LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS
Vol. 4, No. 34: Nov 24, 2014

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Announcements

Collected Papers by the Right Honourable Sir Geoffrey Palmer QC
Part XII Defamation

The Palmer Series collects the papers of the Right Honourable Sir Geoffrey Palmer QC, Distinguished Fellow of the Victoria University of Wellington Law Faculty. The Palmer series is sponsored by an anonymous donor whom the Faculty gratefully acknowledges.

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"Politics and Defamation: A Case of Kiwi Humbug"
New Zealand Law Journal, pg. 265, 1972
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 48

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Recent incidents regarding libel in New Zealand have raised serious issues about the place of libel actions in New Zealand political life. This paper considers the development of libel actions in New Zealand common law, discusses the philosophy behind defamation and freedom of expression, and compares New Zealand's law to the United States approach. The law

of defamation poses serious problems for the media and others who publish material which may reflect upon the reputation of others. In some ways it is stricter than other branches of tort law. Defamation has always smacked of strict liability rather than negligence. Such risks cause the New Zealand media to engage in a good deal of self-censorship.

The United States Supreme Court in the American case New York Times v Sullivan held that State law could not award damages to a public official relating to his or her official conduct unless he or she could prove that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. The key analogy was with seditious libel, which is incompatible with democracy because seditious libel punishes those who libel the government. Political freedom is in dire jeopardy when the government can silence its critics. The new constitutional privilege in the United States can be understood as an extension of the common law defence of fair comment. But the comparison is somewhat misleading because the constitutional privilege is so much wider. It extends to false facts. Under constitutional malice the onus is on the plaintiff to prove malice with convincing clarity. In later cases, the Supreme Court broadened protection to extend to statements made regarding "public figures".

It is plain that politicians and other public figures in New Zealand are not reluctant to sue and they often succeed. Journalists engaged in investigative reporting will frequently get their facts incorrect. The more sensitive the issue the harder their task. The law of defamation as it is developed in New Zealand serves to dampen down public debate. There is nothing free, uninhibited and robust about freedom of expression in New Zealand. We will not have such debate unless the libel laws are altered.

"Defamation and Privacy Down Under"

64 Iowa Law Review 1209, 1979
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 49

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Observers of the common-law world find many interesting comparisons between the law of torts within the United States and the British Commonwealth. Because of the contrast, and because of the fascinating nuances of social attitude reflected in the defamation mirror, a review of the law of defamation and privacy in the Commonwealth from the perspective of recent developments in the United States is worthy of attention. This article analyses suggestions for reforms of the law of defamation that have been made in Australia and New Zealand, and related concerns about development of a privacy tort.

One conspicuous feature of the law of defamation in Australia and New Zealand is the propensity of politicians and public figures to sue. In the United States it is beyond controversy that a public official cannot recover for defamation unless he or she can prove with convincing clarity that the statement sued upon was made with actual malice – with knowledge that it was false or with reckless disregard for whether it was false.

The idea that an action for defamation is necessary to preserve honour seems rooted in values connected with the British notions of social class. It is by no means clear, however, that the same ideas flourish in the more aggressively egalitarian social environments of Australia and New Zealand. Nevertheless, defamation has been a consistent source of litigation in those countries. This raises the question whether defamation was once more popular in the United States than is now possible because of the development of the common law. Comparisons between New Zealand and Iowa cases, however, suggest the possibility that the twilight of defamation preceded rather than resulted from the New York Times v Sullivan decision. New Zealand responses to questionnaires about defamation indicate that while there is no doubt that free speech is regarded as an important democratic feature of New Zealand political culture, it is a value that tends to be regarded as having to function within the framework of existing law.

The common thread connecting Australian and New Zealand inquiries into defamation law reform appears to be the view that the common law of defamation, as it has developed in the Commonwealth, imposes restrictions that are too great to accommodate the full and free functioning of the mass media. Although the committees in all three Commonwealth nations formally considered application of American defamation standards, the absence of analysis concerning why the American rule should be rejected is striking. The rejection seems firmly rooted in cultural assumptions about the appropriate balance between speech and reputation that the committees did not regard as necessary to articulate. The conclusion seems plain: the relaxed American rules relating to defamation of public officials and public figures will not be adopted in the United Kingdom, New Zealand or Australia whatever other changes in defamation law might be made. Nevertheless, this paper considers some alterations recommended in the United Kingdom and largely followed, though with some differences, in New Zealand.

The paper also discusses the law of privacy, observing that the courts of England, New Zealand, and the Australian States have developed no separate tort providing a remedy for invasions of privacy. Considering the American experience with the tort, a number of conclusions can be reached. The tort or torts have been unsatisfactory; the operation of the law has been unpredictable; and the complications with freedom of expression have raised constitutional difficulties. The paper also discusses the potential for law reform in the area of privacy in Commonwealth countries.

