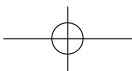
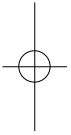


The Right to Speak Ill



The Right to Speak III

Defamation, Reputation and Free Speech

Russell L. Weaver

PROFESSOR OF LAW AND DISTINGUISHED UNIVERSITY SCHOLAR
UNIVERSITY OF LOUISVILLE
LOUIS D. BRANDEIS SCHOOL OF LAW

Andrew T. Kenyon

DIRECTOR, CENTRE FOR MEDIA AND COMMUNICATIONS LAW
UNIVERSITY OF MELBOURNE FACULTY OF LAW

David F. Partlett

DEAN AND PROFESSOR OF LAW
WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW

Clive P. Walker

HEAD OF SCHOOL AND PROFESSOR OF CRIMINAL JUSTICE STUDIES
UNIVERSITY OF LEEDS SCHOOL OF LAW

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2006
Russell L. Weaver, Andrew T. Kenyon, David F. Partlett, Clive P. Walker
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

The right to speak ill : defamation, reputation, and free speech / by
Russell L. Weaver ... [et al.].

p. cm.

ISBN 0-89089-489-2 (alk. paper)

1. Libel and slander--United States. 2. Libel and slander--England.
3. Libel and slander--Australia. 4. Freedom of speech--United States.
5. Freedom of speech--England. 6. Freedom of speech--Australia.
7. New York Times Company--Trials, litigation, etc. I. Weaver, Russell L., 1952- II. Title.

K5210.R54 2005

342.08'53--dc22

2005012708

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

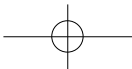
Printed in the United States of America

To Ben and Kate, with love, RLW

To Esther, Thais, Dick, and Ruth, ATK

To Nan, Will and Anne, DFP

*'Life is the crummiest book I ever read,
There isn't a hook, just a lot of cheap shots,
Pictures to shock and characters an amateur would never dream
up' (Brett Gurewitz, Stranger than Fiction, 1994) CPW*



Contents

Preface	xiii
Chapter 1 Introduction	3
Chapter 2 The Common Law Tradition	17
A. Libel, Slander and Procedure	18
B. The Plaintiff's Case	21
C. The Defendant's Case	25
1. Justification	25
2. Fair Comment	28
3. Privileges	31
Chapter 3 U.S. Defamation Law and the <i>New York Times</i> Decision	35
A. From the Framing to Garrison and <i>New York Times</i> : Early U.S. Libel Decisions	35
1. Incorporation	36
2. Defamation as Unprotected Speech	36
B. The Constitutionalization of Defamation: <i>New York Times Co. v. Sullivan</i>	39
1. The Facts	39
2. The Decision	43
C. Post- <i>Sullivan</i> Refinements	49
1. Further Definition of the "Public Official" Concept	50
2. The "Public Figure" Concept	51
3. "Private Individuals"	53
4. Distinguishing "Public Figures" from Private Individuals	61

viii · CONTENTS

D. Rejection of the “Public Interest” Standard	66
E. Application of the “Actual Malice” Standard	68
F. Fact v. Opinion	74
G. Conclusion	75
Chapter 4 1990s Australian and English Developments	77
A. The Australian Free Speech Decisions and <i>Lange</i>	77
1. Pre- <i>Lange</i> Defamation Law	78
2. The <i>Theophanous</i> Decision	80
3. The <i>Lange</i> Decision	82
4. Other Developments Related to the Law of Libel	87
5. Conclusions on <i>Lange</i>	89
B. <i>Reynolds</i> and the English Extension of Qualified Privilege	90
1. Developments Pre- <i>Reynolds</i>	90
2. The <i>Reynolds</i> Development	99
3. Measuring Up to the Human Rights Act 1998	111
4. Other Developments Related to the Law of Libel	120
i. Data Protection Laws	120
ii. Press Complaints Commission	124
5. Conclusions Regarding <i>Reynolds</i>	127
Chapter 5 Interview Results: England and Australia Prior to Qualified Privilege Extensions	131
A. Pre- <i>Reynolds</i> English Interviews	131
1. The External Perception: England’s Tabloid Press	131
2. The English Interviews	138
i. Threats of Suits	139
ii. Post-Publication Suits and Threats of Suits	139
iii. Insurance	141
iv. Participation of Lawyers in the Editorial Process	141
v. The Role of Lawyers and the “Legally Admissible Evidence” Standard	142
vi. The Impact of the “Legally Admissible Evidence” Standard	143

