The New South Wales Court of Appeal decision in O’Shane v Harbour Radio exposes various issues involved in a judicial officer’s suit for defamation, including the challenges faced by defendants in raising the defence of truth. While the majority found that Magistrate O’Shane was not barred from bringing a defamation claim against Alan Jones, the minority held it should be disallowed because of public policy reasons.

This paper proposes that the policy reasons in favour of barring judicial defamation suits can potentially be invoked to establish a novel concept of ‘judicial reputation’, borrowing from existing jurisprudence in relation to ‘governmental reputation’. Applied here, a plaintiff should not have capacity to sue in defamation in order to protect their judicial reputation, because this type of reputation is incompatible with democratic principles of freedom of speech. Having regard to the unique position judicial officers are in, in that they effectively embody the court, and the public nature of the defendant’s wrong in publishing words criticising them, it can be said that a personal suit to protect judicial reputation is incongruous with defamation law.
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An awkward situation: The courts’ approach to a judicial officer suing for defamation

Introduction

The prospect of a judicial officer suing a member of the public for defamation is ‘unseemly’,¹ and acknowledged to give rise to ‘awkward situations’.² Nonetheless judicial officers have so sued, and the recent New South Wales Court of Appeal judgment in *O’Shane v Harbour Radio*³ (‘*O’Shane’*) demonstrates that the issues arising in such proceedings are far from resolved. In *O’Shane* a bare majority determined that former magistrate Patricia O’Shane was not barred from bringing a defamation suit against radio show host Alan Jones for criticising her decision-making as ‘diabolically bad’. In contrast the minority found that, as a matter of principle, judges could not sue to protect their reputation in respect of their judicial capacity and conduct.

This paper considers whether and to what extent a judicial officer should have capacity to sue for defamation in order to protect his or her professional reputation.

There is no clear rule of law prohibiting judicial defamation claims, as per the outcome of *O’Shane*, but wherever the issue has arisen there has been a persistent

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* University of Sydney Law School, 2014. I am grateful for the feedback and advice of my supervisor, Associate Professor David Rolph.

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and principled view that such claims should not be allowed. It is submitted that one way of resolving this is through the concept of a ‘judicial reputation’ which cannot be the subject of a defamation claim. The idea of a judicial reputation that cannot be protected by defamation, just as the governmental reputation of a local council cannot be protected by defamation, has not been adverted to in earlier cases or commentary. This proposal, however, attempts to incorporate the various public policy considerations that have been previously raised.

As a preliminary matter, it should be noted that generally judges, particularly those sitting in more senior courts, rarely sue for defamation.4 That there are very few precedents is most probably attributable to reluctance on the part of judicial officers in becoming plaintiffs in their own or other courts. Asking another judge, whether or not more senior or junior, or a jury to determine judicial capacity may be embarrassing. In addition, the prospect of losing such a claim in the public eye could render the judge’s continued service untenable. It might be said, therefore, that the issue ‘scarcely cries out for an exceptional solution’.5 This paper, however, reflects on the various and complex issues emerging from the few examples that have arisen. It attempts to analyse existing views, mostly expressed in the form of public policy or public interests, in order to pull together an explanation for why there is such unease in relation to judicial defamation claims. Finally it proposes a way of incorporating existing reasoning into a legal rule prohibiting such suits.

Chapter I provides a detailed consideration of the judgment in O’Shane. First, the factual background and appeal questions are outlined. Secondly, the few previous instances of judicial consideration of the issue are discussed. Thirdly, the majority as

5 Mann v O’Neill (1997) 191 CLR 204, 242 (Kirby J).
well as dissenting judgments in *O'Shanes* are analysed. Finally, Chapter I concludes with commentary on the issues left unresolved.

Chapter II presents a possible solution to the unresolved issues emerging in *O'Shanes*, namely through the concept of judicial reputation. This chapter first outlines the jurisprudence concerning the concept of governmental reputation which cannot be the subject of a defamation claim. Then, similar reasoning is applied to suggest that a plaintiff should have no capacity to sue in defamation to protect his or her judicial reputation. In particular freedom of speech to criticise the judiciary is considered, and it is submitted that this freedom should be protected. The public nature of the judge's role and the public nature of the defendant's wrong are then explored to justify this outcome. Finally, the possibilities and limitations of judicial reputation as a proposal are considered.
I. **O’Shane v Harbour Radio**

*O’Shane* is the most recent and extensive examination of issues arising in a judicial officer’s suit for defamation in respect of disparaging comments about their judicial conduct and capacity. In this case former Magistrate Patricia O’Shane sued well-known radio broadcaster Alan Jones for stating on morning radio that she, among other things, made ‘diabolically bad decisions’. The New South Wales Court of Appeal’s judgment explores a number of interesting legal issues, most relevantly for this paper whether a judicial officer should be able to sue for defamation at all. This issue divided the court 3:2.

First, this chapter outlines the facts and background to the five questions removed to the New South Wales Court of Appeal by McCallum J. Secondly, it canvasses previous judicial consideration of the question of whether a judicial officer is entitled to sue for defamation. Thirdly, it summarises the decision on appeal, which consisted of five separate judgments. Finally, it identifies the areas of ambiguity that build the foundation for Chapter II.

**Background to the appeal**

In 2011 the Judicial Commission of New South Wales was investigating complaints made against Magistrate Brian Maloney for inappropriate comments and behaviour on the bench.\(^6\) This investigation commenced some months after a similar inquiry into Magistrate Jennifer Betts, which was also prompted by complaints regarding her conduct on the bench towards litigants, and ultimately resulted in an unsuccessful

motion before Parliament for her dismissal.\(^7\) Around this time there was significant media commentary on both cases.\(^8\)

It was within this context that Alan Jones expressed his views on the investigation into Magistrate Maloney. On his breakfast show on 2GB Radio, Jones defended Maloney as a ‘good man, fighting for his professional life.’ Jones observed that, while Maloney had disposed of thousands of cases in fifteen years on the bench, there were only four complaints made against him. Turning his attention to Magistrate O’Shane, Jones stated:

> My understanding is the complaints [against Maloney] are in respect to what are said to be inappropriate comments. My understanding is there’s no reference to any wrong decisions based on law. But here’s the rub. Pat O’Shane can deliver the most diabolical and wrong decisions in law, and they go through to the keeper, Pat O’Shane.

Similar statements were made in the following week on the same radio show. On 24 November 2011 O’Shane commenced defamation proceedings against Jones and the radio station operator, Harbour Radio Pty Ltd. The first instance proceedings were before McCallum J in the Supreme Court of New South Wales. O’Shane pleaded that the radio broadcast conveyed, among other things, that she had ‘failed

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in her duties as a Magistrate by delivering diabolically bad decisions’ and ‘failed in her duty as a Magistrate by delivering decisions which are wrong in law’. In response the defendants raised the defence of justification,\(^9\) seeking to prove that each imputation was substantially true and therefore not defamatory.

This was, to the author’s knowledge, the first time that a defendant attempted to prove the substantial truth of imputations concerning judicial conduct and capacity. In order to defend Jones’ comments, the defendants needed to prove, for example, that it was substantially true to say the plaintiff failed in her duty as a magistrate by delivering diabolically bad decisions. They proposed to do so by attacking the plaintiff’s judicial reasoning in earlier local court criminal decisions. This was an interesting strategy. As a matter of evidence law a judge is not compellable to give evidence,\(^10\) and cannot give evidence of their reasons except as stated on the record of judgment.\(^11\) Furthermore judgments cannot be tendered to prove the truth of any fact in issue in those proceedings.\(^12\) It appears that if a defendant seeks to prove the truth of statements strongly criticising a judge’s reasoning, they will generally need to resort to attacking the plaintiff’s reasoning in earlier decisions.

The defendants provided particulars of the defence of truth by relying on nine decisions delivered by the plaintiff between 1991 and 2012. Of the nine decisions relied on by the defendants, seven had been successfully appealed in the Supreme Court\(^13\) and the defendants indicated they would ‘adopt the reasoning’ of the appeal

\(^9\) _Defamation Act 2005_ (NSW) s 25.
\(^10\) _Evidence Act 1995_ (NSW) s 16.
\(^11\) _Evidence Act 1995_ (NSW) s 129.
\(^12\) _Evidence Act 1995_ (NSW) s 91.
judgments to criticise the plaintiff’s decisions at first instance. Some of the decisions the defendants relied on had formed the subject of media coverage and criticism. The appeal decisions overturning the plaintiff’s judgments had clearly found errors of law. In DPP v Yeo for example the plaintiff had dismissed a charge against a defendant who had entered a plea of guilty. On appeal, Johnson J held the magistrate’s conduct of the proceedings ‘bore little resemblance to what was required by law’ and ordered that the matter be reheard by a different magistrate.

