Torts or tort? The imperial expansion of defamation

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In (2000) 8 TLJ 159, Dr Des Butler outlined potential bases of negligence liability for the media. This article examines in greater depth one of those bases — liability for economic loss resulting from a negligently made statement.

In the two Australian cases where such a claim was brought against a media defendant, a reason for denying recovery was that the tort of negligence should not be allowed to interfere with the balance between the protection of reputation and the preservation of freedom of speech established by defamation. This article argues that such reasoning is flawed in that it fails to distinguish between reputational and economic interests, ignores principles of concurrent liability, and is inconsistent with the adversarial system of tort law. Finally, it is contended that recent statements on the principles governing duties of care in pure economic loss cases suggest that there is nothing standing in the way of negligence claims of this kind against the media.

Introduction

Since the 16th century, the law has protected a person's reputation through the causes of action available for libel and slander.[1] These actions, in many jurisdictions merged into the single tort of defamation, have been carefully developed to balance the competing interests in a democratic society of the protection of people's reputations and free speech.[2] However, the "imperial expansion of the law of negligence"[3] which has followed the decision of the House of Lords in *Donoghue v Stevenson*[4] has, in the eyes of some judges and commentators, threatened this balance. The question which has recently come into the spotlight is whether the establishment of a duty of care in relation to the publication of information about a person would supplant the role of defamation and unreasonably widen the ambit of protection of reputation and related interests, to the detriment of free speech. As Dr Butler recognised in a recent edition of the *Torts Law Journal*, in the modern world of mass communication this issue is of considerable significance to media organisations which would be potential defendants since their business revolves around the provision of information.[5]

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1 R P Balkin and J L R Davis, *Law of Torts*, 2nd ed, Butterworths, Sydney, 1996, p 9.

2 J G Fleming, *The Law of Torts*, 9th ed, LBC Information Services, Sydney, 1998, p 580.

3 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 570 per Brennan J; 120 ALR 42.

4 [1932] AC 562.

5 D Butler, "Media negligence in the information age: A new frontier for a new century?" (2000) 8 *TLJ* 159 at 163-4.

In the few cases in common law countries in which the relationship between defamation and negligence has been addressed, the outcomes have differed greatly. On the one hand, in *Spring v Guardian Assurance Plc*[6] the House of Lords has recognised a duty to take reasonable care in the preparation of an employment reference despite the fact that there would not, in the circumstances, have been a claim available in defamation. On the other hand, the New Zealand Court of Appeal has rejected that approach on analogous facts,[7] and strongly resists any intrusion by negligence into the realm of protection of reputation.[8] In Australia, two judges have entered the debate. Levine J of the Supreme Court of New South Wales has preferred the New Zealand approach in his judgment in two cases involving media defendants: *Sattin v Nationwide News Pty Ltd*[9] and *"GS" v News Ltd.*[10] In contrast, Harper J of the Supreme Court of Victoria found in favour of a duty of care in a case involving a communication analogous to an employment reference: *Wade v State of Victoria.*[11] As will be seen, despite the factual contrast between situations involving the media and those concerning employment references, conceptually the issues remain the same.

It should be noted at this point that the reason for the rise of the question of the relationship between defamation and negligence is the practical motivation of plaintiffs to bring, in addition to defamation, a cause of action which may be added to their claim "by way of a second string".[12] As will be seen, a negligence action would allow a plaintiff to avoid particular defences which apply in defamation. The motivation of avoiding defamation defences has been seen in other contexts in the past. In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*,[13] a claim based on s 52 of the Trade Practices Act 1974 (Cth) was pursued in addition to a defamation suit because of the availability of an award of damages under s 82 of that Act in the absence of the strictures of defamation law.[14] On the other side of the coin, the same can be seen where a plaintiff elects to bring an additional action because the remedies available under it are preferable. For example, in *Sim v H J Heinz Co Ltd*[15] an application for an interlocutory injunction was brought in both libel and passing off because of the difficulty of obtaining such a remedy for libel.[16] Nevertheless, whether the plaintiff seeks to avoid a particular defence, or avail

6 [1995] 2 AC 296 (*Spring*). For the practical implications of this decision in employment law see J Catanzariti, "Are the Days of the Employee Reference Numbered? 'Negligent' Referees Stung for Liability" (1996) 34(8) *Law Society Jnl* 31.
7 *Balfour v Attorney-General* [1991] 1 NZLR 519.
8 See *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.
9 (1996) 39 NSWLR 32 (*Sattin*).
10 (1998) Aust Torts Reps 81-466 at 64,910 (*GS*).
11 [1999] 1 VR 121 (*Wade*).
12 Cf W L Morison, "The New Law of Verbal Injury" (1959) 3 *Sydney L Rev* 4 at 15.
13 (1984) 2 FCR 82. See also *Australian Ocean Lines Pty Ltd v Western Australian Newspapers Ltd* (1983) 66 FLR 453.
14 See (1984) 2 FCR 82 at 86-7 per Bowen CJ, Lockhart and Fitzgerald JJ.
15 [1959] 1 All ER 547; [1959] 1 WLR 313. See also *Tolley v Fry & Son Ltd* [1930] 1 KB 467.
16 [1959] 1 All ER 547 at 549 per Hodson LJ. Cf *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153. It is interesting to note that *Sim v H J Heinz Co Ltd* may be seen as another incarnation of the special protection given to defamation law. In this case an injunction was

him or herself of a particular remedy, the motivation is to seek the best possible legal outcome.

After an overview of the Australian decisions on the relationship between defamation and negligence, this article will examine and develop the arguments against limiting the protection afforded by the tort of negligence in deference to the tort of defamation. Moreover, it will argue that there are difficulties in circumscribing the scope of the tort of negligence in this area given the acceptance of principles of concurrent liability in Australian law. Furthermore, it is contended that it is difficult to reconcile the approach taken by Levine J in *Sattin* and *GS* with the adversarial system of Australian tort law. In addition, it will be argued that allowing negligence to operate in this area is consistent with recent statements of the High Court on the principles relating to duties of care in respect of purely economic loss, and thus that media operators should take reasonable care in deciding what they publish.

