

CARTER-RUCK ON LIBEL AND PRIVACY

Sixth Edition

General Editors

Cameron Dooley
Professor Alumnia Mullis

Contributors

Harvey Stone
Caroline Achly
Jonathan Griffiths
Ian Fleming
Dr Andrew Scott



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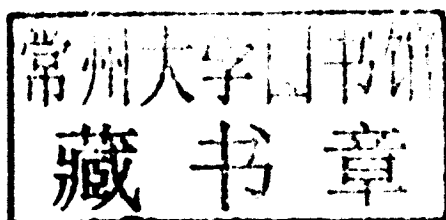
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Carter-Ruck on Libel and Privacy

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Foreword

The Rt Hon The Lord Woolf

Thirteen years have passed since the Fifth Edition of *Carter-Ruck on Libel and Slander* was published in 1997. A new edition was clearly overdue since that period has witnessed enormous changes in the law and practice of defamation, the passage of the Human Rights Act 1998 and the introduction of the Civil Procedure Rules under the Access to Justice Act 1999. There has also been the development of a tort-based law on the misuse of private information and the emergence of the defence of *Reynolds* privilege. A legal response is also necessary to changes both in methods of publication (most notably those involving the internet) and in social mores, though these have been organic in nature and their eventual destinations are still far from clear.

Indeed, if anything is certain it is only that the coming years will see further substantial changes in the law and practice of libel and privacy. A vigorous and well-resourced campaign for libel reform, complemented by editorial clamour against ‘judge led’ development of the law of privacy, has ensured that the subject has remained at the forefront of the political agenda. Each of the three major political parties entered the 2010 general election with a manifesto commitment to legislate in the area and that commitment has since been confirmed by the coalition government that emerged from the electoral process. Reform in the field of civil litigation costs would appear also to be inevitable and the impact of such reforms will be felt particularly keenly in the context of so-called ‘publication cases’ where any natural equality of arms is the exception rather than the rule.

Against this background Cameron Doley, Alastair Mullis and their colleagues must often have felt as if they were seeking to track a moving target. However, they are to be commended for having managed that difficult task and for producing what is an admirably comprehensive, learned and yet pragmatic guide to what has shown itself to be – perhaps unnecessarily – an increasingly complex field of the law. *Carter-Ruck on Libel and Privacy* will, I have no doubt, prove to be a valuable port of call for specialist and general practitioners alike.

15 November 2010

Preface

This is the first edition of *Carter-Ruck* to be published after the death of its original author, Peter Carter-Ruck. Earlier editions of the book very much reflected his particular view of, and approach to, the law of libel and slander. The book has always been highly regarded but, compared to *Gatley on Libel and Slander* (11th edn, 2008) Sweet & Maxwell, and *Duncan & Neill on Defamation* (3rd edn, 2010) LexisNexis, it was less detailed, more discursive and very much reflected the, occasionally idiosyncratic, approach of one of the leading practitioners of his day. As editors of this edition we decided that it would be inappropriate, and perhaps impossible, to maintain the style and tone of earlier editions and consequently we embarked, with our fellow authors, on the ambitious task of completely rewriting the book. Very little now remains of earlier editions. Though elements of the book, in particular the chapters on misuse of private information and related claims, are more discursive than others (in consequence of the nature of the material covered) we have attempted to write a book that is rather more scholarly and is certainly more detailed than previous editions. In short, we have sought to provide a complete and balanced treatment of the law and practice of defamation, privacy and related claims both in England and Wales and in a large number of other jurisdictions.

In order to reflect the introduction of new chapters on the misuse of private information claim, the Data Protection Act 1998 and the Protection from Harassment Act 1997 the book now has a new name, *Carter-Ruck on Libel and Privacy*, rather than *Carter-Ruck on Libel and Slander*. The chapters on libel and slander, which are contained in Part 1, have been completely rewritten in large part because the law has changed significantly since 1997 but also to reflect our desire to change the tone and style of the book. This part of the book begins within an introduction to the underlying concerns of the law and the interests protected (**CHAPTER 2**) before moving on to deal with the essential elements of the claims for libel and slander (**CHAPTERS 3–6**). The difficult issues of jurisdiction and choice of law are covered in **CHAPTER 7** and parties in **CHAPTER 8**. The book then deals, in **CHAPTERS 9–14**, with the defences; justification in **CHAPTER 9**, fair comment in **CHAPTER 10**, absolute privilege in **CHAPTER 11**, qualified privilege in **CHAPTER 12**, the offer of amends procedure in **CHAPTER 13** and other defences in **CHAPTER 14**. We considered splitting the very lengthy **CHAPTER 12** on qualified privilege into separate chapters on traditional privilege, *Reynolds* privilege, statutory privilege and malice, but concluded that on balance it was better to leave them together because of the overlapping nature of the issues involved. The emergence of the reportage variant of *Reynolds* privilege only confirmed us in this view.

Remedies for defamation are dealt with in **CHAPTER 15**, the now abolished offence of criminal libel in **CHAPTER 16** and malicious falsehood in **CHAPTER 17**.

The law addressed in the second part of the book is almost entirely new since the previous edition, albeit that the claim for misuse of private information has emerged out of the old claim for breach of confidence. Part 2 commences with a chapter introducing the concept of privacy and the concerns of the law relating thereto (**CHAPTER 18**). There then follow three chapters on the misuse of private information claim (**CHAPTERS 19–21**). The first of these covers the reasonable expectation of privacy element (**CHAPTER 19**), the second the ultimate balancing test (**CHAPTER 20**) and the third the available remedies (**CHAPTER 21**). The remainder of this part of the book deals with related statutory claims that arise under the Data Protection Act 1998 (**CHAPTER 22**), the Protection from Harassment Act 1997 (**CHAPTER 23**) and copyright and image right (**CHAPTER 24**).

