

alleged defamatory statement. In its report *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission proposed that defamation actions be subject to a special limitation period in order to achieve speedy trials and timely corrections of false statements.

In line with these recommendations, we have determined that defamation actions must be brought within six months of the date the plaintiff first became aware of the publication or three years from the date of the publication, whichever is the earlier.

Privilege & innocent publication

Anthing said in Parliament by a member of Parliament in his or her capacity as a member is protected by absolute privilege. Qualified privilege attaches to fair and accurate reports of 'parliamentary proceedings', and will deal with a number of ancillary matters, such as preparation of papers intended for tabling.

At common law, a statement is defamatory

if the reasonable recipient of the statement would regard it as defamatory. It does not matter whether the publisher intended the statement to be defamatory, or knew it contained defamatory matter.

These principles operate unfairly against the maker of a statement who is unaware that the statement is defamatory. Division 8 of the New South Wales *Defamation Act* alleviates a number of difficulties in this area by permitting a defendant to make an 'offer of amends'. We have agreed that provisions similar to those in New South Wales be adopted in all three jurisdictions.

Damages

It is the responsibility of juries to assess the quantum of plaintiffs' damages. Due principally to large damages awards in their jurisdictions, New South Wales and Queensland intend to give judges the task of assessing damages. In Victoria, where large damages awards are a rarity and the jury system works well in this area, assessment of damages will remain the function of the jury.

Libel is actionable without proof of damage: to succeed in an action for slander, the plaintiff must as a general rule show that he or she has suffered some damage.

Victoria retains the distinction between libel and slander. The distinction is described variously as the difference between defamatory statements in permanent (libel) or transient (slander) form; or alternatively, as the difference between defamatory statements addressed to the sense of sight (libel) or communicated to the ear (slander).

The distinction between libel and slander is based on the old forms of actions, is archaic and no longer serves any useful purpose. It has been abolished in New South Wales and Queensland. It will also be abolished in Victoria.

The above matters form the basis for the uniform defamation laws. It is proposed that amendments will be introduced in the Spring session of the respective parliaments later this year.

I would now hope that other States will re-examine their laws to provide us with truly national defamation laws.

Book reviews

For many years media lawyers have had to rely upon United Kingdom publications such as *Gatley on Libel and Slander*. There were very few Australian texts that covered this area. *Fleming on Torts* contained a very good chapter on defamation. However it was not comprehensive enough for such a complicated area of law. At the time when Sydney was already known as the defamation capital of Australia and Justice Hunt and the New South Wales Court of Appeal was bringing down so many important decisions, we had no Australian textbooks. In 1983 Mark Armstrong, Michael Blakeney and Ray Watterson published a book entitled *Media Law in Australia* (Second Edition 1988) and in 1989 Sally Walker's excellent book *The Law of Journalism in Australia* was published. Both these books were for journalists, broadcasts and lawyers.

Australian Defamation Law and Practice is aimed directly at lawyers. It has many admirable features, the first and probably the most important being that it is a loose leaf service. Most practitioners would regard the ability to include statutory amendments, judicial interpretation and up-to-date case

Peter Bartlett reviews

'Australian Defamation Law and Practice'

analysis as paramount. Another admirable feature is that it covers all Australian jurisdictions. It therefore brings together in a comprehensive fashion the legislation covering all the States and Territories. This allows a practitioner easy access to legislation from the other States, and hopefully access to the most recent amendments.

With a draft Bill to reform the law of defamation in Victoria, New South Wales and Queensland now nearing completion, this book may be the first to reach us with a detailed analysis.

When considering the book I compared its treatment of various limited sections, with that of *Gatley and Walker*.

One topical area is the media's attempts to rely on statutory and common law qualified privilege. None of the books of course refer to Justice Matthew's welcome judgement in *Morgan v John Fairfax* (1990).

However, Tobin and Sexton, *Gatley and Walker* confirm that only in extremely limited circumstances would the media succeed. This book gives a fuller coverage to the topic and quotes from the more encouraging judgement of Justice Smithers in *Australian Broadcasting Corporation v Comalco Limited* (1986).

In the last few years we have had some

interesting cases where a party has attempted to introduce into evidence parliamentary records, documents or Hansard. These include *Rv Murphy* (1986), *Rv Jackson* (1987) and *Wright and Advertiser Newspapers Limited v Lewis* (1990). The *Westpac letters* case earlier this year could also have invoked this complex area of law.

Tobin and Sexton's treatment of this area also compares very well with *Walker and Gatley*. To be fair of course it must be pointed out that *Walker's* book covers areas far wider than those limited to defamation.

Later updates to the book will enable the authors to include more obscure statutory provisions covering the issue of defamation. For example, there is no reference to Section 5A of the *Victorian Wrongs Act* (which provides qualified privilege in limited circumstances for publications made at the request of the Police Force) or Section 62 of the *Victorian Freedom of Information Act* (protection against actions for defamation).

A visit to the defamation list in Sydney is a unique experience, in particular for an interstate practitioner. The ability of barristers to quote from endless unreported decisions is astounding. The difficulty, of course, is to gain access to these unreported decisions. This book contains a tab for unreported

decision (although it is a bit thin at the present time). This may put the occasional visitor to the list on a more equal footing with the recognised defamation bar.

