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LIBEL AND SLANDER

ELEVENTH EDITION

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THOMSON REUTERS

Published in 2008 by Thomson Reuters (Legal) Limited
(Registered in England & Wales, Company No.1679046.
Registered Office and address for service: 100 Avenue Road, London, NW3 3PF)
Trading as Sweet & Maxwell

Typeset by Interactive Sciences Ltd, Gloucester
Printed in the UK by CPI William Clowes Beccles NR34 7TL

For further information on our products and service, visit:
www.sweetandmaxwell.co.uk

ISBN 978-1-84703-492-2

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A CIP catalogue record for this book is available from the British Library.

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LIBEL AND SLANDER

PREFACE

In the 10th edition the most prominent feature on the map of the substantive law of defamation was *Reynolds v Times Newspapers*. Since then the law on this form of “qualified privilege” has been affirmed and restated by the House of Lords in *Jameel v Wall Street Journal Europe* in a manner which emphasizes the importance of freedom of expression on matters of public concern. We have also begun a journey along a by-way of “responsible journalism” in the form of a doctrine of reportage, though at present it is not easy to state its effects, particularly on the long-standing repetition rule. While it seems that nothing will satisfy the United Nations Committee on Human Rights short of the wholesale Americanization of defamation law (93rd session, Geneva, July 30, 2008) there are some signs at Strasbourg of the recognition of the dangers of over-protection of freedom of expression at the expense of reputation (see the concurring opinion of Judge Loucaides in *Lindon v France* App. no.21279/02; [2007] ECHR 836). Although *Reynolds* privilege occupies the centre of the stage, there have been substantial developments and clarifications of the law on a number of other matters, including the single meaning rule, fair comment and internet publication, though given the emphasis which has been placed in the past on absolute privilege being confined within bounds where it can truly be said to be necessary, some may feel doubts about the rapid move to grant absolute immunity in respect of the initiation of complaints to the police. Perhaps not all those whose reputations have been maliciously traduced would agree that they should be satisfied with the fact that the CPS has decided not to prosecute them (Stanley Burnton L.J. in *Westcott v Westcott* [2008] EWCA Civ 818 at [46]) whatever difficulties the contrary view may involve in distinguishing an initial complaint from answers to questioning and witness statements. On the procedural front there has been elucidation of the “Burstein doctrine” on mitigation of damages and of the offer of amends procedure.

A major development in this area of practice since the last edition has been the evolution of the cause of action now generally known as Misuse of Private Information. Technically it is an offshoot of breach of confidence, but in spirit at least it applies rights arising under art.8 of the ECHR and enables complainants embarrassed by media intrusion into, or disclosure of, their private lives to seek injunctions and damages without having to face a defence of truth. It has become a much easier route to obtaining a pre-trial injunction than afforded in defamation, and thus more often used. We have decided to give

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more detailed attention to this cause of action, discussing the substantive law in a separate chapter, and giving specific coverage of the procedural elements of a privacy claim in the Pt IV chapters, principally dealing with the various stages of defamation actions. We do not consider this to be extending the book beyond its historic and natural boundaries. Reputation and privacy are now recognised to be siblings in the family of rights protected under art.8 of the Convention, both being aspects of personal dignity and autonomy, the safeguarding of which is the fundamental purpose of the Article.

The structure of this edition remains broadly similar to that of the 10th. However, we felt that the chapter on qualified privilege needed to be split, not only because of its overwhelming length but also to reflect the very real differences between *Reynolds* privilege and the classical form (though drawing the line between the two is not easy, particularly if, as now seems to be the case, the *Reynolds* privilege is not confined to media publications). As mentioned above, in Pt III, that form of privacy known as Misuse of Private Information now has a chapter of its own. There are no additional or new chapters in Pt IV, the procedural section of the book, though changes to the conduct of defamation actions induced by new procedures introduced by the Defamation Act 1996, and by the Civil Procedure Rules, encouraging judges to adopt an interventionist approach, have proved to be significant and profound. Particular attention should be given to recent cases concerned with the Offer of Amends procedure, now more fully discussed in Chapter 31 and contemporary decisions referred to in Chapter 32, Pre-trial Applications, which nowadays can be critical in relation to the outcome of the action. CPR Pt 36 has been substantially revised since the 10th edition and this is reflected in Chapter 31. Further, as Conditional Fee Agreements are now so common in defamation actions it was felt appropriate to include in Chapter 35 some reference to their existence and effect as well as possible measures to counter their “chilling” consequences. We fear that the new edition has once again grown somewhat but it is worth making the point that a fair number of pages could be saved by some rather uncontroversial legislative changes. For example, we are now distinctly in the minority in maintaining the distinction between libel and slander and a provision on the lines of the Australian uniform legislation (see below) bringing slander within the libel regime but with a general defence of triviality would remove two whole chapters; and we wonder if it is really necessary for the protection of reports of judicial proceedings to require three parallel legal regimes, one at common law and two under statute. As for the continuing enlargement of the footnotes, both numerically and in length, this is almost unavoidable in a world where virtually every judicial pronouncement finds its way on to a database.

As before, we have tried to draw widely on the valuable case law of other common law jurisdictions. However, in Australia statute has now intervened in a major way because all the States have passed uniform legislation so that there is now an “Australian law of defamation”. The provisions are outlined in Chapter 1 and there are numerous subsequent references, using the New

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South Wales Act as the exemplar. The uniform legislation is not a code so that, for example, it says nothing about what is defamatory or about qualified privilege at common law and little about publication (except in relation to innocent dissemination) but in some respects it brings Australian law closer to ours: for example, justification is no longer defeated by absence of public benefit and the statutory defence under s.30 of the New South Wales Act bears more than a passing resemblance to *Reynolds*. We had hoped to include the new Irish legislation (again not a code but more wide-ranging than the Australian Acts) but although the Defamation Bill introduced in 2006 passed the Seanad in March 2008 it is still progressing through the Dáil. We have, however, summarized the Bill in Chapter 1 and referred to it at various points. In Canada there has been some movement towards adopting a *Reynolds* type defence and the matter is due to be considered by the Supreme Court in an Ontario appeal (*Cusson v Quan* [2007] ONCA 771; 286 D.L.R. (4th) 196).

The general editors have read the whole text (except the appendices) in draft. Subject to this, the initial responsibility for writing was as follows: Godwin Busuttil, Chapters 28, 29, 30, 38; Patrick Milmo, Chapters 27, 31 (part), 34, 35, 36, 37; Richard Parkes, Chapters 26, 31 (part), 32, 33; Horton Rogers, Chapters 1 to 23; Clive Walker, Chapters 24 and 25; Adam Speker, the precedents and the damages awards (but we should record our gratitude to Adam for his eagle-eyed attention to other people's drafts). The publishers prepared the tables. As always we are grateful to the staff of the publishers for their patience and assistance. We have endeavoured to state the law on the basis of the material available to us at the end of August 2008.

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November 2008

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