

Ordinary unreasonable people: social attitudes and defamation law

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ORDINARY *un*REASONABLE PEOPLE

SOCIAL ATTITUDES AND DEFAMATION LAW

Roy Baker

A thesis submitted for the degree of Doctor of Philosophy

University of New South Wales

2010

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Abstract 350 words maximum: (PLEASE TYPE)
<p>This thesis concerns the way in which the common law determines whether a publication is defamatory. It also touches on some related matters, such as the assessment of damages for defamation.</p> <p>The law frames the test for defamation not in terms of the reactions to a publication of its actual recipients, but rather the imagined responses of a hypothetical audience, whose members the law often describes as 'ordinary reasonable people'. Through an analysis of case law, the thesis concludes that the legal test for defamation is ambiguous, not least as to whether it should always reflect mainstream opinion, even when it is anticipated that most people would respond to a publication irrationally.</p> <p>In light of such uncertainties, the thesis explores the law's practical application, reporting on interviews with eight judges and 28 defamation lawyers, assessing how they understand and apply the law. It concludes that the majority of lawyers understand the test for defamation as intended to reflect how most people think, both in terms of their values as well as how they interpret communications.</p> <p>With that in mind, the thesis presents empirical findings on whether defamation law achieves that end. By means of a phone survey of 3,000 adults, selected to represent Australia's resident population, as well as eight focus groups conducted among sections of the general community, plus student surveys, answers are sought as to how a number of potentially defamatory publications are received among the public. A disconnect emerges between, on the one hand, the outcome of defamation trials and the views of judges and lawyers as to what is defamatory and, on the other, the way in which people actually respond to publications.</p> <p>Through further empirical research, the thesis accounts for this disparity by reference to a phenomenon identified in communications studies as the 'third-person effect': the tendency for individuals to perceive the negative impact of media messages as greater on others than on themselves. The thesis concludes that the law's reliance on imagined, as opposed to real responses to potentially defamatory material distorts defamation law, unfairly benefiting plaintiffs at the expense of defendants, thus exacerbating the law's chilling effect on free speech.</p>

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Some of the research and findings contained in this thesis have already been published by me. Those publications are:

1. Roy Baker, 'The "Ordinary Reasonable Person" in Defamation Law' (2003) 22.4 *Communications Law Bulletin*, 20 - 23;
2. Roy Baker, 'The Rookie and the Silk: Learning the "Ordinary Reasonable Person" in Defamation Law' (2007) 12.4 *Media & Arts Law Review* 399 - 422;
3. Roy Baker, 'Defamation and the Moral Community' (2008) 13.1 *Deakin Law Review* 1 - 35;
4. Roy Baker and Julian Leslie, 'Rethinking the Defamation Jury' (2008) 13.4 *Media & Arts Law Review* 422 - 46;
5. Roy Baker, 'Defamation and the Culture Wars' (2009) 14.4 *Media & Arts Law Review* 425 - 54.

ABSTRACT

This thesis concerns the way in which the common law determines whether a publication is defamatory. It also touches on some related matters, such as the assessment of damages for defamation.

The law frames the test for defamation not in terms of the reactions to a publication of its actual recipients, but rather the imagined responses of a hypothetical audience, whose members the law often describes as ‘ordinary reasonable people’. Through an analysis of case law, the thesis concludes that the legal test for defamation is ambiguous, not least as to whether it should always reflect mainstream opinion, even when it is anticipated that most people would respond to a publication irrationally.

In light of such uncertainties, the thesis explores the law’s practical application, reporting on interviews with eight judges and 28 defamation lawyers, assessing how they understand and apply the law. It concludes that the majority of lawyers understand the test for defamation as intended to reflect how most people think, both in terms of their values as well as how they interpret communications.

With that in mind, the thesis presents empirical findings on whether defamation law achieves that end. By means of a phone survey of 3,000 adults, selected to represent Australia’s resident population, as well as eight focus groups conducted among sections of the general community, plus student surveys, answers are sought as to how a number of potentially defamatory publications are received among the public. A disconnect emerges between, on the one hand, the outcome of defamation trials and the views of judges and lawyers as to what is defamatory and, on the other, the way in which people actually respond to publications.

Through further empirical research, the thesis accounts for this disparity by reference to a phenomenon identified in communications studies as the ‘third-person effect’: the tendency for individuals to perceive the negative impact of media messages as greater on others than on themselves. The thesis concludes that the law’s reliance on imagined, as opposed to real responses to potentially defamatory material distorts defamation law, unfairly benefiting plaintiffs at the expense of defendants, thus exacerbating the law’s chilling effect on free speech.

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Roy Baker
Sydney, 5 December 2010

CHAPTER 1: INTRODUCTION

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THE ENQUIRY

Defamation law is often portrayed as managing two opposing interests. On the one hand there is the publisher’s right to free speech, on the other the plaintiff’s interest in reputation. Generally, the debate focuses on the conditions in which the law should, and should not, permit defamatory material. In such discussions, freedom of speech is generally recognised as paramount. The enquiry then becomes how to tailor defences to defamation so as to best protect that liberty, while also acknowledging interests in reputation.

Less regard is given to the simple observation that those defences only become relevant once a work has been deemed defamatory. The question of what is defamatory is sometimes passed over as a relatively straightforward threshold issue warranting little attention. But what many authors find ruinous is not that they lack a defence, but the emotional and financial cost of establishing one. In many cases those burdens will remain relatively unaltered, whatever fine-tuning we give to the defences. What matters more to publishers is if someone, somewhere, decides that it is worthwhile arguing that their work meets the legal definition of defamation. It is only then that the publishers’ problems begin.

Conversely, terrible suffering and loss can result from the published word. But if a publication is not thought to be defamatory then there may well be no redress, regardless of how damaging or upsetting it might be.

Of crucial importance, then, are the perceptions of courts, lawyers and the lay public as to what constitutes a defamatory publication. This thesis is an empirical exploration of the process by

which those perceptions are reached. While the legal definition of defamation has been the subject of some theoretical analysis, little attempt has been made to examine, by means of quantitative research methodologies, precisely what happens when courts, lawyers or their clients weigh up whether a defamation has been published. This thesis is an attempt to redress that omission.

The central enquiry is into the practical workings of the Australian common law when it comes to deciding whether or not a publication is defamatory. My task is all the harder because there is no simple formulation of the test the law uses in reaching that determination. In the absence of a universally accepted formula, the law's precise aims remain unclear. An obvious question is whether the law is meeting its objectives, but that cannot be answered until some understanding can be reached of what the law is trying to do. As a result, the first part of this thesis is devoted to a doctrinal analysis of how the common law defines defamation.

My conclusion is that the test for defamation is inherently ambiguous. If we cannot satisfactorily define what kinds of material defamation law aspires to regulate, how can we know whether it operates successfully? My argument is that, despite its ambiguity, the law can be said with considerable certainty to overreach. By this I mean that the law, besides penalising defamers, operates to inhibit publications that should properly be considered non-defamatory, thus unnecessarily and unintentionally silencing speech.

Hence the title of the thesis, which, quite clearly, is a play on a generally accepted statement of the test for defamation. A simplified definition of a defamatory publication is that it is one that would damage someone's reputation in the eyes of 'ordinary reasonable people'. Put at its briefest, this thesis seeks to demonstrate the potential for the hypothetical arbiter of defamation to be, in practice, the ordinary *unreasonable* person. What I mean is that, because of the means used to determine what is defamatory, the law often fails to reflect the views of ordinary people, but instead reflects attitudes that are irrational at best, bigoted at worst. While the aims of defamation law cannot be stated with precision, representing such views is most definitely not among them.

METHODOLOGY

Part A of this thesis is entitled 'Asking the Defamation Question', the question being what constitutes a defamatory publication. As noted above, there is no single, straightforward

formulation of the legal measure of defamation. Instead it is necessary to examine various primary and secondary legal sources. This includes a review of numerous reported and unreported decisions, from Australia as well as overseas, discovered by means of various publicly available databases and other publications. The purpose of this part of the thesis is to try to identify the precise content and aims of the legal test for defamation, so that the second part can ascertain whether those aims are being met.

While Part A lays the groundwork, the mainstay of this thesis is empirical research. Part B is largely based on fieldwork conducted by myself from 2003 onwards. This involved various quantitative and qualitative attitudinal research methodologies, including:

- interviews with eight judges, as well as 28 lawyers specialising in defamation law, drawn from four Australian jurisdictions;¹
- eight focus groups consisting of a total of 64 Australian residents who were neither lawyers nor employees of the media, held in four state capitals as well as regional Australia;²
- a phone survey conducted among a randomly selected sample of 3,000 adult residents of Australia;
- a number of quantitative surveys conducted among 300 undergraduates studying in four universities selected from two states.³

As a vehicle for the research I used descriptions of eleven hypothetical media reports, all of which are potentially defamatory. These relate to some of the areas of shifting and contested morality that most preoccupy contemporary societies: homosexuality, abortion, drink and drugs, pre-marital and extra-marital sex, relationships with authority and criminality. I ask how these issues have been addressed through the prism of defamation law. I seek to contribute to a body of knowledge on public attitudes to these matters, throwing light on how the public sees itself when it comes to sexual norms, intoxication, reproduction, criminality and other areas of public and private life that are often classed as ‘moral issues’. But more centrally, I aim to explore the operation of defamation law by a study of real and hypothetical publications relating to these areas.

¹ New South Wales, Victoria, Queensland and South Australia.

² One meeting was held in New South Wales (in Guildford, western Sydney), two in Victoria (in Moe, eastern Victoria and in central Melbourne), one in South Australia (in Black Forest, Adelaide), three in Queensland (in Ipswich, Cairns and central Brisbane) and one in the Northern Territory (in Alice Springs).

³ University of New South Wales, University of Sydney and Macquarie University (all in Sydney), plus Victoria University (in Melbourne).

I offer this thesis as a contribution to our understanding of defamation law, both in Australia and overseas. I hope it will throw light on the way in which that law operates in many jurisdictions worldwide, as well as have ramifications for law reform. But I also offer it as a contribution to individual and social psychology, the way in which people see themselves, particularly in relation to others. It is an attempt to foster further interdisciplinary approaches to legal scholarship, in particular the vexing question of how legal and social norms interrelate. Ultimately I hope to show that the common law results not only in the unnecessary silencing of non-defamatory speech, but also that it inhibits societal progression towards tolerance and inclusion.

EMPIRICISM IN DEFAMATION LAW

The objection might be raised that the question of what is defamatory cannot be approached empirically because of the essential nature of the question. Just as the validity of a contract is a question of law, not fact, so too is the question of what is defamatory, at least in part. To measure by means of a survey whether a publication is defamatory might seem rather like conducting a poll in order to determine whether a contract is enforceable. Such a survey, even if limited to specialists in contract law, will only reveal what most lawyers think. It does not answer whether the contract is valid.

In support of the proposition that the same principle can be applied to defamation law, attention might be drawn to a question which often precedes any enquiry into whether a publication is defamatory: is the publication *capable* of being defamatory? The question of capacity has the hallmarks of a legal question. For example, unlike the issue of whether a publication *is* defamatory, which may be decided by a jury, it is inevitably left to the judge to decide. What is more, judicial decisions on capacity form binding precedents. If a publication is incapable in law of being defamatory then the question whether it is in fact defamatory has been answered.

Even so, the status of the question of defamation is less straightforward. For instance, while the issue of capacity is left to a judge, the question of whether a publication is in fact defamatory has traditionally been one for a jury. In other areas of law it is jurors rather than judges who are charged with answering the types of question which might be said to lend themselves to empirical analysis, such as whether a defendant's actions had particular consequences.⁴ What is

⁴ In recent times there has been a tendency towards having judges determine not only the question of capacity, but also the question whether a particular publication is in fact defamatory, but it is generally

more, and as will be explored at length below, primary and secondary legal sources are replete with references to community attitudes and standards, which social science methodologies have long claimed to measure. To the extent that defamation law is concerned with how real people respond to certain stimuli, empiricism has a role.

EMPIRICISM IN US DEFAMATION LITIGATION

Even so, the classification of publications into defamatory and non-defamatory is a legal process. Although social sciences have a part to play, it is necessarily limited. The point can be illustrated by a rare American experiment in admitting empiricism into the defamation court room. In 1979 *Barron's Business and Financial Weekly* published a letter from singer Frank Sinatra's lawyer, Milton Rudin, under the heading 'Sinatra's mouthpiece'.⁵ Rudin complained to Dow Jones, *Barron's* publishers, that the term 'mouthpiece' was defamatory. *Barron's* promptly published a statement to the effect that no aspersions had been intended, but this did not mollify Mr Rudin, who issued proceedings.

Rudin's argument was that 'mouthpiece', particularly when used to refer to an attorney, might suggest the abdication of the kind of independent judgment professionally expected of lawyers. Rudin also argued that, when used to describe an attorney, the term connoted involvement in criminality, something exacerbated by popular associations of Sinatra with organised crime. The Court accepted these arguments to the extent that it thought the publication was at least *capable* of being defamatory. But this did not answer whether it was *in fact* defamatory. That fell to Lasker DJ to decide.

It is worth considering in turn each category of evidence presented by Rudin, the plaintiff, in support of the proposition that the publication was defamatory of him. Each category illustrates a role empiricism could play in a defamation trial, if the law were to permit it. First, Rudin called three prominent attorneys to testify as to how they understood the publication. All three supported Rudin's defamatory interpretation of 'mouthpiece'. But this is not the same as evidence that the plaintiff's reputation had been harmed. Indeed, two of the witnesses had previously been acquainted with Rudin, yet neither said their regard for him had declined. One described the plaintiff as 'a man of known integrity, honor and ethics',⁶ while the other remained of the view that Rudin's conduct 'exemplifies the sense of independent judgment ...

understood that the essential nature of the two questions remains unchanged, with the judge acting as a pragmatic substitute for the jury.

⁵ *Rudin v Dow Jones & Co, Inc*, No 79 Civ 433 (MEL), 557 F Supp 535; 1983 US Dist LEXIS 19011; 9 Media L Rep 1305 (US District Court for the Southern District of New York).

⁶ 557 F Supp 535, 539 (Lasker DJ).

central to an attorney's proper role'.⁷ The witnesses supported Rudin's case as to what 'mouthpiece' *denotes*, ie lack of professional disinterest, but not what it *connotes* about him, namely that he is accordingly deserving of less respect.

In this thesis I shall continually distinguish between denotative and connotative meaning. By the first term I refer to interpretation of the publication, particularly with regard to what it has to say or imply about its subjects' actions, thoughts or circumstances. Determining denotative meaning is what defamation lawyers generally have in mind when they speak of the issue of meaning. Denotative meaning is also what the parties will try to capture in their pleaded imputations. When dealing with a straightforward, direct allegation (for instance a publication that simply states 'P is a thief') the denotative meaning and pleaded imputation are likely to be identical to the publication's literal meaning ('P is a thief'). Alternatively, the literal and denotative / pleaded meaning may be quite different. For instance, the literal meaning might be that P had fingers in the till, but still the pleaded imputation would be that P is a thief. Denotative meaning is subjective: it is likely to vary from one member of a message's audience to another and, in the case of a verbal communication, will depend largely on individual readers' understanding of the vocabulary and syntax used in the message, as well as the manner and context of its utterance.

In contrast with denotative meaning, I adopt the term 'connotative meaning' to refer to what the publication connotes about the moral worth of its subjects, given what it has denoted about their actions or circumstances. Again this is defined subjectively and will depend first on each audience member's denotative interpretation of the message, secondly on whether the audience member accepts or rejects the veracity of the denotative meaning and thirdly on the audience member's values. For instance, a statement that individuals are gay might be taken to *denote* that they are attracted to, and possibly sleep with, certain members of their own sex, while it might *connote*, at least to the homophobe, that they are less worthy of respect.

Returning to Milton Rudin's case, the value of the lawyers' testimony to his case was that they confirmed his argument as regards the publication's denotative meaning. Their evidence did not directly relate to the publication's connotative meaning, it being assumed, no doubt, that once the argument on denotative meaning was won then the publication's connotative meaning would be self-evident. In this respect Rudin's case is typical of many found in Australia: disputes tend to revolve around denotative meaning, with connotative meaning generally assumed to follow as a matter of course.

⁷ Ibid.

It should be noted that the lawyers Rudin called did more than give evidence of their own interpretation of the article's denotations. They also gave testimony as to how lawyers generally would understand the term 'mouthpiece'. To this extent they were giving what might be termed expert testimony, expertise based in part on their own legal backgrounds and partly on discussions they had had with other lawyers. Countering the lawyers' testimony, the publishers called an expert of their own, a prominent journalist to attest to the fact that the use of the word 'mouthpiece' was consistent with the principles of responsible journalism and that the original story had been 'indisputably a newsworthy event'.⁸ Dow Jones also produced instances of the use of 'mouthpiece' in other newspapers and media, although Rudin countered with other examples. Then came a different sort of expertise, this time into meaning: dictionary and thesaurus entries were presented to the court.

But most interesting was the use of expert evidence of another kind. Rudin called psychologist Dr Robert Buckhout, whom he had commissioned to conduct two surveys. The first was intended to contrast readers' impressions of an attorney referred to as 'spokesman' with responses to one identified as a 'mouthpiece'. The second was meant to compare reactions when these spokesmen / mouthpieces were said to belong to Sinatra as opposed to 'John Doe'. Buckhout asked respondents to rank the various spokesmen and mouthpieces on scales relating to whether they were perceived as just or unjust, honest or crooked, etc. Based on surveys of subjects intended to reflect *Barron's* readership, Buckhout found that those lawyers described as a 'mouthpiece' were rated significantly more negatively than those referred to as a 'spokesman', although it made no difference whether either term was ascribed to a lawyer for John Doe or one for Sinatra.⁹

The publishers responded with empirical research of their own, engaging a psycholinguist, Dr Douglas Herrmann, to survey 500 randomly selected readers of *Barron's*. With 134 usable responses, Herrmann testified that most of the 'dimensions' between which Buckhout's subjects had been required to choose (eg just/unjust, etc) were considered irrelevant to the meaning of 'spokesman' and 'mouthpiece' by over half the respondents.

But most interesting of all is the judge's response to the empirical studies. He considered them 'intriguing as examples of psycholinguistic research', but that they provided 'ambiguous evidence at best' on the question whether *Barron's* readers were likely to have perceived the caption as defamatory. When considered together, he thought the surveys tended to discredit

⁸ Ibid 543 (Lasker DJ).

⁹ Ibid 544 (Lasker DJ) citing *Mencher v Chesley*, 297 NY 94, 100, 75 N E 2d 257, 259 (1947), quoted in *James v Gannett Co, Inc*, 40 NY 2d 415, 419, 386 NYS 2d 871, 874, 353 N E 2d 834 (1976).

Dow's assertion that 'mouthpiece' is no more than a synonym for 'spokesman'. Even so, to prevail in defamation it is necessary, according to the judge, 'to demonstrate not only that the term applied to the plaintiff was more negatively regarded than a possible alternative, but also that the word actually used was understood by the reader in the defamatory sense alleged by the plaintiff'.¹⁰ In other words, while it may have caused Rudin more harm to be called a 'mouthpiece' than a 'spokesman', this did not answer whether the publication denoted what he claimed it denoted, let alone whether it consequently connoted whatever negative quality about Rudin's character would render it defamatory. A court needs to be convinced that a publication is defamatory in some absolute sense, not just in comparison with others. What is more, it is the law that will determine the dividing line between a defamatory and a non-defamatory publication, not empirical research. Lasker DJ concluded that Rudin had not sustained his burden of establishing that that line had been crossed and he lost the case.¹¹

One other American case is worthy of note, since it illustrates an American willingness to admit empirical evidence, although in this case it is in relation to intended, as opposed to conveyed denotative meaning. In 1982 the Supreme Court of Hawaii considered an appeal in an action brought by Hiram L Fong.¹² While Fong was standing for re-election to the State House of Representatives, a local steelworker, Ken Merena, displayed outside his home a sign which read:

USHIJIMA / FONG
VOTED "YES"
PENSION / PAY RAISE

Apparently Merena had intended to convey that Ushijima had voted in favour of a pension bill while Fong had voted for a pay raise bill, both proposals having recently been the subject of widespread public opposition. Fong accepted that he had supported the proposed pay raise, but objected on the grounds that the sign wrongly suggested that he had voted for the pension bill, a measure which had attracted particular controversy. Merena offered testimony from a linguistic expert to the effect that the virgules (diagonal slashes) meant that the sign would be understood in the way Merena intended. The trial court had refused to permit such evidence. On appeal the Supreme Court thought that the expert's testimony should have been permitted, although only as evidence relating to Merena's intentions regarding the sign (intended meaning being rather more determinative under America's defamation laws than those found in Australia.)

¹⁰ 557 F Supp 535, 544 (Lasker DJ).

¹¹ Ibid.

¹² *Fong v Merena*, 66 Haw 72; 655 P 2d 875; 1982 Haw LEXIS 255.

These two cases indicate some willingness by the US legal system to incorporate social scientific methodologies into the process by which vital issues in defamation are decided. Even so, while the tactic of offering testimony of psycholinguists and other experts as to meaning or the defendant's intentions in publishing words enjoyed some success in the US during the 1980s, the trend in the 1990s was to reject such testimony.¹³ Certainly such evidence will not be permitted in Australia, whether to support a contention as to denotative or connotative meaning, conveyed or intended. As has been made clear by the High Court, 'the moral or social standard by which the defamatory character of an imputation is determined is not amenable to evidentiary proof'.¹⁴

EMPIRICISM IN AUSTRALIAN DEFAMATION LITIGATION

Unfortunately, the fact that defamation law in Australia rejects empirical means of proving or disproving harm to reputation is far more certain than the reasons behind it. If the latter were understood better it would become far clearer what it is that a court is precisely being asked to do when it is charged with deciding whether a publication is defamatory. And if we knew the true nature of that task, we might then be able to explore whether the law functions so as to maximise the chances of the question being answered correctly.

The key to the puzzle lies in the High Court's reference to defamation being determined by some 'moral or social standard'. If defamation depends on social standards then there is a great potential for empirical research in the courtroom. For instance, if the goal of litigation is to establish the meaning attributed to a publication by most of its readership, which seemed to be the case in *Rudin*, then it should be a relatively simple task to conduct appropriate research using standard scientific methodology. Similarly, social science should be able to tell us whether most readers would, as a consequence of that denotative meaning, think less of the plaintiff and whether they actually acted on that antipathy, for instance by ostracising his business. Alternatively, if the test were not what the readership thought but what the majority of the population would have thought if they had been exposed to the publication in question, the research tools could easily be modified accordingly.

¹³ Thomas B Kelley, 'Evidentiary and Procedural Issues: Libel and Privacy Trials', Attachment A to Practising Law Institute, *Newsgathering & Libel Litigation 2000* (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, June 2000) 143, 149. See also Jonathan D Hart, 'Why Expert Testimony on the Meaning of Language has no Place in Libel Suits' in Practising Law Institute, *Libel & Newsgathering Litigation – Getting & Reporting the News* (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, June-July 1998) 517.

¹⁴ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 506 (Brennan J).

The position is, of course, totally different if defamation law is to be decided by *moral* as opposed to *social* standards, meaning that what matters is not what the publication was actually thought to mean, and what people actually thought of the plaintiff as a result, but what the publication *should* be thought to mean, and what consequent conclusions people *should* draw about the plaintiff's moral character. Answering these questions calls for an enquiry into ethics, not a social scientist.

THE REALIST – MORALIST DEBATE

Herein lies what for me is the great ambiguity of defamation law: the comparative role of moral and social standards. Put at its simplest the question is this: does defamation depend on what people *do* think, or what they *should* think? Or does it rely on some combination of the two considerations? It is a debate that rarely comes to the fore in the commentary on defamation law, probably because most people are content that social standards roughly coincide with objective morality.¹⁵ When the issue arises it tends to do so in the context of some area of socially contested morality. Homosexuality is a prime example: should an imputation of homosexuality be defamatory if most people are homophobic, or should it not be defamatory on the basis that sexual orientation does not reflect an individual's moral worth?

Those who support the first proposition can be conveniently termed 'realists', since they are concerned with the 'reality' of social values: what people 'really' think. In this thesis I shall speak of 'realism', or 'realist' interpretations of the law, referring to an understanding of defamation law as being concerned with two questions: first, how a particular audience read the publication in question, or would read that publication if it had been exposed to it, secondly what or how that audience thought of or responded to the plaintiff, or would have thought of or responded to the plaintiff, as a result of being exposed to the publication.

¹⁵ For a few examples of the issue being raised, see Leslie Kim Treiger-Bar-Am, 'Defamation Law in a Changing Society: The Case of *Youssouf v Metro-Goldwyn Mayer*' (2000) 20 *Legal Studies* 291; Roger Magnusson, 'Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges' (2001) 9 *Torts Law Journal* 269; G L Fricke, 'The Criterion of Defamation' (1958) 32 *Australian Law Journal* 7; Lawrence McNamara, 'Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame' (2001) 6(4) *Media & Arts Law Review* 271; Marina Lloyd Jones, 'Imputations of Homosexuality in Defamation Actions' (2001) 5(6) *TeleMedia* 94.

‘REALISM’ IN DEFAMATION LAW

Realism, as I have termed the belief that the question of what is defamatory should be determined by reference to community values and behaviour, promises several advantages. First, it allows for the introduction of empirical methodologies into the courtroom. Deciding what people think about an issue would certainly seem more straightforward than determining tricky ethical questions. Secondly, defamation, as realists would no doubt remind us, is principally about protecting from and providing relief for unjustifiable damage to reputation. On this view it does not matter whether the harm to reputation is morally justified or whether it derives from pure bigotry.

Thirdly, by means of the realist claim, courts maintain an appearance of moral neutrality. We are understandably wary of having judges, or even juries, determine moral issues, particularly when the latter are widely contested within society. This caution arises in part from our familiarity with the fallibility of judges and juries in determining relatively simple factual issues, let alone complex ethical and moral questions. One argument is that courts, by unambiguously presenting their findings as a reflection of community standards rather than their own moral pronouncements, diminish the risk of lending curial authority to moral mistakes. More fundamentally, problems arise as to the authority by which a court might pronounce on issues of conscience. If the state derives its right to govern from the people, then is it not appropriate that its courts reflect the views of the people, however unpalatable these might be?

Fourthly, seeking to reflect what people actually think, rather than what they should think, arguably eases the embarrassment that might arise whenever an appellate court overturns a finding in relation to defamation. It is easier to tell junior judges that they do not understand the minds of ordinary people than that they have misapplied objective moral or rational standards. But this is a less persuasive argument, given that judges routinely assess standards of honesty and reasonableness.

An obvious critique of realism is that the law should not apply attitudes that are bigoted or otherwise irrational. A defence of realism is that the trial, by determining public responses to moral questions, can reflect them back onto the community, enabling the latter to take stock of what should and should not matter to reputation. Indeed, while it would sacrifice the image of moral neutrality, judges, or even juries, could comment on the appropriateness of those community standards, while nevertheless applying them.

The realist position garners so much support that it can be described as the orthodoxy of defamation law discourse. To cite just a few examples, Fleming, in a leading text on Australian tort law, refers with approval to ‘the ordinary practice of deferring to actual community attitudes however prejudiced’.¹⁶ William Lloyd Prosser, probably America’s most eminent authority on torts, argued that a court should not be ‘called upon to make a definitive pronouncement upon whether the views of different segments of the community are right or wrong, sound, or morally justifiable’.¹⁷ In his 1969 work on defamation law in South Africa and Ceylon (as it then was), Ranjit Amerasinghe discussed the matter at length and concluded by supporting the view expressed in the South African case of *Brill v Madeley*, namely that ‘[t]he court is not concerned with the question whether the general opinion today on such matters is right or wrong. We must take public opinion as it exists in (the relevant area) according to our knowledge of it’.¹⁸

‘MORALISM’ IN DEFAMATION LAW

The idea that the law should decide what is defamatory by reference to the ‘reality’ of community attitudes, warts and all, has not passed without challenge. These tend to stem from the observation that the law cannot stand outside of society. Rather it inevitably contributes to the constitution and character of the community whose views it might claim to reflect.

For instance, the law, by deciding to apply perceived community standards, has already adopted a moral position. Awarding damages to heterosexuals because they are wrongly described as gay does not represent neutrality on the moral ‘issue’ of homosexuality, however much the plaintiffs might have suffered as a result of the publication. If homosexuality is immoral and widely recognised as such then it is arguable that people wrongly imputed to be gay deserve compensation, but if it is moral then homophobia is something all citizens should be protected against, regardless of sexual orientation. On that basis, straight people wrongly identified as gay should be no more deserving of compensation than gay people who prefer not to have their sexuality revealed.

Courts, by awarding remedies on the basis of perceived community values, give the latter more than just an appearance of legitimacy. Society’s moral errors are not simply compounded by, for instance, a finding that an imputation of homosexuality is defamatory. There is also the iniquity that the cost of these errors, rather than being borne by all citizens equally, will fall principally on those already disadvantaged by the same shortcomings in social morality. Thus, in the

¹⁶ John G Fleming, *The Law of Torts* (9th ed, 1998) 583.

¹⁷ Prosser and Keeton on the Law of Torts (5th ed, 1984) 777.

¹⁸ Amerasinghe, *Defamation in the Law of South Africa and Ceylon* (1969) 51, citing *Brill v Madeley* [1937] TPD 106, 109.

instance of allowing an individual heterosexual to sue, the price of that person's protection from homophobia, with the accompanying confusion of homosexuality with immorality, is not borne by society generally but by gay people in particular.

Accordingly an alternative to realism might be offered, which might conveniently be labelled 'moralism'. If realism is the belief in or practice of determining what is defamatory by sole reference to perceived social values then moralism is the policy of deciding the same questions by giving consideration to the moral character of whatever responses to a publication might render it defamatory. One might imagine an extreme form of moralism that takes absolutely no account of how an audience actually responded to, or would have responded to a publication. Accordingly a publication would be defamatory if people *should* think less of the plaintiff, even though it is patently clear that in fact the person's reputation was universally enhanced.

More plausibly, given that defamation law is centrally concerned with damage to reputation, not determinations of moral truths, one might envisage a slightly modified moralism in which an audience's actual or potential responses are taken into account, but only if those responses meet certain criteria. For instance, it might be decided that a publication to the effect that two men shared a hotel room would be defamatory only if a sufficient number displayed, or would have displayed, a homophobic response, *and* if it was sufficiently rational and ethical to interpret the article as an adverse reflection on the men's moral character.

One can envisage many different forms of moralism, just as one can of realism. For instance, some realists might argue that defamation should be determined by whatever views predominate in society generally, while others might wish to take account of the plaintiff's particular social milieu. In the case of moralists, they might not always restrict themselves to their preferred moral position on any particular issue: it may be enough to render a publication defamatory if the specified response to it meets some fairly minimal moral and rational standards. For instance, those who feel a degree of ambivalence about the practice of abortion, but who nevertheless generally favour the pro-choice position, might nevertheless argue that it should be considered defamatory to say of doctors that they conduct abortions, as well as to say of them that they refuse to do so, on the basis that both the pro-life and pro-choice positions have some merit. Various moralist and realist positions are explored in this thesis, but what unites moralists is that they all give some objective consideration to the rationality and morality of a specified response to the publication and, consequently, to the plaintiff, while realists do not.

I have adopted the terms realism and moralism from a paper by Leslie Kim Treiger-Bar-Am, who examines a notorious instance in which the UK Court of Appeal allowed a woman to

succeed in defamation on the basis that she was imputed to be a blameless victim of rape, a case frequently cited as though supportive of realism, given that it is wrongheaded to think less of a rape victim, therefore the woman's success demonstrates that it is what people actually think that matters.¹⁹ Treiger-Bar-Am's realist/moralist dyad is similar to that of Roger Magnusson, who speaks of courts facing 'a choice between "realist" and "idealist" models of defamation law'.²⁰ 'A "realist" model', says Magnusson, 'is a "warts and all" model because courts accept that an imputation is capable of being defamatory, even when based on ill-founded attitudes'. On a 'idealist' model, by contrast, 'courts "screen" the social and moral attitudes of the ordinary, hypothetical people whose attitudes determine whether the imputation is capable of being defamatory'.²¹ In this way courts could potentially 'avoid compensating harm based upon prejudice or perverse attitudes'.²² My use of the terms 'realist' and 'moralist' differs slightly from that of Treiger-Bar-Am, as well as Magnusson's 'realism' and 'idealism', but these differences need not presently detain us.

Treiger-Bar-Am accords realism with Patrick Devlin's view that the 'morality which the law enforces must be popular morality'. The moralists' view, on the other hand, is identified as Dworkinian in its belief that 'the law does, and should, reflect a reasoned, principled morality'.²³ Treiger-Bar-Am sees the realist-moralist question as echoing the law and sociology debate as to the role of law in society: '[d]oes law reflect the social structure, and function as an aspect of it, or is it an instrument of the state for changing society and social mores?'²⁴ To answer the question, Treiger-Bar-Am draws, like many others, on Robert Post's characterisation of defamation law as concerned with 'rules of civility': the means by which society distinguishes members from non-members.²⁵ In these terms a defamation trial can be characterised as an enquiry into who has breached the rules of civility; the defendant by publishing untruths about the plaintiffs, or the plaintiffs who, by reason of the act or condition imputed to them, are to be excluded from the forms of respect that constitute social dignity.²⁶

According to Treiger-Bar-Am, defamation law 'uses social solidarity to pressure individuals into certain forms of behaviour, and causes the individuals to internalise those norms'.

¹⁹ Treiger-Bar-Am, above n 15. The case, discussed further in Chapter Two below, is *Youssouppoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

²⁰ Magnusson, above n 15.

²¹ Ibid 278-9.

²² Ibid 279.

²³ Treiger-Bar-Am, above n 15, 313.

²⁴ Ibid 317.

²⁵ Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986)

74 *Calif L Rev* 691, 710.

²⁶ Ibid 711.

Accordingly, rather than giving irrational prejudices legal recognition, ‘the law should work to bring reality, the *is*, in line with the *ought*, and thus to make the *ought* real’.

Unlike these writers, my intention is not to site the realist-moralist debate within legal philosophy. I shall argue no principled position as to whether society would be better served if defamation law were applied in accordance with realism or moralism. Nor do I try to suggest that, doctrinally speaking, realism or moralism is the correct interpretation of the law. Answers to these questions have been attempted elsewhere.²⁷

By addressing the debate by means of empirical methodology, I seek what I hope will be a fresh approach. My central enquiry is this: in the exercise of the law of defamation, can it best be characterised as realist or moralist? In answering that question I shall try to challenge some of the assumptions behind the debate, as well as question its authenticity.

Having laid out the basis of the moralist-realist debate, the stage is now set for Part A of this thesis, in which I embark on a partial survey of legal doctrine when it comes to framing the test for defamation. In particular I shall point to support for the respective positions of realism and moralism. To repeat, I shall not seek any definitive answer to whether the law, when interpreted correctly, requires a moralist or realist approach. I merely try to show that each of these two methodologies is plausible, in the sense that there is a real likelihood that both have their adherents among those concerned with deciding what is defamatory: judges, lawyers, jurors and the lay public generally. The first stage in doing so is to consider the general role of empiricism in the test for defamation. That is the purpose of the next chapter.

²⁷ For a few examples, see above n 15 (page 10).

PART A: ASKING THE DEFAMATION QUESTION

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INTRODUCING THE COMMON LAW TEST OF DEFAMATION

The preceding chapter presented various ways in which a legal system might decide whether a publication is or is not defamatory. Little was said about what the common law in Australia actually has to say on this issue. Other than to state that the issue is not open to evidentiary proof, I simply alluded to the law being unclear. The purpose of this chapter is to begin to explore how Australian courts decide what is defamatory. In particular, I look more closely at the extent to which the matter can be decided empirically.

The lack of clarity in the test for defamation is often accounted for by the supposed difficulty in adequately defining what constitutes a defamatory publication. Indeed, the task is often presented as though beyond human endeavour. 'There is no wholly satisfactory definition', writes one of the foremost authorities.²⁸ 'Legal scholars, no less than judges, have tried their hand at it, unsuccessfully it must be admitted', writes another leading commentator.²⁹ As though to make his point, the latter collects together some thirty or more formulations of the test as to what is defamatory. These are drawn from over one hundred cases, decided in half a dozen common law countries and over almost as many centuries. Even then they do not suffice, the

²⁸ Patrick Milmo and WVH Rogers (eds), *Gatley on Libel and Slander* (11th ed, 2008) 12 (para 1.8).

²⁹ Raymond E Brown, *The Law of Defamation in Canada* (2nd ed, 1994), 61.

writer concluding that ‘publication of some remark may do all of these things or none and still be defamatory for reasons that have yet to be articulated’.³⁰

Even though the test as to what is defamatory appears to evade adequate enunciation, the common law definition is often presented as though possessing coherence and certainty, at least relative to what might be achieved by a codified definition. In opposing codification in 1977, the New Zealand Committee on Defamation commented that the ‘enactment of a statutory definition of defamation would create greater uncertainty than is evident in the existing common law definitions ...’³¹ This followed a tradition of satisfaction with the common law status quo, as exemplified by the Porter Committee on the Law of Defamation, which in 1948 similarly opposed a statutory definition of defamation in the UK:

On the whole ... we think it better to leave the position as it is rather than to recommend a change to fresh language which may well involve the bringing of a series of actions and the obtaining of a number of decisions before the bounds of the fresh definition have been clearly determined.³²

When it appeared in 2004 that the Australian government intended to codify the test, this was strongly opposed by the major media organisations:

The Courts have over centuries defined the common law test of what is defamatory in a way which appropriately takes into account the competing public interests. By introducing the proposed statutory test (let alone one which differs from the common law test) the proposal would throw away that case law and would introduce undesirable uncertainty as to when a cause of action arises.³³

The objectors won and currently all Australian jurisdictions use the common law rather than any statutory definition of what is defamatory. Even though the statutory definition was abandoned, its proposal sparked Australia’s most recent re-assessment of the definition of defamation. For that reason the proposed codification and the opposition it garnered form a logical point of departure for an explanation of what it means to defame in contemporary Australia.

Until 2006 each of Australia’s states and territories had its own defamation laws. Many differed substantially, including in respect to the definition of a defamatory publication. There was a

³⁰ Ibid 60.

³¹ New Zealand Committee on Defamation, *Report of the Committee on Defamation* (1977), 20-21, para 60.

³² *Report of the Committee on the Law of Defamation* (Cmnd 7536) (1948) ¶ 18. In 1975 the Faulks Committee on Defamation recommended a statutory definition in the UK, but this was strongly opposed by a minority on the Committee (William Kimber and Harman Grisewood) and it was never enacted: *Report of the Committee on Defamation* (Cmnd 5909) (March 1975).

³³ Combined Media Defamation Reform Group, *Submission in Response to ‘Outline of Possible National Defamation Law’*, Attorney-General’s Discussion Paper – March 2004, May 2004, 23 (para 9.1).

broad consensus that this was undesirable, but a national defamation law was widely considered a chimera. This changed in 2004 when the federal Attorney-General Philip Ruddock threatened to impose a federal defamation statute unless the states made serious efforts to unify. In outlining his proposed statute, Ruddock suggested a right of action against any person who publishes matter which tends to:

1. adversely affect the reputation of a person in the estimation of ordinary persons;
2. deter ordinary persons from associating or dealing with a person, or
3. injure a person in his or her occupation, trade, office or financial credit.³⁴

This proposed definition of what constitutes a defamatory publication can be broken down into the three components one might expect to find in any formulation of a test for defamation.

First there is the question of what feelings a defamatory publication will engender in relation to the person who is defamed. These are alluded to in the first limb: a defamatory publication adversely affects reputation. This, the most obvious characteristic to ascribe to a defamatory publication, suggests that the feelings engendered will include some degree of disdain or antipathy.

Secondly, there is the question of the consequences a defamatory publication will have on a defamed person. It might produce antipathy or disdain, but do these need to have affected the plaintiff? The second limb of the proposal refers to deterrence from associating or dealing with the defamed person, while the third speaks of injury to occupation, trade, office or financial credit.

Thirdly, there is the issue of the nature of the relevant audience. Who must feel antipathy towards or disdain for the plaintiff, or who must be affected in such a way that the plaintiff suffer the consequences stipulated in the definition? The first and second limbs identify the relevant audience as consisting of 'ordinary persons'.

These three elements of the test for defamation (feelings, consequences and audience) will now be discussed separately, both in relation to the Attorney-General's proposed definition and those to be found in primary and secondary legal sources.

³⁴ Attorney-General's Department, *Outline of Possible National Defamation Law*, March 2004, 2.

THE FIRST ELEMENT: FEELINGS

The connection between defamation law and concern for reputation is as obvious as the association between damage to reputation and varying degrees of ill-will and disregard. According to the much cited phrase of Parke B that dates from 1840: a publication is defamatory if it is calculated (meaning likely to) ‘injure the reputation of another by exposing him to hatred, contempt or ridicule’.³⁵ It is now accepted that far lesser degrees of opprobrium will suffice, which has led to a tendency in more modern formulations of the test to omit specific reference to the emotions defamation engenders. Take, for instance, Griffith CJ’s 1908 reference to publications calculated to ‘injure [the plaintiff’s] character or reputation’,³⁶ or, according to Lord Atkin in 1936, publications ‘tending to lower the plaintiff in the estimation of right thinking members of society generally’,³⁷ or being likely to cause or lead people to think less of the plaintiff.³⁸

It is also recognised in defamation law that damages are awarded in part to compensate for hurt to the plaintiff’s feelings, which can be seen as a likely, although far from inevitable consequence of experiencing or just anticipating the antipathy or disdain of others.

THE SECOND ELEMENT: CONSEQUENCES

In their combined response to the Attorney-General’s proposal, Australia’s primary media organisations conceded that the first enumerated test (that the publication tends to adversely affect the reputation of a person in the estimation of ordinary persons) is ‘very similar’ to that of the common law. It was the second limb (tendency to deter ordinary persons from associating or dealing with a person) that raised disquiet:

This is broader than the common law test. The proposed test could give rise to a cause of action in inappropriate circumstances, such as where a statement was made that a person is ‘very busy’ or suffering an infectious ailment, which could deter friends of that person from contacting him or her.³⁹

The concern is that the three limbs of the proposed test are presented as alternatives. No causal stipulation has been stated between the types of feelings alluded to in the first limb (antipathy and disdain) and the second. As the media identify, one person might avoid another for reasons that have nothing to do with blemishes on the latter’s reputation.

³⁵ *Parmiter v Coupland* (1840) 6 M&W 105 (Parke B).

³⁶ *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 (Griffith CJ).

³⁷ *Sim v Stretch* (1936) 52 TLR 669, 671.

³⁸ *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171 (Jordan CJ); *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632.

³⁹ Combined Media Defamation Reform Group, above n 33, 23 (para 9.1).

Similar issues relate to the third limb of the Attorney-General's test. According to this, a publication is defamatory if it tends to 'injure a person in his or her occupation, trade, office or financial credit'. Again this defines the response that marks a defamatory publication by behavioural rather than normative criteria. What mainly separates this from the second limb of the proposed test is that it is more specific: it is in the defamed person's professional life that the disassociation of others will be felt, whether in the form of customers taking their business elsewhere, suppliers refusing to provide the means to ply a trade and so on.

Even though the second and third limbs seem to cover more or less the same ground, whereas in respect to the second limb the media thought the Attorney-General's proposal was broader than the common law test, '[t]his third limb does not give rise to a cause of action in common law. It appears to have been taken from the tort of injurious falsehood'.⁴⁰

In fact the Attorney-General's third limb closely resembles another frequently quoted formulation of the common law test, this time taken from an 1882 decision of the House of Lords. According to this, a defamatory publication is one 'calculated to' (which should be understood as meaning 'likely to', rather than 'intending to') 'convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade'.⁴¹

What is more, this limb, as with the Attorney-General's other two, resonates with the statutory definitions of defamation that still existed in some Australian states at the time of the Attorney-General's suggestion. Until 2006 the Tasmanian *Defamation Act* provided thus:

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.⁴²

Until that same year Queensland had a statutory definition of defamation that was materially identical to this, as did New South Wales between 1958 and 1974.⁴³

⁴⁰ Ibid.

⁴¹ *Capital and Counties Bank Ltd v Henty* (1882) 7 App Cas 741.

⁴² *Defamation Act 1957* (Tas) s 5(1), repealed by *Defamation Act 2005* (Tas).

⁴³ The Queensland definition read:

'Any imputation concerning any person, or any member of the person's family, whether living or dead, by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other persons are likely to be induced to shun or avoid or

Once again, what is in issue here is whether there needs to be a causal connection between the two elements of defamation discussed thus far: the types of feeling a defamatory publication will tend to engender (disdain, etc) and the effects a defamation will tend to have on the defamed party. This question must be explored in relation to two types of cases, those which might be termed the ‘damage to trade’ cases, and those often referred to as the ‘shun and avoid’ cases.

THE ‘DAMAGE TO TRADE’ CASES

In relation to cases where the plaintiff’s primary concern is that it has suffered loss of trade as a result of a publication, it is generally accepted at common law that the loss of trade in question must be associated with damage to reputation. This became obvious from two decisions that identified a substantial difference between the Australia’s common law and erstwhile statutory definitions of what constituted defamation.

The first decision dates from 1910, after a company sued in Queensland over a newspaper notice which, its management claimed, meant it had gone out of business in that state and had been absorbed by the defendants.⁴⁴ The notice neither contained nor implied any criticism of the company. Nevertheless, because the action was brought under Queensland’s codified defamation law the plaintiff was able to sue for defamation.

This decision was applied 65 years later in a case concerning an imputation that an airline’s passengers faced a serious risk of hijacking by Israelis.⁴⁵ The action was heard in New South Wales after that state had reverted to the common law from a statutory definition of defamatory matter similar to Queensland’s, but the magazine that gave rise to the action was published prior

ridicule or despise the person, is called “defamatory”, and the matter of the imputation is called “defamatory matter”.’ *Defamation Act 1889* (Qld) s 4(1), repealed by *Defamation Act 2005* (Qld) s 47. The NSW definition read:

‘Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter. The imputation may be expressed either directly or by insinuation or irony.’ *Defamation Act 1958* (NSW) s 5, repealed by *Defamation Act 1974* (NSW) s 4(2).

Note that under each of these definitions it is the plaintiff who must be likely to be affected in one of the ways identified in the three subsections. It is not enough that a member of the plaintiff’s family is thus impinged upon: *Livingstone-Thomas v Associated Newspapers Ltd* (1969) 90 WN (Pt 1) (NSW) 223. The same principle applies to the common law. In fact the idea that a publication must sufficiently relate to the plaintiff is essential to defamation law. It is insufficient that a communication causes harm. A newspaper forecast that house prices in a city are about to fall might harm thousands attempting to sell their homes, but would fail any test of defamation because it would not be characterised as being about any particular person.

⁴⁴ *The Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84.

⁴⁵ *Sungrature Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 25.

to that reversion, so it was the codified definition that decided the matter.⁴⁶ The High Court of Australia held that even though the story did not suggest any shortcomings on the part of the airline it was still able to sue in defamation.

Note how in neither of these cases was it necessary for the plaintiffs to show that their trade was likely to suffer injury due to some imputation of fault on their part, for instance that they had gone out of business in Queensland because of poor management or, in the case of the airline, that it was their lax security that rendered them vulnerable to terrorists. This is at distinct odds with the common law:

However much a statement may tend to injure a man in the way of his office, profession or trade it will only be defamatory at common law if it involves some reflection upon his personal character or upon the mode in which he carries on his business, his business reputation.⁴⁷

The point is most clearly made when an imputation is taken to disparage a trader's goods but not the trader personally. When Channel Nine's *A Current Affair* carried an item about a brand of bottled water the management of the water's production company complained that the program suggested that its water was 'a risk to the health of the consumers'.⁴⁸ The action was heard in Western Australia, which applied the common law definition of defamation. It was held that such an imputation was not defamatory, since there was no imputation of misconduct or malpractice on the part of the manufacturer.⁴⁹ A charge of negligence or carelessness would have been defamatory, but as it stood the imputation 'disparaged the goods sold as distinct from the plaintiffs' conduct in relation to the selling'.⁵⁰ Even though the plaintiff may well have lost business it had no case under the common law of defamation.

THE SHUNNING AND AVOIDANCE CASES

Thus far the position seems clear: if plaintiffs are to rely on a tendency for a publication to cause some kind of professional harm, they must also show some likelihood of damage to reputation, even if it is only professional reputation, such as might be brought about by an imputation of incompetence. In other words, there must be some causation between the negative feelings the publication would tend to engender towards the plaintiff (even if it just relatively mild disrespect) and the ensuing professional damage.

⁴⁶ The codified definition of a defamatory imputation was contained in *Defamation Act 1958* (NSW), repealed by *Defamation Act 1974* (NSW) with effect from 1 July 1974, save that the operation of the 1958 Act was preserved in relation to publications preceding that date: *Defamation Act 1974* (NSW) s 4(2).

⁴⁷ *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 25.

⁴⁸ *Aqua Vital Western Australia v Swan TV* [1995] Aust Torts R 62,709.

⁴⁹ *Ibid* 62,718.

⁵⁰ *Ibid* 62,712 (Malcolm CJ).

The need for reputational damage raises particular issues when it comes to another category of formulation of the test, those that refer to a tendency for the plaintiff to be shunned or avoided outside the realm of profession or trade. In a number of cases judges seem to have suggested that a publication might be defamatory of a person on the basis of that tendency, even when the publication has no bearing on that person's moral reputation. For instance, according to Slessor LJ in 1934:

[A]s has been frequently pointed out in libel, not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on her part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on her part.⁵¹

Herein lies the start of the ambiguity in defamation law that leads to the debate I have identified as realism versus moralism. Note how this dictum from Slessor LJ is capable of two quite distinct interpretations. The first is that a publication can be considered defamatory of a person even though there is not the remotest possibility that any audience would consider that it imputes a blemish on that person's moral character or standing. The second is that for a publication to be defamatory there must be a tendency for it to earn the defamed person the disdain of whatever audience is considered relevant (assuming they were exposed to it), to the extent that members of that audience would seek to shun and avoid that person, *regardless of whether the publication imputes moral discredit*. In other words, under the first interpretation, the plaintiff's moral character, and what people think of that character, can be entirely irrelevant to defamation, while under the second, for defamation to arise, the plaintiff's moral character must always be, at the very least, put into doubt, even though those doubts need not be rational or proper. The first interpretation is consistent with moralism, while the latter, if correct, lends support to the contention of realists that defamation law is about what people really think, not what they should think.⁵²

So how should the moralist respond? There is a clear choice. The first is to accept the second interpretation, but identify Slessor LJ as a realist who is not supported by the weight of authority. The second is to maintain the first interpretation. For instance, it might be contended that defamation law is something more than a means to protect reputation. While it will no doubt be conceded that, in the vast majority of cases, the law is concerned with protection of a person's good name, it may be claimed that occasionally it will offer reparation for something other than damage to reputation.

⁵¹ *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587.

⁵² For instance, Fricke, above n 15, 10.

Lawrence McNamara, by tracing the roots of the modern common law to its roots in pre-modern England, has argued that it is a mistake to think of defamation law as always having been concerned solely with reputation. According to him, something resembling today's law of defamation only began to emerge in the seventeenth century. But at that stage 'the virtues that constituted moral goodness were not the point of reference for determining whether a slur would be actionable at common law.'⁵³ It was not until the early nineteenth century that 'the *raison d'être* for the tort of defamation became the protection of reputation, rather than the maintenance of public peace or social order as it had been in the past'.⁵⁴

A particular change identified by McNamara is from a restrictive category-based test for actionability to a broader and general test that is intended to protect reputation. This shift has already been identified above in relation to the types of feelings a defamatory publication will tend to engender. Thus older formulations often speak of exposure to hatred, contempt or ridicule, while more recently the trend has been towards less specific language to capture the concept of reputational damage, such as thinking less of a person. Even so, the old category-based tests have never been entirely expunged from the law, so that elements still linger. They were particularly evident in the common law of slander, which continued to apply in parts of Australia until 2006. What is more, the old, category-specific approach continues to shape the way in which we define defamation.

For instance, it has long been held that a publication will be defamatory if it tends to cause a person to be shunned and avoided specifically on the basis that that person has been imputed to carry certain communicable diseases.⁵⁵ In many cases the disease in question was sexually transmitted, with obvious implications for moral reputation. But the rule also applied to certain other diseases which were recognised as unshameful. Similarly, there are authorities to the effect that it is defamatory to impute insanity, even though the connection between insanity and immorality has long been questioned (meaning that the mad are not always thought of as bad, just as the bad are not necessarily regarded as mad). Imputations of illness, whether physical or mental, rarely form the basis of defamation actions now. Indeed, according to the Faulks Committee on Defamation, such cases have not arisen in the UK for 'hundreds of years'.⁵⁶ Even so, there is no clear authority that they have ceased to be defamatory.

So is Slessor LJ's statement no more than an allusion to the insanity or disease cases? If that were so, it would be relatively uncontroversial, since it could be interpreted as favouring neither

⁵³ Lawrence McNamara, *Reputation and Defamation* (2007), 84.

⁵⁴ *Ibid* 92.

⁵⁵ For instance, *Simpson v The Press Publishing Co* (1900) 67 NYS 401.

⁵⁶ *Report of the Committee on Defamation*, above n 32, 257 (Appendix V).

realism nor moralism when it comes to the category of cases involving reputation, into which the vast majority of contemporary defamation actions fall.

But the circumstances of Slesser LJ's statement clearly lend weight to realism. He was speaking in 1934, from his position as an English Court of Appeal judge hearing the notorious case of *Youssoupoff v Metro-Goldwyn-Mayer*. This defamation action was brought by a niece and cousin of the late Tsar against the studio behind a recently released film based on the life of Rasputin.⁵⁷ She claimed that one of the film's characters, Princess Natasha, would be understood to represent her, and that Natasha was depicted as being seduced by Rasputin. The plaintiff consequently claimed that the film suggested that she, the plaintiff, had thus been seduced. The jury found the film to be defamatory of the plaintiff and it is thought close to US\$1 million was paid to her in agreed damages, a massive sum in 1934.⁵⁸

Youssoupoff concerns imputations of neither disease nor insanity. Since it is generally accepted that, outside those particular categories of imputation, a publication can be defamatory only if there is some tendency towards reputational harm, then it might seem that Slesser LJ is supporting realism: his position must be that a publication that tends to denigrate reputation may be defamatory, even if it does not impute certain diseases or insanity, and even if the denigration of reputation is immoral, irrational or both.

This interpretation is particularly plausible given the circumstances Slesser LJ found himself in. When the defence in *Youssoupoff* appealed to the Court of Appeal there is some doubt as to the exact nature of their complaint, but certain points are relatively clear. At the time it was yet to be decided whether defamation by cinema constituted libel or slander. The defence argued the latter, meaning that the general rule in slander would apply, whereby plaintiffs only succeed if they can demonstrate special damage. This would help the defence, since the plaintiff had proved no such loss.

But even if the defence's argument had succeeded, and defamation by film constituted not libel but slander, the plaintiff might nevertheless have recovered damages. She could have sought to rely on one of the exceptions to the general requirement in slander that special damage be proved. The most obvious exception to plead would have been the *Slander of Women Act 1891*, whereby a woman imputed to be unchaste required no proof of special damage (an illustration of the imputation-specific nature of slander). It was therefore in the plaintiff's interest to prove

⁵⁷ *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

⁵⁸ *The New York Times*, 11 August 1934, 16.

that the film conveyed an imputation of unchastity, while it helped the defendants to rebut that claim.

The defence apparently sought to do this using two arguments. The first was that the character in the film would not be understood to be the plaintiff. But if they failed on identification, their secondary claim was that the film portrayed the character as raped by Rasputin, rather than seduced. While seduction might suggest some compliance on the woman's part, and therefore unchastity, rape does not. Accordingly, ran the defence's argument, the plaintiff, having been portrayed as raped, rather than unchaste, could not rely on the *Slander of Women Act*, and would therefore have to prove special damages, meaning that she had no case, assuming always that defamation by film constitutes slander, not libel.