vii. Hypothetical English Watergate	144
viii. Possible Effects of the English Standards—Cost-Benefit Calculations or More Balanced Reporting?	146
ix. Regional Newspapers	147
x. Ability to Report on Political Figures	148
xi. The Role of Privileges for Reporting Parliaments and Courts	149
xii. Ability to Report the Public Interest	150
B. The Australian Interviews: Pre- <i>Lange</i>	150
1. Threats of Suit	151
2. The Rate of Defamation Litigation	152
3. Responses to Threats of Suit: Pre-Publication	155
4. Responses to Post-Publication Suits and Threats of Suits	156
5. Insurance	158
6. The Motivations of Defamation Plaintiffs	159
7. Participation of Lawyers in the Editorial Process	161
8. The Role of Lawyers in the Editorial Process: Privileges and “Legally Admissible Evidence”	163
9. The Impact of the “Legally Admissible Evidence” Standard on Reporting	165
10. The Media and Particularly Litigious Individuals	169
11. A Resourceful Media	173
12. Ability to Report the Public Interest	175
13. A Hypothetical Australian “Watergate”	176
14. Australia’s Cost Rules	177
C. Preliminary Conclusions: Regarding the Australian and English Media	180
Chapter 6 The American Interviews: The Impact of <i>New York Times Co. v. Sullivan</i> and the “Actual Malice Standard”	183
A. Suits and Threats of Suit	185
B. Responses to Suits and Threats of Suits: Pre-Publication	188
C. Responses to Threats of Suits: Post-Publication	189

x · CONTENTS

D. Insurance	189
E. The Motivations of Defamation Plaintiffs	190
F. Lawyers and the Editorial Process	190
G. The Lawyer's Perspective in the Editorial Process	191
H. Particularly Litigious Individuals	193
I. Suits by Politicians	194
J. Suits by Police and Governmental Officials	194
K. Resourceful Media	195
L. Ability to Report the Public Interest	195
M. Cost Rules	199
N. Conclusions	200
 Chapter 7 Interview Results: Australia Following Extensions to Qualified Privilege	 201
A. <i>Theophanous</i>	201
B. <i>Lange</i> : Immediate Effects	204
C. <i>Lange</i> : Six Years On	207
1. Impact on the Pace of Litigation	207
2. Suits by Politicians	208
3. Suits by Police and Governmental Officials	209
4. Lawyers and the Editorial Process	209
5. Impact on Pre-Publication Advice	210
6. Uncertainties about <i>Lange</i> 's Meaning and Application	211
7. Privileges and Legally Admissible Evidence	211
8. Impact on the Media's View of "Extremely Litigious Individuals"	212
9. The Continuing Impact of the Costs Rule	212
10. Additional Concerns	212
D. Conclusion	213
 Chapter 8 Interview Results: <i>Reynold's</i> Impact on the English Media	 215
A. Threats of Suit	215
B. The Rate of Defamation Litigation	217

C. Responses to Threats of Suit: Pre-Publication	219
D. Responses to Post-Publication Suits and Threats of Suits	220
E. Insurance	221
F. The Motivations of Defamation Plaintiffs	221
G. Participation of Lawyers in the Editorial Process	222
H. <i>Reynolds</i> and the “Legally Admissible Evidence” Standard	223
I. Ability to Report the Public Interest	226
J. Concerns About <i>Reynolds</i>	227
K. <i>Reynolds</i> and Particularly Litigious Individuals	233
L. Suits by Governmental Officials	234
M. Data Protection Laws	235
N. A Hypothetical English “Watergate”	236
O. Court Cost Rules	237
P. Conclusion	240
Chapter 9 Conclusions: Defamation, Free Speech and Reputation in Democratic Societies	243
A. The Common Law Approach	245
B. The New York Times “Actual Malice” Standard	246
1. Does <i>Sullivan</i> Spawn Costly Litigation That Intrudes into Editorial Processes?	247
2. Large Damage Claims and Large Awards	252
3. Little Protection for Reputation	255
4. An “Irresponsible” Media?	256
5. <i>Sullivan’s</i> Focus on Plaintiff’s Status is Misdirected	259
6. Conclusions about “Actual Malice”	265
C. The <i>Lange</i> Approach	266
1. Is Litigation under <i>Lange</i> Complex and Intrusive?	267
2. Cost Rules and Plaintiff and Defendant Legal Expertise	270
3. A Focus on “Political Communication” not Plaintiff Status	271
D. The <i>Reynolds</i> Approach	272
1. Focus on the Public Interest	275
2. Complexity and Uncertainty	276
3. Regulation of the “Tone” of Allegations	277

xii · CONTENTS

4. Impact of Cost Rules	280
5. Pre-Publication Restraints	281
6. Conclusions about the <i>Reynolds</i> Approach	282
E. Conclusion: A Final Tally and Alternative Approaches	289
Bibliography	293
Table of Cases	305
Index	311