Defamation and negligence in Australia

Sattin v Nationwide News — Negligent misstatement and the media

The *Sattin* case arose out of the publication of a photograph in the *Sunday Telegraph* newspaper which showed Mr David Leslie and Mrs Janette Sattin with a caption describing the pair as "newlyweds". In fact, they were not married, and indeed Mrs Sattin was married to someone else. Mrs Sattin sued the newspaper in defamation claiming that to anyone who knew of her true marital status the publication imputed that she was either a bigamist or an irresponsible person who had lied to the photographer about the nature of her relationship with Mr Leslie. In addition to this claim in defamation, Mrs Sattin sought to establish negligence on the part of the newspaper in not properly ascertaining her marital status and publishing a caption which was false in a material respect. This alleged negligence caused Mrs Sattin damage in the form of "Expenses — to be advised".[17]

The legal foundation for this second action was the then recent decision of the House of Lords in *Spring*, in which the defendant insurance company was held to owe a duty of care not to cause economic loss to a former employee as a result of a carelessly prepared employment reference. Four of the Law Lords gave speeches in favour of the plaintiff,[18] with numerous statements made regarding the relationship between the "distinct torts" of defamation and negligence.[19] In reaching this result, the House of Lords expressly did not follow decisions of the New Zealand Court of Appeal in which it had been said that the law should maintain an area free from negligence law in which defamation can operate.[20] The rationale for that approach is exemplified in *Bell-Booth Group Ltd v Attorney-General* where Cooke P (as he then was),

refused in passing off because "it would be inappropriate, while refusing an injunction on the basis of libel, to grant an injunction on the basis of passing off": ibid.
17 See *Sattin* (1996) 39 NSWLR 32 at 34.
18 Lords Goff, Lowry, Slynn and Woolf (Lord Keith dissenting).
19 *Spring* [1995] 2 AC 296 at 337 per Lord Slynn.
20 See *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148; *Balfour v*

delivering the judgment for the majority, said:

> The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.[21]

Of the Law Lords in *Spring*, only the dissenting speech of Lord Keith accepted this position.[22] Moreover, the New Zealand view was strongly criticised by other members of the House of Lords on the basis that it would deny a remedy to a worthy plaintiff for whom a defamation action was unavailable. Lord Woolf made this point most clearly:

> The conclusive answer in the present context to applying the approach of Sir Robin Cooke P is that it will, here, result in real injustice. It would mean that a plaintiff who would otherwise be entitled to succeed in an action for negligence would go away empty-handed because he could not succeed in an action for defamation.[23]

In his reasons for judgment in *Sattin*, Levine J characterised the case before him as one relating to injury to reputation, and began from the premise that "a claim for mere loss of reputation is a proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action".[24] After considering the judgments in *Spring*, Levine J preferred the dissenting views of Lord Keith and struck out the negligence claim, approving the New Zealand cases which were said to support the proposition that:

> [T]he introduction into the law of defamation especially involving instruments of mass communication of some common law duty of care in effect to "get a publication right" would amount to an unacceptable distortion of the principles of common law (as affected by statute) in the law of defamation relating to the balancing of freedom of speech and protection of reputation.[25]

The argument in relation to freedom of speech centres largely around defences to the tort of defamation, in particular qualified privilege. An occasion of qualified privilege can arise where "the person who makes [a] communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it".[26] This operates as a good defence to a claim in defamation, which is lost only on proof of an improper motive or malice on the part of the publisher. In this context, the term malice can refer

Attorney-General [1991] 1 NZLR 519; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

21 [1989] 3 NZLR 148 at 156.

22 *Spring* [1995] 2 AC 296 at 313.

23 Ibid, at 351 per Lord Woolf. It should be noted that writing extra-judicially, Lord Cooke of Thorndon (formerly Cooke P) has argued that *Spring* and the New Zealand cases can stand together based on fine distinctions on their facts: "The Right of *Spring*", in P Cane and J Stapleton (eds), *The Law of Obligations — Essays in Celebration of John Fleming*, Clarendon Press, Oxford, 1998. However, his Lordship does acknowledge that the New Zealand cases do contain dicta supporting a statement of principle beyond their facts: ibid, p 39.

24 *Sattin* (1996) 39 NSWLR 32 at 34, citing *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 399 per Hallett J.

25 *Sattin* (1996) 39 NSWLR 32 at 43.

26 *Adam v Ward* [1917] AC 309 at 314 per Lord Atkinson.

to the use of the privileged occasion for some purpose other than that for which it was given by law, as well as spite or desire to cause harm.[27] In defeating the defence, the onus is on the plaintiff to establish malice on the part of the defendant.[28]

Therefore, it is argued that the effect of holding a defendant liable in negligence rather than defamation is that the defence of qualified privilege is circumvented and rendered ineffectual: an action which previously would have been brought in defamation, on the basis that it involved damage to reputation, and defended on the grounds of qualified privilege, would be brought in negligence without the same protection for freedom of speech.[29] Allowing a claim where there was negligence rather than malice would "impose a greater restriction on freedom of speech".[30] Thus, it is said that the sphere of free speech should be "fenced off" from actions other than defamation.

However, the point should be made that qualified privilege is rarely available to media defendants,[31] and was not relevant on the facts of *Sattin*.[32] Therefore, Levine J's judgment must be seen as a broader statement of principle that, where a publication is sued on and there are pointers to injuries of the kind that attend damage to reputation, the tort of negligence should not be allowed to intrude on the area of the law governed by defamation. This was indeed the interpretation Levine J gave it in the subsequent decision in *GS*:

> [C]onformably with the principles enunciated in *Sattin v Nationwide News Pty Limited* and the matters of policy therein referred to, *the tort of negligence should not be extended to the distortion of the law of defamation*.[33]

In *Spring*, the House of Lords stated strongly that negligence should not be precluded in favour of allowing defences to defamation to apply (in a case in which the defence of qualified privilege did in fact apply). Nevertheless, the relationship between the two actions espoused by Levine J seemed an acceptable position in the context of *Sattin* where both defamation and negligence were pleaded in respect of the same publication and substantially the same loss (remembering that Mrs Sattin did not point to any actual loss she had suffered).[34] Furthermore, there was hope that even if plaintiffs claiming damage to reputation were confined to an action in defamation, the English approach of allowing an action in negligence might be followed in respect of untrue communications which were not defamatory but caused a plaintiff to

27 *Spring* [1995] 2 AC 296 at 329-30 per Lord Slynn.

28 Ibid.

29 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 at 155-6 per Cooke P (for the majority).

30 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 302 per Cooke P.

31 See *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 788; *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609; R Tobin, "Public interest and the defamation of political figures: The English approach" (2000) 8 *TLJ* 152.

32 *Sattin* (1996) 39 NSWLR 32 at 43 per Levine J.

33 *GS* (1998) Aust Torts Reps 81-466 at 64,910 per Levine J (emphasis added).

