

## BOOK REVIEW

### REPUTATION, CELEBRITY AND DEFAMATION LAW

*David Rolph*

Aldershot: Ashgate, 2008, xxvi + 217pp, £55, ISBN-978-0754671244 (hbk)

David Rolph begins this study with some observations that capture the state of literature. Defamation law seeks to both protect reputation and to balance the protection of reputation with freedom of speech. However, while there is an extensive literature on freedom of speech, ‘scant attention’ has been paid to reputation. He rightly notes that this is surprising and that ‘given the rich and evocative ways in which reputation can be described and acted upon, one might have expected to encounter a substantial body of jurisprudence analysing the concept of reputation in defamation law’ – and yet one does not encounter such a body of scholarship (Rolph, 2008:1). It is in this context that Rolph undertakes a detailed analysis of reputation and defamation law, with (as the title suggests) a focus on the ways that a consideration of celebrity might inform both the law and the concept of reputation.

During the time that Rolph was writing and, I am sure, even in the gap between submission of the manuscript and its publication as a book, the state of the literature changed somewhat and his work should now be viewed as a part of a fairly recent collection of material that has considered reputation in different ways, though often motivated by the same foundational concerns that prompted Rolph’s inquiry. Among the recent works is a major book on defamation and free speech by Dario Milo, articles by Roy Baker which have a primarily empirical focus, and my own attempts to grapple with some of the problems.<sup>1</sup> It is an unusual coincidence that reputation has been neglected for a long time and then a burst of work appears so contemporaneously that the various authors offer very little, if any, detailed critical analysis of the arguments which are offered by their peers. This review is not the place for a comparative analysis of the different arguments and critiques. Rather, it is more appropriate to take Rolph’s work as it stands independently of other works which he was not in a position to consider.

The central thrust of Rolph’s book is that reputation has not been adequately investigated. The only major piece is Robert Post’s landmark article, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’.<sup>2</sup> Post argued that reputation was manifested differently in defamation actions and could be conceptualised in three ideal types: reputation as property, reputation as honour and reputation as dignity. Rolph takes this framework and applies it to Australian case law, but seeks to add to Post’s framework. He draws on Gibbons’ analysis<sup>3</sup> of

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<sup>1</sup> D Milo, *Defamation and Freedom of Speech* (Oxford: OUP, 2008); R Baker, “The Rookie and the Silk: Learning the ‘Ordinary Reasonable Person’ in Defamation Law” (2007) 12 *Media & Arts Law Review* 399-422; R Baker, “Defamation and the Moral Community” (2008) 13 *Deakin Law Review* 1-36; L McNamara, *Reputation and Defamation* (Oxford: OUP, 2007).

<sup>2</sup> (1986) 74 *California Law Review* 691-742.

<sup>3</sup> T Gibbons, “Defamation Reconsidered” (1996) 16 *Oxford Journal of Legal Studies* 587-615.

reputation in defamation law (which is one of the very few pieces on reputation aside from Post's) to argue that 'the crucial role of the media is largely overlooked' and:

Accepting Gibbons's critique and seeking to apply it to extend Post's reputational schema, this book contends that it is vital to engage with the media's role in creating and damaging reputations. ... [T]he development and spread of mass communications has led to the emergence of a distinct form of reputation that should now be recognised in addition to those identified by Post – reputation as celebrity. (pp 37-8)

The book is divided into three parts. Part One provides an outline and critique of Post's framework, explores how reputation has historically appeared in defamation law, and examines the ways that reputation underlies the elements of the cause of action and defamation damages. Part Two looks at the Australian case law to see how Post's three concepts appear there. Part Three, comprising one chapter and a brief conclusion, advances the argument for reputation as celebrity.

Stylistically, the book is not always easy reading due to the combination of footnotes and in-text referencing. At times, the latter is so comprehensive that it detracts from the clarity; for instance, at pp 71-3 and 122 extensive citations almost hide the substantive points.

The book has a very heavy focus on Australian case law. While sometimes framed as more broadly oriented, the discussion is primarily and explicitly concerned with Australian law (e.g., pp 87, 106, 182). This need not be a problem if the Australian work is to be viewed as a case study that sets out to prove a larger conceptual claim – and this is suggested towards the end (p 183) – but the non-Australian reader will inevitably feel that the focus is narrow.

On the whole, the book offers an interesting and novel line of inquiry into the nature of reputation and the way that defamation law operates, and it makes a significant contribution to the literature in this regard. There can be no doubt that Rolph is on to something important when he considers the position of those with a degree of celebrity and compares them to those without such celebrity. He makes some acute observations about the function and effects of a defamation action, with some well made points about the ways that commencing an action may backfire and serve to damage rather than repair the claimant's reputation. The stronger claim that 'reputation as celebrity' should sit as a partner with Post's property, honour and dignity is advanced in the final chapter. Whether or not one accepts this claim, Rolph's analysis is suggestive of the need to look more closely at the extent to which Post's framework stands up when the role of celebrity and the media is taken into account. Having said this, there are some respects in which the book falls short of what this line of inquiry might yield.