The two decisions that had not been appealed, that is, DPP v Kanaan and Berlei Bras, were attacked by the defendants on the basis of misconduct or inappropriate conduct. In Berlei Bras four women had pleaded guilty to maliciously damaging a billboard advertising Berlei Bras. The plaintiff did not record a conviction, stating in the course of her reasons that the erection of the billboard was the ‘real crime’ and that those accused of defacing it were ‘not misguided in their actions’.

The plaintiff objected to the defendants’ proposed defence of truth. By way of notice of motion the plaintiff applied to strike out the defence of truth, arguing that the defendants’ pleading of the defence infringed the principle of judicial immunity or was otherwise an abuse of process. The strike out application was initially made when the

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16 DPP v Yeo [2008] NSWSC 953, [39].
17 O’Shane v Harbour Radio Pty Ltd (2013) 303 ALR 314, 323 [33], 353-354 [176].
defendants proposed to prove that the seven appeal judgments overturning the plaintiff’s decisions were correct. If that was the case the plaintiff contended that this amounted to a form of impermissible re-litigation.\textsuperscript{19}

McCallum J removed to the Court of Appeal four questions.\textsuperscript{20} The first three questions concerned whether the defence of truth could be pleaded in a manner that criticised the plaintiff’s judgments, or whether such a defence was precluded by the principles of judicial immunity or finality. The questions were summarised in the judgment of Beazley P as follows:

A. \textit{Are the defendants precluded by the principle of judicial immunity from pleading their defence of truth?}

B. \textit{If Question A is answered in the affirmative, what is the consequence for these proceedings?}

C. \textit{Does the defendants’ defence of truth constitute an abuse of process on the basis that it is inconsistent with the principle of finality?}\textsuperscript{21}

As a starting point, judicial immunity is the proposition that a judge is immune from suit.\textsuperscript{22} Finality is the principle that controversies are resolved once and for all by the judicial system, which is reflected in abuse of process measures such as issue estoppel and \textit{res judicata}.\textsuperscript{23} It is clear from the questions referred by McCallum J that the application of judicial immunity, or finality, to the attempt of a defendant in defamation to prove that the judgments of a judicial officer were incorrectly decided is unchartered territory.

\textsuperscript{19} \textit{O’Shane v Harbour Radio Pty Ltd} (2013) 303 ALR 314, 321 [20].
\textsuperscript{20} \textit{Uniform Procedure Rules 2005 (NSW)} r 1.21.
\textsuperscript{21} \textit{O’Shane v Harbour Radio Pty Ltd} (2013) 303 ALR 314, 325 [40].
\textsuperscript{22} \textit{Fingleton v The Queen} (2005) 227 CLR 166, 185 (Gleeson CJ); \textit{Rajski v Powell} (1987) 11 NSWLR 522, 527, 538.
\textsuperscript{23} \textit{D’Orta-Ekenaik}e \textit{v Victoria Legal Aid} (2005) 223 CLR 1, 17.
As Question B indicates, there is no clear precedent on how the matter would be resolved if the defendants were denied the ability to rely on the defence of truth because of judicial immunity or finality. McCallum J therefore also referred the question of whether judicial immunity, if it had the effect of striking out the defence of truth, infringed the implied freedom of political communication as established in *Lange v Australian Broadcasting Corporation*\(^\text{24}\) (‘*Lange*’):

**D. Is the principle of judicial immunity consistent with the implied freedom of political communication guaranteed by the Australian Constitution?**\(^\text{25}\)

The defendants did not raise the implied freedom of political communication directly by way of defence to the plaintiff’s claim. That could have been done in the form of an extended *Lange* qualified privilege defence. This was most likely not raised because the implied freedom of speech is based on representative democracy and an informed electoral vote.\(^\text{26}\) Previous consideration indicates that communications concerning the judiciary are regarded as outside the scope of the implied freedom,\(^\text{27}\) even if the judiciary is the third arm of government. Despite the way in which the appeal question was framed, that is by arguing that if judicial immunity defeated the defence of truth it infringed freedom of political speech, rather than raising the privilege as a defence itself, it was still in issue whether this freedom applied to communications criticising the judiciary.

**Troughton v McIntosh** and previous judicial consideration

So far the difficulties in this case had arisen in relation to the defence of truth and how it was to be pleaded. Before the appeal hearing the defendants raised a

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\(^{24}\) *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

\(^{25}\) *O’Shane v Harbour Radio Pty Ltd* (2013) 303 ALR 314, 325 [40].

\(^{26}\) *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559-560.

\(^{27}\) *The Herald and Weekly Times Ltd v Popovic* (2003) 9 VR 1; *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.
preliminary matter, which formed the fifth question on appeal. Relying on the 1896
decision of the Full Court of the Supreme Court of New South Wales in *Troughton v
Mcintosh*28 (‘*Troughton*’) the defendants argued the plaintiff ought to be barred from
bringing the claim in the first place. In *Troughton* the majority of the Full Court held
that a police magistrate had no personal action in defamation against a former litigant
for defamatory statements made in court. The fifth question on appeal was therefore:

E. *Is the plaintiff barred from bringing defamation proceedings with respect to
criticism of the performance of her function as a magistrate, having regard to
the decision in *Troughton v McIntosh*?*

The defendant in *Troughton* had made defamatory comments in court about the
plaintiff magistrate after losing four of five appeals before him in respect of rates
payable on property. A few days earlier the defendant had complained about the
magistrate in a public meeting, and before leaving the court said, ‘if I had not made
those remarks at the meeting the other night my rates would have been reduced’,
implying that the magistrate was corrupt. When ordered to leave the court he said, ‘it
is not justice’ or ‘there is no justice here’.

The majority of the Full Court of the Supreme Court (Stephen and Cohen JJ,
Simpson J dissenting) held that there was no personal action available to the
magistrate. The ratio of this case is not easily discernable, because the judgment
includes commentary by the majority, not forming binding precedent, about the
inappropriateness of the claim. The ambiguities are reflected in the different ways the
case has been interpreted by subsequent authorities. It is worth now to consider in

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28 *Troughton v McIntosh* (1896) 17 NSWR(L) 334.
29 *O'Shane v Harbour Radio Pty Ltd* (2013) 303 ALR 314, 325 [40].
some detail the reasoning of Troughton, and subsequent reference to it in the High Court case of Mann v O'Neill.\textsuperscript{30}

To begin with, the majority judges in Troughton acknowledged that there was effectively no precedent of a judge suing for defamation,\textsuperscript{31} which was probably attributable to, in Stephen J’s words, a ‘presumed reluctance’ to sue. Secondly, Stephen J’s judgment turned on the characterisation of the allegedly defamatory statement as a contempt of court: any aspersion on the integrity of a judge was described as ‘a libel on the administration of justice’ such that ‘the personal wrong is … absorbed in the offence against the public, nay more, against the sovereign whom the Judge represents’.\textsuperscript{32} Stephen J thus objected to the availability of a ‘dual remedy’, that is, one to satisfy the public interest through contempt of court proceedings and another for personal reparations to the judge by way of defamation.\textsuperscript{33} Cohen J similarly had regard to the simultaneously public and private nature of the issue. He noted that an insult to the court in the presence of the court is a public wrong, not conferring upon the judge or magistrate any private right to damages.\textsuperscript{34}

Stephen J’s judgment is confined to the factual scenario where the statement was made while court was sitting. He acknowledged, however, that the reasons of policy prohibiting claims against former litigants applied equally to slanders occurring outside the confines of the courtroom and to libels by print publications. Stephen J left open the possibility that a dual remedy could be available in such cases.\textsuperscript{35} Cohen J’s judgment went further, mentioning that lower court judges ought not sue on

\textsuperscript{30} Mann v O’Neill (1997) 191 CLR 204.
\textsuperscript{31} Troughton v McIntosh (1896) 17 NSWR(L) 334, 337, 339-340 (Stephen J), 356 (Cohen J).
\textsuperscript{32} Ibid 337-338.
\textsuperscript{33} Ibid 337-338, 339.
\textsuperscript{34} Ibid 356.
\textsuperscript{35} Ibid 341.
defamatory words in respect of their judicial or magisterial functions, even if those words are uttered outside court.\textsuperscript{36}

Finally, in respect of absolute privilege, the court had heard submissions concerning whether the privilege afforded to witnesses and parties in court proceedings would extend to the comments made by the defendant after his matter had concluded.\textsuperscript{37} Stephen J dismissed the defendant’s arguments and concluded that whatever privilege counsel, witnesses or parties had in respect of defamatory words ‘none can extend to… accusing the sitting tribunal of injustice.’\textsuperscript{38} Instead, these words amounted to contempt of court. Cohen J, on the other hand, accepted the defendant’s submissions about absolute privilege and concluded that the defendant’s statements were still protected since they were spoken immediately after his matter was heard.\textsuperscript{39}

Simpson J, who was in dissent and would have allowed the claim, agreed with Stephen J that absolute immunity could not be claimed and also framed the remaining question as whether the action was maintainable.\textsuperscript{40} In his dissent Simpson J noted that the plaintiff, as a lower court Magistrate, would not have the power to bring contempt proceedings.\textsuperscript{41} He acknowledged the public policy reasons advanced by Stephen J to preclude such claims, but found that they were insufficient to justify the conclusion that the action was not maintainable.\textsuperscript{42}

What is apparent from \textit{Troughton} is that, even in this much earlier judgment, it is very difficult to articulate why a judge ought not sue for defamation, even if there are policy

\textsuperscript{36} Ibid 358-359.
\textsuperscript{37} Ibid 336.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid 363.
\textsuperscript{40} Ibid 346.
\textsuperscript{41} Ibid 346-347.
\textsuperscript{42} Ibid 351.
reasons why the claim might not be brought. The majority judgment might be understood as saying that there is no private remedy for defamation if the statement amounts to contempt of court. It might also be understood as articulating a general rule prohibiting judges from bringing claims in defamation, at least against former litigants.

