BOOK REVIEWS

Libels, Lampoons and Litigants: Famous Australian Libel Cases, by GRAHAM FRICKE Q.C., Judge of the County Court of Victoria (Hutchinson, Melbourne, 1984), pp i-ix, 1-216 with Table of cases, Index of names and Index. Recommended retail price $17.95. (ISBN 009 148770 6).

Media Law: The Rights of Journalists and Broadcasters, by GEOFFREY ROBERTSON, B.A. LL.B. B.C.L. Barrister of the Middle Temple and ANDREW NICOL B.A. LL.B. LL.M., Lecturer in Law at the London School of Economic and Political Science. (Oyez Longman London, 1984), pp. i-xxxvi, 1-403 with Table of Cases, Table of Statutes and Index. Recommended retail price $87.50. (ISBN 0 85120 650 6).

Public Scandal, Odium and Contempt: An Investigation of Recent Libel Cases, by DAVID HOOPER B.A. (Oxon.), Solicitor of the High Court. (Secker & Warburg, London, 1984), pp. i-x, 1-230 with Bibliography and Index. Recommended retail price $29.95. (ISBN 0 43620 093 7).

Two of these books deal exclusively with the tort of defamation and the third makes extensive reference to it – a tort that has long been the springboard for some of the most bitterly-contested and well-publicised litigation in Australian legal history.

As an area of law, defamation is legendary for its technical problems and fine points of distinction. It would be difficult, however, to find a better introduction to this branch of the law than Graham Fricke's selection of famous Australian defamation cases. In the entertaining context of the various actions described, the basic principles of defamation law are set out and explained with a clarity seldom found in legal writing.

Because of the perceived generosity of Sydney juries, New South Wales has long been the preferred jurisdiction for plaintiffs in defamation actions. As many newspaper, journals, television and radio programs are distributed on a national basis, the publication of allegedly defamatory material will have frequently taken place in a variety of jurisdictions and, accordingly, the plaintiff will have a choice of forum. In these circumstances many plaintiffs prefer to bring their action in the Supreme Court of New South Wales, while relying for the issue of damages on the publication in the other States and Territories of the Commonwealth.

It is hardly surprising, therefore, that of the nineteen cases discussed by Fricke twelve were brought in the Supreme Court of New South Wales. The foreword to the book has been written by Mr Justice David Hunt of that Court who has heard a significant number of the defamation actions brought in the Supreme Court of New South Wales

in recent years and has himself made a substantial contribution to the development of the law in this area by his carefully researched and lucidly written judgments.

The legal and financial minefield presented by defamation litigation is dramatically illustrated by one of the first cases considered in the book. This was an action brought by Mr Tom Uren, then and still a Labor member of the House of Representatives, in relation to three articles published respectively in 1961 in the Sydney *Daily Telegraph,* in 1962 in the *Bulletin* and in 1963 in the Sydney *Sunday Telegraph.* All three journals were then published by Australian Consolidated Press Ltd. The imputations of which Mr Uren complained as arising out of the material published were essentially threefold: that he had peddled the views of the Communist Party of Australia; that he had been used as a pawn by a Soviet agent to ask questions in the national Parliament; and that he would have difficulty running a raffle for a duck in a hotel on a Saturday afternoon.

After a trial lasting for some weeks Mr Uren was awarded £30,000 in damages – an enormous award for that time. The defendant appealed to the Full Court of the Supreme Court of New South Wales and relied upon the House of Lords decision of *Rookes* v. *Barnard*[1] which had been handed down only a few weeks earlier. The jury had been instructed by the trial judge that they were entitled to award exemplary damages to Mr Uren in addition to compensatory damages. In *Rookes* v. *Barnard* the House of Lords had sharply restricted the range of conduct for which a defendant could be held liable in exemplary damages. On this basis the Full Court ordered a new trial on the issue of damages.[2] Both plaintiff and defendant appealed to the High Court. The plaintiff sought the restoration of the jury's verdict and the defendant a new trial on the question of both liability and damages. A majority of the High Court ordered a new trial on the issues of liability and damages but also expressed the view that they were neither obliged nor inclined to follow the House of Lords in restricting the grounds of exemplary damages in the way that this had been done in *Rookes* v. *Barnard.* [3] To have this question clarified, the defendant sought leave to appeal to the Privy Council which granted leave and heard the appeal. The Privy Council was not prepared to say that the High Court was wrong in their approach to the question of exemplary damages.[4]