Note, then, that the defence did not need to argue that an imputation of rape cannot be defamatory of the victim. But this is how the defendant's case has been characterised, and it has been claimed that it was rejected by the Court of Appeal. It is the belief that that court held that a woman is potentially defamed by a report that she has been raped which led G L Fricke, an enthusiastic realist, to welcome the decision as 'enlightened and realistic':

What seems to emerge, then from *Youssouppoff's Case* is an abandonment of the right-thinking-member-of-the-community touchstone. Their Lordships refuse to make an *a priori* speculation about what right-thinking members of the community *would* think of a woman allegedly raped – more or less as an intellectual exercise in ethics – but ask themselves rather “how in fact do most people react to such information?” This is a sound approach on principle.

The logic of Fricke's position is clear. Since rape is by definition involuntary, it would be irrational to think less of anyone who falls victim to it. Judges, as reasonable people, will see this irrationality, so if they find that the imputation has a capacity to defame then it must be because they are deciding the matter by reference to social prejudices.

But Fricke exaggerates the extent to which this case supports realism. The problem lies in the assumption that the judges considered denigration of the plaintiff's character on the basis of an imputed rape as immoral or irrational. According to Kim Treiger-Bar-Am, who has conducted perhaps the most comprehensive examination of *Youssouppoff*, including contemporary accounts, they did not. In fact, she claims that the incapacity of a report of rape to defame the imputed victim was never even argued by the defence. Rather, the imputation of a sexual association between Rasputin and the plaintiff, whether rape or seduction, was considered obviously defamatory of the latter by all of the legal players in the case, including the judges and the defence. What the latter was denying was that a report of rape imputes unchastity, not that it is

non-defamatory. As put by Treiger-Bar-Am, '[t]he value of a woman's sexual purity was (and perhaps is) so high, that the subject was taken as self-evident – and unspeakable'. Indeed its unspeakability is illustrated, quite literally, by Scrutton LJ. For whatever reason, he thought that the defence's point was that an imputation of rape does not defame the victim. His irritation with that claim is clear: 'I really have no language to express my opinion of that argument'. No more is said on the issue.

As for the other judges, Treiger-Bar-Am describes how the trial judge cited Shakespeare as authority to the effect that a raped woman has lost her chastity and the *Oxford English Dictionary* as evidence that chastity means 'purity from unlawful sexual intercourse': 'a rape victim, then, on Avery J's (unstated) view, is impure and guilty of unlawful sexual conduct'.

Treiger-Bar-Am also claims that when it comes to the Court of Appeal, 'the judges' reasoning and language reveal that they imbue the standard with hints of moral blameworthiness'. For instance, Scrutton and Slesser LJ 'slip from using the term "raped" to the term "ravished", which implies seduction, consent and hence immorality'.

Treiger-Bar-Am might have also referred to instances, even in more recent times, where women have judicially been held accountable (at least in part) for their rape. And even if the reader considers it implausible that the English Court of Appeal would do the same in the 1930s, thought might be given to the idea that a person's moral worth is not necessarily understood as dependant on their moral blameworthiness. As pointed out by McNamara, blameworthiness 'does not adequately capture the spectrum of criteria for moral judgment that the court perceives and recognises. A negative moral judgment may be made on the basis of the plaintiff's own morally egregious conduct, and sometimes on the basis of the morally egregious conduct of another'.⁵⁹ Thus he is able to conclude from *Youssouff*:

In sum, it was not the *absence* of moral *fault* that was determinative of actionability, but the *diminution* of moral *worth*. That diminution may flow from something for which the plaintiff bears responsibility, or it may flow from some other circumstance.⁶⁰

So does *Youssouff* support the realists in their claim that defamation is decided purely by social standards, regardless of their moral correctness? Certainly it does nothing to undermine that claim. But on the other hand it is not inconsistent with moralism. What is lacking from the Court of Appeal is censure of the behaviour which was alleged to be the consequence of the film, namely the shunning and avoidance of the plaintiff. In the absence of a clear statement of

⁵⁹ Lawrence McNamara, above n 53, 147.

⁶⁰ Ibid 148.

methodology by which the issue of capacity to defame is established, this is what is needed to unambiguously undermine moralism. But the judges did not decry disparagement of a rape victim because they did not consider it without merit.

So far this is good news for moralism. But there remains a problem: Slessor LJ's claim that a publication can defame if it 'tends to make the plaintiff be shunned and avoided and that without any moral discredit on her part'.⁶¹ A careful reading of his rather ambiguous judgment suggests that this observation was prompted not in response to an argument on capacity when it comes to an imputation of rape, but rather to a complaint from the defence that the trial judge had invited the jury to consider a publication that conveyed such an imputation as on par with one that imputes seduction. The trial judge was quoted as telling the jury that for a publisher to say of a woman 'that she has been either seduced or ravished by such a villain as Rasputin is, of course, the worst and most vile libel that could be imagined'. Apparently the defence's point was that the jury should not have been instructed to treat imputations of rape and seduction as the same when it came to deciding quantum of damages, since an allegation of complicity is more serious.

This being so, perhaps Slessor LJ can be paraphrased thus: quantum of damages should be determined by factors other than the extent to which moral discredit has been imputed to the plaintiff, given that in certain circumstances (imputation of certain diseases and insanity) a person can be defamed without any moral discredit having been conveyed. If this is Slessor LJ's point then it is a bold one, given the axiomatic connection between damages and disparagement of character. It is nevertheless rational, if not altogether credible, given the possibility that defamation law is not concerned exclusively with damage to reputation.

Whatever Slessor LJ's point may have been, he expresses it with an ambiguity typical of judges when it comes to expressing the precise nature of defamation. The overall obscurity of *Youssoupoff* is not helped by Scrutton LJ. First, he declined to articulate his objection to the arguments raised by the defence. Secondly, he omitted to endorse the proposition that a publication can be defined as defamatory on the basis that it tends to lead to shunning or avoidance. He preferred to define defamation as 'a false statement about a man to his discredit'. Since Scrutton LJ has no time for the argument that the plaintiff was not defamed, and since he understands defamation in terms of damage to reputation, it logically follows that a suggestion that a woman has been raped must discredit her. But the realist/moralist ambiguity exists here as with Slessor LJ. Is Scrutton LJ saying that the discredit suffered by a woman as a result of a report of rape must have moral and rational foundation for the report to be defamatory, or is he

⁶¹ *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587.

merely suggesting that it is enough that she was disparaged, even if this response is immoral or irrational? If we are to find certain support for moralism or realism, I suggest we must look elsewhere than *Yousoupoff*.

THE RULES OF EVIDENCE RELATING TO CONSEQUENCES

So far I have identified some of the consequences that tend to flow from a defamatory publication: damage to reputation, harm in the economic sphere (business, trade, etc) and shunning or avoidance. But note that there need only be a tendency for these consequences to arise. Plaintiffs are not obliged to produce evidence that a defamatory publication has adversely affected them. They are not required to produce evidence in support of special damages, although they are free to do so, for instance if they feel that a publication has led to a loss of business. Nor are they required to produce evidence of any non-financial loss, such as some degree of social ostracism, displays of disrespect, and so on.

Under the common law the situation was more complicated, due to the historic distinction between libel and slander. Whether a defamatory message constitutes a libel or a slander depends on the means used to communicate it. Those communicated by means of some durable medium, such as the written word, drawn or printed image, effigy, film, video tape or computer disk are libels. Those that existed in only a fleeting form, such as unrecorded spoken words or sounds, gestures, etc, are slanders. Under the common law, those suing for libel remained exempt from the rule that no actual harm need be proved, while those suing for slander must generally prove some ‘actual and temporal loss which has, in fact, occurred’.⁶² Even so, broad exemptions apply to this rule: such evidence is not required in the case of communications imputing that the plaintiff is guilty of serious crime,⁶³ has a certain type of communicable disease,⁶⁴ or is unfit for or is guilty of misconduct in an office, profession or trade in which the plaintiff is currently engaged.⁶⁵

The common law distinction between libel and slander has been abolished in New South Wales, the ACT and the Northern Territory, as well as the code states, for a number of years. It continued to apply in Victoria, South Australia and Western Australia until 2006 when those states fell in line with the rest of the country.⁶⁶ Now all defamations throughout Australia are

⁶² *Ratcliffe v Evans* [1892] 2 QB 524. The loss will normally be financial, or at least capable of assessment in monetary terms: *Chakravarti v Advertiser Newspapers* [1998] HCA 37, 98 (Gaudron, Gummow JJ).

⁶³ *Jones v Jones* [1916] 2 AC 481, 490 (Viscount Haldane).

⁶⁴ *Ibid* 507 (Lord Wrenbury).

⁶⁵ *Ibid* 500 (Lord Sumner).

⁶⁶ Even in those States statutory intervention meant that broadcast defamations were categorised as libels rather than slanders: *Wainer v Rippon* (1979) 42 FLR 44; *Broadcasting Services Act 1992* (Cth) s 206.

effectively treated as libels, meaning that plaintiffs need not adduce evidence of harm occasioned by the publication.

The distinction between libel and slander was little more than an accident of history and many had long favoured its abolition throughout Australia. While this is not surprising, what is more striking is the high degree of support shown towards the rule that actual harm need not be shown. Obviously the detriment that flows from damage to reputation will often not be of a type that is quantifiable, such as a downturn in business, loss of a job, etc. But under the common law of libel it is not necessary to prove *any* loss of reputation, even of the kind that might not lead to quantifiable loss, such as denial of social opportunities and so on.

If this is the case, exactly how ‘realist’ is defamation law? If the law is interested in how people respond to publications, as opposed to how they *should* respond to them, then why not require plaintiffs to produce evidence of real reactions? Even so, the rule is generally justified not by recourse to moralism but by pointing out the hardship plaintiffs would face if evidence of loss occasioned by damage to reputation were needed. Take, for instance, the views of a Sydney defamation solicitor with a practice that caters extensively for publishers as well as plaintiffs:

I think the rule [that proof of actual damage is not required] is one of the best things about the law. It’s impossible. Every plaintiff is hard put to find a witness who will say “I read that and thought less of you” because they don’t want to offend the person. If someone is genuinely defamed, it’s not easy to say “well that’s it, their life has been cut off dead”. It’s slow torture. A client of mine had been defamed after it was reported, quite incorrectly, that he was under investigation. A woman who had heard these allegations told him she had never said anything about them, but it turns out she sent an e-mail around saying my client must not be employed until their outcome was known. It’s very difficult to prove you’ve suffered loss. In another case my client didn’t claim special damages because we would have had to open all his books to teams of accountants.

Sydney defamation solicitor in private practice

However persuasive this may be when it comes to the absence of any requirement to prove actual loss, it does not explain why, generally speaking, plaintiffs are not even permitted to call evidence as to how a potentially defamatory publication was understood, or what conclusions were reached in relation to the plaintiff’s character as a result thereof. What is more, defendants are not allowed to call evidence to the effect that the plaintiffs’ reputation was *not* damaged in order to prove that the publication was not defamatory. For instance, it is not permissible to call evidence that the readership of the publication in question did not believe the truth of any allegation contained in it.⁶⁷

⁶⁷ *Hough v London Express Newspaper Ltd* [1940] 2 KB 507.

What emerges from the rules of evidence relating to the consequences that tend to flow from a defamatory publication demonstrate that it is clearly a mistake to understand the common law of defamation as based around some simple cause-effect correlation, whereby plaintiffs are able to bring a defamation action if they can show that a certain publication caused them some kind of loss. While this does not mean that the moralists are right, it would seem to be inconsistent with a law straightforwardly concerned with the real-world effects of publications.

THE THIRD ELEMENT: AUDIENCE

Having considered the types of feelings a defamatory publication will tend to provoke, as well as the likely consequences for the defamed, the next issue to consider is who must be likely to experience these feelings towards the plaintiff. And who must inflict whatever ill-effects are specified for the plaintiff?

In their combined response to the Attorney-General's proposal, Australia's primary media organisations conceded that the first enumerated test (that the publication adversely affects the reputation of a person in the estimation of ordinary persons) is 'very similar' to that of the common law, which they described as 'whether the matter would be likely to cause the ordinary reasonable recipient of the communication to think less of the plaintiff'.⁶⁸ Even so, two distinctions are immediately apparent: the media's reference to recipients of the communication, something absent from the Attorney-General's proposal, plus the media's use of the adjective 'reasonable', again something omitted by the Attorney-General. It is to these two issues that we now turn.

A HYPOTHETICAL AUDIENCE

If the law were concerned with the real consequences of a publication, it would seem obvious to consider only the responses of those who actually saw or heard it. But the general rule in defamation is that the relevant audience is hypothetical. To this extent the media's response to the Attorney-General's proposed definition is misleading: the common law test is not 'whether the matter would be likely to cause the ordinary reasonable *recipient of the communication* to think less of the plaintiff'.⁶⁹ The law's hypothetical audience includes those who were not and in the normal cause of events would never have been exposed to the publication or any allegations contained therein. Defamation trials are not an exercise in canvassing the responses of a real and naturally constituted audience. Australian law does not even permit defamation to be determined by the calling of evidence from those who saw or heard the publication in order to

⁶⁸ Combined Media Defamation Reform Group, above n 33, 23 (para 9.1).

⁶⁹ Ibid, emphasis added.

establish whether it affected their view of the plaintiff and what, if anything, they did or intended to do about it. What is more, generally speaking, the law does not even require members of the publication's actual audience to give evidence as to what they took it to mean.

There is one exception to the last point. According to the legal innuendo rule, if a plaintiff claims that a publication would bear a defamatory meaning only to people who have some kind of special knowledge (what is termed a legal innuendo meaning) then the plaintiff must prove that at least one such person was directly exposed to the publication (and otherwise than by the plaintiff).

The legal innuendo rule avoids some of the most ludicrous outcomes the law's disregard for a publication's actual audience could engender. Imagine, for instance, a situation in which a notice in a foreign language is displayed on a board visible only to those who do not understand that language. Similarly a publication might contain technical information which, though meaningless to the general public, would signify a great deal to the cognoscenti. An example of the latter is where details of drugs prescribed by a doctor to sick patients would impute gross negligence in the minds of other medical professionals, yet would go over the head of the lay reader. As a result of the innuendo rule the maligned doctor should receive damages only if the publication came to the attention of someone who might understand it to mean the prescription of inappropriate medicine, just as the person defamed by the foreign language notice would only recover if it had been read and understood.

The special knowledge that give rise to the innuendo meaning need not be technical or linguistic in nature. For instance, in *Morgan v Odhams Press* a newspaper article in Britain reported that a named woman had been kidnapped. An acquaintance of the woman, who was not mentioned in the article, was able to claim on the basis that he would be mistaken for the alleged kidnapper. He did this by calling witnesses who had seen him with the woman at the time the kidnapping was reported to have occurred and had read the article in question. Such witnesses had deduced, mistakenly it transpired, that the plaintiff was the abductor.⁷⁰ Without such witnesses it is hard to see how the man's claim would have succeeded, since the article would otherwise not have implicated him.

The legal innuendo rule is only a partial exception to the principle that the reactions of the actual audience do not determine whether the plaintiff has been defamed. Although plaintiffs, if pleading a legal innuendo meaning, must adduce evidence that at least one audience member, prior to exposure to the message, was aware of the special knowledge giving rise to that

⁷⁰ *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1263.

innuendo meaning, they need not prove that that person actually understood the publication to bear that innuendo meaning, although they may do so if they wish. But even if they do, such evidence can only be used to determine denotative meaning. Taking *Morgan* as an illustration, once the plaintiff has proved that at least one person among the report's readership had the special knowledge necessary to understand it to impute that he was the kidnapper (that he was with the woman at the specified time of kidnap), that is enough. The plaintiff did not have to show that that reader therefore took him to be the kidnapper. Nor does the plaintiff need to prove that the reader thought less of him for kidnapping her. As stated in a work on defamation frequently used by Australian practitioners, '[t]he question of whether true innuendoes published to a small number of people "in-the-know" are defamatory is to be determined by general community standards and not by the sectional standards of that group'.⁷¹

THE ORDINARY REASONABLE PERSON

If the law is interested in a hypothetical, as opposed to real audience, who comprises that audience? The media use two adjectives to describe its constituents: 'ordinary' and 'reasonable'. The Attorney-General used just one: 'ordinary'. No attention was drawn to this omission by the media. So is attention to its inclusion just an exercise in semantic pedantry?

Both 'ordinary' and 'reasonable' have normative qualities: to call someone ordinary can, depending on context and political consciousness, be either affirming or disparaging. But there is also a quantitative aspect to 'ordinary', a word that might be understood to mean 'majority' or 'average'. This is lacking from 'reasonable', a descriptor that is more unambiguously normative.

Again the realist-moralist debate emerges. Note how the phrase 'ordinary reasonable recipient' is open to (at least) two interpretations. First, a silent 'and' might be read between the two adjectives: the reference is to the recipient who is both ordinary *and* reasonable. If ordinary people are seen as invariably reasonable then no difficulties emerge, but then the latter descriptor is verbiage, which raises the question why the media bothered to introduce it when the Attorney-General did not.

This leads to the second and more coherent interpretation. If it is envisaged that reasonable recipients of the communication might differ as to how they respond to the publication, to the extent that some would think less of the plaintiff while others would not, then the relevant response is that of those reasonable people who are also ordinary. In other words, defamation

⁷¹ LexisNexis Australia, *Australian Defamation Law & Practice*, ¶ 3135.

law is determined by the values of ordinary, as opposed to extraordinary, reasonable people. Precisely what this means depends on how ‘ordinary’ is understood: it might be that we are to take the reaction of the majority of reasonable people, or that the range of responses among reasonable people should be averaged out with the mean being the determinant. Alternatively, ‘ordinary’ might not be intended as a quantifier at all, but could bear some normative meaning. Certainly the term ‘ordinary reasonable people’ is ambiguous to the point of being confusing.

Whoever the media had in mind, it is clear that the responses of unreasonable people are irrelevant. Taking the media submission literally, unreasonable people can be discounted even if they would constitute the vast majority or entirety of the publication’s audience, or indeed the population. Such a reading of the test, by which defamation is decided ideally, might be said to reflect a position of ‘absolute’ moralism. This stands in starkest contrast with absolute realism, under which no consideration is given to the morality of the various possible responses to the publication.

Both absolutes seem somewhat strained, since neither accounts for the inclusion of both adjectives. What is more, absolute realism, in the sense that a publication is defamatory just because someone somewhere might think less of the plaintiff, is wholly untenable. The point was most pithily expressed by one American commentator:

The fact that the plaintiff is lowered in the eyes of all the members of the Beneficial Burglars’ Society by a statement that his reports have greatly reduced the number of professional burglars in active practice, is not defamatory of the plaintiff’.⁷²

This suggests that some moral criteria determine the parameters of the relevant audience, yet it does not answer what a court is meant to do if its preferred moral response to the act or condition imputed by a publication stands in contrast with that which it perceives as commonplace in society. That is a principal issue explored in this thesis.

For now it is interesting to note how often the description of defamation law’s hypothetical audience uses both ‘ordinary’ and ‘reasonable’ as adjectives. All eight defamation judges and 28 defamation law practitioners interviewed for this thesis readily accepted the phrase ‘ordinary reasonable people’ as accurately identifying the relevant audience. Even so, it must be noted that in the case law variants on this phrase frequently appear. First, it is commonplace for the audience to be either singularised or gendered, although never into the feminine, it would seem. Thus we frequently find reference to the ‘ordinary reasonable man’. Secondly, one or other of the adjectives is often omitted altogether, or is replaced by other adjectives of varying

⁷² Laurence H Eldredge, *Law of Defamation* (1978), ¶ 7.

synonymity, such as ‘average’, ‘right-thinking’ or ‘decent’.⁷³ It is typical of defamation cases and commentary that these variants go unremarked, which is surprising given the potential for a party’s case to stand or fall by them.

THE PROCEDURE FOR DECIDING DEFAMATION

Some preliminary points have now been made about the formulation of the test for defamation. Attention now turns to the procedure by which a court determines what is defamatory. What might that reveal about the relevance of empirical research to deciding if someone has been defamed?

Unless the point is conceded by the defence, every defamation action that reaches trial will involve a court in determining whether the publication in issue is defamatory. This is treated as a factual rather than a legal question, meaning it will be determined by the adjudicator of fact. Historically this was a jury. Since jurors are selected from the general population relatively randomly, and because lawyers are not even permitted to serve on juries, this suggests that the test for defamation is to be decided by social rather than legal norms. In other words, it would appear that the law seeks to answer the defamation question by means of a representative, albeit small, sample of the adult population.

All of this implies realism, an attempt to reflect what ‘ordinary people’ think. But a closer examination of procedure reveals that the issue is somewhat less clear. First, jurors are used not so much as a sample of public opinion as experts in public opinion. They are not asked for their personal response to the publication in question, from which might be inferred the general response of the community, but instead they are asked to consider the likely responses of ‘ordinary reasonable people’. This policy is open to two interpretations. The first, moralist interpretation is that randomly-selected representatives of the public are considered to be better suited to determining morality than are judges. Given that in almost every other area of civil law

⁷³ For instance, *Slatyer v Daily Telegraph Newspaper Co Ltd* (1907) 7 SR (NSW) 488, 504 (‘right minded reader of average intelligence’); *Sim v Stretch* (1936) 52 TLR 669, 671 (‘right-thinking members of society generally’); *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 172 (‘ordinary decent folk in the community’); *Hyams v Peterson* [1991] 3 NZLR 648, 657 (‘ordinary, reasonable, fair-minded readers’); *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488, 494 (‘ordinary, sensible readers’); *Baffsky v John Fairfax & Sons* (1991) 106 FLR 21, 30 (‘average reader’); *Awa v Independent News Auckland* [1995] 3 NZLR 701, 705 (‘ordinary average reader’); *Chapman v Allan* (1999) 74 SASR 274, 291 (‘ordinary man and woman’).

normative questions (such as what discharges a duty of care in negligence) are entrusted to judges, this seems implausible.

The realist interpretation is more credible. Perhaps the rule arises from the realisation that, given their small size, there is a reasonable likelihood of juries not accurately representing public opinion. It also seems to arise from a perception of jurors as dwelling among the general public, in contrast to the cloistered lives of judges. Even if a juror is not the fabled man on the Clapham omnibus, at least the juror might sit next to him. Thus, the realist might argue, defamation juries exist so as to provide the court with their first-hand experience of how most people think. Certainly this was the explanation for the rule most frequently given by the judges and practitioners interviewed for this thesis.

Thus far, defamation trial procedure still supports realism. What challenges realism is the existence, alongside the factual issue of whether a publication is defamatory, of the question as to whether it is *capable* of being defamatory. This is often described as legal, or at least quasi-legal, in nature. Either way, it will always be a matter for judges. Often the defence will not challenge a publication on the grounds of capacity and the issue will not be addressed. But on other occasions it will.

There are two basic scenarios that will give rise to a court considering the question of whether a publication is in law capable of being defamatory. The first is where a judge or jury has already reached a finding on whether the publication is in fact defamatory. If the finding is that it is defamatory, the defendant might appeal to a higher court to consider the issue of capacity so as to attempt to overturn the verdict of the adjudicator of fact.⁷⁴ If the finding is that it is not defamatory, then this can be set aside, even though the adjudicator of fact was properly directed, provided the finding is considered unreasonable.⁷⁵ In this way it is possible for the judiciary to determine, in effect, that a publication is not capable of being not defamatory.

The other situation is where the defendant applies for legal capacity to be determined as a preliminary issue.⁷⁶ If a publication is not legally capable of being defamatory then there is no

⁷⁴ Once the adjudicator of fact has determined that a publication is or is not defamatory, the grounds on which such a decision can be overturned are restricted. If the publication is considered capable of a defamatory meaning and the adjudicator of fact, properly directed, has found that the publication is in fact defamatory then there is nothing the defence can do to overturn the verdict: Milmo and Rogers, above n 28, 1292 (para 38.19).

⁷⁵ *Australian Newspaper v Bennett* [1894] AC 284, 287.

⁷⁶ The process by which a defendant can call on a court to consider capacity as a preliminary issue varies from state to state. In New South Wales and Victoria there can be a separate preliminary determination about whether an imputation is capable of being conveyed or whether a meaning is defamatory: *Uniform Civil Procedure Rules 2005* (NSW) r 28.02; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r

need for the issue to then go to the arbiter of fact, whether that be a jury or a judge substituting for the traditional role of the jury. If, however, the publication is deemed capable of being defamatory then the plaintiff has cleared only the first of two hurdles. The publication will then go on to be considered by a judge or jury to decide whether it is in fact defamatory. The test as to whether a publication is capable of being defamatory is whether a jury could (not would) reasonably resolve the issue of whether the publication is defamatory in the plaintiff's favour.⁷⁷ A finding of a jury may only be overturned if it is one that no reasonable jury properly directed could reach.⁷⁸

The judicial power to determine capacity to defame before or after the matter is handed over to the arbiter of fact is capable of being understood as consistent with moralism or realism. For the realist, it is a safeguard for the defendant, preventing or resolving situations where adjudicators of fact manifestly fail in their task of assessing public opinion. For the moralist, however, capacity hearings can be interpreted as an opportunity for the court to ensure that the jury do not get to consider a publication that no reasonable person could consider defamatory, meaning that the relevant response to the publication (such as thinking less of the plaintiff) fails to meet some minimum threshold in terms of reasonableness.

SUMMARY

This chapter has looked generally at the role of empiricism in defamation law. What is clear is that that role is limited. Even so, the evidence supporting moralism is tenuous. Moralism is supported by the hypothetical nature of the law's relevant audience, frequently described as the 'ordinary reasonable person'. On the other hand, it is not easy for moralists to account for the

47.04. This could be applied for by parties pleading the imputation or their opponents: Eg *Parry v Express Newspapers* [1995] EWCA (unreported, McCowan, Saville and Ward JJ, 9 March 1995). In a study of defamation actions in New South Wales, Andrew Kenyon found that this mechanism has frequently been used for almost as long as the state's Defamation List has existed: Andrew T Kenyon, *Defamation: Comparative Law and Practice* (2006) 37. Kenyon also discovered that in Victoria '[r]ulings have been made, although there has been some question whether this is appropriate because the trial court has not been bound to any pleaded meanings under the traditional Victorian approach: *ibid.* Defendants can also apply to strike out the particulars of claim. To do so they need a plain and obvious case: *ibid.* Parts of pleadings can also be struck out under general provisions of court rules or the court's inherent jurisdiction: *Uniform Civil Procedure Rules 2005* (NSW) r 14.28; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 23.02. Normal summary judgment procedures traditionally do not apply: Kenyon (above), 38.

⁷⁷ *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1168; *Hyams v Peterson* [1991] 3 NZLR 648, 655-6; *Ballantyne v TVNZ* [1992] 3 NZLR 455, 460.

⁷⁸ *John Fairfax Publications Pty Ltd v Rivkin* 201 ALR 77 (2003), 79 (Gleeson CJ) and 130 (Callinan J, Heydon J agreeing).

traditional use of juries as the law's agent in determining defamation, as well as the common reference to ordinariness in the test.

In order to pursue the debate further, a much closer examination is needed of the way the authorities, especially judges, have described 'ordinary reasonable people'. Who are they? And, in particular, how ordinary or reasonable are they?

CHAPTER 3: REFINING THE TEST

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INTRODUCTION

The last chapter outlined the test for defamation and introduced some of the ambiguities it contains. This chapter explores in more depth what various judges have understood the test to be, while the next chapter looks at some of the outcomes when the test has been implemented. In each case the fundamental purpose behind the enquiry is to eke out the role of empiricism in defamation law. In other words, to what extent are courts concerned with assessing popular, as opposed to ideal, attitudes?

The emphasis in this chapter, as in this thesis as a whole, is on the element of the test for defamation that defines the relevant audience, meaning the group of people whose interpretations, values and opinions should be taken into account when deciding what is defamatory. We start, therefore, with a more thorough examination of how that group has been described by judges over the course of the last century and more.

THE RELEVANT AUDIENCE IN PRECEDENT

Empiricism is least relevant to determining what is defamatory when some normative criterion defines the population whose opinions count. Many formulations of the test for defamation contain some transparently normative descriptors for that audience, such as ‘right-thinking’⁷⁹ or ‘decent.’⁸⁰ These terms are increasingly absent from recent formulations and ‘reasonable’ now seems the preferred term. One possible explanation is that the former have come to represent particular moral positions. For instance, ‘decency’ might be taken as an allusion to conservative sexual morality.

Possibly ‘right thinking’ carries similar conservative connotations. In 1975 the Faulks Committee on Defamation recommended to the UK Parliament that defamation should be statutorily defined.⁸¹ Building on the Lord Atkin’s 1936 dictum in *Sim v Stretch*,⁸² the majority initially considered recommending that defamation be defined in terms of matter which injures a person’s credit ‘with right-thinking persons’.⁸³ But this was rejected on the basis that phrases common at the time of Lord Atkin’s speech had, by 1975, ‘acquired inflections that convey emotive suggestions’ which Lord Atkin and his contemporaries might reject. In particular, ‘right-thinking’ could ‘have political flavour’. What this means is unclear: perhaps it was feared that such language might be confused with a mandate for ‘right-wing thinking’. Whatever was troubling the Committee, it chose instead to recommend a statutory definition that referred to ‘the estimation of reasonable people generally’.⁸⁴

But another (related) objection to terms such as ‘decency’ and ‘right-thinking’ is that they sound too exclusive. Given that Australia has tended since European invasion towards egalitarian values, one might expect a certain ‘democratization’ of defamation law, meaning that it should increasingly reflect popular views. This being so, a shift in emphasis towards the determinative audience’s ordinariness, and therefore inclusiveness, would follow.

The relative exclusiveness of the term ‘right-thinking’ can be illustrated by a High Court decision of 1908, which criticised the use of the expression. A newspaper had referred to a

⁷⁹ *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1, 7 (Griffith CJ); *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467, 479 (Greer LJ); *Sim v Stretch* (1936) 52 TLR 669, 671 (Lord Atkin).

⁸⁰ *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 172 (Jordan CJ).

⁸¹ *Report of the Committee on Defamation*, above n 32.

⁸² ‘Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?’: *Sim v Stretch* (1936) 52 TLR 669, 671.

⁸³ *Report of the Committee on Defamation*, above n 32, 15.

⁸⁴ *Ibid.*

parliamentary candidate as ‘socialistic’.⁸⁵ The issue was whether this implied he favoured the confiscation of all property, a charge he clearly considered defamatory. Street J in the New South Wales Supreme Court had ruled that the matter was not to be decided by any construction a ‘perverse minded or unreasonable reader’ might put on the newspaper article, but rather by asking whether ‘any right minded reader of average intelligence’ could reasonably interpret the newspaper article in a way which defamed the plaintiff. Since Street J answered no, the plaintiff had failed to show that the words complained of were calculated to injure his reputation ‘in the opinion of right thinking members of the community’.⁸⁶

On appeal to the High Court, Griffith CJ commented that the only criticism he had of Street J’s decision was the use of the phrase ‘right thinking’. This, he said, had ‘unfortunately come to have an ambiguous meaning’. However, ‘read in the light of the context, it obviously means a man of fair average intelligence’ and as such was acceptable.⁸⁷

Precisely what ambiguity arose with ‘right thinking’ is not spelt out. One possibility is that the judge was referring to ‘right thinking’ as meaning a person of exceptional virtue, as opposed to ‘right thinking’ in the sense of ordinarily rational. Griffith CJ, an apparent realist, seems to have preferred the term to be given the latter meaning. Thus he is obviously more comfortable with the phrase ‘man of fair average intelligence’, which probably equates, more or less, with ‘average man’.

If one were to imagine a spectrum of formulations of the common law test, between at the one end those most favouring realism and therefore empiricism in defamation law, and at the other those most favouring moralism and therefore rendering empiricism redundant, Griffith CJ’s ‘man of fair average intelligence’ might be put towards the realist end, since empirical methods are frequently used to tell us what the ‘average man’ thinks, while ‘right-thinking’ (as in ‘virtuous’) and ‘decent’ clearly sit towards the other.

What requires particular attention is the position on this spectrum of tests that allude to reasonableness. The expression ‘ordinary reasonable person’, which I used extensively in the empirical work that forms the bulk of this thesis, was accepted by all the judges and lawyers I interviewed as an apt description of members of the audience that determines defamation under the common law. What is more, reasonableness receives considerable emphasis in the judgment most often cited by my legally qualified interviewees when it came to describing the common

⁸⁵ *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1.

⁸⁶ *Slatyer v Daily Telegraph Newspaper Co Ltd* (1907) 7 SR (NSW) 488, 504.

⁸⁷ *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1, 7.

law audience.⁸⁸ That judgment, delivered in 1980 by New South Wales Supreme Court judge Hunt J, brings together most of the classic terms used to describe that audience. But first, Hunt J declares that '[i]n deciding whether the matter complained of is capable of conveying to the ordinary reasonable reader the imputations relied upon by the plaintiff, I must be guided and directed by the test of reasonableness'.⁸⁹ With that in mind, the quality of reasonableness requires close consideration.

THE TEST OF REASONABLENESS

On the one hand the use of 'reasonable' may be no more than a modernisation of the rather antiquated terms 'decent' and 'right thinking'. If so, it may be intended to bear at least some of the latter terms' exclusiveness, a reference to something above the commonplace. But reasonableness can also be understood as an inclusive attribute. No doubt this is partly because, in common parlance, 'reasonable' is often used to refer to something that, though good enough, falls far short of exceptional, such as 'reasonable weather', which may be little better than inclement. Defamation law's relevant audience has recently been described as 'ordinary people of reasonable intelligence', which was probably meant to include people of no more than average intelligence.⁹⁰

But when dissected, so that it is read as 'reason-able', the word suggests not a quantifier such as 'average', but an ability to reason, both rationally and morally. But to what standard must people reason before they can be considered reasonable? The term might require the possession of extraordinary intellect and virtue, or it may be satisfied by mere common sense, so that it denotes no more than rationality, as opposed to insanity. If so, any reference to reasonableness, when used in a phrase such as 'ordinary reasonable person', becomes subsumed into the reference to ordinariness, a term that reads more like a quantifier, such as majority or average, thus opening the door to empirical analysis.

But there is a third possibility, one that lies between a wholly exclusive and a wholly inclusive interpretation of the test of reasonableness. It may be that the term is to be interpreted inclusively when referring to one stage of message interpretation, but exclusively in relation to another. I suggest it helps, for current purposes, to conceive of the way in which an audience interprets a message, such as a newspaper report or television program, as involving three linear stages: denotation, verification and connotation. It does not matter if this model does not

⁸⁸ *Farquhar v Bottom* [1980] 2 NSWLR 380.

⁸⁹ *Ibid* 385G.

⁹⁰ *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488 (Tipping J).

accurately reflect the psychological process of textual interpretation. What is more important is that it accords with the way in which the law, lawyers and the laity are likely to conceive of that process.

To illustrate, consider the interpretation of a media report that a company insured its premises against fire the day before they burned to the ground. Two events are reported: the taking out of insurance and a fire. We look for rational explanations as to why it is relevant to report the temporal proximity between the two. We may well decide that the reporter is suggesting a causal connection, in other words insurance fraud. This is our denotative interpretation. There follows verification, whereby we decide whether to believe the denotative meaning: did the company really commit insurance fraud? Here we might consider, among other things, the publishers' track record for accuracy, the type of company involved and the odds of the reported events being simply coincidental. It is only after we verify the denotation that we reach connotative interpretation: should I think less of the company for defrauding its insurers? Denotative interpretation will depend largely on our familiarity with the genre of journalism, verification will depend on our regard for journalists and connotation on our attitude to the imputed conduct.

Having defined denotation, verification and connotation, we turn now to the distinction, commonly made, between morality and rationality, virtue and logic, heart and mind. While these dyads are problematic, they exist nonetheless, both in popular imagination and the law. Denotation and verification belong primarily to the realm of the intellect: to adapt a defamation law cliché, deducing from a report of smoke that there is a fire requires no more than elementary logic. But connotation involves a moral compass and emotion: how we feel about the arsonist.

That being so, it is worth considering those hints in judicial commentary on defamation law's hypothetical audience that *could* (not necessarily *should*) be interpreted to suggest that, however much that audience's intellectual attainments reflect those of ordinary or average people, the same cannot be said about its moral standards.

Returning to Hunt J, it is important to note that when he first raises the test of reasonableness, he begins by speaking in relation to denotation: more precisely, the capacity of matter to convey imputations. But consider what Hunt J has to say as he proceeds to elaborate on what he has in mind by the test of reasonableness:

I must reject any strained, or forced, or utterly unreasonable interpretation. I must proceed upon the basis that the ordinary reasonable reader is a person of fair, average

intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal.⁹¹

Note first the relatively inclusive reference to ‘fair, average intelligence’. This supports a realist interpretation of the law, at least when it comes to denotation.⁹² But note how he then lists four most laudable moral qualities: freedom from perversity, morbidity, suspicion and avidity for scandal.

Someone who is free of suspicion could be termed naïve, although Hunt J steers clear of ascribing such a failing to the hypothetical arbiter of defamation:

This ordinary reasonable reader does not, we are told, live in an ivory tower. He can, and does, read between the lines, in the light of his general knowledge and experience of worldly affairs.⁹³

By juxtaposing the idiom of the ivory tower with what immediately preceded, we are steered into a middle ground between the extremes of unworldliness and excessive suspicion. So far the description of the relevant audience accords with one consisting of men (women do not seem to feature) of impressive virtue. Reading on, however, Hunt J introduces a degree of imperfection:

It is important to bear in mind that the ordinary reasonable reader is a layman, not a lawyer, and that his capacity for implication is much greater than that of the lawyer.⁹⁴

But note how this imperfection relates entirely to denotation, not to verification nor connotation. The judge continues:

In what might be described as “newspaper” cases ... further questions may arise as to the care with which the ordinary reasonable reader would have read a sensational article, and as to the degree of analytical attention he would apply to it, and as to the degree of accuracy he might have expected of that article. The ordinary reasonable

⁹¹ *Farquhar v Bottom* [1980] 2 NSWLR 380, 385-6, citing *Jones v Skelton* [1963] SR (NSW) 644, 650 (re ‘strained, or forced, or utterly unreasonable interpretation’); *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1, 7 (re ‘fair, average intelligence’ and ‘perverse’); *Keogh v Incorporated Dental Hospital of Ireland* [1910] 2 Ir R 577, 586 (re ‘morbid or suspicious of mind’); *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (re ‘avid for scandal’). This description of the ordinary reasonable person was substantially repeated by Hunt J in *Amalgamated Television Services Pty Ltd v Marsden* [1998] 43 NSWLR 148, 165.

⁹² For instance, Fricke relates ‘fair, average intelligence’ to general public opinion: Fricke, above n 15.

⁹³ *Farquhar v Bottom* [1980] 2 NSWLR 380, 386B, citing *Lewis v Daily Telegraph Ltd* [1964] AC 234, 258; *Jones v Skelton* [1963] SR (NSW) 644, 650; *Lang v Australian Consolidated Press Ltd* [1970] 2 NSWLR 408, 412.

⁹⁴ *Farquhar v Bottom* [1980] 2 NSWLR 380, 386B, citing *Lewis v Daily Telegraph Ltd* [1964] AC 234, 277; *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1245; *Lang v Australian Consolidated Press Ltd* [1970] 2 NSWLR 408, 412; *Middle East Airlines Airliban SAL v Sungravure Pty Ltd* [1974] 1 NSWLR 323, 340.

reader of such an article is understandably prone to engage in a certain amount of loose thinking.⁹⁵

Lack of care is hardly a commendable trait, but again this shortcoming is limited to the interpretation of denotative meaning: the degree of care taken in reading the article. What is unclear from this quote is why Hunt J restricts his observation to denotation of ‘sensational’ newspaper articles. Presumably, the judge has in mind articles that mislead, probably through overstatement. He seems to be alluding to concerns that lay readers will fail to appreciate the degree of overstatement.

Even so, it is important to read this statement in light of the authorities Hunt J draws from. The oldest case the judge cites in relation to the proposition that the ordinary reasonable reader engages in loose thinking is the much mentioned 1963 decision of the House of Lords in *Lewis v Daily Telegraph Ltd*. That concerned an important issue in defamation law: does a report of a police enquiry convey to the ordinary reasonable person that the subjects of that enquiry are guilty of the offence under investigation? It is a well known tenet of criminal law that suspects are innocent until proven guilty. The Lords concluded that the relevant audience would interpret a straightforward report of a police investigation in accordance with that legal norm. Even so, Lord Reid distinguished the lay reader from the lawyer:

There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.⁹⁶

Lord Reid later developed this in his 1971 judgment in *Morgan v Odhams Press Ltd*. There he explained what the ‘ordinary man’ test (note the change from ‘ordinary reasonable man’ test) necessarily entails:

If we are to follow *Lewis*’ case and take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind: he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought. The publishers of newspapers must know the habits of mind of

⁹⁵ *Farquhar v Bottom* [1980] 2 NSWLR 380, 386C, citing *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1245 and *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 373 (re ‘a sensational article’); *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, following *Lewis v Daily Telegraph Ltd* [1964] AC 234, 277 (re ‘a certain amount of loose thinking’). See also *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 373; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632, 641 (Mason & Jacobs JJ) and 646 (Aickin J); *Parker v John Fairfax & Sons Ltd* (unreported, NSWCA, 31 May 1980).

⁹⁶ *Lewis v Daily Telegraph Ltd* [1964] AC 234, 258.

their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach.⁹⁷

Elsewhere in his judgment Lord Reid seems to go further than owning that the relevant audience might indulge in a ‘certain amount of loose thinking’, going so far as to admit ‘far-fetched inferences’.⁹⁸ In doing so he referred with approval to two decisions of the English Court of Appeal. The first, *Cassidy v Daily Mirror Newspapers Ltd*, dated from 1929 and concerned the publication of a photograph of a man and a woman together with a reference to their engagement. The man was in fact already married to another woman, who sued the newspaper, claiming that it implied that they were not married and therefore lived in ‘immoral cohabitation’.⁹⁹ Even though Scrutton LJ accepted that the publication was capable of bearing several interpretations other than the suggestion that the photographed man was unmarried, he thought it capable of reasonably being thus understood. The second case, *Hough v London Express Newspaper Ltd*, heard in 1940, similarly dealt with a newspaper reference to a man being married to a woman who was not in fact his wife.¹⁰⁰ Again it was held that it was reasonable to interpret this in a way that defamed the real wife.

THE ADMISSION OF ‘FAR-FETCHED INFERENCES’

Lord Reid’s expansion from ‘a certain amount of loose thinking’ to ‘rather far-fetched inferences’ was picked up by the New South Wales Court of Appeal in 1974, three years later.¹⁰¹ In his dissenting judgment, Moffitt P expressed discomfort with the phrase. In the following passage, the President alludes to the process in defamation hearings whereby a judge can prevent an imputation being considered by a jury if the judge considers the publication incapable of conveying the imputation, or the imputation incapable of defaming the plaintiff:

[I]t has been found in *Morgan’s* case and other cases, that a person may be found to be defamed upon a far-fetched reading of published matter not so intended, that dependence upon a far-fetched identification was no reason to withdraw the case from the jury. It is true that inferences drawn in earlier decisions have been described on some later occasions as “far-fetched”, but I do not understand that thereby some proposition of law or binding guide has been propounded so that any far-fetched reading of printed matter can be left to a jury. I must confess that I have difficulty in understanding how a “far-fetched” view can be reasonably held, or held by a sensible reader, or that it is open to a jury to find that a sensible reader “would” so read an

⁹⁷ [1971] 1 WLR 1239, 1245.

⁹⁸ *Ibid* 1244.

⁹⁹ [1929] 2 KB 331, 331.

¹⁰⁰ [1940] 2 KB 507.

¹⁰¹ *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348.

article. With respect, I find obscurity in the expression and prefer the safer language of the common law to be found in a test of reasonableness.¹⁰²

Moffitt P has difficulty relating the tolerance of a ‘far-fetched reading’ with the requirement that defamation law’s relevant audience be reasonable. But his reservations were overruled and the ‘far-fetched inferences’ in question were admitted into consideration by the majority. In the process of doing so, Hutley JA referred to another decision of the House of Lords, this time dating from 1909, which concerned a story about a fictional churchwarden from Peckham called Artemus Jones.¹⁰³ A barrister by that name successfully sued on the basis that readers would understand this fictional character to be reference to him, even though he was neither a churchwarden nor from Peckham. Hutley JA took this decision as the point at which English law elected to prefer protection of reputation over dissemination of information:

The standards of reasonableness required of an identifying reader are not high. The persons who identified Artemus Jones, barrister, with the Artemus Jones, churchwarden, whose adventures were recounted in the newspaper article were not behaving sensibly, and the same, in my opinion, applies to the identifying witnesses in *Cassidy's* case and *Hough's* case. The identification by means of extrinsic facts in *Morgan v Odhams Press Ltd* was nothing short of far-fetched. The authorities also seem to require the judge, in deciding whether to leave the question to the jury, to have regard to the fact that the identification will not necessarily be made by a careful reader. A sensible but hasty reader may appear a contradiction in terms, but the authorities have made him the standard.¹⁰⁴

This case, like the preceding decisions this extract refers to, concerned whether the plaintiff was identified in the publication, a question that frequently arises. But Hutley JA made it clear that he was not creating a distinct test for determining the issue of identification.¹⁰⁵

Samuels JA also referred to Lord Reid in *Morgan* as authority for the proposition that the ‘ordinary sensible reader’ may be permitted to draw ‘rather far-fetched inferences’:

In my view, the criteria of reasonableness, as established by the cases, are something less than strict. Once the far-fetched inference is permitted, and the requirements of caution and of critical analytical care are rejected, there is no ground for restricting the impression which may reasonably be made by an article such as this to inferences which only rigorous scrutiny can support. It may be that an inference identifying the plaintiff cannot survive the application of critical acid; but the authorities do not require so corrosive a test.¹⁰⁶

¹⁰² Ibid 353, per Moffitt P (referring to *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239).

¹⁰³ *E Hulton & Co v Jones* [1910] AC 20.

¹⁰⁴ *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 364, Hutley, JA (referring to *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 and *Morgan v Odhams Press Ltd* [1970] 1 WLR 820).

¹⁰⁵ *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 363.

¹⁰⁶ Ibid 374.

This is perhaps the high water mark of how far the ordinary reasonable person can stray from the requirement of rational thought. Samuels JA goes so far as to suggest that the ‘requirements of caution and of critical analytical care’ are rejected. The standard of reasonableness remains, but this standard, with its ‘less than strict’ criteria, is relative.

It is at this point that judicial comment strays closest to explicit support of realism, the proposition that a publication can defame even though it should not. There is also something of a moral rebuke in Lord Devlin’s comment that the layperson will read implications into a publication much more freely than will the lawyer, and ‘is especially prone to do so when it is derogatory’.¹⁰⁷

THE FAIR-MINDED READER TEST

It is important, however, that all the above cases relate to denotative interpretation or verification. What primarily concerns us is connotative meaning. Note, then, that at the very point when Lord Reid introduces the idea that there must be allowed a ‘certain amount of loose thinking’, he reminds us that the ordinary reader will not act on casually formed impressions of what the media are saying: ‘one can expect him to look again before coming to a conclusion and acting on it’. This suggests that more care is taken in connotative than denotative interpretation: ordinary reasonable people might be relatively hasty in interpreting the publication as conveying a meaning that could impair the plaintiff’s reputation, but will not proceed to think less of the plaintiff or to permit that antipathy to influence their behaviour towards the plaintiff without giving further thought to both the publication’s credibility and the moral character of the plaintiffs’ alleged actions.

The ordinary reader will also remain honest throughout this process. Presumably Lord Reid has in mind honesty to fundamental principles of justice, such as the need not to condemn on scant evidence. Even when the ordinary reader is careless ‘he’ remains just. Indeed ordinary reasonable people are so fair-minded towards those who fall victim to media attention that they are adept at knowing precisely when it is inappropriate to let their attention slip. Hunt J suggests that the degree of care shown by the ‘ordinary reasonable reader’ will be proportional to that which the publication warrants, with books being read more carefully than a newspaper, and ‘sensational’ newspaper articles (which are presumably the most obviously defamatory) being read least carefully. Note also how favourably the moral personality of ordinary reasonable people has been painted elsewhere: they are not suspicious of mind, nor avid for scandal and even when making ‘far-fetched inferences’ remain sensible.

¹⁰⁷ *Lewis v Daily Telegraph Ltd* [1964] AC 234, 277.

These descriptions, when viewed collectively, hardly present a coherent picture of the hypothetical audience that determines what is defamatory, but there is almost nothing to denigrate its members' moral characters. The following passage from *Lewis v Daily Telegraph*, which concerned a report that the plaintiffs were under fraud squad investigation, throws particularly clear light on how Lord Reid envisaged the morality of the hypothetical arbiters of defamation, endowing them not only with a commendable sense of fair play but with a touching confidence in the capabilities and probity of the machinery of law of which they are the fruit:

In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question. So let me suppose a number of ordinary people discussing one of these paragraphs which they had read in the newspaper. No doubt one of them might say – “Oh, if the fraud squad are after these people you can take it they are guilty”. But I would expect the others to turn on him, if he did say that, with such remarks as – “Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless. We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard”.¹⁰⁸

No firm conclusion can be drawn from this examination of precedent in favour of realism or moralism. While it is fairly plain that public, as opposed to ideal habits of textual interpretation must guide the process of determining what imputations arise from a publication, there is far less to show that the same applies to public values, as opposed to objective morality, when it comes to determining whether those imputations are defamatory.

THE LEGAL INNUENDO RULE AND THE MORALIST – REALIST DEBATE

Chapter Two described how defamation law generally does not require, and indeed often prohibits, evidence relating to how a publication's audience reacted. What counts are hypothetical, not real outcomes. A partial exception was described, in the form of the legal innuendo rule. This, it may be recalled, is the rule that applies where a plaintiff claims that a publication would convey a defamatory meaning (the innuendo meaning) only to recipients with some specialist or peculiar knowledge (the innuendo facts). In these circumstances, the plaintiff must adduce evidence that the message was communicated (otherwise than by the plaintiff) to at

¹⁰⁸ Ibid 259.

least one person who was aware of those innuendo facts. Plaintiffs need not prove that those people responded in any of the ways specified by the tests for defamation, although they may do so if they wish.

The legal innuendo rule was presented in Chapter Two as an indication that defamation law has at least *some* interest in the publication's real audience, as opposed to some imaginary one. But could it be that the legal innuendo rule is actually a further indication of moralism in the law?

If it is accepted that denotative interpretation is primarily a rational process, while connotative interpretation is mainly moral, and if it is agreed that reasonableness is a more unambiguously normative quality than is ordinariness, what transpires is that if we are asked to consider how a hypothetical audience of ordinary reasonable people would *connotatively* interpret a publication then consideration of their reasonableness (ie morality) must come to the fore. In other words, when asked to predict how an audience will answer a moral question, we look foremost at the audience's moral attributes. The audience's ordinariness need not be disregarded when considering connotative meaning, but it will be considered only to the extent that it throws light on the standard of reasonableness expected of the audience. Conversely, in the case of *denotative* interpretation the audience's moral qualities might be thought of as less decisive. To simplify, there might be said to be a subtle shift of emphasis from the audience of ordinary *reasonable* people (as regards connotative meaning) to the audience of *ordinary* reasonable people (when it comes to denotative).

Note, however, that this applies only where no legal innuendo is pleaded. Once a legal innuendo is pleaded, the enquiry moves, however imperceptibly, to the denotative interpretation of the actual, as opposed to hypothetical audience, since the law now enquires into the state of knowledge of people who actually saw or heard the publication. This is the case however extraordinary those people might be. Regardless of whether there is a claim of legal innuendo, however, the connotative issue is always decided by reference to the hypothetical (as opposed to real) audience.

The consequence is that when it comes to determining a publication's *denotative* meaning (where ordinariness is relatively important), the law might either be concerned with how *ordinary* reasonable people interpret it (in the absence of an innuendo claim) or with how *extraordinary* reasonable people understand it (where an innuendo is pleaded). As a requirement, reasonableness, not ordinariness, becomes the constant. Reasonableness, therefore, is a constant in denotative and connotative interpretation, while ordinariness is a constant only in connotative interpretation.

Note how ordinariness, which is not a constant in denotative interpretation, is also relatively unimportant in connotative interpretation. This is because, as argued above, in connotative interpretation ordinariness acts simply as a guide to the norms (level of ‘reasonableness’) required of the relevant community. Combining the two interpretative stages together we find that ordinariness, a comparatively unimportant constant at just one stage, is relatively dispensable compared to reasonableness, an essential constant at both stages. To this extent a hierarchy appears between the qualities of reasonableness and ordinariness, with the former essential and the latter dispensable.

Therefore the doctrine of legal innuendo indicates that Hunt J was right: even when it comes to denotative interpretation, the test of reasonableness comes to the fore.¹⁰⁹ That it is paramount when it comes to connotation is even more obvious. But what the doctrine of legal innuendo does not reveal is the standard of morality represented by the relevant community. Is it that of the ordinary person, or something more?

A TAXONOMY OF INTERPRETATIONS

By the preceding arguments, I do not seek to persuade the reader that the law is necessarily moralist, nor that it has to be realist. Rather, I hope to demonstrate that it contains a real ambiguity, one that should be taken seriously. That ambiguity relates to what should be done if ever a court predicts that an audience of ordinary people would display a relevant response to a publication when it should not, the relevant responses being hatred or contempt towards the plaintiffs, ridicule, shunning or avoidance of the same, or at least disparagement of their reputation. I have also sought to persuade the reader that it is likely, or at least plausible, that those charged with implementing the test of defamation will be divided between those guided by what the relevant community thinks (the realists) and those who decide by what it *should* think (the moralists).

I shall present further evidence to that effect below. But before proceeding further it is useful at this juncture to propose a simple taxonomy of all the interpretations of the common law test I consider credible. This will create a convenient shorthand when it comes to further analysis of each interpretation.

¹⁰⁹ *Farquhar v Bottom* [1980] 2 NSWLR 380, 385G.

I have already alluded to what might be termed ‘absolute moralism’, by which a publication is defamatory only if the relevant response (disapproval, etc) would be ideal. This understanding of the test leaves no room for empiricism, since everything hinges on what people *should* (as opposed to do) think. But it offers little account for the inclusion of the term ‘ordinary’, nor does it accord well with the descriptions of the relevant audience that are found in the authorities, particularly when it comes to denotation. Indeed, absolute moralism seems wholly implausible as an interpretation of the common law.

More convincing is what might be termed ‘relative moralism’, which recognises a range of sufficiently moral and rational responses to a publication. Under this model a publication is defamatory if it might, in the real world, excite a response which, in the circumstances, meets some minimal moral and rational standards, one that is ‘reasonable enough’. Under relative moralism, if a publication might cause some people to experience or display one or more of the relevant feelings or responses (thinking less of the plaintiffs, shunning and avoiding them, etc) and others *not* to do so then it might be open to the court to find the publication defamatory, provided the responses of the former group meet the moral and rational thresholds.

But it is not enough for a court to know that a defamation verdict is open to it, if a verdict of non-defamation is also open to it. Further guidance is needed as to which way the court should jump. Assuming the descriptor ‘ordinary’ is taken as a quantifier (as opposed to a moral quality), this might provide the solution. It may be that the court should determine the matter by reference to whichever of the range of moral and rational (or sufficiently moral and rational) responses reflects that of the majority of the base population, or that which reflects the mean response if ‘ordinary’ is understood as ‘average’. The base population will be determined geographically and normatively. In terms of geography, this might be the jurisdiction (such as New South Wales), although it could be defined more broadly or narrowly. In terms of normative criteria, it consists of all who fall within the relevant geographical area and whose response to the publication in question is (or would be if they were to be exposed to it) sufficiently moral and rational to warrant their inclusion. In other words, the base population consists of all those within the relevant geographical area who can be considered ‘reasonable persons’.

I shall refer to this position as *majoritarian moralism*. It is moralist in that consideration is given primarily to the moral/rational character of the relevant response: a publication cannot be defamatory unless the relevant response meets certain moral and rational standards. But it is majoritarian in that account is also taken of majority (or average) opinion among those whose response to the publication is sufficiently moral and rational to be given consideration. To

illustrate, if we take as a relevant response disapproval of the plaintiff, then if the only moral and rational response to an imputation of homosexuality is disapproval, it follows that the publication is defamatory. If, on the other hand, the only moral and rational response is approval, or at least non-disapproval (which would include both acceptance and indifference), then it is not defamatory. But if disapproval and non-disapproval are both responses that are sufficiently moral and rational, then the court should determine the matter by whichever is the majority (or average) response among the base population, being all those within certain geographical borders who would disapprove, as well as all those who would not disapprove of homosexuality.