It is clear that difficulties exist because the defendant’s comments were not merely criticisms against an ordinary person in their professional capacity. The defendant’s comments cast aspersions against the judge personally, but at the same time amounted to criticisms of the court itself. *Troughton* therefore implicitly acknowledges that it is difficult to draw the line between the reputation of a judge as an individual professional, and the reputation or authority of the court as an institution. This overlap is why the defendant’s comment might have been pursued as contempt of court in addition to defamation.

*Troughton* was only next considered in *Mann v O’Neill*.43 In that case, Special Magistrate O’Neill sued a former litigant, Dr Mann, for writing letters to the Attorney General, the Chief Magistrate and the Minister for Justice alleging that the plaintiff was unfit to hold office. The defendant argued that the letters were complaints about the magistrate made to relevant authorities, and should therefore be regarded as documents initiating proceedings to remove the magistrate from office. Since pleadings filed in the commencement of legal proceedings are subject to absolute privilege, and cannot be sued upon in defamation, it was argued that the defendant’s letters were privileged in the same way.44

The plurality of the High Court rejected this argument. The court held that that the letters did not have the absolute privilege afforded to statements and documents in

judicial or quasi-judicial proceedings, and that the categories of absolute privilege should only be expanded on the basis of necessity. The plurality did not consider *Troughton* but Gummow and Kirby JJ, who joined the majority in separate judgments, referred to it. McHugh J dissented, relying on the case to conclude that the complaint was protected by absolute privilege so that the magistrate had no action against the defendant.

Kirby J cited *Troughton* but said it was only authority for the principle that a judge could not sue for defamation instead of pursuing contempt proceedings where available. Therefore it had no application to the case before him. Kirby J acknowledged that there was no direct authority on point. Therefore he resolved the issue in the plaintiff’s favour by looking at the scope of absolute privilege generally, and considering public policy arguments for and against judges suing for defamation.

Gummow J also described the ratio of *Troughton* to be that there was no defamation claim where contempt was the appropriate cause of action, but adverted to the concerns expressed by Stephen J in *Troughton* that:

> For a Judge to descend from his judgment seat to the floor of the Court as a suitor against the man with whom he dealt or could have dealt judicially, seems to be a denial of the majesty of the law, a forgetfulness of his high representative character, an abasement of the dignity of his Court and his prestige as a Judge.

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46 Ibid 213, 216.
47 Ibid 236.
48 Ibid 252.
49 Ibid.
50 Ibid 269-274.
51 Ibid 245.
52 Ibid 244, quoting *Troughton v McIntosh* (1896) 17 NSWR(L) 334, 340.
Gummow J took from this that there are competing interests in the case of absolute privilege, namely freedom to publish malicious falsehoods and the administration of justice (or ‘the majesty of the law’). He considered that the balance was struck by limiting the protection of absolute privilege to statements made in the course of judicial proceedings.\(^{53}\) By this reasoning any diminution in a judge’s capacity to proceed in defamation, or any increase in the scope of defences, would go too far in the direction of undermining public confidence in the administration of justice.

In his dissenting judgment, McHugh J held that Dr Mann’s letters were protected by absolute privilege. This ensured that such actions were ‘terminated from the outset’.\(^{54}\)

First, he held that, as per Troughton, contempt proceedings vindicating the public interest should be brought in such circumstances rather than a personal defamation suit.\(^{55}\) Secondly, he held that it is in the public interest that complaints against judicial officers be protected against defamation suits\(^ {56}\) even if this means unjustified complaints are made as well as legitimate ones.\(^ {57}\) This strikes a different balance between public confidence in the administration of justice and freedom of speech to that propounded by Gummow J.

Despite at least two successful defamation claims by magistrates in the previous decade or so,\(^ {58}\) the defendants in O’Shane revived this issue. They argued that the principle from Troughton prevented the plaintiff from bringing the claim at all. From the defendants’ perspective, the difficulties in proving the defence of truth in respect of statements that the plaintiff made ‘diabolically bad decisions’ may explain resort to

\(^{53}\) Mann v O’Neill (1997) 191 CLR 204, 245.

\(^{54}\) Ibid 236.

\(^{55}\) Ibid 217.

\(^{56}\) Ibid.

\(^{57}\) Ibid 229-230.

this argument. It is, however, a difficult argument to make, at least on the basis of *Troughton*, given that Jones was never a litigant before the plaintiff and the comments were public criticism outside the context of a courtroom.

**The appeal decision**

On appeal the majority held that O'Shane was not debarred from bringing proceedings in defamation in respect of her judicial capacity and conduct. Beazley P, McColl JA and Tobias AJA concurring, held that *Troughton* stood only for the proposition that a judicial officer could not sue for defamation on comments made *in court*, because they are protected by absolute privilege.\(^59\) McColl JA separately agreed with the conclusion of Kirby J in *Mann v O'Neill* that *Troughton* stood for the proposition that a judicial officer could not pursue a defamation claim instead of contempt where the latter was appropriate.\(^60\)

The majority regarded *Troughton* as standing for a narrow proposition inapplicable to the case before them. In any event, they concluded that it could be distinguished. Beazley P and McColl JA noted that both *Troughton* and *Mann v O'Neill* involved suits by judicial officers against former litigants, whereas O'Shane had sued a public commentator.\(^61\) The majority regarded statements in *Troughton* to the effect that there was no personal right of action, even against members of the public, as obiter dicta.\(^62\)

Significantly, the majority held that this case was different because it was a direct and personal attack on the plaintiff rather than an attack on the institutional integrity of the

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60 Ibid 345 [138].
61 Ibid 330 [65]-[66] (Beazley P), 346 [144] (McColl JA).
magistracy. Therefore, it was unlikely that contempt proceedings could or would be brought. According to this reasoning if the plaintiff was denied the ability to bring defamation proceedings there would not be any appropriate control over the rights of defendants to publish material. In contrast, as discussed below, the minority opinion turned on characterising the defendant’s attack as going to judicial capacity and conduct, and therefore institutional in nature rather than only personally defamatory of the plaintiff.

McColl JA separately added that denying judicial officers the right to sue for defamation amounted to a severe curtailment of rights that only the High Court or legislature could implement. She likened the prospect of a judge being denied the right to sue for defamation to suffering ‘the form of civil death applicable to those attainted for felony’. McColl JA cited Kirby J’s view in Mann v O’Neill that, though judges are expected to withstand public criticism, they are also citizens that should only be denied the right to sue for exceptionally strong reasons. Finally, Tobias AJA’s judgment added to the majority’s reasoning by responding to the public policy reasons advanced by the minority, so is discussed further below.