At the new trial ordered by the High Court Mr Uren was awarded $20,000 by the jury in respect of one of the articles. Both plaintiff and defendant again appealed to the New South Wales Court of Appeal which ordered a new trial in respect of one of the articles for which Mr Uren had received no damages at all. The matter was settled before a third trial took place. The legal fees involved in this extraordinary saga can only be guessed at but the entire exercise does give some idea of the time and cost that can be involved in a defamation action. Obviously few actions follow such a tortuous path as that of Mr Uren but it stands

as a warning to any plaintiff – and perhaps to any defendant – of the perils that may be faced.

The cases of a number of other prominent politican plaintiffs, including former Prime Minister John Gorton,[5] and former Federal Opposition Leader Arthur Calwell,[6] are detailed in the book. Most of the plaintiffs in this book are themselves public figures, as are a substantial number of plaintiffs in cases of the defamation list of the Supreme Court of New South Wales at this time. This is an important point because the most commonly proposed reform to defamation law in Australia, aside from the institution of uniformity across the States, is the introduction of the United States principle that a public figure can only recover damages for defamatory publication relating to his or her public life, if he or she is able to demonstrate malice on the part of the defendant.[7] This obviously places greater barriers to the success of a public figure plaintiff and those for and against such reform usually conduct the debate in terms of the value of free (or freer) speech on one side, and the right of public figures to have their reputations vindicated on the other.

The field of literary and theatrical criticism has provided some of the best-known defamation cases and the book deals with a number of these, including that of the author, Hal Porter,[8] and the actor, Peter O'Shaughnessy.[9] The classic defence to such an action is of course that of fair comment, which is the defence available at common law and in New South Wales has been codified in Division 7 of the Defamation Act 1974 (N.S.W.). In *Gardiner* v. *John Fairfax & Sons Limited,* Sir Frederick Jordan remarked that

> [a] critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord.[10]

This statement certainly represents the law but an award of $180,000 in damages in relation to a book review appearing in a Sydney newspaper in the late 1970s was apt to chill the harshest critics. Moreover, the line between statements of facts and statements of comment is often difficult to draw and only the latter are entitled to the protection of the defence of comment.

One of the book's chapters deals with an action in criminal libel. This was a prosecution brought in 1950 against Frank Hardy in Melbourne as the author of the book *Power Without Glory.* This book was a thinly-fictionalised account of the Melbourne businessman, John Wren, but the basis of the proceedings was not any imputation that might have arisen from the book about Wren himself but the imputation that his wife had been involved in an affair outside her marriage. The committal proceedings were conducted in the name of Mrs Wren as a private informant and when Hardy was committed for trial, the prosecution was taken over by the Attorney-General for the State of Victoria. This area has also been codified in New South Wales but it is still open to

private informants to bring such proceedings.[11] Hardy was acquitted by the jury after a trial lasting a week.[12] Fricke adds an interesting footnote to the case by describing a defamation action brought by Hardy in 1982 against a national newspaper which had alleged an inconsistency between Hardy's expressed political views and his acceptance of government literary grants. In the course of cross-examination by counsel for the defendant Hardy's attitude towards Mrs Wren was again raised and the proceedings in criminal libel that had taken place over three decades earlier were again discussed. Hardy was unsuccessful in his action against the newspaper.

David Hooper practises as a solicitor in London and part of that practice is in the area of defamation law. His book is in some respects an English version of the previous work as it discusses the law of defamation through the prism of well-known cases. Overall, in my view the exposition of principles in Fricke's book is a little more penetrating but both books provide a valuable and entertaining discussion of this field of law.