34 See text accompanying n 17.

suffer economic loss.[35] This had been an issue for some time, with the Australian Law Reform Commission suggesting in 1979 that it was "right in principle" that the maker of an untrue statement about a person which causes that person loss should be liable to make good the loss.[36]

"GS" v News Ltd — Negligent non-misstatement and the media

In *GS* the position in respect of a statement causing harm other than to reputation was raised but not conclusively determined. The plaintiff was a patient of a psychiatrist who was the subject of disciplinary proceedings in the New South Wales Medical Tribunal. The tribunal had ordered that her name be suppressed during its investigation of the psychiatrist's conduct. The defendant media organisations nevertheless published her name and a photograph which identified her. The plaintiff claimed to have suffered physical and psychological injury as a result of the revelation of her identity. Damages were sought from the defendants based on breach of statutory duty, negligence and infringement of a right to privacy.[37]

In respect of the negligence claim, the defendant argued, on the basis of *Sattin*, that the plaintiff's claim operated within the sphere in which the law of defamation applied to the exclusion of the law of negligence and thus should not be allowed to succeed.[38] The factual scenario in *GS* was arguably distinguishable from *Sattin* on two bases. First, the action was in respect of the publication of a truth (the photograph), rather than a falsity (the inaccurate caption).[39] Secondly, this publication was said to have caused physical and psychological injury to the plaintiff, with no claim for damage to reputation being made.[40]

In his recent article, Dr Butler contended that *GS* "may represent an acknowledgement in Australia of the possibility of an action in negligence against the media where the relevant damage is other than damage to the plaintiff's reputation".[41] The basis for this statement is Levine J's conclusion, in granting leave to amend the statement of claim to properly plead negligence, that his Honour was "not persuaded . . . that the case based upon the 'wrong' alleged by the plaintiff is arguably not available as a cause of action in negligence".[42] However, the position expressed by Levine J must be seen as having been at best equivocal at the stage of proceedings contained in the report. In a passage prior to that cited, his Honour, while focusing on the fact that it was the revelation of the plaintiff's identity which caused her personal injury, rather than injury to reputation, said: "A case so outlined is, in my view, not unarguably caught by *Sattin* and the principles therein."[43] In other words, a claim for injury other than to reputation may also be precluded. Therefore, without the benefit of the final decision on the merits of the case, the issue of whether a negligence claim must yield, even where no defamation claim is pursued, must be seen as unresolved.[44]

The final point to be made in relation to *GS* is that the position which Dr Butler suggests might be drawn from the case would be a very significant step in this area of the law. The imposition of a duty of care in respect of statements which are true would be contrary to all previous authority. As cited earlier, the New Zealand approach rejects any notion of "common law duties of care not to publish the truth".[45] Furthermore, in *Spring*, even Lords Slynn and Woolf accepted that there can be no action in negligence if the statement is true.[46]

Wade v State of Victoria — Negligent misstatement and employment references

Stronger support for Dr Butler's suggestion that there may be "new opportunities" for claims in negligence against the media can perhaps be found in the Victorian decision of *Wade* in which a duty of care was established. However, this is not unarguable. In *Wade*, discussion of the issue of the interaction between defamation and negligence returned to a factual scenario far closer to that in *Spring*, with a similar result. The plaintiff, a former employee of the Victorian Police, was employed by a company which manufactured and supplied gaming machines in Queensland. As part of a report being prepared by the Queensland Criminal Justice Commission on criminal involvement in the State's gaming industry, the commission sought information about the plaintiff from the Victorian Police. The plaintiff alleged the information provided was false and misleading and caused him to lose his job. Any action in defamation was faced with the defence of qualified privilege; therefore the only avenue was a claim in negligence.[47]

The issue of "whether persons in the defendants' position owe a duty of care to a former employee when passing information about that person to a third party in circumstances in which it is foreseeable that, if the information is false, the former employee will suffer economic loss" came to Harper J for determination as a separate question preliminary to the trial of the proceedings.[48] His Honour approached this question from first principles of negligence law — reasonable foreseeability and proximity, and taking into

35 See, for example, A Flahvin, "*Sattin* and the Spectre of Media Liability for Negligence" (1997) 16 *Communication Law Bulletin* 11 at 11.
36 See Australian Law Reform Commission Report, *Unfair Publication: Defamation and Privacy*, ALRC 11, 1979.
37 *GS* (1998) Aust Torts Reps 81-466 at 64,898.
38 Ibid, at 64,911.
39 Ibid.
40 Ibid, at 64,912.
41 Above n 5, at 168.
42 *GS* (1998) Aust Torts Reps 81-466 at 64,913.

43 Ibid, at 64,912.
44 An application for leave to appeal from the interlocutory decision of Levine J was denied by the Court of Appeal: *Network Ten v GS; News Ltd v GS* (NSW CA, 31 March 1999, unreported). However, Priestley JA, speaking for the court, acknowledged the importance of the issues raised by this case and envisaged their consideration in that court, and perhaps the High Court, after a trial: at 2-3.
45 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 at 156 per Cooke P (for the majority).
46 *Spring* [1995] 2 AC 296 at 336 and 349 respectively. See further, Lord Cooke of Thorndon, above n 23, p 41.
47 *Wade* [1999] 1 VR 121 at 124.
48 Ibid.

account the then recent statements of the High Court in *Hill v Van Erp*[49] and *Pyrenees Shire Council v Day*.[50] However the greatest influence on the decision was clearly the analogous case of *Spring*,[51] and his Honour found that these facts could give rise to a claim other than in defamation. Using a hypothetical example, Harper J criticised the outcome which would result otherwise:

> The law of defamation has nothing to say about a complaint by an employee that his employer has carelessly said in a reference that the employee has three years' experience when in fact he has eight. How then could it sensibly be argued that, because if something else had been said about the employee he would have had a possible cause of action in defamation, the law of negligence should not offer a remedy when no question of defamation arises?[52]

Although it can be seen here that Harper J was not in favour of limiting negligence law to contexts not inhabited by defamation and qualified privilege, he does distinguish between the appropriate cause of action on particular facts. Moreover, it is clear from other passages in his reasons that Harper J's view of the correct position in this area of the law is more sophisticated than merely accepting that a duty of care should lie where the standard requirements of negligence law are fulfilled:

> If the carelessness is said to be found in the subjective assessment of the employee's character, then the law of defamation ought to occupy the field alone: it is simply too difficult and too dangerous to apply to such a situation notions relating to a duty of care. Freedom of speech must in this area retain that degree of paramountcy which the law of defamation has in its wisdom assigned to it.[53]

However, having expressed some views on the broader issue, Harper J did not attempt to engage with decisions in contexts other than the provision of employment references. As Dr Butler observes, "Harper J was careful to confine his comments to the case of a carelessly prepared reference about a former employee which, although containing no defamatory material, was nevertheless damaging".[54] For example, his Honour concluded his judgment by distinguishing *Sattin* on the basis that it "did not concern a careless reference".[55]

The Australian position: inconsistent and unjustifiable?

