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CHIEF JUSTICE OF NEW SOUTH WALES

FRANCIS FORBES SOCIETY LEGAL HISTORY TUTORIALS

'THE HISTORY OF DEFAMATION LAW: UNJUMBLING A TANGLED WEB'

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INTRODUCTION

1 I would like to begin today by acknowledging the traditional custodians of the land from which this address is being delivered, the Gadigal people of the Eora Nation. I pay my respects to the Elders past, present and emerging.

2 Defamation law has a long history, yet it is by no means an easy beast to pin down. In the saga that is the development of this field of law, the present time provides an interesting viewpoint from which to examine some of that history.

3 I do not profess to be an expert in the technicalities and nuances of defamation law, sometimes disparagingly described as its dark arts, nor its application. I will leave those challenges to my learned colleagues and similarly learned members of the legal profession who have years and indeed, decades of experience in these dark arts. What I seek to do today is to undertake a historical overview of defamation, with a view to understanding how the law has come to be where it is now.

4 In light of recent public discourse surrounding high-profile cases and the reforms to legislation debated and passed, this is a timely exercise. Looking at history can help us to understand how and why things are as they are. Particularly in an area as convoluted as defamation law, which has been

[*] I express my thanks to my Judicial Clerk, Ms Rosie Davidson, for her assistance in the preparation of this address.

described as "bedevilled with complexities and anachronisms",[1] the process is especially apposite.

5 However, this exercise is not merely for the sake of practical utility. The history of defamation in both ancient and more modern times is also extremely interesting. In a field where the law itself is so intimately entwined with human relationships and personal reputation, one can expect to encounter colourful characters and strange stories, even whilst tracing the progression of legal rules and principles.

6 In this tutorial, I will not presume to cover off all the features of the law and how they came to be, nor analyse every major step which has influenced the law as it currently stands. There is simply not enough time to do so. However, my aim is to first give a broad-brush overview of the history of defamation, and then focus more briefly on a few discrete topics of interest which have historical relevance and also inform current circumstances, being themes of technology, damages and power and control. By combing through some of the history, I hope to demonstrate, at least in part, why defamation law appears so tangled up, and think about some of the questions which still remain.

BROAD HISTORICAL OVERVIEW

7 David Rolph has stated that "Australian defamation law, in its present form, is the product of historical accident, piecemeal reform and comparative neglect. The hold of its history needs to be loosened in order for it to be modernised properly."[2] Or, in the words of the then-president of the Victorian Bar

[1] Michaela Whitbourn, 'Fixing Australia's Broken Defamation Laws', *The Sydney Morning Herald* (online, 1 December 2018) <https://www.smh.com.au/national/fixing-australia-s-broken-defamation-laws-20181129-p50j9z.html>.

[2] David Rolph, *Defamation Law* (Thomson Reuters, 2016) 4 [1.40].

Association, Matt Collins QC, "we inherited the English common law and then made it worse".[3]

8 With this in mind, I turn first to a broad historical overview. Over the years, plaintiffs have used the various laws of defamation to ventilate grievances and to seek reparation for injury done, speaking broadly, to their reputations. Successful and unsuccessful suits have ranged from the serious, such as the damage caused by allegations of theft, murder, or sexual harassment,[4] to the seemingly more trivial, such as suggestions that a plaintiff stunk of brimstone[5] or the publication of internet memes inspired by a plaintiff's mullet hairstyle.[6]

9 But instead of jumping straight back in time, let us first establish our current position. On Tuesday, 11 August 2020, the *Defamation Amendment Act 2020* (NSW) was assented to, to amend various provisions of the *Defamation Act 2005* (NSW) and the *Limitation Act 1969* (NSW).[7] The amendments which will be effected by this Act include an additional element that publication of defamatory matter about a person has caused, or is likely to cause, "serious harm" to the reputation of the person,[8] the requirement that an aggrieved person provide a "concerns notice" to a publisher of alleged defamatory

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[3] Michael Pelly, 'Australia – the Defamation Capital of the World', *The Australian Financial Review* (online, 4 September 2019) <https://www.afr.com/companies/media-and-marketing/australia-the-defamation-capital-of-the-world-20190904-p52nuh>.

[4] See for example John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 468; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46; *Nationwide News Pty Limited v Rush* [2020] FCAFC 115.

[5] Patrick George, *Defamation Law in Australia* (LexisNexis Butterworths, 3rd ed, 2017) 35 [2.16], quoting *Villers v Monsley* (1769) 2 Wils KB 403; 95 ER 886.

[6] *Mosslmani by his tutor Karout v DailyMail.com Australia Pty Ltd (ACN 166 912 465); Mosslmani by his tutor Karout v Nationwide News Pty Ltd (CAN 008 438 828); Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd (ACN 065 986 987)* [2016] NSWDC 264; *Mosslmani by his tutor Karout v DailyMail.com Australia Pty Ltd (ACN 166 912 465); Mosslmani by his tutor Karout v Nationwide News Pty Ltd (ACN 008 438 828); Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd (ACN 065 986 987) (No. 2)* [2016] NSWDC 357.

[7] *Defamation Amendment Act 2020* (NSW).

[8] Ibid sch 1 item 6.

imputations before commencing defamation proceedings,[9] a new public interest defence,[10] and clarification about the cap on damages for non-economic loss,[11] among other things. These amendments are the culmination of national consultations on amendments to the 2005 Model Defamation Provisions and the work of the Council of Attorneys-General.[12]

10 Further reviews by the Council of Attorneys-General are also progressing in relation to the "liabilities and responsibilities of digital platforms for defamatory content published online".[13]

11 Australia has been called the "defamation capital of the world", with defamation issues considered by superior courts in New South Wales ten times more frequently on a per capita basis than in the UK.[14] Yet commentators have stated that Australia's defamation laws are "broken"[15] and "arcane".[16] It is still to be seen what impact the recent and ongoing reforms will have on the difficulties encountered in the law. Still, history is also highly relevant to understanding these issues. As Rolph has remarked, "a significant reason defamation law was and remains complex is that it developed in English law from multiple sources."[17]

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[9] Ibid sch 1 items 8-9.

[10] Ibid sch 1 item 27.

[11] Ibid sch 1 item 33.

[12] 'Review of Model Defamation Provisions', *NSW Department of Communities and Justice* (Web Page) <https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-model-defamation-provisions.aspx>.

[13] New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 July 2020, 9 (Mark Speakman, Attorney-General).

[14] Pelly (n 3).

[15] Whitbourn (n 1).

[16] Rolph, *Defamation Law* (n 2) 1 [1.10].

[17] Ibid 39 [3.10].

12 So what are those multiple sources? Humanity has sought retribution or reparation for false facts since time immemorial. Ancient Sumerian, Babylonian and Israelite laws punished wrongful accusations,[18] while Roman law criminalised defamatory statements and publications.[19] The early 6th century compilation of the laws of the Salic Franks, the *Lex Salica*,[20] imposed monetary penalties for particular language, for example, calling a man a "wolf" or a "hare", or making a false imputation of "unchastity".[21] False assertions of being a "thief" or "manslayer" in Norman law would result in payment of damages and the additional punishment of publically confessing the lie whilst holding one's nose.[22] In the days of Alfred the Great, the King of Wessex in the 9th century, slander was punished harshly by removing the source of the problem – the slanderer's tongue.[23]

13 In England, the roots of the modern protection of reputation are in both the spiritual and the temporal – the ecclesiastical courts and other various jurisdictions, including the manorial courts, royal courts and the Star Chamber. These different jurisdictions had different focuses, and rose and fell relative to each other over time.[24]

14 In the 13th and 14th centuries the local manorial courts dealt with defamation matters.[25] These courts, applying customary law and relying on the swearing of oaths or juries, provided remedies, which could include monetary damages, for the common person whose reputation had been tarnished through false

[18] George (n 5) 6 [2.2].