One of the best-known cases considered by Hooper is the action that arose out of Leon Uris' novel *Exodus* in 1964. Uris and the publishers were sued by a Dr Dering who had been described in the novel as performing experimental operations in Auschwitz concentration camp during the 1940s. Dering, who was a Polish doctor and himself an inmate of the camp, was by this time living and working in London. After a trial lasting almost three weeks, Dering was awarded the derisory damages of one halfpenny by the jury and ordered to pay the costs of the defence. Uris made the case the subject of a second novel *QB VII* which brought some points of defamation law even to airport bookstands.

Hooper's book concludes with a particularly interesting table in which he sets out a series of defamation actions between 1972 and 1984, detailing the parties, the allegedly defamatory material and any award of damages. The table illustrates quite vividly the notion of defamation litigation as a lottery. There seems little correlation between the allegations made about various plaintiffs and the size of the damages awarded. What is probably deceptive about the table as a whole is that the majority of the plaintiffs are unable to stay the course until trial but fall by the wayside due to the financial difficulties involved in maintaining a defamation action.

The comprehensive text by Geoffrey Robertson, who is an Australian lawyer practising at the London Bar, and Andrew Nicol, who is an English academic, also deals with the subject of defamation law and does so clearly and concisely. The range of this book is, however, much wider than this aspect of media law. It covers in addition a broad set of subjects of importance to those working in the media and lawyers advising them.

The authors deal with the current British law on obscenity, indecency, blasphemy and the incitement of race hatred. In the past, legislation relating to obscenity and indecency provoked some important litigation in Australia but in more recent times most of the former restrictions have been quietly dismantled. Some restrictions still exist, however, and in 1984 New South Wales, for example, introduced legislation to include distribution of films or videos where, in the words of the statute,[13] the film or video:

(a) describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty or violence, or revolting or abhorrent phenomena, in a manner that is likely to cause offence to a reasonable adult;
(b) is a child abuse film;
(c) describes, depicts, expresses or otherwise deals with sexual activity of any kind between a human being and an animal; or
(d) promotes, incites or encourages terrorism within the meaning of the Australian Security Intelligence Organization Act 1979 of the Commonwealth.

In addition a Joint Committee of the Federal Parliament is considering whether there should be legislation at the national level on this subject.[14] Although the incitement of race hatred has not been made a specific offence in any Australian State or Territory, the creation of such an offence at a federal level was proposed in 1984 by the federal Human Rights Commission. The Federal Government has not to date acted on this recommendation of the Commission.

There is an interesting treatment by the authors of the equitable action of breach of confidence which has assumed some importance for media lawyers in recent years. At one level it may operate to protect against the appropriation of a confidential idea, such as a concept for a television drama script, which is not able to be adequately protected by existing copyright laws. The action is, however, a two-edged sword for the media, as was demonstrated by the proceedings brought by the Australian Government in 1980 against two authors who had published a book containing, inter alia, material from classified government defence and foreign affairs documents. The case was heard by Mason J., sitting as a single justice of the High Court of Australia, and he rejected the Government's arguments on the issue of breach of confidence on the basis that no substantial damage to the public had been demonstrated as arising out of the disclosure of the information in question.[15] The Government was, however, successful in restraining the distribution of the book on the alternative ground that the reproduction of the classified documents infringed the copyright of the Crown in that material.[16] It seems unsatisfactory that an issue of public importance should be decided on a ground that does not go to the substance of the material published and the question of Crown copyright in statutes, law reports and other Government documents clearly requires further consideration.

This case recalled the so-called *Crossman Diaries* case in which the British Government attempted in 1975 to restrain the publication of at least parts of the diaries kept by a Cabinet Minister in the 1960s.[17] Again the Government failed to establish the likelihood of sufficient damage to the public interest and so was unsuccessful on the breach of confidence question. No question of copyright was raised in the *Crossman* case where large portions of Government documents were not reproduced verbatim as they had been in the Australian publication. The whole area of Cabinet secrecy is unchartered from a legal point of view. One question that has never been settled in Australia, for example, is that of the ownership of Cabinet submissions and decisions. Each minister receives a copy of every submission and decision, naturally including his own submissions, and the Department of Prime Minister and Cabinet has always maintained that these are the property of the Commonwealth and must be returned by the minister. Some ministers have argued that these copies are the property of individual ministers and may be retained. Any dispute on this question would obviously be a fascinating piece of litigation.