On the basis of this brief overview of the Australian cases, it is submitted that the position in regard to the relationship between the torts of defamation and negligence in this country is inconsistent, or at best unclear. It would appear that in claims against the media where defamation is pleaded, a negligence action is precluded (on the authority of *Sattin*). This may also be the case where the field is governed by defamation, even if defamation is not pleaded

49 (1997) 188 CLR 159; 142 ALR 687.
50 (1998) 192 CLR 330; 151 ALR 147.
51 See *Wade* [1999] 1 VR 121 at 135-7.
52 Ibid, at 140.
53 Ibid, at 139.
54 Butler, above n 5, at 168-9.
55 [illegible]

(on the basis of dicta in *GS*). However, where the claim concerns an employment reference, it seems that there may be a basis for a duty of care (considering *Wade*).

The difficulty with the position as it stands is that this analysis supports the proposition that where a good defence to a claim in defamation would lie, a duty of care is allowed (*Wade*). Whereas, if there would be no defence to an action in defamation, a duty of care is precluded (*Sattin*, perhaps *GS*). The absurdity of this is that it is contrary to the very justification for the decision in *Sattin* that negligence should be excluded to protect the balance which the defences to defamation create. It is submitted that the best way to deal with this situation is to remove the automatic bar to the operation of the law of negligence which the "fencing off" of defamation requires. In support of that contention, we now turn to a critical analysis of the relationship between defamation and negligence adopted by Levine J in *Sattin*.

Against "fencing off": questions of policy and principle

The tort of defamation essentially involves "the protection of personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion".[56] By contrast, the tort of negligence compensates victims of "inadvertent harm",[57] depending on the breach of a duty of care owed by the plaintiff to the defendant. Defamation and negligence represent one of each of the two species of torts identified by Trindade and Cane: defamation focuses on *a right or interest of the plaintiff* which the law seeks to protect from illegitimate interference or injury by the defendant, whereas negligence is concerned with *an act or type of conduct of the defendant* which the law seeks to discourage or sanction.[58] Therefore, there is the potential for overlap where harm to the plaintiff's reputation as a result of negligent conduct of the defendant causes the plaintiff actual loss.

The normative question of what the relationship between the two actions should be arises because courts have been reluctant to allow the expansion of negligence into new areas where an adequate alternative remedy would be available.[59] Historically, courts have not allowed negligence to encroach on well-established areas such as contract, trusts and intellectual property.[60] In Australia, Gummow J has noted the danger of "extending the imprecisely framed tort of negligence so as to supplant other torts and equitable

56 V V Veeder, "The History and Theory of the Law of Defamation" (1903) 3 *Columbia L Rev* 546 at 546.
57 Fleming, above n 2, p 113.
58 F Trindade and P Cane, *The Law of Torts in Australia*, 3rd ed, Oxford University Press, Oxford, 1999, p 341. See further P Cane, *The Anatomy of Tort Law*, Hart Publishing, Oxford, 1997.
59 T Allen, "Liability for References: The House of Lords and *Spring v General Assurance*" (1995) 58 *MLR* 553 at 555, citing *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 at 316 per Lord Templeman. See also *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at 1059.
60 Trindade and Cane, above n 58, p 341.

doctrines".[61] Nevertheless, the principle of liability based on fault, which the idea of negligence liability involves, "has always had a considerable attraction",[62] and we now turn to discuss the competing interests involved in the intersection of these bases of liability.

The public policy considerations relied on by Levine J in not allowing a claim in negligence against the media are that "the operation of our laws governing restrictions on freedom of speech are, and of course should be, subject constantly to scrutiny".[63] Freedom of speech is "the very foundation of a democratic society" and it is defamation law which seeks to reconcile its importance with the protection of reputation.[64] Therefore, it is argued that proper protection of freedom of speech demands that for any publication where defamation defences apply the publisher cannot be liable for damages either in defamation or in negligence, otherwise "[t]he suggested cause of action in negligence would . . . impose a greater restriction on freedom of speech than exists under the law worked out over many years to cover freedom of speech and its limitations".[65] However, there are several points to be made in relation to these arguments.

First, neither the decision in *Sattin*, nor that in *GS*, falls within this reasoning because in neither case was a defamation defence available: in *Sattin* qualified privilege was not available to the media defendant, nor would it have been in *GS*. Moreover, the New South Wales statutory defence of justification would also have been difficult to establish in *GS* because, although the publication amounted to "truth" there could be no legitimate "public interest" in the identity of a psychiatrist's patient.[66] The House of Lords stressed in *Spring* that an extension to the law of negligence should not necessarily equate to an adverse effect on the doctrine of freedom of speech; rather, it promotes greater attention to the standard of "reasonable care" on the part of the defendant in making the statement.[67]

In explaining the rationale for the defence of qualified privilege in 1863, Erle CJ said:

> [I]t is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only and will cease to obey the dictates of truth.[68]

61 *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 97; 117 ALR 393.
62 Trindade and Cane, above n 58, p 341.
63 R Williams, "Editorial" (1996) 3 *Australian Media Law Reporter* 125 at 127.
64 Fleming, above n 2, p 580.
65 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 302 per Cooke P.
66 See Defamation Act 1974 (NSW), s 15(2). *GS* would have turned on the application of defamation law as altered by this legislation. Although truth is a complete defence at common law, several Australian jurisdictions require a further element. Note the requirement of "public benefit" in Defamation Act (Qld) 1889, s 15; Defamation Act 1957 (Tas), s 15; Defamation Act 1901 (ACT), s 6. Cf *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, where justification did apply.
67 See, for example, *Spring* [1995] 2 AC 296 at 336 per Lord Slynn.
68 *Whiteley v Adams* (1863) 15 CB (NS) 392 at 418.

However, the point to be made here is that the availability of an action in negligence in circumstances such as those in *Sattin* would not require "praise only"; nor would the requirement be to "get a publication right".[69] The standard of care in negligence would only demand that reasonable care be taken, not a guarantee of accuracy.[70] On the facts of *Spring* (where qualified privilege applied), Lord Slynn commented that to allow a claim in negligence would not constitute a restriction on the freedom of speech since employers,

> should be and are capable of being sufficiently robust as to express frank and honest views after taking reasonable care both as to factual content and as to the opinion expressed . . . when they realise the importance of the reference to both the recipient . . . and to the employee.[71]

The same can be said of media defendants when only reasonable care needs to be taken in determining whether a statement, laudatory or critical, is true. Flahvin suggests that a requirement of reasonable care "would not impose any greater burden on the media's freedom to publish than that imposed by the law of defamation".[72] The last point to be made here is that negligence protection in this area would not open the floodgates to litigation against the media since even if a duty of care were not precluded, in order to succeed a plaintiff would have to establish breach of the duty and prove damage was suffered as a result.[73] As recognised by the House of Lords, there are important distinctions between the two torts in that negligence requires proof of both fault and damage whereas defamation liability does not require proof of fault and, at least in respect of libel, damage is presumed.[74]

The second criticism to be made of the *Sattin* approach is that precluding an action in negligence should not be as a result merely of some perceived closeness to the sphere inhabited by defamation if a different interest is sought to be protected. Defamation and negligence are "different wrongs with different origins, elements and defences".[75] The contention that "the law as to injury to reputation and freedom of speech is a field of its own",[76] and should thus be fenced off from negligence, is a weak one given that the House of Lords in *Spring* emphasised that it was the loss of opportunity of employment, rather than reputation, which was a pivotal factor in characterising the situation as one of negligence.[77] Injury to economic interests "is qualitatively different from injury to reputation",[78] and, if the defendant's negligent statement or misstatement of fact has caused economic loss to the plaintiff, it is argued that a remedy should be available.