[19] Ibid 7-8 [2.3].

[20] JW Wessels, *History of the Roman-Dutch Law* (African Book Co, 1908) 37.

[21] Van Vechten Veeder, 'History and Theory of the Law of Defamation' (1903) 3(8) *Columbia Law Review* 546, 548.

[22] Ibid.

[23] George (n 5) 11 [2.4].

[24] Veeder (n 21) 547.

[25] Rolph, *Defamation Law* (n 2) 51 [3.60]; George (n 5) 14 [2.6]; Veeder (n 21) 549.

allegations.[26] Many cases heard in these courts pertained to allegations of dishonesty and theft.[27] However, the local and diverse nature of these courts in specific communities inhibited the development of a consistent law,[28] and by the 16th century, the predominance of these courts declined.[29]

15 The ecclesiastical courts held a separate and distinct jurisdiction over defamation. These courts dealt with matters of defamation from their inception in the times of William the Conqueror, based on the biblical mandate, "you shall not bear false witness against your neighbour".[30] In 1222, the Council of Oxford enacted a constitution, based on the Canons of the Fourth Lateran Council, which decreed that whoever would maliciously impute a crime to any person who is not of ill fame among good and serious men would be excommunicated.[31] Just over 60 years later in 1285, the *Circumspecte Agatis* statute set out that defamation would "be tried in the Spiritual Court when money is not demanded…"[32] Ecclesiastical courts thus came to have an established jurisdiction over defamation. Because the Church was concerned with the purity of the souls of its flock, and defamation

[26] Veeder (n 21) 549; Chris Dent, 'The Locus of Defamation Law since the Constitution of Oxford' (2018) 44(3) *Monash University Law Review* 491, 499, 501; Maureen Mulholland, 'Trials in Manorial Courts in Late Medieval England' in Maureen Mulholland and Brian Pullan (eds), *Judicial Tribunals in England and Europe, 1200-1700: The Trial in History, Volume 1* (Manchester University Press, 2003) 81, 82-3.

[27] Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007) 70.

[28] Rolph, *Defamation Law* (n 2) 51 [3.60].

[29] RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, 2006) 41, citing Marjorie McIntosh, *Controlling Misbehaviour in England, 1370-1600* (1998) 43, 58.

[30] George (n 5) 12 [2.5], quoting Exodus 20:16.

[31] Dent (n 26) 494; McNamara (n 27), quoting RH Helmholz, 'Canonical Defamation in Medieval England' (1971) 15 *American Journal of Legal History* 255, 256.

[32] Franklyn C Setaro, 'A History of English Ecclesiastical Law' (1938) 18(1) *Boston University Law Review* 102, 115.

was treated as a spiritual offence, the ecclesiastical courts could impose punishments of penance for the salvation of the sinner.[33]

16 Defamation suits in the ecclesiastical courts were common.[34] Oaths were sworn by the alleged defamer and a number of compurgators, the focus of those witnesses being whether the defamer was trustworthy and had sworn truly, rather than the actual truth or falsity of the accusation.[35] While allegations of dishonesty and theft also appeared in the church courts, the vast majority of suits heard in the 16th and 17th centuries related to sexual slander, with women making up around 60 to 70% of plaintiffs for these matters.[36] The focus of the process was on the defamer themselves and punishment of their sin, rather than on the person who had been harmed by the words, and the concept of "reputation" was protected in only a very narrow sense.[37]

17 A vigorous jurisdictional struggle in dealing with defamation matters ensued between the ecclesiastical courts and the royal courts from around the 16th to 19th centuries.[38] Some defamatory imputations were said to relate to spiritual crimes, such as adultery or other sexual offences, and could be dealt with and punished by the church courts, while others were said to be temporal issues, such as accusations of thievery, and thus came under the common law jurisdiction.[39] This distinction, however, was not black and white, and there was jurisdictional crossover in practice.[40] Further, as the church courts

[33] Dent (n 26) 496; RH Helmholz, 'Crime, Compurgation and the Courts of the Medieval Church' (1983) 1(1) *Law and History Review* 1, 13.

[34] Outhwaite (n 29) 6.

[35] Dent (n 26) 500.

[36] McNamara (n 27) 73, 75.

[37] Ibid 72.

[38] Franklyn C Setaro, 'A History of English Ecclesiastical Law (Part II)' (1938) 18(2) *Boston University Law Review* 342, 387-8 ('Part II').

[39] Veeder (n 21) 558; Outhwaite (n 29) 40, 42.

[40] Outhwaite (n 29) 40.

declined, the spiritual jurisdiction became even more restricted, and the royal courts would issue writs of prohibition to prevent the ecclesiastical courts from dealing with particular matters, including when there was a mix of spiritual and temporal defamations or where a spiritual defamation resulted in temporal damage.[41]

18 In the royal courts, the first writs for civil defamation date from the early 16th century.[42] Notwithstanding the jurisdictional struggle, ecclesiastical law seems to have influenced the development of defamation law in these common law courts.[43] Initially, the predominant action on the case for slander was for allegations of theft.[44] As the action on the case for words developed, and with it the number of cases brought, there was initially much confusion as to what types of words were in fact actionable. These were in 1648 clarified as including "scandalous words" which made imputations of crime, or unfitness in trade or profession, or contagious disease.[45] In other circumstances, a plaintiff would have to show actual loss in order for the words to be actionable.[46] With such a large number of matters before the courts, other rules developed as to what was actionable, including requirements that words not be too general, or uncertain, or subsequently qualified.[47]

19 One method of interpretation used was known as the *mitior sensus* doctrine, namely the "milder sense" or innocent construction. If there was a possible way to construe words so as to have a non-defamatory meaning, that would

[41] Setaro, 'Part II' (n 38) 389; Rolph, *Defamation Law* (n 2) 43 [3.30].

[42] Rolph, *Defamation Law* (n 2) 43 [3.30]; Baker (n 4) 467.

[43] McNamara (n 27) 83; Baker (n 4) 467.

[44] Baker (n 4) 468.

[45] McNamara (n 27) 83; Rolph, *Defamation Law* (n 2) 44 [3.30].

[46] Rolph, *Defamation Law* (n 2) 44 [3.30]; Paul Mitchell, 'The Foundations of Australian Defamation Law' (2006) 28(3) *Sydney Law Review* 477, 478.

[47] George (n 5) 23 [2.11].

be the interpretation taken.[48] So for example, if one were to say, "Thou art a murderer", perhaps this simply meant that that person was a murderer of hares.[49] Or, to say that someone was "as arrant a thief as any man in England" may not impute any crime at all, as there could in fact be no thieves in that country.[50] Or, if I could perhaps adapt this into a timeless sledge, to say that someone was as dishonest as a lawyer could indeed be innocent, as all lawyers may be ethical and trustworthy. Alternatively, some might think it would be defamatory to simply describe a person as a lawyer. This doctrine reflected its ecclesiastical roots in restricting actions to allegations of punishable crimes.[51] *Mitior sensus* arguments fill the early reports, although it does appear that judges often rejected the more extreme constructions.[52] Nonetheless, this was a way in which lawyers flexed their creativity and legal ingenuity.[53] When this doctrine declined it was replaced by a rule that words were to be understood in their most natural and obvious sense.[54] That is not always apparent in modern defamation cases.