In the next chapter, I shall contend that majoritarian moralism is an entirely plausible interpretation of the common law test for defamation. But it is only one of four. The second interpretation that we should consider might be termed *sectionalist moralism*. Like majoritarian moralism, this takes as the primary determinant the moral and rational character of the relevant response: if the only moral and rational response is disapproval then the publication is defamatory, and vice versa. But this time the relevant response need not be that of the majority for a publication to be defamatory. Absolute moralism, which I have already dismissed as unrealistic, falls into this category, but so do forms of moralism that are more plausible, in that they are relative, not absolute. To repeat, relative moralism envisages circumstances in which contradictory responses (such as thinking less of the plaintiffs in light of a publication and not thinking less of them in light of the same) both meet the relevant moral and rational thresholds. A majoritarian moralist then takes the response of the majority of the base population, ie all those who would display a sufficiently moral and rational response, which we can term the population of reasonable people. But a sectionalist moralist is guided by some other quantifier, which will be applied to the base population (all reasonable people). For instance, the court might ask whether a *substantial proportion* of reasonable people would disapprove of the plaintiff. If the answer is yes then the publication is defamatory, regardless of what the majority (or average) response would be.

There are two obvious counterparts to majoritarian moralism and sectionalist moralism. These fall under the umbrella of realism, whereby no consideration need be given to ideal outcomes, attention being limited to real likelihoods. The first is *majoritarian realism*. For the adherent of this position, a publication is defamatory regardless of the moral and rational quality of the relevant reaction, provided it is the actual response of the majority of the base population, or whatever accords with the average of all reactions among the base population. (Who constitutes this base population in the case of realism is a question I return to below.) The second is *sectionalist realism*, which sets no requirements in relation to the morality or rationality of the

relevant response, nor as to whether it represents the likely majority or average response of the base population. For instance, the sectionalist realist might say that a publication is defamatory provided it is likely to cause a substantial proportion of the base population, or possibly even a single member of that population, to think less of the plaintiff.

These four positions can be presented by way of a flow chart, presented as Figure 1 on page 59. The moralist/realist camps are delineated by how they answer what I term the ‘normative question’, which relates to the moral and rational character of the ‘specified response’, that being the response of the relevant audience that identifies the publication in question as defamatory (disparagement, ridicule or shunning and avoidance of the potential plaintiff, etc). There then follows a question that is empirical in nature, one that separates the majoritarians from the sectionlists.

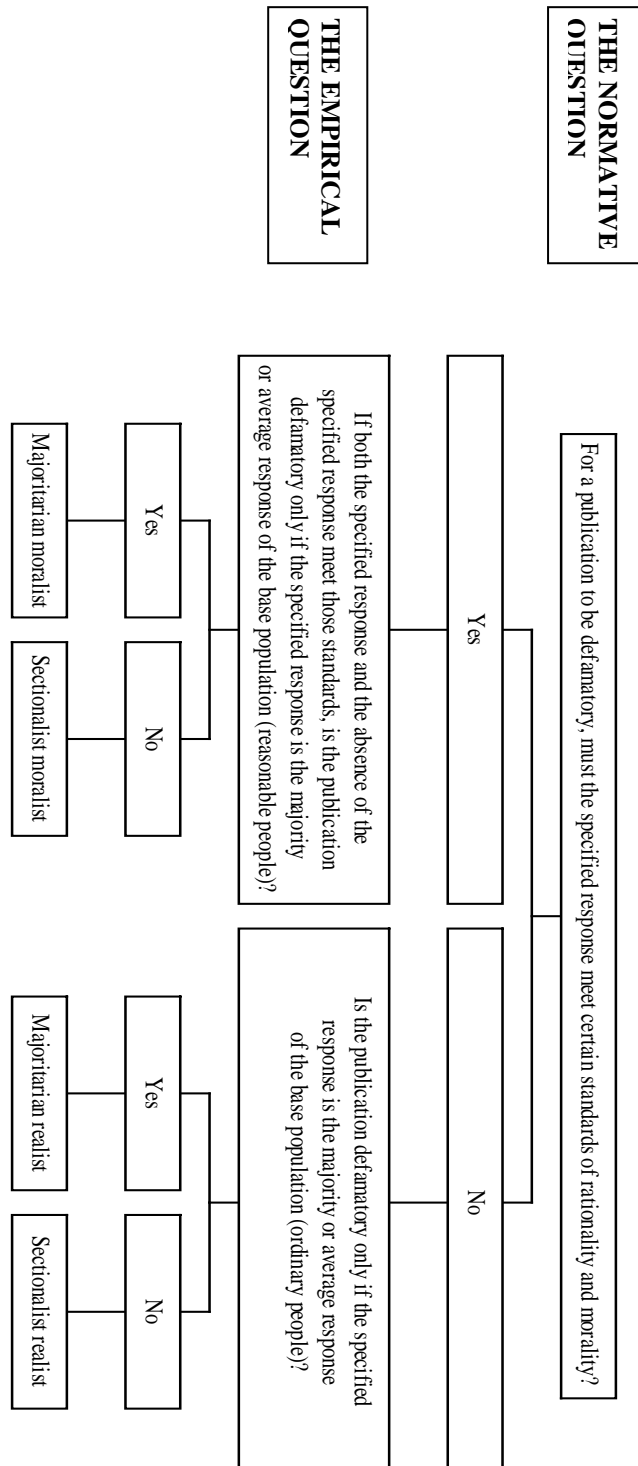
DEFAMATION LAW AS THE MAPPING OF A MORAL COMMUNITY

One important question remains unanswered by the above descriptions of the taxonomic categories of interpretations of the common law text for defamation. When it comes to realism, what is the base population? Under moralism the answer was easy: the only people who needed to be considered were reasonable people, meaning those whose likely response would meet the moral and rational thresholds. As regards realism the answer is less simple.

An obvious answer would be that the base population would be determined not by moral criteria at all, but purely geographically. It might, for instance, include all people (or all adults) who lives within the court’s jurisdiction. What distinguishes realism from moralism is that the latter is only concerned with the likely responses of reasonable people, whereas realism takes the population warts and all. But here realism runs into a difficulty posed by the work of Robert Post, who has offered one of the most interesting analyses of defamation law as something more than simply a means to restitution for wrongful harm to reputation.¹¹⁰

¹¹⁰ Post, above n 25.

Figure 1: Chart to demonstrate four principal methodologies for deciding whether a publication is defamatory



For Post, reputation is something more than a form of intangible property, something akin to goodwill, with each of us able to improve our own reputation by our labours or damage it through our errors, while defamation law compensates for any unlawful harm inflicted by others. Reputation is also bound up with an individual's honour and dignity, and therefore personal identity. That identity is developed and maintained by what Post calls 'rules of civility', which relate to the deference due from others to the individual. Publishing a defamation constitutes a breach of those rules, threatening the reputation and therefore dignity of the defamed party.

But by building on the work of Erving Goffman and the symbolic interactionist tradition in American sociology, Post shows how such a breach of the rules of civility jeopardises not just the defamed, but also the defamer, whose social competence is brought into question as a consequence of the breach. An audience witnessing a defamation are invited to choose: accept the denigration of the subject of the report, or rehabilitate that person's reputation and thereby denigrate the publisher. Whichever side the audience chooses, 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 'in defining and maintaining the contours of its own social constitution'. Or, put differently, 'enforcing rules of civility is a matter of safeguarding the public good inherent in the maintenance of community identity'.¹¹¹

Accordingly, defamation trials can be understood as one of the processes whereby a community determines its membership. This explains many of the foregoing observations about defamation law. For instance, a statement that is financially damaging, such as that a tradesperson is too ill or busy to take on new work, is not necessarily defamatory. It may cause potential clients to shop elsewhere, thus damaging trade, yet it does not bring into question the tradesperson's social membership.

Applying Post's understanding of the law of defamation to the 'ordinary reasonable person' test, what that test suggests is that the community the law is prepared to assist, in terms of its definition and maintenance, is the community of ordinary reasonable people. A publication would be defamatory if it questions individuals' membership of that community, meaning that they do not qualify as ordinary reasonable people. In theory the community of ordinary

¹¹¹ Ibid 713.

reasonable people could be coterminous with a jurisdiction's population, but if that were reality then the only defamatory publications being considered by the courts would be ones in which an individual is imputed to fall outside the jurisdiction, for instance they live abroad. Since such imputations are not defamatory, it is clear that the legally protected community is not determined geographically, but rather normatively.

The foregoing suggests that in any jurisdiction there will be individuals who do not qualify as 'ordinary reasonable people'. These will include some of the individuals associated with acts or conditions the jurisdiction considers defamatory when imputed to a person. It may not include all such people, since Post speaks of defamation law protecting the respect that arises from *full* membership of society, suggesting a hierarchical society consisting of full members and partial members. Thus, in a society where an imputation of homosexuality is defamatory, gay people might qualify as partial members of society, whereas someone who is guilty of an act, the imputation of which is considered more seriously defamatory, such as murder, may fall outside society altogether.

The question then arises as to the extent to which non-members, or partial members of society are entitled to determine its membership. If we are to assume that society represents a voluntary association, then any authority these people have to include or exclude individuals from society must ultimately come from within society itself.

This being so, a court charged with deciding what is defamatory in accordance with majoritarian realism should, unless authorised to do so by society, exclude from its calculations of what constitutes majority opinion societal non-members, or perhaps even partial members. But since realism is premised on the Devlinian dictum that the morality which the law enforces must be popular morality, the majoritarian realist can assume that what constitutes majority opinion within the population is also majority opinion within the normative community that the law is responsible for delineating and supporting.

As regards the sectionalist realist court, under this approach a publication can be defamatory if only a minority would think less of the plaintiff. But unless authorised by society to do so, the court must take no note of those sections of the population which fall outside of society (eg psychopathic killers). Being realist and therefore Devlinian, the court must allow society to be self-defined. Consequently, a publication will be defamatory on the basis of minority opinion only if that minority is evidently accepted into society by society. To this extent there is an element of majoritarianism within the sectionalist realist formula, although only in relation to delineation of society, not in relation to the identification of defamatory material.

To summarise, subject to one refinement which will be added shortly, the base population when it comes to applying whatever quantifier is contained in the defamation test can be defined thus:

- in terms of moralism, it consists of all reasonable people, meaning all those whose likely response, if they were exposed to the publication in question, would meet the moral and rational thresholds;
- in terms of realism, it includes the entirety of what might be termed ‘ordinary people’, meaning all those accepted by the majority of the jurisdictional population as members (whether full or partial) of society.

The final refinement that needs to be added relates to the legal innuendo rule. It will be recalled that where a legal innuendo meaning is pleaded, the plaintiff must prove publication to at least one person who knew the facts (the ‘innuendo facts’) that potentially gives rise to that meaning. Since people who did not know the innuendo facts are excluded under the innuendo rule, the base population must be taken to know those facts, even if they do not. To illustrate, imagine a report that a woman has had her foetus terminated. The innuendo fact is that she is a pro-lifer and the true innuendo meaning pleaded by the plaintiff is that she is a hypocrite. In order to determine whether the report is defamatory (in that it denotes hypocrisy and bears the necessary connotation) the base population must be assumed to know the innuendo fact (that the plaintiff is a pro-lifer).

Having added this proviso to the moralism/realism dyad, Figure 1 on page 59 can be represented as a summary of the four positions I have suggested. Like most taxonomies, mine is open to further refinement and sub-categorisation. Even so, I suggest that any plausible interpretation of the common law test of defamation (plus some implausible ones) can be fitted into one of the four categories outlined.

SUPPORT FROM PRECEDENT FOR SECTIONALISM

Having now introduced four categories of interpretation of the common law test, the next question is the extent to which these approaches are supported by case law. I have already argued that the authorities can be interpreted in favour of both moralism and realism. But what of majoritarianism and sectionalism?

As argued above, if sectionalism were to be understood to mean that a publication can be defamatory simply because someone somewhere would think less of the plaintiff, it is incompatible with Post's characterisation of defamation law as a means of determining social membership. That is because, at the very least, the 'someone' in question must have been admitted into the society the law facilitates and maintains. If the only people who would think less of the plaintiff are those who are so depraved that the geographically determined population would not regard them as members of ordinary society, as 'ordinary people', then the publication is not defamatory. This view is clearly supported by authority. As expressed by Fleming, 'it is not sufficient that the words are regarded as prejudicial by only a small minority whose standards are so anti-social that it would not be proper for courts to recognise them'.¹¹²

But what of my modification of sectionalism, meaning that a publication can be defamatory even though only a minority might think less of its subject, *provided* the geographically delineated population accepts that minority as full or partial members of ordinary society, as 'ordinary people', meaning that the minority meets some moral and rational threshold laid down by the geographically delineated population? This, I suggest, is compatible with Post, but is it supported by precedent?

Sectionalism of any kind faces a clear challenge from the 1982 High Court decision in *Reader's Digest v Lamb*.¹¹³ Larry Lamb, editor of Britain's *Sun* newspaper, had sued *Reader's Digest* when the latter published a book relating to the abduction and murder of Muriel McKay. The book had purported to describe a conversation in which a police officer investigating Mrs McKay's disappearance suggested to another that her husband had contacted his old friend Larry Lamb for solace. Lamb was alleged to have then used the information supplied him so as to secure a scoop for his newspaper. Lamb sued, claiming that the book accused him of exploiting his old friend's tragedy. The jury accepted this meaning and awarded Lamb \$20,000.

In the course of the trial, the judge had allowed the plaintiff's lawyers to call evidence from two members of senior management in the newspaper group employing Lamb. Those executives had attested as to whether they understood the article to mean that the plaintiff's imputed conduct breached journalistic ethical standards. If Lamb had pleaded a legal innuendo meaning, for instance that the book would have meant to those familiar with the requirements of journalistic ethics that he was in breach of those standards, then this would have been unexceptional. As it was, Lamb had based his action solely on the book being defamatory 'in its natural and ordinary

¹¹² Fleming, above n 16.

¹¹³ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500.

meaning': the meaning it would convey to the general reader. As a consequence the admission of evidence as to meaning was challenged by *Reader's Digest*.

In his leading judgment, Brennan J explained the 'simple question' of what is defamatory thus:

Where no true innuendo is pleaded and the published words clearly relate to the plaintiff, the issue of libel or no libel can be determined by asking whether hypothetical referees - Lord Selbourne's reasonable men or Lord Atkin's right-thinking members of society generally or Lord Reid's ordinary men not averse to scandal - would understand the published words in a defamatory sense.¹¹⁴

By now this will be familiar material. What makes the judgment more interesting is what Brennan J says next, again in relation to the situation where no true (ie legal) innuendo is pleaded:

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.¹¹⁵

But if this is so, how was the testimony of the media personnel admissible as relevant evidence? What light could these particular individuals throw on how 'society generally' might respond to the publication? Brennan J answers the question thus:

The challenged evidence went no further than showing that among the likely readers of the book were journalists who would regard more seriously than many other members of society the alleged failure of the respondent to adhere to standards of ordinary decency.¹¹⁶

The journalists' testimony was not relevant when it came to determining whether the publication was defamatory, but it was relevant as to the question *how* defamatory it was, something which would be reflected in the quantum of any damages awarded. The implication is that the community whose membership the law seeks to protect, variously described by Brennan J as the community of 'reasonable men', 'right-thinking members of society generally' and 'ordinary men not averse to scandal', will be united in their decision whether the publication

¹¹⁴ Ibid 505, citing *Capital and Counties Bank Ltd v Henty* (1882) 7 App Cas 741, 745 (re Lord Selbourne's 'reasonable men'), *Sim v Stretch* (1936) 52 TLR 669, 671 (re Lord Atkin's 'right-thinking members of society generally') and *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (re Lord Reith's 'ordinary men not averse to scandal').

¹¹⁵ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505, citing *Byrne v Deane* [1937] 1 KB 818, 833; *Miller v David* (1874) LR 9 CP 118; *Myroft v Sleight* (1921) 90 LJ (KB) 883; *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467, 479.

¹¹⁶ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 507 (Brennan J).

is defamatory, perhaps because membership of that community is defined by response to the behaviour imputed to the plaintiff: men are ‘reasonable’, ‘right-thinking’ or ‘ordinary’ and ‘not avid for scandal’ because, upon reading the book, they would think less of Lamb. But among that community of ‘reasonable men’ etc are those (such as perhaps fellow journalists) who would react more strongly against the plaintiff than would others.

As usual with authorities, Brennan J’s judgment is ambiguous as to whether it should be read as moralist or realist, given its reference on the one hand to ‘reasonable men’ and on the other ‘ordinary men’, as well as to ‘standards, moral or social’. But it is clearly majoritarian: nowhere is there the suggestion that the book would be defamatory simply on the basis that Lamb’s employers or other journalists would think less of him, while the general reader would not.

A decision that stands in stark contrast to *Reader’s Digest* is that of the New South Wales Court of Appeal in *Hepburn v TCN Channel Nine*.¹¹⁷ A registered medical practitioner claimed that an edition of the television current affairs show *60 Minutes* had referred to her as ‘an abortionist’. The question for the court was whether such an imputation was capable of being defamatory.

A preliminary step was to determine the meaning of ‘abortionist’. Hutley JA understood the word to mean ‘a person who, with some regularity, terminates pregnancies’.¹¹⁸ All three judges agreed that, at least in the present context, it need not impute any unlawful conduct. The question thus became whether it is defamatory to accuse a doctor of conducting *lawful* terminations.

Hutley JA thought the argument that such an 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.¹¹⁹

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

¹¹⁷ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682.

¹¹⁸ *Ibid* 686B.

¹¹⁹ *Ibid* 686C.

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.¹²⁰

Whereas *Reader's Digest* stipulates that a publication is defamatory only if it suggests that the plaintiff falls foul of a 'standard common to society generally', according to *Hepburn* the test is whether it might lead to damage to reputation among an 'appreciable' or, according to Hutley JA, 'substantial' section of the community, which presumably includes a minority.

Clearly *Hepburn* is presenting a sectionalist test. But is it realist or moralist? As usual, the authority is ambiguous. Glass JA requires that the relevant section be 'reputable', but 'reputable' can be read to mean 'deserving of good repute' in other words rational and moral (suggesting a moralist test), or 'held in good repute', meaning that the section accords with certain basic values held in common across the wider community. On the latter interpretation, those values are determined by the community, and so the test meets my definition of realism. Hutley JA's phrase 'substantial part of the population' certainly suggests realism, if only because of the choice of the word 'population', as opposed to 'community'. So too does the additional requirement, incorporated by Glass JA, that the publication's audience must have included members of the relevant section of the community; in other words, that the damage to reputation must be something more than hypothetical.

But the significance of these two cases lies in what they say about the 'empirical question': the extent to which the relevant reaction to the publication (disparagement, ridicule, shunning and avoidance etc) must be preponderant within the relevant audience group. We seem to have two conflicting decisions: *Reader's Digest* (majoritarian) and *Hepburn* (sectionalist). In terms of hierarchy of precedent, *Reader's Digest* was a decision of the High Court of Australia, while *Hepburn* was determined by the Court of Appeal of New South Wales. A decision of a higher court should override a contrary dictum from a lower. On the other hand, the dictum quoted from *Reader's Digest* could be regarded as obiter on this issue, in that the case did not turn on whether disfavour arising from an alleged breach of journalistic standards should be disregarded, on the basis that most people would be unfamiliar with what those standards are. Instead, the High Court suggests that a large section (probably a majority) of the population *would* think less of journalists who did what Lamb was alleged to have done, even though fellow media workers might disapprove more strongly than would the population generally. On that basis, *Reader's Digest* would, as an authority, be persuasive at best, and would not bind

¹²⁰ Ibid 694B.

future courts.¹²¹ This view might explain the chronology of the decisions. The High Court's judgment in *Reader's Digest* was delivered on 9 February 1982, some 19 months before argument was heard in *Hepburn*. Even so, the High Court's decision was not cited in argument or referred to by the New South Wales Court of Appeal.

Some measure of the importance given to *Hepburn* can be gained from leading commentaries on defamation law. Gately, England's leading authority starts with the proposition:

Though the issue may need to be further considered by the courts, the present position is that to be defamatory in English law an imputation must tend to lower the claimant in the estimation of right-thinking members of society *generally*. (Emphasis in original).¹²²

Gately cites as authority Greer LJ in the English Court of Appeal:

To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right-thinking man is not actionable within the law of defamation.¹²³

Supporting the argument that this remains the position in English law are obiter comments made in the Court of Appeal in 2001. The Court was considering imputations, allegedly conveyed by a London-based Arab-language newspaper, to the effect that a television news station and its management, also based in London and broadcasting in Arabic, were 'willing tools or agents of the Israelis and Americans, contriving in their schemes to undermine the pan-Arab cause'. The trial judge had concluded that the newspaper article was incapable of bearing those meanings, and the Court of Appeal agreed, thus avoiding the more delicate issue of whether such an imputation is capable of being defamatory on the basis of anti-Israeli or American sentiment within Britain. Even so, Keene LJ commented on the 'considerable difficulties' in departing from the principle that the matter had to be judged by the reaction of ordinary reasonable people in English society as a whole, as opposed to that of such people within a particular community within that society. While he conceded that this was 'an issue which may need to be addressed in the future', given that 'we are today a much more diverse society than in the past', he referred to a 'long series of powerful authorities' supporting the majoritarian position.¹²⁴

¹²¹ This seems to be the view taken by *Gately on Libel and Slander*, the leading work on defamation law: Milmo and Rogers, above n 28, 53 (para 2.12), fn 119.

¹²² Ibid 50 (para 2.10). The point was recently reiterated by the English Court of Appeal in *Arab News Network v Khazen* [2001] EWCA Civ 118.

¹²³ Milmo and Rogers, above n 28, 50 (para 2.10), citing *Tolley v Fry* [1930] 1 KB 467, 479 (Greer LJ, EWCA).

¹²⁴ *Arab News Network v Jihad Al Khazen* [2001] EWCA Civ 118 (unreported, Gibson, Chadwick and Keene LJ, 2 February 2001) [30] (Keene LJ).

Gatley contrasts the majoritarianism of English law with what it terms the ‘American approach’. The leading case illustrating the latter was decided by the US Supreme Court in 1909.¹²⁵ In *Peck v Tribune Co* the plaintiff’s picture appeared in a whisky advertisement along with what was purported to be a testimonial from her. The plaintiff was in fact a teetotaler. Holmes J acknowledged that there was no consensus on the propriety of drinking whisky, but thought:

[I]f the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote ... That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm.¹²⁶

Gatley then identifies *Hepburn* as applying this principle and the dictum in *Reader’s Digest* is demoted as obiter.¹²⁷

On the other hand, *Australian Defamation Law & Practice*, a loose-leaf service which gets considerable attention from Australian practitioners, makes no reference to *Hepburn* in the context of whether the law is sectionalist or majoritarian, while *Reader’s Digest*, with its requirement that the standard to be applied is that ‘common to society generally’, figures prominently.¹²⁸

Somewhere between these positions lies Michael Gillooly. In a work of reference that has more recently gained considerable usage in Australia, he restates Brennan J’s edict from *Reader’s Digest* that ‘[t]he defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes’.¹²⁹ However Gillooly also presents *Hepburn* as authority in circumstances where the sub-community in question is ‘large and respectable’.¹³⁰

Whatever its status as a binding authority, *Reader’s Digest* appears to be the more influential judgment. It has been and continues to be applied in very many cases.¹³¹ Conversely, I am aware of only two cases where the relevant point referred to in *Hepburn* has even been explicitly considered, let alone followed. The first, which again involved abortion, came before the

¹²⁵ *Peck v Tribune Co*, 214 US 185 (1909).

¹²⁶ *Ibid* 190.

¹²⁷ Milmo and Rogers, above n 28, 53 (para 2.12), fn 119.

¹²⁸ LexisNexis Australia, *Australian Defamation Law & Practice*, ¶ 3125.

¹²⁹ Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 46, citing *Reader’s Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 507 (Brennan J) and also *Queensland Newspapers v Baker* [1937] St R Qd 153, 155-6 and *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488, 496-7.

¹³⁰ Michael Gillooly, above n 129, 46.

¹³¹ For instance, by the NSW Court of Appeal in *Australian Broadcasting Corporation v Reading* [2004] NSWCA 411 (unreported, 15 November 2004).

Queensland Court of Appeal in 1996.¹³² Dr Grundmann, a medical practitioner who specialised in family planning services, including terminations, was considering opening a practice in Rockhampton. Dr Georgeson, another medical practitioner, issued a statement opposing the plan, following which he was interviewed by the local paper for an article about the proposed clinic, in which he was quoted as saying that termination is ‘just a nice way of saying murder’. Grundmann took a very literal interpretation of this and other similarly outspoken comments on the part of Georgeson and sued him on the basis that he, Grundmann, had been accused, among a number of things, of being a murderer.

The trial judge said he had ‘not the slightest doubt that the hypothetical referee in Australian society ... was in 1987 sufficiently sophisticated to ridicule such an allegation’. Instead, the words might be ‘understood to express a point of view on an issue of morality or philosophy’. This was because the hypothetical referee ‘would by that time have become accustomed to the hyperbole of the abortion debate’.¹³³

Grundmann appealed against the judge’s finding that the article did not defame him by alleging murder. The majority at the Court of Appeal agreed with the trial judge, but Davies JA took a different view. He thought that what the defendant had meant was that Grundmann was a person who ‘intentionally and unlawfully terminated human life, because he performed abortions by choice’:

It is true that, underlying the debate about whether abortion by choice should be permitted are moral and philosophical questions upon which there are in the community strongly held opposing views. But these differences in views do not affect the meaning which the respondent intended by his words or the meaning which they would be generally understood to convey. They may, however, affect the question whether, having that meaning, they are defamatory.¹³⁴

Davies JA did not think this latter question, that of connotative meaning, admitted of an easy answer:

An immediate problem is to identify the so-called right thinking members of society who are the arbiters of that question. This is because of the opposing views within the community to which I have already referred. I do not think it can be said that either of those views, to the exclusion of the other, is that of right thinking people. Moreover there are many intelligent and reasonable people in the community who are undecided on the question of abortion by choice.¹³⁵

¹³² *Grundmann v Georgeson* (1996) Aust Torts R 63,500, 81-396.

¹³³ *Ibid* 63,512.

¹³⁴ *Ibid* 63,503.

¹³⁵ *Ibid*.

What the judge is suggesting is that the attitudes to abortion do not define the community which the law seeks to define, but instead split it. But there are also those within that community who have no view, or no strong view, either way. It is in view of the effect of Georgeson's words on those people that their publication, according to Davies JA, is defamatory. While those who support abortion by choice may be unaffected in their opinion of the plaintiff by the other doctor's description of him as a 'murderer':

... the same would not be true, in my opinion, of those who are undecided on the question; they, or at least many of them, would think less of the appellant upon reading that what he did when terminating a pregnancy was to murder. And it could not be said that those who thought that were not a substantial, intelligent and reasonable section of the community. That is sufficient, in my view to make the publication defamatory.¹³⁶

The second case that draws on *Hepburn* as authority was heard in the New South Wales District Court in 2009. Earlier that year the Australian Broadcasting Corporation had broadcast a documentary alleging a culture of group sex in NRL football in Australia.¹³⁷ The program included allegations by Charmyne Palavi, who was subsequently the subject of comment by Radio 2UE presenter Steve Price. Palavi complained that Price accused her of being a 'slut' and a 'madam'.¹³⁸ Radio 2UE sought to strike out the latter imputation as non-defamatory on the basis that operating a brothel or working as a prostitute are not illegal. In response, Gibson DCJ, citing *Hepburn* in support, pointed out that 'it is not illegal, in New South Wales, to carry on business as an abortionist, but that does not mean that the allegation of being an abortionist cannot be defamatory'.¹³⁹ Gibson DCJ went on to say, again citing *Hepburn*, that '[t]he law of defamation accommodates discrepant attitudes by use of the test "right thinking people generally"'.¹⁴⁰ Accordingly Gibson DCJ allowed the imputation to go to the jury.¹⁴¹

Hepburn also appears to gain some support from a 1986 judgment of the New South Wales Supreme Court, even though the case is not referred to.¹⁴² Hunt J was hearing a claim by the widow of a police detective that she was defamed by Channel Nine's *Sunday* program on the basis that she had been 'dishonoured by her husband ... because he had committed adultery for more than three years with a prostitute'. The widow's lawyers had pleaded as an extrinsic fact

¹³⁶ Ibid.

¹³⁷ *Four Corners*, ABC Television, 11 May 2009.

¹³⁸ Radio 2UE, 14 May 2009.

¹³⁹ *Palavi v Radio 2UE Sydney Pty Ltd* [2009] NSWDC 238 (unreported, Gibson DCJ, 10 September 2009) [12], citing *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 686 (Hutley JA).

¹⁴⁰ *Palavi v Radio 2UE Sydney Pty Ltd* [2009] NSWDC 238 (unreported, Gibson DCJ, 10 September 2009) [13], citing *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 693 (Glass JA).

¹⁴¹ See also Y C Kux, 'Charmyne Palavi v Radio 2UE Sydney Pty Ltd, Con Ange v Fairfax Media Publications Pty Ltd', (22 September 2009) *Gazette of Law and Journalism* <<http://www.glj.com.au/1372-article>> at 30 October 2010.

¹⁴² *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536.

(thus potentially giving rise to a true innuendo meaning) that '[t]he wife of a husband who commits adultery is dishonoured'.

Hunt J took the view that this was no more than an assertion as to an attitude of the general public. If such an attitude exists, this would not be something that passes beyond the general knowledge of the community. As such it does not give rise to a true innuendo and so should not be pleaded as an 'extrinsic fact'.

Thus far Hunt J's views seem uncontroversial. However, he then went on to suggest that there are cases where a plaintiff relies upon the existence of a particular attitude held by one group within the population but not by the broader community. He gave as an example the disapproval felt by particular religious or ethnic groups towards certain practices:

In such cases, it is necessary for the plaintiff to plead that sectional attitude as an extrinsic fact or circumstance, and his case will then (within certain limits not here relevant) proceed upon the basis that publication in a defamatory sense is alleged only in relation to the publication to members of that particular group.¹⁴³

The suggestion here is that just as true innuendo can be relied on to establish denotative meaning, so too can it be used when it comes to connotative interpretation, meaning that the moral standards of a minority within the community can be determinative in establishing whether an imputation is defamatory.

Hunt J seems to be suggesting a way of circumventing difficulties posed for a plaintiff in circumstances where only a minority of the community is likely to display one of the responses that indicates a defamatory publication. But there is a more common route. In many circumstances behaviour can be characterised in such a way that it will be reprehensible to a far broader section of the community than might otherwise be the case. Often this will be done by depicting the alleged conduct as a form of disloyalty or hypocrisy, conceptual categories of immorality that are likely to attract reproach by a broad section of the population that is indifferent to the tenets of the group which is directly offended.

A clear example is singer and actor Jason Donovan's notorious action against *The Face*, a style magazine aimed at young men. In 1992 Donovan was awarded £200,000 by a London jury after he had sued the magazine over an article on outing homosexuals.¹⁴⁴ Accompanying it was a photograph of Donovan with the words 'Queer as Fuck' superimposed on his T-shirt. Donovan

¹⁴³ Ibid 544D.

¹⁴⁴ Rachel Borrill, 'Jason Donovan Awarded £200,000 Damages for "Queer" Libel – The Face Magazine', *The Independent* (London), 4 April 1992, 1.

claimed that the article suggested he was homosexual, even though the photo montage was not the creation of the magazine but a reproduction of a poster that had appeared the previous year during an outing campaign, and the accompanying article opposed the practice of outing, referring to Donovan as its first ‘victim’. Donovan was clearly uneasy bringing an action on the basis of homophobia, which would have been the case if he had suggested that his reputation was damaged among reasonable people because he was now identified as homosexual. Bringing such an action could be interpreted as an endorsement of homophobia. Instead, he based his claim on the supposed implication that he was a ‘liar and a hypocrite’ for claiming to be heterosexual when in fact he was not. Obviously he hoped that both homophiles and homophobes would sympathise with someone wrongly identified as a liar and a hypocrite, whereas only the latter would sympathise with him for being incorrectly taken to be gay.

As a further illustration of the point, in 1981 the English Court of Appeal considered a letter circulated among members of the Pakistani community of Woking, alleging that one of their number had ‘satirically passed such frivolous remarks ... on the respected personality of the Prophet ... that cannot be written down and which are unbearable for a proud Muslim to hear’.¹⁴⁵ The Court of Appeal accepted that the letter would ‘no doubt’ lower the plaintiff in the estimation of right-thinking Muslims. But did that suffice? The Court accepted that the plaintiff needed to show that his reputation had been lowered in the estimation of right-thinking members of society generally. This he had done: ‘the ordinary member of the public, even if he had no religious views of his own or no strongly held views, would not approve of anyone insulting the religious beliefs of others’.¹⁴⁶

Clearly it is a sensible tactic for plaintiffs to characterise publications as imputing conduct that is widely as opposed to narrowly denigrated. But such an approach seems to elude some lawyers. In 1974 the magazine *Woman’s Day* published in its agony aunt column a letter, purporting to come from an Australian couple of Italian origin, pleading for the couple’s 19-year-old daughter to contact them:

It’s been such a long time since we have seen you. Please write or phone because we want to know how you are, and want to communicate with you urgently.¹⁴⁷

It transpired that the letter was a hoax. The couple, along with the daughter, sued, the latter claiming that the article meant that she was a ‘disloyal daughter who had left home’.

¹⁴⁵ *Shah v Akram* (1981) 79 L S Gaz 814, CA.

¹⁴⁶ *Ibid* (Lawton LJ), applying *Sim v Stretch* (1936) 52 TLR 669, 671 (Lord Atkin).

¹⁴⁷ *Arcidiacono v Queensland Newspapers Pty Ltd* (unreported, Supreme Court of Queensland, Case 561 of 1974).

The daughter's claim was struck out by the judge. As a lawyer in the case explained to me in interview:

It may be abhorrent in an Italian family for a 19-year-old daughter to leave home. But that's applying *a* community standard, not *the* community standard.

This comment illustrates how, despite *Hepburn*, many practising lawyers regard the test for defamation as majoritarian, not sectionalist. Indeed, that was the overwhelming view expressed by the practitioners and judges I interviewed.¹⁴⁸

¹⁴⁸ See below, Chapter Five.

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INTRODUCTION

The previous chapter tried to establish a coherent statement of the test for defamation. I suggest that the nature of that test can be stated with considerable certainty, save for the law's two basic ambiguities; the first relating to whether it is realist or moralist, the second relating to whether it is majoritarian or sectionalist.

The purpose of this chapter is to examine not so much how judges have defined the test, but how it has been applied in various reported decisions. The enquiry is into the extent to which those decisions indicate that the law is understood as realist or moralist. This chapter acts as a bridge into Part B of the thesis, which reports the results of my empirical fieldwork. As a vehicle for that fieldwork I used ten imaginary media reports, each of which imputed an act or condition that seemed of particular relevance to the realism/moralism dyad. This chapter focuses on cases that relate to the acts or conditions imputed by my ten hypothetical reports. Part B then examines the reactions to those reports of the judges and lawyers I interviewed, as well as those of the general public.

I suggest that the cases that are most interesting to consider when addressing the moralist/realist debate fall into four rough categories:

1. Imputations relating to the relationship between legal and social norms

What happens when these fail to coincide, so that a law or the process of law enforcement lacks social support? Moralism can (but need not) be characterised as a means of imposing, through defamation law, unpopular norms onto a society whose values oppose the law's. If that were so, we might expect any allegation of criminality to be defamatory, even when the criminal law is widely flouted, while imputations of conduct designed to further the rule of law would never be defamatory. To examine these issues I chose two imputations:

- a) unlawful use of marijuana;
- b) informing the police about a suspected lawbreaker.

2. Imputations that excite bigotry

If a remark can be defamatory of a person, even though only a bigot would think less of that person as a result, that indicates realism. I look at imputations of three conditions that might excite bigotry:

- a) homosexuality;
- b) HIV infection;

- c) criminal parentage.

3. Imputations relating to shifting sexual morality

The twentieth century saw a shift away from a morality that differentiated marital procreation from other forms of sex. For many consent, plus perhaps adherence to a certain decorum, have become the only moral criteria for sexual behaviour. To what extent has defamation law reflected that change? If the law has followed community standards, that again indicates realism. If it seems to have led the shift, that suggests moralism. I look at imputations of four forms of sexual behaviour:

- a) pre-marital sex;
- b) extramarital affairs;
- c) drunken displays;
- d) female recreational sex.

4. Imputations relating to social and moral controversy

How does defamation law cope when morality is actively contested, particularly when both sides of the debate attract sizeable constituencies? This is of particular interest when it comes to the issue of majoritarianism versus sectionalism. As a study, abortion is an obvious contender, so I look at imputations of lawful terminations.

These categories are for convenience only: obviously they overlap. For instance, I do not mean to imply that disparagement in relation to any of the imputations outside the second category is not a form of bigotry, still less that those outside category three do not relate to sexual morality. Obviously they do. It is also clear that the last is not the only imputation to relate to a moral issue that currently attracts considerable debate.

Before looking at the cases, it is worth remembering what, in the absence of a clear statement of methodology, is required for a curial finding to be unambiguously realist or moralist. For a decision to be unambiguously realist, a court would need to find defamation, or at least capacity, on the basis that the publication in question is likely to provoke a certain response, despite the same court finding that response to be immoral or irrational or both. For a decision to be unambiguously moralist, the court would need to find the publication *incapable* of defaming, having found that it is likely to provoke a defamation response among a majority of the community (if the court has indicated a majoritarian approach) or a section of the community (for the sectionalist moralist court), incapacity being determined by the response's failure to meet certain moral and rational thresholds.

While some cases come close to meeting one or other of these requirements, my contention is that, perhaps unsurprisingly, none is sufficiently unambiguous for it to be stated with confidence that the law is intended to be, or is generally applied, in accordance with moralism or realism.

THE INTERPLAY OF LEGAL AND SOCIAL NORMS

If it is defamatory to report that a person has assisted the legal process, or if it is *not* defamatory to suggest that someone's behaviour is contrary to the law, does this mean that the moralist interpretation of the law is misplaced? The logic behind such an assertion is simple: assuming that legal rules represent a coherent moral code, then if moralism is right, meaning that the law seeks, through the regulation of speech, to promote its morality over community standards, then any imputation of conduct that assists law enforcement must be incapable of being defamatory, while a report that someone has broken a legal rule must be incapable of being *not* defamatory.

No one pretends that the categories of conduct that attract legal sanction are as broad as those that it is defamatory to impute. The essence of a liberal democracy is that it will permit many forms of conduct of which most people disapprove. Just because behaviour is lawful does not mean that its imputation is not defamatory, even though one scholar wrote in 1969 that 'the exercise of legal rights or taking of a defence allowed by law would not evoke the relevant sort of reaction in the relevant sorts of persons unless there are special circumstances'.¹⁴⁹ But even that writer was able to cite with approval Joseph Dean who observed '[t]oday, unfortunately, hardly anybody is able to convince himself that the sentiments of a good citizen must necessarily coincide with the stipulations of Acts of Parliament or the rules and regulations which are made and unmade under them'.¹⁵⁰

Legal and social rules are not identical, and courts are quick to accept that lawful conduct can be discreditable. But it is far more rare for judges to acknowledge that illegality may be acceptable. Unconditional discharges might be taken as the opportunity criminal law offers judges to indicate that an action that 'technically' breaches the criminal law is not reprehensible to society. Even so, statements to the effect that criminality need not be defamatory occur extremely rarely.

¹⁴⁹ Amerasinghe, above n 18, fn 49.

¹⁵⁰ Ibid, quoting Joseph Dean, *Hatred, Ridicule or Contempt* (1964) 126-7.

One such instance arose in 1960 when the question presented to the English High Court was whether it was necessarily defamatory to accuse someone of unlawfully pulling the emergency communication cord on a train.¹⁵¹ The issue came up not in a claim for defamation but one for malicious prosecution. Under English law it was an offence, punishable with a fine of up to £5, to use the cord ‘without reasonable and sufficient cause’. Betty Berry was convicted of this offence, had her conviction overturned on appeal and then sued for malicious prosecution, claiming that as a result of the conviction she had been injured in reputation, held up to ridicule and had ‘suffered pain in mind’.

Diplock J’s approach was to ask himself whether he could conceive of circumstances which would support a conviction for the offence and yet would not be defamatory of the convicted party, that is ‘lower her in the estimation of right-thinking members of society generally’.¹⁵² He thought the answer was yes. This being so, the charges brought against Berry were not ‘scandalous’ and that part of the action failed. On appeal to the English Court of Appeal Devlin LJ agreed with Diplock J that a report of having been charged with the offence was not necessarily and naturally defamatory.¹⁵³

In postulating that the offence could be committed without discredit to the offender, Diplock J gave as examples a situation where the latter had ‘been asleep and woke up to find the train starting to leave, on a non-stop journey of a hundred miles, the station at which he desired to alight’, or ‘if he discovered just as the train was leaving that he had left some valuable property behind him on the platform ... He might indeed think it worth while paying the penalty to attain the result’.¹⁵⁴

Whether the offender’s fellow passengers would consider the consequent delay to their journeys worth the result is unclear. But this decision is interesting not only for Diplock J’s preference for individual over collective convenience, but for his acceptance that an imputation of criminality need not be defamatory, even when there is a selfish motive and an adverse impact on possibly hundreds of others.

It should follow *a fortiori* that imputations of ‘victimless crime’ can be non-defamatory. Perhaps the offence most likely to be considered victimless is that committed by the moderate use of marijuana. To what extent have imputations of such behaviour been found defamatory?

¹⁵¹ *Berry v British Transport Commission* [1961] 1 QB 149.

¹⁵² *Ibid* 166, citing *Sim v Stretch* (1936) 52 TLR 669.

¹⁵³ *Berry v British Transport Commission* [1962] 1 QB 306, 333.

¹⁵⁴ *Berry v British Transport Commission* [1961] 1 QB 149, 165.

THE USE OF MARIJUANA

A trawl of publicly accessible databases of court judgments, as well as a number of secondary sources, reveals numerous instances of plaintiffs suing over publications that relate in some way to illegal drugs. What is surprising is that, despite extensive searching, I could find no Australian case concerning an imputation that specifically relates to the recreational use of cannabis.¹⁵⁵ Either people do not sue over such an allegation, or their actions do not get prominently reported.

Many cases involved imputations of the use of some unspecified illegal drug,¹⁵⁶ as well as the production or supply of the same.¹⁵⁷ With one possible exception, in none of these cases was the imputation found to be non-defamatory. The possible exception concerns an imputation of consuming unspecified drugs. A judge hearing an appeal from the Magistrates' Court in South Australia seemed to consider this non-defamatory, but on further appeal to the Full Court Lander J took the view that the appeal judge did not mean that the imputation was not defamatory, but simply that it had not been conveyed.¹⁵⁸

Not all actionable publications relating to non-specific narcotics accuse plaintiffs of themselves supplying or using the drug. For instance, one case involved imputations of willingly associating with people known to be involved in the manufacture or distribution of unspecified

¹⁵⁵ Outside Australia, cricketer Ian Botham sued in London in 1986 over a *Mail on Sunday* report that he had smoked cannabis in public places and also that he had illegally possessed and supplied cocaine, meaning that the issue of smoking marijuana is conflated with its use in public and also the supply of a harder drug: *Attorney General v News Group Newspapers Ltd* [1986] 3 WLR 365 (EWCA).

¹⁵⁶ Eg *Eason v 3AW Broadcasting Co Pty Ltd* (unreported, NSW Supreme Court, Hunt J, 4 April 1985): case settled with payment of \$570,000 damages: Anonymous, 'Record Settlement in Eason Case', (October 1987) 7 *Gazette of Law and Journalism*, 2; *Burton v Parker* [1998] TASSC 104 (unreported, Evans J, 28 August 1998): an imputation of a history of illicit drug involvement and use was found defamatory by a judge; *Brander v Ryan* [2000] SASC 446 (unreported, Prior, Lander & Bleby JJ, 21 December 2000): imputation of the consumption of an unspecified drug was found to be defamatory by a magistrate. Also in the UK: *Wilbrahim v Faber & Faber*, see Anonymous, 'Dossier' (August 1994) 24 *Gazette of Law and Journalism* 2, 5: Plaintiff sued in relation to an imputation of being a drug-taking homosexual: matter settled with payment of £15,000 damages and an apology.

¹⁵⁷ As regards production, smuggling, trafficking or sale, see eg: *Sinclair v John Fairfax and Sons Ltd* (unreported, NSW Supreme Court, Finlay J, 19 May to 2 June 1986): an imputation of being a convicted drug smuggler was found defamatory by a jury; *Lanteri v Mildura Independent Newspapers* (unreported, Victoria Supreme Court, 1990): an imputation of being involved in drug trafficking was found defamatory by a jury. The plaintiff was awarded \$50,000 damages: 'Anonymous, 'Defamation Table of Quantum' (November 1996) *Gazette of Law and Journalism* 5, 19; *Entienne Pty Ltd v Festival City Broadcasters* [2001] SASC 60 (unreported, Olsson, Duggan & Williams JJ, 8 March 2001): imputations that the second plaintiff and the business of the first plaintiff were involved in the sale of illegal drugs was found defamatory by judge; *Jackson v TCN Channel Nine Pty Ltd* [2001] NSWCA 108 (unreported, Handley JA, Hodgson & Wood CJJ, 10 March 2001): imputations that the Plaintiffs were knowingly involved in the manufacture and distribution of illegal drugs were held to be capable of defaming; *Rakhimov v Jennings* [2001] NSWSC 12 (unreported, NSW Supreme Court, Levine J, 25 Jan 2001): imputations of drug smuggling and dealing were found to be defamatory.

¹⁵⁸ *Brander v Ryan* [2000] SASC 446 (unreported, Prior, Lander & Bleby JJ, 21 December 2000), para 47.

drugs.¹⁵⁹ After a judge had found in favour of the plaintiff in terms of capacity, a jury found that they were in fact defamatory. In another case a hotel owner sued over imputations relating to allowing the sale of unspecified drugs in his hotel.¹⁶⁰ Although the defendant argued that the imputations were not defamatory, they were found to be so by a judge.

Among all these defamatory imputations, one case stands out. A police officer sued after being reported to have had a sexual relationship with a woman known to him as a drug addict, dealer and former prostitute.¹⁶¹ This was found capable of defaming, but when the matter came before a New South Wales jury in 1998 it was found to be not defamatory. But note that marijuana was not specified as the drug in question and the police officer was not accused of personally using the substance.

Only four Australian cases were found that specifically refer to marijuana. One concerned a *Four Corners* program that imputed that the plaintiff was a member of a marijuana growing syndicate, although this was presented in the context of organised crime and, unsurprisingly, was allowed to go to a Queensland jury, who in 1992 found it to be defamatory.¹⁶² Three years later, a jury in the Northern Territory considered a claim by a police officer that he had been accused of cultivating and using cannabis. Given that the plaintiff was a member of the drug squad, it is again unsurprising that no indication exists that the defence challenged the imputations on the grounds of capacity, or that the jury found them to be defamatory.¹⁶³

A more interesting Australian case arose in 1988. A chemist sued in the Victoria County Court on the basis that he had been accused of using heroin or marijuana paste (or both) to deal with corns. There is no report as to whether the capacity of the imputation to defame was challenged, but it was found defamatory by a jury. The chemist was subsequently awarded \$15,000.¹⁶⁴ If it is defamatory to accuse someone of using marijuana to relieve a physical ailment (albeit only corns) then one might assume that recreational smoking of the drug would also be defamatory.

¹⁵⁹ *Jackson v TCN Channel Nine Pty Ltd* [2001] NSWCA 108 (unreported, Handley JA, Hodgson & Wood CJJ, 10 March 2001). Also *Marley's Transport Pty Ltd v West Australian Newspapers Ltd* [2001] WASC 31 (unreported, WA Supreme Court, Hasluck J, 12 Feb 2001): an imputation of running a road haulage business where drivers took drugs to stay awake at the wheel was found capable of defaming.

¹⁶⁰ *Silkman v Federal Capital Press of Australia Pty Ltd* (unreported, ACT Supreme Court, Gallop J, 8 December 1989).

¹⁶¹ *Ison v Fairfax Publications Pty Ltd* (unreported, NSW Supreme Court, Levine J, 12 December 1997). See also Ron Good, 'Central Coast Copper Fails in Action Against SMH' (29 February 2000) *Gazette of Law and Journalism*.

¹⁶² *Bellino v Australian Broadcasting Corporation* (unreported, QLD Court of Appeal, McPherson, Pincus JJA and Williams J, 2 June 1998). Damages were assessed by the jury in 1992 at \$750,000: Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 21.

¹⁶³ *Hart v Wrenn* (No 727 of 1990, NT Supreme Court). See also on page 148.

¹⁶⁴ *Speirs v Herald & Weekly Times* (unreported, Victoria County Court, 1988), referred to in Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 18.

Unfortunately the case is sparsely reported and its implications somewhat obscured by the alleged involvement of heroin.

More recently, Mercedes Corby, sister of Schapelle Corby, an Australian woman serving a prison sentence in Indonesia for smuggling cannabis into Bali, sued Channel Seven television on the basis that the station's news and current affairs programs conveyed various imputations relating to marijuana, including cultivation and possession of the drug.¹⁶⁵ There is no indication of the defence having challenged these imputations on the grounds of capacity and they were found to be defamatory by a 'youthful' jury in 2008.¹⁶⁶

None of these cases involving marijuana or an unspecified illegal drug suggest that imputations of marijuana use are anything but capable of being defamatory. This being so, it comes as no surprise that in those cases involving a specified drug other than marijuana, which typically meant heroin or cocaine, the imputation was, with one exception, found to be defamatory.¹⁶⁷ The exception arose after a Wollongong City Councillor allegedly accused another of attending a council meeting while on crack or drunk. In 1995 a jury found this to be not defamatory, although probably because the circumstances suggested, in the words of the defendant's lawyer, a 'political stoush', not an allegation meant to be taken literally.¹⁶⁸

ASSISTANCE WITH THE LEGAL PROCESS

So far there is no indication that moralism is misplaced, but neither has there been any convincing evidence to substantiate it. But law breaking cannot be considered without its

¹⁶⁵ *Corby v Channel Seven Sydney Pty Ltd* (unreported, NSW Supreme Court, Simpson J, May 2008). See Y C Kux, 'Mercedes Corby v Channel Seven Sydney Pty Ltd & 5 Ors' (12 May 2008) *Gazette of Law and Journalism* < <http://www.glj.com.au/1201-article> > at 30 August 2010.

¹⁶⁶ Y C Kux, 'Corby v Channel Seven Sydney Pty Ltd/Davis v Nationwide News Pty Ltd' (2 June 2008) *Gazette of Law and Journalism* < <http://www.glj.com.au/1211-article> > at 30 August 2010. See also on page 148 below.

¹⁶⁷ *Duffy v Heinrichbaehnk* [1993] SASC 3828 (unreported, Cox J, 4 March 1993): imputation of using heroin; *Eason v 3AW Broadcasting Co Pty Ltd* (unreported, NSW Supreme Court, Hunt J, 4 April 1985): imputation of addiction to heroin; *Burton v Parker* [1998] TASSC 104 (unreported, Evans J, 28 August 1998): trafficking in and sale of heroin, as well as dependency on illicit opiates; *Charles v 6PR Southern Cross Radio Pty Ltd* [1999] WASC 1025 (unreported, Steytler J, 22 March 1999): imputation of dealing in and using heroin or cocaine; *Lynch v News Ltd* [2000] NSWSC 128 (unreported, NSW Supreme Court, Studdert J, 9 March 2000): imputation of professional footballer using a performance enhancing or recreational drug; *Ison v Fairfax Publications Pty Ltd* (unreported, NSW Supreme Court, Levine J, 12 December 1997): police officer imputed to use cocaine and be aware of, but do nothing about, the use of cocaine by another officer, and/or the sexual relationship of the latter with a woman the first police officer knew to be a drug addict, drug dealer and former prostitute. See also Ron Good 'Central Coast Copper Fails in Action against SMH', above n 161.

¹⁶⁸ *Kershaw v Wilton* (unreported, NSW Supreme Court, Newman J, 19 May 1995): Ron Good, 'Nasty Crack' (1995) 33 *Gazette of Law and Journalism* 14, Nick Papadopoulos, 'Councillor Sues Over "Crack" Jibe', *The Sydney Morning Herald*, 17 May 1995, 9 and Nick Papadopoulos, '"Crack" Jibe not Defamation', *The Sydney Morning Herald*, 19 May 1995, 10.

converse: helping to uphold the law. There exists a number of cases, often referred to as the ‘police informant cases’, that have attracted some academic attention because of their relevance to the realist/moralist debate. In these cases the plaintiffs claim to be defamed on the basis that they were imputed to have informed an authority, typically the police, about some form of activity, particularly crime. Realists often refer to this category of cases as evidence of a misplaced moralism. Their reasoning goes thus: most people dislike those who inform on suspected lawbreakers, at least where the suspected offence is minor in character, and particularly where the informant owes the suspect a particular loyalty, for instance because they are family members, friends, work colleagues, or they come from the same community or socio-economic group. And, say realists, defamation law should reflect that opprobrium.

For instance, Fleming, in his leading textbook on torts begins by stating the generally accepted principle that words are not defamatory just because of the views of a small minority whose standards are so anti-social that it would not be proper for courts to recognise them:

This reservation has been used to support the questionable conclusion that it is never defamatory to accuse someone of giving information to the police even if the community’s attitude to the particular type of informer is one of contempt – on the specious ground that to hold it defamatory would be condoning the alleged offence, like the keeping of gambling machines. This is not only inconsistent with the ordinary practice of deferring to actual community attitudes however prejudiced, but confuses the courts’ duty to enforce all crimes alike with the accepted purpose of the law of defamation to protect individuals against (false) allegations calculated to lower them in the esteem of their fellows.¹⁶⁹

But exactly how strong is the support lent to moralism by the police informant cases? To answer this question, I begin with the oldest known authority relating to the informant issue in the English-speaking world.

KENNEDY V ALLAN

In 1848 the Scottish Court of Session heard the case of *Kennedy v Allan*, which consisted of a claim for defamation brought by a Glaswegian stockbroker against an ironmonger, whom he had employed to carry out some work.¹⁷⁰ On being paid for the work, the ironmonger had handed the stockbroker an unstamped receipt. Someone informed the Stamp Office about this and the ironmonger was threatened with a statutory penalty for evading stamp duty. The stockbroker claimed that the ironmonger had then lithographed and circulated the Stamp Office’s letter among Glasgow’s stockbrokers, thus injuring the stockbroker’s character and

¹⁶⁹ Fleming, above n 16.

¹⁷⁰ (1848) 10 SC 1293.

business by imputing that he was a ‘common informer’, a ‘mean, dishonest, and disreputable person’ and a ‘party who would inform against persons who received money from him’.¹⁷¹

The Lord Ordinary dismissed the action, taking the view that there was not enough to constitute a strictly actionable matter. The stockbroker reclaimed to the Court of Session and it was held that his summons set forth a relevant ground of action, meaning that the publication was at least capable of being defamatory.

Realists have cited this argument in their support, apparently basing their argument on two premises.¹⁷² The first is that there exists widespread disdain for those who ‘grass up’ or ‘dob in’ others. The second is that judges, duty bound to uphold law and order, will either have a natural inclination towards, or at least feel obliged to appreciate those who tender aid in the apprehension of law breakers. If they nevertheless heed widespread public antipathy for the police informant, which the judge would presumably consider lacking in morality if not rationality, then the law’s application is consistent with the principles of realism.

One problem realists have with this case is that there is no indication from its relatively sparse reporting that the defender even raised the issue of capacity to defame.¹⁷³ Instead the ironmonger’s defence appears to be first that circulation of the letter would not be construed as implying that the stockbroker had informed on him and secondly that the defender did not intend to use the letter to injure the pursuer’s reputation. Indeed all three justices on the bench took the view that the issues before the court were meaning and intent.