When I saw 'Practice' included in the title of the book I envisaged seeing some of the useful material included in Justice Hunt *Notes on Defamation Practice* (a 1982 College of Law publication) together with material from his annual NSW Reading Programme Lecture. The authors may give consideration to including that material in future updates.

Tobin and Sexton's book, *Australian*

Defamation Law and Practice, is another significant step in the direction from rags to riches in the defamation minefield. Twenty years ago we only had Gatley. This is an extremely good text book and an essential addition to the shelves of any media lawyer.

Peter Bartlett is a partner in the Melbourne office of Minter Ellison, solicitors. T.K. Tobin's and M.G. Sexton's 'Australian Defamation Law and Practice' is published by Butterworths and retails for \$445.00

book would certainly be of considerable use to anyone looking for references to decided cases in any particular area of section 52.

There is still plenty of scope for uncertainty about some of the most fundamental aspects of section 52.

The authors quote Justice McHugh in *Concrete Constructions v Nelson* (1990):

"As a matter of construction, the headings to Part V and Div. 1 identify the scope of section 52 as being limited to unfair practices which mislead or deceive or are likely to mislead or deceive consumers. Those headings are inconsistent with the hypothesis that section 52 is directed to unfair practices generally or to those unfair practices which are of an essentially trading or commercial character."

Although the majority of the High Court in the Nelson case rejected the limitation suggested in the above passage, they imported into the section a different limitation arising from the 'trade and commerce' requirement.

This illustrates that there clearly remains room for further significant development in the interpretation of section 52, notwithstanding the considerable accumulated jurisprudence contained in decided cases. Until the decision in the Nelson case it was regarded in many quarters, including the Full Federal Court (see *Beyanere v Lubidineuse* (1985), that the issue of whether the section was to be read down as limited to 'consumer protection' in the light of the headings to Part V (or as Justice Toohey preferred "the framework of consumer protection" in which section 52 is found) was resolved conclusively in the negative. Although the Full Federal Court was ultimately upheld on the point, a High Court split 4 to 3 on this issue provides little comfort that the last chapter in this aspect of the ambit of section 52 has been written"

Now a note on a rather mundane, but to me significant matter. No doubt as a result of the work being published by CCH, it adopts CCH references to cases. This results in the busy litigation practitioner being forced to conduct a time-consuming cross referencing exercise to the authorised reports before any reference found in the book can be used. It would in my view have been a sensible approach to include alternative citations at least in the main case table. Additionally, in splitting responsibility for the text of various chapters of the book, the authors have allowed a degree of repetition to occur which would not be the case in a work by a single author.

Overall, I found this book to be both readable and useful, but not (and I am sure it was not intended to be) a legal classic.

C P Comans is a Sydney Barrister 'Misleading and Deceptive Conduct' is published by CCH and retails for \$64.00

David Casperson reviews

'Aspects of the Law of Defamation in New South Wales'

This publication collects in a 156 page book seminar papers delivered on various aspects of the law of defamation. The seminars were organised by the Young Lawyers Section of the Law Society of New South Wales.

The book also includes the seminar paper Justice David Hunt prepared on pre-trial defamation practice for new members of the New South Wales Bar.

The papers present a very useful and practical guide to the more important aspects of defamation law in New South Wales. They are written by a very impressive list of authors with years of practical experience in this area of the law.

In the Introduction Justice McHugh writes about 'What is an Actionable Defamation'. This is followed by the paper on pre-trial practice by Justice David Hunt. Nine seminar papers delivered by various barristers, namely Mr H. Nicholas Q.C., Mr T Tobin Q.C., Mr J Sackar Q.C. and Mr M. Sexton on various issues encountered in defamation cases are then included in the book. These include papers on drafting a

statement of claim, defending a defamation action, conducting a defamation trial and various procedural matters.

This book is not meant to be a textbook. It is a practical synopsis of the important principles, procedures and considerations in a defamation action. The book discusses and highlights the common issues and problems a practitioner will encounter in this area of the law.

The book's value to the practitioner is increased because it is very well indexed. There are two bibliographies, an index to cases and an index to words whose meanings have been considered in various defamation cases.

This is a good practical guide to the important areas of defamation law in New South Wales.

David Casperson is a Sydney barrister. 'Aspects of the Law of Defamation in New South Wales', edited by J C Gibson, is published by the Young Lawyers Section of the Law Society of New South Wales and retails for \$49.00.

Peter Comans reviews

'Misleading or Deceptive Conduct': Healey and Terry

The authors reveal, with the substantial judicial assistance of over 600 reported decisions, that section 52 of the *Trade Practices Act 1974* is itself in some respects deceptive, if not misleading. As Chief Justice Gibbs observed in the *Parkdale Custom Built Furniture v Puxu* (1982) case:

"Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions."

The value of this book is that it leads the reader through the shoals of the decided cases. Any student or practitioner faced with a real world problem needs a good chart to navigate these waters as the sheer volume of decided cases otherwise makes the task of focussed and efficient research impossible. This work provides such a chart. Additionally, it is an eminently readable book, written in an easy and familiar style. It is not a deeply intellectual work and the analysis of related fields of law is characterised by rather oversimplified summary. Nevertheless the