20 Another forum for defamation claims was the Star Chamber, which as a limb of the King's Council could exercise prerogative power.[55] In the 15th and 16th centuries, its principal focus was on written libels, and the early 17th century case, *De Libellis Famosis*, marked a significant point in the development of the law of criminal libel and seditious libel.[56] In that case, the Star Chamber selectively adapted Roman criminal defamation law: while the same

[48] RH Helmholz, 'The *Mitior Sensus* Doctrine' (2004) 7(2) *Green Bag* 133, 133.

[49] Kilvert v Rose (KB 1625), Bendl. 155, cited in Helmholz, 'The *Mitior Sensus* Doctrine' (n 48) 134.

[50] Foster v Browning (CP 1624), Cro. Jac. 688, cited in Helmholz, 'The *Mitior Sensus* Doctrine' (n 48) 134.

[51] Baker (n 4) 471.

[52] Helmholz, 'The *Mitior Sensus* Doctrine' (n 48) 135-6.

[53] Ibid.

[54] George (n 5) 23 [2.11].

[55] McNamara (n 27) 87.

[56] Ibid 85; Rolph, *Defamation Law* (n 2) 46 [3.40]; GS McBain, 'Abolishing Criminal Libel' (2010) 84 *Australian Law Journal* 439, 462.

terminology was used, the substance was not. McNamara writes that this was "almost certainly in bad faith", and that while Roman defamation laws were not used oppressively, the Star Chamber's purposes were more related to the exercise of political power and suppression of political pamphlets.[57] Sir Edward Coke was also purported to have had a creative hand in the establishment of criminal libel.[58] As well as this, the Star Chamber offered the remedy of damages, and, unlike the royal courts, allowed suits for defamation even where one of the parties had died.[59]

21 Originally, no distinction was made between slander and libel in civil defamation.[60] Namely, there was nothing to suggest any legal difference between defamation via the spoken word and written word. Nor should this have been expected, since at the time, most ordinary people were illiterate.[61] Those who could read and write included the political elite who often dealt with insults by duelling each other rather than seeking legal redress.[62] However, when this distinction eventually developed from the latter half of the 17th century,[63] it became another tangling factor which made defamation law increasingly complex. Written defamatory words needed no proof of special damage to be actionable, but such proof was required for spoken words except in particular categories.[64] While this distinction was abolished in New South Wales in 1847,[65] this reform was only adopted nationally upon the

[57] McNamara (n 27) 88-9.

[58] McBain (n 56) 465-6.

[59] Rolph, *Defamation Law* (n 2) 46 [3.40].

[60] WJV Windeyer, 'The Truth of a Libel' (1935) 8 *Australian Law Journal* 319, 321; Baker (n 4) 475.

[61] McNamara (n 27) 68.

[62] McBain (n 56) 464.

[63] Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 4; Rolph, *Defamation Law* (n 2) 44 [3.30].

[64] Mitchell, 'The Foundations of Australian Defamation Law' (n 46) 478.

[65] *Slander and Libel Act 1847* (NSW) ss 1-2.

introduction of the Uniform Defamation Laws in 2005,[66] which added further complications. As a further note, while the distinction between libel and slander has been abolished in Australia, the dual characterisation of defamation as both a tort and a crime persists, even if criminal prosecution in recent times is rare.[67]

22 Thus for some time, the ecclesiastical courts, the Star Chamber and the royal courts each created their own relatively independent defamation laws.[68] After the abolition of the Star Chamber in 1641 and the transfer of its jurisdiction to the royal courts,[69] these courts became the major forum for defamation actions. In 1855, the ecclesiastical courts lost all jurisdiction over defamation,[70] although their influence had already much declined.

23 The cumulative effect of these various sources was an English law which, rather than existing as the result of deliberate and defined efforts, grew in a piecemeal fashion and was shaped by particular conditions.[71] Veeder described this law as "absurd in theory, and very often mischievous in its practical operation."[72]

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[66] Rolph, *Defamation Law* (n 2) 52 [3.70]; see also *Civil Law (Wrongs) Act 2002* (ACT) s 119(1); *Defamation Act 2006* (NT) s 6(1); *Defamation Act 2005* (NSW) s 7(1); *Defamation Act 2005* (Qld) s 7(1); *Defamation Act 2005* (SA) s 7(1); *Defamation Act 2005* (Tas) s 7(1); *Defamation Act 2005* (Vic) s 7(1); *Defamation Act 2005* (WA) s 7(1).

[67] David Rolph, 'The Sources of Defamation Law' in JT Gleeson, JA Watson E Peden (eds), *Historical Foundations of Australian Law: Volume II* (The Federation Press, 2013) 106, 125.

[68] Rolph, *Defamation Law* (n 2) 47-8 [3.40].

[69] Setaro, 'Part II' (n 38) 361; Dent (n 26) 503; McNamara (n 27) 89.

[70] Noel Cox, 'The Influence of the Common Law on the Decline of the Ecclesiastical Courts of the Church of England' (2001-2002) 3(1) *Rutgers Journal of Law and Religion* 1, 33; Setaro, 'Part II' (n 38) 388, 390.

[71] Veeder (n 21) 546.

[72] Ibid.

24 Of course, the laws of defamation as they exist in this country have gone further than their English roots. Particular Australian influences, including the impact of federalism,[73] have contributed to the current position.

25 The first court in early colonial New South Wales was the Court of Civil Jurisdiction, presided over by judge advocates who were required to apply British law but who also adapted it to the particular conditions facing the colony.[74] Between 1788 and 1809, 18 out of the 292 cases heard by the Court of Civil Jurisdiction had defamation as the cause of action.[75] One early defamation case heard in that court concerned one Maria Lewin.[76] According to gossip, Mrs Lewin had been sexually involved with two men as she travelled from England to Australia on a different ship to her husband. The defendant claimed to have witnessed Mrs Lewin and one of the men "criminally connected on the steps of Captain Raven's door".[77] Her case was successful and the court awarded £30 damages. The case was also significant for the way that the result diverged from English law. As a so-called moral issue and without a claim for special damages, no common law action should have been available, nor should damages have been awarded according to orthodox English law.[78] However, the nature of the court, coupled with possible legal ignorance of those involved,[79] resulted in an outcome suited to the circumstances.

26 New South Wales in the 1820s saw libel prosecutions used, particularly by Governor Darling, against newspaper proprietors who were vocal in their

[73] Rolph, *Defamation Law* (n 2) 39 [3.10].

[74] Bruce Kercher, *Debt, Seduction and Other Disasters* (The Federation Press, 1996) xix-xxi.

[75] Ibid 96.

[76] *Lewin v Thomson,* Court of Civil Jurisdiction, 3 February 1800 (NSW Archives 1094), cited in George (n 5) 62 [3.2].

[77] Kercher (n 74) 100.

[78] Ibid.

[79] Ibid.

disapproval of the colonial administration.[80] I will turn to this further in due course. In 1827, Darling introduced legislation known by newspaper editors as the "Gagging Act", which authorised bonds to be paid by a defendant in "blasphemous or seditious libel" matters and banishment as punishment for a second offence.[81] In 1841, various newspaper editors petitioned Governor Gibbs for an end to this Act, and for the libel law of the colony to be realigned to English law.[82] However, the new law which would come to pass was to be a noted divergence from the laws of England.