WINN V QUILLAN

The same criticism can be made of the realists’ reliance on another case that arose before the same court in 1899. In *Winn v Quillan*¹⁷⁴ the pursuer, a man of Irish extraction, alleged that the defender repeatedly referred to him in Glasgow as an informer to the Crown against Irishmen over the course of ten years. The pursuer argued that he had been represented as ‘a man who, for the sake of reward and from sinister and disreputable motives, had betrayed his fellows, and disclosed secrets, or given information to the Crown or its executive, against Irishmen and

¹⁷¹ Ibid 1294-5.

¹⁷² For instance, Fricke, above n 15, 8.

¹⁷³ Later Fricke similarly uses the argument that the court was not asked to address the point in question when he discounts the relevance of another case that clearly challenges his proposition on the law concerning the preference of general public opinion over the attitudes of ‘right-thinking people’: *Mawe v Pigott* (1869) 4 IR CL 54 (Court of Common Pleas, Ireland) (see below): Fricke, above n 15, 9.

¹⁷⁴ [1899] SLT 183.

others.’¹⁷⁵ The Court of Session held (Lord Young dissenting) that the case was relevant, meaning that the publication was capable of defaming the pursuer.

This case is very poorly reported and it is difficult to know whether it supports the realist camp, save for the bare fact that an imputation of being an informant was considered defamatory. Indeed the Lord Justice-Clerk thought the only question was whether the pursuer should be permitted to sue for slanders uttered ten years previously, which he decided was not too great a lapse of time.¹⁷⁶

GRAHAM V ROY

Between these cases, in 1851, the same court heard the case of *Graham v Roy*.¹⁷⁷ This case deserves greater attention since the issue of capacity clearly arose. The pursuer, a farmer and miller, had brought an action against an innkeeper on the grounds that the latter had falsely and maliciously accused him of having ‘assumed the office of a common informer’ against a whisky distiller, who was subsequently convicted for contravening excise laws.¹⁷⁸ As in *Winn v Quillan*, this allegation also carried with it a charge of informing for financial gain, since informants apparently stood to obtain half of any penalty imposed.

The defender argued that the pursuer had no cause of action because an informer is a legal officer and it was ‘not slander in the eye of the law to say that a man gave information which had the effect of repressing an illegal act, such as smuggling’.¹⁷⁹ The Court of Session disagreed.

The reasons for judgment are so scarcely reported that they can be reproduced in full below:

Lord Fullerton - If you publish on the streets of a town that a man is a common informer, is that not slander? It may be perfectly legitimate to give information, but an informer is by no means a popular character.’

Lord President - Here the averment is, that the defender represented the pursuer as a person who gave information for the sake of the reward. I think that is clearly actionable.’¹⁸⁰

¹⁷⁵ Ibid 184.

¹⁷⁶ Ibid.

¹⁷⁷ (1851) 13 D 634.

¹⁷⁸ Ibid 634.

¹⁷⁹ Ibid 635.

¹⁸⁰ Ibid 636.

If we are to understand the moralist position as being that defamation law is concerned with upholding a community of law-abiding citizens who inevitably support any attempt to maintain legal order, then this is the first serious challenge to moralism. The problem for realists is that it is greatly outweighed by other, more recent authorities from a number of jurisdictions, including Australian.

MAWE V PIGOTT

One of the most commonly cited authorities for the proposition that it is not defamatory to accuse someone of being an informer dates from 1869, when the Irish Court of Common Pleas considered an allegation that a parish priest had declared that ‘men who gave up all - life, liberty and home - for what they deemed the sacred cause of Old Ireland, were guilty of infamous conduct’.¹⁸¹ It was also claimed that the priest would ‘watch them’ and would ‘become an informer against them, so as to have them prosecuted for a political offence’.¹⁸²

The court, in a judgement delivered by Lawson J, allowed the defendant’s demurrer that the alleged publication did not give rise to a valid cause of action and therefore should not go before a jury. This was despite Lawson J’s belief that a court’s duty is to send the matter to a jury if ‘by any reasonable intendment a jury could infer that the publication complained of reflects upon the moral conduct or the professional reputation of the Plaintiff’.¹⁸³

Fricke tries to accommodate *Mawe v Pigott* within the majoritarian realist approach he favours by observing that the ‘Irish court dealt with the informer case before it on the express assumption that the class which regarded with disapproval acts of informing of the type alleged was a minority group’.¹⁸⁴ Apparently the plaintiff’s argument to the court was that among criminals, or sympathisers with crime, a publication would expose a person to ‘great odium’ if it were to ‘represent him as an informer, or a prosecutor, or otherwise aiding in the detection of crime’. The court had declined to adopt that standard and instead accepted the defendant’s argument that the alleged words ‘would not bring [the plaintiff] into hatred or contempt with any society the law recognizes’.¹⁸⁵ As Lawson J added, ‘[t]he very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men’.¹⁸⁶

¹⁸¹ *Mawe v Pigott* (1869) 4 IR CL 54, 54 (Court of Common Pleas, Ireland)

¹⁸² Ibid 55 (Court of Common Pleas, Ireland).

¹⁸³ Ibid 60, citing *Capel v Jones* 4 CB 264 (Wilde CJ).

¹⁸⁴ Fricke, above n 15, 9.

¹⁸⁵ *Mawe v Piggott* (1869) Ir. R 4 CL 54, 56.

¹⁸⁶ Ibid 62.

Fricke implies that if only counsel for the plaintiff had put his argument on the basis of a general public antipathy towards informers then he would have won the day. Lawson J had accepted that the court ‘can only regard the estimation in which a man is held *by society generally*’ (emphasis added).¹⁸⁷ Thus, if a realist, he would have heeded public opinion once it was pointed out to him that the public do not like informers.

Fricke could have more easily accommodated *Mawe* within his realist approach if he had been less convinced that the public do not like informers, a proposition which he thinks needs only be stated to be accepted. Not only does Fricke fail to substantiate his claim, but nowhere is it apparent that if it had been put before the court then the judges would have accepted it. In fact, the case is more easily understood to be one in which the court, having decided that the matter should be determined by general social attitudes, considered what the prevailing opinion towards informers might be, concluded that it is not antithetical to them and thereby settled that the publication could not be defamatory. In other words, the decision is majoritarian realist. It is pure supposition that this is how the court approached the issue, but there is just as much reason to think of *Mawe v Pigott* as supportive of Fricke’s majoritarian realist position as against it.

BYRNE V DEANE

Mawe v Pigott gains some attention within legal commentary, but far less than the case that is without doubt the most commonly cited authority on informant imputations in the common law world outside of the United States. In 1937 the English Court of Appeal considered *Byrne v Deane*, an action brought by a member of a golf club against the club’s proprietor and secretary.¹⁸⁸ Automatic gambling machines, at the time illegal in England, had been installed in the club’s premises and were enjoyed by members for a number of years until someone told the police, whereupon the machines were taken away. The plaintiff, Mr Byrne, was clearly suspected of being the informant because on the day following the machines’ removal a piece of doggerel verse appeared on a club notice board lamenting their departure and concluding with the hope:

But he who gave the game away
May be byrnn in hell and rue the day.

The plaintiff alleged that the words meant that he had been the police informant and was guilty of disloyalty to his fellow members. At trial the words were held to be defamatory and the plaintiff was awarded nominal damages. The defendants appealed and the Court of Appeal held

¹⁸⁷ Ibid.

¹⁸⁸ [1937] 1 KB 818.

that an imputation that a person had put in motion the proper machinery for suppressing crime could not on the face of it be defamatory.

Fricke suggests that for the Lord Justices to reach the decision that the lampoon was incapable of being defamatory they had to follow one of two courses. They either had to assert that public feeling favours informants, something Fricke describes as ‘surely false’, or they had to adopt a moralist test.

In the event Fricke claims that Slesser LJ ‘oscillated between both approaches’ to the extent that his judgment contains ‘internal inconsistencies’.¹⁸⁹ The charge of oscillation seems to derive from the Justice’s statements of the relevant standard against which a potentially defamatory publication must be measured. On the one hand he refers to this as the *arbitrium boni*, the view which would be taken by the ‘ordinary good and worthy subject of the King’. In the next paragraph, however, Slesser LJ required courts to have regard only for ‘the estimation in which a man is held by society generally’.¹⁹⁰

In fact the judgment is more coherent than most and is perfectly consistent once it is understood that for Slesser LJ society is generally constituted by ordinary good and worthy subjects of the King: the *arbitrium boni* equates with the *arbitrium populi* and neither is antagonistic towards police informants.

Fricke maintains that the ‘inescapable’ inference in Slesser LJ’s judgment is that the public favours informants. He then criticises the judge for not stating this more explicitly so that ‘its falseness would have been apparent’. First, it seems to escape Fricke that the public need not favour informants, but might be indifferent towards them. Secondly, Fricke may be correct and Slesser LJ wrong: perhaps the public dislikes informants, although neither Fricke nor the judge provide much by way of substantiation for their claims. Fricke declares ‘[w]e are all aware, through personal experience of the unfavourable public attitude towards informers’.¹⁹¹ But Fricke offers us no more than personal conviction.

But most importantly, Fricke’s criticism of the judge for lack of candour is misplaced. It is difficult to know how much more explicit Slesser LJ could be, particularly when he states that ‘to say or to allege of a man ... that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him *in the minds of the general public*’ (emphasis added). Quite clearly, and despite Fricke’s criticism of him, Slesser LJ is realist.

¹⁸⁹ Fricke, above n 15, 12.

¹⁹⁰ Ibid, citing *Byrne v Deane* [1937] 1 KB 818, 832-3 (Slesser LJ).

¹⁹¹ Fricke, above n 15, 12.

Greene LJ, in his dissenting judgment, comes closer to expressing a moralist position. He does not spell out what test he approves, but acknowledges that ‘it may very well be that the Legislature in its wisdom has made into a crime something which the public conscience of many persons in this country does not consider involves any sort of moral reprobation; but this Court it seems to me cannot be concerned with considerations of that kind’.¹⁹² If ‘many people’ do not disapprove of a form of criminalised conduct then they might well censure those who inform in relation to it. If the court cannot take such views into account, this suggests that Greene LJ is no sectionalist realist. But he does not make it clear whether he is prepared to reject the majoritarian realist position, whereby an imputation of informing on such conduct may be defamatory once the ‘many’ who disapprove constitute a majority of ordinary people. All that can be said is that *Byrne v Deane* is neither unequivocally moralist nor obviously realist.

PRINSLOO V SOUTH AFRICAN ASSOCIATED NEWSPAPERS LTD

Despite this doctrinal ambiguity in *Byrne v Deane*, it has been applied in a number of common law jurisdictions, for instance South Africa where a newspaper reported that a student from Witwatersrand University had been asked by South African police to report on fellow students’ criminal activities. The newspaper published the plaintiff’s photograph, reporting that when interrogated by other students she denied knowledge of ‘espionage’.¹⁹³ It was held that the applicants had failed to prove that the complaint was defamatory.

CONNELLY V MCKAY

This decision holds the kind of status in US law that is enjoyed by *Byrne v Deane* in Commonwealth countries, and is probably cited at least as often.¹⁹⁴ The proprietor of a service station and rooming house, patronised mainly by truck drivers, claimed the defendant slandered him with a report that he was informing the authorities about drivers who were in breach of rules relating to the permitted number of continuous driving hours. Although the plaintiff claimed a consequent decline in business, it was held that the statement relied upon could under no circumstances be considered defamatory. Deyo J quoted from the *Restatement of the Law of Torts* to the effect that ‘[t]he fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them’.¹⁹⁵ ‘To hold otherwise’, he continued, ‘would

¹⁹² [1937] 1 KB 818, 840.

¹⁹³ [1959(2)] S.A. Reports 693.

¹⁹⁴ 28 NYS 2d 327 (1941).

¹⁹⁵ Ibid 329, citing *Restatement of the Law of Torts* 142, para 559.

be contrary to the public interest, in that it would penalize the law-abiding citizen and give comfort to the law violator'.¹⁹⁶

In one of many US cases citing *Connelly v McKay*, a musician sued a rap singer with whom he had been indicted on a charge of sexually assaulting a woman.¹⁹⁷ The charges against the plaintiff were later severed from those against the singer, the latter's case going to trial and resulting in a conviction while the plaintiff pleaded guilty to lesser charges. An album of the singer's work was later released, selling around seven million copies in the US. The plaintiff claimed that one song alleged that he was working as an undercover informant against the singer, as a result of which the plaintiff had been 'unable to find employment commensurate with his training and experience, and has had his reputation destroyed in the community'.¹⁹⁸

Granting the defendants summary judgment, Mukasey J took the view that the plaintiff had not satisfied the court that the publication met the definition of a libellous publication under New York law: a statement that holds the plaintiff up to ridicule or scorn in the minds of 'right-thinking persons'.¹⁹⁹ Those who would think ill of someone who legitimately co-operates with law enforcement officials are not such persons. Consequently the plaintiff had not been exposed to public contempt, ridicule, aversion or disgrace in the minds of right-thinking persons.

In both of these cases the plaintiff claimed financial loss, but in other cases the harm faced by alleged informants is of a more vicious nature. In one American action, the plaintiff, a prison inmate, brought an action for slander against a television station when he was wrongly called an 'FBI informant'.²⁰⁰ The plaintiff contended that as a result of the broadcast, his life had been endangered and he had suffered both physical and mental damage. Nevertheless the claim was dismissed on the basis that '[t]he defamatory statement must expose the plaintiff to public contempt or ridicule in the minds of "right thinking persons" or among "a considerable and respectable class of people"'.²⁰¹ It was acknowledged that a charge of informing may bring opprobrium from the plaintiff's fellow inmates. Even so, 'it is not one's reputation in a limited community in which attitudes and social values may depart substantially from those prevailing generally which an action for defamation is designed to protect'.²⁰²

¹⁹⁶ 28 NYS 2d 327 (1941), 329.

¹⁹⁷ *Agnant v Shakur* 30 F Supp. 2d 420 (1998, US District Court, New York).

¹⁹⁸ Ibid 422.

¹⁹⁹ Ibid 424.

²⁰⁰ *Saunders v WHYY-TV* 382 A 2d 257 (1978) (Supreme Court of Delaware).

²⁰¹ Ibid 259, citing *Lawlor v Gallagher Presidents' Report, Inc*, SDNY 394 F Supp 721 (1975) and *Sharratt v Housing Innovations, Inc*, Mass. Supr., 365 Mass. 141, 310 NE 2d 343 (1974).

²⁰² *Saunders v WHYY-TV* 382 A 2d 257, 259 (1978) (Supreme Court of Delaware).

In another US case brought by a prisoner,²⁰³ the *Baltimore Sun* newspaper was sued when it incorrectly reported that the plaintiff, after pleading guilty to a major drug conspiracy charge, was to be given a new identity through the government's witness-protection program. The plaintiff claimed that as a result he was shunned by fellow inmates, called a liar and informer and faced the threat of harm. Granting the defendant summary judgment, Northrop J held that not only was a communication not libellous as a matter of law if it merely accused a person of being a criminal informant, but in order to be libellous the words complained of must hold a plaintiff up to scorn or ridicule in the eyes of a 'significant element of the community'.²⁰⁴ The criminal community was not such an element.

MURPHY V PLASTERERS' SOCIETY

Although this section concerns the police informant cases, it is relevant to mention a fascinating decision of the South Australian Supreme Court dating from 1949, since it has particular relevance to *Byrne v Deane*.²⁰⁵ Instead of alleged police informants, this involved the morality of breaking an unlawful strike. If ordinary reasonable people would approve of anyone who assists in the apprehension of law breakers, regardless of circumstances, might they also support those who resist calls for the unlawful withdrawal of labour?

An illegal strike had been called among workers building a new power house at Osborne, near Adelaide. During the dispute one union distributed a leaflet headed 'Osborne Scabs Must Go', which named those who had allegedly continued to work in defiance of their union. As a result twelve workers sued the union.

The defendant union argued that the leaflets were not defamatory, saying that to be defamatory words must lower the plaintiffs' reputation in the eyes of the right-minded citizen and not merely in the eyes of any particular section of the community, such as trade unionists.²⁰⁶ The court thus witnessed the curious spectacle of a trade union arguing that trade unionists do not equate with 'ordinary average right-minded' people. Almost as remarkably, the union also pointed out that the strike was unlawful, which might lead the right-minded 'good and worthy subject of the King' to approve of anyone who broke it.²⁰⁷

These arguments found no favour with Abbott J and the leaflets were held to be defamatory. In other words, the relevant audience would think less of someone for breaking a strike, even

²⁰³ *Burrascano v Levi* 452 F Supp 1066 (1978) (US District Court, Maryland).

²⁰⁴ *Ibid* 1072.

²⁰⁵ *Murphy v Plasterers' Society* [1949] SASR 98.

²⁰⁶ Referring to Slessor LJ in *Byrne v Deane*, see above at pages 87 to 89.

²⁰⁷ *Murphy v Plasterers' Society* [1949] SASR 98, 104.

though the strike was unlawful. This suggests that if Abbott J was using the moralist test, he was applying a morality that places worker solidarity above observance of the law. Since this seems improbable, it might be concluded that Abbott J was a realist: the leaflet was defamatory because a sufficiently sizeable number of people would think less of the plaintiffs, even though it is neither immoral nor irrational to break an unlawful strike.

To reach this conclusion is to fail to appreciate Abbott J's characterisation of 'ordinary reasonable people'. The judge suggests it is eminently moral and rational for ordinary reasonable people to shun and avoid strike breakers, even when the strike is illegal. But this is not because ordinary reasonable people put duty to the union above that to the law. In fact Abbott J, although describing trade-unionists as a 'large part of the population', explicitly declines to take their views as determinative of what is defamatory. And the judge appears not to countenance that non-trade unionists might share a concern for worker solidarity.

Instead, it transpires that the 'ordinary reasonable people' who are shunning strike breakers are 'average citizens not personally interested in trades unionism'. And for Abbott J the group represented by this person consists of, or at least includes, prospective employers, who would sensibly 'shun and avoid' the strike breakers, meaning decline to hire them, since their presence in the workforce could prove disruptive:

It cannot be doubted that for an employer to employ a man who has been stigmatized by his fellow workman as a "scab" would be to invite an immediate strike by the rest of his employees.²⁰⁸

For Abbott J the choice before him is not between a morality that gives paramount consideration to worker solidarity and one in which the rule of law comes first. If anything, the choice is between the rule of law and the economic interests of industry. The fact that Abbott J chose the latter might be taken as supportive of realism. But I suggest the matter is not so clear-cut. Instead, the decision bears the hallmarks of Greer LJ's dissenting judgment in *Byrne v Deane*, the case brought by the man accused of telling the authorities about the gaming machines in his golf club.²⁰⁹

One (mistaken) way to understand *Byrne v Deane* is that the majority decision is moralist: however much the public dislike informants, imputations of informing are *non*-defamatory, since it is improper to dislike informants. If that were the correct reading of *Byrne*, then we

²⁰⁸ *Murphy v Plasterers' Society* [1949] SASR 98, 105.

²⁰⁹ [1937] 1 KB 818.

might take Greer LJ's dissent to be realist: the public dislike informants, *ipso facto* imputations of informing are defamatory.

I do not think that is a valid conclusion. Greer LJ characterises the verse which gave rise to the action as imputing not that the plaintiff informed on lawbreaking, but rather that he breached his duty of loyalty to his fellow club members. This would normally bring him discredit in the eyes of the 'reasonable person' (who later in the judgment becomes 'ordinary reasonable member of the club'). It is this 'reasonable person' who is the relevant arbiter of defamation, according to Greer LJ. However, the judge suggests that the plaintiff would be able to argue, presumably in response to a defence of truth pleaded by the defendant, that the defamatory statement was not true on the basis that all he had done was his duty to the law. Assisting the police, far from constituting discreditable behaviour, instead excuses conduct that would otherwise be considered shameful. The inference is clear: one's duty is to one's club, but one's *first* duty is to the law. Therefore, Greer LJ need not be understood as saying that the public dislike informants. Rather, his position may be that the public dislike disloyalty, unless one's higher duty to the law requires it.

Similarly, Abbott J. in the case relating to strikebreaking, understands that the relevant audience, the 'average citizen not personally interested in trades unionism', would regard 'scab', the word used to describe the plaintiffs in the offending publication, as opprobrious, just as Greer LJ permitted that the reasonable person would recognise that disloyalty to one's club is *prima facie* wrong. According to Abbott J:

['Scab'] is a word well known to all members of the community, and well known as an insulting and derogatory epithet ... [T]o insist upon an innocent interpretation where any reasonable person could, and many reasonable persons would, understand a sinister meaning is to refuse reparation for a wrong that has in fact been committed ... I am satisfied that the word 'scab', apart altogether from its accepted meanings among trades unionists, is defamatory, and would be so understood by a substantial number of reasonable and fair-minded people – indeed, probably by all who read it.²¹⁰

The issue, then, is not whether 'reasonable and fair-minded people' would regard with disdain those who break unlawful strikes, but whether they would think less of someone termed a 'scab'. And they would, just as they would think less of those who are disloyal to their golf club. But the obloquy would lift once it was understood why the 'scab' had broken the strike, that is because it was illegal. In both cases, upholding the law excuses otherwise unconscionable behaviour: it exonerates the scab as well as the snitch.

²¹⁰ *Murphy v Plasterers' Society* [1949] SASR 98, 105.

BERRY V IRISH TIMES LIMITED

This case returns us to the issue of police informants, but this time with a sectarian dimension. In 1973 the Supreme Court of Ireland considered an action brought by a senior civil servant over a photograph in the *Irish Times*. The picture was of a Sinn Féin demonstration which, the accompanying text explained, was demanding the release of Irish prisoners held in Britain. The only crime of these prisoners, according to the demonstrators, was that they were ‘trying to do what little they could to loosen the imperial grip on Ireland’. The article centred on two Irishmen imprisoned in Britain for taking part in an arms raid in Essex.

Visible among the demonstrators shown in the photo was a man carrying a placard bearing the words ‘Peter Berry - 20th Century Felon Setter - Helped Jail Republicans in England’.²¹¹ The trial judge was of the view that these words were defamatory:

Prima facie, as a matter of reasonable inference, to suggest of a person of his standing, a reputable public servant, that he is an informer would lower his reputation.²¹²

Even so, the question was one for the jury. Despite the judge’s directions, and even though the jurors found that the words complained of meant that the plaintiff had helped jail Irish Republicans in England, they decided that the publication of those words was *not* defamatory. The plaintiff appealed to the Irish Supreme Court, claiming that no jury acting reasonably could answer that the matter complained of was not defamatory. By a 3:2 majority, the appeal was dismissed.

The plaintiff’s application won strong support from the minority. Fitzgerald J was strident:

It appears to me, and I think it would appear to any Irishman of normal experience and intelligence, that the words complained of were clearly a libel. “Felon-setter” and “Helped jail republicans in England” were not words in respect of which one has to have recourse to a dictionary to know what they meant to an Irishman; they were equivalent to calling him a traitor.²¹³

He thought that ‘a gross injustice was done to the plaintiff’.²¹⁴ The words were plainly defamatory and the jury should be so directed, the only issue left to decide being the level of damages.

McLoughlin J similarly thought it ‘beyond all argument’ that the words are defamatory:

²¹¹ [1973] IR 368 (Supreme Court of Ireland).

²¹² Ibid 380, quoted by McLoughlin J. See also *ibid*, 377 (Ó Dálaigh CJ) and 378 (Fitzgerald J).

²¹³ Ibid 378.

²¹⁴ Ibid.

[T]he suggestion is that this Irishman, the plaintiff, has acted as a spy and informer for the British police concerning republicans in England, thus putting the plaintiff into the same category as the spies and informers of earlier centuries who were regarded with loathing and abomination by all decent people.²¹⁵

McLoughlin J had a particular understanding of the test of what is defamatory. A publication is defamatory, he said, if it injures or tends to injure a person's good reputation 'in the minds of right-thinking people'.

It does not mean all such people but only some such people, perhaps even only one, because if a plaintiff loses the respect for his reputation of some or even one right-thinking person he suffers some injury'.²¹⁶

This is sectionalism in the extreme. Later the Justice continued:

It is my view that there must be many right-thinking persons who, although they do not approve of or positively disapprove of the acts of militant republicans in England, would regard the plaintiff with contempt if they believed that he had gone out of his way to supply information to the British police so as to have such persons jailed in England.²¹⁷

Giving judgement for the majority, Ó Dálaigh CJ accepted as a statement of the test as to what is defamatory the sectionalist test of Walsh J in *Quigley v Creation Ltd*, namely that defamatory material is that which will lower the plaintiff in the eyes of the 'average right-thinking man':

Words are defamatory if they impute conduct which would tend to lower [the plaintiff] in the eyes of a considerable and respectable class of the community, though not in the eyes of the community as a whole.²¹⁸

Applying this to the present case:

It is perhaps surprising that the Supreme Court should be asked to hold, as a matter of law, that it is necessarily defamatory to say of one of the citizens of this country that he assisted in the bringing to justice in another country of a fellow countryman who broke the laws of that country and who was tried and convicted for that offence in the ordinary course of the administration of criminal justice. This Court is bound to uphold the rule of law and its decisions must be conditioned by this duty.²¹⁹

Ó Dálaigh CJ makes a telling observation in relation to the view that someone who is accused of informing on a politically motivated criminal is necessarily defamed:

²¹⁵ Ibid 379.

²¹⁶ Ibid 380.

²¹⁷ Ibid 382.

²¹⁸ Ibid 374, citing *Quigley v Creation Ltd* [1971] I R 269, 272 (Walsh J).

²¹⁹ [1973] IR 368, 375.

To say, in those circumstances, that such an allegation must be defamatory would be to hold that ordinary right-thinking people in this country could not condemn such militant activities ...²²⁰

Ó Dálaigh CJ had earlier accepted a sectional test.²²¹ If we are to assume that a ‘considerable and respectable class of the community’ need not encompass all ‘ordinary right-thinking people’, an argument that a ‘considerable and respectable’ section of the ‘ordinary right-thinking’ community might find the imputation defamatory is not necessarily a claim that all ordinary right-thinking people find it defamatory. But Ó Dálaigh CJ does not seem to consider the possibility that ordinary right-thinking people can be divided in their opinion on the armed struggle for a united Ireland, with some condemning it and others not. The implication is that ordinary right-thinking people are united in their views on the struggle, and since they clearly do not condone it (otherwise the informant imputation would be capable of being defamatory), either they must all condemn it, or they are all indifferent to it.

BLAIR V MIRROR NEWSPAPERS LTD

The most interesting Australian police informant case arose in 1970 in the New South Wales District Court. Maria Blair had commenced proceedings over a newspaper article entitled ‘Wife Hands Over Husband to Law’.²²² Her claim arose from the following words:

Maria was tiny and frail-looking, her dark hair falling limply around her thin, pale face. She looked as if a puff of wind would blow her over ... yet her action was one which would make the strongest woman quail. She handed Roger, her husband, over to police custody in Paddington Court.

The defendant applied for the plaintiff’s claim to be struck out on the basis that these words were incapable of being defamatory. Referring to Lord Halsbury’s test of what is defamatory as the ‘sense in which any ordinary reasonable person would understand the words’,²²³ Levine DCJ rejected the plaintiff’s argument that a reader would think less of a woman who hands her husband over to the police, whether or not the reader thought him guilty of an offence:

What reasonable man would think of the words published in this case should not be judged by the opinion of those persons sympathetic towards criminals and crime, such persons constitute a small section of our society and certainly are not to be included in the class of reasonable man to whom Lord Halsbury referred. The law cannot recognize

²²⁰ Ibid 375.

²²¹ Ibid 374.

²²² [1970] 2 NSW 604.

²²³ *Nevill v Fine Art and General Insurance Co* [1897] AC 68.

as odious a standard of conduct accepted as such by the criminal class, but which ordinary right thinking law abiding citizens would consider to be proper conduct.²²⁴

Even though Levine DCJ was aware that ‘the jurisdiction to strike out the particulars of claim should be sparingly exercised and be done only in a clear case’²²⁵ he made the order sought by the defendant, adding that in his view, and in contrast to the plaintiff’s argument, ‘the words published are more likely to arouse sympathy with and for the plaintiff without any suggestion of her having done anything discreditable’.²²⁶

On appeal to the New South Wales Court of Appeal, the plaintiff’s argument was that a wife is by law placed in a specially sheltered position in relation to her husband, which enables her to avoid disloyalty to him, as for instance by giving evidence against him, disclosing confidential communications or being an accessory after the fact to his felony. Thus, it might be said, a wife’s first duty is to her husband, not the law.²²⁷ Giving the unanimous judgment for the Court of Appeal, Sugerman P was unconvinced by this line of argument and upheld the decision below.

YOUNAN V NATIONWIDE NEWS PTY LTD

The principle that in Australia imputations of informing will be incapable of defaming was being applied as recently as 2003.²²⁸ A newspaper reported that the plaintiff had been named in a Royal Commission report as acting as a police informant and had been involved as intermediary in an attempted entrapment of drug dealers. The report added that in the event the plaintiff had absconded with the \$340,000 of police money with which he was supposed to lure the dealers. The focus of the report, however, was that police were investigating the shooting of the plaintiff in the thigh by a gunman who was believed to have lain in wait for him, and that the plaintiff was currently in hospital under police guard, apparently for his own safety.

The plaintiff sued, claiming that the article imputed, among other things, that he is a police informant. The defendant applied to the New South Wales Supreme Court for a finding that this imputation was incapable of being defamatory. Upholding the application, Levine J described the test for capacity to defame as resting on the same foundation as the test for whether an imputation is carried: the foundation of reasonableness:

²²⁴ (1970) 2 DCR (NSW) (NSW District Court) 191, 193 (references omitted).

²²⁵ Ibid, citing *General Steel Industry Incorporated v Commissioner of Railways* [1965] ALR 636 and *Murphy v Australian Consolidated Press Ltd* [1968] 3 NSW 200.

²²⁶ (1970) 2 DCR (NSW) (NSW District Court) 191, 193.

²²⁷ [1970] 2 NSW 604 (NSW Court of Appeal), 606.

²²⁸ [2003] NSWSC 1211 (unreported, Levine J, 16 December 2003).

When ... one asks the question: whether the ordinary reasonable sensible member of the community, the right thinking citizen who constitutes the standard in this area, think [sic] the less of a person who is an informant to police, the answer in my view must be “no”. That the criminal community would regard such a person, in its own parlance, at the very least, as a “dog”; that the criminal community would so despise any person of whom that is said, to the point that its vengeance would be wreaked upon that person, is not the proper and available test and does not reflect the reasonable right thinking segment of the community.²²⁹

ISON V FAIRFAX PUBLICATIONS

One more Australian case is worth mentioning. The realist objection to the informant decisions is that it reflects misplaced moralism, whereby community disparagement of the dobber is ignored on the basis that the ‘right-thinking person’, as envisaged by the court, approves of attempts to uphold the law. What, then, of a situation where someone is imputed to have *failed* to inform? If this critique of moralism were correct then it might follow that the curial right-thinking person would look askance.

In 1997 the New South Wales Supreme Court heard an action brought by a police officer over a newspaper report of the Royal Commission into the New South Wales Police Service.²³⁰ Levine J accepted that the article was capable of imputing, among other things, that the plaintiff, while a police officer, was aware of, but did nothing about the use of cocaine by another officer (described as the plaintiff’s ‘partner’), and the partner’s sexual relationship with a woman whom the plaintiff knew to be a drug addict, drug dealer and former prostitute.

The alleged omission can be viewed as an officer of the law failing in his duty or a worker standing by his mate. Whichever is the case, the judge’s view remains unknown, since there is no indication from the report that the defendants ever raised the argument that the imputations were not defamatory. In 2000 a jury of two women and two men held that the plaintiff had not proved that the imputations relating to failure to inform had been conveyed to ‘the ordinary reasonable reader’.²³¹ This was despite Levine J having said earlier that he had ‘no reservation’ in concluding that each of the pleaded imputations was capable of being conveyed. As a consequence the defamatory nature of the imputations did not need be considered.

SHAHA V DARDIRYAN

While *Byrne v Deane* involved allegations of disloyalty at the golf club, in 1985, shortly before the first Intifada, the Israeli Supreme Court considered the same fundamental issue in a rather

²²⁹ Ibid [6].

²³⁰ *Ison v Fairfax Publications Pty Ltd* (unreported, NSW Supreme Court, Levine J, 12 December 1997): see Ron Good, ‘Central Coast Copper Fails in Action against SMH’, above n 161.

²³¹ Ron Good, ‘Central Coast Copper Fails in Action against SMH’, above n 161.

more dramatic context.²³² An archbishop in the Armenian church in East Jerusalem sued his patriarch when the latter accused him of collaborating with the Israeli government in the occupied territories. As a result the plaintiff, a citizen of Jordan, was denied entry into that kingdom. The archbishop sued in the District Court of Jerusalem, claiming the allegations had damaged him in the estimation of many Arabs, especially those who live in East Jerusalem and other occupied territories. At the defendant's motion the District Court struck out the claim as establishing no valid cause of action: whether the allegation was defamatory depended on the norms prevailing in the Israeli community. If a person's reputation is damaged in the eyes of a particular group then it is necessary to show that the norms and opinions of that group are not rejected by society generally.

The plaintiff's appeal was unanimously dismissed by the Israeli Supreme Court. Levin J followed the standard of 'right-thinking members of society generally':

Every reasonable person in Israel as well as in any civilized state does not regard as defamatory a statement alleging that a certain person collaborated with a policy aiming at securing the Rule of Law and maintaining security and public order. On the contrary, a person acting this way will be regarded by any reasonable person as someone who deserves to be commended and encouraged.²³³

But Elon J rejected the 'right-thinking' test. In one of the most obviously sectionalist realist decisions I have found, he thought the test was whether the statement is likely to injure a person within the segment (albeit small) of the community to which that person belongs, according to the common norms prevailing in that group. That, according to Elon J, remains the case, even though the statement is not regarded as offensive by the majority of the public, and even though the 'right-thinking person' may consider the norms of the group in question 'peculiar'.²³⁴

ROBSON V NEWS GROUP NEWSPAPERS

The principle that imputations of being a police informant are not capable of defaming now seems to be so entrenched that plaintiffs need to find ways around the problem. In 1995 the English High Court heard a complaint from a convicted fraudster that the *Sun* newspaper had reported he had 'turned grass', providing information about criminal offences to Scotland Yard's Flying Squad.²³⁵ According to the judge, the plaintiff accepted that this was not capable of defaming him, since 'it is the duty ... of all members of society to give such information to

²³² C.a. 466/83, PD 39 (4) 734 (1985) (Israeli Supreme Court). The case is described in Daniel More, 'Informers Defamation and Public Policy' (1989) 19 *Georgia Journal of International and Comparative Law* 503.

²³³ C.a. 466/83, PD 39 (4) 734 (1985), 741.

²³⁴ Ibid 750. Ben-Porath DP also rejected the 'right-thinking' test, but her support for a sectionalist test was more equivocal: C.a. 466/83, PD 39 (4) 734 (1985), 747.

²³⁵ *Robson v News Group Newspapers* (unreported, QBD, Previt  QC as J, 9 October 1995).

the police'. Rather, the plaintiff sought to bring an action under the relatively defendant-friendly laws of malicious falsehood. This was to the plaintiff's disadvantage, since he now had to prove that the allegation was both untrue and published maliciously. But it did away with the issue of whether disparagement met any moral or social criteria.

WESTBY V MADISON NEWSPAPERS

It is worth mentioning one more case, since this throws light on the parameters of the 'social duty' of helping to uphold the law. While we are supposed to pass on information to the authorities, it seems that we should not go so far as to act as snoops.²³⁶

The decision in question was reached in Wisconsin in 1977 and arose after a husband and wife sued a newspaper that referred to them as government informers, paid to spy on their neighbours, who were accused of political activism. After the defendants' objection to the complaint was overruled by the Circuit Court, they appealed to the Supreme Court of Wisconsin on the issue whether the article was capable as a matter of law of being defamatory.

Beilfuss CJ saw the issue as whether the publication was capable of being understood in a defamatory sense in the community by 'reasonable persons'. He pointed out the reference, early in the article, to federal 'snooping', which brought 'at least a hint of investigative excesses on the part of federal authorities'. Taken together with the reference to the plaintiffs spying, this could well be understood to mean that they were engaging in 'reprehensible snooping'. The fact that they were accused of accepting compensation for their spying suggested they were doing more than 'what any good citizen would do'. Furthermore, the phrase 'paid informant' could be interpreted as labelling them as 'mercenary opportunists' who violated the trust of their neighbours, with whom, according to the offending publication, the plaintiffs enjoyed 'close relationships'.²³⁷

Beilfuss CJ referred to several (unspecified) decisions from foreign jurisdictions supporting the proposition that libel could not flow from a charge of lawful co-operation with the proper authorities. These, he said, were to be distinguished from the present case, most importantly because 'all of them involved co-operation with law enforcement authorities against actual lawbreakers'.²³⁸ The plaintiffs' neighbours were not even suspected criminals but rather political activists, something likely to touch on American liberal sentiments relating to freedom of political activity.

²³⁶ *Westby v Madison Newspapers, Inc* 259 N.W.2d 691 (1977) (Supreme Court of Wisconsin).

²³⁷ *Ibid* 694.

²³⁸ *Ibid*.

SUMMARISING THE INFORMANT CASES

The informant cases, particularly *Byrne v Deane* and *Connelly v McKay*, are frequently cited as evidence that the law will at times eschew majority public opinion in favour of sentiments the courts find more palatable. In the above analysis of those and related cases, I have argued that the support the informant cases lend to moralism is ambiguous at best. While many courts have held that an imputation of assisting the police is not or cannot be defamatory, it is rarely obvious that this arises from anything other than a perception of most people as supportive of the rule of law.

IMPUTATIONS THAT EXCITE BIGOTRY

The above cases potentially pit legal norms (obeying and upholding the law) against social norms (loyalty to one's spouse, fellow workers, nationals, etc). In this section attention turns to some cases involving imputations likely to excite bigotry.

For the purposes of this study, three social phenomena have been chosen. Each relates to a viewpoint that can be described as bigotry, since it lacks moral and rational foundation. These are:

- a) homophobia;
- b) disapproval of human immunodeficiency virus (HIV) infection;
- c) disparagement of people on the basis of their criminal parentage.

The first was an easy choice for study, given that publications imputing homosexuality were the most frequently raised example of material that is neither obviously defamatory nor clearly non-defamatory. Homophobia is also an issue that attracts considerable media and social attention. The second similarly received considerable media coverage at the time when AIDS first grabbed popular attention (particularly the 1980s), but its position in public discourse has probably declined since then.

Another reason for choosing the first two phenomena was that, along with racism and sexism, they have been identified as prejudices whose eradication needs legal and institutional assistance. Consequently, many jurisdictions have laws protecting individuals against

homophobia or prejudice based on HIV infection.²³⁹ To this extent, defamation cases imputing these conditions, like the cases discussed above, involve opposition between, on the one hand, community attitudes and, on the other, legal norms. But imputations of homosexuality are particularly interesting, given that homophobia remains institutionalised in many areas of our culture and law.

The third social phenomenon stands in contrast to the others. It probably attracts less attention, perhaps because it is seen as less of a societal problem. This no doubt explains why there are fewer calls for institutional or legal solutions. To this extent the interaction between social and legal norms is less obvious: there are no specific laws protecting individuals from prejudice based on a parent's criminal record. Conversely, one of the issues underlying such prejudice is the moral status of criminality, so the relationship between social and legal norms is raised once again. What is more, it seemed a good choice because it was suspected that, out of the three prejudices selected, it might be the one most widely identified as straightforwardly irrational, while the other two (and especially the first) are more bound up with competing norms, particularly conservative versus progressive sexual moralities, as well as various religious doctrines.

HOMOSEXUALITY

LITIGATION PRIOR TO THE 1990S

Recorded defamation actions involving imputations of homosexuality stretch back to 1675, when a man sued after it was said he had been 'buggered'.²⁴⁰ The next two centuries produced a number of defamation actions on a similar theme, including one of history's most famous suits, brought by Oscar Wilde in 1895 when he was accused of 'posing as a Somdomite' (sic).²⁴¹

²³⁹ Discrimination in various areas on grounds relating to homosexuality is unlawful throughout Australia: *Anti-Discrimination Act 1977* (NSW) ss 49ZF – 49ZR (re homosexuality); *Anti-Discrimination Act 1991* (Qld) s 7 (sexuality and lawful sexual activity); *Equal Opportunity Act 1984* (SA) Pt 3 (sexuality); *Anti-Discrimination Act 1998* (Tas) s 16 (sexual orientation and lawful sexual activity); *Equal Opportunity Act 1995* (Vic) s 6 (sexual orientation and lawful sexual activity); *Equal Opportunity Act 1984* (WA) s 35O (sexual orientation); *Anti-Discrimination Act* (NT) s 19 (sexuality) and *Discrimination Act 1991* (ACT) s 7 (sexuality). The federal Australian Human Rights Commission can also investigate complaints about discrimination in employment on the grounds of sexual preference, as well as complaints against the Commonwealth in relation to acts or practices based on sexual orientation: *Australian Human Rights Commission Act 1986* (Cth). Federal law prohibits discrimination against people infected with, or believed to be infected with HIV, as well as those who associate with such people, in the areas of employment, education, access to premises, the provision of goods, services and facilities, accommodation, buying or selling property, membership of clubs and sport organisations and administration of Commonwealth programs: *Disability Discrimination Act 1992* (Cth).

²⁴⁰ *Snell v Webling* (1675) 2 Lev 150 83 ER 493.

²⁴¹ Apparently, there remains some doubt as to precisely what the defendant, the Marquis of Queensberry wrote on the infamous calling card that gave rise to the libel action, given his unclear handwriting. Some argue it reads 'For Oscar Wilde posing as a Somdomite': Denis Donoghue, *England, their England*:

Proceeding to the twentieth century, in 1917 two men sued in Scotland over allegations of homosexual acts after which ‘they were left without a shred of character; they are not men, they are beasts’.²⁴² Almost as famous as Wilde’s action is that brought by entertainer Liberace in 1959, after *The Daily Mirror* described him as a ‘heap of mother love’. He was awarded £2,000 in respect of this imputation of homosexuality.²⁴³

In none of these cases was there any serious challenge to the capacity of an imputation of homosexuality to defame. In America the presumption of defamation was so strong that up until about the 1970s an allegation of homosexuality was considered an imputation of sodomy and thus slanderous *per se* as an imputation of criminality, meaning that plaintiffs were excepted from the usual burden in slander of proving special damage.²⁴⁴ Similarly, an allegation of lesbianism was interpreted as an imputation of unchastity and thus slanderous *per se*.²⁴⁵

The first hint of a more enlightened attitude emerges from Illinois in 1977. The defendant to a slander action argued that the term ‘fag’ should be innocently construed because dictionary definitions include ‘cigarette’ and ‘to become weary’.²⁴⁶ Unsurprisingly this argument failed, but so too did the plaintiff’s attempt to argue that imputations of homosexuality constitute a fifth

Commentaries on English Language and Literature (1989), 242. Others claim the card read ‘To Oscar Wilde, posing Sodomite’: David Jays, ‘Wilde Disappointment’, *New Statesman* (London), 25 September 2000 <<http://www.newstatesman.com/200009250040>> at 22 February 2010. Other pre-20th century cases include *Colman v Godwin* (1782) 3 Dougl. 90, 99 ER 554 and *Anon* (1869) 29 UCQB 456 (CA) (accusation of being a ‘sodomite’).

²⁴² *AB v XY* [1917] SC 15. It is open to debate whether the defamation lay in the imputation of homosexuality *per se*, or whether it lay in the implication of criminality, homosexuality being at the time illegal in Scotland. For the former view, see McNamara, ‘Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame’, above n 15, 293. For the latter, see *Quilty v Windsor* (1999) SLT 346, 350K (Lord Kingarth OH).

²⁴³ *The Times* (London), 18 June 1959, 14. See also *The Times* (London), 17 June 1959. The full description of Liberace is somewhat more flamboyant and is gratuitously repeated by virtually all commentators on the issue of homosexuality and defamation. For instance, Levine J cites the famous quote, entirely unnecessarily, as a footnote to his judgment in *Horner v Goulburn City Council* (unreported NSW Supreme Court, Levine J, 5 December 1997) (see below at page 106).

²⁴⁴ *Buck v Savage* 323 SW 2d 363 (1959) (Tex Civ App); *Head v Newton* 596 SW 2d 211 (1980) (Tex Civ App); *Mozart v State of NY* 441 NYS 2d 600 (1981) (Ct of Claims, NY). Later US decisions were to the effect that an imputation of male homosexuality does not give rise to an imputation of unlawful conduct: *Stein v Trager* 232 NYS 2d 362 (1962) (SC, NY); *Moricoli v Schwartz* (1977) 361 NE 2d 74 (App Ct, Ill); *Matherson v Marchello* 473 NYS 2d 998 (1984) (SC App Div, NY); *Hayes v Smith* 832 P 2d 1022, 1025. For a detailed discussion on the issue, see Randy M Fogle, ‘Is Calling Someone “Gay” Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech’ (1993) 3 *Law & Sexuality* 165; Patrice S Arend, ‘Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?’ (1997) 18 *North Illinois University Law Review* 99; Eric K M Yatar, ‘Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence’ (2003) 12 *Law & Sexuality* 119.

²⁴⁵ *Schomer v Smidt* 170 Cal Rptr 662 (1980) (Ct App, Cal); *Nazeri v Missouri Valley College* 860 SW 2d 303 (1993) (SC En Banc, Missouri). In English law a similar situation was created as regards lesbianism: *Kerr v Kennedy* [1942] 1 KB 409.

²⁴⁶ *Moricoli v Schwartz* (1977) 361 NE 2d 74 (App Ct, Ill), 76.

category of slander *per se* in the US. This did not mean that they ceased to be defamatory, simply that evidence of actual damage to reputation would be needed.²⁴⁷

IMPUTING CHARACTER IN CRIMINAL LAW

Judicial disparagement of homosexuality was not limited to defamation proceedings. As a result of a criminal prosecution brought in 1974 the English Court of Appeal held that an allegation of a homosexual affair remains an imputation on a man's character, despite the partial decriminalisation of gay male sex in 1967. In *R v Bishop* a man charged with burglary sought at his trial to explain the presence of his fingerprints in the complainant's bedroom by saying that he and the complainant had had a homosexual relationship.²⁴⁸ The prosecution then applied for leave to cross-examine the defendant on his previous convictions, including ten for dishonesty. Leave was granted on the basis that the defence had brought into question the character of the complainant.²⁴⁹ The defendant's appeal failed: an imputation on character, within the meaning of the relevant provision, included charges of faults or vices, even if not criminal offences.²⁵⁰ An allegation of 'homosexual immorality' was such a charge in that it may reflect on a witness's reliability.²⁵¹

As recently as 1998 the High Court of Ireland was still prepared to use this disgraceful decision to support a finding that an imputation of homosexuality is defamatory. A Dublin nightclub manager had sued when a magazine described him as a 'gay bachelor'.²⁵² The defendant argued that this would not harm reputation. Even so, Kelly J, having discovered *R v Bishop* through his own research, thought that this represented the legal position in England and Ireland.²⁵³ He thus granted an injunction against publication of the magazine article.

LITIGATION POST 1990

During the 1990s, successful defamation actions arising out of imputations of homosexuality continued in America and elsewhere with alarming regularity. In Australia, for instance, Labor's

²⁴⁷ The same argument also failed in Colorado, when in 1992 Dubofsky J considered the community view on homosexuality to be mixed: *Hayes v Smith* 832 P 2d 1022, 1025, and again in Delaware in 1994: *Q-Tone Broadcasting, Co v Musicradio of Maryland, Inc* (unreported, Superior Court of Delaware, New Castle, Silverman J, 22 Aug 1994). The court was considering remarks made to a record company to the effect that a local radio personality was gay and propositions male clients, plus a remark to an advertising executive that the radio presenter had designs on him. These were found to be actionable defamations, even though not slander *per se*.

²⁴⁸ *R v Bishop* [1975] QB 274 (CA, Criminal Division, June 1974).

²⁴⁹ *Criminal Evidence Act 1898* (UK) s 1(f)(ii)a.

²⁵⁰ *R v Bishop*, 282G (Stephenson LJ).

²⁵¹ *Ibid* 282D (Stephenson LJ).

²⁵² *Reynolds v Malocco* [1999] 2 IR 203.

²⁵³ *Ibid*.

Health Minister Neal Blewett settled with damages and an apology in 1990 when it was said that he was gay.²⁵⁴ Liberal frontbencher Neil Brown QC had failed in his defamation action three years earlier, but only because the Master could see no imputation of homosexuality, and therefore no basis for action.²⁵⁵ According to media reports, both politicians later declared their homosexuality.²⁵⁶ Meanwhile in the UK, an old boy of Eton obtained £15,000 damages and an apology in 1994 after claiming that a fictional character in a novel, who was a drug-taking gay man, would be confused with himself.²⁵⁷

Even so, from the late 1980s onwards cases brought in London's libel courts start to suggest a change in social attitudes. For instance, when an openly gay journalist sued the BBC in 1989, it was not over an imputation of homosexuality but rather because he had been depicted as closeted and neurotic in relation to his sexuality.²⁵⁸ More famously, actor and singer Jason Donovan sued *Face* magazine in 1992 after it published a picture of his face superimposed over a body wearing a 'queer as fuck' T-shirt.²⁵⁹ Donovan, no doubt concerned about appearing homophobic if he sued over an imputation of homosexuality, complained that the photograph suggested his claims to heterosexuality were dishonest. He was awarded £200,000 by a London jury, but nevertheless the case is often cited as having greatly harmed his career.²⁶⁰

One London defamation lawyer has been quoted as saying 'the wheels came off gay claims at that point. The public reaction made it clear to all lawyers practising in the field that you could never sue on the allegation that someone was gay'.²⁶¹ While that might be true in relation to allegations of homosexuality per se, people continued to sue for defamation on the basis that they had been identified as gay, albeit always in the context of aggravating factors. In 1994, a nun sued the BBC in Scotland, complaining that a radio quiz show had suggested she was a

²⁵⁴ *Sun Herald*, 17 November 1991. See also *The Sydney Morning Herald*, 18, 19 & 22 July 1989.

²⁵⁵ *Brown v Ramsey* (unreported, Victoria Supreme Court, Master Barker, 24 July 1987). See also Anonymous, 'Brown v Time Australia' (July 1987) 6 *Gazette of Law and Journalism* 3.

²⁵⁶ *The Age* 19 October 1996 (re Brown), *The Sunday Age* 4 June 2000 (re Blewett).

²⁵⁷ *Wilbrahim v Faber & Faber* (England & Wales High Court): Anonymous, 'Dossier' (August 1994) 24 *Gazette of Law and Journalism* 2, 5. In the same year Prince Albert of Monaco failed in his suit against the presenter of a satirical French television show who had allegedly imputed that the prince was gay: Anonymous, 'At a Glance' (October 1994) 25 *Gazette of Law and Journalism* 20.

²⁵⁸ *Duncan Campbell v British Broadcasting Corporation*. The imputation was one of a number, the most serious of which related to the betrayal of an anonymous source. Campbell settled and recovered substantial damages, an apology and costs. The proceedings were conducted on behalf of the BBC by myself.

²⁵⁹ Rachel Borrill, 'Jason Donovan Awarded £200,000 Damages for 'Queer' Libel – The Face Magazine', *The Independent* (London), 4 April 1992, 1.

²⁶⁰ Eg Vincent Graff, 'Gay? Not Gay? So What! Why Should it be a Matter for the Libel Lawyers?', *The Independent* (London), 11 December 2005 <news.independent.co.uk/media/article332261.ece> at 8 February 2006.

²⁶¹ Mark Stephens quoted in Vincent Graff, 'Gay? Not Gay? So What! Why Should it be a Matter for the Libel Lawyers?', *The Independent* (London), 11 December 2005 <news.independent.co.uk/media/article332261.ece> at 8 February 2006.

lesbian. The final outcome of that action is unknown, but the BBC failed to get the action dismissed at a preliminary hearing, the judge considering it unnecessary at that stage to consider whether as a matter of law a suggestion of lesbianism remained defamatory.²⁶²

In 1998 film stars Tom Cruise and Nicole Kidman sued the *Express on Sunday*, claiming that a magazine article suggested, among other things, that ‘far from being the “golden couple” that they seek to portray ... the likely truth is that their marriage is a hypocritical sham, there being good reasons to believe that it is a cover for the homosexuality of one or both of them’. They also complained that the article suggested that there are ‘good reasons’ to believe that Cruise’s ‘failure to father children is attributable to impotence and/or sterility’ and that ‘his vehement public denial of sterility’ is ‘probably a lie’.²⁶³ These imputations were held by the judge at first instance (at an interlocutory hearing) to be capable of defaming the plaintiffs.²⁶⁴ The case was settled in November 1998, with the defendants reportedly recovering around £167,000 each in damages.²⁶⁵

Actions arising out of imputations relating to homosexuality also continued in Australia and elsewhere. In 1997 a Queensland judge, hearing the notorious ‘Pauline Panstdown’ defamation action, which resulted from a song in which a female impersonator derided One Nation leader Pauline Hanson for her reactionary views, clearly considered an imputation of homosexuality to be defamatory.²⁶⁶

QUESTIONING CAPACITY TO DEFAME

Even so, 1997 also saw the first known challenge (at least in Australia) to the assumption that an imputation of homosexuality can defame.²⁶⁷ Levine J rejected an argument of incapacity in the New South Wales Supreme Court while hearing a case arising in the employment context.²⁶⁸

²⁶² *Prophit v British Broadcasting Corporation* [1997] SLT 745, 748 (Temporary Judge TG Coutts QC). See also John Robertson ‘Woman Wins Hearing in Comedy Defamation Case’, *The Scotsman* (Edinburgh), 14 February 1997.

²⁶³ It was also claimed that there was good reason to believe that the marriage was a ‘cynical business arrangement and/or a marriage ordered by the Church of Scientology so that the Scientologists might dishonestly hold up the plaintiffs as an example to the young’: *Cruise v Express Newspapers PLC* [1999] Q B 931.

²⁶⁴ *Cruise v Express Newspapers PLC* [1999] Q B 931, 939G.

²⁶⁵ Ciar Byrne, ‘Cruise Wins £6m over “Gay” Allegations’, *The Guardian* (London), 17 January 2003.

²⁶⁶ *Hanson v Australian Broadcasting Corporation* (unreported, Queensland Supreme Court (in Chambers) Ambrose J 1 September 1997). The granting of an injunction was unsuccessfully appealed: *ABC v Hanson* (unreported, Queensland Court of Appeal, de Jersey CJ, McMurdo P, McPherson JA, 28 September 1998). The litigation has been the object of considerable analysis, eg Lawrence Bogad, ‘Electoral Guerrilla Theatre in Australia: Pauline Hanson vs Pauline Pantsdown’ (2001) 45(2) *The Drama Review* 70.

²⁶⁷ McNamara, ‘Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame’ above n 15, 284-6.

²⁶⁸ *Horner v Goulburn City Council* (unreported NSW Supreme Court, Levine J, 5 December 1997).

The Director of Corporate Services, Goulburn City Council, had written a review of the Human Resources Manager's performance which, it was claimed, imputed that the latter was in a gay relationship with the Council's General Manager. Both men sued the Director and his employer.

In considering capacity to defame, Levine J thought that community attitudes to homosexual relationships 'may range from sympathetic tolerance and understanding to an irrational abhorrence':

I do not consider that it can conclusively be said that even towards the end of this century's last decade that there can be, among ordinary members of the community, a view that to say of a person that that person is in a homosexual relationship is not disparaging or is not likely to lower that person in the estimation of such people. I do not hold that the imputations of a homosexual relationship are not capable of being defamatory.²⁶⁹

The following year, the Ontario Court of Justice heard a case brought by a police officer after a person with whom he had had an altercation displayed a sign on the tailgate of his vehicle describing the officer as a 'queer, steroid-using cop'.²⁷⁰ Although the defendant denied that this was defamatory, Kovacs J considered that 'queer' is a pejorative reference to sexual orientation and is 'designed to expose a person to hatred, contempt or ridicule when used in the way it was'.²⁷¹ The plaintiff was awarded \$5,000 for general damages.