In the minority, Basten JA, McCallum J concurring, held that because the matter complained of and each of the pleaded imputations related to the conduct, competence and capacity of the plaintiff in carrying out her functions as a judicial officer, she had no cause of action against the defendants in defamation. Basten JA agreed with the majority that the facts before the court were different from those in

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63 Ibid 330 [66].
64 Ibid.
65 Ibid 330-331 [67].
66 Ibid 344 [133].
67 Ibid 348 [153].
Troughton and Mann v O’Neill because Alan Jones was not a former litigant before O’Shane.\textsuperscript{70} He also accepted that Troughton did not deal with defamatory statements made outside court.\textsuperscript{71} After considering the limited authorities and commentary on judicial defamation claims, however, Basten JA concluded that there had been ‘little articulation of the underlying principles’.\textsuperscript{72}

Basten JA’s minority judgment is based, not on Troughton per se, but on balancing the personal interests protected by a private claim for defamation and the public interests involved in the administration of justice. His judgment considered four public interests. First, the administration of justice would be brought into disrepute if the plaintiff were to attack or defend her own judgments in the defamation proceedings. Secondly, the independence of the judiciary, which forms an aspect of the administration of justice, requires judicial immunity. Thirdly, the court should be protected from false allegations that tend to bring the administration of justice into disrepute, but fourthly there is a public interest in determining the truth or otherwise of allegations made against the court.\textsuperscript{73}

In respect of the plaintiff’s private interests, Basten JA observed that a judge’s right to defend his or her professional reputation does not equate with the equivalent right enjoyed by ordinary citizens. This, Basten JA stated, is illustrated by judicial tenure and immunity from suit.\textsuperscript{74} He noted that the ‘acts of the judicial officer are acts of the court, not the acts of an individual’.\textsuperscript{75} Therefore, he concluded that a judicial officer has at best a ‘derivative’ private interest in vindicating his or her judicial capacity, and

\textsuperscript{70} Ibid 359 [203].
\textsuperscript{71} Ibid 361 [209].
\textsuperscript{72} Ibid 364 [223].
\textsuperscript{73} Ibid 364-365 [226]-[229].
\textsuperscript{74} Ibid 365 [230].
\textsuperscript{75} Ibid.
that this interest is already protected from governmental interference.\textsuperscript{76} Further, the public interest in preventing illegitimate attacks against the courts and preserving finality is already protected by the law of contempt.\textsuperscript{77} Basten JA did not regard the availability of a dual remedy as determinative.\textsuperscript{78} Instead, the factors noted above constituted policy reasons precluding a cause of action by a judicial officer in respect of his or her judicial capacity or conduct.\textsuperscript{79}

McCallum J on the appeal bench agreed with Basten JA, adding briefly that the plaintiff’s interest was not a private one, and that ‘vindicating the reputation of an individual judicial officer overlooks the institutional source of the authority to act’.\textsuperscript{80} This accords with Basten JA’s view that an individual judge exercises the power of the court when acting in a judicial capacity. It is clear, as it was in \textit{Troughton}, that the point of difference between the majority and minority is in respect of the distinction between the judge as an individual and the judge as an embodiment of the court.

That the minority conclusion goes beyond the scope of the question on appeal, which was limited to whether \textit{Troughton} prohibited the claim, is noted and criticised by majority judge Tobias AJA.\textsuperscript{81} Tobias AJA accepted that the four public interests identified by Basten JA existed, but held that they were not necessarily inconsistent with a judicial officer suing for defamation in respect of his or her judicial functions.\textsuperscript{82} He agreed with the comments of Kirby J in \textit{Mann v O’Neill} that various policy reasons were only sufficient to demonstrate why judicial officers \textit{should} not sue as opposed to

\begin{itemize}
\item \textsuperscript{76} Ibid 366 [231].
\item \textsuperscript{77} Ibid.
\item \textsuperscript{78} Ibid 361 [211]
\item \textsuperscript{79} Ibid 366 [231].
\item \textsuperscript{80} Ibid 372 [264].
\item \textsuperscript{81} Ibid 368 [245], 370 [255], [261].
\item \textsuperscript{82} Ibid 369 [249].
\end{itemize}
why they may not sue.⁸³ Along the same lines as McColl JA, and Simpson J in Troughton, Tobias AJA concluded that despite public policy reasons the minority view was ‘contrary both to experience and to authority.’⁸⁴ As McColl JA had found, Tobias AJA concluded it was a step best left to parliament, or at the very least the High Court.⁸⁵ Therefore the outcome on appeal in respect of the issue of Troughton was that the plaintiff was allowed from bringing a defamation claim against the defendant.

The remaining questions regarding the complex interaction of the defence of truth and judicial immunity or finality, and the implied freedom of political communication, were resolved unanimously on the facts. In respect of judicial immunity, Beazley P held that it operates defensively to protect judicial officers from suit, and could not be used offensively to defeat the defendant’s defence of truth.⁸⁶ To allow the plaintiff to defeat the defendant’s defence of truth by judicial immunity would ‘distort the law of defamation’ since she might be able to obtain damages for publication of a true statement.⁸⁷ Basten JA considered judicial immunity, though he did not need to decided the point, and concluded it had no direct application to the case.⁸⁸

In the way that the defence was pleaded, that is by adopting the reasoning of the appeal judgments to prove errors of law, there was no abuse of process in the form of undermining finality either.⁸⁹ In respect of decisions where misconduct but no errors of law were alleged, there was no impermissible interference with finality.⁹⁰ Therefore the defendants could rely on the defence of truth as pleaded, and prove

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⁸⁴ O’Shane v Harbour Radio Pty Ltd (2013) 303 ALR 314, 370 [255].
⁸⁵ Ibid.
⁸⁶ Ibid 334 [81] (Beazley P).
⁸⁷ Ibid 334 [82]-[83].
⁸⁸ Ibid 359 [200].
⁸⁹ Ibid 341 [117] (Beazley P), 359 [198] (Basten JA).
⁹⁰ Ibid 340-341 [116] (Beazley P), 358-359 [197] (Basten JA).
errors of law in seven of the plaintiff’s judgments and misconduct in another two judgments.

Finally, the court considered the implied freedom of political communication. Question D on appeal asked whether the implied freedom was infringed if the principal of judicial immunity precluded the defendants from relying on the defence of truth. The court did not need to determine this as the defence was allowed to run and judicial immunity was held to have no effect on it, but Beazley P said the implied freedom would not cover communications criticising the judiciary. The implied freedom only applies to communications on governmental and political matters, as was decided in cases such as Popovic\(^{92}\) and APLA.\(^{93}\)

Unusually, the immediate outcome of the appeal decision in O’Shane was favourable to both the plaintiff and defendants: the plaintiff was allowed to bring the claim, and the defendants’ defence of truth was not struck out. While there was certainty regarding these outcomes, broader areas of ambiguity emerge from this judgment which require further consideration.

**Unresolved issues**

At least three aspects of O’Shane point to the need to develop a coherent legal principle debarring claims for judicial defamation, namely one that deals with the plaintiff's particular kind of reputation as a judicial officer. First, it appears that as a matter of practice defendants in judicial defamation claims will face difficulties in raising relevant defences. Secondly, there is a persistent view in favour of barring judges from bringing defamation suits, but this view has yet to be clarified in the form

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\(^{91}\) Ibid 342 [123]-[126] (Beazley P).

\(^{92}\) Herald & Weekly Times Ltd v Popovic (2003) 9 VR 1.

\(^{93}\) APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322.
of a cohesive or coherent legal rule. Thirdly, it is apparent from O’Shane that it is
difficult to disentangle the public and private nature of a judge’s identity and rights.
This has resulted in a lack of clarity regarding how to draw the line between the
personal right of a judge to sue to protect their reputation as an individual, and the
authority and integrity of the court.

The first issue raised by O’Shane is the viability of defences to adequately protect a
defendant in a judicial defamation claim. It is clear from the court’s position regarding
the Lange implied freedom of political communication94 that the extended qualified
privilege defence arising from that case will not cover communications about the
judiciary. Absolute privilege, as was argued in Mann v O’Neill, will also not assist
media commentators. The workability of other statutory defences in such cases have
been previously considered by academics.95 There is little by way of empirical
evidence on the success of various defences in this context, but it is interesting to
note that all the defences raised in the prior instances of magistrates suing for
defamation – The Herald and Weekly Times Ltd v Popovic96 (‘Popovic’) and John
Fairfax Publications v O’Shane97 (‘Fairfax v O’Shane’) – failed.

The defence of truth is critically important because the gist of the tort of defamation is
the publication of false imputations, so, as acknowledged by Beazley P,98 it is not
appropriate for a plaintiff to recover damages in respect of imputations that are true.
Here, to prove the defence of truth in respect of the plaintiff making bad decisions
Jones and Harbour Radio were fortunate to have recourse to appeal judgments, but it
is highly unlikely that a defence of truth would be allowed to run if the defendant

94 O’Shane v Harbour Radio Pty Ltd (2013) 303 ALR 314, 342 [123]-[126] (Beazley
P).
95 See Gould, above n 2; Campbell and Lee, above n 4.
96 The Herald and Weekly Times Ltd v Popovic (2003) 9 VR 1
sought to directly attack the plaintiff’s reasoning at first instance without any appeal decisions in their support. Beazley P accepted in obiter dicta that considerations of finality will preclude a direct attack on judgments to establish a defence of truth.99 This is because it would be an abuse of process for the defendant to directly attack and re-litigate previous decisions of another, or possibly the same, court before which they appear. It is not clear how a defendant in that position could raise and substantiate the defence of truth, so the outcome of O’Shane is cold comfort to media outlets or public commentators that seek to criticise the reasoning of judges at first instance.