27 In 1847, the passing of the New South Wales *Slander and Libel Act* marked the beginning of a law which was "distinctively Australian".[83] This statute abolished the slander/libel distinction and radically altered the defence of truth to also require that a publication be for the "public benefit".[84]

28 Prior to the passage of this Act in New South Wales, legislators in England had been attempting to make various amendments to the laws of defamation. While truth was not a defence in criminal libel, it was a complete defence in a civil action.[85] An 1816 attempt spearheaded by Henry Brougham to get rid of the slander/libel distinction and modify the truth defence failed before the second reading, as did Bills initiated by various others in 1833 and 1834. Bills to amend the law continued to fail in 1835, 1836, and 1837.[86]

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[80] Margaret Van Heekeren, 'The Press and the 1847 Libel Act: The First Criminal Libel Cases in New South Wales' (2009) 13(2) *Legal History* 269,270-1; Brendan Edgeworth, 'Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824-1831)' (1990) 6 *Australian Journal of Law and Society* 50.

[81] Van Heekeren (n 80) 271-2; *Blasphemous and Seditious Libels Act 1827* , 8 Geo 4; *The Australian*, 6 November 1841.

[82] Van Heekeren (n 80) 272; *The Sydney Herald,* 1 December 1841, 2.

[83] Mitchell, 'The Foundations of Australian Defamation Law' (n 46) 477.

[84] Ibid.

[85] Ibid 479.

[86] Ibid 480-4.

29 You may imagine that after so many setbacks the reformers would give up, but in 1843, Lord John Campbell joined in on the attempts. The difficulties of the law were apparent to him and he stated that "on this important subject the law of England is more defective than that of any other civilised country in the world."[87] He sought to introduce the requirement of truth and public benefit as a defence for both criminal and civil defamation. However, unfortunately for him, his attempts were largely thwarted by the British Attorney-General Sir Frederick Pollock, who disliked many of the proposed changes, and the 1843 Act which eventuated was a major compromise: it only made truth for the public benefit a defence to criminal libel, rather than the more wide-reaching reforms of the civil law that were envisaged.[88] However, that failure in the UK Parliament actually paved the way for its success over here. As Hohnen has noted, although the work done by Lord Campbell's Committee was largely wasted in England, it was soon afterwards recognised in New South Wales.[89]

30 The New South Wales Legislative Council then turned to have a go where England had failed. Richard Windeyer took control, and introduced a Bill which included the unsuccessful English provisions – assimilating slander and libel, and requiring "public benefit" in the defence of truth.[90] The Bill passed. Mitchell notes that the success of the Bill was largely a critique of the English parliamentary process.[91] The key reforms of the 1847 New South Wales Act were also adopted in Queensland.[92]

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[87] Ibid 485.

[88] Ibid 489-90.

[89] Peter Hohnen, 'Lord Campbell's Efforts for the Reform of Defamation Law in England and His Influence on the Establishment of the Defence of Truth and Public Benefit in New South Wales' (June 1995) 38.

[90] Mitchell, 'The Foundations of Australian Defamation Law' (n 46) 493; Van Heekeren (n 80) 272-3.

[91] Mitchell, 'The Foundations of Australian Defamation Law' (n 46) 493.

[92] Ibid 504.

31 Later in Queensland, under the impetus of Sir Samuel Griffith, the common law of defamation was codified in the *Defamation Act 1889* (Qld).[93] The Queensland code was also largely implemented in Tasmania in 1895 and a similar code adopted in Western Australia in 1902.[94] Codification, it was said, would simplify defamation law.[95] One result, however, was a lack of conformity between Australian jurisdictions – some used the code, with its inter-state variations, while others continued to apply the common law. The model provided by the Queensland code was eventually adopted in New South Wales under our 1958 *Defamation Act*.[96] However, in 1974 the 1958 New South Wales Act was replaced by the *Defamation Act 1974* (NSW), bringing an end to the defamation code in our jurisdiction and a return to the common law with statutory modification.[97]

32 Rolph says that "[b]y the second half of the 20th century… there were eight substantively different defamation laws in Australia" which all "potentially appl[ied] to the publication of the same matter."[98]

33 This of course was not the only problem. The law and the way it was applied by judges had become impossibly complex. The 1990 case of *Drummoyne Municipal Council v ABC*[99] provides a useful illustration. In that case, the council pleaded imputations that it was "corrupt". However Justice Hunt at first instance struck out the pleadings on the basis that they lacked specificity, holding that "corrupt" could convey at least three distinct meanings.[100] While

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[93] Mark Lunney, *A History of Australian Tort Law 1901-1945* (Cambridge University Press, 2018) 32.

[94] *Defamation Act 1895* (Tas); *Defamation Act 1957* (Tas); *Criminal Code Act 1902* (WA); *Criminal Code Act 1913* (WA).

[95] Andrew T Kenyon and Sophie Walker, 'The Cost of Losing the Code: Historical Protection of Public Debate in Australian Defamation Law' (2014) 38 *Melbourne University Law Review* 554, 567.

[96] Ibid 557-8.

[97] Rolph, *Defamation Law* (n 2) 53 [3.70].

[98] Ibid 54 [3.70].

[99] *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135.

[100] Ibid 153-4.

the majority of the Court of Appeal upheld the order to replead, Kirby P in dissent warned against "excessive precision". He commented that "[d]efamation procedure, including pre-trial application of the kind with which Hunt J was dealing here, have become unduly and unnecessarily complex. With complexity comes delay and expense outweighing the utility gained. A plaintiff who alleges that it has been defamed must run a gauntlet of interlocutory proceedings …"[101] These sentiments were also reflected by Levine J, who described the "undue technicality that attends the formulation of imputations" as a "straight-jacket" in defamation litigation,[102] and criticised the time and resources spent on the determination of meaning as being "positively scandalous".[103]

34 This technical minefield in the defamation law of New South Wales was also on clear display in the defamation proceedings brought by John Marsden against Channel Seven, which aired allegations that he had solicited sex with underage boys.[104] Far from a quick resolution, the entire process was drawn out over six years and many judgments on a large number of technical points, and caused extensive damage to Marsden's reputation.

35 With eight different systems and the problems of unnecessary complexity, something needed to change. The Australian Law Reform Commission had in 1979 released a report which made many recommendations, including for there to be a "uniform law of defamation".[105] However, since the Commonwealth is not empowered under the Constitution to make laws with respect to defamation, one ALRC suggestion was for the State Parliaments to

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[101] Ibid 149. See also Andrew T Kenyon, 'Imputation or Publication: The Cause of Action in Defamation Law' (2004) 27(1) *University of New South Wales Law Journal* 100, 109.

[102] *Hughes v Seven Network* (Supreme Court of New South Wales, Levine J, 13 November 1998), quoted in Kenyon (n 101) 111.

[103] Justice David Levine, 'The Future of Defamation Law' (Speech, UTS Law School, 31 August 1999) [12].

[104] *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158.