THE FIRST FINDINGS OF NON-DEFAMATION

But the tide was clearly turning, and 1999 saw what seems to be the first decision by an adjudicator of fact to the effect that an imputation of homosexuality is not defamatory. This was reached by a New South Wales jury considering a claim brought by racing odds assessor Arthur Harris, who was unhappy when a book left no doubt about its author's views on the plaintiff's sexuality.²⁷²

In the same year, Scotland produced the first judicial (as opposed to jury) indication (albeit obiter) that an imputation of homosexuality per se may not be capable of being defamatory.²⁷³ A prison inmate wrote to the Scottish Prison Service, complaining about a particular prison officer, who, according to the prisoner, was homosexual. Lord Kingarth expressed the view that

²⁶⁹ Ibid.

²⁷⁰ *Anderson v Kocsis* 86 OTC 107.

²⁷¹ Para 39.

²⁷² *Harris v Perkins* (unreported, NSW Supreme Court, Ireland J, 24 March 1999). See McNamara, 'Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame', above n 15, 283 fn 59. See also Ron Good, 'Harris Gets Perkins' (August 1994) 24 *Gazette of Law and Journalism* 15.

²⁷³ *Quilty v Windsor* (1999) SLT 346.

‘merely to refer to a person as being homosexual would not now generally at least be regarded – if it ever was – as defamatory per se’. But Lord Kingarth took the letter to convey that the officer’s alleged homosexuality was, ‘albeit in some unspecified way, interfering with his work, and thus affecting his fitness to hold office, in the prison service, in particular in relation to his dealings with young offenders’.²⁷⁴

Around that time, actions arising from imputations of homophobia, as opposed to homosexuality, start to emerge. In 2000 a New South Wales jury found a number of teachers defamed by allegations that they had taken part in a deliberate campaign of ridicule and vilification against their lesbian headmistress.²⁷⁵

Even so, in December 2000 the Full Court of the South Australian Supreme Court still seemed to consider that a relatively straightforward imputation of homosexuality is capable of being defamatory. The Chairman of a political party known as Australian National Action sued after being lampooned in an article appearing in Adelaide’s *Messenger* newspaper. It was suggested that the Chairman would ‘sit down to take a pee’, referred to him doing the splits ‘in a delicious green leotard’ and speculated as to whether he might varnish his toenails. The defendant’s primary defence was not that the imputation was incapable of being defamatory, but rather that the article would be understood as published in jest. The plaintiff succeeded when the matter was tried at first instance by a magistrate, who found that imputations that he displays feminine, effeminate and homosexual behaviour arose. Subsequent appeals went against the plaintiff, not on the basis that any imputation of ‘homosexual tendencies’ was incapable of being defamatory, but rather that the lampoon did not give rise to any such imputation.²⁷⁶

RIVKIN V AMALGAMATED TELEVISION

The next occasion for consideration of capacity for imputations of homosexuality to defame arose when high profile Sydney stockbroker Rene Rivkin sued the *Australian Financial Review*, the *Sydney Morning Herald* and Channel Seven’s *Witness* current affairs program, all of which had reported on the suspected murder of a young model, Caroline Byrne. In the course of doing so they examined the relationship between Rivkin and the model’s boyfriend, Gordon Wood. Rivkin claimed that the two newspapers defamed him by suggesting that he had homosexual

²⁷⁴ Ibid 354.

²⁷⁵ *Mularczyk v Nationwide News Pty Ltd* (No 21449 of 1996): Ron Good, ‘Gay Teacher Furore Goes to Trial’ (3 November 2000) *Gazette of Law and Journalism* <www.lawpress.com.au/genews/ge123_NNews.html> at 2 July 2002.

²⁷⁶ *Brander v Ryan* [2000] SASC 446 (unreported, Prior, Lander & Bleby JJ, 21 December 2000).

intercourse with Wood.²⁷⁷ The papers did not challenge the ability of this imputation to defame Rivkin and a jury subsequently found that it did not arise from the publication.

When Rivkin claimed that a similar imputation arose from the Channel Seven program, however, Amalgamated Television challenged its capacity to defame the plaintiff. In support of their argument, the defence referred to various enactments of the New South Wales and Federal legislature as evidence of the growing acceptance of homosexuality: the partial legalisation of consensual homosexual activity between men in 1984, the outlawing of discrimination on the grounds of homosexuality in a number of contexts, the anti-homosexual vilification measures of 1993, and others.²⁷⁸

For the plaintiff it was submitted that such legislation did not speak to the question of whether ‘ordinary right thinking members of the community’ might think less of a man who has homosexual intercourse. It was also submitted that ‘many reasonable persons holding religious convictions would consider engagement in homosexual sexual relations to be a sin’.

Bell J accepted the latter submission, but nevertheless held the imputation incapable of defaming the plaintiff:

[I]t is no longer open to contend that the shared social and moral standards with which the ordinary reasonable member of the community is imbued include that of holding homosexual men (or men who engage in homosexual sex) in lesser regard on account of that fact alone.²⁷⁹

Her reasons suggest that this was not because homophobes are irrational or unethical in their views, but rather because homophiles outnumber them. Bell J draws in particular on the decision of the High Court in *Reader’s Digest v Lamb*, where it was held that ‘[t]he defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes’.²⁸⁰ It was on this basis that Bell J reached her conclusion:

I accept that reasonable members of the community by reason of religious belief may think the less of a man who engages in homosexual intercourse. However, the test

²⁷⁷ *Rivkin v John Fairfax Publications Ltd* (unreported, NSW Supreme Court, Simpson J, 18 April 2001).

²⁷⁸ The partial decriminalisation of consensual male homosexual activity in New South Wales occurred with the repeal, by the *Crimes (Amendment) Act 1984* (NSW), of the relevant provisions of the *Crimes Act 1900* (NSW). Discrimination in NSW on the grounds of a person’s actual or perceived homosexuality is unlawful under the *Anti-Discrimination Act 1977* (NSW) ss 49ZF – 49ZR. That Act has also outlawed homosexual vilification since 1994 due to the *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW): *Anti-Discrimination Act 1977* (NSW) s 49ZT.

²⁷⁹ *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432 (unreported, NSW Supreme Court, Bell J, 28 May 2001) para 30.

²⁸⁰ See above at pages 63 to 65.

enunciated in *Lamb* posits a hypothetical audience of ordinary reasonable persons who hold a standard common to society generally.²⁸¹

On this basis Bell J's decision is far from moralist: the inference must be drawn that if more 'reasonable members of the community' shared the religious beliefs of those who would think less of men who engage in homosexual intercourse then this would suffice to render an imputation of homosexuality capable of being defamatory.

This is not how others have seen the decision. For instance, Marina Lloyd Jones thought that the conclusion that homophobia is not an attitude held by a significant sector of society (not a claim made by Bell J) is 'superficially attractive'.²⁸² However, Bell J was to be criticised for importing the 'mindset' of 'right thinking members of the community':

The argument promoted for looking through the eyes of "right thinking" community members is that the law should attempt to encourage progressive moral attitudes within the community. However, one wonders whether this task should be undertaken by ignoring what may be the prevailing attitude.²⁸³

POST-RIVKIN PREVARICATION

Less than six months later (November 2001) the issue was again referred to in the New South Wales Supreme Court, although this time in an obiter remark by Levine J. The case before the court involved a photograph in the magazine *The Picture* which showed a water polo player with her breasts exposed as a result of her swimming costume having become askew.²⁸⁴ During consideration of the defence's argument relating to changing social attitudes to public exposure of breasts, Levine J indicated his agreement with Bell J's decision in *Rivkin*, also acknowledging that it ran contrary to his own in *Horner v Goulburn City Council* less than four years earlier.²⁸⁵

It is curious, then, that in June 2003 Levine J once again found an imputation of homosexuality capable of being defamatory.²⁸⁶ *The Sun-Herald* had published a photograph of a man apparently tied to the top of a grand piano in Hyde Park in central Sydney. The accompanying text described this as a 'piano-top bondage display' and a street performance due to form part of that year's Gay and Lesbian Mardi Gras. The article also stated that the performer was Rob

²⁸¹ *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432 (unreported, NSW Supreme Court, Bell J, 28 May 2001), para 25.

²⁸² Lloyd Jones, above n 15, 94.

²⁸³ *Ibid* 96.

²⁸⁴ *Obermann v ACP Publishing Pty Ltd* [2001] NSWSC 1022 (unreported, Levine J, 16 November 2001) [21].

²⁸⁵ See above at page 106.

²⁸⁶ *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586 (unreported, Levine J, 27 June 2003).

Kelly, described as Queensland Performing Arts Trust chairman and ‘senior partner with law firm Gadens’. In fact the Rob Kelly who had held both of these positions was not the man depicted in the photograph. This case of mistaken identity drew from the paper a prompt apology, but this did not suffice for Kelly the lawyer, who sued, claiming that the article imputed, among other things, that he ‘is a homosexual’.

Despite his comments in 2001, Levine J decided not to follow Bell J’s decision, with which he now said he was not ‘entirely in agreement’. In any event, there had ‘intruded into this area ... a new factor’. In 2002 the New South Wales Court of Appeal had decided that in determining whether an imputation is capable of defaming the plaintiff, regard must be had for the context in which the imputation arose.²⁸⁷ In this case the imputation of homosexuality, if it arose at all, came in the context of a light-hearted newspaper report about a piece of street theatre in Hyde Park. In contrast, *Rivkin* related to a sensationalist television program about a boss engaging in intercourse with an employee and then conspiring to murder that employee’s girlfriend. It is hard to imagine a context more damaging to the plaintiff than the latter, or more harmless than the former. That being so, the circumstances in *Kelly* should, if anything, have reduced still further the capacity of an imputation of homosexuality to defame. Nevertheless, *Rivkin* gave rise to such an imputation that could not defame, while the conditions in *Kelly* were such that the same imputation could defame! Reassuringly, in 2004 a jury of four men decided that the senior partner in *Kelly* had not been defamed when it was suggested that he is gay, thus becoming the second jury known to have found that an imputation of homosexuality is not defamatory.

No subsequent defamation action has been found that relates to an imputation of homosexuality per se. Today, any reference to homosexuality in pleaded imputations is likely to be combined with aggravating factors. For instance, in the action brought by celebrity stockbroker Rene Rivkin against Channel Seven, although Bell J held that a straightforward imputation of homosexuality was incapable of being defamatory, a Sydney jury found him to have been defamed when the station suggested that he had lavished gifts on, and engaged in homosexual intercourse with an employee (again Gordon Wood), a man ‘much younger than him’, who was

²⁸⁷ *Greek Herald v Nikolopoulos* (2002) 54 NSWLR 165.

engaged to be married and viewed Rivkin as a father figure'.²⁸⁸ The imputation cost Channel Seven \$150,000 in damages.²⁸⁹

More recently in 2005, in an action remarkably reminiscent of Jason Donovan's some thirteen years earlier, singer Robbie Williams recovered damages over media reports that he is secretly homosexual and had covered up a string of casual sexual encounters with men.²⁹⁰

HIV

By the end of 2008, it was estimated that over 28,000 people in Australia had been diagnosed as infected with HIV. There were over 10,000 people diagnosed as having AIDS and there had been over 6,700 deaths following the syndrome.²⁹¹ Only around 7% of infections are not associated with sexual activity, and in the case of over half of these the cause was believed to be the injection of prohibited drugs. 76% of infections are attributed to male homosexual contact and a further 14% to heterosexual contact.²⁹²

Given the strong statistical and social connection between HIV and drug use or sexual activity, particularly male homosexuality, it would not be surprising if imputations of HIV infection had been found to be at least capable of defaming. According to Gatley, 'it would be extraordinary if an imputation of being HIV positive were not actionable per se'.²⁹³ This conclusion seems to be reached independently of the proposition put forward in that book that it suffices if a publication

²⁸⁸ *Rivkin v Amalgamated Television Services Pty Ltd* (No 20086 of 1998, NSW Supreme Court). See Claire Harvey, 'Rivkin Defamed by Witness Sex Report', *The Australian*, 29 May 2001, 5; Ellen Connolly 'Rivkin Takes Stock After Second Jury Rebuffs Him' *The Sydney Morning Herald*, 29 May 2001, 3; Richard Ackland 'Gay Balance in the Scales of Justice', *The Sydney Morning Herald*, 8 June 2001, 15. See also at page 108 above.

²⁸⁹ *Rivkin v Amalgamated Television Services Pty Ltd* [2002] NSWSC 496 (unreported, NSW Supreme Court, Cripps AJ 18 June 2002). Rivkin also took action against two articles in *The Sydney Morning Herald* (25 Feb & 5 Mar 1998) on the basis of imputations that he had 'engaged in homosexual intercourse' with his employee and that 'the police had reason to suspect that the plaintiff had engaged in homosexual intercourse' with his employee: *Rivkin v John Fairfax Publications Pty Ltd* (No 20084 of 1998, NSW Supreme Court). A jury returned a verdict that the imputations did not arise: Anonymous, 'Rene Rivkin Loses Defamation Case against Fairfax' (April 2001) *Gazette of Law and Journalism* <lawpress.com.au/genews/ge127_Rivkin_Fairfax.html> at 24 April 2001. The High Court subsequently overturned this verdict as perverse: *Rivkin v John Fairfax Publications Pty Ltd* (2003) 201 ALR 77, but the case was then settled: Michael Cameron 'Rivkin Settles Defamation Case', *The Australian*, 8 July 2004, 18. See also Neil Chenoweth 'Costs Next Battle in Rivkin-Fairfax Case', *Australian Financial Review*, 19 May 2004, 12; Richard Ackland, 'High Price to Pay for a Deflated Ego', *The Sydney Morning Herald*, 21 May 2004, 11.

²⁹⁰ Mark Honigsbaum, 'Robbie Williams Wins Damages over "Secret Homosexual" claims', *The Guardian* (London), 7 December 2005.

²⁹¹ Australian Bureau of Statistics, *1301.0 Year Book Australia, 2009-10* (2010) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1301.0>> at 23 August 2010, 365.

²⁹² The proportion of newly diagnosed cases of HIV infection attributed to heterosexual contact has risen considerably in recent years (27% in 2008): Australian Bureau of Statistics, *1301.0 Year Book Australia, 2009-10*, above n 291, 366.

²⁹³ Milmo and Rogers, above n 28, 146 (para 4.13), fn 68.

would cause others to shun or avoid a person, even if they would not be thought worse of, since '[t]here will be some cases (eg where there is an allegation of venereal disease) where the statement is capable of imputing discreditable conduct to the claimant'.²⁹⁴ Gatley continues 'it is submitted that it would be defamatory to say that a person was HIV positive even though the statement made it plain that the condition had been acquired innocently, for example by a blood transfusion'.²⁹⁵ *A fortiori*, if the virus were contracted 'guiltily', such as through sex. Indeed, in *The Law of Defamation in Canada* Raymond Brown wrote '[t]he rule is generally confined to diseases that are especially repugnant, lingering or chronic in character. The cases in Canada have been limited to venereal disease. ... An accusation that a person has AIDS is undoubtedly slanderous per se'.²⁹⁶

In contrast to the numerous imputations of homosexuality considered by the courts, no case law could be found within Australia or the UK relating to how an imputation of HIV infection might actually fare. Even so, in the course of interviewing Australian legal practitioners for this thesis, at least two complaints against the media came to light, made by those who felt defamed as a result of being wrongly identified as HIV positive. Both cases were settled with the payment of damages.²⁹⁷

There are also US cases where it seems assumed that the imputation is defamatory. For instance, in 1988 *The National Enquirer* reported on a dispute over maintenance payments for the daughter of singer Engelbert Humperdinck. In the course of litigation the child's mother claimed that Humperdinck had 'AIDS related syndrome'. The paper reported the story under the heading 'Mom of Superstar Singer's Love Child Claims in Court ... Engelbert Has AIDS Virus'. Humperdinck denied the claim, but his suit for defamation failed on the basis that the article was privileged as a 'fair and true report' of judicial proceedings.²⁹⁸ There is no record of the publisher having challenged the defamatory nature of the story.

In 1994 some medical staff in North Carolina, on their way to lunch at a delicatessen housed in a building known as Colonial House, were allegedly warned by the Director of Emergency Medical Services that 'I heard someone over there has AIDS'.²⁹⁹ This statement found its way

²⁹⁴ Ibid 45 (para 2.6).

²⁹⁵ Ibid.

²⁹⁶ (2nd ed, 1994) 448-9.

²⁹⁷ One such complaint was brought against a commercial television station, arising out of a news item dating from the late 1980s which concerned the potential risk to rescue workers arising out of a car accident involving a man said to have AIDS. The other was made against an Australian newspaper publisher.

²⁹⁸ *Dorsey v National Enquirer, Inc*, 973 F.2d 1431; 20 Media L. Rep. 1745; 92 Cal. Daily Op. Service 7073; 92 Daily Journal DAR 11390 (US Court of Appeals, Ninth Circuit, 1992).

²⁹⁹ *Chapman v Byrd* 124 N.C. App. 13; 475 S.E.2d 734 (North Carolina Court of Appeals).

into the local news media, as a result of which nine individuals, all of whom owned or worked in various types of business in Colonial House, sued in defamation. The action was dismissed on the basis that the plaintiffs were insufficiently identified as the people who were supposedly HIV positive. Again, there is no indication that the argument was raised that the statement was not defamatory in nature.

Finally, in 2001 the Ontario Superior Court refused to strike out a claim that a police officer had been bitten by an HIV-positive suspect, saying that the claim might succeed.³⁰⁰ On the basis of this and the other precedents and commentary it appears that the report relating to HIV is almost certainly capable of defaming and probably would be considered defamatory.

CRIMINAL PARENTAGE

Another group who might be thought to be at risk from irrational prejudice are those law-abiding citizens who are related, through no choice of their own, to criminals.

I have posited that disparagement of criminal parentage might be widely challenged on the basis of irrationality, more so than denigration of those with HIV or, even more so, disparagement of homosexuals, which might be taken as evidence of conservative sexual morality. The view that imputations of criminal parentage reveal nothing (or at least very little) about an individual's morality is more likely to be widely embraced, regardless of religious or political views.

It was argued in Chapter Three that the law seems to afford the ordinary reasonable person more latitude when it comes to irrationality than in relation to moral choices. That being so, the likelihood of an imputation of criminal parentage being defamatory should be greater than the chances of an imputation of homosexuality or HIV infection being defamatory, assuming of course that disparagement on the basis of the last two imputations is considered unethical.

But the authorities suggest that denigrating someone on the basis of their parentage is rather too irrational. At least that is so in England, whence the clearest authority comes. When the *Sun* newspaper reported in 1993 that a convicted fraudster had 'turned grass', providing information about criminal offences to Scotland Yard, they also reported that he was the illegitimate son of notorious English gangster Ronnie Knight.³⁰¹ The judge accepted the defence argument that it cannot be defamatory of a man to say he is the son, illegitimate or otherwise, of such a man:

³⁰⁰ *Serdar v Metroland Printing Publishing and Distributing Ltd* [2001] OTC 318.

³⁰¹ *Robson v News Group Newspapers* (unreported, English High Court (Queen's Bench Division), Previt  QC as J, 9 October 1995).

‘[q]uite obviously, it is not - and cannot be - an imputation of discredit to any person to say that their father is a criminal.’

In Australia the position is less clear. The matter was considered hypothetically in 1969, when the New South Wales Court of Appeal was hearing a case in which the plaintiff’s father was said to be a voluntary patient in a Sydney mental hospital.³⁰² By a majority of 2:1 this was held to be incapable of being defamatory in the absence of any mention of a hereditary element in the condition. In the process of reaching that decision Jacobs JA, as part of the majority, briefly considered three hypothetical and separate imputations: that a man’s parents are not married, that his mother is a whore and that his father is a murderer or a traitor. All of these he thought capable of defaming the son.

Jacobs JA’s views were considered in 1984 by Hunt J in the New South Wales Supreme Court. He accepted the first two were capable of being defamatory, but failed to address the ones relating to the father’s criminality.³⁰³ The case he was hearing concerned an imputation that the plaintiff’s brother is a criminal. A newspaper had reported on the case of Linus Patrick Driscoll, an alleged member of the ‘Toe Cutters’ gang, which tortured its victims by cutting off their toes with bolt cutters. The article was accompanied by a photograph, purporting to be of Linus, but actually of the plaintiff. The paper apologised for the error, but in doing so identified the plaintiff as the brother of Linus. The plaintiff sued on the grounds that the apology imputed that he is ‘to be shunned and despised’ as the brother of a ‘brutal criminal’. Hunt J held that it was insufficient to say that his reputation was disparaged on this basis.

In 1998 the New South Wales Supreme Court was faced with a similar case, but this time Levine J was presiding.³⁰⁴ The imputation was that the plaintiff was a ‘brother of Raymond Galea who had been charged with a grisly murder’ and was a ‘person with whom people should not associate because his brother had been charged with a gruesome murder’. Neither was held capable of being defamatory.

A further indication as to whether the legal profession consider an imputation of criminal parentage defamatory comes from a 1988 action brought against the author of a book that accused a deceased police detective of criminal offences.³⁰⁵ The action, brought by the detective’s son, did not claim the book was defamatory of the son. Instead, the son sued under

³⁰² *Livingstone-Thomas v Associated Newspapers Ltd* (1969) 90 WN (Pt 1) (NSW) 223.

³⁰³ *Driscoll v Australian Consolidated Press Ltd* (No 17295 of 1978) (unreported, NSW Supreme Court, Hunt J, 26 September 1984).

³⁰⁴ *Galea v Amalgamated Television Services* (unreported, NSW Supreme Court, Levine J, 20 February 1998).

³⁰⁵ *Krahe v Freeman* (1988) ATPR para 40-871.

the New South Wales' *Fair Trading Act 1987*. Section 42 provides that a person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Given the relatively favoured position of plaintiffs in defamation proceedings (they carry a minimal burden of proof) it seems certain that the son had been advised that defamation proceedings brought on the basis of his parentage would fail.³⁰⁶

An obvious distinction is between those associations that are involuntary, for example where the criminal is a blood-relative, and those that are chosen. Not surprisingly, on a number of occasions imputations of voluntary association with criminals have sufficed as a basis for a defamation action. For instance, in 2001 the New South Wales Court of Appeal considered an allegation that members of the Rebels Motorcycle gang willingly and knowingly associated with people involved in the manufacture and distribution of illegal drugs.³⁰⁷ These imputations were allowed to go to a jury who found the imputation to be defamatory.

At first brush *Sinclair v John Fairfax & Sons Ltd* seems to deviate from this position.³⁰⁸ The plaintiff was a 72 year-old retired businessman who had been convicted in Thailand of possessing heroin with intent to distribute, but had later been acquitted on appeal. He sued when a newspaper suggested that he 'knew and associated with members of the underworld, including criminals'.³⁰⁹ The jury found that the article conveyed this imputation, but indicated that it did not consider it to be defamatory of the plaintiff. Note, however, that the judge asked the jury if it found the allegation to be true, which it did.³¹⁰ It is possible that the jury mistakenly conflated the issue of what is defamatory with the question of whether the imputation was true.³¹¹

While the result in *Sinclair* is ambiguous, consider a third case brought in New South Wales, this time in 1977. A police officer had been accused by a newspaper of a sexual relationship with a woman whom he knew to be a drug addict, drug dealer and former prostitute.³¹² A jury

³⁰⁶ In the event the proceedings under the *Fair Trading Act* failed anyway, on the basis of s 60, which exempted prescribed publications by certain information providers.

³⁰⁷ *Jackson v TCN Channel Nine Pty Ltd* [2001] NSWCA 108 (unreported, Handley JA, Hodgson & Wood CJJ, 10 March 2001).

³⁰⁸ Action nos S 16057 of 1983 and S 14128 of 1986, NSW Supreme Court.

³⁰⁹ Leanne Norman 'Victory for Fairfax in Sinclair Defamation Trial' 1(2) *Gazette of Law and Journalism* 5, 6.

³¹⁰ *Ibid* 7.

³¹¹ The plaintiff unsuccessfully appealed (but on unrelated grounds) against the verdict entered against him: *Sinclair v John Fairfax and Sons Ltd* (unreported, NSW Court of Appeal, Glass JA, Mahoney JA and McHugh JA, 4 March 1986).

³¹² *Ison v John Fairfax Publications Pty Ltd* (unreported, NSW Supreme Court, Brownie AJ, 17 February 2000).

found that the publication in question conveyed this imputation, but that the imputation was not defamatory.³¹³

For those with some belief in the sanctity of marriage, matrimony straddles the two categories of relationship, the involuntary and those over which the individual has complete control. In 1986 the New South Wales Supreme Court considered an action brought by the widow of a police detective, the same one whose son had sued under the *Fair Trading Act*.³¹⁴ Allegations of criminal conduct, made against the detective while alive, were repeated during media reports of his funeral. Apparently the widow received different legal advice, since she sued for defamation, claiming a range of imputations, one of which was that ‘she is a woman of loose morals because she knew her husband committed adultery with a prostitute and associated with criminals but still continued to live and cohabitate (sic) with him’.³¹⁵

Unfortunately the relevant part of Hunt J’s judgment is not reported.³¹⁶ However, according to one journalist’s coverage of the case, ‘the absurdity of the submission that anyone who lived with an adulterer and a criminal would be regarded by the general community as a person of loose morals, was finally conceded’.³¹⁷ Conjecture suggests that the absurdity lies in the idea that a report of living with a criminal necessarily implies knowledge of the latter’s criminality. As the report goes on, ‘[t]he proposition that the general community also understands that husbands and fathers always confide everything to their wives and family has only to be stated in order to be rejected’.³¹⁸

IMPUTATIONS RELATING TO SHIFTING SEXUAL MORALITY

Where do ordinary reasonable people stand on issues of sexual morality? Unsurprisingly, defamation law has traditionally reflected a constrained approach to sexuality. No study of the law’s relationship with community attitudes would be complete without considering the extent to which more progressive views have permeated into the courtroom.

³¹³ Ron Good, ‘Central Coast Copper Fails in Action against SMH’, above n 161.

³¹⁴ *Krahe v TCN Channel Nine Pty Ltd* (1986) S13824 of 1985, NSW Supreme Court (1986).

³¹⁵ Anonymous, ‘No Separate Trial for Imputations’ (May 1986) 1(1) *Gazette of Law and Journalism* 4, 5.

³¹⁶ Hunt J’s judgment in relation to other aspects of the case is reported: *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536.

³¹⁷ Anonymous, ‘No Separate Trial for Imputations’, above n 315, 6.

³¹⁸ *Ibid*, apparently quoting Hunt J.

SEX BEFORE MARRIAGE

Until very recently, defamation law reflected an assumption that an imputation of unchastity would lead to real and quantifiable damage to an unmarried woman's reputation.³¹⁹ In 1891 the British Parliament felt sufficiently sure about the matter to amend the common law which, until then, required proof of damage before a woman could sue over words imputing a lack of chastity 'unless they were spoken of her in the way of her calling'.³²⁰ Following decades of judicial disquiet about this rule,³²¹ the *Slander of Women Act 1891* removed the requirement for special damage.³²² Every Australian state or territory with a special damage requirement for slander followed suit. While some parts of the country abolished the distinction between libel and slander many decades ago,³²³ it remained relevant in three states until 2006, when Australia implemented new, harmonised defamation laws. Consequently, in the states of South Australia, Victoria and Western Australia there continued into the 21st century a special exemption from the requirement of special damage in the case of allegations of female unchastity. The first two states specified that '[w]ords spoken and published of any woman imputing to her a want of chastity, shall be and shall be deemed to be slander, and an action shall be sustainable for such words in the same manner and to the same extent as for words charging an indictable offence',³²⁴ while Western Australia provided that slanders imputing unchastity or adultery to a woman shall not require special damage to render them actionable.³²⁵

There is, of course, the question of what constitutes 'chastity' and what it takes to lose it. If we interpret chastity as synonymous with the equally archaic concept of maidenhood, there appear to have been no cases in post-war Australia that deal straightforwardly with pre-marital loss of virginity. For instance, in 1994 a woman sued in New South Wales when author Bob Ellis

³¹⁹ Numerous historic precedents exist of women bringing actions on the basis of an imputation of unchastity or related imputation: eg *Anderson v Stewart* (1851) 8 UCQB 243 (CA), *Porter v McMahon* (1885) 2 NBR 211 (CA) (imputations of bearing an illegitimate baby); *Speight v Gosnay* (1891) 60 LJQB 231 (rumour that an unmarried woman was unchaste, as a result of which the plaintiff's fiancé broke off the engagement); *Sefton v Baskin* (1917) 37 NZLR 157 (SC) and *Brenner v Cisek* (1929) 23 Sask LR 573 (slandorous imputations of unchastity actionable *per se*); *Faryna v Chorny* [1951] 4 WWR 171 (BCCA) (allegation that an unmarried housekeeper for Ukrainian clergy had left her services temporarily 'for confinement').

³²⁰ *Jones v Jones* [1916] 2 AC 481, 495. See also *Wilby v Elston* (1849) 18 LJCP 320.

³²¹ *Jones v Herne* (1759) 2 Wilson 87; *Lynch v Knight* (1861) 9 HLC 577, 593-4 (Lord Campbell CJ and Lord Brougham); *Roberts v Roberts* (1864) 5 B&S 389 (Cockburn CJ); *Speight v Gosnay* (1891) 60 QBD (NS) 321.

³²² *Slander of Women Act 1891* (UK) s 1. 'Special damage' was recently judicially defined as 'some form of pecuniary loss or loss capable of assessment in money terms': *Chakravarti v Advertiser Newspapers* [1998] HCA 37, 98 (Gaudron, Gummow JJ).

³²³ For instance, New South Wales, Queensland, Tasmania and the Northern Territory. By its *Defamation Act 1901* s 3 the ACT retained the libel / slander distinction but abolished the requirement to prove special damage in the case of the latter.

³²⁴ *Wrongs Act 1936* (SA) s 5 and *Wrongs Act 1958* (Vic) s 8 (identically worded).

³²⁵ *Slander of Women Act 1900* (WA) s 1.

described her as having been ‘deflowered ... behind the Memorial Baths’ while a young teenager. This, she said, accused her of ‘immoral conduct’, ‘unchastity’ and ‘promiscuity’. She succeeded in her action, but was able to bolster her claim with the ingredient of under-age sex.³²⁶

But ‘chastity’ means something more than virginity. In a case where a married woman sued over an article that described her waking in bed to find a man lying between her and her husband (he claimed he was sleepwalking) the term is used in the context of adultery,³²⁷ while in 1991, when a social worker sued a woman client who accused her of attempted seduction, ‘unchastity’ was extended to encompass lesbianism.³²⁸

For an imputation of heterosexual activity to be defamatory of a single woman, it seems that some aggravating factor must be added. Bob Ellis re-emerges in another of Australia’s most interesting modern cases relating to unchastity. This time Ellis had published an anecdote, attributed to former Labor minister Rodney Cavalier, to the effect that Liberal politicians Tony Abbott and Peter Costello were originally both ‘in the Right Wing of the Labor Party till the one woman fucked both of them and married one of them and inducted them into the Young Liberals’. Abbott and Costello, together with their respective wives, sued the publisher. At first the wives claimed to have been accused of promiscuity, but Higgins J found no such imputation, since there was reference to only two episodes of premarital sex. He thought the matter ‘does not impute the kind of serial conduct which seems to me to be properly described as promiscuity’.³²⁹

³²⁶ *Cumming v Ellis and John Fairfax Group Pty Ltd* (unreported, NSW Supreme Court, Levine J, 17 March 1994). The plaintiff obtained a published apology: Anonymous, ‘Ellis’ Teenage Tales Deflated’, (August 1994) 24 *Gazette of Law and Journalism* 3. See also Ron Good, ‘Not a Banana Queen’, (May 1994) 22 *Gazette of Law and Journalism* 10.

³²⁷ The article was found to be capable of defaming the wife: *Whear v Northern Territory News Services Ltd* (unreported, NT Supreme Court, Muirhead J, 1 April 1981). Indeed the use of ‘unchastity’ in the context of extra-marital as opposed to pre-marital sex has a long pedigree: *Tait v Beggs* [1905] 2 Ir R 525 (CA) (allegation of a married woman having been caught in some shrubbery with a man in a questionable position), *Varner v Morton* (1919) 53 NSR 180 (CA) (the defendant imputed unchastity to the plaintiff when, in accordance with the local customary celebration of marriage, he fired off guns, rang bells and shouted when the plaintiff returned to town with a married man other than her husband), *Mitchell v Clement* (1919) 14 Alta LR 28 (CA) (defendant said the plaintiff ‘wanted me to take \$30 out in trade at \$1 a time’), *Quinn v Beales* [1923] 3 WWR 561 (wife suggested her husband was the father of the latest child of the plaintiff, a married woman) and *Paliuk v Masoruk* [1931] 3 WWR 380 (Sask KB) (married woman sleeping with her stepson).

³²⁸ *Harrison v Galuszko* (unreported, WA Supreme Court, Adams M, 8 November 1991) following *Kerr v Kennedy* [1942] 1 KB 409, 413 (Asquith J). Adams M considered the ‘highly offensive’ remarks a ‘serious slur’ on the plaintiff, a ‘grave reflection on her suitability and fitness to carry on her duties’.

³²⁹ *Costello v Random House Australia Pty Ltd, Abbott v Random House Australia Pty Ltd* (1999) 137 ACTR 1.

Even though the women had not originally complained of an allegation of unchastity, Higgins J found that such an imputation was conveyed. He thought it less serious than one of promiscuity. Nevertheless, ‘while to say that society condemns [sex outside marriage] is perhaps to put too high a point upon it, it would, in the absence of explanation or some reason proffered to except it from the general rule, be regarded, if not with derision or contempt, then, at least, with disappointment.’³³⁰ Mrs Abbott was awarded \$45,000 compensatory and aggravated damages, with \$85,000 going to Mrs Costello.

The defendants appealed Higgins J’s conclusion that the imputation was defamatory, arguing that he should not have read ‘sexually promiscuous’ as meaning ‘guilty of unchastity’, since this is a substantially different imputation. They also argued that the book was not capable of conveying an imputation of unchastity and that in any event this imputation is not defamatory.³³¹

Dismissing the defendants’ appeal, Drummond J (Miles J agreeing) thought that Higgins J was using ‘unchastity’ to ‘describe loose or shameless sexual conduct which did not qualify as promiscuity only because he considered that a woman would have to have more than two sexual partners before she could be said to be promiscuous’.³³² He agreed with Higgins J that the article described not just pre-marital sex, but sex being used repeatedly in a manipulative way.³³³ It may be inferred from this that an imputation of straightforward pre-marital sex, absent of any aggravating circumstances, is not defamatory. This stands in opposition to Higgins J’s view that pre-marital sex is regarded as a ‘general rule’ with ‘disappointment’.

FEMALE RECREATIONAL SEX

What constitutes recreational sex might seem as mysterious as what it means to be chaste. I have in mind what in the vernacular might be called ‘sleeping around’, minus any connotation of disapproval. I adopt the term instead of ‘promiscuity’, although this is the pejorative found in pleadings and judgments. Promiscuity suggests indiscriminateness, a passive acquiescence. I have in mind the sexually *active* woman who seeks out, perhaps with considerable discernment, partners who she hopes will bring her sexual pleasure.

³³⁰ Ibid, 16 (para 100).

³³¹ *Random House Australia Pty Ltd v Abbott, Random House Australia Pty Ltd v Costello* (1999) 167 ALR 224, 229-30 (paras 17-8). For commentary see Julie Eisenberg ‘Abbott, Kennett and Costello’ (April 1999) 153 *Communications Update* 19.

³³² *Random House Australia Pty Ltd v Abbott, Random House Australia Pty Ltd v Costello* (1999) 167 ALR 224, 258 (para 171).

³³³ Ibid 261 (para 186).

The fact that such a woman is considered promiscuous says something about a certain understanding of female sexuality. The basic premise is that, for a woman, sexual activity requires some justification. The obvious reason to have sex is the pursuit of pleasure, but for the purposes of female sexuality pleasure is presented as apart from reason, meaning that sex driven by sexual desire is conflated with sex for no reason, thus indiscriminate sex, hence promiscuity.

To illustrate, in the Abbott and Costello litigation, Beaumont J in the Full Court of the Federal Court thought that ‘promiscuous’ suggests ‘indiscriminate behaviour or conduct without any particular reason’.³³⁴ This is so even though many would not hesitate to describe a woman who indulges a voracious sexual appetite as promiscuous. Ellis’s book suggested the sexual relationships were to manipulate Abbott and Costello politically, so according to the judge there was no promiscuity imputed. It would seem to follow that a woman depicted as initiating sex for its own sake is acting without reason.

One 1997 case from the Victoria Supreme Court suggests that the pursuit of financial gain (ie prostitution) is a better reason for a woman to have sex than her libido. An Olympic gold medallist sued over an item on the GTV-9 evening news where she was called ‘the other little tart’.³³⁵ The plaintiff first sued on the imputation that she was a ‘little tart’, but later substituted ‘slut’, ‘whore’ and ‘trollop’. The plaintiff argued that these terms did not mean the same thing, since ‘slut’ could mean a woman of immoral sexual behaviour, but not necessarily one motivated by money. Such a woman was even worse, the plaintiff submitted, than a ‘whore’, which imputes prostitution for money.

First, public money was spent considering the incremental differences between ‘slut’, ‘whore’ and ‘trollop’. Hedigan J concluded that they are ‘so slight as to be virtually meaningless in the present context’.³³⁶ No meaning had been assigned to ‘trollop’ that is not encompassed by ‘slut’ or ‘whore’, so that term must be struck out. As for the plaintiff’s submission that ‘slut’ carries with it a more ‘vicious’ connotation than ‘whore’ because it conveys that the person referred to ‘might offer her body either as a habit or for any reason, money or not’, the judge thought this distinction ‘marginally supportable in the sense that a reasonable person might accept the distinction claimed’.³³⁷ On balance, the judge concluded, the plaintiff should not be deprived at

³³⁴ Ibid 237 (para 54).

³³⁵ *Watt v General Television Corporation Pty Ltd* (No 7836 of 1996, Victoria Supreme Court). See Chip Le Grand “‘Tart’ a Just Cause for Watt Action”, *The Australian*, 20 February 1997, 3; Benjamin Haslem ‘Judge Lets Nine Spell Out Why Watt’s a “Tart”’, *The Australian* 24 October 1997, 3.

³³⁶ *Watt v General Television Corporation Pty Ltd* (unreported, Victoria Supreme Court, Hedigan J, 19 February 1997) 7.

³³⁷ Ibid.

the pre-trial stage of the opportunity of advancing what appears to be a meaning that distinguishes ‘slut’ from ‘whore’ on the basis of ‘non-payment for services by money’.³³⁸

The more sexual partners a woman is said to have, the more likely she is to be perceived as governed by sexual desire rather than ‘reason’, and so the greater the defamation. In 1994 Levine J thought that when a woman was accused of just one act of intercourse, this ‘hardly, even on a capacity basis, warrants the assertion of promiscuity in the sense that that word is generally understood’. Accordingly he would not allow an imputation of sexual promiscuity to go to the jury as a natural and ordinary meaning.³³⁹

In that same year a female radio journalist sued as a result of a comment accidentally broadcast when a microphone was left open.³⁴⁰ The words suggested that the general manager of two radio stations ‘must be sleeping with’ the journalist. Objection was taken by the defendant to a pleaded imputation of promiscuity, on the basis that the matter complained of was incapable of conveying it. Levine J agreed that the broadcast was incapable of referring to the plaintiff as ‘indiscriminate in her sexual relations’, the meaning he attributes to ‘promiscuous’.³⁴¹ Presumably the plaintiff’s problem was that the broadcast referred to only one sexual relationship. If rather more had been mentioned then it might be concluded that she was prepared to give vent to her sexual appetite for men.

Even so, a woman’s sexual encounters need not always be particularly legion. In 1977 Junie Morosi, Principal Private Secretary to Deputy Prime Minister Jim Cairns, sued in relation to an imputation of promiscuity.³⁴² The NSW Court of Appeal held unanimously that ‘[t]he conduct of a married woman in continuing to live with her husband, and at the same time to have an affair with another man, can properly be described as promiscuous’. Furthermore, ‘to say of a woman that she is of loose sexual morals is, in substance, similar to saying that she is promiscuous’.³⁴³

Defamation cases relating to imputations of promiscuity continue in more recent years. In 2009 Nicole Cornes, a candidate in the 2007 Australian federal election sued Channel Ten and comedian Mick Molloy after the latter made a quip which, according to the candidate, imputed

³³⁸ Ibid 11.

³³⁹ Instead the plaintiff settled the action, having also complained that the publication in question accused her of unchastity: *Cumming v Ellis and John Fairfax Group Pty Ltd* (unreported, NSW Supreme Court, Levine J, 17 March 1994).

³⁴⁰ *Chapman v Radio 2CH Pty Ltd* (No 20407 of 1994, NSW Supreme Court). The broadcast also gave rise to an imputation of adultery, which was assumed to be defamatory.

³⁴¹ Unreported judgment, NSW Supreme Court, Levine J, 16 Dec 1994.

³⁴² *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

³⁴³ Ibid 771.

that she was unfaithful to her husband and also promiscuous.³⁴⁴ Later, in 2009, Charmyne Palavi, a NRL ‘groupie’, sued Steve Price and Radio 2UE on the basis of being referred to as a ‘slut’.³⁴⁵

DRUNKEN DISPLAYS

Pursuing the same basic enquiry into the extent to which the simple pursuit of hedonism is considered acceptable, the decision was taken to incorporate in this survey imputations relating to inebriation. A review of precedent revealed that plaintiffs mostly sue when it is imputed in circumstances that might compromise their work. For instance, actor Telly Savalas sued in 1976 when the *Daily Mail* reported that nightly carousing left him red-eyed and unable to remember his lines.³⁴⁶ A London jury awarded him £34,000, even though at the time his career was soaring with his starring role in the television series *Kojak*.³⁴⁷ Ten years later a judge thought it defamed a member of South Australia’s vice squad to say he had attended a farewell party while on duty.³⁴⁸ In 2000 a Sydney jury considered television personality Donnie Sutherland defamed when *Ralph* magazine said of him ‘[n]o man in the history of Australian TV has appeared hung over – or still pissed – as much as Donnie Sutherland’.³⁴⁹ As a final example, a Deputy Commissioner of the New South Wales Police Service sued in 2001 over an imputation that he ‘engaged in drunken, threatening, bullying conduct’ towards other members of the Service. Not surprisingly this was considered capable of being defamatory.³⁵⁰

Only two exceptions were found to the generality that plaintiffs sue when the drinking was reported to impact directly on the performance of their duties. In 1994 a New Zealand journalist was awarded \$NZ375,000 after a jury found she had been defamed by a magazine report that

³⁴⁴ Y C Kux, ‘Dossier’ (10 August 2009) *Gazette of Law and Journalism* <<http://www.glj.com.au/1353-article>> at 30 August 2010.

³⁴⁵ *Palavi v Radio 2UE Sydney Pty Ltd* [2009] NSWDC 238 (unreported, Gibson DCJ, 10 September 2009). See also Y C Kux, ‘Charmyne Palavi v Radio 2UE Sydney Pty Ltd, Con Ange v Fairfax Media Publications Pty Ltd’, above n 141, and at page 70 above.

³⁴⁶ Mark Friedgut ‘Commentary: Justice Levine Gets it Wrong’ (August 1994) 24 *Gazette of Law and Journalism* 5.

³⁴⁷ The series ran from 1973 to 1978. *The Times* described the damages as ‘offensively high’ and the foreman of the jury wrote to the paper saying ‘with the other jurors, I entered the Royal Courts of Justice with not the remotest idea what compensation is paid for anything except perhaps a dented boot and wing; haloes are outside our terms of reference. Apparently that is why we were asked. If that is so, the court had the outcome it deserved from the appointed procedure’: ‘Law - Private Eye Judgement - Cash Lottery that is still Bananas’ *The Independent* (London), 27 October 1989, 11.

³⁴⁸ *Willoughby v Advertiser Newspaper* (unreported, South Australia Supreme Court, 1986): Anonymous, ‘Defamation Table of Quantum’ (November 1996), above n 156, 26.

³⁴⁹ *Sutherland v ACP Publishing Pty Ltd* [2000] NSWSC 1139 (unreported, NSW Supreme Court, Levine J, 8 December 2000 (re application to strike out parts of the defence)), para 2.

³⁵⁰ *Moroney v John Fairfax Publications Pty Ltd* [2001] NSWSC 1138 (unreported, Levine J, 14 December 2001).

she was ‘regularly pissed’.³⁵¹ Even this report leaves open the possibility that the plaintiff’s work suffered as a result.

A second, more interesting case arose in the ACT Supreme Court in 1989.³⁵² A number of newspapers had reported on a party held at Parliament House to mark the announcement of the forthcoming federal election. It seems that the party was attended primarily by government members of staff, as well as journalists and various figures from the Labor Party. Reports included reference to an unnamed staff member dancing for some time with her dress lifted high above her waist. The *Weekend Truth* newspaper subsequently published an article naming the woman in question, saying that at the party at which ‘plentiful supplies of alcohol’ were consumed, she ‘lifted her skirt in a series of impromptu dances on and off tables’. The piece added that a male staffer was later seen to ‘guide her from the festivities’.³⁵³ The named woman was a 37-year-old secretary to a senior adviser in the Prime Minister’s office. She sued and was awarded damages of \$58,500.³⁵⁴

This is an interesting case for several reasons. First, despite the plaintiff’s claim that the report possibly suggested she was a ‘person of intemperate habits as regards alcohol’, Miles CJ was not satisfied that the ‘reader’ would have considered the plaintiff a person who, as a matter of habit and custom, became inebriated or abused drink. Leading on from this, although according to the plaintiff the paper imputed that her conduct ‘was such as to render her unfit to be employed in the office of the Prime Minister as a member of the staff of that office’, since her alleged inebriation was on the single occasion the judge thought it unlikely that the reader would conclude that her conduct rendered her unfit for office. Rather, the reader would consider that there was ‘serious doubt about the plaintiff’s capacity to remain sober and to behave in a seemly manner on social occasions, and that would have reflected upon her fitness to work in the office of the Prime Minister’. The judge continued ‘I do not think the reader would be so unfair to think that risqué dancing and drunkenness on one occasion within the confines of Parliament House amongst parliamentary colleagues and staff meant that a person in the position of the plaintiff must be banished from it’.

Here, then, we have an example of a woman accused of an isolated, intoxicated impropriety. Although she may have been imputed to have, in the words of the plaintiff, ‘conducted herself

³⁵¹ This was an action brought by Toni McRae against Australian Consolidated Press. Facing an appeal, the journalist subsequently accepted on settlement reduced damages believed to be \$NZ100,000 including costs: Anonymous, ‘\$1.5 million: NZ Defamation Record’ (December 1994) 28 *Gazette of Law and Journalism* 19; Anonymous, ‘Defamation Table of Quantum’ (November 1996), above n 156, 32.

³⁵² *Bogusz v Thomson and Truth Newspapers Pty Ltd* (1989) 95 FLR 167.

³⁵³ *Ibid* 169.

³⁵⁴ *Ibid* 170.

in a lewd, indecent and/or unseemly manner',³⁵⁵ her alleged inebriation led to behaviour which, on anyone's reckoning, was harmless, consisting of antics which many would regard as amusing, perhaps endearing, even admirable in their doughtiness. On the basis that this case, unlike the others under review, relates less to sexual morality and more to simple decorum, it was included in the study.

EXTRAMARITAL AFFAIRS

Within the ambit of cases relating to sexual mores, almost antithetical to the last case are those involving reports of an extramarital affair. With adultery a more obvious victim emerges, the cheated spouse. Alongside those of unchastity, such allegations were, by act of several parliaments, exempt from slander's general requirement of proof of special damage, at least when levelled against a female.³⁵⁶ Indeed, actions relating to adultery are perhaps more common than those caused by any of the other class of imputation studied in this research project. There is abundant evidence that these allegations, particularly when involving deception, are usually defamatory. Indeed there are even modern authorities to the effect that an imputation of being a cuckold is defamatory.³⁵⁷

To give just a few examples, in 1990 Jane Makim, sister to the Duchess of York, was awarded \$365,000 damages (including interest) by a jury against one newspaper and in 1991 settled an

³⁵⁵ Ibid 175.

³⁵⁶ *Slander of Women Act 1891* (UK), s 1 and *Slander of Women Act 1900* (WA) s 1 (repealed). While the *Wrongs Act 1936* (SA) s 5 (repealed) and the *Wrongs Act 1958* (Vic) s 8 (repealed) referred only to 'want of chastity', this has been interpreted to include adultery, 'fornication' and lesbianism: *Kerr v Kennedy* [1942] 1 KB 409.

³⁵⁷ In *West v Mirror Newspapers Ltd* (unreported, NSW Court of Appeal, Jacobs P, Reynolds and Hutley JJA, 14 May 1973) the plaintiff sued over the words 'Morris West: Wife's Love For Doctor'. Jacobs P had 'not the least doubt' that the imputation was defamatory. 'The derision and scorn that has so often been heaped on the cuckold, the husband who suffers the unfaithful wife, is, as Mr Glass has shown from his references in present day literature, by no means a thing of past ages. It may be true that today there is more pity than ridicule and contempt but whether pity has displaced ridicule is a typical question for the jury.' Reynolds J also thought that the imputation was capable of being defamatory. Counsel for the defendant had submitted 'with some force' that it could not be defamatory of a man to say that he divorced his wife on the ground of adultery, and that this being so, the statement of which the plaintiff complains 'being of a much less damaging nature' a fortiori was not capable of a defamatory meaning. Reynolds J responded '[a]nalogies are not always helpful, and I am far from agreeing that the premise is correct.' I suspect the analogy was rejected since the real sting of cuckoldry is the emasculation of acquiescence, something not suggested by the action of divorce.

Krahe v TCN Channel Nine Pty Ltd (1986) 4 NSWLR 536 considered an imputation that a wife was 'dishonoured by her husband ... because he committed adultery for more than three years with a prostitute'. Hunt J was of the view that this was not defamatory, but declined to strike it out, believing it to be capable of being defamatory: 545.

On the other hand, in *Goold v Newcastle Newspapers Pty Ltd* [2000] NSWSC 133 (unreported, Studdert J, 9 March 2000) the NSW Supreme Court considered an imputation that a wife had 'so failed to satisfy her husband sexually' that he had engaged prostitutes at a brothel. There was a challenge on whether the publication was capable of bearing the meaning pleaded, but apparently no challenge as to whether the imputation was defamatory.

action against another as a result of several articles suggesting she had ‘engaged in adultery contrary to the moral obligation of marriage’.³⁵⁸ In 1995 a South Australian was convicted of criminal defamation after accusing a former business partner of adultery (among other things) and comparing him to ‘the worst most infectious bacterial parasite which can only be found at the bottom of the most unhygienic sewage scum swamp’.³⁵⁹ And in 2009 the New South Wales Supreme Court heard a defamation action brought by a married, senior bank executive who claimed that the *Daily Telegraph* had defamed him by suggesting that he had attempted to seduce a junior employee.³⁶⁰

Adultery also featured in a defamation action that arose from the notorious ‘love boat’ scandal of the 1980s. This involved allegations made against leading figures in the Labor Party that they had cruised Sydney Harbour in the company of a prostitute. An article published in the *West Australian* reported that three senior Federal politicians denied claims of a “‘love boat” sex romp’. In 1992 defamation proceedings ensued, several politicians claiming that the article meant they had ‘committed adultery with a prostitute’. In what was essentially a ‘bane and antidote’ argument, the paper claimed that this and various other imputations could not be said to arise from the report in question. Master Hogan of the ACT Supreme Court disagreed, commenting as an aside that ‘it is obvious that if they do arise, they are defamatory’.³⁶¹

There is one case that questions the general assumption that an imputation of adultery is defamatory. This was brought in 1998 by Jeff Kennett, Premier of Victoria, when he sued *The Australian* over a report that he was separating from his wife.³⁶² The article referred in passing to ‘constant pressure on the marriage, including unsubstantiated accusations of infidelity’. Later

³⁵⁸ *Makim v Nationwide News Pty Ltd* (1990): resulted in award of \$300,000 damages and \$65,000 interest. Apparently the Sunday Telegraph suggested she was ‘a slut, a multiple adulteress’: Annabel Dean, ‘Fergie’s Sister Awarded \$300,000 for “Slut” Reports’, *The Sydney Morning Herald* 28 November 1990, 3. The defendant appealed and the case was later settled on undisclosed terms: ‘Duchess of York’s Sister Settles Court Dispute’, *Reuter News*, 4 June 1993. *Makim v John Fairfax & Sons Ltd* (No 15264 of 1988): settlement included publication of an apology: Daniel Lewis ‘Fairfax Lawsuit Settled’ *The Sydney Morning Herald*, 27 July 1991, 6. See also *Makim v John Fairfax & Sons Ltd* (1990) 5 BR 196.

³⁵⁹ *Rogers v South Australia (No 2)* [1998] 3760 SADC (unreported, Lunn J, 20 February 1998).

³⁶⁰ *Blomfield v Nationwide News Pty Ltd* (unreported, Harrison J, NSW Supreme Court, 9-10 September 2009): see Y C Kux, ‘Michael Blomfield v Nationwide News Pty Ltd and News Digital Media Pty Ltd’ (10 September 2009) *Gazette of Law and Journalism* <<http://www.glj.com.au/1368-article>> at 30 August 2010.

³⁶¹ *Loosley v West Australian Newspapers* [1993] ACTSC 16 (unreported, Master A Hogan, 26 February 1993) para 5. The same plaintiff later sued Channel Nine over similar allegations, settling the case for an undisclosed figure: *Loosley v TCN Channel 9 Pty Ltd* (No 13065 of 1988); Gary Hughes, ‘Defamation has been a Nice Little Earner for Politicians’, *The Age* (Melbourne), 13 October 1994, 4; Anonymous ‘Nothing Loose in “Love Boat” remarks’ (May 1993) 18 *Gazette of Law and Journalism* 13. See also unreported judgments: NSW Supreme Court, Abadee J, 3 September 1992 and NSW Court of Appeal, Priestley, Clarke and Crippen JJA, 9 October 1992.

³⁶² *Kennett v Nationwide News Pty Ltd* (No. 4292 of 1998, Victoria Supreme Court).

the article named two women whom Kennett had been ‘persistently linked with’.³⁶³ Kennett claimed the article imputed that, whilst living with his wife, he was sexually involved with other women. Apparently the jury was told to answer just three questions, the first asking whether the article was defamatory, while the others related to the size and nature of any damages.³⁶⁴ The jury answered no to the first question. But it cannot be known whether the jurors did so on the basis that the imputation of adultery did not arise, or because it arose but was not defamatory.³⁶⁵ Given the reference to the accusations being ‘unsubstantiated’, the reason could well have been the former.

Whatever happened in Kennett’s case, a jury found an imputation of adultery to be defamatory in New South Wales in 2000 when a married teacher took action over a skit performed by students which apparently suggested that he had had an affair with a married colleague.³⁶⁶ Earlier that year, when the same court heard a suit brought by a married man over an allegation that he had sex with prostitutes ‘contrary to the moral obligations of his marriage’, there appears to have been no challenge to the imputation’s capacity to defame.³⁶⁷ Also in 2000, a woman claimed that Channel Ten had suggested, in the course of an item on contemporary attitudes to marriage, that she ‘married with a lack of commitment’.³⁶⁸ *Simpson J* in the NSW Supreme Court found this imputation capable of defaming her: ‘even in modern society, prevailing mores are such that ordinary people expect commitment in marriage - certainly at the time the marriage is entered - and would frown upon a person who entered a marriage lacking that commitment’.³⁶⁹ Nevertheless, *Simpson J* rejected a second imputation, that the plaintiff ‘was anti-social because she did not take marriage commitment as seriously as she should’, since the judge could see no causal connection between failing to take marriage commitment seriously and being anti-social.³⁷⁰

The most interesting cases relating to allegations of extra-marital affairs arose from media speculation during the 1970s and 80s of an affair between Treasurer Jim Cairns and his secretary Junie Morosi, both of whom were married, but not to each other. In 1977 Morosi sued

³⁶³ ‘A House Divided’, *The Australian*, 29 January 1998.