First, there is sometimes a sense of imbalance in the book, especially with regard to the function of different parts. This occurs, on the one hand, in the way it is written. The tendency is to use lengthy descriptive sections and then follow these with a point, critique or analysis. However, the descriptions sometimes seem unnecessarily long, with the point they establish being perhaps brief or straightforward. For example, the law about the requirement of publication is recounted (pp 69-74) where a shorter discussion would have sufficed to make the point that 'the principles relating to publication in defamation law are medium-neutral' (p 74). Similarly, the five-page

description of the *Costello & Abbott* case is disproportionate to the two-page analysis, especially as the latter provides more food for thought with regard to the thesis about the media's role and could have been expanded upon.

Secondly, and slightly frustrating, the book's most interesting dimension is the way it proposes to examine the role of the media, the mode of communication, and celebrity in defamation cases and the ways these affect reputation, but it takes quite some time to do this. There are claims that media and communication are significant (e.g., pp40, 74), but these come across as assertions which are not yet established, rather than arguments which have been supported by the preceding analysis. It is not until page 118 that we really start to see the analysis of the cases providing support for the thesis. Once he gets there, there is some very interesting analysis of the media's role and the claimant's use of a defamation action. There is a good discussion of high profile stockbroker Rene Rivkin's action regarding allegations he was homosexual and Jason Donovan's action against *The Face* is also well dealt with. However, there is usually only a page or two at most on any given instance and (as discussed below) this does not seem adequate to establish the larger theoretical case. The second problem is that it is not until the final chapter that there is any real discussion or definition of what 'celebrity' is. This is problematic because if the analysis of the cases is intended to show how celebrity is significant, then a clear definition up front seems as though it would have been both essential and would have made for a much richer analysis of the cases and the significance of the mode of the communication and the claimant's status. Alternatively, a more detailed analysis of the media dimensions of the cases could have provided a stronger foundation for the later theoretical claims and the development of celebrity in the final chapter.

Thirdly, and flowing from this, what of the key conceptual claim that Post's framework warrants a fourth pillar? The last chapter begins to build a more integrated discussion of how reputation as celebrity compares with the three existing conceptualisations, drawing on some non-law scholarship, and here Rolph's argument is persuasive, at least to the extent that celebrity seems very relevant, even if there could be a more detailed analysis and explanation of just how it is relevant. However, celebrity as he explains it looks like a different *type* of creature than property, honour or dignity. He distinguishes it from the existing concepts on the grounds that it does not rely on the proposition that reputation is always deserved (p 181). Overall, Rolph's analysis remains more convincing with regard to providing insights into how celebrity affects the ways property and honour (but also dignity) are mediated, whereas the case for reputation as celebrity as an equal partner is less convincing. What would strengthen the latter are the matters raised above: an extended, detailed analysis of the content and patterns of media coverage, with closely drawn connections to support the theoretical claims. The connections drawn in the final chapter provide a starting point, but it would be fascinating to see them taken further.

Fourthly, there are arguably some methodological problems, and it might be that these also hold the book back from clearly establishing what looks to be potentially a very strong thesis. To the extent that Rolph's claim is that defamation law and reputation are different for celebrity and non-celebrity claimants, it is not clear that an analysis of the media content and cases (however detailed) will be able to fully support this claim. Instead, it looks like some interview-based work with non-celebrity claimants would be necessary. For example, in the comparison of *Ettingshausen* and *Shepherd* cases, where both claimants sued over naked photographs, Rolph argues that the celebrity Ettingshausen's case 'had lasting impact, whereas Shepherd's case has not'

(p 165). The problem is that without asking the non-celebrity Shepherd, it is difficult to know what the lasting impact has been for her. There are also some troubling expressly stated presumptions that the stakes are lower for the non-celebrity (p 156). It would also have been interesting to see why some cases were chosen over others. For example, Australia's longest-running defamation case, *Amalgamated Television Services Pty Ltd v Marsden*,<sup>4</sup> is not mentioned, where one might think that the extensive media coverage and salacious details of the private life of this outspoken, high-profile, homosexual, civil liberties lawyer may have yielded much for Rolph's study. Similarly, a very wide range of matters in Australia and Britain is identified late in the book (p 183) and some detailed explanation of why the chosen case studies were selected would have been helpful.

In the end, the book comes across slightly more as having advanced a very interesting hypothesis, rather than having established a thoroughly supported case. However, at the heart of the work is an important contention for which the author has provided both some good evidence and a novel, interdisciplinary theoretical critique of Post. It is a thorough piece of research which inquires into issues that have not received anywhere near the attention they deserve, either in the past or in the most recent contributions to the scholarship in the area.

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<sup>4</sup> (1998) 43 NSWLR 158.