[105] Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (Report No 11, June 1979) [303].

all enact identical legislation.[106] Eventually, after a range of unsuccessful attempts, the Standing Committee of Attorneys-General in 2004 drafted a version of a national uniform defamation law, which after some modification was enacted by the States and Territories in 2005 and 2006,[107] and came into effect in 2006.[108]

36 It is significant, from a historical point of view, that the New South Wales *Defamation Act* includes a section providing for a review of the Act, "to determine whether the policy objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives".[109] The significance of this provision lies in the recognition of the need for reforms which are uniform and which adapt to developing technologies.[110] This is important so as not to further add to the complexity and confusion that has come about as a result of history. While the current reforms were long-awaited and, some might say, long overdue, it remains to be seen how successful they are in achieving this goal.

TECHNOLOGICAL DEVELOPMENTS

37 I now turn to the topic of technology, and the historical intersection between developments in this field and the laws of defamation. The explosive advances over the late 20th and now 21st centuries have left our defamation laws desperately trying to play catch-up. Time will tell whether the recent reforms and upcoming review of this area can accommodate the ways that technologies and digital platforms will continue to evolve in ways we have yet to fathom, or whether the laws will require perpetual review into the future.

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[106] Ibid.

[107] *Civil Law (Wrongs) Act 2002* (ACT) Ch 9; *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

[108] Rolph, *Defamation Law* (n 2) 55 [3.70].

[109] *Defamation Act 2005* (NSW) s 49.

[110] Judge JC Gibson, 'Adapting Defamation Law Reform to Online Publication' (2018) 22 *Media and Arts Law Review* 119, 126.

38 Long before the internet, laws related to defamation developed in response to innovations and what were then novel forms of expression. In the 15th century, a new technology represented an even greater threat to the establishment than possibly any other before it. This was, of course, the printing press. Suddenly, there was a much-increased scope for conveying ideas, which had undeniable significance in the development of the law.

39 How was this new technology, so dangerous in the eyes of the Crown, to be contained? Extreme censorship in the 16th century seemed to be the answer. Printers of texts were required to be licenced, and Elizabeth I decreed that anyone in possession of "wicked and seditious" books would be executed.[111] In 1579, the lawyer John Stubbs narrowly escaped such a fate, after publishing a printed pamphlet in which he criticised the proposed marriage between Elizabeth I and a French Duke. However, Stubbs lived up to his name when his right hand was cut off in punishment for that crime.[112] Censorship continued in the 17th century. Any printing or publishing of newspapers or pamphlets without a licence was illegal, and other publishers and printers received severe punishment for seditious libel, including execution.[113]

40 Law reports from the 18th century show the centrality of newspaper publication in criminal libel cases. Out of the 15 reported criminal libel cases from the period 1759-1800, at least nine cases related to libels published in newspapers, which made a range of allegations including bigamy, murder, adultery, treason and improper professional conduct.[114] In a 1789 case, Mr Walter, the editor of *The Times,* was sentenced to a total of two years imprisonment and fined £250 for various libels, after publishing articles which made various allegations, including that the Duke of York and Prince of Wales were disappointed that King George III had recovered from a psychotic

[111] George (n 5) 19 [2.9].

[112] Ibid.

[113] Ibid 25-6 [2.12]-[2.13].

[114] McBain (n 56) 476-9.

illness. After he was released from prison it appears that the government, which had wanted the articles published, reimbursed his fines.[115]

41 Alongside the growth of newspapers and magazines in the 19th century came an increase in defamation proceedings brought against publishers, rather than purely between individuals.[116] Baker notes that "the Victorian era brought in a plethora of more popular publications, many of which earned their profits by reporting scandalous and salacious titbits without too much regard for verifiable evidence."[117] It is interesting to see how some things never change.

42 Radio was another technology that came to the fore in the 20th century. This brought with it a range of questions – for example, were comments made on a radio broadcast slander or libel?[118] The spoken/written distinction was no longer so clear. With virtually no relevant authority on this issue from England save for one decision,[119] the Victorian Supreme Court in *Meldrum v Australian Broadcasting Co Ltd*[120] held that a defamatory broadcast was a slander, which was upheld in the Full Court. The significance of this decision lay in the fact that when confronted with a novel situation brought about by a new technology, the Court chose to distinguish the British decision rather than blindly applying it.[121] The decision, however, was not without its critics, and after some time the Commonwealth legislature resolved the issue by clarifying in an amendment to the *Broadcasting Act 1956* (Cth) that the transmission of words by a radio or television station was deemed to be publication in a permanent form.[122]

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[115] Ibid 477.

[116] Baker (n 4) 477.

[117] Ibid.

[118] Lunney (n 93) 42.

[119] *Forrester v Tyrrell* (1893) 9 TLR 257, cited in ibid 43.

[120] [1932] VLR 425.

[121] Lunney (n 93) 43-5.

[122] *Broadcasting and Television Act 1956* (Cth) s 52.

43 The advent of the internet has, of course, shaken up the realm of defamatory possibilities. Whereas in bygone days a defamatory comment or written remark was more likely to stay within a community, such remarks now have the capacity to be circulated virtually instantaneously on a global scale. The speed at which the internet has advanced is also remarkable. In the 2002 landmark case of *Dow Jones & Co Inc v Gutnick*,[123] Kirby J noted, somewhat prophetically, "It can scarcely be supposed that the full potential of the Internet has yet been realised… A legal rule expressed in terms of the Internet might very soon be out of date."[124]

44 However, both the uniform laws and appellate authority are relatively sparse when it comes to dealing with particular issues of defamation and online publication.[125] Technology has obviously made great bounds since 2005, and with the forthcoming second stage of reforms focussing on internet service providers and digital platforms only now in development, the legislature is dragging its feet in comparison. 2005 was still early days for many of the online platforms which are now the setting for various defamatory publications. For perspective, Facebook only became publically available from 2006,[126] and Twitter began that same year with only a few thousand users.[127] Even the very nature of how users interact with those platforms has fundamentally changed in the intervening years. It seems that technology will continue to change more rapidly than the law can keep up with, and so it is vital that reviews grapple with these issues.

45 The social media age has brought its own specific set of troubles, some of which the amendments to the uniform laws are seeking to remedy. A

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[123] (2002) 210 CLR 575; [2002] HCA 56.

[124] Ibid [125].

[125] Gibson (n 110) 124, 126.

[126] Sarah Phillips, 'A Brief History of Facebook', *The Guardian* (online, 25 July 2007) <https://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

[127] Nicholas Carlson, 'The Real History of Twitter', *Business Insider* (online, 14 April 2011) <https://www.businessinsider.com.au/how-twitter-was-founded-2011-4?r=US&IR=T>.

substantial number of defamation claims relate to posts or comments on forums such as Facebook and Twitter, and even emojis can have defamatory meaning.[128] There are surely many cases where the issue is relatively minor and a litigious solution could end up causing more harm than good. But defamatory publication even to a relatively small audience, such as on a private social media account, can also have devastatingly serious consequences for the reputation of the person affected. And as the purposes for which social media is used expand, new complexities emerge. The decision earlier this year in *Fairfax Media v Voller*[129] dealt with the issue of defamatory comments posted by third parties on Facebook pages operated by the applicant media companies. The media companies had published news stories on Facebook about the incarceration of Mr Voller in a juvenile justice detention centre in the Northern Territory. Facilitated by those companies, various Facebook users made comments on that story which defamed him.[130] The New South Wales Court of Appeal upheld a finding that the media organisations which operated the pages were publishers of the defamatory comments.

46 From crackdowns on publications as criminal, to new principles dealing with the challenges brought by social media, defamation law has always been forced to react to developing technologies. However, while earlier technological developments appeared relatively gradually over defamation's long history, the exponential growth seen in the internet age requires a law which can keep in step.

