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Freedom to speak of members of parliament

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FREEDOM TO SPEAK OF MEMBERS OF PARLIAMENT

After looking at Nationwide News and ACTV the Court agreed in Theophanous that there is an implied freedom of communication in the Commonwealth Constitution. The Conrt stated (at 716) "in those cases the Court distilled from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution, an implication of freedom of communication."

It went on to say however, that the implication does not extend to freedom of expression generally. The freedom is available only with regard to communication about the government of the Commonwealth and extends to all political matters including matters relating to other levels of government.

Having said this, the Court then looked at whether that freedom extends to the publication of matter concerning members of Parliament relating to the performance of their duties and/or their suitability for the position. It decided that it did.

Theophanous argued that there was no constitutional issue at hand as constitutional freedoms are not absolute, that they are fettered by existing laws and that nnder the common law of defamation he had a case.

The Court disagreed with him and stated that (at 719) "if the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former."

The Court pointed out that it was true that constitutional freedoms were not absolute but that the limits to the freedoms were to be determined by evaluating what is necessary for the working of the Constitution and its principles.

The question was also raised about what criterion is to be applied in determining whether a publication which discusses political matters and is defamatory of the plaintiff is nonetheless not actionable.

It was held that, in light of the freedom implied in the Constitution, a publication will not be actionable under law relating to defamation if the defendant establishes that:

it was unaware of the falsity of the material published;

it did not publish the material recklessly, that is, not caring whether the material was true or false; and

the publication was reasonable in the circumstances. This means that the publisher should be able to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accnracy of the material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate.

ESSAY QUESTION

It has been suggested by some that there should be a rule compelling the critic of official conduct to prove truth as a defence to an action in defamation.

What are the strengths and weaknesses of this suggestion? Include examples and/or cases to support your answer.

RESEARCH ASSIGNMENT

What are the facts of the case Stephens v Western Australian Newspapers Ltd (1994) 68 ALJR 765

What was held in this case?

What relevance does this case have to the Theophanous case?

THE IMPLIED RIGHT

Theophanous, Nationwide and ACTV are all cases (although not the only cases) in which the implied constitutional right to freedom of speech was considered by the High Court.

This freedom, as the cases held, is not a right to freedom of speech in a general sense, nor is it an individual right. It is an implied right in the Constitution relating to the citizens of the Commonwealth regarding the public discussion of political matters.

It is a right which is considered essential to a representative democracy which embodies the principles prescribed by the Australian Constitution

Mason CJ. in Theophanous (at 717) stated that: "Because the system of representative government depends for its efficacy on the free flow of information and of ideas and of debate, the freedom extends to all those who participate in political discnssion. By protecting the free flow of information, ideas and debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government".

Freedom of public discussion of government (including the institutions and agencies of government) then, is not regarded as as desirable thing but as essential to very idea of representative democracy.

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