

THE THIRD MAN: REFORM OF THE AUSTRALASIAN DEFAMATION DEFENCES by Michael Gillooly, Annandale (NSW), Federation Press, 2004, 247pp, ISBN 1 86287 489 1

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The eminent media law professor, Eric Barendt, recently observed that, whilst there is a vast literature about defamation directed at practitioners, the academic literature about defamation is comparatively sparse.<sup>1</sup> He points to the rarity of journal articles about defamation law in university law reviews in support of his view. Barendt himself is unsure of the reasons for this. He suggests that one reason might be the uncertain place defamation law occupies in university curricula. To this might be added the highly technical nature of the rules and principles of defamation law, the interdependence of defamation law and the rules of pleading and procedure, and the comparatively few academics devoted to research in this area of law.

In Australia, certain issues, such as the impact of the implied freedom of political communication on defamation law, raised by the High Court's judgment in *Lange v Australian Broadcasting Corporation*,<sup>2</sup> and the jurisdictional problems presented by internet defamation, raised by the High Court's decision in *Dow Jones v Gutnick*,<sup>3</sup> have stimulated academic criticism in this country and ensured that defamation law appears more regularly in university law reviews. Yet, as these cases demonstrate, the academic interest surrounding these high-profile cases is not confined to defamation law. Rather, these cases have engaged the attention of scholars working in a number of areas of law – for instance, in defamation law and constitutional law, in the case of *Lange*, and defamation law, private international law and internet regulation, in the case of *Gutnick*. These cases do not, in a sense, raise issues of 'pure' defamation law. The advent of specialist journals, notably the *Media and Arts Law Review*, has helped foster critical scholarship about defamation law, providing an important forum for the publication of the latest research in defamation law. Nevertheless, for whatever reason, there remains force in Barendt's criticism of the state of defamation scholarship.

Thus, an addition to the academic literature on defamation law is always welcome. Michael Gillooly's recent monograph, *The Third Man: Reform of the Australasian Defamation Defences*, is the first book-length academic analysis of its subject matter. Drawn from his doctoral work, Gillooly's thesis is that Australian defamation law fails adequately to take into account the interests of the recipients of publications when it deals with defences to defamation. He notes that the purpose of defamation law is frequently stated to be the striking of a balance between the competing interests of the protection of reputation, on the one hand and the freedom of expression on the other hand. These interests align with the

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1 Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 *Current Legal Problems* 110 at 110–11.

2 (1997) 189 CLR 520.

3 (2002) 210 CLR 575.

respective positions of the plaintiff and the defendant in a defamation case. Gillooly argues that the purpose of defamation law, so stated, excludes a direct engagement with and consideration of the interests of the recipients of publications. He maintains that it is vital for defamation law, particularly its defences, to be reformed so as to consider and incorporate the ‘legitimate interests’ of recipients. He notes that such interests are already considered integral to the issue of liability for defamation. Indeed, the ‘ordinary, reasonable reader’, the hypothetical referee by which a jury determines whether or not a particular publication is defamatory, is a familiar construct, which exists precisely to take into account the interests of the recipients of publications. What Gillooly attempts to do is to extend this analysis beyond the issue of liability and into the next stage of defamation proceedings, the defences to defamation. Here again, Gillooly recognises that certain defamation defences already require a consideration of the real or asserted interests of the recipients of defamatory publications. The common law defence of qualified privilege, premised, as it is, on a reciprocity of duty on the part of the speaker or writer and interest on the part of the audience, is the most obvious example. Gillooly’s contention is that a rigorous analysis of defamation defences, bringing to the fore the interests of the recipients of publications, will illuminate the shortcomings of these defences and provide a basis for reform. To this end, and taking his cue from the classic 1949 film directed by Carol Reed, starring Orson Welles and written by Graham Greene, Gillooly posits a new hypothetical referee, ‘the third man’, to represent the interests of recipients of defamatory publications.

The strength of Gillooly’s work is its lucid, comprehensive exposition of the principal defences to defamation in Australia and New Zealand. This should come as no surprise to readers of Gillooly’s earlier book, *The Law of Defamation in Australia and New Zealand* (1998). The value of this exposition should not be underestimated. Unless, or until, the current proposals for the introduction of national uniform defamation laws are enacted, there remain eight defamation jurisdictions in Australia. The differences between these jurisdictions are real and substantial – hence, a significant reason for the inordinate delay, and, until now, the seeming impossibility, of achieving uniformity on defamation law throughout Australia. Adding the defamation law of New Zealand introduces another layer of complexity, for it diverges from Australian law again in substantial ways. In chapters three to eight of this monograph, being the bulk of the work, Gillooly outlines the relevant law relating to the defences of truth, fair comment, absolute and qualified privilege, fair protected reports and what Gillooly styles ‘miscellaneous defences’ (being defences such as innocent dissemination, offers of amends and unlikelihood of harm). In doing so, he demonstrates a profound grasp of the detail and nuance of the law as it applies across nine defamation jurisdictions. Gillooly also presents this material in a manner which is clear, structured and accessible. For tertiary students or legal practitioners encountering defamation law for the first time, or for academics who seek a succinct statement of the law relating to defamation defences, Gillooly’s monograph has much to recommend it.

