MUST READING

Balancing Press Freedom with Reputation: The United States, England, and Australia

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The threat of libel litigation offshore has emerged as an ineluctable reality for U.S. media, no matter where their offices and production facilities are located. Most illustrative are recent libel cases in Australia, Canada, and England, each involving American news media. In 2002, the High Court of Australia held Dow Jones & Co. liable for defamation in connection with online material published in *Barron's Online* magazine.[1] In 2004, a Canadian trial court rejected the *Washington Post*'s argument that a former U.N. official's libel lawsuit filed in Ontario against the American newspaper be dismissed because the case had nothing to do with Canada. The decision was overturned in 2005.[2] Most recently, the House of Lords found, in *Jameel v. Wall Street Journal Europe*,[3] that the *Wall Street Journal Europe* was not irresponsible in publishing defamatory statements about a Saudi businessman.

Faced with the prospect of similar cases, lawyers, academics, and journalists are coming to view defamation law as a matter of international and comparative law. Two recent books shed significant light on this phenomenon: *Defamation: Comparative Law and Practice* by Andrew Kenyon, director of the University of Melbourne's Centre for Media and Communications Law, and *The Right to Speak Ill: Defamation, Reputation, and Free Speech* by the University of Louisville law professor Russell Weaver et al. Both books provide fascinating comparisons of the libel laws of Australia, England, and the United States.

Kyu Ho Youm, the Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication, has reviewed a number of publications on libel law, including Sack on Defamation: Libel, Slander, and Related Problems, Carter-Ruck on Libel and Slander, The Law of Defamation and the Internet, Reputations Under Fire, *and* The International Libel Handbook.

Defamation: Focused on "Meaning" in Libel Law

Defamation concentrates on two issues Kenyon considers essential to libel litigation:

- The central role that a publication's meaning plays in defamation law and practice, especially in England and Australia. Kenyon's book fills a void in libel law, for few have delved into the issue of "meaning" in defamation law empirically and comparatively.
- The ways in which media speech is protected by qualified privilege in England and Australia and by the U.S. constitutional rules.[4]

In discussing a publication's meaning, Kenyon concentrates on four areas of English and Australian law: (1) how parties in libel litigation are bound by any meanings; (2) the degree of specificity required in pleading meanings; (3) whether and how defense meanings are presented to counter the plaintiff's meanings; and (4) the stage of a libel trial at which differences in meanings are examined.

Half of the ten-chapter book analyzes defamatory meaning in the libel laws of England and Australia. Sharing the viewpoint of U.S. libel expert Rodney Smolla,[5] Kenyon views the meaning of libelous words as an area of "cardinal significance" in defamation law. After providing a doctrinal analysis of "defamatory meaning," he examines litigation practices in England and the Australian states of New South Wales and Victoria. The investigation of libel practices is based on the author's review of court files and his in-depth interviews with fifty-six libel lawyers and judges.

Defamation: Comparative Law and Practice
by Andrew T. Kenyon
UCL Press: London (2006)
431 pages; $86.95

The Right to Speak Ill: Defamation, Reputation, and Free Speech
by Russell L. Weaver, Andrew T. Kenyon, David F. Partlett & Clive P. Walker
Carolina Academic Press: Durham, N.C. (2006)
331 pages; $45.00

In England, Kenyon finds, defendants almost always raise their own *Lucas-Box* meanings[6] different from the imputation relied on by the plaintiffs. The *Lucas-Box* defense meanings can determine what evidence defendants can adduce as a central issue in libel litigation. By contrast, in New South Wales, libel defendants rarely plead meanings by way of contextual imputations or truth or comment. Instead, the plaintiffs' imputations are detached from the publication. Thus, New South Wales litigation practice allows no room for the parties' differences about defamatory meanings. Further, the imputations do not relate to comments. In Victoria, nonetheless, defendants often present *Lucas-Box* meanings, and they invoke truth and fair comments more frequently than in New South Wales. This is because defendants almost never accept plaintiffs' imputations, and truth and fair comment can be raised less rigidly.

Defamation also examines the role that qualified privilege plays in England, Australia, and the United States and con-

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siders the practicality of litigating qualified privilege defenses. Kenyon finds a comparative framework in the "actual malice" rule from *New York Times v. Sullivan.*[7] He finds a conceptual link between the English and Australian qualified privilege and the *Sullivan* doctrine, both of which recognize the preferred position of political or public interest speech in a democratic society.

This portion of the book centers on the case law, such as *Reynolds v. Times Newspapers*[8] and *Lange v. Australian Broadcasting Corp.*,[9] combined, again, with the author's interviews with fifty defamation lawyers in England, New South Wales, and Victoria. Kenyon concludes that *Reynolds* privilege, which is wider and stronger than the one recognized in *Lange*, has garnered more support among the English legal profession. He also finds *Reynolds*' practical impact on English news media greater than that of *Lange* on the Australian press.

