

REVIEW OF GATLEY ON LIBEL AND SLANDER

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Gatley on Libel and Slander

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1427 pages

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[255] Retailing at almost \$800 in Australia, weighing up whether to buy the latest edition of *Gatley on Libel and Slander* may not be easy for anyone except the best-healed practitioner or institution. Making the decision harder is the fact that this edition comes just two years after a supplement to update the last edition. Even that last edition, at six years old, is still relatively young, given that the edition previous to that remained current for 17 years.

That said, this is without doubt one of the most authoritative and comprehensive works on defamation law in the English speaking world. What is more, despite being firmly focussed on English law, it has an undeniable status in Australia.

As part of Australia's *National Defamation Research Project* I recently interviewed many of Australia's leading defamation practitioners, located in three states. One question I asked was what source they most turn to when researching the law. I expected reference to Tobin and Sexton's loose-leaf service, *Australian Defamation Law and Practice*, with its particular emphasis on the procedural aspects of Australian defamation law in all its various jurisdictions. I thought that many would also refer to Michael Gillooly's excellent textbook, *The Law of Defamation in Australia and New Zealand*.

Both works were mentioned, but I was struck that the most common response was *Gatley*. This was uncommon praise for a work directed to squarely at England. The

reasons are clear. Tobin and Sexton does a great job of summarising procedural aspects in Australia's eight defamation jurisdictions, but does so at a cost to the thoroughness of their analysis of substantive aspects. Gillooly's work is in many respects stronger when it comes to the latter. It is also truly admirable in the way it manages to pack so much information into so little space, then presenting it not only at an affordable price but also in a [256] commendably clear and readable style. Even so, he unavoidably sacrifices the detail needed by the specialist litigator.

That, of course, leaves the old faithful itself: *Gatley*. Now 80 years' old and in its tenth edition, this workhorse of the defamation industry manages to thoroughly survey the bizarre contours of common law defamation. It also methodically analyses the procedural aspects of the law. The problem, of course, is this: whose procedure does it cover? Despite its many references to other jurisdictions, *Gatley* is resolutely a book on English defamation law. While the analysis of the common law has a lot to say to Australian lawyers, even to those in the states that have codified the law, how much else will be of relevance outside the book's home jurisdiction?

The background to the new edition

Before returning to that question, it is worth exploring why it is that we have a whole new edition just two years after the supplement to the last edition. For the first 57 years of *Gatley's* history it was updated at fairly regular intervals, each averaging around eight years, save for a 15 year hiatus to allow for World War II. This process stopped with the eighth edition, published in 1981. After that, the history of *Gatley* seems to be a comedy of bad timing.

By the early 1990s, when a new edition was already overdue, major changes to English defamation law were on the horizon. Not least among these was a new defamation bill, intended to patch up some of the law's worst aberrations. Whether it was a conscious decision on the part of the editors or publishers to wait until this bill was enacted as the *Defamation Act 1996* is not clear, but by the time that statute was passed the eighth edition was hopelessly out of date.

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With hindsight, delaying the ninth edition until the passage of that Act seems to have been a mistake. For a start, the most radical provisions of the new legislation, including the new offer of amends and summary disposal procedures, as well as the revision of the statutory privileges for reports, were not immediately brought into force. Indeed parts of the Act were not made effective until 2000.

It may have been better to have brought out a supplement with the passage of the Act and then produced a new edition when the Act was fully in force. Rather than delay further, however, the decision was made to proceed with the ninth edition, which was published in 1998, aiming to state the law as at September 1997.

Almost immediately there began some of the most radical changes in English defamation law for decades, all of them too late to be included in the new edition. First much of the new Act came into force. But these relatively modest changes were rapidly overshadowed by the *Civil Procedure Rules*, introduced in April 1999. The ramifications of these went far beyond new terminology, whereby plaintiffs became claimants, writs became claim forms and discovery turned into disclosure. In a trend also seen in Australia at around the same time, courts became increasingly pro-active in their management of cases, making sleeping dogs things of the past.

