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## Book reviews

Editor: Angelina Gomez

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### DEFAMATION LAW

*Defamation Law*, by Dr David Rolph, Thomson Reuters, Australia, 2016, 424 pages: ISBN 9780455228570. Hardcover \$195.00.

Dr David Rolph's *Defamation Law* is an outstanding work. It will be as useful to the solicitor who occasionally has to advise a client concerning a defamation problem as it will be to counsel conducting a defamation trial or an appeal. It will be just as useful to the appellate judge determining how a principle of defamation law should be applied to a novel situation. And it will be required reading for any reformer of a body of law that has become overly technical, complex and unbalanced in weighing the competing interests of protection of reputation and freedom of expression.

*Defamation Law* combines the practical with the theoretical and historical and provides incisive insights into the many problems that nowadays beset the law of defamation. Dr Rolph says that the purpose of his book is to provide an accessible but rigorous exposition of defamation law thereby demystifying this complex cause of action. He achieves this object admirably.

It may be going too far to say, as Dr Rolph says, that defamation law has the deserved reputation for being the most arcane area of private law. Patent law, for one, would give it a good run for its money. But that said, defamation law is nowadays complex and, as Dr Rolph says, more than any other area of law, defamation is fixated upon pleadings. That was not always the case.

At the Bar, I had a retainer for the News Ltd stable of companies for 16 years and also frequently appeared for plaintiffs. I did dozens of defamation trials and appeals and was involved in another few hundred matters in giving advice, in drafting or settling pleadings and in arguing interlocutory applications. I was never conscious of defamation law being overly complex until the introduction of Rules of Court in the 1970s requiring the pleading of imputations and the enactment of the *Defamation Act 1974* (NSW) permitting the pleading of contextual truth and other defences. Until then, the chief problems were tactical:

- what meaning should the plaintiff put to the jury bearing in mind that it affected the scope of various defences particularly justification (a plaintiff was not required to *plead* a meaning in the Declaration or Statement of Claim unless relying on a true innuendo);
- in an action against a media outlet, should a reporter be joined as a party (unwise in my opinion, juries might think the individual had to pay a share of the damages);
- where the defendant pleaded justification, should the plaintiff be called as a witness and, if so, in chief or in reply. (If called in reply, the plaintiff could not give evidence of hurt to feelings – an important head of damage.);
- should the defendant plead and prove justification when there was a substantial risk the plea would fail? (In most cases yes, because it usually reduced the damages although it failed.)

Another problem in some cases was unfairness to the defendant because the plaintiff was not required to plead a meaning and was unwise to do so. (If the plaintiff pleaded a meaning at a high level of abstraction, he or she might face a plea of justification which relied on conduct that was not mentioned in the publication, as occurred in *Maisel v Financial Times (No 1)* (1915) 84 LJKB 2145 and in the New South Wales case of *Gray v Mirror Newspapers Ltd* (settled during the trial.) Some of the problems for defendants in cases where no meaning was pleaded were referred to in *Chakravarti v Advertiser Newspaper Ltd* (1998) 193 CLR 519, 532.

Insofar as the modern law of defamation law has substantive, as opposed to pleading, problems, they arise largely from its derivation from multiple sources. Defamation law began with the Ecclesiastical Courts which were concerned with the spiritual not the social consequences of defamation. Excommunication, or more often absolution and public penance, was the fate of the defamer. However, the modern defamation law's focus on falsity and malice can be traced to this part of its history. The short, unhappy life of the Star Chamber played its part in developing the tort by

awarding large damages in its attempt to stamp out duelling. I have always thought that this produced a culture that induced the common law courts' approach to defamation. It was not until the second half of the 16th century, however, that the common law courts began to develop the tort from a base that bore the marks left by the Ecclesiastical Courts and the Star Chamber. Legislative repairs to this body of law have been piecemeal and in many instances have only added to the problems.

Against that background, it is unsurprising that defamation law is not a coherent body of doctrine. As Dr Rolph points out, even fundamental concepts such as what constitutes defamation and what constitutes reputation for the purpose of the tort have never been satisfactorily defined. Indeed, it was not until the first part of the 19th century that the common law courts developed the defence of qualified privilege – now the most litigated area of defamation in recent High Court cases.

After an introductory chapter, the second and third chapters of *Defamation Law* examine the competing interests in this body of law, its history and its sources. They are required reading for anyone who wants to understand the law of defamation.

Chapter 4 examines the criminal law of defamation.

Chapter 5 deals with preliminary matters such as the distinction between libel and slander, the limitation periods for bringing an action, the persons or organisations who have standing to sue and the role of judge and jury in a defamation trial.

Chapters 6 to 17 then deal with the individual issues that commonly arise in a defamation action. They contain copious reference to the relevant case law and statutory provisions with critical commentary and suggestions for reform. Even the most experienced practitioners in this field of law will profit from Dr Rolph's exposition and commentary.

Chapter 18 – the final chapter – contains a useful examination of other causes of action that are relevant to the protection of reputations. It deals with injurious falsehood, negligent misstatement, false imprisonment, privacy and breach of confidence and the statutory causes of action of false and misleading conduct and racial discrimination.

I highly recommend this outstanding work.

*The Hon M H McHugh AC QC*