THE COMMONWEALTH BROADCASTING POWER AND DEFAMATION BY RADIO OR TELEVISION

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The law's inability to keep pace with scientific and technological developments is no more clearly illustrated than in the area of defamation. Modern mass communication media have so facilitated the dissemination of defamatory statements, whether spoken or written, that the original distinction drawn by the law between libel and slander is now quite anachronistic.

Historically, the distinction between libel and slander has depended on the method of disseminating the defamatory statement.[1] For a defamatory statement to be actionable as libel it had to be reduced to some durable or permanent form such as writing, printing, pictures,[2] or statues,[3] whereas in the case of slander, a more transitory publication, generally by spoken words, was sufficient to be actionable. The distinction between libel and slander at common law is that in order to be libel, a defamatory statement has to be published in a permanent form directed to the visual sense; a slander, on the other hand, is a non-permanent publication directed to the aural sense. In the case of slander, the common law courts have also required that unless the words imputed a crime, certain loathsome diseases, or reflected upon the plaintiff in his business, trade, profession or office, special damage has to be proved.[4] Subject to those exceptions, proof of special damage is demanded in a slander action as the law presumes that harm to reputation does not ensue from a mere verbal statement. A plaintiff in a libel action, however, is not required to prove special damage as injury to reputation is presumed from the defamatory publication. It has been said that libel endures longer than slander; that more significance is attached to the written than the spoken word by those to whom the communication is addressed; that libel conveys the impression of deliberate calculation to injure the reputation of another whilst slander is usually borne of sudden irritability.[5]

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1 For the historical development of defamation see Veeder: 'History and Theory of the Law of Defamation', (1903) 3 *Col. L. Rev.* 546 and (1904) 4 *Col. L. Rev.* 33; Carr: 'The English Law of Defamation', (1904) 18 *L.Q.R.* 255; Holdsworth: 'Defamation in the Sixteenth and Seventeenth Centuries', (1924) 40 *L.Q.R.* 302 and (1925) 41 *L.Q.R.* 13.

2 *Dunlop Rubber Co.* v. *Dunlop,* [1921] A.C. 367; *Burton* v. *Crowell Publishing Co.*, 82 F. 2d. 154 (C.C.A. 2d. 1936).

3 *Monson* v. *Tussauds Ltd.*, [1894] 1 Q.B. 671.

4 See Donelly: 'Defamation by Radio: A Reconsideration' 34 *Iowa L.R.* 12. (1948).

5 Fleming: *The Law of Torts* (3rd ed.) p. 529.

The distinction between these twin torts has also been concerned with the extent to which the defamatory material was disseminated. Before the development of radio and television, the capacity for harm of a spoken defamatory statement was not as great as that of its written counterpart since slanderous statements did not lend themselves so readily to re-publication as written libels. Today, when mass radio and television audiences hear live or recorded statements broadcast nation or even world-wide, their potentiality for harm is greater than anything envisaged by the widest possible circulation of any newspaper. To this must be added the power of the human voice to stir the emotions of listeners. Furthermore, defamation by radio is in the ordinary course not impulsive, but represents quite as much deliberation as does the ordinary written message.[6] Despite the fact that defamation by radio, in the absence of a script, lacks the measure of durability possessed by a printed libellous publication, it in no way lessens its capacity for harm. It is also as reasonable to presume damage from the nature of the medium employed when defamation is broadcast by radio as when published by writing.[7]

Classification of Defamation by Radio or Television

Whether defamation by radio or television constitutes libel or slander is a contentious issue. In the United States, the suggestion has been made that such defamation falls into a new category, properly labelled 'defamacast', which is actionable *per se*.[8]

It has been held in *Meldrum v. Australian Broadcasting Co. Ltd.*[9] by the Full Court of the Victorian Supreme Court, that words spoken over the radio, even if read from a prepared script, constitute slander and not libel. In *Meldrum's Case*, the Full Court mechanically applied the mode-of-publication test, whether or not the defamatory words impinge upon the eyes, to determine whether a defamatory radio broadcast was libel or slander. McArthur J. with whose judgment Mann J. agreed,[10] held that it was 'quite immaterial' for listeners to know whether the speaker was reading from a written document or not. It is obvious that the radio listener cannot know whether the words are read or simply spoken and the resultant injury to the person defamed is the same. It is not the writing that contains the 'sting' but the audible sounds.[11] *A fortiori*, it may be added that ad-lib comments would also be treated as slander. While this judicial treatment of radio defamation is consistent with the

6 Vold: 'The Basis for Liability for defamation by Radio' 29 *Minn. L.R.* 612, 643.

7 See *Hartmann* v. *Winchell* 296 N.Y. 296, 300; 73 N.E. 2d. 30, 32 per Fuld J. Note (1958) 36 *N. Carolina L.R.* 355.

8 *American Broadcasting-Paramount Theatres, Inc.* v. *Simpson* 106 Ga. App. 230, 126 SE 2d. 873. Quoted in *American Jurisprudence* 2d., Vol. 50, p. 517. See Newhouse: 'Defamation by Radio: A New Tort', (1938) 17 *Ore. L.R.* 314.