DAMAGES

47 I now turn to look at the theme of damages. In light of the recent record-breaking award of almost $2.9 million to Geoffrey Rush by the Federal

[128] *Burrows v Houda* [2020] NSWDC 485.

[129] *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102.

[130] Ibid [47], [71].

Court,[131] and steps to curb such high payouts, this is a particularly relevant issue, the history of which provides much illumination.

48 From classical antiquity, monetary penalties for defamatory words provided a remedy for those wronged. One entertaining example from Roman times concerns a rich citizen named Veratius, who would insult others as he walked through the city. Perhaps to pre-emptively save time, a servant would walk behind him, paying the required fine to those he had insulted.[132] Even then, it seems clear that the payment of damages had less consequence for those with deep pockets.

49 The purview of the English ecclesiastical courts in providing a remedy was markedly different from earlier Frank or Norman codes, which prescribed particular financial penalties for false imputations, or even from the local manorial courts where there were various examples of damages awarded.[133] As a "spiritual" matter, the Church's concern was penance and repentance from the sinner rather than reparation for the victim.[134] The power to excommunicate held by these courts[135] could be a terrible threat, but so too was the punishment of public shaming through penance.[136] Pre-Reformation penance involved the wrongdoer processing around the church holding a candle. In contrast, post-Reformation penance involved a more public acknowledgment of the sins. The penitent would make a public confession of the transgression to the parish congregation, dressed in a white sheet and carrying a white staff.[137]

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[131] *Nationwide News Pty Limited v Rush* [2020] FCAFC 115.

[132] George (n 5) 8 [2.3].

[133] Rolph, *Defamation Law* (n 2) 51 [3.60]; Mulholland (n 26) 100 n 46.

[134] Outhwaite (n 29) 11.

[135] Ibid 12; Rolph, *Defamation Law* (n 2) 42 [3.20].

[136] Dent (n 26) 496 n 35.

[137] Outhwaite (n 29) 11.

50 It is perhaps unimaginable to a modern audience that spiritual penance would be an adequate remedy for damage to personal reputation and standing. Or perhaps, not so unimaginable. The "penance" required in the church courts, which also included an apology to the defamed person and an acknowledgment of the baselessness of an imputation,[138] could conceivably be a successful outcome for various defamation matters today. The inclusion of the "concerns notice" requirement in the amendments to the uniform laws, as a step to keep matters out of the courts, also appears to recognise the utility of non-litigious remedies.

51 Of course, the appeal of monetary compensation in the here and now was ultimately more attractive for plaintiffs than the mere knowledge of a defendant's spiritual atonement. A prosecution in the ecclesiastical courts could punish sin, but a common law action on the case could lead to an award of damages.[139] The power and influence of the royal courts, with that pecuniary allure, grew while the jurisdiction of the ecclesiastical courts became increasingly limited.[140]

52 As I have mentioned, the Star Chamber also provided remedies of damages for defamation, which were often oppressively harsh. In one notable example from 1632, the Earl of Suffolk claimed that Sir Richard Grenville had accused him of "baseness", and the Star Chamber ordered the unfortunate Grenville to pay a £4000 fine and £4000 in damages, in addition to being imprisoned.[141] In today's currency, this would be some approximately $2 to 3 million dollars, or the 1630s purchasing power of 1484 cows or 313 years of wages for a skilled tradesman.[142]

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[138] Veeder (n 21) 551.

[139] Setaro, 'Part II' (n 38) 388.

[140] Ibid 389.

[141] Rolph, *Defamation Law* (n 2) 47 [3.40].

[142] Calculations based on 'Currency Converter: 1270-2017', *The National Archives* (Web Page <www.nationalarchives.gov.uk/currency-converter/>, and 'Inflation Calculator', *Bank of England* (Web

53 Before the 18th century, juries had significant control over the amount of damages that were awarded in defamation proceedings. Juries were known to award successful plaintiffs large sums, and it was not uncommon for such damages to be disproportionate to the harm or defendant's capacity to pay.[143] Although there were at times some limited forms of mitigating excessive awards of damages, through the attaint and remittitur procedures,[144] judges were often reluctant to interfere in a jury's decision.[145] Only from the 18th century were judges more regularly willing to take steps to deal with an excessive jury award of damages, which would be done by granting a new trial.[146]

54 Juries are another feature of defamation law that has persevered in various Australian jurisdictions, including in New South Wales.[147] Further, up until 1994 in New South Wales, assessing damages was still within a jury's purview in defamation proceedings. In 1987 and 1988, Mr Nicholas Carson, a partner at Blake Dawson Waldron (as it then was) sued Fairfax and a journalist for two defamatory *Sydney Morning Herald* articles. Mr Carson was successful and was awarded a total of $600,000 in damages. However, the New South Wales Court of Appeal set aside the verdicts as manifestly excessive and ordered new trials on the question of damages, which was upheld in the High Court.[148] A nasty shock it must have been to the courts and Fairfax when, at the retrial, the jury awarded a total of a whopping $1.3 million in damages, although the matter settled before another appeal.[149] It is

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Page, 26 August 2020) <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>.

[143] Baker (n 4) 470.

[144] Michael Stuckey, 'Judicial "Intermeddling"' (1996) 70 *Australian Law Journal* 571, 572.

[145] Ibid 571.

[146] RH Helmholz, 'Damages in Actions for Slander at Common Law' (1987) 103 *Law Quarterly Review* 624, 637.

[147] *Defamation Act 2005* (NSW) ss 21-2.

[148] *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; [1993] HCA 31.

[149] Rolph, *Defamation Law* (n 2) 307 n 18.

perhaps not too surprising, then, that the year after the High Court decision in *Carson*, a new s 7A was inserted into the *Defamation Act 1994* (NSW) which abolished the assessment of damages by a jury.[150]

55 Damages, of course, only go so far in providing a satisfactory outcome. Geoffrey Rush and Eryn Jean Norvill were both correct when they stated that there were "no winners" in that case.[151] Norvill herself stated that she "would have been content to receive a simple apology and a promise to do better".[152] Unfortunately, the notion that there are only losers in such proceedings is not a new one. While John Marsden technically won his litigation, his reputation was dragged through the mud as the details of the allegations and proceedings were kept in the public eye for so long.[153] In his own words: "No amount of money, no matter what it could be, can compensate me for the anguish, the pain, the humiliation of the past few years".[154]

56 There is another issue which concerns me. In many cases, often involving social media, it seems that the damages which may eventually be granted to a plaintiff are devalued by other considerations. The huge monetary costs of a defamation action is clearly one of these, but so too are the weeks spent in a case which may result in only a small verdict of damages, and the repetition of the allegations when the case is reported. One thing that has to be considered is whether the procedures adopted and the arcane law is simply too complex to provide a remedy at a reasonable cost to the plaintiff.

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[150] *Defamation (Amendment) Act 1994* (NSW) sch 1.

[151] 'Why Geoffrey Rush and His Accuser Say There's "No Winners" in Defamation Case', *SBS News* (online, 11 April 2019) <https://www.sbs.com.au/news/why-geoffrey-rush-and-his-accuser-say-there-s-no-winners-in-defamation-case>.

[152] Ibid.

[153] Truda Gray and Brian Martin, 'Defamation and the Art of Backfire' (2006) 11(2) *Deakin Law Review* 115, 125-6.