"The Law of Defamation in New Zealand – Its Recent Evolution and Problems"

Jeremy Finn and Stephen Todd (eds.) 'Essays in Honour of John Burrows QC' (Lexis Nexis, Wellington, 2008)
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 50

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In this paper the author discusses his personal experiences with the law of defamation, including his family ties, private practice work, American studies in the subject area, and his early attempts at law reform. The hazards of suing in defamation are substantial and can be disastrous personally and financially. Pleading and conduct of a defamation action offers extraordinarily difficult sets of challenges. The passing years have not made defamation cases any easier. In United States law, however, following the precedent in New York Times v Sullivan, public officials are required to prove actual malice to succeed in a defamation case. Historically, Australian and New Zealand cases show a propensity for politicians in both countries to sue for defamation. Comparing this to United States law, 42 percent of the plaintiffs in Australia and New Zealand between 1969 and 1978 would have had a more onerous case under US law.

The Defamation Act 1992 has had significant impact in reforming the law of defamation, most notable of which was the repeal of the provisions relating to criminal defamation. The recommendation stopping a plaintiff, in an action where there is a news media defendant, specifying in the statement of claim the amount of damages was useful in curbing gagging writs. The law of defamation interfered too much, in the author's opinion, with the freedom of the media by imposing a form of strict liability upon it. But that said, the author also believes that New Zealand media has a way to go to improve on its weaknesses. Democracy under MMP requires a well-informed electorate and the media is the main vehicle for the reticulation of information. Politics in New Zealand tends to be reported as a variety of sport or theatre with dangerously little policy analysis of the choices made of those rejected. Alongside legislative reform, the common law has relaxed the defamation law to some extent.

The final section of the paper considers the implications of the modern media industry, which has increasingly become corporatized into large multinational media companies. The ownership of the New Zealand media, coupled with journalistic concerns about cost cutting, are current realities that the policy governing media regulation needs to take into account. The paper discusses the enterprise liability approach undertaken in American tort law for dangerous and defective products, and whether such an approach ought to be applied to defamation law. It then turns to the Commonwealth courts, finding that whether by common law development or by legislation, new principles can be applied to defamation law that better suit the realities of the industry that generates defamatory statements. That said, the emergence of the celebrity culture seems to be changing attitudes to defamation law.

The author does not propose any further efforts at present regarding reformation of defamation in New Zealand. The empirical evidence does not suggest the current law is inhibiting freedom of expression unduly. The structure of the current media industry does not suggest they need protection. While there are attractions in moving to a different theory of liability, the author is doubtful that the solution would be accepted. Finally, if the trends in the developing proliferation of media outlets, blogging, the internet and web-based news continue, coupled with the emphasis on "infotainment", it seems possible that the tort of defamation will fall into disuse over the next thirty years.

"Political Speech and Sedition"
11 and 12 Yearbook of New Zealand Jurisprudence 36, 2009
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 51

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This article considers the law of sedition, tracing its history through the origins and evolution of such laws in England. It discusses the philosophy behind freedom of expression, identifying the four commonly held justifications for the principle. It contemplates the tradition of free speech in the United States and the relationship between First Amendment free speech, defamation, and sedition, as illustrated in the case New York Times v Sullivan. It argues that sedition (in the form of defamation against the government) strikes at the very heart of democracy and that political freedom ends when government can use its powers and its courts to silence its critics.

The article then turns to the laws of sedition and criminal libel in New Zealand and the history of reform. The law of sedition, inherited in New Zealand through British common law and first codified in the Criminal Code of 1893, was the subject of unsuccessful reform attempts in 1989. Sedition was potentially an instrument of political suppression, generally used during times of political or civil unrest or war. The article discusses 19th and early 20th century cases in which sedition was charged, from Parihaka and other Maori arrests to labour strikes and opposition to conscription. While sedition prosecutions were so rare in the second half of the 20th century that it appeared the crime had fallen into disuse, three final cases of sedition rose in quick succession in 2006 and 2007.

In considering reform, the Law Commission concluded that the State should be entitled to punish statements or conspiracies advocating imminent violence against the State, or the community, or individuals. However it found that seditious offences had been used both in New Zealand and overseas to prosecute and punish speech that might be inflammatory, vehement and unreasonable, but where there was no proved intention to urge immediate violence. It considered that there were other and more appropriate criminal offences which could be used to prosecute offending behaviour but which did not carry the risk of abuse or the tainted history of seditious offences. It also made clear that seditious offences were not an appropriate response to terrorism and that other methods of dealing with such conduct, which did not infringe the principle of freedom of expression, should be used.

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About this eJournal

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to

lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the **Law School** has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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