³⁶⁴ Jason Silverii, ‘Kennett’s Huge Bill’, *Herald Sun* (Melbourne), 12 March 1999, 1, 2. See also Peter Gregory, Ewin Hannan and Caroline Milburn, ‘Kennett faces huge bill after libel defeat’, 12 March 1999 *The Age* (Melbourne) 1.

³⁶⁵ A number of lawyers whom I interviewed for this thesis expressed the view that the jury verdict simply reflects Kennett’s political or personal popularity at the time of the case.

³⁶⁶ *Bishop v New South Wales* (No 20992 of 1997, NSW Supreme Court): Ron Good, 10 Nov 2000 *Gazette of Law and Journalism* <www.lawpress.com.au/genews/ge123_Bishop_NSW.html> at 3 October 2003. See also Margaret Scheikowski, ‘NSW – Jury Finds Teacher Defamed, but Department not Responsible’, *Australian Associated Press*, 9 November 2000.

³⁶⁷ *Goold v Newcastle Newspapers Pty Ltd* [2000] NSWSC 133 (unreported, Studdert J, 9 March 2000).

³⁶⁸ *Mirny v Network Ten Pty Ltd* [2001] NSWSC 177 (unreported, Simpson J, 4 May 2001) [7].

³⁶⁹ *Ibid* [20].

³⁷⁰ *Ibid* [22].

over several reports of a romantic attachment between the two ‘constituting an embarrassment to the Prime Minister’.³⁷¹ This was held to be capable of defaming Morosi.³⁷² Six years later the couple sued over an article in *The National Times* which referred, in passing, to Morosi as Cairns’ ‘girlfriend’.³⁷³

This time a jury found the imputation of an affair between them was *not* defamatory. The plaintiffs appealed, arguing that this verdict was perverse. Effectively, therefore, the question arose whether the imputation of adultery is capable of *not* defaming the plaintiffs. In the New South Wales Court of Appeal Hutley JA thought that a romantic, even sexual relationship between married partners might not be defamatory. On the contrary, he suggested that Morosi and Cairns’ mutual interest may raise their standing in public eyes, because Morosi was ‘intelligent and glamorous’ and Cairns was important:³⁷⁴ ‘passions between the powerful and glamorous may have a quality which transcends middle-class morality.’³⁷⁵ He continued ‘the simultaneous finding that there was the allegation of improper adultery ... and the finding that this is not defamatory is unusual, but not perverse in these days’.³⁷⁶ Mahoney JA agreed that it was open to the jury to conclude that a romantic or a sexual association in breach of the obligations of marriage was not discreditable.³⁷⁷

Samuels JA disagreed. The jury had already attached a pejorative epithet (‘improper’) to the relationship. Their alleged behaviour was also contrary to obligations undertaken to a marriage partner. ‘I fail to understand how ordinary members of the community applying current community standards could fail to regard such an implication as defamatory’.³⁷⁸

The majority finding in *Cairns* was referred to in 1988 when cricketer Greg Chappell sued over allegations in the *Truth* newspaper of adultery and of engaging in sexual activities ‘of an unusual nature’ with Samantha Hickey. Chappell later applied for an injunction preventing Channel Nine from repeating the allegations.³⁷⁹ In deciding whether to grant the injunction, the

³⁷¹ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

³⁷² *Ibid* 769G.

³⁷³ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708. Jim Cairns subsequently admitted that reports of an extramarital affair with Morosi were true: Richard Ackland, ‘Cairns Admits Sex, and Breathtaking Hypocrisy’, *The Sydney Morning Herald*, 20 September 2002; Tony Stephens, ‘Oh Yes, Minister’, *The Sydney Morning Herald*, 21 September 2002, 27.

³⁷⁴ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708, 710D.

³⁷⁵ *Ibid* 710F. Cairns himself, when interviewed on ABC Radio in 2002, was reported to have said: ‘I don’t think the ordinary person thought I was wrong or a fool in going to bed with Junie Morosi. They thought it was a pretty good thing – I wouldn’t mind doing it myself’: Tony Stephens, ‘Junie and Me: Cairns Concedes a Very Real Kind of Love’, *The Sydney Morning Herald*, 17 Sept 2002, 2.

³⁷⁶ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708, 710G.

³⁷⁷ *Ibid* 719G.

³⁷⁸ *Ibid* 717D.

³⁷⁹ *Chappell v TCN Channel Nine Pty Ltd* (1998) 14 NSWLR 153.

court had to consider whether the television channel could possibly defend itself at any subsequent defamation trial. The station admitted that the imputations would arise from their program, but denied that they were defamatory. Hunt J reached the view that if a jury were to find the imputations to be not defamatory, then such a verdict would not necessarily be set aside as unreasonable.³⁸⁰

IMPUTATIONS RELATING TO SOCIAL AND MORAL CONTROVERSY

CONDUCTING ABORTIONS

All of the above cases involve issues of propriety which, to varying degrees, are contested within the community. But one of the most publicly and vociferously debated questions of private and public morality is abortion. Given the support given to the often contradictory pro-choice and anti-abortion positions, what should defamation law do when an individual is accused of behaviour considered unconscionable by one side but not the other?

In *Hepburn v TCN Channel Nine Pty Ltd* the NSW Court of Appeal held that an imputation that a person is an ‘abortionist’ is capable of being defamatory, even if ‘abortionist’ is interpreted to refer to a doctor who carries out lawful abortions.³⁸¹ Chapter Three has already explored the support this case gives to a sectionalist understanding of Australia’s defamation test, according to which a publication is defamatory if it would cause detriment to the plaintiff’s reputation in the eyes of a minority of the community, provided that minority meet certain threshold requirements as regards size and, possibly, morality. Thus Hutley JA thought it enough that the plaintiff’s reputation is damaged in the eyes of a ‘substantial part of the population’,³⁸² while Glass JA thought that ‘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’.³⁸³

³⁸⁰ *Chappell v TCN Channel Nine Pty Ltd* (1998) 14 NSWLR 153, 158D. The interim injunction was nevertheless granted. See also Janet Fife-Yeomans, “‘Smut Circus’, says Chappell Case Judge”, *The Sydney Morning Herald*, 21 July 1988, 7.

³⁸¹ [1983] 2 NSWLR 682.

³⁸² *Ibid* 686B.

³⁸³ *Ibid*. The issue of abortion also featured in *Grundmann v Georgeson* (1996) Aust Torts R 81,396, where a medical practitioner specialising in family planning services was accused in a letter written to Rockhampton’s *Morning Bulletin* of being a ‘murderer’, of practising ‘genocide’, of having no respect for

There were three principal reasons why it was felt pertinent to include in the research project a hypothetical media report that caught the essence of the publication involved in *Hepburn*. First, the intention was to discover the extent to which the judges and defamation practitioners interviewed for the project would assess such a report by reference to a majoritarian test as to what is defamatory, as opposed to the approach suggested by *Hepburn*. Secondly, it would be interesting to discover the extent and nature of the proportion of the population which disapproves of those who conduct terminations. Some light might then be thrown on whether they do indeed constitute a ‘substantial’ or ‘appreciable and reputable’ section of the community, particularly when considered relative to the proportions of respondents who would think less of the subjects of the other nine hypothetical media reports, some of which appear from precedent to be not defamatory.

Thirdly, the project afforded an opportunity to measure attitudes about those Australians who express disapproval of those who conduct abortions. *Hepburn* suggests that such ‘pro-lifers’ can be described as not only a ‘substantial’ or ‘appreciable’ part of the population, but also as ‘reputable’, qualities clearly derived from the quantitative and qualitative components of the common law test for defamation. Consequently, it was decided that phone survey respondents who said they would *not* think less of the doctor in question should be asked whether they could think of those who *would* think less of her as ‘ordinary’ and ‘reasonable’. In this way it would be possible to assess the proportion of the community who thought that ordinary, reasonable Australians could be said to disapprove of the doctor, even though such Australians might constitute a minority of the overall population.³⁸⁴

SUMMARY

The preceding chapters have had two principal goals. The first was to convince the reader that the common law test for defamation contains two basic ambiguities. The first relates to the test’s empirical component: need it reflect majority opinion, or can it echo sectional values? The second, more fundamental and interesting question is the test’s relationship with community attitudes in circumstances where the latter are undesirable.

Perhaps the ambiguities were obvious from the outset: how much coherence can there be in a test that enquires as to the opinion of ordinary reasonable people? Less apparent, I hope, was the

human life and of taking life contrary to the Hippocratic oath and the standards of his profession. The case hinged on how those words would be understood and on the defence of comment.

³⁸⁴ The results to this part of the survey are reported in Chapter Seven at pages 323 to 328.

paucity of clear statements, whether from judicial descriptions of the test or curial outcomes, as to how the test should be applied.

Having raised these issues but provided no answers, the time has come for my empirical findings. An obvious question to raise when interviewing defamation lawyers and judges was this: how do you interpret the test for defamation, particularly in those circumstances where sectional or majority opinion is considered unsavoury? It is to their answers that I now turn.

PART B: ANSWERING THE DEFAMATION QUESTION

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INTRODUCTION

So far I have presented the test for defamation as containing certain ambiguities. It is uncertain whether majority public opinion is determinative of what is defamatory, or whether the views of certain minorities can be taken into account. Also unclear is the extent to which the law applies a normative, as opposed to numerical yardstick when deciding whether certain responses to a publication suffice to render it defamatory. Those ambiguities cast doubt on the role of empiricism when it comes to determining whether a publication is defamatory. What is more, one might expect such ambiguities to lead to confusion, or at least inconsistency, among those charged with deciding whether a publication is defamatory.

In order to determine whether such doubts or inconsistencies exist, as part of the research for the *National Defamation Research Project* I conducted surveys among representatives of three groups who have an actual or potential concern with deciding what constitutes defamation. One consists of Australia's lay public. Any member of this group may come into contact with defamation law, whether through wanting to write or speak about others, as someone who feels defamed, or because they have been selected to serve on a defamation jury. The results of the interviews with representatives of the general community, which took the form of focus group discussions and a phone survey, bolstered by student surveys, are reported in the subsequent chapters of this thesis. This chapter concerns interviews I conducted with two groups who experience more regular contact with defamation law. Towards the end of the chapter I discuss the results of conversations with 28 legal practitioners who have varying degrees of involvement with the field. Before then I look at discussions I had with eight judges, all of whom have experience, sometimes extensive experience, of hearing defamation actions.

As a vehicle for this empirical research, ten hypothetical media reports were used. These ten reports were described to representatives of the lay public, as well as the judges and legal

practitioners I interviewed. The first section of this chapter introduces those ten reports and explains their goals.

THE TEN HYPOTHETICAL MEDIA REPORTS

BASIC SURVEY METHODOLOGY

Each of the ten hypothetical media reports was designed to explore the basic ambiguities examined by this thesis. While it was possible to discuss abstract legal doctrine when interviewing judges and lawyers, it was clearly inappropriate to engage the lay public in those terms. Instead, concrete examples of potential defamations were needed, and it was felt that the same would also enrich and clarify the discussions held with legally qualified interviewees.

Ideally, actual or mock-up media content, such as whole newspaper articles in their original context, or tapes of broadcast items, would have been used. Even so, it was obviously unfeasible to have a sample of 3,000 Australian residents read a particular newspaper report, or listen to a recording of some radio or television program. Instead, it was decided to expose each interviewee to a succinct but identical description of the imaginary report(s) being used. In the case of the lay sample interviewed via the phone survey, an identical description of one of the reports was read out over the phone to each respondent. For the focus groups, the same descriptions were read out during the meetings. As regards the judges and the lawyers, each interviewee was given a standard sheet setting out the same brief summaries of the ten media reports, always in the same order. Each lawyer and judge, as well as each focus group, was interviewed in relation to all ten reports, while each phone survey respondent was interviewed in relation to only one. In each case, embellishment on the standard description was avoided, in order to enable the responses of each individual and group to be compared.

The standard description for each report is set out in Table 1 below, together with the title given to each media report and an indication as to why the media report was included. This information is repeated in Appendix I on page 359. The titles were not shared with any category of interviewee, but will be used in this thesis to identify each report conveniently.

The overriding criterion for the design of the ten reports was that each should illuminate an aspect of the legal ambiguities examined in this thesis. In order to do so, each should relate to an issue which divides the community. More precisely, the intention was that each should impute an act or condition which was likely to be met with disapproval, as well as a lack of disapproval, by a significant proportion of the Australian population. Mostly, the media reports were devised with an eye to particular curial decisions, or judicial pronouncements, that were felt to present a questionable perspective on social attitudes, as well as those cases that relate to imputations often raised in the course of the debate over whether defamation law is (or should be) on the one hand moralist or realist (such as the police informant imputations or those relating to homosexuality) or on the other sectionalist or majoritarian (most notably *Hepburn v TCN Channel Nine*).³⁸⁵

Table 1: Hypothetical media reports as described to respondents

<i>Media Report title</i>	<i>Report description (as given to interviewees and respondents)</i>
<i>Extramarital Affair</i>	The media, while talking about a particular, named married man who holds a powerful public office, have reported that he has an affair with an intelligent and glamorous married woman, and neither of them tells their spouse. (Is this report defamatory of the man?)
<i>Drunkenness</i>	The media, while talking about a particular, named 37 year-old secretary in the Prime Minister's office, have reported that she has got drunk at an office party and then danced on the tables with her skirt lifted.
<i>Recreational Sex</i>	The media, while talking about a particular, named single woman, have reported that she sleeps with a number of men each year simply to enjoy having sex with them. (Is this report defamatory of the woman?)
<i>Informing Police</i>	The media, while talking about a particular, named woman, have reported that she has reported her husband to the police because she suspects him of committing an extremely trivial offence. (Is this report defamatory of the woman?)
<i>Marijuana Use</i>	The media, while talking about a particular, named man, have reported that he occasionally smokes a little marijuana socially or for relaxation.
<i>Criminal Parentage</i>	The media, while talking about a particular, named man, have reported that he has a parent who is a criminal. (Is this report defamatory of the son?)
<i>Conducting Abortions</i>	The media, while talking about a particular, named medical doctor, have reported that she conducts lawful abortions.
<i>Male Homosexuality</i>	The media, while talking about a particular, named man, have reported that he is homosexual.
<i>HIV Positive</i>	The media, while talking about a particular, named man, have reported that he is HIV positive.
<i>Sex Before Marriage</i>	The media, while talking about a particular, named young woman, have reported that she had a single sexual relationship before getting married.

The Media Report titles did not form part of the information given to interviewees or respondents.

³⁸⁵ [1983] 2 NSWLR 682.

Since the phone survey was intended to reflect contemporary, as opposed to historical Australian opinion, recent case law was of particular interest. Of the ten media reports used in the phone survey, five were closely based on specific Australian cases decided from 1970 onwards. All of these were discussed at some length in Chapter Four, but are summarised again below.³⁸⁶ A further four, although based on issues raised in recent Australian cases, are less directly identifiable with the publications that gave rise to those actions.³⁸⁷ The remaining report relates to HIV infection, a condition not directly raised in any Australian case found during research, but an issue known to have come up in complaints to the country's media, as well as defamation litigation elsewhere, and which was felt to be of particular relevance to the debate surrounding moralism and realism.³⁸⁸

Table 1 on page 138 above sets out the standard descriptions of the hypothetical reports as given to each class of respondent. A list of the report descriptions can also be found at Appendix I.³⁸⁹ Where a report relates to more than one person, I add in parenthesis an indication of the person whose reputation was the focus of study.

RATIONALE BEHIND EACH HYPOTHETICAL REPORT

Chapter Four has already given a clear indication of what motivated the choice of ten reports. This section summarises those reasons.

EXTRAMARITAL AFFAIR

The imaginary report was described to respondents thus:

The media, while talking about a particular, named married man who holds a powerful public office, have reported that he has an affair with an intelligent and glamorous married woman, and neither of them tells their spouse. (Is this report defamatory of the man?)

³⁸⁶ *Informing Police* (*Blair v Mirror Newspapers Ltd* [1970] 2 NSW 604); *Conducting Abortions* (*Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682); *Extramarital Affair* (*Cairns v John Fairfax & Sons Ltd*; *Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708); *Drunkenness* (*Bogusz v Thomson and Truth Newspapers Pty Ltd* (1989) 95 FLR 167) and *Male Homosexuality* (numerous recent decisions, including *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586 (unreported, Levine J, 27 June 2003)).

³⁸⁷ *Marijuana use*, *Recreational Sex*, *Sex Before Marriage* and *Criminal Parentage*.

³⁸⁸ See above pages 112 to 114.

³⁸⁹ See below page 359.

Apart from the rather ambiguous outcome to Jeff Kennett's litigation, there is only one precedent suggesting that an imputation of adultery is anything but defamatory.³⁹⁰ It will be recalled that in the early 1980s former politician Jim Cairns and his secretary Junie Morosi sued after *The National Times* referred to Morosi, in passing, as Cairns' girlfriend. When a jury subsequently found the imputation of an affair between them to be *not* defamatory, the couple was unable to persuade the New South Wales Court of Appeal that the verdict was perverse. Hutley JA thought that, far from being defamatory, a imputation of a sexual relationship between married partners might raise their standing in public eyes. Describing Morosi as 'intelligent and glamorous', and Cairns as 'important', he thought that 'passions between the powerful and glamorous may have a quality which transcends middle-class morality'.³⁹¹ Mahoney JA agreed that it was open to the jury to conclude that a sexual association in breach of the obligations of marriage was not discreditable.³⁹²

To explore that question further, a hypothetical report was designed which incorporated what were felt to be the relevant components of the publication that gave rise to the above litigation.

DRUNKENNESS

The description of the report read:

The media, while talking about a particular, named 37 year-old secretary in the Prime Minister's office, have reported that she has got drunk at an office party and then danced on the tables with her skirt lifted.

In designing an imaginary report on drunkenness, specificity was crucial. While some might object to inebriation per se, for many others what matters is who does what and where. Furthermore, the use of alcohol is so commonplace that it is hard to imagine the media reporting the bald fact of intoxication unless it was clearly out of place or character.

For the study, it was ideal to choose a scenario in which the drunkenness was neither wholly acceptable nor obviously inappropriate. With that in mind, the facts in the case of *Bogusz v Thomson and Truth Newspapers* seemed particularly apt.³⁹³ To recap, this involved an imputation of drunkenness at a party, a situation in which a few drinks might seem appropriate,

³⁹⁰ *Kennett v Nationwide News Pty Ltd* (No 4292 of 1998, Victoria Supreme Court). See also page 126 above. For discussion on imputations of extramarital affairs generally, see pages 125 to 129 above.

³⁹¹ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708, 710F. See also page 128 above.

³⁹² *Ibid* 719G.

³⁹³ (1989) 95 FLR 167, See also page 124 above. For discussion of cases relating to imputed drunken behaviour generally, see above pages 123 to 125 above.

except that this party was held in Parliament House and the drunkenness involved the secretary to a high-ranking public official, factors that could demand greater decorum. On the other hand, the imputed conduct might be considered entirely harmless, even endearing, and certainly not warranting the \$58,500 damages awarded. The hypothetical media report was intended to contain all the factors that might be felt relevant to an assessment of the woman's imputed drunkenness. The research goal was to explore whether or not the imaginary secretary's conduct would be regarded as a harmless bout of bacchanalian indulgence, the phrase 'office party' intending to suggest something work-related, but also highly informal, at which some high jinks might be tolerated.

RECREATIONAL SEX

The description read:

The media, while talking about a particular, named single woman, have reported that she sleeps with a number of men each year simply to enjoy having sex with them.

This report was supposed to capture conduct some would describe as promiscuous. As described above, Australia has seen a number of instances in recent years in which women have successfully sued after being referred to as a 'tart',³⁹⁴ as 'sleeping with' a co-worker,³⁹⁵ or even 'guilty of unchastity'.³⁹⁶ The imaginary report was intended to test, in short, attitudes to the exercise of female libido.

INFORMING POLICE

The report was described thus:

The media, while talking about a particular, named woman, have reported that she has reported her husband to the police because she suspects him of committing an extremely trivial offence.

The interest in the police informant cases has already been explored.³⁹⁷ To recap, if a moralist position is adopted, and assuming legal consistency, then any imputation of assisting the law should be incapable of defaming.

³⁹⁴ *Watt v General Television Corporation Pty Ltd* (No 7836 of 1996, Victoria Supreme Court), see above page 121. For discussion on female recreational sex generally, see above pages 120 to 122.

³⁹⁵ *Chapman v Radio 2CH Pty Ltd* (No 20407 of 1994, NSW Supreme Court). See also page 122 above.

³⁹⁶ *Costello v Random House Australia Pty Ltd*, *Abbott v Random House Australia Pty Ltd* (1999) 137 ACTR 1. See also page 119 above.

³⁹⁷ See above pages 82 to 101.

In summary, seventeen cases involving informant imputations were found. In just four, an imputation was held to be capable of defaming,³⁹⁸ while in the remaining thirteen it was held to be incapable.³⁹⁹ Three of the four cases where the imputation was held to be capable of defaming come from nineteenth century Scotland,⁴⁰⁰ while the fourth was a 1977 Wisconsin decision relating to an imputation of 'reprehensive snooping' on neighbours suspected of being political activists, which would raise obvious concerns for freedom of political activity.⁴⁰¹

It will be remembered, however, that the most cited case in relation to this area is to the effect that an imputation of assisting the forces of law enforcement is incapable of being defamatory. That case was *Byrne v Deane* and involved an imputation that a golf club member had reported illegal gaming machines at the club house.⁴⁰² That case has been widely cited and the principle was still being followed in Australia as recently as 2003.⁴⁰³ The American case of *Connelly v McKay* was decided on a similar basis and is regularly cited and applied in the US.⁴⁰⁴

Of the various factors likely to determine whether an informant is disliked, perhaps the most important is the nature of the behaviour about which information has been provided: the more acceptable the crime, the greater the opprobrium heaped on those who help in its apprehension. The evasion of tax is perceived by some as bordering on the righteous, so it is interesting that one case where an informant imputation was held to be defamatory related to informing on stamp duty evasion,⁴⁰⁵ while another concerns the dodging of government revenue on whisky (both in nineteenth century Scotland).⁴⁰⁶ In one US case, however, an allegation of informing

³⁹⁸ *Kennedy v Allan* (1848) 10 SC 1293; *Graham v Roy* (1851) 13 D 634; *Winn v Quillan* [1899] SLT 183; *Westby v Madison Newspapers, Inc* 259 NW 2d 691 (1977) (Supreme Court of Wisconsin). See pages 83 to 100 above.

³⁹⁹ *Mawe v Pigott* (1868) Ir R 4 CL 54 (Court of Common Pleas, Ireland); *Byrne v Deane* [1937] 1 KB 818 (UK Court of Appeal); *Connelly v McKay* 28 NYS 2d 327 (1941) (Supreme Court of New York); *Rose v Borenstein* 119 NYS 2d 288 (1953) (City Court of New York); *Prinsloo v South African Associated Newspapers Ltd* [1959(2)] S A Reports 693 (Witwatersrand Local Division Court, South Africa); *Danias v Fakis Del. Super.* 261 A.2d 529 (1969) (Superior Court of Delaware); *Blair v Mirror Newspapers Ltd* [1970] 2 NSW 604 (NSW Court of Appeal); *Berry v Irish Times Ltd* [1973] IR 368 (Supreme Court of Ireland); *Saunders v WHYY-TV* 382 A 2d 257 (1978) (Supreme Court of Delaware); *Burrascano v Levi* 452 F Supp 1066 (1978) (US District Court, Maryland); C.a. 466/83, *Shaha v Dardiryan*, PD 39 (4) 734 (1985) (Israeli Supreme Court); *Agnant v Shakur* 30 F Supp. 2d 420 (1998, US District Court, New York); *Younan v Nationwide News Pty Ltd* [2003] NSWSC 1211 (unreported, Levine J, 16 December 2003).

⁴⁰⁰ *Kennedy v Allan* (1848) 10 SC 1293; *Graham v Roy* (1851) 13 D 634; *Winn v Quillan* [1899] SLT 183; see above pages 83 to 85.

⁴⁰¹ *Westby v Madison Newspapers, Inc* 259 N.W.2d 691 (1977, Supreme Court of Wisconsin); see above page 100.

⁴⁰² *Byrne v Deane* [1937] 1 KB 818; see above page 87.

⁴⁰³ *Younan v Nationwide News Pty Ltd* [2003] NSWSC 1211 (unreported, Levine J, 16 December 2003); see above page 97.

⁴⁰⁴ 28 NYS 2d 327 (1941); see above page 89.

⁴⁰⁵ *Kennedy v Allan* (1848) 10 SC 1293, see above page 83.

⁴⁰⁶ *Graham v Roy* (1851) 13 D 634. The imputation related to informing for financial gain, a factor which some commentators see as relevant: Milmo and Rogers, above n 28, 56 (para 2.14), fn 135.

against customs duty evasion was insufficient grounds for a defamation action.⁴⁰⁷ The plaintiff had been accused of informing French customs that the defendants were smuggling diamonds. This information apparently led to the authorities apprehending the defendants and confiscating a large and valuable quantity of industrial diamonds. The plaintiff presented proof that as a result of stigmatisation he was unable to obtain employment in the diamond industry, either as a broker or cutter. The plaintiff's claim was nevertheless dismissed.⁴⁰⁸

Besides the nature of the crime or activity the police are being assisted to apprehend, another important factor is the relationship between the alleged informer and the person about whom information is being supplied. The most intense dislike of informants is likely to arise when the act is perceived as a betrayal.⁴⁰⁹ Debts of loyalty often arise from class affiliation: not necessarily the 'criminal class' but also the plaintiff's social stratum. In other circumstances allegiance will be owed along national or ethnic lines. In 1969 a member of the Greek Orthodox community of Wilmington, Delaware sued another member of that community for allegedly stating at various times she had informed immigration authorities about a third community member who was illegally residing in the US.⁴¹⁰ The plaintiff argued that she was disgraced, degraded and brought into contempt and ridicule in the eyes of her fellow Greeks. Dismissing the complaint, the court stated '[o]ur society has not yet reached a point where false rumours of a lawful attempt to assist law enforcement agents constitute slander per se'.⁴¹¹

Contempt for the informant is likely to be most intense where there exists open conflict between nationalities. It is interesting that so many of the cases relating to informant imputations arise in the context of British-Irish relations. For instance, one of the three nineteenth century Scottish cases suggesting that such an imputation might be capable of defaming concerned an allegation made against a Glasgow innkeeper of Irish abstraction that over the course of ten years he was a paid informant against other Irishmen in relation to unspecified offences.⁴¹²

But even imputations that could be understood in terms of collusion with a foreign power in the occupation of the homeland have been held to be incapable of being defamatory, as in the case of the parish priest who sued in Ireland in 1869 when he was accused of informing against 'men who gave up all - life, liberty and home - for what they deemed the sacred cause of Old

⁴⁰⁷ *Rose v Borenstein* 119 NYS 2d 288 (1953) (City Court of New York).

⁴⁰⁸ 289, McGivern J citing *Connelly v McKay* 28 NYS 2d 327 (1941) (Supreme Court of New York), see above page 89.

⁴⁰⁹ Greer LJ in *Byrne v Deane* saw the charge against the plaintiff as essentially one of disloyalty: [1937] 1 KB 818, 837.

⁴¹⁰ *Danias v Fakis* Del. Super. 261 A.2d 529 (1969).

⁴¹¹ Ibid 531 (Judge Christie). It is unclear from the judgment whether the plaintiff would have succeeded if she had been able to adduce evidence of special damages.

⁴¹² *Winn v Quillan* [1899] SLT 183; see above page 84.

Ireland'.⁴¹³ The imputation was considered incapable of being defamatory. A similar outcome arose in 1973 when the Irish Supreme Court upheld a jury verdict to the effect that it was not defamatory to say of an Irish senior civil servant that he had been accused in a Sinn Féin demonstration of being a '20th Century Felon Setter' and of helping jail Irish Republicans in England.⁴¹⁴ In a different ethnic context there is the 1985 decision of the Israeli Supreme Court that it could not defame an Archbishop in the Armenian Church in East Jerusalem to accuse him of collaboration with the Israeli government in the occupied territories.⁴¹⁵

Given that Australia has not witnessed such violent ethnic conflict, the fact scenarios in these cases were felt to be of relatively little direct relevance. Indeed, many contemporary Australians will perceive loyalty as owing less to race or nation and more to colleagues, friends and family.⁴¹⁶ Perhaps the institution most likely to be seen as creating debts of loyalty that go over and beyond those owed to the law is marriage. For this reason the case of *Blair v Mirror Newspapers Ltd*, decided by the New South Wales District Court in 1970, formed the basis of the hypothetical report.⁴¹⁷

It may be recalled that the plaintiff commenced proceedings over a newspaper article entitled 'Wife Hands Over Husband to Law'. Levine DCJ struck out the claim, even though he was aware that 'the jurisdiction to strike out the particulars of claim should be sparingly exercised and be done only in a clear case'.⁴¹⁸ In his view, 'the words published are more likely to arouse sympathy with and for the plaintiff without any suggestion of her having done anything discreditable'.⁴¹⁹ The New South Wales Court of Appeal unanimously rejected the plaintiff's appeal, Sugerman P stating on behalf of the court 'words which merely convey that a wife has handed her husband over to the police cannot be treated as in themselves defamatory of the plaintiff'.⁴²⁰

⁴¹³ *Mawe v Piggott* (1869) Ir. R 4 CL 54, 54 (Court of Common Pleas, Ireland); see above page 86.

⁴¹⁴ *Berry v Irish Times Ltd* [1973] IR 368 (Supreme Court of Ireland); see above page 94.

⁴¹⁵ *Shaha v Dardiryan*, C.a. 466/83, PD 39 (4) 734 (1985). The case is described in Daniel More, above n 232. See above at page 98.

⁴¹⁶ Rather than being asked about the defamatory capacity of an informant imputation, in 1997 the NSW Supreme Court came close to considering the defamatory nature of an imputation of *failing* to inform on a colleague. In the event the jury found that the imputation did not arise, so it was unnecessary to decide whether it was defamatory. The case involved imputations that the plaintiff, while a police officer, was aware of, but did nothing about, the use of cocaine by another officer and another officer's sexual relationship with a woman whom he knew to be a drug addict, drug dealer and former prostitute': *Ison v Fairfax Publications Pty Ltd* (unreported, NSW Supreme Court, Levine J, 12 December 1997)

⁴¹⁷ See above page 96.

⁴¹⁸ (1970) 2 DCR(NSW) 191, 193, citing *General Steel Industry Incorporated v Commissioner of Railways* [1965] ALR 636 and *Murphy v Australian Consolidated Press Ltd* [1968] 3 NSW 200.

⁴¹⁹ (1970) 2 DCR(NSW) 191, 193.

⁴²⁰ *Blair v Mirror Newspapers Ltd* [1970] 2 NSW 604 (NSW Court of Appeal), 607.

In adopting *Blair* as the basis for the hypothetical report, the intention was to test the moralist position with a particularly hard case, one involving an alleged informant thought least likely to arouse sympathy. Not only did *Blair* relate to an allegation that a wife had reported her husband to police, but in giving judgment for the Court of Appeal Sugerman P referred with apparent approval to a particular passage in *Byrne v Deane*:

[I]t has been argued here that these words in the present case cannot really be said to be defamatory because in substance the crime which it is suggested in the libel that this gentleman is endeavouring to prevent is really of so trivial a character, and one which is so popular with the mass of the people, ... that the real substance of the case is the dislike and animosity which must be created in the minds of his fellow members of the club against the plaintiff. I find it quite impossible, speaking for myself to draw a distinction between one crime and another in this particular.⁴²¹

No record has been kept of the nature of the crime the wife in *Blair* allegedly suspected her husband of committing. Even so, following the logic of *Byrne v Deane*, as seemingly supported by Sugerman P, the imputation would not be defamatory, even if that crime were exceedingly minor. Consequently, the hypothetical media report framed for this research was described so as to refer to information in relation to 'an extremely trivial offence'.

Given the relationship between the alleged informer and suspected offender, as well as the 'extremely trivial' (but unspecified) nature of the offence, those who argue that the law is moralist might expect phone survey respondents to say that they would think less of the woman, but for lawyers to say the report is not defamatory.

MARIJUANA USE

The description of the report read:

The media, while talking about a particular, named man, have reported that he occasionally smokes a little marijuana socially or for relaxation.

Of the ten media reports used in the survey, this is the only one to impute unlawful conduct. It is illegal to use, possess, grow or sell marijuana in Australia, although some jurisdictions have decriminalised the possession of small amounts for personal use, imposing instead a modest monetary civil penalty.⁴²² The most recent government statistics suggest that there are over 52,000 arrests or infringement notices issued for cannabis offences each year.⁴²³

⁴²¹ *Byrne v Deane* [1937] 1 KB 818, 834 (Slesser LJ), cited by Sugarman P at 607.

⁴²² *Criminal Code Act 1995* (Cth); *Drug Misuse and Trafficking Act 1985* (NSW); *Drug, Poisons and Controlled Substances Act 1981* (Vic); *Drugs Misuse Act 1986* (Qld); *Controlled Substances Act 1984*

The inclusion of a media report imputing unlawful conduct was an easy decision. As discussed earlier, one interpretation of moralism is to link the values of the ordinary reasonable person with legal norms, so that an imputation of any offence would be automatically defamatory. On the other hand, many realists might claim that certain laws are so discredited that transgressors face minimal disapproval. Realists, as well as some moralists, would argue that the court should consider the ethics of the ordinary reasonable person independently of legal norms.

To make the study meaningful it was important to choose a form of criminal activity that does not necessarily meet widespread disapproval. Moderate, social use of marijuana was an obvious candidate. Evidence suggests that cannabis has played a part in many people's lives. Research conducted in 2004 suggests that 34% of Australians aged 14 and over have used marijuana at least once in their lifetime, with 11% having used it in the last 12 months.⁴²⁴ Earlier research had found that of recent users, 41% took the drug at least once a month.⁴²⁵ Presumably, few who use cannabis will disapprove of others who do likewise and it might be expected that, even among the 61% of adults who have never used cannabis, many will take the view that its use is not a moral issue.

The description of the media report was intended to make it clear that the imputed marijuana use was for recreational rather than medicinal use, although the moderate nature of its consumption was emphasised.

As reported in Chapter Four, no cases were found that isolated as an imputation the use of marijuana, although a number refer to the production, supply or use of unspecified illegal drugs, or drugs which are considered harder than marijuana, typically heroin or cocaine.⁴²⁶ In all the cases found, there was no indication that the imputations were considered incapable of being

(SA); *Cannabis Control Act 2003* (WA); *Misuse of Drugs Act 2001* (Tas); *Drugs of Dependence Act 1989* (ACT); *Misuse of Drugs Act* (NT)

⁴²³ 67% of all drug arrests relate to cannabis, 20% involved amphetamine-type stimulants (eg 'speed') and 3% heroin and other opioids: Australian Bureau of Statistics, *1301.0 Year Book Australia, 2009-10*, above n 291, 421.

⁴²⁴ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, above n 521, 26. Cannabis was the most prevalent illicit drug used, with 11% of Australians aged 14 or over using it in the last 12 months, compared with 3.4% using ecstasy, 3.2% using meth/amphetamines and 3.1% using pain-killers/analgesics: *ibid*, 3.

⁴²⁵ Australian Institute of Health and Welfare, *1998 National Drug Strategy Household Survey: Detailed Findings* (2000), 29. 17% of regular users used the drug daily and 25% at least once a week. 'Recent' was defined as having used the drug in last 12 months.

⁴²⁶ See above pages 80 to 82.

defamatory. In almost every case the imputation also seems to have been found to be defamatory.⁴²⁷

Some defamatory imputations involved not use of drugs but knowing association with people involved in their manufacture or distribution, such as when in 2001 a member of the Rebels Motorcycle gang was found by a New South Wales jury to have been thus defamed.⁴²⁸ On the other hand, in 1997 a police officer sued when he was alleged to have had a sexual relationship with a woman whom he knew to be a drug addict, dealer and former prostitute.⁴²⁹ A NSW jury found this imputation to have been conveyed but not to be defamatory.⁴³⁰ Again, neither case specifies marijuana as the drug in question.

Four cases were found specifically involving marijuana. Three could be said to fall either side of our hypothetical report: two more defamatory, one less so. The two relating to imputations that are probably more defamatory date from 1992 and 1995 respectively. The first relates to an

⁴²⁷ *Eason v 3AW Broadcasting Co Pty Ltd* (unreported, NSW Supreme Court, Hunt J, 4 April 1985), a claim arising out of an imputation that the plaintiff, *inter alia*, used illegal drugs, was addicted to heroin and as a result of her addiction committed suicide, settled for damages believed to total \$570,000: Anonymous, 'Record settlement in Eason case' (October 1987) 7 *Gazette of Law and Journalism* 2, *The Sydney Morning Herald*, 11 & 30 September 1987; *Sinclair v John Fairfax & Sons Ltd* (unreported, NSW Supreme Court, Finlay J, 2 June 1986), imputation of being a convicted drug smuggler found defamatory by a NSW jury: Leanne Norman 'Victory for Fairfax in Sinclair Defamation Trial', above n 309 (see also page 116 above); *Silkman v Federal Capital Press of Australia Pty Ltd* (unreported, ACT Supreme Court, Gallop J, 8 December 1989): imputation that the proprietor and licensee of a hotel permitted the sale and use of drugs on the premises found by an ACT Supreme Court judge to be defamatory, despite the defendant's submission that the text was not defamatory. Plaintiffs awarded \$48,000 damages: Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 15; *Lanteri v Mildura Independent Newspapers* (unreported, Victoria Supreme Court, 1990): imputation of involvement in trafficking drugs found by a Victorian jury to be defamatory. Plaintiff awarded \$50,000 damages: Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 19; *Duffy v Heinrichbaehnk* [1993] SASC 3828 (unreported, Cox J, 4 March 1993): use of heroin found by a South Australian magistrate to be defamatory; *Wilbrahim v Faber & Faber* (1994): UK case involving an imputation of being a drug-taking homosexual settled with damages: Anonymous, 'Dossier' (August 1994) 24 *Gazette of Law and Journalism* 2, 5; Francis Wheen, 'Francis Wheen Examines the Bloodied Victims of the Libel Juggernaut', *The Observer* (London), 19 June 1994, 4; *Burton v Parker* [1998] TASSC 104 (unreported, Evans J, 28 August 1998) imputation of illicit opiates dependency found by a Tasmanian judge to be defamatory; *Charles v 6PR Southern Cross Radio Pty Ltd* [1999] WASC 1025 (unreported, Steytler J, 22 March 1999): imputation of heroin or cocaine use considered probably defamatory by a WA judge; *Brander v Ryan* [2000] SASC 446 (unreported, Prior, Lander & Bleby JJ, 21 December 2000), consumption of drugs by a politician found by a South Australian magistrate to be defamatory: see also Cynthia Banham, 'Racist Successful in Action against Satirical Article' (25 May 2000) *Gazette of Law and Journalism* <www.lawpress.com.au/genews/ge114_Brander-v-Ryan.html> at 2 July 2002; *Entienne Pty Ltd v Festival City Broadcasters* [2001] SASC 60 (unreported, Olsson, Duggan & Williams JJ, 8 March 2001): imputation of involvement in sale of illicit drugs found defamatory by a SA judge. For an exception to this rule, see *Kershaw v Wilton*, discussed above on page 82, where a jury returned a verdict of no defamation in relation to an alleged remark made by one city councillor to another that the latter had attended a council meeting while on crack or drunk.

⁴²⁸ *Jackson v TCN Channel 9* [2001] NSWCA 108 (unreported, Handley JA, Hodgson & Wood CJJ, 10 March 2001).

⁴²⁹ *Ison v John Fairfax Publications Pty Ltd* (unreported, NSW Supreme Court, Brownie AJ, 17 February 2000); see above page 81.

⁴³⁰ Ron Good, 'Central Coast Copper Fails in Action against SMH', above n 161.

imputation of marijuana production, although in the context of organised crime.⁴³¹ The second concerns another police officer, this time a member of the drug squad, who claimed that he had been accused of cultivating and using cannabis.⁴³² This was found by a jury in the Northern Territory to be defamatory. The officer was awarded \$103,307 damages for this and other drug-related imputations.⁴³³ Since this involved an officer of the law (of the drug squad, no less) allegedly breaking the law, this might be thought to be more seriously defamatory.

The case which is arguably less defamatory relates to a chemist accused of using either heroin or marijuana paste (or both) to deal with corns. The report was found to be defamatory by a jury in 1988 and the chemist was subsequently awarded \$15,000.⁴³⁴ If it is defamatory to accuse someone of using marijuana to relieve a physical ailment (albeit corns) then one might assume that recreational smoking of the drug would also be defamatory. Note, however, the reference to the possible use of heroin.

The case most on point is the action brought by Mercedes Corby, sister of Schapelle Corby, the Australian woman serving a prison sentence in Indonesia for smuggling cannabis into Bali. This case, already mentioned in Chapter Four, involved imputations relating to marijuana, including cultivation and possession of the drug.⁴³⁵ These were found to be defamatory in 2008 and led to a settlement with the defendants on undisclosed terms.⁴³⁶

Probably the cumulative effect of these and other recent Australian cases suggest that a court would find an imputation of the unlawful use of marijuana defamatory, particularly if it was recreational.⁴³⁷ In the description of the hypothetical report it was therefore made clear that the smoking of the drug is for social or relaxation purposes. On the other hand, I was eager to distinguish light use of the drug from any suggestion of addiction. Accordingly it was specified that only a little marijuana was used.

⁴³¹ *Bellino v Australian Broadcasting Corporation* (unreported, QLD Court of Appeal, McPherson, Pincus JJA and Williams J, 2 June 1998). Damages were assessed by the jury in 1992 at \$750,000: Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 21.

⁴³² *Hart v Wrenn* (No 727 of 1990, NT Supreme Court).

⁴³³ Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 29. The other imputations involved corruption, unlawfully possessing an unspecified, 'dangerous drug', failure to properly account for all prohibited drugs coming into his possession as a member of the drug squad, etc.

⁴³⁴ *Speirs v Herald & Weekly Times*, Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 18.

⁴³⁵ Y C Kux, 'Mercedes Corby v Channel Seven Sydney Pty Ltd & 5 Ors', above n 165.

⁴³⁶ Y C Kux, 'Corby v Channel Seven Sydney Pty Ltd/Davis v Nationwide News Pty Ltd', above n 166. See also on page 82 above.

⁴³⁷ Looking overseas, English cricketer Ian Botham sued in London in 1984 after the *Mail on Sunday* newspaper accused him of having smoked cannabis in a public place, although the outcome of the action is unknown: Ian Freckelton, 'Ian Botham Struck for Six: the Sticky Wicket of Libel and Contempt' (February 1987) 4 *Gazette of Law and Journalism* 13. The case later led to an action for contempt of court: *Attorney General v News Group Newspapers Ltd* [1986] 3 WLR 365 (EWCA).

CRIMINAL PARENTAGE

The report was described in these words:

The media, while talking about a particular, named man, have reported that he has a parent who is a criminal.

Chapter Four surveyed a series of authorities suggesting that imputing a person's parentage is incapable of defaming that person, although I was unable to find any recent authority precisely on point.⁴³⁸ The closest is a decision in the New South Wales Supreme Court of 1998, although that involved an imputation of being the brother of a suspected murderer, not the progeny of a convicted criminal.⁴³⁹ There are also clear indications that legal practitioners doubt the defamatory ability of an imputation of direct criminal antecedence.⁴⁴⁰ The report *Criminal Parentage* was included so as to test the public's response.

CONDUCTING ABORTIONS

This report was described thus:

The media, while talking about a particular, named medical doctor, have reported that she conducts lawful abortions.

The focus of interest here is *Hepburn v TCN Channel Nine Pty Ltd*, the 1983 decision of the New South Wales Court of Appeal that suggests that the test for defamation is sectionalist.⁴⁴¹ That case also involved imputations to the effect that a female registered medical practitioner was an 'abortionist'. The report was included primarily so as to establish the extent to which judges and legal practitioners were aware of that decision, as well as the weight they gave it, particularly in light of countervailing authorities that seem to require a majoritarian approach to deciding what is defamatory.⁴⁴²

MALE HOMOSEXUALITY

The description of this report was straightforward:

⁴³⁸ See above pages 114 to 117.

⁴³⁹ *Galea v Amalgamated Television Services* (unreported, NSW Supreme Court, Levine J, 20 February 1998); see above page 115.

⁴⁴⁰ See, for instance, *Krahe v Freeman* (1988) ATPR para 40-871, a case brought under the fair trading legislation rather than defamation law, discussed above at page 115.

⁴⁴¹ [1983] 2 NSWLR 682; see above at pages 62 to 73 and pages 129 to 130.

⁴⁴² See, in particular, *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500.

The media, while talking about a particular, named man, have reported that he is homosexual.

The moralist/realist debate is most relevant when defamation actions touch on areas of changing and contested social morality. Attitudes to homosexuality was the example invariably given by lawyers when asked about shifts in social mores so dramatic that imputations once thought unquestionably actionable may no longer possess even the capacity to defame. Even so, over recent years imputations of (particularly male) homosexuality continued to form the basis of litigation with alarming regularity. A relatively cursory search of Australian cases found that at least thirteen such actions have been brought since 1986.⁴⁴³ Indeed, a number of practitioners interviewed for the project remained of the view that such imputations are defamatory and most thought them at least capable of defaming.⁴⁴⁴

Male homosexuality was chosen over female as the subject of research since it forms the basis of most of the relevant case law.⁴⁴⁵

⁴⁴³ For instance, *Lee v Commonwealth Broadcasting Corporation Pty Ltd* (unreported, NSW Supreme Court, Hunt J, 9 April 1986) (imputation of lesbianism capable of defaming), see also Richard Ackland, 'Separate Trial on Imputations in Katrina Lee Case' (May 1986) 1 *Gazette of Law and Journalism* 6, 7; *Brown v Ramsey* (unreported, Victoria Supreme Court, Master Barker, 24 July 1987) (finding of no imputation of homosexuality); Anonymous, 'Brown v Time Australia' (July 1987) 6 *Gazette of Law and Journalism* 3 and 'No Basis for Action', *Sydney Morning Herald*, 24 July 1987; action brought by Health Minister Neal Blewett against the Australian Medical Association executive Bruce Shepherd (settled with damages and an apology): *Sun Herald*, 17 November 1991; *Harrison v Galuszko* (unreported, WA Supreme Court, Adams M, 8 November 1991) (Plaintiff awarded \$11,000 after being imputed to be a lesbian), see Anonymous, 'Defamation Table of Quantum' (November 1996), above n 156, 24; *Horner v Goulburn City Council* (unreported, NSW Supreme Court, Levine J, 5 December 1997), see above page 106; *Hanson v Australian Broadcasting Corporation* (unreported, Queensland Court of Appeal, de Jersey CJ, McMurdo P, McPherson JA, 28 September 1998), see above page 106; *Harris v Perkins* (unreported, NSW Supreme Court, Ireland J, 24 March 1999), see above page 107; *Brander v Ryan* [2000] SASC 446 (unreported, Prior, Lander & Bleby JJ, 21 December 2000), see above page 108; *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432 (unreported, NSW Supreme Court, Bell J, 28 May 2001) see above page 108; *Rivkin v John Fairfax Publications Ltd* (unreported, NSW Supreme Court, Simpson J, 18 April 2001), see above page 108; *Obermann v ACP Publishing Pty Ltd* [2001] NSWSC 1022 (unreported, Levine J, 16 November 2001), see above page 110; *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586 (unreported, Levine J, 27 June 2003), see above page 110.

⁴⁴⁴ These results are reported in detail in Chapter Five.

⁴⁴⁵ In *Woods & Pirie v Gordon* (unreported, House of Lords, 1820) two boarding school mistresses successfully sued over an imputation that they were in a lesbian relationship: McNamara, 'Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame', above n 15, 279 especially footnote 40. In *Kerr v Kennedy* [1942] 1 KB 409 the plaintiff claimed that the defendant told a common acquaintance of the parties that the plaintiff was a lesbian. The judge found this to be a defamatory imputation of unchastity on the basis that this includes 'impurity', 'lasciviousness' and the like. Accordingly the *Slander of Women Act 1891*, s 1 applied, meaning that actions for slander relating to lesbianism did not require proof of special damages. See further above at page 118. In *Lee v Commonwealth Broadcasting Corporation Pty Ltd* (unreported, NSW Supreme Court, Hunt J, 9 April 1986) a reference to a woman 'mango-sucking', which the woman claimed was slang for cunnilingus, was thought by the judge to be capable of defaming, meaning that the matter should go to the jury (see also Richard Ackland, 'Separate Trial on Imputations in Katrina Lee Case' (May 1986) 1 *Gazette of Law and Journalism* 6, 7). In *Harrison v Galuszko* (unreported, WA Supreme Court, Adams M, 8 November

HIV POSITIVE

The description of this report was also succinct:

The media, while talking about a particular, named man, have reported that he is HIV positive.

As reported above, a number of leading commentators assume that an imputation of HIV infection is actionable *per se*.⁴⁴⁶ While this accords with a number of US and Canadian authorities, the point appears not to have been decided by an Australian court. There is, however, evidence of complaints relating to false associations with HIV leading to out-of-court settlements in Australia.⁴⁴⁷

SEX BEFORE MARRIAGE

The description of the imaginary report read thus:

The media, while talking about a particular, named young woman, have reported that she had a single sexual relationship before getting married.

In 1999, Higgins J expressed the view in the ACT Supreme Court that sex outside marriage 'would, in the absence of explanation or some reason proffered to except it from the general rule, be regarded, if not with derision or contempt, then, at least, with disappointment.'⁴⁴⁸ To explore the point further, a simple report imputing sex before marriage was devised. The singularity of the pre-marital sexual relationship was specified so as to separate the issue from that of promiscuity. A young woman was chosen as the subject of the media report, since that term describes the plaintiffs in the aforementioned case at the time of the sexual liaisons that allegedly involved them.

1991) a female social worker was awarded \$11,000 when she sued for slander after a client claimed that the plaintiff had tried to seduce her. See also above at page 106 re *Prophit v British Broadcasting Corporation* [1997] SLT 745: imputation that a nun was a lesbian.

⁴⁴⁶ See, for instance, Gatley and Brown, cited above pages 112 to 114.

⁴⁴⁷ See above pages 112 to 114.

⁴⁴⁸ *Costello v Random House Australia Pty Ltd, Abbott v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 16 (para 100).

THE JUDGES

The eight judges I interviewed were drawn from three jurisdictions: New South Wales, South Australia and Queensland, from their supreme courts as well as an inferior court. These interviewees, who included a Chief Justice as well as Justices, were not chosen randomly but were approached on the basis that they would have particularly pertinent views on defamation law. Mostly this was because they had considered a large volume of defamation cases, or had decided cases of particular interest to the realist/moralist debate. The judges were assured anonymity.

The method adopted in the interviews was to avoid asking the judges outright questions relating to whether they interpreted defamation law as moralists or as realists. This was to avoid influencing their answers as a consequence of the way in which the questions were phrased. Instead, more general questions were put to them, such as 'what do you think is meant by the 'ordinary reasonable person?'

In addition, each judge was asked questions in relation to the ten imaginary media reports outlined above. As with the practitioners, the judges were asked to approach these descriptions not as carefully formulated imputations, as might appear in a statement of claim, since the purpose of the exercise was not to discuss the technicalities of pleading. Rather, the judges were requested to consider the descriptions as summaries of the publication complained of.

In relation to each imaginary report, the judges were asked two basic questions. The first was whether they considered the reports capable in law of giving rise to a defamatory imputation. The second was what outcome they would predict from a properly instructed jury asked to decide whether the report is defamatory. If the judge predicted that a finding of defamation was likely, the judge was then asked to estimate the gravity of the defamation in the jury's eyes, doing so by means of a scale of one to five, where one is least serious and five most serious. The judges were asked to assume that identification was not in issue and that the act or condition stipulated in the summary was presented in a relatively neutral context, meaning that the report was neither censorious nor approving of whatever was imputed. The judges were also requested to assume that there was no additional information likely to enhance or damage the relevant person's reputation.

THE POSITION OF EACH JUDGE AS REGARDS MORALISM AND REALISM

What was most striking from the interviews was that none of the judges seemed to have given consideration, or at least conscious consideration, to what has been described here as the realist/moralist debate. Indeed, it was found to be extremely difficult to communicate to some the nature of what I have presented as fundamental ambiguities in the test. Some failed to see any ambiguity, while most did not see it as a serious problem. Indeed, many were dismissive of the relevance of the questions put to them in an attempt to establish their positions in that regard. What is more, just as it is extremely difficult to find from legal precedents any unambiguous statement in support of moralism or realism, so was it far from easy, indeed sometimes frustratingly difficult, to elicit any clear position from the judges during interview.

Even so, I suggest that the interviewed judges can be categorised, with a degree of circumspection, as follows: three majoritarian moralists, two majoritarian realists and three sectionalist realists. I emphasise that the judges were not a randomly selected sample: no claim is made as regards the proportions of the judiciary who adhere to each doctrinal position outlined in the foregoing chapters. But the research supports the proposition that judges are divided along the lines indicated.

THE MORALIST JUDGES

None of the judges indicated by their answers that they could be described as sectionalist moralists. Three of the eight judges were felt to display relatively clear majoritarian moralist positions, meaning that they expressed the view that the law permits courts to override public opinion in limited circumstances. To maintain anonymity, these will be referred to as Judges MM1, MM2 and MM3.

Judge MM1:

The following judge expressed the moralist position most unambiguously. This exchange arose while we were discussing *HIV Positive*:

JUDGE MM1: I think *probably* it's likely that a jury *would* find it defamatory.

But would you have let it go to a jury?

JUDGE MM1: I would really want to *think* about that and hear submissions on it. ... If it *was* left [to a jury], I'd have little doubt that many members of the community, chosen at random and forming part of a jury in the way that our system works, *would* say that it is defamatory.

Would you be open to an argument that if you believe that then you've really got no choice but to leave it to the jury? If you've got a thought in your mind that a jury properly instructed might well find it defamatory, can you resist leaving it to the jury?

JUDGE MM1: Well, let me pose this to you. I think, as a matter of reality, that many members of our society would think that to say of a person that their father, or mother, was Aboriginal would be to lower them in the estimate of a number of members of our community who happen to be racist. I have no doubt in concluding that, as a matter of law, it would not be open to conclude that to say of a person that they are of Aboriginal ethnicity is defamatory. We simply could not tolerate saying that the common standards of our society admitted that in the view of right-thinking people.

I think other judges might well say "well, we shouldn't keep back from the jury something that they might find defamatory. Even though in our own mind we'd be disappointed if they did feel that".

JUDGE MM1: I think there's a very big realm for that style of thinking. If reasonable minds can differ about a matter, plainly it must be left. But there are some matters that we all know, having regard to our understanding of ordinary members of the community and of the fact that there are a variety of prejudices about, that might in a real sense, with a significant number of the community, lessen a person in the community's eyes. But it seems to me we would simply not tolerate these being allowed as defamatory.

And [an imputation that a man is HIV positive] might be one of them?

JUDGE MM1: Yes.

But if it did go to a jury, how seriously would they view the imputation?

JUDGE MM1: I think probably many members of the community would think that that was a serious defamation of the person.

In view of this clear moralism, it is particularly interesting to look at the judge's response to the two reports that have the most clear potential to pit legal norms against community standards. *Marijuana Use* was considered capable of being defamatory and the judge predicted that a jury would find it defamatory, rating it at the midpoint of a scale of seriousness:

JUDGE MM1: It's exactly the same point again [as with *HIV Positive*]. I mean one can imagine it might still be viewed as defamatory in a number of circumstances, notwithstanding the evidence that a large number of people under the age of 40 or whatever would have smoked marijuana socially or for relaxation. So I think probably it still is defamatory, and I think it's quite likely that the jury would find it defamatory.

But it sounds as though it's conceivable that a plaintiff might fail to convince a jury that it's defamatory.

JUDGE MM1: Oh yes. I can well imagine. But I think *probably* it's quite likely that a jury would find that to be defamatory.

Could you imagine a judge not allowing it to go to a jury?

JUDGE MM1: No, I think a judge would always have to let it go [to a jury].