A further difficulty in respect of proving judicial error to substantiate the defence of truth is that, even if successful appeal judgments can be relied upon, it is difficult to say how a jury ought to determine whether proof of errors in five, ten or twenty judgments establishes the substantial truth of imputations about being a bad judge. Even in respect of allegations of misconduct, the defendant may face difficulties in obtaining evidence of complaints made against the plaintiff by the public. When the defendants in O’Shane issued a subpoena on the Judicial Commission of New South Wales after the appeal hearing, they were only able to obtain disclosure of any complaints relating to the nine particularised decisions. Beech-Jones J allowed the Judicial Commission’s objection to the subpoena, only ordering disclosure of complaints relating to the nine cases which the defendants had already identified.100

The second theme that emerges from O’Shane is that, though there is uneasiness in allowing judicial officers to sue for defamation, so far no clear legal principle has been articulated to encapsulate it. In addition to the cultural norm of restraint, there have been attempts to establish a policy or principle discouraging judges from suing

99 Ibid 341 [121].
100 O’Shane v Harbour Radio Pty Ltd [2014] NSWSC 93, [47]-[59].
in defamation. Justice Young has said, for example, that there is a ‘sound theory that judicial officers should never sue for defamation in respect of statements made about them in a judicial capacity’ and separately that such actions are ‘very much discouraged’. Similarly Justice Sackville has advocated extra-judicially for restraint, justified by freedom of speech to criticise the judiciary. He observed that a majority of judicial officers surveyed by the Australian Law Reform Commission saw ‘major problems’ in judges suing for defamation, but noted that successful claims had been brought before, namely those brought by Victorian magistrate Jelena Popovic in 2003 and O’Shane herself against Fairfax in 2005.

These guidelines or norms of restraint are not binding. The majority in O’Shane allowed the plaintiff’s defamation suit on the basis that, Troughton, properly understood, did not debar it. Troughton was also distinguished because Jones’ comments were not spoken in court, nor was he a former litigant. On the other hand, Basten JA in O’Shane, and McHugh J in Mann v O’Neill, inferred a broader principle from Troughton to the effect that a defamation claim should never be brought by a judge. Basten JA looked beyond Troughton itself to have regard to relevant public interests to conclude that these should have priority over the private interest of the judge. It might be said that reliance on a policy of restraint, or consideration of public interests, is the minority view straining to identify a rule of law prohibiting such claims.

101 Gould, above n 2, 602.
The majority in *O'Shane* did not dispute the merits of the public interests advanced for debarring such claims, but considered that a judicial officer’s ‘right’ to sue for defamation should not be terminated by the court on the basis of such policy reasoning. Much earlier in *Troughton*, Stephen J, who was in the majority that disallowed the claim, had said that ‘if... there are clear reasons of public policy opposed to such an action, it is only passing a line to say that what ought not be cannot be.’\(^{107}\) In direct contrast Simpson J, who allowed the claim, said that undesirability of superior judges suing was insufficient to preclude the cause of action and noted that ‘public policy is a restive horse, and has to be carefully ridden.’\(^{108}\) This substantially foreshadowed the same point of contention between the majority and minority in *O'Shane*.

The third issue arising from this case is that it is difficult to separate the personal rights of a judicial officer and his or her role as an embodiment of the court. The heart of the unease associated with judicial defamation claims is that a judge, in his or her professional capacity, exercises judicial power and directly exercises the authority of the court. Unfortunately, the majority and minority decisions in *O'Shane* fail to clarify how the line should to be drawn between statements disparaging a judicial officer’s personal reputation and statements more broadly amounting to criticism of the court’s function.

In *O'Shane* the minority’s decision turns on the characterisation of the defendants’ statements as going to judicial capacity such that any private interest of the magistrate is subjugated to public interests. At the same time, the majority seem to assume that the defendants’ statements are of a private or personal nature. Beazley P stated in her lead majority judgment, in the course of distinguishing *Troughton*, that

\(^{107}\) *Troughton v McIntosh* (1896) 17 NSWR(L) 334, 340.

\(^{108}\) Ibid 351.
Jones’ statements were a ‘direct, personal attack on the plaintiff for allegedly making wrong and diabolically bad decisions’, not ‘an attack on the institutional integrity of the magistracy or judicial system’. This appears to imply that an attack on the institutional integrity of the judicial system would not be actionable by the magistrate, but it is not clear why allegations that a judge made diabolically bad decisions are not such an attack. Surely disputing the correctness of the magistrate’s decisions is an attack on the integrity of the court as well as, if not to the exclusion of, an attack on the individual judge’s judicial capacity. This view ignores that the majority in *Troughton* based its decision, at least in part, on the inability to extricate the magistrate’s personal rights from the public interest vindicated by contempt proceedings.

To review, in Chapter I *O’Shane* and previous judicial consideration of judges suing for defamation have been outlined. From this it has emerged that there is a persistent minority view in favour of barring such claims, and clear difficulties faced by the defendant who criticises a member of the judiciary, but no legal principle has been articulated to govern the situation. In order to consider a possible solution to this, the simultaneous availability of public and private remedies, and the simultaneously institutional and personal nature of the defendant’s attack, require further consideration.

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II. A proposed solution

Chapter II proposes a way of reconceptualising the difficulties involved in judicial defamation through the lens of capacity to sue, specifically by proposing that a plaintiff should have no capacity to sue in respect of his or her 'judicial reputation'.

First, this chapter outlines the notion of capacity and why it is a preferred way to consider the problem. Secondly, the law regarding governmental reputation is reviewed in order to provide a basis for the analogous concept of judicial reputation. Thirdly, and most importantly, the concept of judicial reputation is explored by reference to existing public policy reasoning. The relevant themes are freedom of speech to criticise the judiciary, the special position of judges as public officials and the public as opposed to private nature of the claim. Finally, the limitations and workability of the proposal are considered.

The plaintiff’s capacity to sue

Returning to first principles, defamation law must strike a balance between a plaintiff’s reputation and a defendant’s right to free speech. In light of increasing acknowledgement of the need to protect freedom of speech critical of the conduct and capacity of the judiciary, this paper suggests that the proper balance must favour the protection of freedom of speech. Freedom of speech to criticise the judiciary can be adequately protected in this context by increasing the scope of defamation defences. The alternative is to reconsider the plaintiff’s capacity to sue in the first place.

The benefit of regarding the issue as one of capacity is that it is within the accepted framework of defamation. It accords with the notion that merely having a reputation capable of being damaged does not mean defamation law will be enforceable to protect it. This approach also responds to the argument that it is going too far to curtail a judge’s ‘right’ to sue for defamation on the basis of public policy, an argument advanced most clearly by McColl JA in O’Shane,111 because there is no universal or unlimited right to sue for defamation.

Defamation law acknowledges that not all entities or persons can sue to protect their reputation. The estate of a deceased person, for example, cannot pursue a defamation claim in respect of the deceased.112 Only certain types of companies – generally speaking, small companies – can sue for defamation.113 A partnership cannot sue in respect of imputations that defame the individual partners in a moral capacity but not the partnership as a trading entity.114 The ability to sue is also moderated by the requirement of identification. The matter complained of must be ‘of and concerning’ the plaintiff,115 so the plaintiff’s ability to sue will depend on the particular matter complained of. Therefore, in Healy v Askin an individual representative of the Labor Party was not able to sue in respect of a television advertisement casting aspersions of communism against the Labor Party. The court held that the claim was not maintainable because the nature of the allegation was

112 Defamation Act 2005 (NSW) s 10(a).
113 Defamation Act 2005 (NSW) s 9.
generalised, and directed against the political views of the party, not the reputation of the individual plaintiff.\textsuperscript{116}

**Governmental reputation**

The right to sue is also moderated because of the particular type of reputation impugned. Given that defamation law seeks to strike a balance between reputation and freedom of speech, where protection of the particular type of reputation is incompatible with accepted democratic principles of freedom of speech there is no capacity to sue. This reasoning has been applied to deny the right of governing bodies to sue for defamation. In New South Wales, the majority of the Court of Appeal held in *Ballina Shire Council v Ringland*\textsuperscript{117} (‘*Ballina Shire Council*’) that a local council could not maintain an action in defamation in respect of its governing or governmental reputation. This decision followed the, then recent, English decision of *Derbyshire County Council v Times Newspapers Ltd*\textsuperscript{118} (‘*Derbyshire*’).

In *Derbyshire* the House of Lords held that Derbyshire County Council was not entitled to sue in respect of criticisms about its investments of public money. Lord Keith of Kinkel, with whom the other Lords agreed, accepted that the plaintiff as an entity was a corporation and that ordinarily corporations can sue for defamation.\textsuperscript{119} He reasoned, however, that as a local authority it was in a unique position, particularly because it was of ‘[t]he highest importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.’ As *Gatley on Libel and Slander* puts it, the decision rests ‘not upon

\textsuperscript{116} *Healy v Askin* [1974] 1 NSWLR 436, 440 (Lee J).
\textsuperscript{117} *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.
\textsuperscript{118} *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.
\textsuperscript{119} Ibid 547.
any absence of likely damage to such a body... but upon the likely chilling effect on free speech of granting a right of action'.  