Fermenting in the background as these changes occurred, the whiff of more upheaval was already in the air. Throughout the 1990s the ramifications of the European Convention on Human Rights were becoming increasingly apparent, something recognised in the ninth edition, which included a new chapter on the Convention. By the time that edition was published, Labour had won office and showed every sign of honouring its pre-election commitment to incorporate the Convention into English law. The ninth edition forecast that this ‘probably does not augur a general revolution in defamation law but we would not be surprised to see early developments (fuelled also by what has happened in Australia) in relation to privilege and statements about persons involved in public affairs’.²

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² *Gatley on Libel and Slander* (1998, 9th ed) Preface, vii.

The latter part of this prophesy proved accurate, although perhaps it was not foreseen precisely how rapidly these changes would come. Around the time of publication of the ninth edition, a defamation [257] claim, brought by Albert Reynolds, former Taoiseach (prime minister) of Ireland against the *Sunday Times*, was working its way through the Court of Appeal. The plaintiff won that appeal, but when the newspaper pursued the matter to the House of Lords the following year, England saw one of the most dramatic reforms to its substantive defamation law for possibly decades. *Reynolds v Times Newspapers*, through the extension of qualified privilege as it relates to the mass media, brought unprecedented protection to the English media who publish untrue allegations, provided they behaved reasonably in the process.³ It also made the English media the envy of their counterparts in Australia, who had already awoken to the false promise of the antipodean counterpart to *Reynolds*, *Lange v ABC*.⁴

Seventeen years elapsed between the publication of the eighth edition of *Gatley* in 1981 and its replacement in 1998. Even so, given the introduction of the *Defamation Act*, the new *Civil Procedure Rules* and *Reynolds*, as well as the incorporation of the European Convention into English law by means of the *Human Rights Act 1998*, all of which occurred within two years of publication of the replacement edition, by 2000 the latter was looking just as obsolete as the eighth ever had.

Then was perhaps the right time for a new edition. Reluctant, however, to bring out yet another edition two years after the last one, *Gatley's* publishers took the unprecedented step of updating the work with a 276-page supplement, bringing the law up-to-date as at August 2001.

This messy solution to a period of rapid change in defamation law's development could never be allowed to remain for long. The tenth edition aims to state the law as at July 2003, a modest update. But the new edition's real contribution is to incorporate the myriad of changes contained in the Supplement into the main volume. Essentially, the new edition is an act of tidy housekeeping.

³ [2001] 2 AC 127.

So what has changed about the new edition?

First, the measurements: the tenth edition weighs in at 1273 pages, a 20 per cent increase on the ninth edition, which in turn had expanded the eighth by 40 per cent. Given that it has dispensed with the Supplement, however, *Gatley* has effectively been trimmed slightly. More importantly, doing away with a separate up-date has made the work far more manageable for the user.

As for the layout of the book, almost nothing has changed. *Gatley's* basic structure has always been to first deal with the substantive law and afterwards with procedure. It was acknowledged in the ninth edition that the line between the two is much harder to draw in the case of defamation than it is in other areas of civil law. Some reorganisation occurred with that edition to avoid unnecessary duplication as well as to keep cognate material together. That structure has barely changed.

There are in all two new chapters and five new sections. One new chapter relates to the new offer of amends procedure contained in the *Defamation Act 1996*, as well as other ways in which the parties may seek compromise and settlement. The other new chapter relates to the new summary procedures for [258] disposal of procedures. *Reynolds* has spawned a section of some 30 pages devoted to the extension of qualified privilege to the media. This also summarises the situation in a number of common law countries, including Australia. The point remains, however, that much of this material is contained in the Supplement to the ninth edition.

So is it worth updating? For any serious practitioner in or student of defamation law, there really is no choice. *Gatley* remains the definitive work. For those who can tolerate the inconvenience of checking for updates in the supplement, however, the ninth edition has life in it still, at least for those not concerned with the minutiae of English procedure.

What Australia really needs is a work that combines Tobin and Sexton's attention to procedure with Gillooly's accessibility and eye for the common law. Until then, the boxes of *Gatleys* had better continue to arrive.

⁴ (1997) 145 ALR 96.