9 [1932] V.L.R. 425.

10 *Ibid.*, p. 438-9.

11 Hon. Sir John Barry: 'Radio, Television and the Law of Defamation', 23 *A.L.J.* 203.

original purposes of the distinction between libel and slander, it fails to take into account the impact of radio and television on this area of the law.

The Defamation Acts in the Australian Capital Territory, New South Wales, Queensland and Tasmania no longer distinguish between libel and slander and appear to render all defamatory publications, however made, actionable without proof of actual damage.[12]

As far as defamatory television broadcasts are concerned, the same legal difficulties encountered with defamation by radio do not arise. Television, like motion pictures, is designed for both visual and aural perception. In *Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd.*[13] it was held that a motion picture constitutes libel and not slander. Television broadcasting is not dissimilar to publication by motion picture and it may therefore be argued that a television broadcast of defamatory matter also constitutes a libel.[14]

Yet, as the common law tests distinguish between whether the defamatory publication was in permanent or non-permanent form, or whether the publication was addressed to the eyes or the ears, this analogy might break down in the case of 'live' telecasts. Whereas cinematographic films are in a permanent form — the celluloid encapsulates the message — some television broadcasts may be unrecorded and thus not in any permanent form. If strict adherence to the common law rules concerning defamation is maintained, an absurd distinction would thus have to be made between live and videotape telecasts.

Commonwealth Legislation

In an attempt to update this area of the law, the Commonwealth Parliament in 1956 passed an amendment to the Broadcasting and Television Act 1942-1956, s.124, which was designed to affect significantly the law of defamation concerning broadcasts by radio or television. The Constitution however, contains no reference to broadcasting in any form, or to defamation, as subjects over which the Commonwealth has power to legislate. By Section 51(v) of the Constitution, the Commonwealth Parliament is empowered to make laws with respect to 'postal, telegraphic, telephonic and other like services' and the High Court has given expansive interpretations of this Section, extending Commonwealth legislative power to include both radio[15] and television[16] broadcasting.

The issue of federal legislative competence in the area of defamation has not yet been settled by the High Court. While s.51(v) confers power on the national Parliament to legislate concerning broadcasting, there is no clear constitutional mandate to legislate with respect to 'defamation',

12 A.C.T., Defamation Act 1901, s.3; N.S.W., Defamation Act 1958, s.20; Qld., Criminal Code 1899, s.376; Tas., Defamation Act 1957, s.15. See Higgins: *Elements of Torts in Australia*, p. 407.
13 (1934) 50 T.L.R. 581.
14 See Higgins: *Elements of Torts in Australia*, p. 404.
15 *R.* v. *Brislan; Ex parte Williams* (1935) 54 C.L.R. 262.
16 *Jones* v. *Commonwealth* [no. 2] (1965) 112 C.L.R. 206.

a matter which was until 1956, when the Commonwealth entered that field, the province of the States. The question thus arises as to whether the Commonwealth and the States have concurrent legislative powers in this area and whether s.124 of the Broadcasting and Television Act 1942-1956 is incidental to the power contained in s.51(v) of the Constitution.

On 19 April 1956 the Postmaster-General, Mr. Davidson, introduced in the House of Representatives an amendment, which was subsequently adopted as Section 124,[17] to the Broadcasting and Television Act 1942-1956.

S.124 provides:

> for the purpose of the law of defamation the transmission of words or other matter by a broadcasting or television station shall be deemed to be publication in permanent form.

Mr. Davidson stated in his introductory remarks:

> the effect of this amendment is that, in any action which may be brought against a broadcasting or television station for the publication of defamatory matter, such matter will be treated as if it were libel and not slander.[18]

The Effect of Section 124

Since the adoption of this section, two actions have been brought in the Victorian Supreme Court against broadcasting stations for defamation and conflicting decisions have emerged concerning the effect of s.124.