In *Ballina Shire Council* the same issue arose when the plaintiff council sued the defendant for publishing a press release alleging that it had covertly and unlawfully disposed of sewage in the sea at night and during storms. The first instance judge, Levine J, referred the matter to the Court of Appeal, asking whether the plaintiff being a council was able to maintain an action for damages for defamation. Gleeson CJ and Kirby P held that the council had no such right, while Mahoney JA dissented.

The majority judges attached considerable importance to freedom of speech to criticise governmental institutions. Kirby P described freedom of speech as a ‘fundamental human right’, noted international human rights law to that effect and canvassed earlier High Court authorities confirming the emergence of the implied right under the Constitution. Gleeson CJ, in a manner similar to that of the court in *Derbyshire*, said:

> The idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of the government.

Freedom of speech is only the starting point, however. Gleeson CJ’s reasoning turned ‘upon the concept of reputation, and the nature of the reputation which the law of defamation sets out to protect.’ He concluded that an individual’s right to reputation can be protected without undue interference with freedom of speech, but

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120 Gatley on Libel and Slander above n 110, [8.20].
122 Ibid 709-710.
123 Ibid 701-703.
124 Ibid 691.
125 Ibid.
for a government to protect its governmental reputation is *incompatible* with the process of representative democracy. In a somewhat similar way, Kirby P considered the unique capacity of a local government authority to respond publicly to criticisms. Kirby P described it as misconceived for the authority to use public funds to sue the public body for criticising it, and observed that this could allow for serious abuse of power by such governmental institutions.

This decision rests at least partly on the nature of the governmental body as an elected entity. The notion of defamation law protecting governmental reputation jars in its application to a body which, by definition, is elected freely by citizens. This is illustrated by *Healy v Askin*, noted above in respect of identification. In this case the plaintiff, an endorsed candidate for the Labor Party in New South Wales, could not sue for defamation on an advertisement by the Liberal Party conveying imputations of communism against the Labor Party generally. Lee J observed that the law of defamation could not be used to judge the conduct of the political parties; rather, that was something left to be determined by electors at the time of election. This view, perhaps going further than the circumscribed view of Gleeson CJ in *Ballina Shire Council*, suggests that the appropriate venue for the determination of the plaintiff’s ‘reputation’ is not a courtroom. Instead, in the case of a political party or governmental body, it is the ballot box.

Mahoney JA’s dissenting judgment in *Ballina Shire Council* took issue with the outcome of the majority approach as leaving governmental bodies with no recourse to the law of defamation, even in the face of malicious or false attacks. First, he regarded it as unexplained why a governmental body could not sue to protect its

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126 Ibid.
127 Ibid 707.
governmental reputation, but an individual vested with public power could.\textsuperscript{129} Secondly, Mahoney JA considered that though freedom of speech was valuable in a democratic society it was never without restriction.\textsuperscript{130} Defamation law, he noted, ought to strike the correct balance between the good and harm of freedom of speech, including by way of defences.\textsuperscript{131} Mahoney JA’s dissent is compelling in that it recognises the severity of the step taken by the majority. Nonetheless it should be noted that, contrary to his prediction, there has been no noted increase of malicious or false attacks against governmental bodies, even some twenty years later. The majority view in \textit{Ballina Shire Council} has been subsequently affirmed.\textsuperscript{132}

Importantly, the majority in \textit{Ballina Shire Council} acknowledged that there had been prior cases where a council had sued for defamation and no issue as to whether the action was maintainable was raised.\textsuperscript{133} Nonetheless, on the basis of the argument raised before it, the court held that the action could not be brought. By way of contrast, the majority in \textit{O’Shane} regarded the successful claims in \textit{Popovic} and \textit{Fairfax v O’Shane} as supporting evidence that the claim could be brought.\textsuperscript{134}

\textbf{Judicial reputation}

The following section applies the considerations described above to the proposed concept of judicial reputation. The solution proposed is that there should be no capacity to sue in respect of a plaintiff’s judicial reputation. By way of definition, a judicial officer’s judicial reputation includes that dimension of their reputation \textit{qua}
judge. Allegations regarding judicial reasoning and relevant conduct on the bench would therefore be allegations going to judicial reputation.

This concept relies on the jurisprudence in respect of governmental reputation and attempts to absorb and reflect the existing public policy reasons to debar defamation claims by judges. First, freedom of speech to criticise the judiciary is considered. This forms the foundation of the decisions in *Derbyshire* and *Ballina Shire Council* regarding governmental reputation. Secondly, the special position of judges is considered. This seeks to demonstrate that even as individuals judges are effectively public authorities, and that their capacity to sue can be denied because of the characteristics of judicial reputation. Thirdly, the incompatibility of defamation law with the public nature of the defendant’s wrong is considered.

**Freedom of speech to criticise the judiciary**

Freedom of speech to criticise the judiciary is more complicated than freedom of speech to criticise the government because of competing public interests. The biggest difficulty with any claim to freedom of speech to criticise the judiciary is that attacks on judges and courts are discouraged in the interests of the administration of justice, particularly where criticisms are unjustified or malicious. It is said that if reports about courts and tribunals are ‘too negative too often’ the public will lose confidence in the legal system. This reasoning forms the basis of the law of scandalising contempt, which punishes ‘scurrilous abuse of a judge *qua* judge, or of a court, and unwarranted attacks upon the integrity or impartiality of a judge or

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135 *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 447.
The law of scandalising contempt was said to be ‘virtually obsolescent’ by Lord Diplock several decades ago, but there has been an acknowledged resurgence in its use. One reason that the law of scandalising contempt, which restricts freedom of speech to criticise the judiciary, has been questioned is that it can have the effect of undermining public confidence in the legal system as the ‘public struggles to accept why judicial officers … require a special form of protection’.

In the context of defamation, freedom of speech to criticise the judiciary should be protected. This view acknowledges the potential ‘chilling effect’ on speech if such claims are allowed. There are several arguments in favour of increasing freedom of speech to criticise the judiciary. These are outlined below, before the scope of the implied freedom of communication under Lange is considered.

First, it has been acknowledged that judges are public officials, and ought to be accountable to the public for their decisions. English academic Michael K Addo has argued, in his book Freedom of Expression and the Criticism of Judges and elsewhere, that the judiciary is an organ of the government which must be subject

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138 David Eady and A T H Smith, Arlidge, Smith and Eady on Contempt (Sweet & Maxwell, 4th ed, 2010), 5-204.
139 Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339.
141 Gould, above n 2, 609.
to scrutiny and criticism in a democratic society. He argues that, in the context of a liberal democracy, most people would find it unacceptable that judicial accountability is limited to internal procedures, and observes that the work of judges is generally shrouded in mystery.145

In a similar vein McHugh J in Mann v O’Neill, in dissent, adverted to the fact that it is desirable for complaints against the judiciary to be made without fear of lawsuit, so they may be properly investigated and actioned if necessary.146 This accords with the dissenting view of Gillard AJA in Popovic where he observed, in the context of an argument about qualified privilege, that:

[t]he way [magistrates] behave in court, their fitness for office and their conduct as magistrates are all matters which in my view every member of the … community has a real and legitimate interest in knowing about.147

Secondly, the view that courts need to enforce public silence in order to preserve confidence in the legal system is increasingly regarded as anachronistic. The United States’ position very clearly favours public debate and discussion of judicial decisions. Massachusetts judge Marshall CJ has said extra-judicially, for example, that completely unfettered criticism and commentary about the judiciary is a foundation of judicial independence. Even after decades of vehement criticism and attacks against judges, often in the context of politically charged matters such as Bush v Gore, she observed that the American public have retained faith in the system as a whole.148 Notwithstanding the vastly different constitutional framework in the United States, the robustness of democratic institutions in Australia should

145 Addo, above n 143, 11.
147 The Herald and Weekly Times Ltd v Popovic (2003) 9 VR 1, 53 [250].
similarly provide support for the view that criticism of judges, even if incorrect or excessive, will not seriously undermine the public’s confidence in the legal system.\textsuperscript{149}

Thirdly, the work of judges is often inherently political in nature. Canadian Judge Beverley McLachlin, now the Chief Justice of the Supreme Court of Canada, has said, for example, that judicial lawmaking increasingly invades ‘the domain of social policy, formerly the exclusive right of Parliament and the legislature’.\textsuperscript{150} Similarly Sir Gerard Brennan observed that ‘[i]t would be absurd to suggest that the \textit{Mabo, Wik} and \textit{Ha and Hammond} judgments of the High Court could not and should not be subject to critical examination.’\textsuperscript{151} In a related context Andrew Kenyon has argued that qualified privilege in Australia should be extended to cover political matters more generally.\textsuperscript{152}

Finally, the traditional view that freedom of speech to criticise the judiciary must be limited because judges are unable to respond to that criticism has been worn down. In \textit{R v Metropolitan Police Commissioner}, for example, Lord Denning had said, ‘[a]ll we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms.’\textsuperscript{153} As Lord Kilmuir famously said, ‘so long as a judge keeps silent his reputation for wisdom and impartiality remains

\begin{footnotes}
\textsuperscript{149} Sackville, above n 104,199-201.
\textsuperscript{153} \textit{R v Metropolitan Police Commissioner: Ex parte Blackburn (No 2)} [1968] 2 All ER 319, 320.
\end{footnotes}
unassailable'. According to this view, a judge must not enter into the fray of public discussion about his or her decisions or political controversies generally. As a matter of practice, however, judges do enter into public debate, and perhaps in light of increasingly common and hostile criticism of judicial officers some form of response is necessary. As pointed out by Justice Sackville and Kim Gould, it has become increasingly difficult to justify the archetype of a ‘remote and silent’ judiciary.