69 Cf *Sattin* (1996) 39 NSWLR 32 at 43 per Levine J.
70 R Fowler, "Fencelines or Welcome Signs?" [1995] *NZLJ* 120 at 122; Butler, above n 5, at 175-6.
71 *Spring* [1995] 2 AC 296 at 336 per Lord Slynn.
72 Flahvin, above n 35, at 11.
73 C Hilson, "Liability for Employment References: The Possible Effects of *Spring v Guardian Assurance*" (1996) 25 *Anglo-American L Rev* 441 at 468. See also Flahvin, above n 35, at 13.
74 See *Spring* [1995] 2 AC 296 at 334 per Lord Slynn.
75 M Gillooly, *The Law of Defamation in Australia and New Zealand*, Federation Press, Sydney, 1998, p 41.
76 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 at 156 per Cooke P.
77 See *Spring* [1995] 2 AC 296 at 334 per Lord Slynn.
78 R Magnusson, "*Spring* in the House of Lords" (1994) *TLJ* 210 at 218.

However, Levine J seems to deny this:

> [In a case where] a defendant publishes material that conveys imputations defamatory of a plaintiff's reputation and even where consequential damages in the "personal injury" sense are alleged to have been caused, the cause of action is defamation and only defamation.[79]

Furthermore, as noted above, in *GS*, where no defamatory imputations were raised, his Honour stated that the case is "not unarguably caught by *Sattin* and the principles therein", and thus that a negligence action might be precluded.[80] This position is problematic since, in the *Sattin* scenario, the plaintiff will have to depend on a remedy in defamation for personal injury. The two objections to this are: first, that the law in respect of personal injury awards in defamation is by no means clear;[81] and secondly, from a policy perspective, it is difficult to see why compensation for personal injury should be linked to the competing interests of freedom of speech and protection of reputation. Even more problematic is the *GS* scenario, where loss arising from personal injury may go uncompensated because the plaintiff cannot establish a tangentially relevant action in defamation.

The third criticism of Levine J's reasoning is that it introduces incongruency into the law if the recipient of a negligently made statement can sue for loss yet the subject of the statement cannot.[82] The establishment of a duty of care between an employer and the subject of a negligently unfavourable reference confirms and mirrors the already existing potential liability of an employer to the receiver of a negligently favourable reference under the principle established in *Hedley Byrne v Heller*.[83] In that case it was held for the first time that the maker of a negligent misstatement could incur liability for economic loss sustained in justifiable reliance on the inaccurate information supplied in the absence of disclaimer.[84] In other words, if an employer can be liable to other employers for mistakenly overstating a former employee's abilities, why should it not be liable to the employee for mistakenly understating them, simply because a defamation action would not be successful? Although this is of greater significance in cases such as *Spring* or *Wade* than in situations involving the media, conceptually the point is a strong one.

As seen above, the position adopted in *Sattin* on the relationship between defamation and negligence is based on the notion of an "unacceptable encroachment by negligence into the field of defamation".[85] We shall now move on to argue that this position encroaches on other accepted principles of Australian law. Since the approach taken by Levine J "admits of only one

79 *GS* (1998) Aust Torts Reps 81-466 at 64,912 per Levine J.
80 Ibid.
81 *Sattin* (1996) 39 NSWLR 32 at 45 per Levine J. See *Rigby v Mirror Newspapers Ltd* (1963) 64 SR (NSW) 34; *Mirror Newspapers Ltd v Jools* (1985) 5 FCR 507; *Brooke v Flinders University of South Australia* (1987) 47 SASR 119.
82 See *Spring* [1995] 2 AC 296 at 335 per Lord Slynn, 346 per Lord Woolf; *Wade* [1999] 1 VR 121 at 143 per Harper J.
83 [1964] AC 465. See Hilson, above n 73, at 459.
84 Fleming, above n 2, p 190.
85 R Shine and A-P Linhares, "The Kiss of Death: Employer Liability for Inaccurate or Unfair References" (1997) 8 *Auckland University L Rev* 533 at 536.

ground of liability for any particular set of facts",[86] and ignores the principle that a plaintiff "may take advantage of any rules which favour his case",[87] we now turn to examine Levine J's reasoning in the context of Australian principles of concurrent liability and the adversarial tort system.

Against "fencing off": principles of concurrent liability

The first set of principles which sheds further light on the present issue is that relating to concurrent liability. The issue under consideration has been described as the "overlap between the torts of negligence and defamation".[88] However, use of the term "overlap" emphasises the liability which the two actions could establish, rather than the nature of the torts. The actions themselves, one protecting a right and the other proscribing a manner of conduct, do not in any way "overlap". If both were available, they would be alternative claims as, for example, was attempted in *Sattin*. Although some commentators have argued that negligence is not an independent cause of action but merely a basis of liability available in some circumstances,[89] others assert that "[t]he existence of negligence as a separate tort with a distinct set of principles is now undeniable".[90] Regardless of the correct position, where there is more than one remedy available on a particular set of facts, the issue of concurrent liability is raised.

