

**DEFAMATION AND POLITICS**

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Ian Loveland, *Political Libels — A Comparative Study*.

Hart Publishing, Oxford, 2000, 190 pages

ISBN 1 84113-115-6

[75] This short yet scholarly work, written by Professor Ian Loveland of City University London, explores one of the most fascinating areas of the law of defamation namely political libels. As the author himself puts it:

The thesis advanced in the book is a simple one — namely that English law has in the main been too jealous of defending the reputations of politicians and insufficiently alert to the legitimate interests of the electorate in consuming political information about those who govern us (ix).

In making good this contention, Professor Loveland adopts an approach that is both historical and comparative. Beginning with the great nineteenth century cases, he traces the somewhat halting development of the law of England and Wales with respect to political defamation up to the recent pronouncements of the House of Lords in *Reynolds v Times Newspapers*.<sup>2</sup> This journey is broken at various points along the way with illuminating detours into the jurisprudence of the United States of America, Australia, New Zealand and the European Community.

The introduction opens with several illustrations of recent political libel cases, and then moves on to outline the basics of English libel law. This brief but helpful summary renders the book accessible to those unfortunate souls who have yet to be fully initiated into the mysteries of the law of defamation. The remaining nine chapters of the book may be conveniently divided into two groups. Chapters 2 to 4 deal with the position prior to the celebrated decision of the United States Supreme Court in *Sullivan v New York Times*,<sup>3</sup> whilst chapters 5 to 10 consider *Sullivan* and developments thereafter.

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<sup>2</sup> [1999] 4 All ER 609.

Chapter 2 'The Common Law and Political Libels in the 19th and Early 20th Century Britain' focuses mainly upon certain well known 19th century cases, closely re-examining them in light of the book's central thesis. Concerns with the need for freedom in the dissemination of political information are traced back to the judgments of Cockburn CJ in *Campbell v [76] Spottiswoode*,<sup>4</sup> *Wason v Walter*<sup>5</sup> and *Purcell v Sowler*.<sup>6</sup> In those decisions, his Lordship showed a nice appreciation both of the necessity for the common law to respond to the increasing democratisation of British society, and of the benefit to the community in protecting the flow of political information:

who can doubt that the public are gainers by the change, and that, though public men may often have to smart under the keen sense of wrong inflicted by hostile opinion, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties. (29)

Whilst such sentiments promptly sank into jurisprudential obscurity in England, they received an enthusiastic reception in several jurisdictions on the other side of the Atlantic.

Chapter 3 'American Perspectives on Political Libels in the Early Democratic Era' is a most interesting chapter concentrating as it does on the United States position prior to *Sullivan*. Professor Loveland points out that *Sullivan* was not conjured out of thin air, but was the culmination of a number of decisions of certain State courts going back to the beginning of the century. These decisions often relied upon the English common law, in particular the judgements of Cockburn CJ, in concluding that defamatory political communications merited qualified protection. Particular attention is paid to the decision of the Supreme Court of Kansas in *Coleman v McClennan*<sup>7</sup> in which a unanimous court, relying heavily upon *Wason*, determined that political information attracted a privilege which was defeasible only on proof of 'actual evil-mindedness'. These American developments reflected a view that the interests of politicians in

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<sup>3</sup> 376 US 254 (1964).

<sup>4</sup> (1863) 3 B & S 769.

<sup>5</sup> (1863) LR 4 QB 73.

<sup>6</sup> (1877) 2 CPD 215.

<sup>7</sup> 98 Pac 281 (1908).

protecting their reputations and of the press in being free to print what they liked were of only secondary importance in cases of political libel. The dominant consideration was the interests of the ‘citizenry in exercising informed consent to their system of governance and the individuals who staffed it’ (49).

Professor Loveland’s examination of the pre *Sullivan* position closes with chapter 4 ‘The English Common Law in the Early Years of the Modern Democratic Era’. Returning his focus to post war Britain, the learned author finds little evidence that either courts or the legislature have yet grasped the critical importance of information flows in a modern democracy. And yet there are some glimmers of hope, most notably *Braddock v Bevins*,<sup>8</sup> *Perera v Peiris*<sup>9</sup> and *Webb v Times Publishing*.<sup>10</sup> The stage is now set for the most significant development of the 20th century.

Chapter 5 ‘*Sullivan v The New York Times*’ contains a valuable discussion not only of the decision itself but also the background to it, and the various expansions and contractions the *Sullivan* principle has undergone in subsequent years. In broad terms, a majority of the Supreme Court held that where the plaintiff in defamation proceedings was a ‘public figure’, then in order to succeed he or she must prove ‘with convincing clarity’ that the defendant publisher was activated by ‘actual malice’. Following on from the analysis in chapter 3, the author argues persuasively that the true source of the *Sullivan* rule was the common law, as originally formulated in England and subsequently adopted in various American States. The First Amendment was merely a transmission device whereby the principle could be imposed nationwide. Nonetheless, despite its claimed common law ancestry, the *Sullivan* principle received a cold reception in English legal circles. As pointed out in chapter 6 ‘The *Sullivan* Principle in English Law’, it was generally regarded both as irrelevant and undesirable.

