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Law Of Defamation, by Rodney A. Smolla

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BOOK REVIEWS

LAW OF DEFAMATION. By Rodney A. Smolla.* *New York: Clark Boardman Co., Ltd., 1986. 544 pp. $85.00.*

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Once again we are advised that the law of defamation is " 'a forest of complexities, overgrown with anomalies, inconsistencies, and perverse regidities [sic],' a veritable 'fog of fictions, inferences, and presumptions.' "[1] Such colorful cautionary quotations have become standard fare for modern text writers in the field of defamation. Yet, ironically, with each new exposition on the complexities of the law—and there are now quite a few from which to choose[2]—many of the wrinkles are smoothed. In Professor Smolla's recent contribution, *Law of Defamation,* the field is nearly ironed flat. The depth and breadth of research and straightforward writing style of this book make a generally muddy topic comprehensible and accessible to the practitioner, academician, and journalist alike.

The introductory chapter provides a broad overview which traces the origins of the tort, discusses the common law cause of action, and the constitutionalization of the field of libel. It then gives a useful summation of the purposes which libel law traditionally has served and the countervailing free speech values which constitutional restrictions on the tort have served. It concludes with a description of the modern cause of action which includes

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1. R. SMOLLA, THE LAW OF DEFAMATION 1-4 (1986) (quoting Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349, 1350 (1975) and Coleman v. MacLennan, 78 Kan. 711, 740, 98 P. 281, 291 (1908)).

2. S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS (1984); M. NIMMER, NIMMER ON FREEDOM OF SPEECH (1984); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS (1980); B. SANFORD, LIBEL AND PRIVACY - THE PREVENTION AND DEFENSE OF LITIGATION (1985). The Practising Law Institute's annual *Communications Law* outline also provides an invaluable collection and organization of libel and slander cases.

some or all of *nine* distinct elements (more than any other author has yet identified)[3].

Chapters two through six are the meat of the book. They examine the public figure doctrine, fault requirements, defamatory meaning, truth, and opinion, providing a thorough analysis of the constitutional libel rules established by the Supreme Court's decisions from *New York Times Co. v. Sullivan,*[4] through *Philadelphia Newspapers, Inc. v. Hepps.*[5] They also integrate the common law doctrines that have survived these Supreme Court decisions. In describing the relevant Supreme Court decisions, Smolla pays particularly close attention to the facts of each case and the rationale of each decision. Rather than distilling the case into cold legal rules, he takes the time to set forth the circumstances of each case in a very readable story format and thereby gives meaning to the rules the cases established.

Where Smolla disagrees with the Supreme Court, he does not refrain from saying so. In assessing a footnote in *Wolston v. Reader's Digest Association,*[6] he first labels it "a loose and ill-considered bit of dicta,"[7] and then proceeds into a series of hypotheticals to show that the "illogic of the *Wolston* dicta is easily demonstrable."[8] After discussing the Supreme Court cases, Smolla shows how the rules they establish have been applied in contemporary cases such as *Westmoreland v. CBS, Inc.,*[9] *Sharon v. Time, Inc.,*[10] and *Burnett v. National Enquirer, Inc.*[11]

He also takes a turn at the real problem of applying the constitutional rules in cases which have yet to be litigated. One of his most interesting discussions along these lines examines what Smolla calls the "context public figure."[12] Here, he points out that "public figures" usually are regarded as persons such as Jerry

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3. R. SMOLLA, *supra* note 1, at 1-23.

4. 376 U.S. 254 (1964).

5. 106 S. Ct. 1558 (1986). Unfortunately, the Supreme Court rendered *Hepps,* a decision which holds that the first amendment places the burden of proving falsity on the plaintiff, after Professor Smolla's September 1, 1985 discovery cutoff and so his discussion of the major impact this case will have is limited to a brief insert at the conclusion of chapter 5.

6. 443 U.S. 157 (1979).

7. R. SMOLLA, *supra* note 1, at 2-46.

8. *Id.* at 2-47.

9. 596 F. Supp. 1170 (S.D.N.Y. 1984).

10. 599 F. Supp. 538 (S.D.N.Y. 1984).

11. 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed,* 465 U.S. 1014 (1984).

12. Professor Smolla first argued for development of the "context public figure" in his article *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 64-77 (1983).