[154] Peter Lloyd, 'Marsden Wins Defamation Case', *ABC Radio* (Transcript, 27 June 2001) <http://www.abc.net.au/worldtoday/stories/s319864.htm>.

POWER AND CONTROL

57 I now turn to my third, and, you will be relieved to hear, final theme in this wander through the vast and complex history of defamation law. This is the idea of power and control. For centuries, and indeed still today, defamation has been wielded by plaintiffs not simply to protect their reputations, but as a method of silencing critics and asserting or re-asserting dominance. People who are in power often like to stay that way, and control of the words people say and write has proved a desirous tool in the arsenal of the influential. Despite the well-known rationale of the law of defamation, being the difficult balancing act between the rights to free speech and reputation, the relevant danger of a chilling effect on expression must be held in mind.

58 Looking back again to the 13th century, another of the many sources of defamation law was the so-called *scandalum magnatum* offence, which was used sporadically until the 1700s and was finally abolished in the 19th century.[155] It was derived from a 1275 statute which prohibited "false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm".[156] "Fake news", it would seem, has been a persistent problem not solely suffered in the Trumpian age.

59 The purpose of this offence, rather than to protect the reputations of the so-called "great men of the realm", was to repress sedition and prevent political turmoil which could arise from criticism of such men.[157] Nonetheless, it also influenced the development of the law of defamation. "Great men" were not considered "great" because of any particularly admirable character trait, but because of their standing in the social order of the day: the dukes, earls, barons, and other nobles.[158] Very convenient it must have been that those in

[155] McNamara (n 27) 75.

[156] Veeder (n 21) 553.

[157] Ibid 554; Dent (n 26) 498; McNamara (n 27) 76.

[158] Dent (n 26) 498.

the ruling classes were availed of a legal protection against dissent. Indeed, from the late 15th century, *scandalum magnatum* was used by the nobility to bring slander actions against commoners, and became a method of reinforcing class distinctions.[159] Plaintiffs in such cases were greatly advantaged, including because imputations which might not have been actionable under the common law were actionable under the *scandalum magnatum* statutes.[160] It could also be a political and highly oppressive tool, as illustrated by the use of the offence by the Duke of York, who was later to become James II. Between 1682 and 1684, the Duke of York was the plaintiff in 10 different *scandalum magnatum* cases, in half of which he was awarded damages of £100,000,[161] which would be around $20 to 38 million today, or, if we are again to take a bovine measurement, the equivalent of about 24,000 cows or over 3,000 years of wages for a skilled tradesman.[162] But *scandalum magnatum* was only one way in which such laws were used to maintain power, and exercise control over others.

60 The Church, too, exercised control of the social order through punishment of sin. While excommunication may not have been a frequent punishment, it not only cut the wrongdoer off from the church but also purportedly from the community, whether or not in practice.[163] The shame of public confession also acted as deterrence and a method of control over the general population.[164] McNamara also suggests that the standard of protection of one's good fame "among good and serious men" set out in the Oxford

[159] McNamara (n 27) 76-8.

[160] Dent (n 26) 504.

[161] John C Lassiter, 'Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum,* 1497-1773' (1978) 22(3) *American Journal of Legal History* 216, 229.

[162] See above n 142.

[163] Outhwaite (n 29) 12.

[164] McNamara (n 27) 74.

Constitution served to maintain social control through exclusion of those of ill fame from the protection of church law.[165]

61 As I have mentioned, the Star Chamber had a significant role in maintaining the authority of the government of the day,[166] being pivotal as a mechanism to curb dissent and supress criticism.[167] Hence, it developed law which worked to prevent breaches of the peace and public order, including the principles of criminal defamation.[168] However, it was a hated forum, owing to its severe application of the law of libel.[169] The regulation of the printing press was another way that the Star Chamber sought to exercise control.[170]

62 One notable distinction between criminal libel and civil defamation related to truth. Truth was a complete defence in civil actions, with the common maxim stating that "the truth is no libel". The further explanation for this, from *M'Pherson v Daniels* was that "the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess."[171]

63 On the other hand, truth was no defence in criminal libel. This appears counter-intuitive, particularly when compared with current criminal defamation.[172] However, the rationale was more closely concerned with a keeping of the peace, rather than to expose false facts. The maxim here was "the greater the truth the greater the libel", and the widely reported example was that "as the woman said, she would never grieve to have been told of her

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[165] Ibid.

[166] Windeyer (n 60) 321.

[167] McNamara (n 27) 76.

[168] Windeyer (n 60) 321.

[169] McNamara (n 27) 87.

[170] Rolph, *Defamation Law* (n 2) 46 [3.40].

[171] (1829) 10 B & C 263, 272; 109 ER 448, 451, quoted in Dent (n 26) 517.

[172] *Crimes Act 1900* (NSW) s 529.

red nose if she had not one indeed."[173] The truth, then, was not in issue; the real concern was a society which remained within controllable limits of expression.

64 Of course, the issue of truth was foundational to the way the law developed in Australia. As I have previously touched upon in speaking of Lord Campbell's Libel Act and Richard Windeyer's 1847 Act in New South Wales, reforms brought about in relation to the truth shaped the path which defamation law, particularly in this state, would take. The addition of the requirement of public benefit, and not merely truth, to a plea of justification was particularly suited to colonial New South Wales, where truth on its own could be damaging to the reputations of emancipated convicts who may otherwise wish for their prior crimes to remain under the radar,[174] or indeed, anyone with a past to hide.[175] This in itself afforded a greater degree of power to those people whose narratives relied on particular things not coming to light. However, substantial truth is now a complete defence, as the requirements of public benefit and public interest in addition to truth, which existed in previous Acts in various jurisdictions including New South Wales, have been abolished under the uniform laws.[176]

65 In early colonial New South Wales, defamation laws were used by politicians to suppress unflattering publications in newspapers. The relationship between the colonial press and the government was, at times, fraught. This is well illustrated by the extreme (and not to mention, highly illegal) reaction in 1827 by Governor Darling's assistant Colonel Dumaresq to an apparent libel of him in the *Australian*. The Colonel issued a challenge, and the newspaper's part owner Robert Wardell met him for a duel. After a few

[173] Windeyer (n 60) 322.

[174] Ibid 323.

[175] Mitchell, 'The Foundations of Australian Defamation Law' (n 46) 494.

[176] See for example in New South Wales: *Defamation Act 1901* (NSW) s 6; *Defamation Act 1912* (NSW) s 7; *Defamation Act 1958* (NSW) s 16; *Defamation Act 1974* (NSW) s 15; *Defamation Act 2005* (NSW) s 25.

unsuccessful shots at each other, an apology was given with the encouragement of the other part owner William Wentworth, and all was well.[177] It is fortunate, perhaps, that it is no longer in vogue for the owners of newspapers which have published defamatory material to be challenged to a duel, or Rupert Murdoch might be looking somewhat worse for wear.

66 Governor Darling was notorious in his attempts to constrain the colonial press, although his success in this cause could be said to be fairly ineffectual.[178] His contests, in particular with the newspapers established in the 1820s, the *Australian* and the *Monitor*, increased as the press began to rigorously critique the administration.[179] With no censorship or regulation of newspapers, he turned to common law criminal and seditious libel as a means to control what was being reported[180] – at that time, the defence of truth was not available in such prosecutions.[181]

67 Francis Forbes played an interesting role in the saga of restrictions on the press in the New South Wales colony. When presented by Governor Darling with a 1827 Bill to establish press licensing and restrain the publication of blasphemous and seditious libels,[182] the Chief Justice declared that specific licencing provisions were repugnant to the laws of England, and refused to certify the Bill, including for the reason that the legislature should not remove the right to free speech where the press was not threatening the safety or peace of the colony.[183] The Bill was passed without the licensing provisions.[184]

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[177] Edgeworth (n 80) 50.