Kenyon notes:

> [R]easonableness under *Lange* is "more onerous" for defendants than responsibility is under *Reynolds*. *Lange* appears not to have improved the position of publishers to any significant degree. It has not reduced the apparent chill of defamation law, apart perhaps from reducing suits by politicians. . . It is significant that English interviewees suggested the media can raise more allegations and stories of public interest under *Reynolds*. This follows from the approach of English courts to a publication tone.[10]

In his chapter on U.S. law, Kenyon offers a quick overview of pre-*Sullivan* libel law, the *Sullivan* "actual malice" doctrine, the status of public versus private plaintiffs, the constitutional opinion privilege, state law on defamation, interlocutory hearings and appeals, the role of judges and juries in libel trials, and appellate review. He also includes an analysis of U.S. libel law practice based on his interviews with twenty-four American media lawyers, concluding that

• The "actual malice" doctrine allows a "more intrusive" appellate review in U.S. libel litigation.

• American focus on factual falsity in opinion distinguishes the United States from England and Australia.

• The defamatory meaning in U.S. practice concentrates more on factual allegations.

• Motions to dismiss and for summary judgment play a "far more important" role in preempting trials than the pretrial meaning disputes in England and Australia.

• The status of plaintiffs is a decisive factor in U.S. law while the type of speech is overriding in English and Australian law.

Without question, Kenyon's final chapter, "Comparative Defamation Law and Practice," is the gem of the book. Particularly from a comparative law perspective, Kenyon's U.S. findings will be useful to future research. First, libel judgments can be analyzed to examine the role of substantial truth in U.S. practice for ascertaining defamatory meanings. Second, his research material can be used to investigate libel law, media content, and media production practices in all three countries. And finally, further work can be built based on earlier research. Given Britain's House of Lords' recent decision in *Jameel*, Kenyon's observation could not be more timely: "Just what U.S. and English courts evaluate as an 'adequate investigation' in particular circumstances could be a valuable area for research, especially when further decisions have appeared under *Reynolds.*"[11]

***Right to Speak Ill:* Broad Comparison**

Right to Speak Ill is more readable and less densely packed with exhaustive details, and its focus is broader than that of *Defamation* although, of necessity, not as detailed. It covers nearly all the key subjects of libel law in England, Australia, and the United States.

Right to Speak Ill considers defamation law to be global in scope. Like Kenyon, Weaver and his co-authors go beyond an analysis of the case law. They also examine news publishers' behavior "in the shadow of the law," with a particular emphasis on how changing libel laws affect the publication of *political* speech.[12] Their empirical project involved interviews with news reporters, editors, producers, and media lawyers.

In comparing the libel law of three jurisdictions, *Right to Speak Ill* examines

• How do defamation laws vary?

• How do the variations affect the press and press practices?

• Most importantly, do reporters (or, more commonly, editors and producers) kill news stories because of fear of defamation liability?

• Even if stories survive, are they "significantly modified" because of the threat of liability or the costs associated with defamation litigation?

• How do defamation laws affect the news media's reporting on matters of public interest?[13]

The nine-chapter book devotes space evenly to the doctrinal and empirical discussion of libel laws in the three subject countries. Starting out with concise overview of the libel laws, the authors proceed from the genesis of U.S. and Australian libel laws in English common law. They explain the distinctions between libel and slander, the English rule on litigation costs, and the roles of jury and judge in defamation actions. Their review of defamation law looks at the plaintiff's perspective and the common law libel defenses: justification (truth), fair comment, and privilege.

Not surprisingly, the heart of the chapter on U.S. law is the landmark *Sullivan* decision. The Supreme Court's revolutionary restructuring of American libel law is treated in considerable detail. A number of significant post-*Sullivan* cases are examined, including *Sullivan*'s extension to "public figures," distinctions between private and public figures, judicial applications of "actual malice," and fact versus opinion. The case discussion is to the point, although it sometimes tends to be bogged in tangential minutiae. Moreover, it is not entirely clear whether case analysis relies on Supreme Court cases or lower court decisions because the cases are frequently discussed together.

The empirical research is derived from the authors' interviews with media professionals and defamation lawyers. The interviews in England and Australia were conducted before and after qualified privilege was expanded in *Reynolds* and *Lange.* Interviews in the United States were post-*Sullivan*.

The pre-*Reynolds* English interviews cover a range of issues, including threats of lawsuits; insurance; the role of lawyers (in the editorial process and elsewhere); the "legally admissible evidence" standards;

regional newspapers; and media reports on political figures, the conduct of the Parliament and the courts, and matters of public interest. According to Weaver and his co-authors, *Reynolds* has had a "significant positive effect" on English law. Nonetheless, the English media remain uncertain about the application of its multifactor analysis, although the House of Lords decision in *Jameel* is likely to ameliorate some of the media's concern.