Falwell, Ralph Nader, William F. Buckley, or Dan Rather, but that "[v]ery few people purposefully inject themselves into an arena of national attention."[13] He then argues persuasively that anyone should be classified as a "public figure" for libel purposes if he or she is well known in the community to which the libel is published. "There are, in short, national marketplaces of ideas and local marketplaces of ideas, and for many citizens the local marketplaces are every bit as important as speech in a national context."[14]

At several points in the treatise, Smolla interweaves subsections dealing with litigation strategy. These sections provide useful suggestions regarding how to posture a defense or claim in light of uncertainties in the law. At the conclusion of his discussion regarding classification of public figures, Professor Smolla suggests that strategically it might be wise to argue that whether an individual is a public figure or not is a matter of state law rather than first amendment analysis. Smolla observes that

> [i]n light of the Supreme Court's current conservatism in its formulation of the public figure doctrine . . . as well as the expression of doubt by some Justices as to the soundness of the whole *New York Times* line of precedent . . . there is a danger that any lower court adopting a more flexible approach to the public figure definition will be reversed on appeal. To the extent that the context public figure concept is treated as an elaboration on common law conditional privileges, however, this danger may be substantially diminished.[15]

Not content with describing history or providing guidelines for future litigation, Smolla at several points turns to predicting how the Supreme Court will elaborate on existing doctrine. He takes a daring stab at prognostication in Chapter 3 where he suggests that the Supreme Court will allow the states to apply strict liability in cases which do not involve speech about a "matter of public concern." He deduces this conclusion from a variety of "clues" and "signals"[16] which he finds in Justice Powell's opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[17]

Chapter 7 should be mandatory reading for any lawyer who is even considering filing or defending a libel or slander suit or any judge who presides over such a case. It gives a concise description

13. R. SMOLLA, *supra* note 1, at 2-56.
14. *Id.*
15. R. SMOLLA, *supra* note 1, at 2-60-61.
16. R. SMOLLA, *supra* note 1, at 3-10-14.
17. 105 S. Ct. 2939 (1985).

of the common law rules which classified libel and slander as "per se" and "per quod." There perhaps is no greater confusion in this area of the law than the meaning of these terms.[18] At the conclusion of the chapter, Smolla advances a proposal for a simplified, fair reform which would abolish the distinction between libel and slander, eliminate all special harm rules, require special harm in all cases, and permit a jury to weigh all relevant factors in assessing damages.[19]

Chapter 8 discusses and catalogs common law privileges. Quite properly, emphasis is placed on the privilege or lack of privilege for credit reporting. The Supreme Court's *Dun & Bradstreet* decision plainly stripped much, if not all, first amendment protection away from such speech as well. Here, Professor Smolla predicts that the *Dun & Bradstreet* dicta will substantially undermine common law protection afforded for such speech. "Given the Supreme Court's general denigration of the social importance of credit reporting information in *Dun & Bradstreet,* it seems reasonable to surmise that a spillover influence will be that credit reports will receive less favorable common law conditional privilege protection as well."[20]

Damages and other remedies are addressed in Chapter 9. An important issue addressed here is whether plaintiffs may rely on emotional distress as their sole source of damages. Here, Smolla spells out in plain terms that which the Florida courts have never expressly recognized—that the common law requires damage to reputation as an element of the tort, although the first amendment, in cases where it is applicable, requires a plaintiff only to prove "actual injury" which may be any injury actually shown by the evidence.[21]

In addressing whether a court could order a libel defendant to publish a retraction, Smolla reaches the somewhat startling conclu-

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18. Confusion over the meaning of these terms is manifested in the recent Florida Supreme Court decision Mid-Florida Television Corp. v. Boyles, 467 So. 2d 282 (Fla. 1985).

19. R. SMOLLA, *supra* note 1, at 7-15-17.

20. *Id.* at 8-26. In states such as Florida, where the vitality of the common law privilege is hotly contested, this is particularly important. *Compare* Putnal v. Inman, 76 Fla. 553, 80 So. 316 (1918), *with* Vinson v. Ford Motor Credit Co., 259 So. 2d 768 (Fla. 1st DCA 1972).

21. R. SMOLLA, *supra* note 1, at 9-6-7. Ignoring common law rules, the Florida Supreme Court upheld a compensatory damage award of $100,000 notwithstanding that the plaintiff had waived all claims for damage to reputation and claimed only injury to her mental state in Time, Inc. v. Firestone, 305 So. 2d 172 (Fla. 1974). The United States Supreme Court subsequently affirmed that award, concluding that the first amendment posed no barrier to such an award as long as it was supported by the evidence. 424 U.S. 448, 460 (1976).

sion that the landmark decision *Miami Herald Publishing Co. v. Tornillo*,[22] does not foreclose the possibility that a retraction could be ordered by a court as a remedy for defamation. In *Tornillo*, the Supreme Court of the United States held a Florida statute providing political candidates a "right-to-reply" abridged the first amendment.[23] Smolla points out, however, that a

> compulsory retraction (or compulsory equal space) *after* a full-fledged defamation trial with all appeals exhausted could survive the holding in *Tornillo*, since the defendant would have received the full protections of due process of law and applicable first amendment liability rules prior to being forced to retract or yield equal space.[24]

Chapters 10 and 11 sprint through the torts of invasion of privacy, infliction of emotional distress, and publication of injurious falsehood, providing the reader with only a well-organized glimpse at these actions which frequently appear either along side of or in lieu of libel actions.