Preface

To trace the law of defamation is to transverse centuries of the common law from its origins in the ecclesiastical courts to its place in modern political discourse. The printing press had its influence on the fabric of the law, as has the digital revolution. Courts, including the Star Chamber, have teased antique doctrine to accommodate changing societies, and legislatures have intervened frequently, and with mixed results, to reform the law.

This book brings authors together to write on a subject that has until recently, been deeply rooted in particular communities. Not so now. The watershed legal development was the landmark United States Supreme Court decision, *New York Times v. Sullivan*.¹ The decision builds upon the notion that representative democracies can function optimally only when political debate is open. Many obstacles stand in the way of political debate, but the rules of defamation with their tendency to chill speech is one obstacle that should be overcome. Speech can be maximized, while reputation is given less moment.²

The principles embodied in *Sullivan* derived from the First Amendment, yet they spoke to values common to all democracies, particularly after the Second World War when the discourse of rights grew powerfully. Both England and Australia rest the legitimacy of their respective political systems upon representative democracy and upon legal traditions of individual rights, including freedom of expression. The *Sullivan* principles diffused in ways noted in the following pages. Their absorption depended upon the legal, political and social culture obtaining in Australia and England. Crafting its own rule, each jurisdiction proposed to reach the same result, to avoid chilling of political speech by taming overly aggressive defamation doctrine. After a searching analysis of their own social and political traditions and constitutional law structures, the courts in England and Australia crafted a law of defamation in the 1990s that gave a new

1. 376 U.S. 254 (1964).

2. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L.REV. 691 (1986).

xiv · PREFACE

weighting to the protection of political free speech. The new doctrines, although to some extent reflecting the aspirations of the United States Supreme Court, represent a fabric that is woven with vital differences, as we point out, and reflect a growing commonality of concern for the value of free speech in public life which is shared by at least three jurisdictions.

This book, we hope, makes a significant contribution in reciting the law as it has evolved under the influence of the free speech imperative in three different legal systems. But, for us, that is not enough. Our aim is to probe beyond case law analysis to examine publishers' behavior in the shadow of the law and how, in particular, doctrinal changes influence willingness to publish political speech. Our methodology has been to interview those actors most involved with the development and publication of political speech. We have interviewed journalists, editors, producers and defamation lawyers. Our conclusions are drawn from this empirical material, as well as from comparisons of the relevant legal doctrines in each country. In its approach, the book builds on earlier empirical research into defamation law and the media, which has focused on one or two countries' approaches.³ This book is unique in the breadth of jurisdictions it considers, and in the long time frame during which interviews were conducted for the project. These interviews began in the early 1990s, a time when both England and Australia continued to adhere (with some modifications) to common law

3. For an examination of pre-*Reynolds* research on English and U.S. defamation law, see Russell L. Weaver and Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993). There has been extensive work focused solely on the U.S. See, e.g., RANDALL P. BEZANSON, GILBERT CRANBERG AND JOHN SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (New York: Free Press, 1987); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503 (2001) (reporting on the findings of the Libel Defense Resource Center, <http://www.medialaw.org>); Brian C. Murchison, John Soloski, Randall P. Bezanson, Gilbert Cranberg and Roselle L. Wissler, *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994). For other work examining England, see Russell L. Weaver, Andrew T. Kenyon, David F. Partlett and Clive P. Walker, *Defamation Law and Free Speech: Reynolds v. Times Newspapers and the English Media*, VAND. J. TRANS-NAT'L L. 1255 (2004); ERIC BARENDT, LAURENCE LUSTGARTEN, KENNETH NORRIE AND HUGH STEPHENSON, *LIBEL AND THE MEDIA: THE CHILLING EFFECT* (Oxford: Oxford University Press 1997) (the study also included Scotland). For empirical analysis involving Australia, see Russell L. Weaver & David F. Partlett, *Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege*, 36 G.W.I. L. REV. 377 (2004); Tim Majoribanks and Andrew T. Kenyon, *Journalistic Practice and Defamation Law in Australia and the U.S.*, 25 AUSTRALIAN JOURNALISM REV. 31 (2003) (includes comparisons with the United States). For interview-based work about England and Australia, see Andrew T. Kenyon, *Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406 (2004).

defamation liability rules. In addition, the interviews continued following more recent defamation protections. Thus, the interviews provide a basis for evaluating the impact of recent decisional changes. For the first time, empirical material preceding and following important changes to defamation law in major defamation jurisdictions have been drawn on to understand more about the legacy of *New York Times v. Sullivan*.

