common law defences which protect the reputation of persons who are the subject of defamatory publications do so at the price of significantly inhibiting free communication. To that extent, the balance is tilted too far against free communication…. (p. 20)

The Court rejected the approach developed by the United States Supreme Court in the case of *New York Times v. Sullivan* that, with regard to public figures, only false statements made with actual malice could be sanctioned, on the basis that it offered too little protection to reputation and that the “public figure” standard was unworkable. The Court specifically rejected the idea of shifting the onus of proof of truth to public officials, as this was an unreasonably heavy burden for them to bear. Instead, in relation to political communications, the Court held that defendants should have what might be termed a defence of reasonable publication:

[I]f 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 (i.e. not caring whether the matter was true or false), and that the publication was reasonable in the sense described. (p. 23)

Reasonableness, in this context meant that:

[I]n the circumstances which prevailed, [the publisher] acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which where adequate. (p. 23)

It is for the defendant, who is claiming the defence, to prove that a publication comes within the scope of the implied constitutional freedom of political communication.

The common law defence of qualified privilege has the effect of protecting a publisher against liability unless her or she acted with malice. However, it only applies where the publisher has a duty to publish and the person to whom the statements are published has a reciprocal interest in hearing them. Traditionally, this has been understood as ruling out publication to the world at large, as in a newspaper, since the public as a whole cannot sustain this reciprocal duty and interest. Despite this, the Court held that a discussion which fell within the ambit of the implied constitutional freedom of political communication was also an occasion of qualified privilege, and hence attracted the protection of this defence. This confused the issue, because the defence of qualified privilege is actually stronger than the test set out by the Court. The Court clarified this issue in the later case of [Lange v. Australian Broadcasting Corporation](http://www.article19.org/ViewArticle.asp?AreaID=42&SubAreaID=137&PageID=302&ElementID=299&ArticleID=1093&Comment=).

Link to full text (on Australian Legal Information Institute database):

<http://www.austlii.edu.au/au/cases/cth/high_ct/182clr104.html>