government can fine the spammer US$250 for each e-mail sent that was untruthful!

CAN-SPAM also leaves room for the creation of a "Do Not Spam Registry". This would be similar to the recent, and controversial, "Do Not Call Registry". A "Do Not Spam Registry" may in fact create greater controversy in the USA due to First Amendment Protection of commercial speech.

Both the Australian legislation and CAN-SPAM are very limited in their approach for the same reason – most spam, and in the case of the USA, most illegal of deceptive spam, comes from overseas.

Thus, without international co-operation and enforcement mechanisms, bringing international spammers to justice is likely to prove problematic, as will creating a global approach.

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The 'Ordinary Reasonable Person' in Defamation Law

In the first of two articles, Roy Baker examines the way the law determines what is defamatory and asks what the law, and society generally, means by the 'ordinary reasonable person'

INTRODUCTION

Sydney has been proclaimed 'Defamation Capital of the World'. Despite serious competition for the title, the UK produces fewer writs per head of population and, on rough estimate, Australians start 35% more defamation actions than do the entire American population. Sydney alone sees a level of defamation litigation equivalent to 60% of that in the US.

This gulf between Australia and the US can be accounted for by the US's Constitution, the First Amendment of which requires that 'Congress shall make no law ... abridging the freedom of speech, or of the press'. In the 1960, the US Supreme Court determined that that English common law of defamation whereby, as a general rule, publishers can be required to prove the truth of any defamatory allegation they publish, that was inherited by the US resulted in a 'chilling effect' that was an impermissible infringement of free speech[1]. Thus, the focus of US defamation law shifted from what publishers could prove to how they had behaved.

In contrast, Australia has largely retained the common law of defamation. The publishers' success rate at trial of around 32% arguably demonstrates that the system is hopelessly skewed in favour of plaintiffs. The expense and uncertainty involved in defending defamation proceedings is such that the media settle the bulk of defamation actions brought against them. Australia's major newspaper publishers, who receive threats of defamation proceedings almost daily, bear millions of dollars of defamation pay-outs each year.

THE NATIONAL DEFAMATION RESEARCH PROJECT

In this climate of vigorous litigation, the Communications Law Centre at the University of New South Wales was awarded funding from the Australian Research Council to conduct extensive research into defamation law.

The project was grounded in social research and used quantitative and qualitative research methodologies to explore social attitudes to a range of issues relating to defamation law. A phone survey of several thousand, randomly selected Australians is to be supplemented with an extensive series of focus groups around the country as well as by interviews with journalists, defamation lawyers and judges.

Pure research will contribute popular opinion to the debate about reforms that would narrow the gap with America. For instance, we shall seek to measure the extent to which the public think the award of defamation damages should be contingent on a lack of care by the publisher, rather than publisher's ability to prove truth.

Our social attitudes research, shall extend beyond contributing public attitudes to the law reform debate. We shall examine the public's role in defamation law and how defamatory material is understood by the public.

IDENTIFYING WHAT IS DEFAMATORY

Throughout Australia, with the exception of South Australia and the Australian Capital Territory, a jury may be involved in defamation proceedings. In some states they will be asked to determine whether the publisher has proved all charges it has levelled against the plaintiff. To this extent the defamation jury functions much like the jury in a criminal court.

Defamation juries have another two unique functions:

- determining what, if anything, the publication being sued over imputes about the plaintiff;

- determining whether that imputation meets the legal definition of what is defamatory.

Queensland and Tasmania are the only two states that have adopted a statutory definition of defamation. Those definitions are almost identical and Tasmania's will suffice to illustrate both:

> *An imputation concerning a person or a member of his family, whether that member of his family is living or dead, by which -*
>
> *(a) the reputation of that person is likely to be injured;*
>
> *(b) that person is likely to be injured in his profession or trade; or*
>
> *(c) other persons are likely to be induced to shun, avoid, ridicule, or despise that person;*
>
> *is defamatory, and the matter of the imputation is defamatory matter.*[2]

There is a subtle distinction between subsections (b) on the one hand and (a) and (c) on the other. Subsections (a) and (c) involve an element of disparagement, whereas such denigration is not needed for a publication to meet the definition set out in subsection (b).[3] For instance, an untrue report that a tradesperson has died is more likely to elicit sympathy than criticism, even though it will likely lead to a loss of custom.