This suggests that there is no scope for judicial intervention in the event of a jury finding an imputation of breaking the law to be non-defamatory. But what if a jury returns a verdict of defamation in the case of a report of *assisting* the law? Interestingly, the possibility that *Informing Police* is capable of being defamatory was seriously entertained. As a moralist, the judge seems to consider it open to a judge to determine defamation by norms other than those reflected in the law. Indeed, she gave a very telling personal reaction to the behaviour of the woman, even though this was quickly stifled:

JUDGE MM1: [Laughing] Well of course I'd view that as defamatory of the woman. What a thing to do!

That's an interesting reaction.

JUDGE MM1: Oh well, it's a frivolous reaction. I mean, I really ah ... um... Just on the face of it, I'm not quite sure that that's defamatory.

Then after some consideration:

JUDGE MM1: She *suspects* him of committing an extremely trivial offence so I suppose she doesn't have the evidence of it. Look - I don't know, I think maybe it is. But it's pretty difficult.

You seemed to imply earlier that it's a policy of the law that even if real social opinion is adverse to a person, at times the law can disregard that.

JUDGE MM1: Well, I have no doubt that is true.

And I wonder if that applies in the case of this imputation?

JUDGE MM1: No.

Despite the clarity of the judge's initial reaction to the allegation, she would not be drawn:

JUDGE MM1: I just find it hard, absent any context, to really understand what is being said. I mean it's all very well to abstract an imputation from the matter complained of, but to invite someone to comment on the imputation absent the matter complained of is, I think, quite difficult.

The judge was more certain when it came to deciding between the majoritarian approach required by the High Court in *Reader's Digest* and the sectionalist approach of *Hepburn*:

JUDGE MM1: I agree there is a tension between those two cases, but there is no doubt that the authority remains the authority of the High Court ... I don't think the statement of the principle in *Reader's Digest v Lamb* has been derogated from. So that is the way I would deal with that topic, but it's not to say I'm not conscious of the tension.

Table 2 below sets out Judge MM1's responses to all ten media reports, in relation to whether they have capacity to defame and the likely verdict of a jury.

Table 2: Views of Judge MM1 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	4.0
<i>Drunkenness</i>	Yes	3.0
<i>Recreational Sex</i>	Yes	No
<i>Informing Police</i>	Yes	1.0
<i>Marijuana Use</i>	Yes	3.0
<i>Criminal Parentage</i>	Unsure	Unsure
<i>Conducting Abortions</i>	Unsure	Unsure
<i>Male Homosexuality</i>	No	No
<i>HIV Positive</i>	No	3.0
<i>Sex Before Marriage</i>	Unsure	No

Judge MM2:

Two more judges have been tentatively classified as majoritarian moralists, although their position is less clear. The following judge came close to stating the position unambiguously:

JUDGE MM2: I don't think there's any doubt that [the ordinary reasonable person test] is in *most* situations what most people would think. But ... in some special situations the law says there are particular reasons why the ordinary reasonable person is not what most people think...

I think you're referring to the police informant cases.

JUDGE MM2: Oh I wouldn't just limit it to that situation. Let's say that in a rural area, a slightly redneck area, a statement was made implying a person was racist towards Aboriginals. Now even if you knew that most people out in that area actually were rather racist themselves, I think you'd find a court would say "no, we can't take that as the standard because we can't adopt a standard that is either contrary to law in the sense of contrary to the *Racial Discrimination Act*, or contrary to what the court would say, I suppose, are some very fundamental moral principles".

So it's not necessarily majority opinion that counts, but it's majority opinion tempered by this quality of reasonableness?

JUDGE MM2: Well, I would say in most cases it's majority opinion, but there will be some situations in which, for a particular policy reason, the court will say it's not. So in most cases this refinement won't arise, but when it *does* arise, well, you can put it another way, you can say it's the ordinary – it's the bulk of the community tempered by certain considerations, or you can say "well, in this particular situation, in reality the test is a different one and now it becomes [the views of] a *right-thinking* member of the community, whether most people in the community are right-thinking or not".

This position seems unequivocally majoritarian and moralist, save for the way in which the judge characterises the situation in which community values should be disregarded. By referring to a 'rural area', the implication is that what legitimates the overriding of that community's 'redneck' attitudes is majority opinion of a geographically broader community. It is unclear what should happen if a majority of the jurisdictional population supported racism.

The judge considered five of the ten imaginary publications capable of defaming, including, surprisingly for a moralist, *Informing Police*:

JUDGE MM2: I think people's reaction to this would be "what sort of woman is she?" I think they'd be focusing on why she is going to [the police] about a very trivial offence? And they'd be thinking more of her as being malicious ... I think most people would say it probably is defamatory.

Is that one where you think the judge would have to step in and say "well never mind what the majority thinks, as a matter of policy we have to find this not defamatory"?

JUDGE MM2: No, I'm not sure you would, because I think you might say there's really no duty to report extremely trivial offences to the police. ... To me, the thrust of this one is more "why is this woman doing that to this man?"

So it's unlike a neighbour dobbing in another neighbour?

JUDGE MM2: Yes, so I'd say *probably* the majority would say it's defamatory, but it's a tricky one and I would say not particularly serious: 2 to 3 [on a scale of 1 to 5].

This judge would not feel obliged to treat every instance of helping with law enforcement as a morally defensible activity in the eyes of 'right-thinking' people. Nor did the judge think it necessarily defamatory to impute criminality, something revealed by the judge's response to *Marijuana Use*, which the judge thought was capable of being non-defamatory, predicting a verdict to that effect from a jury:

Do you think a judge might ever have to step in and say "an imputation of criminality is always defamatory, because we have to maintain some sort of public morality"?

JUDGE MM2: I don't think the law says that at the moment. I'm not sure but I wouldn't have thought it does say that. ... I don't think you'd say it would be defamatory of someone to say that, um, last year you got three parking tickets. I mean they are offences but I don't think it's an offence that's regarded as morally reprehensible. So I'd say not defamatory to that one, according to majority opinion.

It will be recalled that this judge envisaged a curial authority to disregard evidence of racism so as to find non-defamatory an imputation of membership of a subjugated racial group. This was because of either the anti-racial discrimination laws, or, in the words of the judge, 'what the court would say ... are some very fundamental moral principles'. Does the same principle apply when it comes to an imputation of homosexuality? Probably not:

JUDGE MM2: If you say someone is gay or homosexual, is that defamatory? [pause] Yeah, that would be a tricky one for a judge to decide because a lot of people would regard it as defamatory to be - you know, it's an interesting thing to say to be "accused" of being gay, but a lot of people would resent being called gay when they weren't. But I suppose really to be blunt, if someone were saying I had a crippled right leg I'd probably rather resent that too. Although, you know, there's nothing wrong with having a crippled leg.

I'm just trying to think which way you would tend to lean, whether you'd say that the law says there can be no discrimination and we're all aiming to treat these people equally, therefore it's not defamatory, or whether there the law would ... [trails off and pauses] ...

Um, I tend to think that probably the court would just stick to the general opinion and would probably say that, however unfortunate it may be, there are discriminatory attitudes towards homosexuals in our community, and therefore it is defamatory to say a person is a homosexual, even though the law goes to considerable - it's statute law - goes to a considerable extent to try to remove the situation in which there is any adverse treatment on that account. But I don't know what the case law has said about that particular one.

Table 3 below gives the full results for this judge.

Table 3: Views of Judge MM2 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	No
<i>Drunkenness</i>	Yes	2.5
<i>Recreational Sex</i>	Yes	2.5
<i>Informing Police</i>	Yes	2.5
<i>Marijuana Use</i>	Yes	No
<i>Criminal Parentage</i>	Unsure	No
<i>Conducting Abortions</i>	Yes	No
<i>Male Homosexuality</i>	Yes	No
<i>HIV Positive</i>	Yes	4.5
<i>Sex Before Marriage</i>	Yes	No

Judge MM3:

A third judge has also been classified as majoritarian moralist, although she was the hardest to classify since she seemed to express conflicting views on the issue. She started quite unambiguously during the following discussion concerning *Male Homosexuality* and *Conducting Abortions*:

If you had to decide whether these imputations are defamatory, with no jury, how would you go about it? Would you think "I think most people are accepting of homosexuality" or "I think most people are accepting of current abortion laws", therefore these imputations are not defamatory?

Judge MM3: Not quite, no. I think you'd have to think "how does the ordinary reasonable person view it?" ... That's something judges have to do quite a lot: what the reasonable person would do. Say in the area of negligence, you're looking at the question of the reasonable person all the time. So it's a test that judges are used to applying. And it's not a scientific test.

If you were to change the test to what most people think, do you think that would make a difference?

Judge MM3: That wouldn't be a good idea because most people might have been whipped up into a frenzy about some issue. And how would you tell what most people thought? Then you'd have to conduct some sort of survey ...

So you wouldn't simply think in terms of what most people think? You'd think very much in terms of the ordinary reasonable person?

Judge MM3: Absolutely.

Shortly afterwards the conversation continued:

Imagine a survey showed that, for instance, 80% of the population would think less of someone for being gay - would that influence you?

Judge MM3: It might.

But it wouldn't be a determining factor?

Judge MM3: It would be *a* factor. The fact that *I* might not think less of him is irrelevant. ... The knowledge that a huge proportion of people - we're talking about a *huge* proportion of people - think differently from me, that would have an effect, obviously.

Note that majority opinion would have an effect, but would not be determinative. And later still:

Judge MM3: The test [of what is defamatory] is what the ordinary reasonable person thinks, not what someone thinks the vast majority of people think.

These views, which clearly indicate moralism, seem contradicted by the following two comments made later in the same interview. The first came in response to a question about the presence of the word 'reasonable' in the phrase 'ordinary reasonable person':

Judge MM3: I think the word "reasonable" is a good addition because it means that you concentrate on the ordinary person unaffected by extreme views. So it adds something. Now maybe if you just said "the ordinary person" you'd imply that, but by using the word "reasonable" you make it perfectly clear that you're talking about a person in the community unaffected by extreme views, which make them more susceptible to prejudice.

Perhaps the last few words clarify that what is meant by 'extreme views' are immoral or irrational views, in which case the judge is indeed moralist. On the other hand, her explanation for the requirement of reasonableness, being that it is there to ensure that *majority* views are heeded, was not only the one most commonly given in interviews with judges and defamation practitioners, it was usually taken to imply a realist perspective: majority views count, warts and all. Certainly the following comment seems realist:

Judge MM3: Everything depends on the individual circumstances. If you start introducing policy questions as to whether or not something *ought* to be defamatory, rather than whether it is capable of being defamatory, I think that's quite difficult, because then you are introducing subjective views. So I think the question of whether or not something's capable of being defamatory is the question, rather than whether something *ought* to be considered capable of being defamatory.

Also confused was the judge's response as regards the capacity of *Informing Police* to defame:

Do you think there is a point at which a court would say "there is a policy here whereby we have to find an allegation of being a police informant to be not defamatory: even though it's going to make your life a misery having this allegation made against you, you've actually been accused of doing a good thing?"

Judge MM3: I think that is adequately answered by the ordinary reasonable person test: would the ordinary reasonable person think that was defamatory? Well, one would assume that the ordinary reasonable person would think that the person had done a brave and good thing. And therefore it was not defamatory ...

Table 4: Views of Judge MM3 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	No
<i>Drunkenness</i>	Yes	No
<i>Recreational Sex</i>	Yes	No
<i>Informing Police</i>	Yes	No
<i>Marijuana Use</i>	Yes	1.0
<i>Criminal Parentage</i>	Yes	No
<i>Conducting Abortions</i>	Yes	No
<i>Male Homosexuality</i>	Yes	No
<i>HIV Positive</i>	Yes	No
<i>Sex Before Marriage</i>	Yes	No

However, after a moment's hesitation the judge continued, seemingly contradicting this typically moralist position:

Judge MM3: But this is if the report was true. Of course if it was untrue ... [*hesitates*] This is very difficult and defamation may not be the answer. For example ... someone may say of someone else that they're a dob and informer where their intention is not to reveal a truth but to have the other person killed. So everything depends on the circumstances.

The full results for this judge are given in Table 4 above.

REALIST JUDGES

None of the other five judges were felt to express views that clearly indicated a moralist understanding of the law, although again some interviewees appeared inconsistent in their views on the point. Two were considered majoritarian realists (Judges MR1 and MR2) and three sectionalists (SR1, SR2 and SR3).

Majoritarian realists

Judge MR1:

This judge, who had extensive experience in defamation law, was clearly realist:

Would it be fair to summarise the test of what is defamatory as what is the opinion of the ordinary reasonable person?

Judge MR1: Well it has to be, it's the general audience.

What is the ordinary reasonable person? How would you describe that?

Judge MR1: Just the ordinary man in the street. The person you sit beside on the train. They're ordinary Mums and Dads reading their newspapers, the man on the Clapham omnibus.

Is there any meaningful difference between the expression "the ordinary person" and "the ordinary reasonable person"? If we were to lose the word "reasonable", would it make any difference?

Judge MR1: Well, yes and no. The key to it is "reasonable". There are plenty of people who will read things from a prejudiced viewpoint, or look for the worst in something. ... And there are others who take the opposite standard: it doesn't occur to them that anything unkind is being said about anybody. You talk about a reasonable person as being somebody in the middle.

Later the judge shifted a little towards moralism, at least when it comes to determining denotative meaning:

But would it really make a difference if we dropped the word "reasonable"? Is it reinforcing the concept of ordinariness?

Judge MR1: No, I think it's trying to emphasise the importance of keeping your feet on the ground. Probably in today's language it's not a particularly helpful or clear word. I think probably a better word is "fair-minded". A *fair* person, as opposed to an

irrational person. Unreasonable: someone who jumps to conclusions, you know, because they see a headline they say "that's it! He's guilty".

But ultimately he returns to realism:

You might be able to imagine a situation where jurors perceive themselves as having reasonable opinions, but perceive their personal opinions as different to that of the majority of the population. What should they do then?

Judge MR1: Well, this is where I suppose it becomes hopelessly artificial, the whole thing, but it's been the case ever since time began that the trial judge directs them to say "it's not what you personally think. You are here as representatives of the community and you have to approach the answers to these questions on the basis of ... not what you'd say, but what you think the ordinary fair-minded man would say."

And is that the preferable test, do you think?

Judge MR1: Yes I do. I think that's the safest thing. You've got to *try* to give them some standard. I mean you might have a bloke who is the head of the Anti-Abortion League sitting on the jury. And so implicitly you're saying "you abandon your own peculiar views, be honest enough to face up to the fact that you've got extreme views about it. ... You're going to put aside your personal prejudice. ... And that's the way we're asking you to approach it: to do the best you can to assess what you consider the ordinary member of the community would do."

Could you imagine a situation ever where a court would say "well the majority of people think this, but that's such an offensive view that we should determine the matter by the view of a reasonable minority of the population?"

Judge MR1: No, I can't, because why is it for the Court to give a direction of that kind? I mean, words are the currency of everybody for exchanging ideas and communicating and so on. Who authorises a judge to say "this is how it ought to be understood?"

Ironically, the judge predicted that a jury would find *Informing Police* not defamatory, although on the basis of social attitudes:

Judge MR1: Let's assume that [the wife] did honestly believe that [the husband] committed this extremely trivial offence. Well then I don't see that that would be defamatory of her. People might strongly take the view that it was a *duty*. ... I would say that it's one capable of going to the jury. The jury would have to decide that. And then the ordinary men and women of the world ... [*trails off*]. I would give it a 50% chance: they might or they might not [find it defamatory]. Really borderline. If you ask about gravity I'd say about 1 on the scale. Pretty low level ... And the lawyers opt out by simply saying "oh well, that's a real jury question!" [*Laughs*]

There is a touch of moralism in what follows:

If as a judge you had to determine the final issue as to whether a publication is defamatory, can you imagine situations where you would be prepared to find it not defamatory to allege the committal of a criminal offence? Or do you think as a judge you would feel duty-bound to find it defamatory?

Judge MR1: Well, it's not a duty thing. You've got to step away from that. You've got to try to put yourself in the position of being the objective reasonable member of the

community. You try to put yourself in the position of the ordinary bloke in the street. To say that someone's committed an offence by smoking marijuana ... [pause] It's a hard one. I think I'd get it over the line, yeah.

It would be defamatory?

Judge MR1: Assuming it involves a breach of the law. I mean, where there is no criminality involved, forget it! If it carries with it a breach of the law, there are some members of the community who no doubt do take the view that marijuana is, you know, halfway to vice and all sorts of things. Sure.

So you're taking a slightly less liberal view as a judge determining the issue than you would think a jury would in determining the issue?

Judge MR1: Well yes, I suppose that's right. If you were asking me when I was sitting as a trial judge alone then I suppose I'm bound to say that if I was honest with myself I probably *would* find it was defamatory if it brought in criminality. But if you're asking me to make my assessment based on my experience of what *jurors* would do then I would think a juror would probably find the other way. And then you can start bringing in all sorts of reasons why I'd be thinking slightly differently. You know, background, experience, training, blinkers, all those sort of things.

Despite these reservations, it seems that the matter should be decided by community standards:

In a State where marijuana use is not criminal, are you saying an imputation of using marijuana is incapable of being defamatory, would not be found by a jury to be defamatory and also you personally would not think less of the user?

Judge MR1: Certainly then, I wouldn't have any hesitation in saying all those things.

But what if marijuana use is criminal?

Judge MR1: If you're saying a man in breach of the law smokes marijuana socially, I think it certainly would be capable because he has breached the law. Would a jury find it defamatory? Well, 50:50 on that one because they might say "well, yeah sure, but we ..." [trails off] I mean it's not defamatory to say of someone that they went through a red traffic light or committed a parking offence. I mean, we all do that. Who cares? And so it may be in fact not defamatory. But I think as a judge I would have to say it was *capable*. You couldn't take it away from the jury. If I was a plaintiff I would say it's arguable. It *is* arguable. That's why we're here. So that's enough to get it to the jury. And then I think, I suppose as a betting man I'd say a jury would probably throw it out. I'd say it's probably got a 30% chance of surviving in front of a jury, and as regards how defamatory it is, 1 on a scale of 1 to 5.

The judge's realism also came through when considering *HIV Positive*:

Judge MR1: I'd say yes it is capable of being defamatory because it has been long recognised that to say that a person with an infectious and particularly a sexually transmissible disease (I assume HIV is a sexually transmissible disease), whether or not the poor man is a philanderer etc, nevertheless is to say something which is likely to cause the regard in which he's held to be marred in some way. And that might be fair or unfair but that's not the point. So it's no doubt capable.

As for sectionalism, this judge, who had a very extensive background in defamation, preferred *Reader's Digest*, the authority that supports majoritarianism, to *Hepburn's* sectionalist approach. He referred in particular to the former's status as a High Court judgment:

You're right, Readers Digest does go the other way to Hepburn.

Judge MR1: Well, it's the High Court, mate! [Laughs] It doesn't go anywhere else!

Table 5 below sets out the full results for Judge MR1.

Table 5: Views of Judge MR1 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	3.5
<i>Drunkenness</i>	Yes	3.5
<i>Recreational Sex</i>	Yes	No
<i>Informing Police</i>	Yes	Unsure
<i>Marijuana Use</i>	Yes	No
<i>Criminal Parentage</i>	No	No
<i>Conducting Abortions</i>	No	No
<i>Male Homosexuality</i>	No	No
<i>HIV Positive</i>	Yes	3.0
<i>Sex Before Marriage</i>	No	No

Judge MR2:

This judge, who, if anything, is even more experienced in defamation law than Judge MR1, shared the latter's conviction in majoritarian realism:

What's your impression of what "ordinary reasonable person" means?

Judge MR2: It refers to the sensible, open-minded, big middle-ground between two extremes. It's been used essentially by everyone, with inconsequential variations as far as I'm concerned, and I think everyone understands it. And some evidence in support of that proposition is that from time to time you get questions from the jury, the question is "are you asking about Mr and Mrs Ordinary"? ... I was impressed that they had used those words. ...

In your mind does that fairly summarise the test, that "Mr and Mrs Ordinary"?

Judge MR2: Yes.

The judge's realism was reflected in his approach to *Informing Police* and *Marijuana Use*:

Do you think a jury would find [Informing Police] defamatory?

Judge MR2: Yes, too right!

On a scale of one to five?

Judge MR2: [long pause] Very much between three and five.

There is a series of cases relating to police informant cases. Byrne v Deane is probably the most famous one from England and there's an Australian one, Blair v Daily Telegraph, which this is based on, where it was said to be not capable of being defamatory. Blair was 1970 and Byrne v Deane was in the 1930s. Do you think that something has changed?

Judge MR2: Hmmm? [surprised] They said it was incapable of being defamatory?

Yes.

Judge MR2: That's a different view of the law, which was probably going to be reflected in my answer to [*Marijuana Use*]. I'd say a jury would probably find it not defamatory.

Do you think it's capable?

Judge MR2: Barely. It's on the edge. It would depend on which State. In fact in some States where the law reflects a greater relaxed approach to the consumption of marijuana, it mightn't be defamatory at all.

But you think a jury would toss it out?

Judge MR2: Yes.

As for sectionalism, this judge was just as dismissive as Judge MR1:

Judge MR2: I think *Hepburn* was an aberration.

Because it applies the wrong principles?

Judge MR2: Yes. [*Conducting Abortions*] is incapable of being defamatory.

But there are a lot of judges who, because of Hepburn, would let it go to a jury. What would happen then, do you think?

Judge MR2: Well I'd like to think the answer would be no.

Would you expect the answer to be no?

Judge MR2: I would expect the answer to be no.

You referred to Hepburn as an aberration. In your experience it's not referred to often in argument?

Judge MR2: No.

Even though there might be situations like this where it would seem to do the plaintiff a good job?

Judge MR2: Well I haven't heard it referred to for a long time.

Table 6 below gives in full the responses for this judge.

Table 6: Views of Judge MR2 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	No
<i>Drunkenness</i>	Yes	No
<i>Recreational Sex</i>	No	No
<i>Informing Police</i>	Yes	4.0
<i>Marijuana Use</i>	Yes	No
<i>Criminal Parentage</i>	No	No
<i>Conducting Abortions</i>	No	No
<i>Male Homosexuality</i>	No	No
<i>HIV Positive</i>	Yes	No
<i>Sex Before Marriage</i>	No	No

Sectionalist realists

Judge SR1:

What distinguished the remaining three realists from the last two is their sectionalism. This was most pronounced in the case of one judge, also with extensive experience of hearing defamation cases, who referred to *Hepburn* repeatedly during her interview, calling it 'the *locus classicus* on defamatory meaning':⁴⁴⁹

You're the first judge who has volunteered [Hepburn]. Do you still see it as a very salient and relevant case?

Judge SR1: I see it as salient and relevant. I think it's almost as salient and relevant as *Nikolopoulos*.⁴⁵⁰ ... When I was at the Bar I referred to it constantly. I had a very big defamation practice. ... I would always be referring to *Hepburn* because it really is ... [trails out] ... Those decisions of the Court of Appeal ... from the early 80s, you know,

⁴⁴⁹ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682.

⁴⁵⁰ *Greek Herald v Nikolopoulos* (2002) 54 NSWLR 165. This decision of the New South Wales Court of Appeal is to the effect that, in determining whether an imputation is capable of defaming the plaintiff, regard must be had for the context in which the imputation arose.

*Hepburn, Sergi Barbaro.*⁴⁵¹ Really, the Court of Appeal's decisions now are a bit of a pale shadow in my view.

The judge was classed as a realist. Take, for instance, her approach to *Male Homosexuality*:

You think a jury would find it defamatory?

Judge SR1: I think a jury *may*, it could go either way. It would depend. But I would certainly have to let that go to a jury because it's a question for community standards. The imputation that a person is homosexual in my view ought not to be defamatory.

Discernable from this judge was a particular attention for legal norms. Moralists, as defined in this thesis, take the view that a publication can only be defamatory if the relevant response meets certain moral and rational thresholds. Thus any jury verdict to the effect that an imputation is defamatory would need to be reversed if based on an insufficiently moral or rational response. But there is a compromise between moralism and realism. Under this, and as a starting point, jury verdicts would not be set aside on the basis of moral or rational considerations, but only on the basis that it is not credible that they reflect an attitude that is sufficiently widespread in the community. Even so, plaintiffs pleading certain imputations, such as those relating to conduct that is contrary to a legal norm, might be given an advantage over others in that there would be judicial reluctance to withhold such an imputation from the jury on the basis that it is incapable of being defamatory, even though it might be predicted that the behaviour imputed thereby would cause very few people to think less of the plaintiff. Such an approach was detected from the reasoning of a number of judges who appeared otherwise realist in their approach, including this one:

Judge SR1: I can't see a jury seeing [*Marijuana Use*] as defamatory. I would have to let it go to the jury, though, because it's illegal. A judge would think it serious but the jury I suspect might not. I think a jury would have trouble with that one, I really do. It would be very easy to argue to a jury that smoking a little marijuana today doesn't mean much.

Can you imagine situations where, with an allegation of criminal behaviour, a judge could not allow it to go to a jury? Or once something imputes criminality, does it automatically go to a jury?

Judge SR1: Pretty much. I think so. An imputation of criminal conduct, hypocrisy, dishonesty, stupid behaviour, they're always going to go. Minor drug use? You know, it would have to go to the jury, but a jury may well take the view that it's nothing. Especially if it's only smoking a little.

Would you still predict a defamation verdict from a jury if marijuana were legalised?

Judge SR1: Oh then it would definitely not be defamatory.

So if there is a social stigma, it's not on the drug but on the criminality?

⁴⁵¹ *Barbaro v Amalgamated Television Services* (1985) 1 NSWLR 30.

Judge SR1: It's the criminality that has the social stigma.

So once it was legalised it would probably sail through a jury?

Judge SR1: Yes.

But ultimately this judge was realist in her reasoning: while marijuana use remains illegal she would let the imputation go to the jury because of community values, not legal norms:

Judge SR1: I think it's a community standard issue. I think at the moment it's like communism. I think I'd still let communism go, and I'd still let marijuana go. It would have to have been legalised for a number of years before I'd say no it can't [be defamatory]. It's a community matter, the kind of matter that would have to go.

Indeed, this judge seemed prepared to send most imputations to the jury, provided there was a realistic chance that it might meet her sectionalist test:

Judge SR1: Would I let [*HIV Positive*] go to a jury? Well, it would depend on the matter complained of, but if that's all it said then it's a quintessential jury question. It's a very low threshold. I take the view you should let things go to the jury if there's any issue of public debate.

Table 7 below sets out the responses for Judge SR1.

Table 7: Views of Judge SR1 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	3.0
<i>Drunkenness</i>	Yes	No
<i>Recreational Sex</i>	Yes	1.5
<i>Informing Police</i>	Yes	4.5
<i>Marijuana Use</i>	Yes	Unsure
<i>Criminal Parentage</i>	No	No
<i>Conducting Abortions</i>	Yes	1.0
<i>Male Homosexuality</i>	Yes	No
<i>HIV Positive</i>	Yes	No
<i>Sex Before Marriage</i>	No	No

The final two judges were the most difficult to classify, the first because he did not seem to have given the defamation test's qualitative aspect much consideration, and the second because she did not appear to have given prior thought to the test's quantitative component. Even so, on the

basis of remarks that emerged during the interviews, I have classified them both as sectionalist realists.

Judge SR2:

This judge, despite not being a clear realist, was certain, at least, that the test is sectionalist. This was so even though he confirmed that in his experience *Hepburn* is rarely cited:

When you apply the ordinary reasonable person test, do you apply majority opinion, or is it permitted to allow a minority opinion, do you think?

Judge SR2: It's ordinary decent people in the community. I don't think it's majorities or minorities. If it's an ordinary decent view, that necessarily implies a minority could carry the day. Because decency is not limited to majorities.

He also agreed with Judge SR1 that a jury would only be likely to find *Marijuana Use* defamatory while cannabis remains illegal:

So there's no stigma to the drug itself then?

Judge SR2: No, it's because it's criminal. A man who occasionally smokes Craven A's, that's not defamatory!

He also agreed that the reaction to a publication of a minority section of the community can be determinative.

Table 8 below sets out the responses of this judge.

Table 8: Views of Judge SR2 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	1.5
<i>Drunkenness</i>	Yes	2.5
<i>Recreational Sex</i>	Yes	4.0
<i>Informing Police</i>	Yes	No
<i>Marijuana Use</i>	Yes	1.0
<i>Criminal Parentage</i>	No	No
<i>Conducting Abortions</i>	No	No
<i>Male Homosexuality</i>	Yes	No
<i>HIV Positive</i>	Yes	No
<i>Sex Before Marriage</i>	Yes	No

Judge SR3:

The final judge initially disapproved of *Hepburn*, but then seemed to accept its dictum. After explaining the decision, since the judge appeared unaware of it, there followed this exchange:

You didn't approach the issue of what is defamatory in terms of thinking "well, is there is a sizeable but reputable minority?"

Judge SR3: No, I didn't. [pause] I don't know how that fits in with the ordinary reasonable reader test.

Well, how do you understand the ordinary reasonable reader test to work?

Judge SR3: [mock groan] Well I understand it *not* to work! ...

But if jurors were to ask you a specific question: "are you asking me to apply what I think is majority opinion?" would you say "yes"?

Judge SR3: I'd say "no" to that. I don't think it's the same thing. I suppose now I think about it, the phrase should be "*an* ordinary reasonable reader". Because there is no "*the* ordinary reasonable reader". ... I don't know. I mean, it's very difficult. ... The trouble with "*an* ordinary reasonable reader" is that they could come back and say "well, some are going to say they think less of the plaintiff and some are not". It's a fact. But I guess if there's a reasonable number of ordinary reasonable people who would think less, then that is the boundary.

Which is what Hepburn was saying, isn't it?

Judge SR3: Yes. When you think about it, it makes sense. Because if there are enough people out there who would interpret it that way, then the plaintiff has been defamed ... to a number of people. When you come to damages you look to see - or try to make some assessment of how many people might have thought less of them, maybe.

So, taking [*Conducting Abortions*], there may be some people who the jury would classify as reasonable who'd think it was defamatory. But you'd have to say there's a huge number of people who wouldn't. I haven't really thought those things through! [laughs]

At one point this judge seemed to be a clear realist, putting aside her own morality as regards at least one of the media reports:

Is your answer [that HIV Positive is capable of being defamatory] based more on the fact that it's a contagious disease rather than that people would think less of somebody who is HIV positive?

Judge SR3: Yes exactly. I'm really relating it to those contagious disease cases. ... I suppose, even back before this sort of thing, I always had problems with that contagious diseases one, but it was the law and you had to deal with it.

If the test for defamation were simply "would you think less of the man?", would the jury find it defamatory?

Judge SR3: I think it's very likely a jury would, yes. I guess that's a good illustration of where a jury might come back with a different result to the one *I* would come back with.

Even so, having concluded (after considerable hesitation) that *Criminal Parentage* is capable of being defamatory, this judge was, interestingly, quite certain that a jury would find it defamatory on the basis of community attitudes. A hesitation to send such a report to the jury could be understood to reflect a moralist position. Indeed this judge demonstrated considerable appreciation of the moralist argument, although it appeared to be ultimately rejected, as is suggested in the following exchange relating to the capacity of *Criminal Parentage* to defame:

Would a jury find this defamatory?

Judge SR3: [Pause] ... Mmm. Yes I think so...

Would you leave it to a jury?

Judge SR3: Just on its own? Perhaps not.

But you think it is probably incapable of being defamatory?

Judge SR3: I suppose what I think is it shouldn't be. It sort of comes into that *Harrison* territory, doesn't it? Which I've always thought was a decision that people shouldn't think the way people do. Well, the High Court wouldn't allow them to think the way I do. So it sort of comes into that class for me. So I might leave it to a jury, given a bit of loose thinking.

And you think a jury would find it defamatory?

Judge SR3: I think quite likely, yeah.

But the case against leaving it to a jury would be based on what I take to be your feeling about that statement, that you'd have to be rather prejudiced to find it defamatory?

Judge SR3: Yes, yes.

What score would a jury give it, out of 5?

Judge SR3: 2.

Harrison is a reference to the 1982 decision of the High Court of Australia that limited the possible range of meanings that reports of criminal proceedings could bear. The Court determined that a report that does no more than state that a person has been arrested and is expected to be charged with an offence is incapable of imputing guilt or probable guilt,⁴⁵² while a statement that a person has already been charged with an offence is capable of bearing the imputation that the police suspect that they have the right person and have reasonable cause for doing so.⁴⁵³

⁴⁵² *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293, 300 (Mason J, with Gibbs CJ, Wilson and Brennan JJ concurring).

⁴⁵³ *Ibid* 301 (Mason J, with Wilson and Brennan JJ concurring, but Gibbs CJ dissenting).

The interviewed judge seems to imply that these limitations of meaning are artificial and that in reality people would tend to read more into such reports. The ruling in *Harrison* is therefore considered to be a moralist mechanism, whereby the courts intervene so as to put aside the way in which the general public would actually react to a publication's audience, supplanting that reaction with one the court considers more desirable. The judge suggests that on this basis she should perhaps hold a report that a man is the son of a criminal to be incapable of being defamatory, even though in reality people would bear suspicions against that man. But ultimately the judge seems to decide that the matter should go to the jury, although she is far from clear.

In the High Court of Australia Kirby J has also alluded to the proposition that the rule in *Harrison* derives more from policy considerations than an appreciation of how people really think:

[I]n considering whether, as claimed, the matter complained of actually harms the reputation of the plaintiff, it is appropriate for the decision-maker to keep in mind the importance attached to freedom of communication. This too is a fundamental human right. Reconciling the attainment of freedom of communication in circumstances where the individual's reputation is also protected is a function of the law of defamation. Allegedly defamatory matter must be read in a way appropriate to a society such as Australia which, by its Constitution and otherwise, enjoys a high measure of freedom of expression. Although reporting that a person has been arrested and charged undoubtedly occasions damage to some degree to the reputation of that person, this must be tolerated on the basis of the legitimate public interest in the reporting of such facts.⁴⁵⁴

Judge SR3 also thought that *Marijuana Use* only has potential to defame because of the imputation of criminality:

Would a jury find it defamatory?

Judge SR3: No. I think you'd probably have to let it go to the jury because it still is illegal.

But if the law were amended so that it became lawful?

Judge SR3: Oh well, then it wouldn't be defamatory.

So there isn't a stigma to the drug itself? It's purely the law-breaking aspect?

Judge SR3: Well, that's the only reason I would let it go to the jury. But I think a jury would find it not defamatory because there's a pretty high level of tolerance of minor use of marijuana.

The responses of Judge SR3 are set out in Table 9 below.

⁴⁵⁴ *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 576 (Kirby J).

Table 9: Views of Judge SR3 as to whether the media reports are capable of defaming and whether a jury would find them defamatory

<i>Media report</i>	<i>Capable of defaming?</i>	<i>Jury likely to find defamatory?</i>
<i>Extramarital Affair</i>	Yes	2.75
<i>Drunkenness</i>	Yes	1.0
<i>Recreational Sex</i>	Yes	Unsure
<i>Informing Police</i>	Yes	3.0
<i>Marijuana Use</i>	Yes	No
<i>Criminal Parentage</i>	Yes	2.0
<i>Conducting Abortions</i>	No	No
<i>Male Homosexuality</i>	No	No
<i>HIV Positive</i>	Yes	3.0
<i>Sex Before Marriage</i>	No	No

THE DEFAMATORY NATURE OF THE TEN MEDIA REPORTS

Having got a sense of where each judicial interviewee stands as regards sectionalism and moralism, we now turn to the judges' response to each of the ten hypothetical reports. What is of interest here is the extent to which these throw additional light on whether the judges are generally moralist or realist in their outlooks. Table 10 on page 174 summarises the responses of interviewed judges as regards each media report. I discuss the most interesting qualitative findings below, categorising the hypothetical media reports in the same way as the related imputations discussed in Chapter Four.

THE INTERPLAY OF LEGAL AND SOCIAL NORMS

Informing Police

Two reports fall into this category: *Informing Police* and *Marijuana Use*. In the face of moralism, one might expect many judges to identify the former as non-defamatory but the latter as defamatory. It is surprising, then, that *Informing Police* was one of the three reports most likely to be considered defamatory by a judge. All of the judges concluded that the report was capable of being defamatory. None expressed the view that, out of some policy consideration, the jury should be prevented from determining whether it is in fact defamatory. Indeed, only one judge was aware of the case law relating to police informant imputations.⁴⁵⁵ This judge, despite

⁴⁵⁵ Judge MM1: see pages 153 to 156 above.

being a moralist when it came to an imputation of Aboriginality, did not feel that *Police Informant* was a case where the court should intervene.

Table 10: The responses of interviewed judges to the media reports as regards capacity to defame and predicted jury verdict

<i>Media report</i>		<i>Informing Police</i>	<i>Marijuana Use</i>	<i>Male Homosexuality</i>	<i>HIV Positive</i>	<i>Criminal Parentage</i>	<i>Extramarital Affair</i>	<i>Drunkenness</i>	<i>Recreational Sex</i>	<i>Sex Before Marriage</i>	<i>Conducting Abortions</i>
<i>Total judges finding report capable of defaming</i>		8	8	4	7	2	8	8	6	3	3
<i>Total judges finding report incapable of defaming</i>		0	0	4	0	4	0	0	2	4	4
<i>Total judges predicting a jury verdict of defamatory</i>		5	3	0	4	1	5	5	3	0	1
<i>Total judges predicting a jury verdict of non-defamatory</i>		2	4	8	4	6	3	3	4	8	6
<i>Report capable of defaming?</i>	<i>Defamation verdict predicted?</i>										
<i>Yes</i>	<i>Yes</i>	MM1 MM2 MR2 SR1 SR3	MM1 MM3 SR2		MM2 MR1 SR3	SR3	MM1 MR1 SR1 SR2 SR3	MM1 MM2 MR1 SR1 SR3	MM2 SR1 SR2		SR1
<i>Yes</i>	<i>No</i>	MM3 SR2	MM2 MR1 MR2 SR3	MM2 MM3 SR1 SR2	MM3 MR2 SR1 SR2	MM3	MM2 MM3 MR2	MM3 MR2 SR1	MM1 MM3	MM2 MM3 SR2	MM2 MM3
<i>No</i>	<i>Yes</i>				MM1						
<i>No</i>	<i>No</i>			MM1 MR1 MR2 SR3		MR1 MR2 SR1 SR2			MR1 MR2	MR1 MR2 SR1 SR3	MR1 MR2 SR2 SR3

Two factors appeared to assist most of the judges in concluding that the report would be capable of being defamatory. First, the offence which the husband had committed and about which the wife was informing the police was described as 'extremely trivial'. Note, for instance, the following judge's reaction:

Would you actually let this imputation go to a jury?

JUDGE SR3: In that form I would. Take out the "extremely trivial" and I might not.

Secondly, the conjugal relationship between the informant and the law-breaker was likely to encourage the view that the wife's duty of loyalty to her husband outweighed any social or moral responsibility she might have in relation to law enforcement. Even so, this factor did not weigh heavily with all interviewees, with one swayed more by the genuineness of the wife's belief in her husband's guilt:

Judge MR1: What we're really trying to say is that she in some way betrayed her husband by reporting him to the police. Well then, the concept of betrayal of the husband I think probably *is* defamatory.

Let's assume that she did honestly believe that he committed this extremely trivial offence.

Judge MR1: Then I don't see that that would be defamatory of her. People might strongly take the view that it was a *duty*. But it's one capable of going to the jury. The jury would have to decide that one. And then the ordinary men and women of the world ... [*trails off*] I would give it a 50% chance of success, they might or they might not think it's defamatory. It's really borderline.

Five out of the seven judges thought that a typical jury would probably find the report defamatory, while one thought it would not and another thought the outcome impossible to predict. When those who thought a jury probably would find the report defamatory were asked about how serious such a jury would probably regard the imputation, answers ranged very widely: from 1 to 4.5 on a scale of 5.

Marijuana Use

Unsurprisingly, the judges were unanimous in the view that this report is capable of being defamatory for as long as marijuana possession remains a criminal offence. Interestingly, a number of judges, who generally appeared realists, expressed doubts as to whether they would permit an imputation of marijuana use to go to a jury once the drug is decriminalised, suggesting that they consider social disapproval of marijuana to be very low indeed.

A minority predicted a jury verdict of defamation, but all eight judges agreed that if the report were to be found defamatory by a jury then this was due to the criminality of marijuana use, rather than because of any inherent stigma in the drug. At least one judge thought that a great deal hangs on the identity of the user:

Do any of [our hypothetical reports] leap out at you as almost always defamatory unless there are some fairly particular set of circumstances?

Judge MM3: I think [the imputation of marijuana] use might be one.

That's the most defamatory?

Judge MM3: Not necessarily. But [pause] if you're talking about media publications, they're unlikely to publish it about Tom, Dick and Harry. So they're more likely to be publishing it about someone who has an influential position in public life. And therefore people might be worried about the fact that they do something illegal on a regular basis. And that's the only thing that you said that is illegal. It's criminal behaviour. So I think it is different to allege of someone that they continue to engage in criminal behaviour. So I'd put that one in a different category.

IMPUTATIONS THAT EXCITE BIGOTRY

A majority of judges thought that *HIV Positive* should go to a jury, but only half thought the same about *Homosexuality*. While two of the moralist interviewees regarded an imputation relating to Aboriginality as incapable of being defamatory, only one regarded an imputation of male homosexuality thus incapable, and that on non-moralist grounds.⁴⁵⁶ The interviews suggest that judicial attitudes to homosexuality and HIV remain very distinct from the unambiguous condemnation displayed towards racism against Aborigines.

Views in relation to *Criminal Parentage* were rather more enlightened. Only two of the eight judges thought this report even capable of being defamatory, and only one expected a jury verdict of defamation. The reasons were fairly predictable:

Judge MR1: It's well settled by authority that a man is not responsible for his parents. And there's plenty of authority which says that. That wouldn't go to the jury, on the question of being defamatory.

IMPUTATIONS RELATING TO SHIFTING SEXUAL MORALITY

All eight judges considered *Extramarital Affair* and *Drunkenness* to be capable of defaming the subjects and a majority predicted a verdict of defamation. In the case of *Recreational Sex*, a minority predicted a jury verdict of defamation. The response of one of the judges who expected a finding of defamation suggests that my efforts to avoid imputing promiscuity failed:

Judge SR2: [Laughs.] If you were pleading it, you would say, "she's a promiscuous woman". To say of somebody "you're a promiscuous woman", I think most people would say is defamatory. ... I think the tail of saying "to enjoy having sex with them" is really irrelevant to whether it's defamatory or not. It might be relevant to whether or not she's damaged by it, but the meaning is there that it's promiscuous. And if it was argued I think most - four out of five would say "yes, that's defamatory".

And what score would they give it out of 5?

Judge SR2: 4.

A 4? That's the most serious so far.

⁴⁵⁶ The basis for the decision was that homophobia is insufficiently widespread in society to reflect the views of the ordinary reasonable person, as opposed to homophobia being irrational or immoral and therefore incapable of gaining expression through defamation law.

Judge SR2: Yeah, I think so.

But for the following judge, I *had* successfully distinguished the woman's conduct from promiscuity:

Judge MR1: In 2004 it's not defamatory, unless it's suggesting (and it doesn't have to be spelled out) that she was a harlot or a prostitute or something of that kind. But that's not how I understand this report. It's simply saying that she's a woman who um ... [trails off]. Unless it is suggested that she's a person of low moral virtue, because she does that. That's a 19th century sort of concept.

Would you leave it to a jury?

Judge MR1: As stated, I don't think I would. If this is written about her in the newspaper, the pleaded imputation would be that the plaintiff is a person of low moral virtue. If the reader would take from reading the newspaper that she *was* a person of low moral virtue then I think it would be *capable* of being defamatory. But I'm not sure that today people would do that, given that there's no sanctity in marriage and the views about women have changed so much.

... [A]lways the jury will be asked to consider the meaning presented [in the pleaded imputation] in the context of the article. ... And so they have the article in front of them and they're looking at it as the context in which to understand this collection of words. So in other words if it imports a flavour of promiscuity or gross or disgusting conduct - maybe it does. But I must say my reaction today would be probably no. But once you started to articulate a suggestion of promiscuity, I think arguably "promiscuous" and all the things that are associated with it - "depravity" if that's not taking it too far - they carry with it a sting which in my view would be capable of being defamatory.

So it sounds like it's probably not defamatory in the eyes of the jury, you think? If the publication expressed it something like that? For instance, it was a throwaway line in the publication about this woman?

Judge MR1: ... Barely stated and there wasn't anything more to reflect adversely on the woman, I'd say not capable of being defamatory.

The judge did not embroider on what might constitute 'depravity' or 'gross or disgusting conduct', but the suggestion is that our hypothetical report does not impute it.

A number of interviewees confirmed that manifestations of a man's sexual appetite arouses different reactions in the community, including this male judge:

If it was said of a man, do you think it would pass the defamation test? "A single man sleeps with a number of women each year"?

Judge SR2: Ah, the gender difference.

Is there that double standard still, do you think?

Judge SR2: Oh, there is [laughs]. I'm sure there is.

So you probably wouldn't find that defamatory.

Judge SR2: I think most juries would still apply the double standard. I'm sorry but that's true. I think they would.

Even so, one of the female judges interviewed did not think this should affect decisions on capacity. Asked if the imputation concerning the single woman would be capable of being defamatory, after some hesitation she replied:

Judge SR3: Probably. I guess I've always taken a fairly liberal view about capacity, because of the way people think and different views in the community. And certainly with that, you know, there are large segments of the community who would regard that as *quite* defamatory. And others who'd say "so what?"

Do you perceive that double standard where if the report were about a man, "a man sleeps with a number of women each year"?

Judge SR3: Yeah, I think it may have a different result. I don't know about on capacity. I think on capacity you'd have to treat them the same. But the jury might have a different view of it. It's not so long since judges had a different view of it too. I'm not sure that there aren't still some that do.

Interestingly, almost half of the judges thought that *Sex Before Marriage* should go to a jury, even though no one expected a jury to find it defamatory.

IMPUTATIONS RELATING TO SOCIAL AND MORAL CONTROVERSY

As reported, most of the judges took a majoritarian approach to the law. The only judge who predicted a jury verdict of defamation was a sectionalist (the only judge to really consider *Hepburn* to be noteworthy). Even so, two majoritarian judges thought the matter should go to a jury, even though they did not predict a verdict of defamation.

SUMMARY

The interviewees were not easily divided into moralists and realists, and many showed inconsistencies in their position. Indeed, it is easier to classify the judge's various statements as moralist or realist than it is the judges themselves. Nevertheless, some interviewees seemed to lean towards moralism, while others lent in the other direction. Precisely the same point can be made in relation to support for majoritarianism and sectionalism. Indeed it is striking how casually judges, even those whose workload is dominated by defamation hearings, appear to approach these questions of doctrine, given their potential importance to an action.

Even so, the first part of this thesis suggested that there exists legitimate scope for a range of opinions as to the role of empiricism in defamation law. Eight relatively brief interviews with as many judges support this proposition.

THE LEGAL PRACTITIONERS

The views of defamation judges in relation to the precise nature of the test for defamation are of obvious interest. First, they regularly make legal determinations as to what is capable of being defamatory. Secondly, when a jury is to decide whether a publication is actually defamatory, judges guide jurors towards that decision. Thirdly, judges increasingly act as substitutes for the jury, deciding for themselves what is defamatory.

Legal practitioners might be taken to speak with less authority on the process. Even so, it can be assumed that the advice lawyers give will frequently decide what is published and what goes unsaid, as well as whether legal actions are started and settled. For this reason alone, it is worth canvassing opinion among defamation law practitioners as to how they understand the test for defamation, as well as what they regard as defamatory.

But there is also the issue of the millions of dollars that change hands each year as a result of defamation law, not only in the form of damages, but also legal expenses. The beneficiary is the industry of lawyers that has grown up around defamation. In researching the process by which lawyers and the law decide what is defamatory, a simple pragmatic question might be asked: what value for money are clients getting? More specifically, if defamation law has a strong empirical component, meaning that public opinion determines what is defamatory, what is it that a defamation lawyer can offer a client that a good opinion pollster could not?

Besides the threshold issue of whether a publication is defamatory, or at least capable of defaming, there is also the question of seriousness of defamation. The importance of accurately distinguishing a serious from a trivial defamation should not be underestimated. Most obviously, the perceived gravity of a defamation affects not only the level of any damages awarded, but also the more common question of what monetary amount to offer or accept by way of settlement. Secondly, it shapes vital decisions as to how to quantify, as well as whether to accept, any payment into court, a common means used by defendants to force a pre-trial settlement. Thirdly, when a lawyer is asked to give pre-publication advice, or is consulted by someone who feels defamed, it is unlikely that the material in question will be entirely anodyne. Often the central issue is not whether someone has been or will be defamed, but whether it is worth anyone's while to sue, as well as see the matter to trial. The grosser the perceived defamation, the greater the motivation to sue. Behind all these essential considerations lie lawyers' perceptions as to how a court will understand and apply the test for defamation.

THE INTERVIEWEES

With this in mind, interviews were conducted with 28 lawyers who practice in the area of defamation. Interviews were sought with a range of practitioners, from novices to those nearing retirement, from defamation specialists employed full-time by the media to private-practice lawyers whose involvement in defamation law is occasional. While there was a degree of randomness in the selection of interviewees, only lawyers known to have a reasonably substantial defamation practice were chosen. Since plaintiff work tends to be more thinly spread than defendant, interviewees generally acted for publishers more than for victims of defamation. At an extremely rough estimate it is felt that the research project interviewed the lawyers responsible for giving around one half of Australia's pre-publication defamation advice. Given this large proportion of the whole, some relatively certain quantitative findings can be given in relation to the lawyers predominant in that area.

The final selection of interviewees included 23 solicitors (seven employed in-house by media organisations) and five barristers, including two Senior Counsel. Eleven of the lawyers practised in Sydney, ten in Melbourne, four in Adelaide and three in Brisbane. Most pleasingly, almost no lawyer I approached declined to be interviewed.

TIME SPENT ON DEFAMATION

While practitioners were mostly selected for interview on the basis that they were believed to have a sizeable defamation practice, some effort was made to include a few lawyers whose involvement in defamation is smaller. As part of the interview, lawyers were asked to estimate the proportion of their entire legal career that had been given over to practice in the field. Responses varied from 10% to 85%, giving an average of 44% (median 40%). The lawyers were also asked to estimate what proportion of their *recent* legal career (defined as the last four years) had been involved in defamation law. Estimates varied from 7% to 90%, giving an average of 48% (median 50%).

While this modest overall increase in defamation practice would be consistent with a rise in defamation litigation over recent years, anecdotal evidence from the lawyers did not bear this out. If anything, there was a perceived drop in litigation. Rather, many expressed the view that defamation practice has simply become more specialised, with fewer lawyers (including our interviewees) capturing a larger share of the market. Furthermore, a number of lawyers spoke of a trend towards publishers seeking pre-publication defamation advice, which some saw as accounting for any reduction in number of defamation suits.

LENGTH OF PRACTICE

In selecting interviewees I aimed for a variety of levels of experience, both in terms of defamation and legal practice generally. The interviewee with the longest practice had been admitted during the mid-1960s and had worked as a lawyer for 39 years, while the most recently qualified lawyer (admitted in 2002) had practised for just two years. The average number of years' practice was 20 (median also 20). Some lawyers had handled defamation work from the very outset of their career, but many had not. The number of years of legal practice during which there had been some involvement in the area of defamation (to whatever extent) ranged from two to 35, with the average being 18 (median 17).

By multiplying the number of years during which there had been some involvement in defamation law with the proportion of career given over to the field, a rough estimate can be obtained of the amount of time each lawyer had devoted to defamation practice over their career. These ranged from the equivalent of just over three months' full-time defamation work up to the equivalent of 18 years' full-time defamation work, averaging at 8 years (median 7 years).

TIME SPENT ON PRE-PUBLICATION DEFAMATION ADVICE

As might be expected, solicitors working in-house for media organisations were the most involved in pre-publication advice. On average, such work accounted for 41% of their recent⁴⁵⁷ defamation practice (median 45%), compared with the private practice solicitors who averaged just 16% (median 20%). These figures suggest that even when working in-house for the media, lawyers tend to spend more time on defamation litigation than on giving pre-publication defamation advice. Even so, the findings indicate that substantial amounts of time (and clients' money) is spent on the latter. On average, in-house solicitors spent 30% of their time (median 41%) on this activity, whereas it made up 13% of the practice of solicitors in law firms.

Within both categories of solicitor, the commitment to pre-publication defamation advice varied enormously. In-house solicitors' estimates of the proportion of their defamation practice given over to pre-publication advice ranged from 5% to 70%, while for private practice solicitors they ran from 2% to 60%. From these estimates it can be calculated that the in-house solicitors spend between 1% and 56% of their entire working time giving pre-publication defamation advice, while this activity takes up between 1% and 45% of the legal work of the private practice solicitors.

⁴⁵⁷ Defined as the last four years of practice.

The barristers I interviewed were least involved in giving advice on forthcoming publications. All five estimated that this work made up less than 10% of their current defamation practice. In each case at least 90% of their current contact with defamation law took the form of engagement in litigation or mediation. The proportion of their *entire* current practice (ie defamation and non-defamation related) given over to advising on defamation pre-publication never exceeded 4%.

Looking at the 28 interviewed lawyers overall, an average of 27% of their current defamation practice (median 15%) and 15% of their current *entire* practice (median 5%) was spent giving pre-publication defamation advice. To put these figures in some context, they suggest that on average each lawyer is devoting around one hour per working day advising clients on the defamation risks posed by their intended publications. Private practice solicitors might typically charge \$200 per hour for such work, suggesting that our samples' media clients are paying, on a very rough calculation, around \$2 million per year on such advice.

PLAINTIFF / DEFENDANT WORK DIVIDE

Most of the interviewees worked at least occasionally for defamation plaintiffs or prospective plaintiffs. The exceptions were the lawyers working in-house for media organisations, who almost never represented defamation plaintiffs. Instead, their defamation-related work consisted of giving pre-publication advice, dealing with complaints, defending proceedings and training journalists.

As regards the remaining 16 solicitors, all of whom worked in private practice, they too tended to be more heavily involved in work for publishers than complainants. Estimates as to how much of their defamation practice was on behalf of publishers ranged from 30% to 97%, averaging at 77% (median 80%). The vast majority of these could be described as media publishers (as opposed to those for whom publication is not their core business).

The five barristers divided their defamation practice more evenly between plaintiffs and defendants, with estimates of the proportion spent on the latter ranging from 20% to 75% (average 58%, median 70%). Looking at the sample of 28 lawyers overall, the average proportion of defamation practice given over to defendants or potential defendants was 79% (median 80%).

METHODOLOGY

As with the judges, general questions were asked of the practitioners' understanding of the test for defamation, approaching the moralist/realist debate tangentially. During their interviews, the

lawyers were shown the same list of ten hypothetical reports as was shown to the judges (and in the same order). As with the judges, the lawyers were asked to imagine that each report's subject was clearly identified, that the context of the imputation under study was fairly neutral, being neither censorious nor supportive, and that there was no additional information likely to enhance or damage the person's reputation.

The lawyers were invited to consider how they would respond if asked by a client to advise on certain issues. They were asked for two predictions in particular. The first was whether a judge, applying the law correctly, would decide that the proposed report is capable of defaming its subject. The second was the verdict the lawyer would expect from a typical jury in the lawyer's State (assuming it permitted defamation jury trials) on the issue of whether the report is in fact defamatory. Interviewees were asked to assume that the jury was properly directed and that the abilities of the plaintiff's and defendant's advocates were equal.

Overwhelmingly, the lawyers declined to predict with certainty how a judge would decide any issue. They were even more equivocal about juries, whom they generally considered far less predictable than judges. Nevertheless, in both cases lawyers were encouraged to indicate the more likely outcome. Only if lawyers thought it entirely impossible to predict which way a judge or jury's decision would go was a lawyer's prediction recorded as uncertain.