Swanton observes that "co-existing categories of civil obligation are already an entrenched feature of our law of obligations".[91] Of particular relevance here is the fact that the High Court has expressed a view against the fencing off of areas from negligence liability. In the context of concurrent liability in tort and contract, their Honours stated that it is *not legitimate* to assert that:

> [T]he *compartmentalisation of the law* dictates that liability under the ordinary principles of negligence in respect of either damages generally or a particular kind of damage must be excluded as between parties in a contractual relationship notwithstanding the absence of any actual agreement between the parties to that effect.[92]

The House of Lords expressly rejected compartmentalisation of the law in the relationship between defamation and negligence in *Spring*. Lord Woolf asserted that there was "no justification for erecting a fence around the whole of the field to which defamation can apply and treating any other tort, which can beneficially from the point of view of justice enter into part of that field,

86 Fowler, above n 70, at 122.
87 K M Stanton, "Insurance, the *Hedley Byrne* Principle and Concurrent Liability" (1995) 3 *Tort L Rev* 85 at 88.
88 Shine and Linhares, above n 85, at 536.
89 Fleming, above n 2, p 115.
90 Balkin and Davis, above n 1, p 197. See also Trindade and Cane, above n 58, pp 341-2.
91 J Swanton, "Concurrent Liability in Tort and Contract" (1996) 10 *Jnl of Contract Law* 21 at 22.
92 *Bryan v Maloney* (1995) 182 CLR 609 at 624 per Mason CJ, Deane and Gaudron JJ; 128 ALR 163 (emphasis added). See further *Astley v Austrust Ltd* (1999) 197 CLR 1; 161 ALR 155.

as a trespasser if it does so".[93] However, the approach taken in *Sattin* and the New Zealand cases represents "the complete antithesis of concurrency, or co-termination, or any other epithet that attempts to capture the simple concept of layers of liability".[94]

The New Zealand approach adopted by Levine J can be stated as "where defamation might apply, negligence shall not", despite the fact that "[t]here are plenty of cases where one set of facts establishing liability for non-economic loss will give rise to overlapping liability in a number of torts".[95] In this regard it should be noted that the modern law of negligence has its foundations in the context of establishing alternative bases of liability: *Donoghue v Stevenson* arose as a case because no contractual remedy was available to the person who drank the snail-infected ginger ale bought for her by a friend.[96] In other words, the absence of damages for breach of contract was not seen as a bar to the development of liability in tort. The same can be said for a *Hedley Byrne v Heller* situation "where there is a relationship which is, broadly speaking, either contractual or equivalent to contract".[97]

Although the rules in defamation law regarding qualified privilege and malice were established long before *Donoghue v Stevenson*, and certainly well before *Hedley Byrne*, since the tort of negligence has developed into a distinct cause of action, it "could quite justifiably expect now to share the same stage as its older sibling".[98] The fact that it was never contemplated when the defamation laws were first developed "is not a reason for banishment".[99] Therefore, acceptance of the possibility of concurrent liability in Australian law, especially concerning negligence, should militate against precluding the finding of a duty of care in the vicinity of another tort.

It is interesting that Levine J is in favour of fencing off an area of liability from negligence, in contrast to the approach of the House of Lords in *Spring*, despite the fact that Australian law is recognised as maintaining a more expansive law of negligence than that adopted in England, and is seen as less likely to seal off areas of liability than English law. This observation is supported by statements of the High Court in *Bryan v Maloney* where it was said in reference to the position adopted in a pair of House of Lords decisions:

> Their Lordships' view in that regard seems to us, however, to have rested on a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than is acceptable under the law of this country.[100]

Therefore, it is submitted that the approach taken by Levine J does not conform with Australian concurrent liability principles, and must at best be justified as an exception on the basis of the importance of freedom of speech.

93 *Spring* [1995] 2 AC 296 at 351 per Lord Woolf.
94 Fowler, above n 70, at 122.
95 Ibid, citing *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348.
96 See *Donoghue v Stevenson* [1932] AC 562 at 566 per Lord Buckmaster.
97 *Spring* [1995] 2 AC 296 at 324 per Lord Goff.
98 Fowler, above n 70 at 123. See *Spring* [1995] 2 AC 296 at 332 per Lord Slynn.
99 Ibid.
100 *Bryan v Maloney* (1995) 182 CLR 609 at 629 per Mason CJ, Deane and Gaudron JJ; 128 ALR 163. See *D & F Estates Ltd v Church Commissioners* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398.

However, it is argued that the earlier discussion limits the persuasiveness of the need to protect freedom of speech from negligence liability, and that "there appears no good reason why both causes of action should not be concurrently available".[101] The approach in *Spring* is to be preferred — the two torts were recognised as "distinct and separate causes of action providing protection against different forms of damage (loss of reputation in the case of defamation and financial losses in negligence)".[102] It is not a question of merging defamation and negligence,[103] merely allowing both of the actions to apply, and permitting the plaintiff to elect which he or she sees as more likely to succeed in view of the interest sought to be protected. This leads us to the issue of how claims are brought in our adversarial system.

Against "fencing off": adversarial litigation

The question posed in this context is the extent to which Levine J's approach limits a plaintiff's right to plead his or her case in the manner most likely to succeed. In *Astley v Austrust Ltd*,[104] the High Court approved the statement, in the context of concurrent liability in contract and tort, that "the plaintiff has the right to assert the cause of action that appears to be the most advantageous . . . in respect of any particular legal consequence".[105] The corollary of that proposition is that under an adversarial common law system it is for the plaintiff to plead and prove facts which fall within some specific and established rule of liability, which it is then for the defendant to defend. In light of these observations, there are two points relevant to the present debate.

First, there is the issue of the relationship between pleading and defending a particular cause of action. In *Chakravarti v Advertiser Newspapers Ltd*,[106] which dealt with a narrower issue relating to pleading multiple imputations in a defamation claim, the point was made that it is the pleadings "which are directed to precisely defining the issues between the parties, providing the benchmarks against which the relevance of evidence is to be assessed and deciding those issues on their merits".[107] The plaintiff pleads a particular cause of action and it is of no use to the defendant to defend something which has not been put against them: "A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence."[108] Extrapolating beyond defamation alone, pleading the defence of qualified privilege to a claim in negligence would not ordinarily be of any effect. Nevertheless, this is essentially what would be required under the *Sattin* approach if a defendant were faced with a negligence action in circumstances in which a defamation claim would fail. The defendant would

101 Gillooly, above n 75, p 42.
102 Stanton, above n 87, at 88.
103 Cf *Balfour v Attorney-General* [1991] 1 NZLR 519 at 529 per Hardie Boys J.
104 Above n 92.
105 *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 at 522 per Le Dain J. See *Astley v Austrust Ltd*, ibid, at CLR 20 per Gleeson CJ, McHugh, Gummow and Hayne JJ.
106 (1998) 193 CLR 519.
107 Ibid, at 544 per Gaudron and Gummow JJ, quoting *Pizza Pizza Ltd v Toronto Star Newspapers Ltd* (1996) 2 CPC (4th) 394 at 400 per Cameron J.
108 *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at 528 per Brennan CJ and McHugh J; 154 ALR 294.

seek to make the point that *if* the claim were one in defamation, a good defence would apply. It should be noted that this is in fact a position which has been adopted in the United States where effect has been given to the policy behind qualified privilege by allowing that defence to apply to negligence claims.[109]

Alternatively, it is implicit in the argument that negligence should not interfere in defamation's field that no action should lie in negligence where the facts resemble circumstances which might raise harm to reputation. The logical extension of this reasoning is that the pleading or non-pleading of defamation is a defence to a claim in negligence so long as the matter can be characterised as falling within a certain field. Levine J acknowledges this in *GS*: after outlining the general rule that it is not for the defendant to seek to impose on the plaintiff a cause of action to which there are established defences, Levine J states that the defendant *can* do this in the *Sattin* situation and "not unarguably" in the *GS* scenario.[110] If this approach were adopted, it would fundamentally alter the nature of civil proceedings in our adversarial system since it would no longer be for the parties to advance and defend causes of action in the hope of persuading a court or jury, but for the judge to determine whether, under a certain factual matrix, one action should be brought rather than another.