Chapter 12 is a very brief description of special problems which arise in litigation, touching on jurisdiction, conflict of laws, pleading, discovery, summary judgment practice, and post-trial motions. The brevity of the chapter does not allow the author to exposit his own theories or to provide a thorough discussion of the relevant case law as is found in other chapters; however, the chapter does provide a good overview of these particular problems and discusses the major cases and literature in the area. Particular attention is paid to the Supreme Court's recent decisions in *Calder v. Jones*[25] and *Keeton v. Hustler Magazine, Inc.*[26] No attempt, however, is made to discuss how to try a libel case. Chapter 13 essentially is a short essay on how libel lawyers should deal with their clients, offering a variety of practical suggestions which should minimize misunderstandings between lawyers and clients.

The final chapter of the book touches on media insurance, but really makes no effort to cover this area thoroughly, providing little more than the names of the major carriers, a description of the types of policies available, and the factors which a carrier is likely

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22. 418 U.S. 241 (1974).

23. *Id.*

24. R. SMOLLA, *supra* note 1, at 9-40. Smolla concedes, however, that the "draconian remedy of compulsory retraction or right of reply is probably best kept a theory." *Id.* at 9-41.

25. 465 U.S. 783 (1984).

26. 465 U.S. 770 (1984).

to use in setting policy provisions. This remains an area of critical concern to publishers, yet seems to defy attempts at analysis.[27]

Many of the modern libel treatises are written from the perspective of defending libel claims. Accordingly, they reflect a bias—or perhaps more fairly a belief—on behalf of the author that libel law should be done away with altogether or, at the very least, restricted as much as possible.[28] While these treatises provide optimal defense arguments, they sometimes can be deceptive. Even the most pessimistic of defense lawyers tend to paint a bleak portrait of any plaintiff's libel claim and highlight the possibility for defense coups.

No such bias is reflected in Professor Smolla's treatise. It provides as much a guide for plaintiffs as defendants and, from a defense standpoint, the piercing analysis is in many ways alarming. For example, although most defense lawyers have taken the position that a statement of pure opinion, particularly in such necessarily subjective contexts as restaurant and movie reviews,[29] is absolutely protected by the first amendment,[30] Professor Smolla finds room in constitutional as well as common law analysis for liability based upon such traditionally hallowed statements. For example, Smolla advances the following hypothetical:

> Suppose a movie critic sets out to pan a film, telling her readers not to see it, when in fact the critic loved the movie. Like Antonio Salieri, who (as portrayed in the movie *Amadeus*) set out to sabotage the career of Mozart by demeaning Mozart's compositions, though in fact Salieri thought they were works of genius, a modern critic might, out of jealousy, envy, or spite, choose to pan a film. Should such a 'dishonest evaluative opinion' be actionable?[31]

Pointing out that some commentators have found there should be no liability because of the difficult proof problem encountered in showing whether the defendant believed her opinion, Smolla takes the opposite view. "In the rare case of hard evidence that the opin-

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27. A slightly more elaborate discussion of insurance is found in R. SACK, *supra* note 2, at 563.

28. *See, e.g.*, R. SACK, *supra* note 2, at xxix (conceding the inevitable bias of a media defense lawyer).

29. *See* Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985).

30. The conclusion is drawn largely from the dicta in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), that "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.*

31. R. SMOLLA, *supra* note 1, at 6-20.

ion was misrepresented—a memorandum by the critic, or a telltale statement to the contrary in the presence of witness— the suit should be permissible."[32] These ideas and others which might well be advocated by the most creative of plaintiffs' lawyers simply have never been well articulated in the existing treatises.

The book is not as drenched in citations as Slade Metcalf's *Rights and Liabilities of Publishers, Broadcasters and Reporters*, it does not provide cross-citations to BNA's *Media Law Reporter* (the most essential basic resource for serious students of libel law), it is not as dedicated to freedom of speech as Robert Sack's *Libel, Slander and Related Problems*, and it undoubtedly will come under attack from the media defense bar as offering up too many "anti-speech" theories for plaintiffs. Notwithstanding these criticisms, Professor Smolla's *Law of Defamation* should become a standard in the field.

32. *Id.* at 6-21.