The third part of the book is also completely new and is intended to provide a guide to the practice and procedure relating to both defamation and privacy in so far as they differ from ordinary civil practice and procedure. The first five chapters of Part 3 cover defamation practice and procedure, with privacy practice and procedure dealt with in **CHAPTERS 32–36**. **CHAPTERS 30** (costs) and **31** (appeal) seek to address issues arising in relation to both defamation and privacy.

The final part of the book, Part 4, deals with the law in other jurisdictions. Previous editions addressed only the defamation law of such jurisdictions; this edition, however, seeks in each instance to deal with both the law of defamation and the law of privacy (albeit that the latter is, in a number of countries, barely extant). The book does not purport to include descriptions of the law in all jurisdictions across the globe. However, there are chapters covering the laws of a large number of countries in Western and Eastern Europe, Asia, Africa, the Middle East and North, Central and South America. Most detail is provided of the law within the common law world, but in all cases our aim has been to provide a succinct and clear guide to the main features and characteristics of the law in each jurisdiction.

The book contains appendices. The first of these, **APPENDIX 1**, contains relevant statutory material. The only significant omission is the Copyright, Patents and Designs Act 1988. The chapter on copyright and image rights is broad in coverage and we felt that we should either include the whole Act or none of it. As this book is not a specialist book on copyright and image rights, and the Act itself is very long, we decided to omit it in its entirety. The second and third appendices contain schedules of awards of damages in, respectively, defamation actions (**APPENDIX 2**) and privacy claims (**APPENDIX 3**). Both of these are complete so far as we aware and we wish to acknowledge the important work of Mr Benjamin Pell in assisting us in this regard.

As general editors we have reviewed the whole text. Cameron Doley has, however, undertaken the task of assembling and editing all the chapters in Part 4 of the book and **APPENDICES 2 and 3**. We have been extremely fortunate in the team of practitioners and academics who have undertaken the onerous responsibility of writing individual chapters. The author of each chapter is identified at the beginning thereof. The responsibilities for writing the English

law part of the book were divided as follows: **CHAPTERS 1–6** and **8–16** were written by Professor Alastair Mullis. **CHAPTER 7** on jurisdiction and choice of law was written by Andrew Stephenson, Ruth Collard and Cameron Doley and **CHAPTER 17** on malicious falsehood was written by Harvey Starte. The second part of the book was written in the main by Dr Andrew Scott (**CHAPTERS 18–23**), but **CHAPTER 24**, on copyright and image rights, was written by Jonathan Griffiths. The chapters on practice and procedure were divided between Ian Helme, Caroline Addy and Harvey Starte (all of One Brick Court) and Cameron Doley, though others from Carter-Ruck were also involved. Part 4, on the law in other countries, was written by practitioners and academics specialised in defamation and privacy in their respective jurisdictions. We wish to acknowledge the considerable time and effort our fellow authors gave to writing their chapters, to record our appreciation of their expertise and to thank them for all the work they put in.

As with many books of this size and complexity, it has taken longer to complete than originally anticipated. Our commissioning editor at LexisNexis, Evelyn Reid, must have despaired occasionally that the book would ever be finished. Through a combination of charm, gentle, and not-so-gentle pressure, she has kept us at the task and we are very grateful to her for bearing with us and supporting us in bringing it to a conclusion. We are also very grateful to Vicki Hillyard and others at LexisNexis for their labours and for the patience they have shown at all times.

Cameron Doley – In addition to the above, I should like to thank my partners (several of whom, having welcomed me to Carter-Ruck as an articled clerk two decades ago, can claim the questionable honour of having taught me most of what I know about the law of libel and privacy) both for volunteering me to work on this update of Peter's book and for thereafter allowing me the time to do so. Many people at the firm have provided help without which my sections of the book would never have seen the light of day. Particular thanks are due to Isabel Hudson and Stevie Loughrey for their prolonged and patient work in relation to Part 4, as well as to Andrew Stephenson and Ruth Collard (**CHAPTER 7**), Hanna Basha (**CHAPTER 28**), Luke Staiano (**CHAPTERS 28** and **30**), Matt Smith (**CHAPTER 30**) and Nigel Tait and Dominic Garner (**APPENDICES 2** and **3**). I should also, however, record my thanks to Magnus Boyd, Claire Gill, Della Hall, Samantha Hall, Debbie McLaren, Glenn McMillan, Guy Martin, Athalie Matthews, Lucy Middleton, Kate Pantling, Alasdair Pepper, Michelle Riondel, Lesley Short, Rebecca Toman and David White. Space does not permit me to refer here by name to all those expert practitioners and academics responsible for the chapters that comprise Part 4 (though they are, of course, all identified elsewhere). This is not, however, to downplay the debt of gratitude owed to them; they were, without exception, a joy to work with and the insights that they were able to provide often cast new light on the validity of practices and principles adhered to in this jurisdiction that I had long since ceased to question. It has also been the greatest of pleasures to work with Professor Alastair Mullis who has, besides bearing the weight of many of the heaviest chapters of the book, single-handedly cured me of a number of prejudices accumulated over 20 years of practice and opened my eyes afresh to the value and rigour of the academic approach to the law. Finally, my thanks and love go, as ever, to my wife Kathryn for her guidance and sense of perspective (born, no doubt, of her work as a lawyer in a real world that does