In *Kasic v. Australian Broadcasting Commission Ltd.*,[19] an action involving a summons to strike out an allegation in a statement of claim, Gowans J. said that for the purpose of determining the striking-out summons:

> I should not proceed on any other basis than that an allegation as to alleged defamatory matter being published in circumstances which by statute are deemed to constitute publication in permanent form, is a sufficient allegation of actionable libel.[20]

However, in *Burns v. Collins and the Herald and Weekly Times Ltd.*[21] this deceptively simple statutory provision converting slander into libel did not go unchallenged. In the *Burns Case*, Menhennit J. held that it was 'an arguable issue' whether the declaration in s.124 . . . 'makes broadcasting (by radio) of a defamatory statement libel as distinct from slander'.[22]

In commenting on the *Kasic Case*, Menhennit J. in the *Burns Case*, pointed out that Gowans J.:

> was not conclusively deciding the matter (that the effect of s.124

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17 This provision was first introduced into the Broadcasting and Television Act 1942-1954 by Act No. 33 of 1956 as s.95A, and renumbered by that Act as s.124. S.1 of the English Defamation Act 1952 is its counterpart.

18 Vol. 10, *House of Representatives Debates*, 5 Eliz. 11, 22nd Parlt., 1st Session, p. 1542.

19 [1964] V.R. 702.

20 *Ibid.*, p. 705.

21 [1968] V.R. 667.

22 *Ibid.*, p. 670.

> was to make broadcasting of a defamatory statement libel and not slander) but rather deciding that, for the purpose of the striking out summons, there was a sufficient allegation of actionable libel to lead to the same conclusion that the statement of claim should not be struck out.[23]

Menhennit J. appears to have been persuaded to some extent by the defendant's argument that as *Meldrum v. Australian Broadcasting Commission Ltd.*[24] had held that the test for libel is whether or not the words impinge upon the eyes, the declaration in s.124, that the transmission of words by a radio broadcasting station shall be publication in permanent form, is not the relevant test. If the distinction between libel and slander is to be regarded as depending on more than the permanency of publication, then s.124 may not be effective in all States in aiding persons defamed by radio or television.

The *Burns* and *Kasic* cases raise more issues than they satisfactorily resolve. As a result of those two cases, doubts have been cast on the effect of s.124. It is no longer possible to assume that this enactment effectively makes the broadcasting of a defamatory statement libel and not slander in those States, such as Victoria, that have not adopted legislation regarding defamation by radio or television.

The Broadcasting Power

The Constitutional power enabling the Commonwealth Parliament to legislate in the area of broadcasting is derived, as indicated, from s.51(v) which empowers Parliament to make laws concerning 'postal, telegraphic, telephonic and other like services'.

In formulating this head of power, the Australian founding fathers arrived at a definition which took into account the difficulties which had arisen under a similar, but more limited provision, in the United States Constitution. The American provision only confers power to establish 'post offices and post roads', and in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*[25] it was contended that this power did not extend to include the regulation of the electric telegraph. The United States Supreme Court held in that case that:

> . . . the powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new development of time and circumstance.

The framers of the Australian Constitution knew that inevitably they could not foresee all the questions which might arise in the future and all the circumstances which might call for exercise of federal powers other than those already granted. In drafting s.51(v) they mentioned the technological developments in the field of communications which had

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23 [1968] V.R. 667, 670.
24 [1932] V.L.R. 425.
25 96 U.S., 1, 9 (1877); 24 Law Ed. 708, 710.

occurred up to that time, and in order to incorporate future advances, included the phrase 'and other like services'.

The addition of the words 'other like services' means that s.51(v) must be given a broad and generous interpretation for it is evident that the drafters of the Constitution 'expressed themselves in terms calculated to cover developments in science and organization enabling the control of analogous and ancillary services'.[26]

At the time when the Constitution was adopted, neither radio nor television had been invented, but as an open-ended grant of power s.51(v) incorporates both radio and television broadcasting, and would presumably also extend Commonwealth legislative competence to broadcasting by satellite or any other new form of communication.[27]

Radio Broadcasting

The scope of s.51(v) was first tested in 1935 before the High Court in *R. v. Brislan; Ex parte Williams*[28] where it was contended that Commonwealth legislation dealing with radio broadcasting was *ultra vires*, as broadcasting did not fall within one of the services specifically mentioned in s.51(v). The majority of the Court rejected this contention and held that that section conferred on Parliament power to legislate with respect to radio broadcasting. The reasons advanced by the Justices differed, but the majority were of the view that the Commonwealth could exercise legislative power in this area.