It was not until the 1990s that the legitimate interests of the British electorate in the free flow of [77] political information began to receive proper consideration. In chapter 7 ‘English Law — the First Phase of Reform’ the belated effect of Art 10 of the European Convention on Human Rights on English libel law is noted. Article 10 played an

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<sup>8</sup> [1948] 1 All ER 450.

<sup>9</sup> [1949] AC 1.

<sup>10</sup> [1960] 2 QB 535.

influential role both in the denial of *locus standi* to a local authority in *Derbyshire CC v Times Newspapers*,<sup>11</sup> and in the efforts made to reduce the size of damages awards in *Rantzen v MGN*,<sup>12</sup> and *John v MGN*.<sup>13</sup> Professor Loveland is highly critical of both developments: *Derbyshire CC* because it merely stripped the council of the right to sue while leaving intact the rights of councillors in respect of precisely the same material; and *Rantzen* and *John* because their effect on large damages awards in political discussion cases is more a product of accident than design. He contends that the English jurisprudence is lacking in sophistication, and it is necessary to turn to the Antipodes for a suitable model for reform. Chapter 8 'Sullivan v New York Times in Australia' contains much material that is familiar to Australian defamation lawyers. The author briefly surveys the so called free speech cases (*Nationwide News v Wills*,<sup>14</sup> and *ACTV v Commonwealth*<sup>15</sup>); the ill fated Constitutional defence (*Theophanous v H & WT*,<sup>16</sup> and *Stephens v WAN*<sup>17</sup>); and the ultimate qualified privilege solution to the political discussion problem (*Lange v ABC*<sup>18</sup>), before turning his attention once again to Britain.

In Chapter 9 'English Law — The Second Phase of Reform' Professor Loveland presents a useful review of recent developments before the European Court of Human Rights, before turning to consider the decisions of the New Zealand High Court and Court of Appeal in *Lange v Atkinson*.<sup>19</sup> Unfortunately the book went to press before the recent revision of that decision by the Court of Appeal,<sup>20</sup> following a successful appeal to the Privy Council<sup>21</sup> and so the author's comments must be read in this light. The chapter closes with a comprehensive examination of the decisions of the Court of Appeal and House of Lords in *Reynolds v Times Newspapers*.<sup>22</sup> Professor Loveland laments the refusal of both courts to recognise political discussion as a generic category of qualified privilege. For the author, this provides further evidence of the English judiciary's continuing failure to properly appreciate that, in cases of political libel, the

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<sup>11</sup> [1992] 4 All ER 795.

<sup>12</sup> [1993] 4 All ER 975.

<sup>13</sup> [1996] 2 All ER 35.

<sup>14</sup> (1992) 177 CLR 1.

<sup>15</sup> (1992) 177 CLR 106.

<sup>16</sup> (1994) 182 CLR 104.

<sup>17</sup> (1994) 182 CLR 211.

<sup>18</sup> (1997) 189 CLR 520.

<sup>19</sup> [1997] 2 NZLR 22; [1998] 3 NZLR 424.

<sup>20</sup> Unreported 21/6/00 [2000] NZCA 95.

<sup>21</sup> [2000] 1 NZLR 257.

<sup>22</sup> [1998] 3 All ER 961; [1999] 4 All ER 609.

dominant priority should be 'to protect the principle that electors be afforded the maximum opportunity to exercise informed consent to the process of governance' (125).

The conclusion reiterates the author's view that political libels are better understood in a constitutional rather than a tortious context. Under the [78] compulsion of the *Human Rights Act 1998* (UK), changes will have to be made to English libel laws to comply with European Convention obligations. Professor Loveland's modest proposal for reform is to adopt an approach broadly similar to that taken by the High Court of Australia in *Lange v ABC*. Wide dissemination of political information and ideas should be recognised as attracting privilege, provided that the defendant acts without negligence.

As one would expect, *Political Libels* is a well-structured work. The argument is clearly and logically developed in easily comprehensible stages. Effective use is made of short concluding passages at the end of each chapter and within some chapters. The comparative analysis is skilfully interwoven within the fabric of the book, and the mode of expression is clear and sharp. The usual aids to accessing the contents are present: tables of cases and statutes, a select bibliography and a helpful index.

Overall, Professor Loveland has advanced an intensely readable and erudite case for reform of the English law of political libels. His book makes a valuable and stimulating contribution to scholarship in this area, and is well deserving of a place on the bookshelves of all defamation aficionados.