Levine J's approach to the relationship between defamation and negligence, although giving effect to valid policy concerns of protection of free speech, undermines basic common law principles in relation to how litigation is to be conducted. Moreover, it should be noted that Harper J's analysis in *Wade* suffers from a similar defect in relation to the second point. It will be remembered that his Honour stated that the availability of negligence would depend on an assessment of whether the statement contained objective facts or subjective assessment.[111] To the extent that any attempt is made to categorise which factual scenarios should be governed by defamation, and which can be subject to negligence proceedings, the judge will be involved in an exercise beyond the established role of neutral arbiter between plaintiff and defendant.

This ramification does not appear to have been clear to either Levine J or Harper J, and it is submitted that the preferable position would be that of the House of Lords in *Spring*, which recognises the independent character of the two torts and maintains a plaintiff's capacity to elect the cause of action he or she believes offers the greater hope of recovery, depending on the injury suffered. However, it must be acknowledged that Lords Slynn and Woolf in *Spring* stated that a negligence claim could only be brought if the statement were not true, yet a claim in defamation was unavailable.[112]

In favour of a duty of care

Whatever the strength of the arguments made thus far in relation to perceived problems with the relationship between defamation and negligence expounded

109 *Apostle v Booth Newspapers Inc* 572 F Supp 897 at 905-6 (1983); *Parnell v Booth Newspapers Inc* 572 F Supp 909 at 917 (1983). See Butler, above n 5, at n 43.
110 *GS* (1998) Aust Torts Reps 81-466 at 64,912 per Levine J.
111 See text accompanying n 53.

in the New Zealand cases and *Sattin*, primarily they seek to demonstrate that a duty of care in this area should not be automatically precluded. The further step which needs to be taken is to establish reasons in favour of such a duty. Imposition of liability in negligence for pure economic loss has always been a controversial question. In the wake of the apparent abandonment of proximity as a conceptual basis for the imposition of negligence liability,[113] the question has become further vexed since the legal principles for determining whether a duty of care exists in a novel category of case are presently in flux.

There has been no authoritative statement as to what will replace proximity as the unifying criterion for the existence of a duty of care,[114] and two very recent decisions of the High Court in *Perre v Apand Pty Ltd*[115] and *Crimmins v Stevedoring Industry Finance Committee*[116] have disclosed stark differences in approach between members of the bench.[117] In these cases there can broadly be said to be three positions on how a court should approach the question of whether there was a duty of care between the plaintiff and defendant. The first is based on incremental, analogous development of categories of liability from the caselaw;[118] the second focuses on the "salient features" of the relationship between plaintiff and defendant;[119] and the third is the English *Caparo Industries Plc v Dickman*[120] three-stage test which addresses the elements of reasonable foreseeability, proximity and policy considerations.[121]

Although the question of the proper approach for determining the existence of a duty of care is well beyond the scope of this article, it is possible to make a few observations in the present context. Despite the apparent conflict among members of the High Court, some commentators consider that the differences on the bench may be more superficial than fundamental.[122] Whatever the conceptual framework for considering the question, there appear to be four factors which the proponents of the different tests agree bear on the issue of the determination of a duty of care in a novel category of pure economic loss.

113 See *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 624 per McHugh J (*Perre*); *Hill v Van Erp* (1997) 188 CLR 159 at 176-7 per Dawson J, 210 per McHugh J, 237-9 per Gummow J; 142 ALR 687; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414 per Kirby J; 151 ALR 147. Cf *Jaensch v Coffey* (1984) 155 CLR 549 at 586 per Deane J; 54 ALR 417.
114 See *Perre* (1999) 164 ALR 606 at 624 per McHugh J.
115 *Perre* (1999) 164 ALR 606.
116 (1999) 167 ALR 1 (*Crimmins*).
117 Note that the question of the principles applicable in this area may arise again in the High Court in *Tepko v Water Board* (Matter S187/1999). This case was granted special leave to appeal from the NSW Court of Appeal on 10 March 2000.
118 See, for example, *Perre* (1999) 164 ALR 606 at 629-42 per McHugh J; *Crimmins* (1999) 167 ALR 1 at 19 per McHugh J.
119 See, for example, *Perre* (1999) 164 ALR 606 at 660-5 per Gummow J.
120 [1990] 2 AC 605.
121 See, for example, *Perre* (1999) 164 ALR 606 at 676-90 per Kirby J; *Crimmins* (1999) 167 ALR 1 at 57 per Kirby J.
122 J Tesvic, "*Perre v Apand Pty Ltd* — Coherent Negligence Law for the New Millennium?" (2000) 22 *Sydney L Rev* 297 at 312; J Swanton and B McDonald, "Liability in Negligence for Pure Economic Loss" (2000) 74 *ALJ* 17 at 22; J L R Davis, "Liability for careless acts or omissions causing purely economic loss: *Perre v Apand Pty Ltd*" (2000) 8 *TLJ* 123 at 129.