> Four of the five Justices constituting the majority regarded the means whereby broadcasting is performed as the feature bringing it within s.51(v), either as a telegraphic or telephonic service, or a like service, while Latham C. J. regarded broadcasting a service like to postal, telegraphic and telephonic services because each is a form of communication.[29]

Dixon J. dissented and was not prepared to accept the wider view of the majority that the power conferred by s.51(v) extended to radio broadcasting. In his view broadcasting did not provide any inter-communication as did other specified services and it 'appeared to be outside the scope and purpose of the power'.[30]

Television Broadcasting

In *Jones v. The Commonwealth* [*no.2*][31] the High Court held that the scope of Commonwealth power under s.51(v) extends to the control and regulation of television broadcasting. This case concerned the acquisition of property by the Commonwealth for use as broadcasting

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26 *R.* v. *Brislan; Ex parte Williams,* (1935) 54 C.L.R. 263, 282, per Evatt and Rich J.J.
27 'If a new form of communication should be discovered it too might be made the subject of a "like service".' per Latham C. J. *Ibid.*, p. 277.
28 *Ibid.*, p. 263.
29 Per Menzies J. in *Jones* v. *The Commonwealth* [*No. 2*] (1965) 112 C.L.R. 206, 231.
30 (1935) 54 C.L.R. 262, 293.
31 (1964-1965) 112 C.L.R. 206.

and television studios of the Australian Broadcasting Commission. Two principal constitutional issues were before the court. First, whether television falls within s.51(v) and secondly, whether the powers conferred by that section were restricted only to supplying the means of communication or whether they extended to preparation of material for transmission.

The court easily disposed of the first issue as both parties regarded the transmission of television messages as being a 'like' service within the genus of s.51(v) and that the reasoning of the majority in *Brislan's Case*[32] would support that view. However, it was argued by the plaintiff that the supplying of material to be broadcast and the production by the Australian Broadcasting Commission of programmes to be telecast, were beyond power as not being a 'like' service. The actual broadcasting and telecasting of those programmes was carried out by the Postmaster-General's Department, which it was said, provided the 'service' in the relevant sense. The duties and functions of the Commission are concerned with the actual production of programmes not the actual transmission of them, which the plaintiff contended was the subject matter of the Commonwealth's power under s.51(v) of the Constitution.[33]

The majority of the High Court was not prepared to restrict the ambit of federal power to such a limited extent and held that the Broadcasting and Television Act 1942-1962, in so far as it incorporated the Commission and authorized it to prepare programmes and to use apparatus provided for transmission by the Postmaster-General, was a valid law under s.51(v).[34]

The Chief Justice and Taylor J. agreed with Kitto J. who held:

> ... the power under s.51(v) is not confined to providing for the establishment, maintenance and operation of the telegraphic, telephonic or other like services, but extends to the choice of the persons who may make use of such a service either to send or to receive communications, to the conditions upon which persons may so use it, and to every aspect of the use and advantage they may have from it. No narrower view would be consistent with the understanding, upon which *Brislan's Case* insists, of the grant of power in s.51(v).[35]

McTiernan J. held that proper incidents of broadcasting and television services are the preparation of programmes for broadcasting. In his view it was incidental to the conduct of the service not only to provide and compile adequate and comprehensive programmes for transmission, but also to take appropriate measures to maintain a supply of such programmes.[36]

Owen J. said:

> to hold that the only power exercisable by the Commonwealth is

32 (1935) 54 C.L.R. 262.
33 See Note: (1965) Federal L.R. 342, 345 for a critical analysis of *Jones* v. *The Commonwealth [No. 2]* and *R.* v. *Brislan; Ex parte Williams.*
34 Per Barwick C. J. (1964-1965) 112 C.L.R. 206, 218.
35 (1964-1965) 112 C.L.R. 206, 226.
36 *Ibid.*, p. 223.

> to provide the technical apparatus for transmission (of television services) would be to take an unduly narrow view of the powers conferred by s.51(v).[37]

Windeyer J. was of the view that the Commonwealth Parliament may control and authorize a corporation of its creation to provide or control television stations, and it may authorize its corporate agent to control the programmes to be shown and, if it desires, to provide them.[38]

Menzies J., dissenting, held that the Commission did not provide, according to the test laid down by at least three judges in *Brislan's Case*, either a telephonic service or a service 'like' a telephonic service. He accepted the plaintiff's argument that the Commission's principal function is to prepare and present programmes, not transmit them.[39]

The High Court considered Commonwealth legislative power concerning television in *Herald and Weekly Times Ltd. v. The Commonwealth*[40] where it upheld the validity of legislation imposing conditions upon the holding of commercial television licences, and which controlled, by way of penalty, relationships through which some power to influence companies providing television services could be exercised. The legislative provisions approved by the Court were designed to ensure 'freedom of competition between television services' and as Menzies J. indicated, 'their extent was purely a matter for Parliament'.[41] As a result of these decisions, it is evident that the Commonwealth Parliament can exercise wide powers of regulation and control over radio and television broadcasting.