[178] Ibid 52.

[179] Ibid 55.

[180] Ibid 52, 60.

[181] Ibid 55, 61.

[182] George (n 5) 66 [3.3].

[183] It should also be noted that while Forbes seemed to believe in the notion of free speech and freedom of the press for the "free man", he also believed that "a free Press is not quite fitted to a

68 On the back of that failure, Governor Darling turned to the courts in an attempt to control the press. After a couple of failed seditious libel trials in 1827 against Wardell, including for comments about Darling in the *Australian*, the Governor in 1828 brought a successful prosecution against Edward Hall, the editor of the *Monitor,* for an article suggesting the Archdeacon of Sydney was extremely incompetent.[185] By the middle of 1829, the editors of both papers had been jailed for libel after various criticisms of Darling and the administration.[186] This did not stop them however, and Hall was found guilty of further libels after continuing to edit the newspaper from prison, and had his sentence extended to three years.[187] Yet Darling's attempts to silence dissent through these prosecutions, although heavy-handed, did not seem to have the desired impact; Hall seemed relatively unphased, having decided that he would stay in prison continuing what he was doing until Darling was out of office, although he was pardoned and released at the end of 1830.[188]

69 The type of control sought through such actions, and in particular seditious libel, bear similarities to the *scandalum magnatum* offence. Edgeworth notes that the law as it was applied to the press in the 1820s in New South Wales "bore all the vestiges of a society where rulers are regarded as innately superior to their subjects and it is wrong to utter public criticism of them."[189] He goes on to say that by "characterising all criticism as insolence and

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servile population", further stating that freedom of the press was perhaps "not suited to a state of society where half of the community are worked in chains by the other… Yet I must not leave out of account that the other half of the people are free and that as an abstract they are consequently entitled to the laws and institutions of the parent State." See Edgeworth (n 80) 66-8.

[184] George (n 5) 66 [3.3]; *Blasphemous and Seditious Libels Act 1827*, 8 Geo 4.

[185] Edgeworth (n 80) 70, 72.

[186] Ibid 74-5.

[187] Van Heekeren (n 80) 271.

[188] Edgeworth (n 80) 77, 80.

[189] Ibid 80.

subjecting it to criminal penalties, [seditious and criminal libel] were both the legal expression of the idea of the inherently superior nature of the ruler".[190]

70 After the passing of the 1847 New South Wales Act, it seemed that the theme of using libel litigation to control the press was to continue. The first two people to be prosecuted for criminal libel after the new Act were newspaper proprietors, Samuel Goode and Benjamin Isaacs.[191] Isaacs, the publisher of the *Bathurst Advocate*, ran a poem critical of a police chief who had been charged with bribery, which *The Sydney Morning Herald* described as containing "language that was too filthy to meet the public eye".[192] Isaacs may have anticipated that he would be protected by the new 1847 Act, and that the libel was justified as truth for the public benefit.[193] Unfortunately for him, he was charged and found guilty by a Supreme Court jury of libel, fined £40 and sentenced to two month's imprisonment.[194]

71 Of course, the theme of those in power using defamation as a means of control is not confined to history no longer in living memory, nor to criminal proceedings. Skipping forward more than one hundred years, the Queensland political stage presented another such player in the drama: none other than the notorious Sir Joh Bjelke-Peterson, who was known to use defamation law to pursue critics to "vindictive extremes".[195] On one single day in March 1986, five separate defamation writs were issued on his behalf to Labor politicians and officials and media organisations.[196] More writs were issued in the week after, and various other Queensland politicians followed

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[190] Ibid 81.

[191] Van Heekeren (n 80) 274.

[192] *The Sydney Morning Herald,* 20 June 1849, 3.

[193] Van Heekeren (n 80) 282.

[194] Ibid 284-8.

[195] 'Death of a populist', *The Age* (online, 24 April 2005) <https://www.theage.com.au/national/death-of-a-populist-20050424-ge01be.html>.

[196] Chris McKelvey, 'The Queensland Cabinet, Shakespeare and Defamation' (1986) 11(6) *Legal Service Bulletin* 273.

suit.[197] McKelvey commented in relation to these events that, "[i]t is said often enough that you have to be thick skinned to be in politics. The reality, however, is that Australian politicians have a habit of being thin skinned when it comes to their own reputations."[198] In 2009, the then Premier Anna Bligh delivered a stinging slap to Clive Palmer, who brought a defamation action against her (which ultimately settled)[199] after she allegedly implied that he tried to purchase influence and benefits through political donations. She said, "[t]his is 2009 – it's not the time in Queensland that Mr Palmer remembers fondly, when the National Party could silence critics with legal threats".[200]

72 While in the English ecclesiastical courts, women who brought sexual slander defamation actions to defend their reputations of chastity used the law to protect themselves and their lives because of the danger of ostracism, violence from the community or prosecution,[201] complainants of sexual abuse who speak up are at danger of having their account disbelieved in defamation proceedings, thereby shifting the power balance to the alleged abuser plaintiff.

73 Much is troubling about the *Rush v Nationwide News* proceedings. One particular point of deep concern is that the Daily Telegraph published the allegations of Mr Rush's conduct without the consent of the complainant Ms Norvill, the author of the articles having failed to speak with her and in fact aware that she did not want her identity revealed.[202]

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[197] Ibid 273.

[198] Ibid.

[199] Rosanne Barrett, 'Clive Palmer, Anna Bligh Make Up', *The Australian* (online, 7 August 2010) <https://www.theaustralian.com.au/national-affairs/clive-palmer-anna-bligh-make-up/news-story/dca9269d50e45798376bbe255cf49579>.

[200] Christine Flatley, Jessica Marszalek and Gabrielle Dunlevy, 'Billionaire Sues Qld Premier, Treasurer', *The Sydney Morning Herald* (online, 25 February 2009) <https://www.smh.com.au/national/billionaire-sues-qld-premier-treasurer-20090225-8h9a.html>.

[201] McNamara (n 27) 73.

[202] *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, [737].

CONCLUSION

74 As I come now to the end of this tutorial, many questions remain unanswered. To what extent should defamation impose a fetter on free speech? What is the cost of balancing the right to free speech with the right to reputation? How revolutionary should reforms be, or how much more do they need to be? Is the law truly bound up in its history, or can we detangle and simplify where needed? Perhaps exposing some of the history of defamation, rather than detangling the themes that we see in the law today, reveals the depth of these issues.

75 It has been said that that liberty should not be confused with licence. Free expression should not provide justification for an unconfined ability to damage people's reputations. However, there is also a need to balance the right to freedom of speech with the right of people to speak up. One thing our law should not do is to restrict the making of reasonable complaints. The Rush case is a troubling example of the consequences of the interaction between sensationalist media and the rights of a complainant.

76 As our lawyers and legislators continue to grapple with these fundamental issues in our law, they must contend with the legacy of the past and the trajectory of the future. It is not for me to answer all the questions that have been raised. But hopefully, this brief overview of the history of defamation law has given real food for thought, as it always does, as to how those questions should be answered.