They are: the knowledge of the defendant,[123] the vulnerability of the plaintiff,[124] indeterminacy of liability to which potential defendants would be exposed,[125] and whether the defendant's acts can be said to be legitimate conduct in the pursuit of commerce.[126]

It is submitted that in considering these factors an argument can easily be made in favour of establishing a duty of care in respect of negligently made statements in the form of references, and no less in circumstances of a media defendant. First, the defendant's knowledge of potential harm to the plaintiff would be easily established since the plaintiff will either be the subject of a personal reference, or the subject of some comment by the media organisation. Any inaccuracy could thus certainly give rise to "reasonably foreseeable" loss or injury. Secondly, the vulnerability of the defendant is very high, being at the mercy of what the defendant says. If it is in the context of a personal reference, there is a high level of qualitative significance since what is said will bear directly on the prospects of any future employment, as was noted in favour of a duty of care in *Spring*[127] and *Wade*.[128] In the media context, the statement need not be extreme to have a tangible effect on a plaintiff because its quantitative significance will be high because of the number of people who become aware of statements made in the mass media.[129] For example, in *GS* the foundation of the plaintiff's complaint was merely "[t]he destruction of her anonymity".[130]

Thirdly, in either a reference case or a media case liability will not be indeterminate because the essence of this kind of case is the focus on a named, or at least known, individual.[131] The fear of exposing a defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class"[132] does not arise if the act giving rise to liability is a publication which reflects on an individual personally, or states facts about that person as an individual. Although there would, in the media context, be the potential for statements about a class of persons to fall to this category, such a class would be readily definable by the very terms of the statement made. These are in fact both very easy scenarios in which to impose liability for economic loss because of the one-to-one nature of the relationship.[133]

Finally, the legitimacy of the acts of a defendant in their trade (either negligent provision of a reference for a former employee, or negligent

123 *Perre* (1999) 164 ALR 606 at 611 per Gleeson CJ, 615 per Gaudron J, 640-1 per McHugh J, 661 per Gummow J, 687 per Kirby J, 695-6 per Hayne J, 717 per Callinan J.
124 *Perre* (1999) 164 ALR 606 at 611 per Gleeson CJ, 618 per Gaudron J, 636 per McHugh J, 664 per Gummow J, 688 per Kirby J, 718-19 per Callinan J.
125 *Perre* (1999) 164 ALR 606 at 611 per Gleeson CJ, 615-16 per Gaudron J, 633 per McHugh J, 660 per Gummow J, 688 per Kirby J, 699 per Hayne J, 717 per Callinan J.
126 *Perre* (1999) 164 ALR 606 at 616 per Gaudron J, 635-6 per McHugh J, 701-2 per Hayne J, 719 per Callinan J.
127 *Spring* [1995] 2 AC 296 at 319 per Lord Goff.
128 *Wade* [1999] 1 VR 121 at 139.
129 See Butler, above n 5, at 163.
130 *GS* (1998) Aust Torts Reps 81-466 at 64,908 per Levine J.
131 Cf Butler, above n 5, at 163.
132 *Ultramares Corporation v Touche* 255 NY 170 at 174 (1931) per Cardozo J.
133 Cf *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241; 142 ALR 750.

commercial journalism) would not be seen as detrimental to the existence of a duty. In either of these situations the imposition of a duty of care would not amount to a restriction on the type of unimpeded autonomy which the common law allows in the conduct of commerce. In *Perre* the sort of acts contemplated by McHugh and Hayne JJ focused on competitive practices within a particular industry, and the notion that there is no legal prohibition on gaining from another's loss.[134] The imposition of a requirement not to cause economic loss through negligent communication would not amount to such a prohibition.

The power of the media

The final point which is worth addressing in the context of the imposition of a duty of care in negligence such as that contemplated here is the reaction powerful media interests would be likely to have to the potential liability to which they would be exposed. In this regard, the legislative events following the decisions of the Federal Court of Australia in *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*[135] and *Australian Ocean Lines Pty Ltd v Western Australian Newspapers Ltd*,[136] referred to earlier,[137] are instructive. These two cases, which held that the publication of statements in newspapers in the course of reporting the news was capable of breaching s 52 of the Trade Practices Act if the statements were misleading or deceptive, "led to a concerted lobby by media proprietors" to have the Act amended, and the power to institute proceedings against the media for breaches of s 52 in relation to newspaper articles or radio or television broadcasts "is now severely limited".[138]

That limitation is in the form of s 65A of the Act, which was inserted by Act No 165 of 1984 within months of the *Global Sportsman* decision. Section 65A(1) provides that, subject to some exceptions relating to publications in connection with goods, services and interests in land, "[n]othing in section 52, 53, 53A, 55, 55A or 59 applies to prescribed publication of matter by a prescribed information provider". A "prescribed publication" is, relevantly, a publication made by a "prescribed information provider in the course of carrying on a business of providing information".[139] A "prescribed information provider" is "a person who carries on a business of providing information" and specifically includes the holders of licences under the Broadcasting Services Act 1992 (Cth), the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation.[140]

These amendments were clearly directed at benefiting the media, and provide these interest holders with substantial immunity from the consumer

134 *Perre* (1999) 164 ALR 606 at 635-6 per McHugh J, 701-2 per Hayne J.
135 (1984) 2 FCR 82; 55 ALR 25.
136 (1983) 66 FLR 453.
137 See text accompanying n 13.
138 R V Miller, *Annotated Trade Practice Act*, 15th ed, Law Book Company, Sydney, 1994, p 240.
139 Trade Practices Act 1975 (Cth), s 65A(2)(a).
140 Trade Practices Act 1975 (Cth), s 65A(3).

protection provisions of the Act.[141] It is submitted that the power of the media to exercise political clout has not waned or diminished to any extent since the 1980s. Thus it is not unreasonable to suspect that a similar result might be sought and achieved if courts began imposing duties of care on media organisations in respect of communications concerning individuals.

Conclusions

Liability for negligent statements in either the media or employment reference context should not be discounted. The approach to the relationship between defamation and negligence which would preclude negligence law from developing in the area of communications can be seen to be flawed on several levels. First, the distinction between injury to reputation and other loss which can be caused by a statement is ignored. Consequently, there is an unnecessary blurring of the line between actions in defamation and negligence where the facts giving rise to the proceedings could be characterised as involving questions of reputation. This approach is inconsistent with the distinctness of the two torts, principles of concurrent liability and the workings of the common law system in which it is for the plaintiff to decide which cause of action offers the greatest advantage.

In the face of the expansion of the number of situations in which a duty of care is recognised, the approach to be taken in reconciling overlaps which will occur,

> is not by blanket prohibition of the type imposed in *Bell Group* and later cases, but by a careful consideration of the merits of each particular situation with a view to determining whether justice requires the recognition of a duty of care.[142]

It is submitted that in light of the realisation that negligence liability will not undermine the protection of freedom of speech, negligence should not be restricted from providing a remedy where demonstrable loss has been suffered. In this regard, a duty of care for economic loss arising from statements made about an individual would seem to be consistent with the requirements considered in recent decisions of the High Court.

However, it must be acknowledged that such a position would impose far broader liability than that proposed in any of the cases which have recognised a duty in circumstances of a negligent communication. As noted above, on the authority of *Spring* the statement sued on would have to be untrue, and moreover Harper J in *Wade* would limit negligence claims to statements of objective fact rather than subjective assessment. The fine distinctions drawn on various factual scenarios in this context suggest that this is an area of tort law that will continue to throw up cases which are difficult to reconcile with each other until an authoritative statement is made. One might then expect the powerful interests behind the media to seek legislative protection from the imposition of liability of this kind.