

Chapter 5

The Sources of Defamation Law

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Introduction

Defamation law is one of the most arcane areas of private law. Judgments are replete with observations about its complexity.¹ Writing extra-curially, Ipp JA evocatively described defamation law as “the Galapagos Islands Division of the law of torts”.² The complexity of defamation law is attributable, to a significant extent, to its multifarious origins in English law and the lack of any subsequent rationalisation of the body of principles which haphazardly developed.³ Judicial and academic writings have observed that defamation law remains indelibly marked by its formative period in the 16th and 17th centuries, with subsequent developments essentially being refinements or accretions on existing principles.⁴

This chapter focuses on the sources of defamation law and their contribution to the development of defamation law up until the end of the 17th century. As it was the first forum in which defamation claims were entertained, this chapter begins with an examination of the ecclesiastical jurisdiction over defamation. It then analyses the royal courts’ assumption of jurisdiction over defamation claims at the beginning of the 16th century. It then explores the concurrent development of the Star Chamber’s jurisdiction over criminal defamation. It also examines the parallel development of the statutory offence of *scandalum magnatum*. Finally, it considers the treatment of defamation claims in local courts during this period. There are a number of discernible themes running through the history of defamation law in the period covered by this chapter, such as the transformation of

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1 See, for example, *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35, 58 (Blackburn J); *Burrows v Knightley* (1987) 10 NSWLR 651, 654 (Hunt J).

2 Ipp, “Themes in the Law of Torts” (2007) 81 *Australian Law Journal* 609, 615.

3 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J); *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, [123] (Gummow J).

4 Holdsworth, “Defamation in the Sixteenth and Seventeenth Centuries: Part I” (1924) 40 *Law Quarterly Review* 302, 303; Holdsworth, *A History of English Law* (Methuen & Co, London, 1972), Vol VIII, 378; *Hill v Church of Scientology* [1995] 2 SCR 1130; 126 DLR (4th) 129, 162 (Cory J).

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