The Constitutionality of s.124

The Commonwealth clearly is empowered to legislate with respect to radio and television. However, it is doubtful whether defamation is comprehended within this power. The principal constitutional issue posed by s.124 is whether it is a law 'with respect to postal, telegraphic, telephonic or other like services'. If this enactment may be characterized as a law with respect to broadcasting then no question arises as to its validity. However, if the true nature and character of the section is considered to be a law with respect to defamation, and not broadcasting, then it is invalid.

The unambiguous words of the section itself indicate that it is concerned with two substantive legal matters: the law of defamation and the law of broadcasting. But it is one or the other for the purpose of constitutional validity under s.51(v). While this section is incorporated in the Broadcasting and Television Act 1942-1956 the form of the legislation in which it appears is not decisive in determining its validity. The validity of any section is not ensured by its inclusion in an Act, described by Parliament as concerning a particular subject matter, when the sub-

37 *Ibid.*, p. 245.
38 *Ibid.*, p. 237.
39 *Ibid.*, p. 233.
40 (1966) 115 C.L.R. 418.
41 *Ibid.*, p. 437.

stantial operation of the enactment in question may directly affect an altogether different matter not contemplated within the legislative powers of the Commonwealth. All laws are laws with respect to a number of things. In determining the validity of a law

> it is in the first place obviously necessary to construe the law and to determine its operation and effect (that is, to decide what the Act actually does). In the second place one must determine the relation of that which the Act does to a subject matter in respect of which it is contended that the relevant Parliament has power to make laws.[42]

The Characterization Issue

A strong argument could be advanced that s.124 is *invalid* because it cannot be characterized as a law concerning any legislative power conferred upon Parliament. There is no specific constitutional head of power enabling the Commonwealth to make laws with respect to defamation. The only head of power which Parliament could be assumed to have relied upon to support the enactment is the power concerning broadcasting under s.51(v), or the incidental power in s.51(xxxix) in its application to broadcasting.[43]

The plenary grant of power made under s.51(v) of the Constitution for the provision of broadcasting and other services does not include a reference to defamation and the link with Commonwealth power under that section is therefore a most tenuous one as defamation cannot be regarded as a 'service' within the meaning of that section or even as being similar to the genus of services enumerated in s.51(v). The High Court, by giving s.51(v) a broad interpretation, has in effect expanded that section to now read 'postal, telegraphic, telephonic *radio, television* and other like services'. While the Court has extended and updated the range of those services, it has not expanded the enactment to include the independent and distinct subject of defamation.

The language employed in s.124 — 'for the purpose of the law of defamation ...' — clearly indicates that the section's legal operation or effect is to affect defamatory statements made by means of television or radio. It is thus a law 'with respect to'[44] television, radio and defamation.

In arguing that s.124 is invalid, it could be said that its 'relevance to' or 'connexion with' a head of federal legislative power is merely incidental. What is significant is that the operation of the section clearly

42 Per Latham C. J. in *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1, 186.

43 'A legislative power ... with respect to any subject matter contains within itself authority over whatever is incidental to the subject matter of the power and enables the legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental.' per Dixon C. J. in *Wragg* v. *N.S.W.* (1953) 88 C.L.R. 353, 386.

44 In *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55, 77, Dixon C. J. said: 'The words "with respect to" ought never to be neglected in considering the extent of a legislative power conferred by s.51 or s.52. For what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament.'

affects rights, duties, powers and privileges[45] of broadcasters, telecasters and those defamed.

The common law rules concerning publication of defamatory statements are materially changed by its operation and a strong argument could be advanced that s.124 is principally concerned with defamation and not broadcasting or telecasting.

Under s.51(xxi) and s.51(xxii) of the Constitution (the 'Marriage Power'), the Commonwealth has specific legislative power to affect fundamental private rights and interpersonal relationships. By analogy, decisions concerning the marriage power may shed light on the scope of the broadcasting power in so far as it concerns private rights and duties.

In *Attorney-General (Vic.) v. The Commonwealth*,[46] a case involving the marriage power, Windeyer J. succinctly stated the limits on Commonwealth power in the area of private law:

> Speaking generally the Constitution does not give the national Parliament powers over fundamental private rights... But the powers that the Constitution gives to the Commonwealth are mostly over topics which involve in some way functions of government or the relationships of subjects to government, not the relationships of subjects to one another in matters of private law.[47]

The law of defamation is a branch of private law which does not in any way involve the functions of government. The government may not sue for defamation as it is not a juristic person in the relevant sense. The protection afforded by group libel similarly does not avail the government as a body. If a member of the government is defamed he may bring a personal action but he cannot sue as a representative on behalf of the government. The relationships of subjects to the government are also not involved in a defamation action unless, of course, the government should be responsible for the defamatory publication. An argument might thus be advanced that the legal rights and duties affected are those that arise out of a defamation action and therefore the section should properly be characterized as a law with respect to defamation.