The distinction between reports that denigrate and those that do not is crucial in the remaining states and territories that have no statutory definition of defamation. In these areas it is an essential ingredient of any action that plaintiffs show that some act or condition has been attributed to them which is to their discredit.[4]

Injurious falsehood is used to deal with untrue reports not meeting this requirement. This law has more in common with the defamation law of America than that of Australia, including the former's significantly less favourable treatment of plaintiffs.

Note, then, how in most of Australia the tradesperson whose death is deceitfully prematurely announced may enjoy less protection under the law than the tradesperson about whom a mildly disparaging, yet entirely well-meant, remark is made. Such iniquity is hard to comprehend while defamation law is understood simply as concerned with the protection of reputation.

DEFAMATION LAW AS THE ARBITER OF SOCIAL INCLUSION

American jurist Robert Post has argued in favour of an understanding of reputation that extends beyond conceiving it as a form of intangible property.[5] Reputation is commonly thought of as akin to commercial good will, something that can not only be bought and sold, ando built up through hard work and sound judgment. Like property it can also be stolen and defamation actions might be characterised as society's restitution to those wrongfully deprived of what is theirs.

Post also suggests that reputation can be seen in terms of human dignity. Post sees defamation law as governing 'rules of civility' which develop and maintain personal identity. He suggests that acts of defamation can be characterised as a breach of these rules. Building on the work of Erving Goffman[6] and the symbolic interactionist tradition in American sociology, Post shows how a breach of the rules of civility jeopardises two parties.[7] First is the plaintiff whose dignity is threatened. Second, the social competence of the publisher is also brought into question. An audience witnessing such a breach of civility is invited to decide who is in breach of social norms: the plaintiff or the publisher. Whichever side they choose, the other will suffer discredit and stigmatisation.

In this way Post argues that the dignity that defamation law protects is the 'respect (and self respect) that arises from full membership of society'. Rules of civility operate to distinguish members from non-members and defamation law enforces society's interest and that 'enforcing rules of civility is a matter of safeguarding the public good inherent in the maintenance of community identity'.[8]

To understand defamation law as a means of mapping the moral community, renders its indifference to the mistaken report of the tradesperson's demise is clearly explicable: such a publication does not bring into question the tradesperson's social membership. It also becomes clear why, as a general rule, the question whether publications cause damage to reputation is not decided by reference to evidence called by the plaintiff of actual damage to reputation. The issue for the law is not so much whether the plaintiff has suffered, but whether there has been a breach in the rules of civility that may have led to the dignity of the plaintiff or defendant being compromised.

IDENTIFYING THE MORAL COMMUNITY

Defamation law also identifies which communities are worthy of its support. This is expressed in the common law definition of what is defamatory. There are numerous variations in the way this test is formulated, but for current purposes I choose that contained in what is probably Australia's most commonly used reference on defamation law. As stated in Tobin and Sexton's *Australian Defamation Law and Practice*:

The test is whether the publication would have been likely to cause the ordinary reasonable man or woman to have thought the less of the plaintiff.[9]

This limits protection to those

communities consisting of 'ordinary, reasonable people' and excludes the 'criminal classes'. This is typically exemplified by the law's refusal to recognise as defamatory allegations of being a police informant. While the informant may be exposed to severe retribution, there is no recourse in defamation law, the rationale being that no ordinary reasonable person would think less of someone for helping to enforce the law.[10]

DEALING WITH DIVISION WITHIN THE MORAL COMMUNITY

Who, then are these 'ordinary, reasonable people'? What are their values? And most interestingly, how homogenous are they? Put differently, what moral issues define the moral community and which divide it?