It is somewhat difficult to chart the appropriate scope of freedom of speech to criticise the judiciary, because the arguments tend to involve unsubstantiated assertions about what is in the public interest. On the one hand it might be said that the prospect of judges suing for defamation undermines public confidence in the administration of justice, because such suits can create the appearance of the partiality. Perhaps a real-life example of this is Richard Ackland’s opinion of the O’Shane decision itself, entitled ‘Judges should stay on the bench and keep off the playing field’. Equally, however, it could be argued that false accusations of corruption or incompetence destabilise the same public confidence, and that judges should sue to correct these misapprehensions. There is a lack of empirical evidence on these issues, and persuasive statements either way. For the purpose

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155 Brennan, above n 151, 36.
156 Campbell and Lee, above n 4, 87-88; Sackville, above n 104, 200.
158 Gould, above n 2, 611-612; Sackville, above n 104, 200.
159 Sackville, above n 104, 193.
161 Gould, above n 2, 613.
162 Ibid 615.
of this paper it is sufficient to observe that current protections of freedom of speech to
criticise the judiciary are limited, but without adequate justification.

By way of comparison, speech critical of the other arms of government is relatively
well protected in Australia. The differential treatment of judges is problematic. In the
formative case of Lange the High Court held that the provisions of the Constitution
requiring democratic election of government necessarily implied freedom of
communication in order to facilitate a free and properly informed electoral decision.\footnote{Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 559-560.}

As discussed above, this freedom does not extend to criticisms of the judiciary. At its
highest McHugh J in APLA\footnote{APLA Limited v Legal Services Commissioner (NSW) (2005) 224 CLR 322, [65]-[66].} and Winnecke ACJ in Popovic\footnote{The Herald and Weekly Times Ltd v Popovic (2003) 9 VR 1, 10-11 [10].} said that
communications concerning the judiciary might be protected if they amount to
comment on the executive’s failure to remove the judicial officer. That the court in
O’Shane determined that Jones’ comments were not communications on government
or political matters\footnote{O’Shane v Harbour Radio Pty Ltd (2013) 303 ALR 314, 342 [123]-[126] (Beazley P).} reflects a gap in the protection afforded by the implied freedom.

Notwithstanding the textual constraints of the Constitution, the carving out of the
judiciary from public commentary and criticism is difficult to justify as a matter of
principle.\footnote{Sackville, above n 104, 210-211.} It is not without reason that there has been expression in academic
commentary of a possibility that the implied freedom could be expanded to cover
comments on judicial conduct.\footnote{Campbell and Lee, above n 4, 80, 88-89; Sackville, above n 104, 209-211; Gould, above n 2, 615-621.}

Attempts in litigation to extend the implied freedom to cover communications
criticising judges, by way of the common law qualified privilege defence, have also
failed. In Popovic the majority rejected the argument that qualified privilege, relying on the Lange definition of implied freedom of communication on government and political matters, extended to the judiciary. Only Gillard AJA, dissenting, accepted the argument on the basis that members of the judiciary were sufficiently connected to the government. Later, in Fairfax v O’shane counsel for Fairfax, Bret Walker SC, submitted that the extended Lange qualified privilege defence should be understood as covering communications about the judiciary. In the alternative he argued that there should be a qualified privilege analogous to the extended Lange qualified privilege. The latter argument was based on the need for public discussion about legal decisions and the airing of criticisms about judges failing to do their jobs. This proposed defence was rejected by the court. Young CJ in Eq opined that though the appellant’s arguments were elegantly put, and may have reflected ‘sound wisdom’, they were contrary to authority.

It is difficult to pursue much further the argument that the Lange implied freedom of communication should be extended to protect communications critical of the judiciary. Because the implied freedom is based on those sections of the constitutional text requiring direct election of government, and the judiciary is independent from the government of the day, it is likely that it cannot be extended in this way. At least in the context of the defence of qualified privilege, arguments in favour of extension have been repeatedly rejected. The purpose of outlining these arguments, however, is to illustrate the unique treatment which judges receive. There is no protection of communications criticising the judiciary under the implied freedom

170 Ibid 52-53 [248]-[251].
172 Ibid.
173 Ibid [261].
174 Ibid [287].
of political communication, even though the judiciary is appointed by, funded by, and applies the laws of the government.

In considering freedom of speech to criticise the judiciary in the context of ‘judicial reputation’, it is submitted that a more general principle of freedom of speech should form its basis. It is not necessary to rely on the Lange implied freedom; Ballina Shire Council was decided in relation to governmental reputation before the implied freedom was properly developed. Instead, as outlined earlier, within the context of defamation law there are reasons to protect freedom of speech to criticise the judiciary which render judicial reputation incompatible with it.

**The special position of a judge**

In addition to freedom of speech to criticise the judiciary a concept of judicial reputation requires consideration of the unique role played by judicial officers in relation to members of the public, who could be defendants in a defamation claim brought by such officers. This adapts the consideration in respect of governmental reputation regarding the nature of governmental bodies.

The starting point is that judges are not ordinary professionals. They are unlike doctors or builders who can sue in defamation to protect their professional or commercial reputation. In one sense, O’Shane’s claim was brought to defend her professional capability. However as Basten JA observed in O’Shane, generally judges cannot suffer pecuniary harm because of damage to their professional reputation, nor be removed easily.\(^{175}\) Since judges are individuals in a hierarchical institution created by the state, and dispense public power, there are apprehensions in respect of defamation claims to protect their reputation.

\(^{175}\) O’Shane v Harbour Radio Pty Ltd (2013) 303 ALR 314, 365 [230].
One difficulty in the proposed concept of judicial reputation is that it denies individuals the capacity to sue for defamation, whereas in cases concerning governmental reputation courts seem to offer consolation by way of observing that individual representatives of the government remain entitled to sue for defamation, even if the government body cannot. The decisions in *Ballina Shire Council* and *Derbyshire* acknowledged that though the plaintiff council could not sue for defamation, individual councillors were entitled to if they were defamed by what the defendant published.¹⁷⁶ That this is a potential inconsistency was noted by Mahoney JA, dissenting in *Ballina Shire Council*, when he observed that the exemption from defamation depends on ‘the accident of whether the power in question was vested in a body or an individual.’¹⁷⁷ Clearly, it has never been argued, much less accepted, that a court as an entity could sue for defamation, only that individual judges can do so. Nonetheless, because judges occupy a special position, wherein they directly and personally dispense the judicial power of the state, it is submitted that this incursion on any individual ‘right’ to sue can be made.

Judicial officers are in an extremely unique position with respect to public power; when an individual judge sits on the bench, he or she embodies the court. Unlike an individual in a representative body, such as a councillor, who may not have any ‘governing reputation’ of his or her own, a judicial officer has the same judicial reputation as the court which they constitute. The subsuming of personal identity into the institutional role was of critical concern to the minority in *O’Shane*, though it was not framed by a concept of judicial reputation. McCallum J noted pithily in *O’Shane* that ‘[t]he functions of a court are not personal to the judicial officers who exercise the

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¹⁷⁶ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 684 (Gleeson CJ), 710-711 (Kirby P); *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 550D.

¹⁷⁷ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 691.
court’s jurisdiction.’ Basten JA similarly observed in his consideration of public and private interests that:

The acts of the judicial officer are the acts of the court, not the acts of an individual; the judge is not a party to any appeal; judicial review of orders made is properly brought against the court or tribunal, not against the judicial officer who made the orders…

Much earlier in *Troughton*, Stephen J illustrated the difficulty of a judge suing for defamation, in respect of aspersions cast against them in the capacity of a judge, by considering the hypothetical scenario of more than one judge constituting the bench:

If two Justices had formed the Court, certainly as a Court no action could be brought. Could they have maintained one jointly for the aspersion upon their administration of justice? It seems to me clearly not. Could they then have maintained one separately for the particular loss of character which each may be supposed to have sustained? Again, in my opinion, no.