The authors provide a useful discussion of the difficult area of contempt. The Australian Law Reform Commission is currently considering as one of its references the reform of the law of contempt and public attention was focused on at least one aspect of this reference by the publication of comments by a number of jurors from the trial of Mr Justice Murphy and one juror from the trial of Builders' Labourers' Federation Secretary, Mr Gallagher, which both took place in 1985. It is interesting to note that the British Parliament enacted legislation in 1981 to make such publications an offence.[18]

The authors also devote some space to the Official Secrets Act 1911 (U.K.) which is essentially designed to penalise the disclosure of government material by civil servants, unless authorised to do so, and by other persons into whose possession that material might come. This legislation was enacted during a German spy scare in 1911 and its Australian counterpart, the Crimes Act 1914 (Cth), had similar origins in the early days of the Great War. Those sections of the Crimes Act dealing with the disclosure of information are very, but not precisely, similar to those of the British statute.[19] In neither statute, however, are the relevant sections easy to construe and both would appear to be in need of reconsideration from the point of view of both concept and language.

This selection of subjects covered by the authors does not do justice to what is an extremely comprehensive text on media law. It has the twin virtues for a text of being functional for a practising lawyer and engrossing for any person with an interest in the social and political

questions raised by the dissemination of information.

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FOOTNOTES

1 *Rookes* v. *Barnard* [1964] AC 1192.
2 *Uren* v. *Australian Consolidated Press Ltd* (1965) 83 WN (Pt. 2) (NSW) 229.
3 *Australian Consolidated Press Ltd* v. *Uren* (1966) 117 CLR 185.
4 *Australian Consolidated Press Ltd* v. *Uren* (1967) 117 CLR 221.
5 *Gorton* v. *Australian Broadcasting Commission* (1974) 22 FLR 181.
6 *Calwell* v. *Ipec Australia Ltd* (1975) 135 CLR 321.
7 *New York Times* v. *Sullivan* 376 US 254 (1964).
8 *Porter* v. *Mercury Newspapers Pty Ltd* [1964] TasSR 235.
9 *O'Shaughnessy* v. *Mirror Newspapers Ltd* (1970) 125 CLR 166.
10 (1942) 42 SR(NSW) 171, 174.
11 See ss 49-53 of the Defamation Act 1974 (N.S.W.).
12 For a consideration of the legal issues that arose out of the trial see *R.* v. *Hardy* [1951] VLR 454.
13 Film and Video Tape Classification Act 1984 (N.S.W.) s.9(2).
14 Joint Select Committee on Video Material.
15 *Commonwealth of Australia* v. *John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50-54.
16 *Id.*, 54-57.
17 *Attorney-General* v. *Jonathan Cape Ltd* [1976] 1 QB 752. *Cf. Argyll* v. *Argyll* [1967] 1 Ch 302.
18 Contempt of Court Act 1981 (U.K.).
19 See ss 77-79 of the Crimes Act 1914 (Cth).

Understanding Land Law, by J. OXLEY-OXLAND, B.A., LL.B. (Rhodes), LL.M. (Yale), Senior Lecturer in Law, University of Sydney, and R.T.J. STEIN, LL.B. (A.N.U.), LL.M. (Dalhousie), PH.D. (Sydney), A.Mus.A. (A.M.E.B.), Senior Lecturer in Law, University of Sydney, (Law Book Company, 1985), pp.i-xix, 1-171, with Table of Cases and Index. Cloth recommended retail price $22.50 (ISBN 0 455 20303 2), limp recommended retail price $12.50 (ISBN 0 455 20304 0).