A few paragraphs prior to the above test as to what is defamatory, Tobin and Sexton had introduced defamatory publications as being those 'likely to cause ordinary, reasonable persons to think the less of the plaintiff or to shun or avoid the plaintiff'.[11] A tension between these two definitions is immediately apparent. The first, by making reference to 'the ordinary reasonable man or woman', creates a single, hypothetical construct as arbiter of what will injure the plaintiff's reputation: the 'ordinary, reasonable person'. This 'ordinary, reasonable person' embodies the sentiments of those within the community of 'ordinary, reasonable people'. While this does not necessarily imply a moral consensus, it at least requires the identification of the views of the majority as opposed to a minority of 'ordinary, reasonable people'.

In contrast, the second definition, by referring to the opinions of 'ordinary, reasonable persons', appears to permit the attitudes of minorities within the community of 'ordinary, reasonable people'. The most likely constraint on how small that minority can be is that the viewpoint must not be such that its possession disqualifies its adherents as regards the requirement of ordinariness.

Following on from the reference to 'ordinary, reasonable persons', Tobin and Sexton saw two consequences as likely to flow from a defamatory publication, each distinct from the other:

> *(a) a likelihood to cause damage to the reputation of the plaintiff in the eyes of right-thinking members of the community in general;*
>
> *(b) a tendency to exclude the plaintiff from society.*[12]

The scope for considering minority viewpoints might seem tempered by the term 'right-thinking members of the community *in general*' (my emphasis). 'General' can mean 'relating to ... all members of a class or group', thus indicating an opinion shared among all right-thinkers.[13] But 'general' is as likely to be interpreted as 'common to many or most of a community',[14] which need not mean majority. What is more, the words 'in general' may simply identify the community to be considered: the views to be heeded are those of at least some right-thinking members of the general, broad community, rather than of any sub-community.

Similar ambiguities are not limited to Tobin and Sexton: they exist in many of the commonly quoted formulations of the defamation test. Our research indicates that the matter is barely clarified by judicial directions to juries. Take, for instance, the following direction given to a jury by Levine J, who has heard the bulk of defamation cases in New South Wales over recent years:

> *[D]efamatory means likely to lower the plaintiff in the eyes or estimation of fair minded, right thinking members of the community, likely to injure the plaintiff in his good name or reputation. You are members of the community and as such are best placed to apply community standards to this issue.*[15]

This is shortly followed by a reference to 'the ordinary, decent folk' and moments later by a direction that the benchmark to be applied is 'fair minded, decent, ordinary members of the community'.

The law has not been blind to the issue as to whether the defamation can be determined by reference to minority attitudes. Tobin and Sexton, for instance, immediately clarify that there is assumed to be a uniform community standard in determining what is defamatory. 'In other words, the jury must decide whether the meanings conveyed are defamatory or not by reference to "general community standards and not by reference to sectional attitudes"'.[16] They cite as authority[17] Brennan J in *Reader's Digest Services Pty Ltd v. Lamb*:

> *Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation, being a standard common to society generally.*[18]

Curiously absent from Tobin and Sexton's discussion of the issue is a subsequent case often quoted as authority that certain minority viewpoints can be considered. *Hepburn v. TCN Channel Nine* concerned an imputation that a registered medical practitioner 'is an abortionist'.[19] One question for the court was whether this imputation could be considered defamatory to the extent to which it relates to lawful terminations.

Hutley JA thought the argument that such in imputation is not capable of being defamatory to be 'startling':

> *As any abortion is regarded as wicked by a substantial part of the population on moral grounds, to say of a person that he is an abortionist may bring him into hatred, ridicule or contempt of ordinary reasonable people. As the objection to abortion is on moral grounds, to a substantial part of the community, legality is relatively irrelevant.*[20]

Glass JA addresses the issue more fully and concludes:

> *[A] man can justly complain that words, which lower him in the estimation of an appreciable and reputable section of the community, were published to members of it, even though those same words might exalt him to the level of a hero in other quarters. Where a television programme has been beamed to a large audience it can be presumed, without special proof, that its viewers will include some who advocate the "right to life" and abhor the destruction of foetuses, whatever the circumstances. In the estimation of such persons the plaintiff can claim to have been disparaged even if abortionist meant lawful abortionist. If it also meant unlawful abortionist, she can also claim to have been denigrated in the eyes of a different but substantial section of the viewers who support the existing law but do not want it extended.*[21] *(Emphasis added.)*

In the case of the mass media, at least, the defamation test as formulated in *Hepburn* means that every 'reputable' viewpoint on a moral issue is reflected in defamation law, provided that viewpoint is one held by an 'appreciable/substantial' group. Clearly *Hepburn*, like all defamation test formulations, evolves from the standard construct of the community of ordinary, reasonable people. According to *Hepburn*, 'ordinary' pertains to an 'appreciable' or 'substantial' section of the community', while 'reasonable' is equated with 'reputable'.

It is not hard to see how a general application of *Hepburn* greatly extends the range of material that can be deemed defamatory. Whether or not juries are routinely referred to the case is of no great import: the potential for juries to interpret the defamation test, as frequently formulated, in a way that permits consideration of views perceived to be those of the minority is still there.

Nothing short of extensive jury research will establish how often this happens. While the NDRP will not tackle such a task, we shall measure the extent to which people perceive issues as dividing, as opposed to defining, the community of ordinary, reasonable people. Part of our research will be to collect quantitative data on how much certain imputations damage reputation in the eyes of a representative sample of the population. Then we shall ask the same respondents to think about people who would come to the opposite conclusion as themselves as to what is defamatory. Could they think of these people as 'ordinary' and/or 'reasonable'?

The degree to which the application of *Hepburn* would lead to an expansion of what is deemed defamatory will be in proportion either to the extent to which people consider others who disagree with them as to what is derogatory to be 'ordinary' and reasonable', or the extent to which the population is prepared to characterise both sides of a debate as to whether a statement stigmatises as 'ordinary' and 'reasonable'. The question as to which is the better measure will depend on a second limb of our research, one that will be considered in the next article in this series: is the term 'ordinary, reasonable person' more likely to be considered tautological or an oxymoron?

The second article, due to appear in our next edition, considers the impact on defamation law of the phenomenon known as the 'third person effect': the tendency for individuals to exaggerate the difference between themselves and others. It looks at the potential for this to unnecessarily restrict speech and its relevance to law reform.

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1 *New York Times Co v Sullivan*, 376 US 254.

2 *Defamation Act 1957* s 5(1) (TAS). For the Queensland definition see *Defamation Act 1889* s 4.(1) QLD).

3 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

4 Eg *Aqua Vital Western Australia v Swan Television and Radio Broadcasters* [1995] Aust Torts R 62,709.

5 RC Post, 'The social foundations of defamation law: reputation and the Constitution', *California Law Review* (1986) 7A 691-742.

6 E Goffman, *Interaction Ritual: Essays in Face-to-Face Behavior*, (1967, Aldene Pub. Co., Chicago).

7 Post (1986), 711.

8 Ibid, 713.

9 TK Tobin & MG Sexton, *Australian Defamation Law and Practice* (1999, loose-leaf service, Butterworths, Sydney), Para 3120, Service 28.

10 *Blair v Mirror Newspapers Ltd* [1970] 2 NSWR 604).

11 TK Tobin & MG Sexton, Para 3010, Service 30.

12 TK Tobin & MG Sexton , Para 3010, Service 30.

13 *Macquarie Concise Dictionary*, 3rd edn.

14 Ibid.

15 *Purcell v Cruising Yacht Club of Australia*, unreported, NSW Supreme Court, 16 October 2001.

16 Para 3130, Service 28.

17 Para. 3125, Service 28.

18 (1982) 150 CLR 500 at 505-506.

19 [1983] 2 NSWLR 682.

20 Ibid, at 686B.

21 Ibid, at 694B.