The notion that an individual personally exercising public power effectively embodies a public authority, and must forgo their personal reputation to do so, is acknowledged in the ‘public official’ doctrine in the United States. According to the seminal case of *New York Times v Sullivan* – which marks its 50th anniversary this year, no less – to pursue a claim in defamation public officials must establish that the defendant published the statement knowing, or in reckless disregard as to, its falsity. This reverses the presumption of falsity in defamation, and makes it markedly more difficult for a public official to sue.

It is difficult to import these requirements into Australian law, given the vastly different development of defamation law and constitutionally enshrined freedom of speech in the United States. When an argument was made in *Theophanous* to that effect, the

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179 Troughton v McIntosh (1896) 17 NSWR(L) 334, 341.
majority of the High Court rejected it.\textsuperscript{181} \textit{New York Times v Sullivan} is nonetheless relevant because, as noted by academic Robert Post, this decision has the effect of preventing defamation law from transmuting ‘impersonal government criticism’ into personal criticism of government officials.\textsuperscript{182} It therefore supports the view that judicial reputation, necessarily involving the personal exercise of public power, cannot be the subject of a defamation claim. This reasoning reflects the view of McHugh J in \textit{Mann v O'Neill} that a judicial officer’s suit against a former litigant is ‘incompatible’ with judicial office.\textsuperscript{183} It also incorporates the concerns Basten JA expressed in \textit{O'Shane} in forming the view that any personal, ‘derivative’ interest the plaintiff had to sue was trumped by public interests.\textsuperscript{184}

\textbf{The public nature of the wrong}

Governmental reputation cannot be protected by defamation because value judgments relating to the elected body are best determined by the electoral process by virtue of which it exists. In a similar way it can be argued that the law of defamation cannot protect ‘judicial reputation’ when the real interest, the authority of the court, is determined by the public in a democracy that respects the court and is adequately protected by the law of scandalising contempt.

One aspect of the decision in \textit{Ballina Shire Council} was that it was incompatible with the democratic election of the plaintiff body for it to sue to protect a governmental reputation. Judges are not elected, so the view that the plaintiff and defendant’s dispute should be dealt with in the format of a democratic election, rather than a

\textsuperscript{181} \textit{Theophanous v Herald & Weekly Times Ltd} (1994) 182 CLR 104, 134-137 (Mason CJ, Toohey and Gaudron JJ), 159-161 (Brennan J), 191 (Dawson J), 206-207 (McHugh J).
\textsuperscript{183} \textit{Mann v O'Neill} (1997) 191 CLR 204 235.
\textsuperscript{184} \textit{O'Shane v Harbour Radio Pty Ltd} (2013) 303 ALR 314, 366 [231].
defamation suit, does not apply. Instead, the incompatibility of a defamation suit with the plaintiff’s reputation as a judge can be demonstrated by acknowledging the public, rather than private, nature of the issue through the law of scandalising contempt.

Scandalising the court is a form of contempt making it an offence to commit an act or publish words ‘calculated to bring the court or a judge of the court into contempt or to lower his authority.’

Unlike contempt sub judice, the impugned words or actions need not be directed at proceedings that are ongoing or any particular proceeding at all. Australian examples include a disparaging and sarcastic editorial suggesting the High Court wantonly destructed the effect of legislation and comments by a prominent union official implying influence over a decision of the Full Federal Court. The existence or sufficiency of the law of scandalising contempt has been previously regarded as an explanation for judicial restraint in suing for defamation. As discussed in Chapter I, Stephen J in Troughton objected to the availability of a ‘dual remedy’, namely one in contempt for vindicating the public interest and one in defamation giving rise to personal reparations.

With respect to the present proposal the argument put forward is not that the availability of two remedies is untenable, but that a concept of judicial reputation in defamation accepts the public nature of the defendant’s wrong as already forming the subject of the law of scandalising contempt. Therefore, as issues of governmental reputation are best determined by public discussion and election, issues of judicial reputation are best dealt with by the law of contempt.

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185 Fisher, above n 140, 73, quoting R v Gray [1900] 2 QB 36, 40.
186 Rolph, Vitins and Bannister, above n 115, 472.
187 R v Dunbabin; Ex parte Williams (1935) 53 CLR 434.
188 Gallagher v Durack (1983) 152 CLR 238.
189 Troughton v McIntosh (1896) 17 NSWR(L) 334, 338.
In his dissenting judgment in *Mann v O'Neill* McHugh J followed *Troughton* to conclude that ‘where it is necessary to deal with a person who scurrilously abuses a judicial officer, that should be done by enforcing the public law of contempt or scandalising the court, not by a private action for damages.’\(^{190}\) In *O'Shane* the majority did not accept this reasoning. Beazley P noted that from a practical point of view contempt proceedings could not be brought years later by the plaintiff, nor were they likely to be brought by the Attorney General against Jones.\(^{191}\) McHugh J’s argument, however, is a broader one. In accordance with Stephen J’s comment in *Troughton* that, even if the contempt was passed over in silence, the defamation claim could not be brought\(^{192}\) McHugh J’s view was that the mere availability, not the exercise, of the power of contempt made the defamation action not maintainable.\(^{193}\) As one commentator put it, that contempt proceedings *could* be brought illustrates the public rather than the private nature of the issue.\(^{194}\)

**Judicial reputation in context**

The notion of judicial reputation, being one that a plaintiff cannot sue to protect, is not without its limitations. First, as a matter of law, it is not directly adaptable from the jurisprudence with respect to governmental reputations. The preceding section has attempted to address those difficulties, and it is submitted that this framework is at least a useful starting point to incorporate the public policy objections and culture of restraint that already exist in order to formulate a legal rule about judges suing for defamation.

\(^{190}\) *Mann v O'Neill* (1997) 191 CLR 204, 236.

\(^{191}\) *O'Shane v Harbour Radio Pty Ltd* (2013) 303 ALR 314, 330 [66].

\(^{192}\) *Troughton v McIntosh* (1896) 17 NSWR(L) 334, 339.


Secondly, it must be accepted that barring all judges from suing in respect of their judicial reputation is not a small step to take, even if scandalising contempt can be used to deal with particularly dangerous or severe criticisms. It should be noted that it is not desirable to encourage prosecutions in contempt instead of proceedings by way of civil redress.\textsuperscript{195} Scandalising contempt, however, clearly requires a much higher threshold to be pursued as compared to defamation, and should continue to be used in rare cases in the interests of freedom of speech. There will be cases where the defendant’s statements are capable of being defamatory but are not of a kind that would be prosecuted for scandalising the court. If so, the judge’s personal capacity to sue is precluded.

At the same time, the content of judicial reputation is open to consideration. In \textit{O’Shane}, for example, allegations about making diabolically bad decisions attacked the plaintiff’s judicial reasoning, but perhaps if a narrower definition of judicial reputation is taken more outlandish comments can still be sued on. Finally, alternative modes of response, such as increased participation by judges in public life, and means of communications such as court media officers,\textsuperscript{196} should not be ignored. This could allow for non-litigious dialogue to correct misapprehensions or incorrect statements made by the public.

\textbf{Conclusion}

In Chapter I, \textit{O’Shane} was reviewed. The difficulties in that case emerged initially because of Jones and Harbour Radio’s defence of truth, which involved an attempt to attack Magistrate O’Shane’s judgments from years earlier. The Court of Appeal had

\begin{footnotesize}
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  \item \textit{Mann v O’Neill} (1997) 191 CLR 204, 252 (Kirby P); \textit{O’Shane v Harbour Radio Pty Ltd} (2013) 303 ALR 314, 346 [143] (McColl JA).
  \item Brennan, above n 151, 40.
\end{itemize}
\end{footnotesize}
little authority with which to determine the claim, but identified that there was no rule preventing a judge from suing a member of the public for defamation. The minority decision turned on the institutional nature of the defendant’s criticisms, since they attacked the plaintiff’s judicial capacity and conduct, whereas the majority assumed it to be a personal attack.

In Chapter II, a refocusing was proposed. By considering capacity to sue and the nature of the reputation to be defended, it was suggested that defamation law should not acknowledge judicial reputation as the proper subject of a claim. Borrowing from the existing jurisprudence in respect of governmental reputation, it was argued that freedom of speech to criticise the judiciary should be preserved. To this end, existing public policy reasoning was incorporated to explain why a suit for defamation is incompatible with the plaintiff’s reputation as a judge. It is suggested that this way of approaching the problem appropriately incorporates the minority’s concerns in *O’Shane*, but does so through the concept of reputation in defamation law rather than public interests taking precedence over private interests.
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