There are, however, a number of difficulties with Gillooly's analysis. One of the significant problems is the identification and definition of the interests of recipients of defamatory publications. Gillooly argues that defamation law ought to consider and incorporate the 'legitimate interests' of the recipients of defamatory publications. He acknowledges that, in doing so, he is urging the courts to make a normative assessment, thereby excluding 'illegitimate interests'. Ultimately, Gillooly defines the 'legitimate interests' of the recipients of defamatory publications by expressly adopting the test applied in the context of the common law defence of qualified privilege. Two observations might be made. Firstly, the law of defamation already undertakes a normative assessment of what is a legitimate or an illegitimate matter of interest to recipients of publications in the context of a number of defamation defences, as Gillooly himself demonstrates. Hence, the oft-cited distinction drawn between 'the public interest' and that in which the public is interested – a feature of the defence of justification and comment. Gillooly adopts and accepts the need for this normative assessment but it might be validly asked whether the way in which defamation law currently distinguishes between legitimate and illegitimate interests, between the genuinely public and the merely prurient, is efficacious or whether it casts the concept of 'legitimate interests' too narrowly. Certainly, it should be asked whether the rather narrow treatment of the 'legitimate interests' of recipients of defamatory publications for the purpose of the common law defence of qualified privilege is a viable or desirable working definition. Gillooly's work is avowedly doctrinal, yet his analysis might have benefited from a more critical stance towards the existing state of defamation law. Rather than reducing the definition of 'legitimate interests' to that adopted by one of the pre-existing defamation defences, Gillooly's analysis might have been enlivened by a more detailed and expansive treatment of this central concept.

The second, related criticism one might make of Gillooly's concept of the 'legitimate interests' of the recipients of defamatory publications is whether it is possible or desirable to embody such interests in a single, hypothetical referee, 'the third man'. In a pluralistic society, the 'ordinary, reasonable reader' test, which purports to recognise and enforce a uniform moral and social view, becomes more difficult to apply. This is particularly so in relation to matters, such as homosexuality and adultery, about which attitudes have changed markedly over the last forty years. If the utility of the 'ordinary, reasonable reader' for the purposes of liability for defamation may be doubted, perhaps the construction of a mirroring, hypothetical referee for the purposes of defences, 'the third man', also needs to be questioned. Just as the 'ordinary, reasonable reader' test, as a general rule, takes cognizance of society as a whole, and not sections of that society, the concept of 'the third man', in order to work effectively, equally treats the audience as a monolithic, undifferentiated entity. Yet the reality is that, for any given mass media publication, there is likely to be a range of 'audiences' amongst the consumers of that publication, all of which have different interests, legitimate and illegitimate. Given the diversity of audiences, one can expect a diversity of interests. The problem with the 'third man' is that, by identifying the interests an

audience has in a given publication with the unifying 'legitimate' ones, such a concept could tend to reduce and obscure the actual interests of the audience, rather than illuminating the broad range of interests.

The final criticism one might make of Gillooly's analysis is that there is insufficient acknowledgement of the fact that most defamation defences that are litigated to judgment fail. Compared to the obstacles confronted by defendants in defamation cases, it is relatively straightforward for plaintiffs to establish liability. In its current form, Anglo-Australian defamation law tends to protect the interests of plaintiffs at the expense of the interests of defendants – a comment made by a number of United States commentators following *Gutnick*. A recognition of the present unviability of most defamation defences raises the question of whether it is desirable to reform such defences so as to make them more difficult for defendants to resist claims made against them. Yet Gillooly, in relation to certain defences, such as the common law defence of truth and comment, suggests that precisely such a course is desirable. To have defences which are available at the level of principle but are rarely effective in practice could have the undesirable effect of bringing defamation law into disrepute. The argument surely needs to be stronger to suggest that not only must the interests of recipients be considered separately but that, having considered such interests, such consideration necessitates a recasting of defamation law to make it even more difficult for defendants to establish their defences.

If one were to devise an ideal system of law to balance the protection of reputation and freedom of expression, one would not produce Australian defamation law in its present state, beset, as it is, by inordinate and unnecessary complexity, technicality and, on occasion, irrationality. It is ripe for reform. The current proposals for a national, uniform system of defamation law have the benefit of reducing eight systems of law to one. However, beyond achieving the desirable goal of uniformity, they do not aim for rigorous, comprehensive or significant reform of substantive doctrines. Gillooly's analysis is ambitious in its scope, calling for a fundamental recasting of defamation law to consider and incorporate the legitimate interests of recipients of defamatory publications. As such, Gillooly's work is a welcome challenge to the existing shape and structure of Australian defamation law. Ultimately, though, Gillooly's analysis of the 'legitimate interests' of the 'third man' raises more questions than it answers.

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