Russell Weaver participated in all of the interviews in all three countries and took the prime responsibility for their narration; David Partlett participated in some of the interviews. During the fieldwork, potential interviewees were identified by their status within prominent news organizations (e.g., editor, investigative reporter, in-house or external defamation lawyer), and each was individually contacted. While the overwhelming majority of interviews were conducted face-to-face, a few were conducted by phone or by e-mail. All interviews were recorded by notes that were taken on computer.

The book is broken into three parts. Part I summarizes the defamation rules in the subject countries. The law is described before and after *New York Times v. Sullivan* and the key 1990s cases in England and Australia. It is important to note that ongoing efforts exist to create uniform defamation law across Australia's states and territories. In 2005, state and territory governments agreed reform proposals that would create uniform defamation law,⁴ if they pass through the various parliaments. Many previous efforts have failed to be enacted, although none has progressed quite as far as the current proposals. In any event, the reforms are not substantial for the purposes of this book. They do not change common law burdens of proof or the Australian approach to legal costs. They follow many of the elements of the plaintiff's case and defenses that are described in later chapters for the state of Victoria. Importantly, the proposals leave the *Lange* defense unchanged,⁵ and apply a privilege defense similar to that under s. 22 of New South Wales' Defamation Act 1974 right across Australia.⁶ Part II of the book analyzes how defamation rules function in practice, and how those rules affect the press' functioning. As noted above, Part II is based on extensive interviews with reporters, producers, editors and defamation lawyers in the three subject countries. Part III, the most difficult part for four authors from three countries to compose, attempts to draw evaluative judgments about the trade-offs made

4. See e.g. Defamation Bill 2005 (Vic); Defamation Bill 2005 (NSW).

5. See *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520; and see chapter 4.

6. See further ANDREW T. KENYON, *DEFAMATION: COMPARATIVE LAW AND PRACTICE* (London: UCL Press, 2005).

xvi · PREFACE

in the affected countries. The limited scale of the proposed reforms to Australian defamation law—if indeed they are enacted—does not substantially effect the book’s analysis of differences between the United States, English and Australian defamation law and the media.

Portions of this book were previously published in other places including the following: Russell L. Weaver, Andrew T. Kenyon, David F. Partlett & Clive P. Walker, *Defamation Law & Free Speech: Reynolds v. Times Newspapers and the English Media*, 37 VAND. J. TRANS-NAT’L LAW 1255 (2004); Russell L. Weaver & David Partlett, *Defamation, the Media & Free Speech: Australia’s Experiment with Expanded Qualified Privilege*, 36 GEO. WASH. INT’L. L. REV. 377 (2004); Russell L. Weaver & Geoffrey J.G. Bennett, *Is the New York Times “Actual Malice” Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993). However, no other publication contains the full and extensive range of analysis, interview results and conclusions found in this book.

Russell offers particular thanks to the various groups and organizations within the University of Louisville that provided support for this research including the Intramural Research Incentive Grant program, the Vice President for Research (who provided support through the University’s Distinguished University Scholar program), and the University of Louisville’s International Center. He also wishes to thank the following foreign institutions for their financial support, in-kind support, and collegiality. Specially to be thanked are the following: University of Melbourne’s Centre for Media and Communications Law; Macquarie University Division of Law; Sydney University Faculty of Law; Australian National University Faculty of Law; Notre Dame London Law Centre; and University of Leeds School of Law.

Andrew thanks the Australian Research Council, which has supported his work on this project (DP0343258), as well as thanking Emma Stacey and Amy Harrington, administrators of the Centre for Media and Communications Law, Jason Bosland, researcher at the Centre, Tim Marjoribanks and his colleagues in the Melbourne Law School. All three other authors wish to thank our research assistants and secretaries who made this book possible. David thanks his co-authors for their patience, understanding, and inspiration. His colleagues at Washington and Lee University School of Law provide a scholarly environment second to none. Clive likewise thanks his co-authors but especially Russell Weaver, whose support and hospitality over the past decade or more has been superb.

All the authors wish to thank our families for their incalculable support.

RLW, ATK, DFP, CPW
March 2005