

BOOK REVIEW

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Patrick George, Defamation Law in Australia, (LexisNexis Butterworths 2006) 494pp

Defamation Law in Australia is a thorough examination of the law of defamation throughout history. However, this text is no dry and boring discourse – the author’s obviously extensive knowledge of the law of defamation¹ has enabled this text to be not only informative but also very interesting and even – in places – entertaining.

In the past the law of defamation in Australia has been a complex and confusing action, with each jurisdiction having its own set of laws. For example, Queensland and Tasmania codified the civil law of defamation, whilst New South Wales relied upon the common law as modified by legislation. After many failed attempts at imposing a national law of defamation, the enactment of the *Defamation Act 2005* in nearly all of the Australian jurisdictions has brought about some uniformity. This text provides a detailed description and analysis of the law prior to the 2005 legislation as well as guidance on the new legislation, noting the differences between the jurisdictions.

Defamation Law in Australia is divided into five parts, commencing with an interesting and entertaining consideration of the development of defamation law in England. For example, who knew that the demise of duelling in the mid 19th century can be linked to the developing law of slander and the change in fashions (pistols and swords no longer being worn as part of dress)? Part 1 also catalogues the development of defamation law in England and in Australia through to the present day. Detailed references to recent cases and current media practices, such as the role of the paparazzi and new communication technologies, place the law of defamation in context in modern society.

Part 2 of the text entitled ‘General Principles’ is really the elements of the action – the meanings of defamatory matter and publication and the capacity to sue and be sued in defamation. The chapters that examine what is defamatory provide an excellent reference to leading cases, both old and current. Unlike other texts that are devoted to all of torts law and are therefore confined to a brief examination of what is capable of being defamatory, *Defamation Law in Australia* provides a detailed analysis of

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¹ The text has already been cited in *Australian Broadcasting Corporation v O’Neill* [2006] HCA 46 (28 September 2006) and *Channel Seven Adelaide Pty Ltd v S, DJ* [2007] SASC 117 (4 April 2007).

particular defamatory meanings, with example cases that assist in demonstrating the point.

Part 2 also includes a consideration of what are often thought of as related causes of action. The supposed developing common law tort of privacy is examined in its own chapter and another chapter is devoted to other avenues open to a plaintiff for the publication of material, such as injurious falsehood and misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth) or its equivalent under the State Fair Trading Acts.

Alternative solutions to litigation are dealt with in Part 3 in one chapter, considering apologies, offers, mediation and arbitration.

Part 4, which comprises the bulk of the text, then examines litigation, that is, the defences and remedies for defamation. Each defence to defamation has been given its own chapter. The traditional defences are comprehensively considered - the common law defence, the statutory defence, any previous statutorily modified and/or codified version of the defences are all included. Reference to the standard defamation authorities is supplemented with in-depth analysis of recent Australian and international decisions.

Defences that have been introduced by the defamation legislation of 2005 are investigated with the same attention to detail. Comparisons with similar provisions from the now repealed New South Wales *Defamation Act 1974* assist the reader in the interpretation of the new defences such as contextual truth and honest opinion.

The chapters on remedies cover the whole spectrum of the possible damages available to a defamed plaintiff. The text makes no claim of providing clear principles and guidelines as to how to assess damages for a plaintiff's injured reputation with accuracy. Instead it examines the approaches of the courts over the years to measuring a person's reputation and awarding compensation that is appropriate and rational. As an introduction the author points out the lack of consistency in awards of damages. Referring to the English case of *Sutcliffe v Pressedram Ltd* [1991] 1 QB 152 where a jury awarded the wife of the Yorkshire Ripper £600,000 when a magazine suggested that she had sold her story to newspapers, the author notes that the editor of the magazine after the judgment stated: 'If this is justice, then I am a banana.' (at 373). The author points out that in Australia similar anomalies also arise, for example in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 the High Court ordered a new trial upon appeal that the award of damages by the jury was excessive. The new jury awarded \$1.3 million – more than twice the amount awarded by the original jury.

The assessment of damages under the common law is explained in detail and includes chapters on:

- General damages – damages for consolation, reparation and vindication of reputation;
- Aggravated damages – damages when the defendant's conduct is improper or not bona fide;
- Exemplary damages – damages to punish the defendant;
- Special damages – damages for the economic loss caused by the publication; and

- Mitigation – a consideration of the plaintiff’s conduct and bad reputation or recovery of damages previously, the lack of malice on the part of the defendant, the truth of imputations, apologies by the defendant and the circumstance of the publication.

Alternative remedies are also dealt with in the text, the author noting that with the introduction of a cap upon the award of damages by the 2005 legislation, plaintiffs may seek alternatives if damages will not achieve their objective in bringing the action in defamation (p410). Therefore the possibility of the interlocutory injunction, the equitable remedy of account of profits and crisis management are explored.

Part Five – ‘Evidence/Transitional’ – works through the evidence required in a defamation action and notes the transitional provisions for the 2005 legislation. In respect of evidence there is a discussion of what evidence is required to prove a defamatory matter has been published, as well as whether evidence of the plaintiff’s criminal convictions may be raised. Criminal defamation is also briefly considered in its own chapter to make the consideration of the topic complete.

The text contains two informative and useful appendices. Appendix I contains the *Defamation Act 2005* (NSW), whilst Appendix II has comparative tables for not only the various *Defamation Acts 2005*, but also the limitation of actions legislation and criminal law Acts.

Defamation Law in Australia is an excellent reference not only for practitioners, students and academics, but journalists will also find it informative. By tracing the history of defamation law it allows the reader to understand and appreciate the dynamic nature of the law of defamation. By providing an analysis of the current national defamation law the text is a valuable resource.