The marriage power also raises problems similar to those posed by the broadcasting power. The marriage power extends to legislation on the subject of the contract of marriage, and authorizes legislation on matters such as form, capacity and evidence, just as the broadcasting power authorizes legislation, such as the Broadcasting and Television Act 1942-1956, determining the description of those who may obtain licences, the conditions for holding licences and the form and method of transmission. But does the marriage power extend to the authorization of legislation affecting the incidents of the status of marriage, and the

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45 In *Fairfax* v. *Federal Commissioner of Taxation* (1965) 114 C.L.R. 1, Kitto J. observed: 'The question is always one of subject matter to be determined by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes.' (pp. 6, 7).

46 (1961) 107 C.L.R. 520.

47 *Ibid.*, p. 529.

broadcasting power to the legislation affecting the legal liability of the licensee in respect of material broadcast by it in the various States of the Commonwealth? In *Attorney-General (Vic.) v. The Commonwealth*[48] Dixon C. J. and Windeyer J. both doubted whether the marriage power extended to authorize legislation as to the effect of marriage upon property, contractual and other obligations.

It is problematical therefore whether the marriage power extends to the regulation of the rights and duties of married people as between the world at large. Those marital rights and duties *inter se* which concern such matters as testamentary disposition, community property or adoption may not be classified as 'marriage law' but might be designated as 'family law' and therefore beyond the marriage power. Accordingly, s.124, as affecting the common law position of broadcasters *vis-a-vis* those defamed, would not be a law with respect to 'broadcasting', but would be designated a law with respect to 'defamation'.

The Construction of s.124

The view that s.124 is a *valid* enactment may also be strongly argued. The source of legislative power which extends to defamation can be drawn from the broadcasting power conferred by s.51(v) despite the omission of defamation from its terms; or, from the incidental power under s.51(xxxix). Transmission is the *sine qua non* of the defamation in this context, for unless the defamatory statement in question is 'broadcast' or 'telecast' then no cause of action lies. Section 124 can thus be characterized as a law with respect to broadcasting, a recognized head of Commonwealth power. It does not matter that the effects of the section also impinge upon a matter not included within the enumerated heads of power. There is a direct and substantial connexion between defamation by radio and television and one of the direct consequences of the exercise of the broadcasting power. As those communication services are widely controlled and directed by the exercise of the Commonwealth broadcasting power under s.51(v) it is therefore within the power of federal Parliament to enact legislation concerning the content of radio or television broadcasts including provisions relating to defamatory transmissions.

In characterizing s.124, it is suggested that its validity should be tested by reference to the substantial operation[49] of the enactment, or what it affects, not what things it may indirectly affect.[50] To determine this question of the principal character of the section, it is only necessary to

48 *Ibid.*, p. 543, 544.

49 In *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (1940) C.L.R. 338, the Privy Council held that the 'pith and substance' of a statute was to be regarded in order to determine its validity. In *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1, the plaintiff invoked the test of 'pith and substance' to characterize the legislation in question. This doctrine, together with the propositions that the exercise of power was valid so long as a law 'touched and concerned' or was 'relevant to' a given subject matter, were considered by the Court.

50 *McArthur (W. & A.) Ltd.* v. *Queensland* (1920) 28 C.L.R. 546, 564.

consider its terms. 'There is no necessity to go beyond its expressed language to seek the motive or purpose of the legislature.'[51] The terms of s.124 indicate that its principal legal effects all concern broadcasting. It assists in the control that may be exercised over programme content by deterring the publication of possible defamatory statements, and it puts on notice those responsible for the transmission of words or other matter that their transmissions may constitute the basis of a defamation action. As s.124 impinges on matters that may be described as being with respect to both the broadcasting power and to defamation — a subject not contemplated within Commonwealth legislative power — the method of construction adopted by the High Court in analogous cases is instructive.

In *Fairfax v. Commissioner of Taxation*[52] and *Herald and Weekly Times Ltd. v. The Commonwealth*[53] the High Court adopted a broad approach to the question whether a Commonwealth law may be said to be 'with respect to' a head of power, holding that the fact that a law may also be said to be 'with respect to' some other matter not within power, does not render it *ultra vires*.[54] In the *Fairfax Case*, the appellants argued that s.11 of the Income Tax and Social Services Contribution Assessment Act 1961 was not a law with respect to taxation but a law with respect to investment in public securities, and beyond the power of Parliament. This section prescribed conditions for the investment of superannuation funds in public securities, and income tax was attracted as a sanction in the event of non-observance of the conditions. The respondent contended that if a law is characterized as one with respect to a head of Commonwealth power — in the instant case taxation — it does not matter that it also affects a matter not included in the heads of Commonwealth power. The characterization which brings the law within power is decisive. This view was unanimously upheld by the High Court.