The coverage of the pre-*Lange* Australian interviews parallels that of the pre-*Reynolds* English ones. Nonetheless, the Australian interviews also look at the rate of defamation litigation, the motivation of libel plaintiffs, "particularly litigious" individuals, a "resourceful" media, and Australia's cost rules. The post-*Lange* interviews in Australia reveal that *Lange* has not lived up to its expectations. The Australian media remain unsure about *Lange*'s "reasonableness" and "conduct of government" tests. Further, the costs rule still affects the media negatively.

Both the English and Australian interviews address whether English and Australian media would have covered Watergate as doggedly as the American press did in the early 1970s. Their consensus: Such coverage would have been all but impossible in England and Australia, because prepublication injunctions, the "reasonableness" requirement in reporting, and the denial of the protection of news sources would have posed insuperable barriers.

The areas covered during the American interviews are identical to those addressed in the English and Australian interviews, although with one significant difference related to libel suits by police officers. The findings should come as little surprise: The U.S. media are more nonchalant about libel law than their chary English and Australian counterparts, and the role of lawyers in American news production is less pronounced.

In their summary chapter, Weaver and his co-authors reject the common law approach to libel law as overly restrictive on speech. The *Sullivan* "actual malice" rule, which they contend has essentially eliminated libel law's "chilling effect" on American news media, is regarded as a sensible way to reconcile reputation with press freedom. Still, the authors deem the *Sullivan* rule "misdirected" when it primarily concerns the plaintiff's status, and not the subject matter of defamation. Meanwhile, they suggest that Australia could benefit from the English *Reynolds* privilege while at the same time avoiding the media-friendly excesses of the *Sullivan* rule. To Weaver and his co-authors, the *Lange* decision of the Australian High Court offers little meaningful protection.

Practical and Scholarly

The practical value of the two books lies in their revealing empirical data from extensive interviews with lawyers and media practitioners in all three countries. The findings provide rare insights into how a country's libel law affects the actual conduct of the news media and challenge many of our perceptions on the impacts of defamation law on news media under different legal systems.

Kenyon notes the practical relevance of his chapter on U.S. law to legal scholars and media lawyers alike:

> Appreciating why the particular issues are addressed in the chapter . . . should help U.S. readers gain a new perspective on their situation and on the issues that have importance when material is published in significant defamation jurisdictions outside the U.S. In both instances, the intention is to support sophisticated comparative analysis by commentators and practitioners. Understanding central elements of litigation practice should only help comparative doctrinal analyses—especially when digital communications are increasing the risks of transnational liability for defamation, as well as transforming much legal practice.[14]

The scholarly value of the books is no less important. On this point, *Defamation* provides much greater meticulous analysis of its topic and painstaking documentation with a detailed appendix that details the author's research methodology. *Right to Speak Ill* also has substantial scholarly merit and provides ample resources for readers who wish to pursue any of its topics.

Although the two books can be distinguished in their analytical depth and focus, they also overlap to a considerable extent. This might have been somewhat inevitable, given that they examine the same countries and that Andrew Kenyon, the author of *Defamation*, is a co-author of *Right to Speak Ill.*

Regardless, *Defamation* and *Right to Speak Ill* are both worth the price. Especially to those interested in libel law in action, both books stand out for their thorough analyses and significant contribution to comparative law research. From my perspective as a comparativist in libel law, there are few books comparable to, or competitive with, these two books. In that respect, each one is, after all, sui generis.

Endnotes

1. Dow Jones & Co. v. Gutnick [2002] H.C.A 56.
2. Bangoura v. Washington Post, 258 D.L.R.4th 341 (Ont. Ct. App. 2005).
3. [2006] U.K.H.L. 44.
4. Andrew T. Kenyon, *Defamation: Comparative Law and Practice* 1 (2006). "Qualified privilege" in English and Australian law, as it has evolved since the mid-1990s, is distinguished from the common-law qualified privileges such as the fair report privilege. Kenyon notes: The new "qualified privilege" is concerned with "*publications* to the world at large" rather than with "*occasions* in the traditional sense." *Id.* at 196.
5. RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:1 (2d ed. 2006).
6. The "*Lucas-Box* meanings," which are derived from the English Court of Appeal decision in Lucas-Box v. News Group Newspapers [1986] 1 W.L.R. 147, refer to the meanings the libel defendant seeks to justify while denying the plaintiff's defamatory meanings.
7. 376 U.S. 254 (1964).
8. [2001] 2 A.C. 127.
9. [1997] 189 C.L.R. 520.
10. Kenyon, *supra* note 4, at 372 (citations omitted).
11. *Id.* at 388–89.
12. Weaver et al., *The Right to Speak Ill: Defamation, Reputation, and Free Speech* xiv (2006).
13. *Id.* at 15.
14. Kenyon, *supra* note 4, at 4–5 (citing Berezovsky v. Forbes [2001] 1 W.L.R. 1004; Dow Jones v. Jameel [2005] E.W.C.A. Civ. 75; Dow Jones v. Gutnick [2002] 210 C.L.R. 575).