What motive[55] actuated the legislature to adopt this section is not considered by the Court nor is the ultimate end to be attained:

> A statute is only a means to an end, and its validity depends upon whether the legislature is or is not authorized to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences.[56]

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51 *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31, per Dixon J. at p. 79.

52 (1965) 114 C.L.R. 1.

53 (1966) 115 C.L.R. 418.

54 Sawer: 'Comment' [1969] *Public Laws*, p. 7.

55 See *e.g. A. G. for Victoria* v. *The Commonwealth* (1961) 107 C.L.R. 529 and *Fairfax* v. *Commissioner for Taxation* (1965) 115 C.L.R. 1, per Taylor J. at p. 7: 'This Court has consistently maintained that where a challenge is made to a statute on the ground that it is not a law with respect to a particular legislative subject matter it is irrelevant to consider the motive which led to its enactment or to examine the indirect consequences which may ultimately result for it; if it be in substance, a law with respect to a particular subject matter, the motives which influenced the legislature or the indirect consequences of the measure cannot operate to change its character.'

56 *R.* v. *Barger* (1908) 6 C.L.R. 44, 67, per Griffith C.J., Barton and O'Connor JJ.

Thus s.124 poses a classical problem of characterization,[57] for its direct legal effects concern two separate and distinct issues, one within power, the other without. The effect of the section is more than indirect on the law of defamation and Parliament is not specifically empowered to legislate with respect to that subject. Despite the dual nature of this legislation it will be held to be within power for the substance of the enactment operates within a field assigned to the Commonwealth.

The issue of characterizing a statute adopted under the broadcasting power was posed to the High Court in *Herald and Weekly Times Ltd. v. The Commonwealth.*[58] In this case the Court held that the Parliamentary power to make laws with respect to television services 'extends to determining the description of those who will or may obtain licences to conduct television services and the circumstances in which a licence having been granted, will or may be determined'.[59] The statutory power to grant licences for the conduct of commercial television stations was attacked as having been actuated by a purpose extraneous to the power. The court was not prepared to accept the argument that the conditions prescribed by Parliament as to the suitability of the persons holding licences to conduct television services, should have a real connexion with those services. The plaintiffs contended that Parliament could deny such a licence, for example, to a person convicted of blasphemy or obscenity, as that conviction bore upon the suitability of a person to conduct a television service, but that Parliament could not deny a licence to a person because of a conviction for manslaughter or house-breaking — convictions having nothing to do with the suitability of a person to conduct a television service.[60] Menzies J. held that:

> If Parliament can prohibit any person from conducting a television service... Parliament can also determine the persons to whom, and the conditions upon which, authority to transmit will, or may be, given and may be held, and it is not necessary for validity to find in any criterion which Parliament has adopted something which, in itself, relates to television services. Parliament can give and Parliament can take away upon its own terms.[61]

It is evident from the *Herald and Weekly Times Case* that that which may be prohibited may also be permitted subject to conditions. Parliament may legislate any conditions it chooses to prescribe for the selection of a commercial television operator. A law with respect to those conditions, just as a law, for example, prohibiting a cabinet member from holding shares in a company holding a television licence, would be regarded as a law with respect to television services.[62]

On the basis of *Jones v. The Commonwealth* [*no.2*],[63] which upheld

57 See Lane: 'Judicial Review or Government by the High Court', (1966) 5 *Syd. L.R.* 211, for a detailed analysis of how the High Court ascertains the character or subject matter of a Commonwealth Act.

58 (1966) 115 C.L.R. 418.

59 *Ibid.*

60 *Ibid.*, p. 439.

61 *Ibid.*, p. 440.

62 *Ibid.*, p. 440, 441 per Menzies J.

63 (1964-1965) 112 C.L.R. 206.

the function of the Australian Broadcasting Commission to produce material for radio and television dissemination, a law concerning the content or subject matter of broadcasts might also be regarded as being a law with respect to broadcasting. Parliament could thus enact those conditions it saw fit regulating what may or may not be disseminated. By s.118 of The Broadcasting and Television Act 1942-1969 such matters as blasphemous, indecent and obscene disseminations are prohibited. Just as a law with respect to a blasphemous or obscene broadcast is a law with respect to a subject of federal legislative power, so also is s.124 as being a law with respect to the transmission of defamatory matters. But unlike s.118, s.124 does not ban or regulate defamatory broadcasts. What this latter section does provide is the attribution of actionable consequences to those responsible for the transmission of defamatory broadcasts and telecasts over services the Commonwealth undoubtedly controls.

In the light of the *Brislan, Jones* and *Herald and Weekly Times* cases, it is submitted that Parliament is competent to direct in what manner, at what time, and subject to what conditions, broadcasting and the reception of messages are to be permitted throughout the Commonwealth.[64]

Both broadcasting law and defamation law may be regarded as individual and particular branches of communication law which occasionally interact. Before the words or material become defamatory by radio or television, they must be transmitted. The transmission takes place via the media of services controlled by the Commonwealth. Until the defamatory statements are disseminated, they do not satisfy the common law rules regarding publication. The defamation does not occur until and unless the words are broadcast, and in the view of the writer, s.124 is a valid exercise of power under s.51(v).

If we assume that s.124 is a valid enactment, an interesting hypothetical situation would arise should the Commonwealth, instead of adding to a defamed plaintiff's rights, enact a provision in the Broadcasting and Television Act which denied or abolished certain common law rights or remedies. What if the Federal Parliament provided that no award of exemplary damages could be made in the event of a defamatory broadcast or telecast? Alternatively, what would be the effect of a federal statute which provided that the only remedy available to such a defamed person was an apology from the radio or television station concerned, and that no action for damages could be brought. In each of these situations, the laws concerned would probably be characterized as being with respect to broadcasting and therefore valid. A more difficult issue arises should the Commonwealth insert in the Broadcasting and Television Act a complete code on liability for defamation in respect of material transmitted by radio or television. In such a case it might

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64 See Wynes: *Legislative, Executive and Judicial Power in Australia*, 4th ed., p. 133.

appear that the full force and effect of the section is directed towards the law of defamation. Nevertheless, broadcasting is involved in more than an ancillary or consequential way and even such a code might be regarded as being with respect to broadcasting or as one of the incidents of broadcasting.

In support of the view that s.124 is a valid enactment, the Commonwealth has also adopted the Parliamentary Proceedings Broadcasting Act 1946, which

> enables the broadcasting of some of the proceedings of the House to take place, requires the Australian Broadcasting Commission to broadcast them and gives immunity from action or proceedings civil or criminal against any person for broadcasting any portion of the proceedings of the House.[65]

This conferring of absolute privilege, in respect of broadcasts of parliamentary debates, is enacted pursuant to a combination of s.49 of the Constitution which enables Parliament to declare its powers, privileges and immunities; and s.51(xxxix), the incidental power. Both s.124 and the Parliamentary Proceedings Broadcasting Act 1946 deal with matters arising out of broadcasts. No issue concerning Parliamentary privilege arises until the broadcast is transmitted, and by analogy no issue concerning defamation arises until the words or matter are also transmitted.

Conclusion

Because the principal subject matter of s.124, broadcasting, involves or includes a plethora of things that are incidental, consequential or ancillary to it, a law as to some aspects of these things would not be *ultra vires*. On the other hand, the operation of a law upon any subject may not be apparent on its face but yet be clear when the actual practical working of cause and effect is perceived.[66] Defamation by radio or television is an incident or a consequence of broadcasting as the defamatory effect does not occur until so caused by the operation of the media. The two issues of broadcasting and defamation are inextricably interwoven and it is not possible in this context to divorce the effect of laws concerning broadcasting from those that touch and concern defamation.

This section should be interpreted in the light of the various cases dealing with the broadcasting power. Those decisions have established that s.51(v) of the Constitution extends to radio and television and that strict regulation and control of those services may be exercised by the Commonwealth.

Once it is established that there can be no radio or television broadcasting in Australia without a Commonwealth licence and the Commonwealth may, if it sees fit, prohibit transmission altogether, then it can control all of the incidents that result from an activity that cannot be carried on in the absence of Commonwealth permission. As broadcast-

65 Per Dixon C. J. in *R.* v. *Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 168.

66 See *Attorney-General (Vic.)* v. *The Commonwealth* (1961-1962) 107 C.L.R. 529, 543, per Dixon C. J.

ing is in effect a Commonwealth creation, then the Federal Parliament may make laws controlling all activities that occur only because the Commonwealth allows them. Implicit in this argument is the control that the Commonwealth may exercise over the content and subject matter of programmes broadcast. If defamatory material is broadcast then the Commonwealth may revoke the broadcaster's licence or, as in the case of s.124, provide that for the purposes of defamation a private remedy will be at the suit of a defamed individual. Despite the lack of specific reference to defamation as a legislative head of power under the Constitution, and despite the nature of s.124 which deals with personal rights, duties and obligations, it is submitted that s.124 is a valid exercise of Commonwealth legislative power.