The number of reports in relation to which a lawyer declined to make a prediction ranged, on the issue of capacity, from none (in the case of 24 lawyers) to three (for one lawyer), with an average of 0.25 per lawyer, and on the issue of jury verdict from none (in the case of 13 lawyers) to three (for three lawyers), with an average of 0.9 per lawyer. The number of declined predictions per report ranged, on the question of capacity, from zero in the case of five reports⁴⁵⁸ to three in the case of *Male Homosexuality* (average per report was 0.7) and on the issue of jury verdict from one in the case of three reports⁴⁵⁹ to six in the case of *Male Homosexuality* (average per report was 2.4).

Table 11 below gives the majority predictions of the practitioners as to whether the reports are capable of being defamatory and are in fact defamatory. In the case of eight out of the ten reports, the majority expected a judge to find capacity. As for whether a typical jury would find the media reports defamatory, in the case of five reports a majority predicted a non-defamatory outcome. In the case of four a majority expected a defamatory verdict. As for the remaining

⁴⁵⁸ *Drunkenness, Extramarital Affair, Informing Police, Marijuana Use and Recreational Sex.*

⁴⁵⁹ *HIV Positive, Drunkenness and Sex Before Marriage.*

report (*Recreational Sex*), 14 lawyers (50%) said a jury would find it defamatory, nine (32%) thought it would be non-defamatory and five (18%) thought the outcome impossible to predict.

Table 11: Majority predictions of practising lawyers as to whether the media reports described are capable of defaming and are in fact defamatory

<i>Media report</i>	<i>Capable of being defamatory?</i>	<i>Proportion constituting majority</i>	<i>Defamatory?</i>	<i>Proportion constituting majority</i>
<i>Extramarital Affair</i>	Yes	100%	Yes	86%
<i>Drunkenness</i>	Yes	100%	Yes	86%
<i>Informing Police</i>	Yes	82%	Yes	71%
<i>HIV Positive</i>	Yes	89%	Yes	68%
<i>Recreational Sex</i>	Yes	93%	Yes	50%
<i>Marijuana Use</i>	Yes	93%	No	54%
<i>Male Homosexuality</i>	Yes	75%	No	54%
<i>Conducting Abortions</i>	Yes	86%	No	82%
<i>Criminal Parentage</i>	No	61%	No	75%
<i>Sex Before Marriage</i>	No	61%	No	89%

No. of respondents: 28. All percentages are rounded.

In summary, five reports were considered by at least 50% to be both capable of being defamatory and more likely than not to result in a defamation verdict. Three reports were thought capable in law but unlikely to be found defamatory by a jury, and two were considered neither capable of defaming nor likely to result in a defamatory decision.

THE PRACTITIONERS' POSITIONS AS REGARDS MORALISM AND REALISM

Some the practitioners I interviewed had clearly given what I have characterised as the realist / moralist debate considerable thought; more, indeed, than any of the judges. Even so, it was clear that the majority had given it little or no conscious consideration. As with the judges, the lawyers' positions have to be teased out from their broader comments, and the lawyers similarly made often inconsistent, ambiguous or occasionally downright unintelligible statements on the matter. Even so, with a degree of circumspection, some generalisations can be made. Twenty-four of the 28 lawyers (86%) were identified as relatively clear realists, while the remaining four (11%) seemed more or less moralist.

Far easier determinations could be made as to whether the lawyers took a sectionalist approach to the law. Of the 24 realists, all but one was felt to take a majoritarian stance, while all four moralists were felt to do likewise. In summary, 23 lawyers (82%) were identified as majoritarian realists, four (14%) as majoritarian moralists and one (4%) as a sectionalist realist. To assure anonymity, the lawyers are identified by a code which also indicates their apparent position on realism and sectionalism.⁴⁶⁰

INFORMING POLICE

The media report that was expected to throw the most light on whether a lawyer is realist or moralist was *Informing Police*. As already explored, there is clear authority for the proposition that an imputation of assisting the process of law enforcement cannot be defamatory, a proposition that may be worrying to many realists who perceive a widespread dislike of the 'dobber' in Australian society.⁴⁶¹ It was predicted that those concerns might be voiced by a number of interviewees.

In the event, very few interviewees were aware of the police informant cases. Even so, *Informing Police* attracted some diametrically opposing views. The following was easily classed as moralist:

Lawyer MM2: Even if you could say that the majority of the population didn't condone dobbing, right-thinking members are the ones we think about. And we say "yes, reporting crime is proper". If there was empirical evidence, for example, that the majority felt we shouldn't report crime, a judge would be able to say "I don't take that into account, I look at right-thinking members. It's not numbers".

So right-thinking really means law-abiding?

Lawyer MM2: It would have to. For the court to take any other approach would not be tenable. To say it would be right-thinking to break the law, that wouldn't work.

So a shift from the 'ordinary reasonable person' test to an 'ordinary person' test would be a substantial change in the law?

Lawyer MM2: It could be, yes. The 'ordinary person' is not always reasonable.

From clear moralism we go to stark realism:

Lawyer MR12: The interpretation I put on "reasonable" is that the ordinary reasonable reader is someone who is not particularly bigoted or biased. There was a case saying that the defendant is not liable for the opinions of particularly bigoted or biased people.

It can't be that if the majority of people think a particular thing that they are biased or bigoted. But having said that, if you go back 50 years, when the majority of people

⁴⁶⁰ MR indicates a majoritarian realist, SR a sectionalist realist and MM a majoritarian realist.

⁴⁶¹ See above pages 82 to 101.

thought less of Aboriginals or Asians or whatever, on my argument that would mean that at the time those people were not bigoted. I guess they were ordinary at that time and in defamation that is who you have to go with.

Before having the police informant cases explained to them, just five out of the 28 lawyers said they would expect a judge to find *Informing Police* to be incapable of being defamatory. The following was the most strident in that opinion:

Lawyer MR19: [The wife informing on her husband] is personally disloyal, but she's trying to comply with the law, so this can't be defamatory.

But what is striking is that most who thought the report incapable of defaming seemed to ground that view not so much in moralism (that an imputation of assisting the law is inherently non-defamatory, despite public disdain for informants) but in realism: that insufficient people would think less of the wife.

Even the practitioner presented above as an obvious moralist saw no tension between legal policy in relation to informant imputations and public opinion. In short, he had problems seeing why anyone should consider *Informing Police* defamatory:

Lawyer MM2: I don't think there's any difference between how a judge or a jury would view this report. [pause] I'm just trying to think how this might damage someone's reputation. How does it cause her reputation to be lowered? I suppose you might say it suggests she's out to cause trouble, "why are you reporting this to the police?"

There is a perception that in Australian society dobbing in is unacceptable.

Lawyer MM2: We take the stand that reporting crime to the police is a good thing.

But some people might say things are different between husband and wife.

Lawyer MM2: I still think the argument you would put up is that it may be factually incorrect but it simply doesn't lower her reputation. If she's reported crime to the police that's a good thing. Trivial or otherwise, we should all be reporting crime. A judge and a jury would both think that.

The lawyer who seemed most aware of precedents on the point was classified (with considerable hesitation) as a realist, partly in light of his response to this report. He cited *Byrne v Deane*,⁴⁶² probably the best known authority to the effect that such imputations cannot defame, and then continued:

Lawyer MR4: I think it probably *would* be found capable of being defamatory, although I don't think it *should* be. I think as a matter of law you'd have an argument. Whether it was let through or not ... [trails off] It might be that if you struck the right judge on the right day they wouldn't let it go to a jury.

⁴⁶² *Byrne v Deane* [1937] 1 KB 818. See above page 87.

... If it did go to a jury, it's very low level. I think a jury might throw it out. If that's all the woman is complaining about, they might think why is she wasting her time over such a trivial defamation. They might be quite impatient with a case like that because it's a very weak imputation. If I were advising the paper I would be fairly relaxed about that. I think it's borderline and could go either way.

What if the offence were of unspecified seriousness?

Lawyer MR4: Then I don't think it's capable. It's the reference to the offence being extremely trivial that pushes it into being possibly defamatory. Although Australians hate dobbers. You could work a jury pretty well. You know, "we don't know what this offence was". A jury ought to be very slow to find it defamatory. A wife is not her husband's chattel.

Another practitioner referred to the recent case of *Younan v Nationwide News*, one of the most recent Australian decisions relating to an informant imputation.⁴⁶³ It had resulted in Levine J concluding that such an imputation is incapable of defaming:

Do you think the judge's finding reflects the view of most people in society?

Lawyer MR20: Probably not, but if you asked someone in the street you would get a different answer to asking someone in the jury box. When you are in the jury box you are told that you are a judge of the Supreme Court. However subtly that will influence how you approach it. In other words you think "well, I have to think properly about this".

THE TEST OF REASONABLENESS

Given that most practitioners expressed views resonant with realism, they were asked to account for the inclusion in the definition of defamation of the requirement of reasonableness. To a realist, the term 'reasonable' or 'right-thinking' might seem redundant, even misleading. But very few interviewees were comfortable with the removal of 'reasonable' from the term 'ordinary reasonable person'. Far from potentially contradicting 'ordinary', 'reasonable' was seen as underlining the need to take majority or average views:

Lawyer MR6: When you are addressing judges and juries, "reasonable" is a useful word because it implies some limit on flights of fancy. "Reasonable" ... implies that you've got to be objective and sober in your assessment, rather than being worried about flights of fancy.

Flights of fancy being?

Lawyer MR6: The extreme ends of the bell curve.

You mean views that don't reflect what most people think?

Lawyer MR6: Yes. The 'ordinary reasonable person' presumably has a majority view.

⁴⁶³ *Younan v Nationwide News Pty Ltd* [2003] NSWSC 1211 (unreported, Levine J, 16 December 2003): See above page 97

Another idea expressed by some lawyers was that 'reasonable' serves to moderate defamation law's response to any temporary swings in public opinion:

Lawyer MR15: There may be situations where there is a huge groundswell of public opinion at some time. For instance, a Pauline Hanson-type issue, where perhaps something happens in the news and for a period of months you can point to 75% of the community all of a sudden saying we think in this particular way. But that may be completely out of touch with the laws of the country and how things are done. It may be seen as a passing viewpoint and it may be that the reasonable in that context would say 'well most people think this at this particular time, but if you look at this over a longer period of time, it's different. Reasonable drags it back to the centre.

But others saw the potential tension between the tests of reasonableness and ordinariness:

If the law were modified from 'ordinary reasonable person' to just 'ordinary person', would that be a change in the law?

Lawyer MR17: I think in judge-alone cases it would help publishers, in that instead of having to get over those two thresholds: who's ordinary and are they reasonable, it would be the average, majority voter.

Which suggests that 'right-minded' helps the plaintiff. Is that because it encourages the judge to think more in terms of traditional values?

Lawyer MR17: Yes. And judges are probably more representative of a view of society that is 20 or 30 years old. It's not just that judges tend to be fairly old themselves. Judges tend to be conservative by nature. Many come from a fairly conservative background.

The same question (about whether removal of the test of reasonableness would make any real difference) was put to the following lawyer. Despite these comments, she appeared on balance to be realist in her approach:

If we replace 'ordinary reasonable person' with 'majority opinion', would that be the same thing?

Lawyer MR19: No, no, no. The reasonable aspect, that phrase 'right-thinking members of society' injects some intelligence into the definition. It's not what most people think. It's about people who think things through. They don't have to be super brains, but they are people who can think about things in a reasonable, logical way. They understand what society is like. They allow people to misbehave occasionally. They are not so judging. I think talking about the ordinary or average person would not be quite right. The 'ordinary person' might be a *Current Affair* viewer. With the ordinary reasonable person there is some intelligence, some understanding of the way that media works, some reading between the lines. The ordinary person is the average person, just anyone in the street. Watches *Current Affair* and goes to footy or whatever. Ordinary reasonable person is about injecting different qualities.

But if juries are meant to represent the ordinary person, and what you say is right, they are being asked to judge on a standard that is better than their own.

Lawyer MR19: But if you are sitting in judgment on something, there's a possibility of giving it more seriousness than otherwise.

Only a few appeared to have given the realism / moralism debate any serious consideration. The following was a notable exception:

Lawyer MM4: It's a difficult question for law, because it's a difficult question for society. Do we think of our nation as one of toleration? Or do we think of it as a society where, lurking under the surface, are all these racist, sexist, homophobic impulses that we have to control? It's a hard choice.

EVIDENCE OF SECTIONALISM AMONG PRACTITIONERS

Unlike the extent to which moralism garnered support among the lawyers, the level of support for sectionalism can be summarised with comparative ease. Despite the considerable importance one of the judicial interviewees placed on *Hepburn*,⁴⁶⁴ and even though three judges were felt to be sectionalists, it was clear that *Hepburn* had made an impression on very few of the lawyers. Less than 25% had even heard of the case or the principle it illustrates. Of the seven who were aware of the case, one admitted he knew of it only because he had prepared for our interview.

When *Hepburn* and its apparent conflict with *Reader's Digest* were explained to the other lawyers, all but one said that it was the latter case that reflects their understanding of the law. Interestingly, the one exception was an extremely prominent defamation specialist with a very extensive practice in the area. Even so, he was initially unaware of the *Hepburn* decision:

Lawyer SR1: I don't think [an imputation that a female doctor conducts lawful abortions] would be defamatory in mainstream society. But you need to look at various areas of the community. She would be thought less of by strict practising Catholics and multi-cultural ethnic groups. So if she were a Roman Catholic or Muslim, it would be defamatory of her in those communities. It comes down to whether authorities say it is the normal person in society or can it be in a particular group. I think there is a danger that it can be a person in a particular group.

[The apparent contrast between Hepburn and Reader's Digest was then explained by the interviewer.]

Lawyer SR1: Yes, it is necessary to look at the particular society in which the allegation appears. If it appeared in a Muslim newspaper, going to an Arab community, and if she was an Arab doctor then she could well sue.

One in-house lawyer thought that perhaps some consideration is given to the principle in *Hepburn*, although he was more equivocal than the last:

Lawyer MR19: You wouldn't focus on [minority attitudes], but if there is a section of the community that is quite strong on an issue then you might shift things to the right, so you are being more conservative, because you are looking at the more conservative

⁴⁶⁴ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682; see above, particularly pages 65 to 73. The judge in question was SR1: see above pages 166 to 169.

element of society. But I don't know how I analyse things. I am not even aware of the process.

These lawyers were alone in thinking that sectional views might determine what is defamatory.

The following in-house lawyer was very clear in his understanding of the law:

Lawyer MR4: I don't have a problem with that notion [of considering the views of a substantial and reputable minority] provided they [the jurors] are told that they can only do that as part of their processing in working out what the ordinary reasonable reader would think. They can't carrel off a section of the community and make the determination having regard to that, whether it is a substantial section of the community or not. They've got to think of the whole spectrum.

So should the jury take the majority opinion?

Lawyer MR4: Well, that's a forensic point on the way to it. I wouldn't put it as bluntly as take the majority opinion, but I don't think the fact that a substantial and respectable minority of people might have a particular view about the matter can in any way be determinative of the issue. That must imply that there is perhaps a majority who do not hold that view. So they've got to come to the determination looking across all of those people and thinking "where does the ordinary reasonable reader fit"? If, for example, they came to that determination based on the fact that they have regard to a substantial segment of the population who think it is morally wrong, they wouldn't be doing their job properly.

What if the allegation was that a doctor refused to conduct an abortion?

Lawyer MR4: It's not defamatory.

One lawyer described *Hepburn* as 'a surprising decision'⁴⁶⁵ and another as 'just wrong'.⁴⁶⁶ Yet another thought that 'people don't take *Hepburn* seriously' and that '[i]f you raised *Hepburn* I don't think you'd get anywhere'.⁴⁶⁷ This last lawyer, one of the most experienced, also said he had never heard the point argued in court.

The following private practice lawyer seemed to have particularly heartfelt views on the idea that minority opinions should dictate what is defamatory:

Lawyer MR23: There's a wonderful academic in Australia called Professor Kim Wiltshire and he says that the benchmarks of conduct in the Australian community are very simple and easily identifiable: everyone gets a fair go and everyone is allowed to have a go. That's Australian society. And a fair go doesn't mean that the sectional zealot gets to rule the day. I don't think so.

Another lawyer, although unfamiliar with *Hepburn*, illustrated from his own experience how the principle might have operated:

⁴⁶⁵ MR6.

⁴⁶⁶ MR10.

⁴⁶⁷ MR5.

Lawyer MR22: I had a client who was a Vietnamese woman living in Australia. She was accused of having gone back to her home town in Vietnam. Somehow this was understood in the Vietnamese community to mean that she was a traitor and a communist sympathiser. So she felt defamed in that community. I managed to get a clarification published explaining that she had gone back because her mother was dying. But she didn't sue in the end. It was all too scary for her and she backed out.

Another lawyer referred to the test of what is defamatory as whether the publication would harm the plaintiff's reputation in the eyes of *the* ordinary reasonable person, emphasising the singular:

Lawyer MR20: Have you ever read Isaac Asimov's short story 'Franchise'?⁴⁶⁸ It's set in the future and they've worked out that by running the computers every year they can work out the one person who will reflect the rest of the community's decision on who should be the government.

So they only have to ask that one person which government we should have?

Lawyer MR20: Yes. So the ordinary reasonable person is a bit like that. That one person reflects society, even though not everyone thinks the same.

THE EFFECT OF LEGAL PRACTICE ON LAWYER PREDICTIONS

While only eight judges were interviewed for this thesis, the number of legal practitioners interviewed (28) is sufficient to justify some tentative quantitative analysis. This is particularly so since the number of practitioners interviewed represents a significant proportion of the Australian legal profession concerned with giving defamation advice, or at least pre-publication advice to the media, which was the focus of research.

To what extent does the defamation advice obtained by a client (in particular a media client) depend on choice of lawyer? In particular, are certain types of lawyer more likely to take the view that a publication is defamatory? The average interviewee considered eight of the ten reports to be capable of defaming. If all ten reports were to reach a typical jury, then the average prediction was of five verdicts of defamation and four of non-defamation, with the jury's reaction in the case of one report too difficult to predict. But these averages do not convey the wide range of views as to how many reports are defamatory, as well as which reports a client should treat with caution.

Four out of the 28 lawyers (14%) thought all ten reports were capable of defaming. At the other extreme, one lawyer thought that only half of them could defame. No lawyer predicted a jury verdict in the case of all ten reports, but four (14%) thought that at least seven would be found defamatory by a jury, 18 (64%) predicted between four and six jury verdicts of defamation and

⁴⁶⁸ This short work of science fiction appears in Isaac Asimov, *Earth is Room Enough* (1957).

six lawyers (21%) predicted fewer than four. To take the extremes, the lawyer who seemed to regard the reports as most anodyne, while thinking that six were capable of defaming, thought that just one would be found defamatory, while six would be found non-defamatory (with verdicts in the other three impossible to predict). This lawyer, a young solicitor who worked in-house with the media, had the least experience of defamation law. At the other end of the scale was a private-practice barrister with ten years' experience in the field. He thought that all were capable of being defamatory, eight would be found defamatory and just two not defamatory.

To some extent these extremes reflect the general findings. The average barrister said 5.6 reports would be thought defamatory, as opposed to 4.5 in the case of the solicitors. Media in-house solicitors were the least likely to expect a defamatory finding, with on average 3.7 reports being thought defamatory, as opposed to 4.9 in the case of private practice solicitors. It may be thought that this is because those most familiar with pre-publication defamation clearance (work that tends to be done in-house) are less averse to risk. Anecdotally this claim is often made, at least by in-house media lawyers. The research lends no support for this contention. In the case of only four out of the ten reports was the average proportion of practice given over to pre-publication advice greater in the case of lawyers anticipating a defamatory verdict than those giving the opposite prediction.

On the other hand, there is evidence that a propensity to expect a defamatory outcome from a jury tends to increase with exposure both to defamation law and to legal practice generally. Table 12 on page 193 compares, on a report by report basis, the average years of legal practice of lawyers in relation to which jury verdict was predicted. First the table provides the number and proportions of lawyers who thought a jury would and would not find the report defamatory. It then provides for each group the average number of years of legal practice, including work unrelated to defamation. In the case of seven reports the lawyers who thought a jury would find the report defamatory had on average practised law longer. Taking the mean result for all ten reports, lawyers who predicted a defamation verdict had almost 22 years of legal experience, 24% longer than the average legal practice of lawyers who predicted a non-defamatory outcome (17.6 years). The table then repeats the same exercise, substituting for overall length of practice first the average number of years of practice involving at least some defamation law, and then the average number of equivalent years of full-time defamation practice. In all three cases, similar results emerge.

Table 12: Average years of legal practice of lawyers in relation to which jury verdict was predicted for each report

<i>Media report</i>	<i>No (and proportion) of lawyers predicting a verdict of ...</i>		<i>Average years of practice of lawyers predicting a verdict of ...</i>		<i>Difference in years expressed as a proportion of the second figure</i>	<i>Average years of defamation practice of lawyers predicting a verdict of ...</i>		<i>Difference in years expressed as a proportion of the second figure</i>	<i>Average equivalent years of full-time defamation practice of lawyers predicting a verdict of ...</i>		<i>Difference in years expressed as a proportion of the second figure</i>
	<i>defamation</i>	<i>non-defamation</i>	<i>defamation</i>	<i>non-defamation</i>		<i>defamation</i>	<i>non-defamation</i>		<i>defamation</i>	<i>non-defamation</i>	
<i>Drunkenness</i>	24 (86%)	3 (11%)	20.6	8.3	148%	18.5	8.0	131%	8.0	6.0	33%
<i>Recreational Sex</i>	14 (50%)	9 (32%)	21.6	18.7	16%	22.3	13.0	72%	8.6	6.3	37%
<i>Marijuana Use</i>	11 (39%)	15 (54%)	20.6	18.6	11%	20.6	16.0	29%	9.8	6.2	58%
<i>Male Homosexuality</i>	7 (25%)	15 (54%)	23.6	18.3	29%	19.3	17.5	10%	9.3	7.2	29%
<i>Criminal Parentage</i>	5 (18%)	21 (75%)	24.4	18.3	33%	22.4	16.9	33%	10.4	7.4	41%
<i>Sex Before Marriage</i>	2 (7%)	25 (89%)	30.0	18.9	59%	28.0	17.0	65%	11.5	7.2	60%
<i>HIV Positive</i>	19 (68%)	8 (29%)	21.1	14.9	42%	18.5	15.0	23%	7.6	7.6	0%
<i>Informing Police</i>	20 (71%)	6 (21%)	19.3	19.5	-1%	17.8	16.0	11%	7.8	6.5	20%
<i>Extramarital Affair</i>	24 (86%)	2 (7%)	20.5	21.5	-5%	18.5	19.0	-3%	7.8	9.0	-13%
<i>Conducting Abortions</i>	3 (11%)	23 (82%)	16.7	19.3	-13%	12.0	18.0	-33%	3.0	7.8	-62%
<i>Av per report</i>	12.9 (46%)	12.7 (45%)	21.8	17.6	24%	19.2	16.4	17%	8.2	7.2	14%

Notes:

'Practice' refers to legal practice, whether or not involving defamation law. The average length of practice was 19.7 years.

'Defamation practice' refers to legal practice wholly or partly involving defamation law. The average length of defamation practice was 17.8 years.

'Equivalent years of full-time defamation practice' refers to the amount of time spent solely on defamation law. The average was 7.7 years.

No. of respondents: 28. All years and percentages are rounded.

CONFORMITY OF ADVICE

So far it appears that experienced defamation lawyers are more likely to predict a defamation outcome than their novice colleagues. But even more interesting is whether lawyers tend to converge in their predictions as they gain exposure to the law. To a very large degree, the extent to which a lawyer gives the same advice as other lawyers is a measure of that lawyer's competence. Clients do not need to know whether a publication is defamatory in some abstract sense. Often they do not even need to know whether a court will find it defamatory, since the vast majority of defamation disputes are settled long before they get near trial. Often, probably usually, the best advice to a defamation litigant is to settle, and opponents who receive similar advice are more likely to compromise early.

Clients usually receive the best advice (from the perspective of self-interest) from the most conforming lawyers. The point can be illustrated by imagining a situation in which a rogue lawyer thinks material is defamatory when every other lawyer would disagree. If that advice is given at the stage of pre-publication screening, material might be needlessly suppressed, even though there is little or no risk of proceedings. In litigation, the effects could be bad for both parties. Such non-conforming advice given to plaintiffs may pointlessly propel them towards an unprofitable trial, while any defendant receiving such advice may waste money on settlement. Abnormal advice is also bad advice if it is to the effect that material is non-defamatory: allegations are published without sufficient substantiation, prospective plaintiffs are discouraged from taking steps to salvage their reputation and defendants fail to settle, only to be devastated at trial.

As regards the mechanics of litigation, pleading imputations that most other lawyers would regard as incapable of being defamatory (or, conversely, challenging imputations most lawyers would regard as clearly defamatory) can precipitate hearings on the issue of capacity to defame. This can disadvantage a client, even though the maverick lawyer's prediction as to the court's attitude to capacity might transpire to be correct. Even where parties succeed at a capacity hearing, they do not necessarily recover their costs for that hearing if they do not win the overall action, rendering their victory pyrrhic. Where all lawyers agree on something, that is one less issue to litigate over. Often in litigation it matters little if lawyers on both sides make mistakes, provided they make the same mistakes.

CONFORMITY OF VIEWS ON CAPACITY TO DEFAME

The results indicate a high degree of conformity among lawyers' responses as to whether each media report would be considered capable of being defamatory. Since capacity is a matter of

law, and since the lawyers should know the same law, this is to be expected. On average, a report had 84% of lawyers agreeing as to whether it is capable of defaming. In the case of two reports all agreed they could defame.⁴⁶⁹ On the other hand, in the case of the two reports considered by the majority to be incapable, only 61% of lawyers agreed on this issue.⁴⁷⁰

CONFORMITY OF PREDICTIONS OF JURY VERDICT

As expected, the task of predicting jury verdicts divided lawyers more than that of determining capacity. The average media report saw 71% of lawyers agreeing upon whether it would be considered defamatory by a jury. Looking at individual reports, they can be divided into three categories, depending on the level of consensus as to the outcome of a jury trial.

First there were those reports where there was a high level of consensus. Two were 'clearly' defamatory, with 86% of lawyers agreeing on the outcome of a jury trial: *Drunkenness* and *Extramarital Affair*. It was equally 'obvious' that two more were non-defamatory: *Sex Before Marriage* (89%) and *Conducting Abortions* (82%).

Second were the three reports upon which there was only a moderate level of agreement (between 75% and 85%). Two were considered by the majority to be defamatory: *Informing Police* (71%) and *HIV Positive* (68%), while one was considered non-defamatory: *Criminal Parentage* (75%).

As for the three remaining imputations, there was a very low level of consensus. In the case of *Marijuana Use* and *Male Homosexuality* only 54% agreed that the reports would be found not defamatory, while in the case of *Recreational Sex* there was no clear majority either favouring or opposing the proposition that the imputation was defamatory.

Overall, no greater consensus was found when it came to the five reports that were considered by 50% or more lawyers to be defamatory, as compared with the five reports considered by a majority to be non-defamatory.

THE EFFECT OF LEGAL PRACTICE ON CONFORMITY

The conformity of a lawyer's advice can be measured by counting the number of times that lawyer's responses coincide with the majority of other lawyers.⁴⁷¹ On average, more than eight

⁴⁶⁹ *Extramarital Affair* and *Drunkenness*.

⁴⁷⁰ *Criminal Parentage* and *Sex Before Marriage*.

⁴⁷¹ For the purpose of this exercise, responses to the effect that an outcome is unforeseeable were discounted. In the event, 98% of requests for predictions about capacity decisions were met with the

out of a lawyer's ten predictions concerning capacity corresponded with the majority of other lawyers' predictions. In the case of three lawyers (two Senior Counsel and one inexperienced in-house solicitor) all ten of their decisions coincided with those of the majority. The least conformist lawyer (another inexperienced in-house solicitor) agreed with most other lawyers in relation to two thirds of his decisions.

80% of the average lawyer's predictions as to jury verdicts coincided with those of the majority of other lawyers prepared to offer a prediction. The least conformist lawyer agreed with the majority of his colleagues in the case of just three out of the ten reports, while the predictions of four lawyers agreed with most of their fellows in the case of all ten reports.

The two predictions required of interviewees differed in nature. Predicting whether an imputation is capable, as a matter of law, of being defamatory relates directly to legal knowledge. On the other hand, the question whether a jury would find an imputation defamatory calls on perceptions of social norms. Even so, in relation to both decisions, lawyers are likely to draw on their knowledge of precedent.

That being so, it might be expected that the tendency of defamation lawyers to agree with each other when it comes to predicting judicial and jury behaviour will increase relative to experience in the field. One way to measure whether lawyers' conformity increases with exposure to defamation law is to compare the level of experience of those who displayed above-average conformity with those who were below average in the extent to which they agreed with their peers. Another is to compare the quartile of lawyers who were least conformist in their decisions with the quartile who were most conformist.

In making these comparisons, lawyers can be distinguished on the basis of how *long* they have practised defamation law, or by reference to the *quantity* of defamation work undertaken by them. It is possible to get a measure of the latter by multiplying the number of years in which a lawyer has had some involvement with defamation by the lawyer's estimate of the proportion of time spent on such work during those years. For instance, a lawyer who has spent two years devoting half her time to defamation work can be said to have the equivalent of one year's full-time defamation experience.

Table 13 below compares conformist and non-conformist lawyers on the basis of three factors: first, their average length of practice (regardless of the nature of practice); second, average years

response that one outcome is more likely than the other. In the case of requests for jury predictions, the interviewees obliged in 91% of cases.

in which their practice involved defamation to some extent; third, the quantity of defamation work they have undertaken, expressed in terms of equivalent years of full-time defamation practice. The table also gives the difference between the finding for the more conformist and the finding for the less conformist lawyers, expressed as a percentage of the latter.

Table 13: Experience of lawyers in relation to their propensity to conform

<i>Lawyer description (n in brackets)</i>	<i>Average years of practice as a qualified lawyer</i>	<i>Change from bottom to top figure</i>	<i>Average years of experience as a lawyer with some involvement in defamation law</i>	<i>Change from bottom to top figure</i>	<i>Average defamation work undertaken in career (in equivalent years of full-time defamation practice)</i>	<i>Change from bottom to top figure</i>
CONFORMITY RE CAPACITY TO DEFAME						
Lawyers displaying above-average conformity (12)	19.7	0%	19.1	13%	9.0	34%
Lawyers displaying below-average conformity (16)	19.7		16.9		6.7	
Seven most conforming lawyers	19.0	-4%	18.9	17%	8.9	23%
Seven least conforming lawyers	19.7		16.1		7.2	
CONFORMITY RE JURY VERDICT PREDICTION						
Lawyers displaying above-average conformity (16)	20.5	10%	19.3	22%	8.0	9%
Lawyers displaying below-average conformity (12)	18.6		15.8		7.4	
Seven most conforming lawyers	24.3	29%	23.9	53%	9.7	37%
Seven least conforming lawyers	18.9		15.6		7.1	

No. of respondents: 28. All years and percentages are rounded.

What emerges from this table is that defamation practice has a substantial impact on a lawyer's tendency to conform when giving advice on two issues: whether a publication is capable of defaming and whether a jury is likely to find it defamatory. When it comes to views on legal capacity, this is hardly surprising. Conformity is likely to come from knowledge of the law, and it transpires that the most conformist lawyers had 34% more experience of defamation practice than the least conformist lawyers. What is more, conformity seems to come from exposure to defamation law in particular, as opposed to legal practice in general: when non-defamation legal practice is also taken into account, experience as a lawyer, there is no increase in conformity of advice.

In the case of predicting a jury verdict, lawyers' answers are also likely to be influenced by knowledge of case law, as well as experience of litigation. This time, however, their responses are also likely to be affected by perceptions of societal values. These will be shaped not just by the lawyer's defamation practice, but by their engagement in life more generally. Since lawyers lead many different lives, we might expect a weaker convergence in their views over time.

What is interesting, then, is that length of legal practice, even practice unrelated to defamation law, emerges as a relatively strong predictor of a lawyer's tendency to conform when it comes to predicting jury verdicts. The results suggest lawyers are influenced relatively little by their non-defamation legal practice when it comes to their views as to the legal capacity of a publication. That is unsurprising. But their contact with law and lawyers outside their defamation practice seems to have a relatively large impact on the lawyer's verdict prediction. Since the overwhelming indication from the lawyers was that their verdict predictions were largely based on their perceptions of community attitudes, the conclusion can be drawn that those perceptions are also shaped by both defamation and non-defamation legal practice. Alternatively, it is of course possible that what is shaping predictions is not legal practice but the mere passage of time. Chapter Six will explore further the effect of age on perceptions of social values.⁴⁷²

⁴⁷² See below at page 217.

COMPARING THE JUDGES' AND PRACTITIONERS' ANSWERS WITH THE CASE LAW

CASE LAW SUMMARY

Precedents, even recent precedents, give generally conflicting answers as to whether the imaginary reports used in this research are defamatory. Nevertheless, one of the research goals was to match up actual court findings with the results of interviews with judges and practising defamation lawyers, and eventually with the phone survey results reported in the next chapter. In order to do so, certain generalised conclusions must be made about the current state of case law relating to each of the ten imputations investigated. Table 14 below is an attempt to reach such conclusions. It tries to summarise, as much as possible, what might be concluded from precedent as to whether the hypothetical reports have the capacity and quality of defamation.

Table 14: Summary of the indication given by precedent as to whether the hypothetical media reports are defamatory

<i>Hypothetical media report (title and as described to respondents)</i>	<i>Indication as to whether the report is ...</i>	
	<i>capable of defaming</i>	<i>actually defamatory</i>
<i>Drunkenness</i> The media, while talking about a particular, named 37 year-old secretary in the Prime Minister’s office, have reported that she has got drunk at an office party and then danced on the tables with her skirt lifted.	Almost certainly capable	Probably defamatory
	Most persuasive decision (with jurisdiction and year): <i>Bogusz</i> (ACT, 1989)	
In <i>Bogusz</i> a 37 year-old woman employed as a secretary to a senior adviser in the Prime Minister’s office was named by a newspaper as someone who, at a party held at Parliament House to mark the announcement of the forthcoming federal election, attended primarily by government staff, Labor Party officials and journalists and at which ‘plentiful supplies of alcohol’ were consumed, ‘lifted her skirt in a series of impromptu dances on and off tables’. The newspaper added that a male staffer was later seen to ‘guide her from the festivities’. A judge found her defamed and awarded her \$58,500 damages. ⁴⁷³		

/ continued

⁴⁷³ *Bogusz v Thomson and Truth Newspapers Pty Ltd* (1989) 95 FLR 167: see above page 124.

Hypothetical media report (title and as described to respondents)	Indication as to whether the report is ...	
	capable of defaming	actually defamatory
HIV Positive The media, while talking about a particular, named man, have reported that he is HIV positive.	Almost certainly capable	Probably defamatory
Gatley on Libel and Slander, a leading commentary on defamation law, has stated that it would be ‘extraordinary’ if an imputation of being HIV positive were not actionable <i>per se</i> . Brown, another important authority, has expressed a similar view. ⁴⁷⁴		
Extramarital Affair The media, while talking about a particular, named married man who holds a powerful public office, have reported that he has an affair with an intelligent and glamorous married woman, and neither of them tells their spouse.	Almost certainly capable	Arguably not defamatory
	Most persuasive decisions (with jurisdiction and year): <i>Cairns v John Fairfax</i> ; <i>Morosi v John Fairfax</i> (NSW, 1983) ⁴⁷⁵	
A jury found an imputation of an adulterous affair between Treasurer Jim Cairns and his secretary Junie Morosi to be not defamatory. Hutley JA suggested that Morosi and Cairns’ alleged relationship may raise their standing in the public’s eyes, because Morosi was ‘intelligent and glamorous’ and Cairns was important. Mahoney JA agreed: ‘[p]assions between the powerful and glamorous may have a quality that transcends middle-class morality.’ This decision was applied in <i>Chappell v TCN Channel Nine</i> (1988). ⁴⁷⁶		
Recreational Sex The media, while talking about a particular, named single woman, have reported that she sleeps with a number of men each year simply to enjoy having sex with them.	Probably capable	Probably defamatory
	Most persuasive decision (with jurisdiction and year): <i>Random House v Abbott and Random House v Costello</i> (ACT, 1999)	
Beaumont J thought that ‘promiscuous’ suggests ‘indiscriminate behaviour or conduct without any particular reason’. The defendant’s book suggested the sexual relationships between one of the female plaintiffs and the male plaintiffs were to manipulate the latter politically, so there was no promiscuity imputed. If the liaisons had been aroused by pure lust on the part of the woman in question then presumably she would have been open to a charge of promiscuity. ⁴⁷⁷		

/ continued

⁴⁷⁴ Milmo and Rogers, above n 28, 146 (para 4.13), fn 68.

⁴⁷⁵ *Cairns v John Fairfax & Sons Ltd*; *Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708: see above page 128.

⁴⁷⁶ *Chappell v TCN Channel Nine Pty Ltd* (1998) 14 NSWLR 153: see above page 128.

⁴⁷⁷ *Random House Australia Pty Ltd v Abbott*, *Random House Australia Pty Ltd v Costello* (1999) 167 ALR 224: see above page 119.

Hypothetical media report (title and as described to respondents)	Indication as to whether the report is ...	
	capable of defaming	actually defamatory
Marijuana Use The media, while talking about a particular, named man, have reported that he occasionally smokes a little marijuana socially or for relaxation.	Probably capable	Probably defamatory
Most persuasive decision (with jurisdiction and year): <i>Corby v Channel Seven</i> (NSW, 2008)		
Corby involved imputations of cultivating and possessing marijuana. They were found to be defamatory by a NSW jury. ⁴⁷⁸		
Conducting Abortions The media, while talking about a particular, named medical doctor, have reported that she conducts lawful abortions.	Probably capable (adopting a sectionalist test)	Probably defamatory (adopting a sectionalist test)
	Most persuasive decision (with jurisdiction and year): <i>Hepburn v TCN Channel Nine</i> (NSW, 1983)	
An imputation that a person is an ‘abortionist’ is capable of being defamatory, even if ‘abortionist’ is interpreted to refer to a doctor carrying out lawful abortions. The NSW Court of Appeal applied a sectionalist test: Hutley JA thought it enough that the plaintiff’s reputation is damaged in the eyes of a ‘substantial part of the population’, while Glass JA preferred the term ‘appreciable and reputable section of the community’. ⁴⁷⁹		
Sex Before Marriage The media, while talking about a particular, named young woman, have reported that she had a single sexual relationship before getting married.	Possibly capable	Unclear as to whether defamatory
	Most persuasive decision (with jurisdiction and year): <i>Random House v Abbott</i> and <i>Random House v Costello</i> (ACT, 1999)	
Higgins J thought that an imputation of unchastity was conveyed. Even though he thought it less serious than one of promiscuity, sex outside marriage is generally regarded at least with disappointment.’ ⁴⁸⁰		

/ continued

⁴⁷⁸ Y C Kux, 'Corby v Channel Seven Sydney Pty Ltd/Davis v Nationwide News Pty Ltd', above n 166. See above pages 82 and 148.

⁴⁷⁹ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682: see above pages 65 to 73.

⁴⁸⁰ *Random House Australia Pty Ltd v Abbott*, *Random House Australia Pty Ltd v Costello* (1999) 167 ALR 224: see above page 119.

<i>Hypothetical media report (title and as described to respondents)</i>	<i>Indication as to whether the report is ...</i>	
	<i>capable of defaming</i>	<i>actually defamatory</i>
Informing Police The media, while talking about a particular, named woman, have reported that she has reported her husband to the police because she suspects him of committing an extremely trivial offence.	Probably not capable	Not applicable
	Most persuasive decision (with jurisdiction and year): <i>Blair v Mirror Newspapers Ltd</i> (NSW, 1970)	
In <i>Blair</i> a woman sued over a newspaper article entitled ‘Wife Hands Over Husband to Law’. The article was held to be incapable of defaming her. Sugerman P (NSWCA) approved of a passage in <i>Byrne v Deane</i> to the effect that an informant imputation cannot defame even if the offence in relation to which information is being given is popularly regarded as trivial or even tolerable. ⁴⁸¹		
Criminal Parentage The media, while talking about a particular, named man, have reported that he has a parent who is a criminal.	Probably not capable	Not applicable
	Most persuasive decision (with jurisdiction and year): <i>Galea v Amalgamated Television Services</i> (NSW, 1998)	
In <i>Galea</i> a man sued on the basis that he was alleged to be a brother of a man charged with a ‘grisly murder’. This was held incapable of being defamatory. ⁴⁸²		
Male Homosexuality The media, while talking about a particular, named man, have reported that he is homosexual.	Uncertain capacity: conflicting recent precedents	Recent precedents suggest not defamatory
	Most persuasive decision (with jurisdiction and year): <i>Rivkin v Amalgamated Television Services</i> (NSW, 2001); <i>Kelly v John Fairfax</i> (NSW, 2003)	
In <i>Rivkin</i> a straightforward imputation of male homosexuality was considered incapable of defaming. In <i>Kelly</i> action was taken over a newspaper article that suggested that the (male) plaintiff had taken part in a public display of piano bondage as part of Sydney’s Lesbian and Gay Mardi Gras. Levine J seemed to take context into account in determining whether the imputation was capable of being defamatory. Later in 2003 a jury of four men found that the imputation was not defamatory. ⁴⁸³		

⁴⁸¹ *Blair v Mirror Newspapers Ltd* [1970] 2 NSW 604 (NSW Court of Appeal): see above page 96.

⁴⁸² *Galea v Amalgamated Television Services* (unreported, NSW Supreme Court, Levine J, 20 February 1998): see above page 115.

⁴⁸³ *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432 (unreported, NSW Supreme Court, Bell J, 28 May 2001) *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586 (unreported, Levine J, 27 June 2003): see above pages 108 to 110.

In summary, according to precedent and authority, three media reports can be considered almost certainly capable of defaming: *HIV Positive*, *Drunkenness* and *Extramarital Affair*. The first two can be expected to result in a defamatory verdict, whereas *Extramarital Affair* possibly would not. A further three media reports can be considered to be probably capable of defaming: *Marijuana Use*, *Recreational Sex* and *Conducting Abortions* (particularly when a sectionalist test is adopted as regards the last). Precedents suggest that all three are probably defamatory, again with the proviso that the result as regards *Conducting Abortions* is likely to be affected by the choice between sectionalism and majoritarianism. Possibly *Sex Before Marriage* should also be considered capable on the basis of Higgins J's comments in the Abbott and Costello litigation, although there is a lack of precedent to suggest whether a straightforward implication of a single pre-marital sexual relationship might actually result in a verdict for the plaintiff.

According to precedent, two reports are probably incapable of being defamatory. There is particularly persuasive case law that *Informing Police* cannot be considered defamatory, while the case law relating to *Criminal Parentage* is less clear.

It was difficult to draw any meaningful conclusion in the case of the last report: *Male Homosexuality*. Much, it seems, would depend on the individual judge and jury.

SUMMARY OF THE FINDINGS OF THE THREE SURVEYS

Table 15 below serves to compare the indications from precedent with the views expressed by the eight judges interviewed for this thesis. It gives the proportions of the judges who said the report was capable of defaming (as opposed to incapable or 'don't know') and the proportions who predicted a defamation verdict from a properly instructed jury (as opposed to a non-defamation verdict or an unpredictable verdict).

As might be expected, the lawyers' views as to capacity generally reflect the case law. Based on precedent, three reports are almost certainly capable of defaming.⁴⁸⁴ All three were considered capable by at least seven out of eight judges and by at least 89% of practitioners. In each case, at least half of the interviewees expected a finding of defamation from a jury.

⁴⁸⁴ *Drunkenness*, *HIV Positive* and *Extramarital Affair*.

Table 15: Precedent indicators compared with views of interviewed judges and practitioners as to the defamation status of the media reports

Media report	Indication given by precedent as to whether the report is capable of defaming	Proportion of interviewees indicating capacity to defame		Indication given by precedent as to whether the report is actually defamatory	Proportion of interviewees predicting a jury verdict of defamatory	
		Judges	Practitioners		Judges	Practitioners
<i>Drunkenness</i>	Almost certainly capable	100%	100%	Probably	63%	86%
<i>HIV Positive</i>	Almost certainly capable	88%	89%	Probably	50%	68%
<i>Extramarital Affair</i>	Almost certainly capable	100%	100%	Arguably not	63%	86%
<i>Recreational Sex</i>	Probably capable	75%	93%	Probably	38%	50%
<i>Marijuana Use</i>	Probably capable	100%	93%	Probably	38%	39%
<i>Conducting Abortions</i>	Probably capable (adopting a sectionalist test)	38%	86%	Probably (adopting a sectionalist test)	13%	11%
<i>Sex Before Marriage</i>	Possibly capable	38%	36%	Unclear	0%	7%
<i>Informing Police</i>	Probably not capable	100%	82%	Not applicable	63%	71%
<i>Criminal Parentage</i>	Probably not capable	13%	36%	Not applicable	13%	18%
<i>Male Homosexuality</i>	Unclear: conflicting recent precedents	50%	75%	Recent precedents suggest not	0%	25%

No. of judges: 8. No. of practitioners: 28. All percentages are rounded.

Two reports appear from case law to be probably capable using a majoritarian test.⁴⁸⁵ Again, both were considered capable by most judges and practitioners. But with these reports, not much more than one third of judges and practitioners expected a jury to find the report defamatory.

⁴⁸⁵ *Recreational Sex and Marijuana Use.*

The authorities indicate that *Criminal Parentage* is incapable of defaming and most judges and practitioners agreed. Even if such an imputation reached a jury, most did not expect a finding for the plaintiff. Precedents relating to *Sex Before Marriage* and *Male Homosexuality* are divided, and the interviewees split on the issue of capacity.

When it comes to the issue of capacity, the two groups of interviewees (judges on the one hand and practitioners on the other) were furthest apart in relation to *Conducting Abortions*. The outcome for the informant imputation is also surprising, not because the two groups polarised, but because the majority in both thought it capable of being defamatory. Two thirds in each category also expected a defamation verdict from a jury. The interviewees' responses suggested that the former anomaly is due primarily to unfamiliarity with the relevant case law, while the latter result indicates a widespread view that informants are not always popular.

As expected, interviewee predictions as to jury behaviour are less closely related to precedent. The likelihood of a particular imputation being considered defamatory will depend very much on the unique facts of a case, as well as perceptions of prevailing social attitudes, which can rapidly change. A finding by a judge or jury several years ago that an imputation was defamatory in a particular case affords little guide as to how an arbiter of fact will currently behave in non-identical circumstances.

One report where interviewee predictions and precedent clearly do not match up was *Extramarital Affair*. Most interviewees did not share the view expressed by the New South Wales Court of Appeal in the litigation brought by Jim Cairns and Junie Morosi that adulterous affairs between the powerful, intelligent and glamorous might garner public support.⁴⁸⁶

Apart from that, it generally emerged that the interviewees' predictions of jury verdicts bode fractionally better for defendants than do the relevant precedents. Case law suggests that four reports are probably defamatory,⁴⁸⁷ but when the judges' responses are averaged out across those four reports, only around half the judges predicted a finding of defamation from a jury, while for practitioners the proportion is 61%. It is also interesting that, as a class, the judges tended to expect jury findings for the plaintiff less than practitioners, although extreme care has to be taken with any quantitative analysis of such a small sample of judges.

⁴⁸⁶ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708: see above page 128.

⁴⁸⁷ *Drunkenness, HIV Positive, Recreational Sex and Marijuana Use*.

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INTRODUCTION

This thesis began by asking about the relevance of empirical research into social attitudes when it comes to deciding what is defamatory. I have presented two contrasting positions on the issue.

The one I have called moralism suggests that surveys of public opinion only partially reveal the views of the legal construct known as the 'ordinary reasonable person'. The converse position, realism, suggests that defamation verdicts should very much coincide with what people actually think, regardless of how uncomfortable a court may be with those views.

Whatever the correct legal position may be, it is instructive to compare public opinion with actual trial outcomes, as well as the views of those charged with regularly determining or advising on what is defamatory, namely judges and legal practitioners. With that in mind, this chapter reports on the results of qualitative and quantitative social research conducted by myself under the auspices of the *National Defamation Research Project (NDRP)*. This included a phone survey of 3,000 Australian residents, selected as a representative sample of the general adult population, as well as focus group discussions involving various sections of the community.

PHONE SURVEY METHODOLOGY

A detailed account of the phone survey methodology and sample can be found at Appendix II below.⁴⁸⁸ In summary, each of 3,000 respondents, all of whom identified themselves as adult residents of Australia, was randomly allocated one of the ten hypothetical media reports that were used in the interviews with judges and legal practitioners. That media report then formed the basis of the respondent's interview, so that 300 respondents were asked questions in relation to each media report. A set script was used to describe the report and then ask questions about it.⁴⁸⁹ One of the key questions was whether the respondent would think less of a specified subject of the media report as a result of the report. For instance, in the case of *Extramarital Affair*, the respondents were asked whether they would think less of the man.

For reasons that will be explained in the next chapter, phone survey respondents were asked not only about their own reaction to the media report put to them, but also that of a hypothetical person. In the case of one third of each group of 300 (ie 100 respondents), this person was the 'ordinary person living in Australia'. Another hundred were asked about the reaction of the 'reasonable person living in Australia', while the remaining third were asked about the reaction of the 'ordinary reasonable person living in Australia'. The question related to whether that hypothetical person would think less of the specified subject of the report. Thus, for instance, 100 respondents were asked whether the ordinary reasonable person living in Australia would think less of the wife referred to in *Informing Police*.

⁴⁸⁸ See page 361 below.

⁴⁸⁹ The phone survey interview script is included as Appendix III: see page 367 below.

In the case of half of the total of 3,000 respondents, the questions about the hypothetical person's reaction immediately preceded those about the respondent's personal reaction to the report. In the case of the other half, the questions about the hypothetical person's reaction came immediately *after* those about the respondent's personal reaction. The first group of respondents will be referred to as PVS respondents, since they were interviewed in the PVS (Personal Views Subsequent) condition. The latter half will be termed PVP (Personal Views Prior) respondents. 500 PVP and 500 PVS respondents were asked about each of the three hypothetical persons, meaning that there were six groups of 500 respondents in all.

Each group of 500 can then be divided into ten sub-groups of equal size (ie 50 respondents). In all, then, there were 60 sub-groups, each of 50 respondents ($60 \times 50 = 3,000$ respondents).⁴⁹⁰ Each respondent was interviewed using the same script as that used for the other respondents in her or his sub-group of 50, but the script used for each sub-group, while following the same basic structure, varied in relation to the description of the media report or hypothetical person ('ordinary reasonable person', etc) and question order. In this way, 100 respondents were asked questions about each combination of media report and hypothetical person, there being 30 such combinations ($10 \text{ media reports} \times 3 \text{ hypothetical persons} = 30 \text{ combinations}$; $30 \text{ combinations} \times 100 \text{ respondents per combination} = 3,000 \text{ global sample}$).

NOTE ON REPORTING METHODOLOGY

Reporting the findings of the phone survey presents a particular challenge. This is because it was found that those asked about the responses of a hypothetical person before being asked about their own personal reaction (PVS respondents) were significantly more likely to say that they themselves would think less of the subject of the media report (27% in the case of PVP respondents, 32% for PVS).⁴⁹¹ This phenomenon was particularly significant if the hypothetical

⁴⁹⁰ In fact, because of minor errors in sample apportionment, some sub-groups contain 49 or 51 respondents.

⁴⁹¹ $p < .01$. In reporting the NDRP's statistical findings, this thesis will refer in footnotes to ' p '. In this context, ' p ' stands for 'probability'. The probability indicated is the probability that whatever statistical claim is being made is incorrect. In this instance, p is indicated as being less than (indicated by the symbol '<') .01, which can be understood as 1%. (.01 = 1%, .1 = 10%, .15 = 15%, 1.0 = 100%, etc). Therefore, ' $p < .01$ ' indicates that the probability of the statistical claim being wrong is smaller than 1% (ie less than 1 in 100). In this case, the statistical claim is that PVS respondents are more likely than PVP respondents to say that they themselves would think less of the subject of the media report put to them. It follows that we can say with greater than 99% certainty that, if the survey were to be repeated, we would again find that PVS respondents are more likely than PVP respondents to say that they themselves would think less of the subject of the media report put to them. What is more, assuming that the phone survey respondents are indeed a randomly selected sample of Australia's resident adults, it follows that it can be said with greater than 99% certainty that, if the survey had been extended so as to cover all adults resident in Australia, then we would still find that PVS respondents are more likely than PVP respondents to say that they themselves would think less of the subject of the media report put to them.

person previously asked about was the 'reasonable person living in Australia', in which case the percentage saying they personally would think less of the subject of the media report increased from 24% (PVP) to 32% (PVS).⁴⁹² This is an issue explored in the next chapter. For now it suffices to note certain difficulties this presents in presenting the data from the phone survey.

This chapter is concerned with the *personal* reactions of respondents to the media reports, as opposed to their predictions as to how some hypothetical person (for example the 'ordinary reasonable person') might react. It is arguable, therefore, that only the results from PVP respondents should be reported, since they are unaffected by any preceding questions relating to a hypothetical other. For that reason, it might be said that the responses of the PVP respondents better reflect public opinion.

I suggest that a better approach, when faced with a choice of reporting methodologies, is to always adopt the more conservative, by which I mean the reporting methodology more likely to lead to type-2 rather than type-1 errors. Type-2 errors involve mistakenly accepting a null hypothesis; type-1 errors involve mistakenly rejecting it.

What constitutes the null hypothesis can, in itself, be a matter of some debate. A lot depends on the nature of the enquiry. The first part of this chapter looks in particular at the effects of certain demographic factors on respondents' personal attitude to the acts or conditions imputed in the hypothetical reports. In that case the null hypothesis could be said to be that those demographic factors have no bearing. Accordingly, in that part of the chapter I consider PVP responses in isolation from PVS respondents (unless the contrary is indicated), even though doing so reduces the relevant sample size and thus the number of statistically significant findings. That seems preferable to falsely asserting that a demographic factor has a bearing when it does not.

Later in the chapter, attention turns to a comparison between on the one hand the phone survey responses and on the other the forms of research earlier reported on (namely the interviews with judges and lawyers and the analyses of cases. In that situation, the null hypothesis is that the results of the last two reflect public opinion. As a consequence the more conservative approach, and the one I adopt, is to combine PVP and PVS responses (unless the contrary is indicated),

It is also worth commenting on the use of the term 'significant' as used in this thesis. When used in the context of reporting NDRP statistical findings, the term is reserved for situations in which the probability of the statistical claim being correct is greater than 95% (ie $p < .05$). This is the confidence level (the level of certainty) conventionally adopted in the social sciences. In this context, 'significant' can therefore be understood as 'statistically significant'. As a general rule, differences in proportions arising from the NDRP data are not reported unless those differences are statistically significant. In other words, no claim will be made in relation to P1 (Proportion 1) being greater (or smaller) than P2 unless $p < .05$. Departures from this practice will be clearly indicated.

⁴⁹² $p < .005$.

since doing so lends greater support to the null hypothesis (that lawyers and the law accurately reflect social attitudes) than if I were to take PVP responses alone.

My aim, then, is for caution in the conclusions I draw from the data. Even so, in the summary of phone survey results that immediately follows I can safely combine all respondents for the sake of an overview.

THE PHONE SURVEY RESULTS IN SUMMARY

The proportion of phone survey respondents who said they would or would not think less of the subject of the media report put to them is given in Table 16 below. Overall, 29% of the 3,000 respondents said that they would think less of the subject of the media report. 68% said they would not and 3% said they did not know. The proportion indicating disapproval varied substantially depending on the content of the report. Least popular was the man accused of an extramarital affair (54% would think less of him), compared with a mere 12% who would disapprove of the young woman reported to have had sex before marriage.⁴⁹³

Table 16: Number and proportion of phone survey respondents who said they would / would not think less of the subject of the media report described to them

<i>Media report</i>	<i>Would you think less of the subject of the media report as a result of the report?</i>					
	<i>Yes</i>		<i>No</i>		<i>Don't know</i>	
<i>Extramarital Affair</i>	162	54%	128	43%	10	3%
<i>Drunkenness</i>	133	44%	163	54%	4	1%
<i>Recreational Sex</i>	106	35%	185	62%	9	3%
<i>Informing Police</i>	100	33%	184	61%	16	5%
<i>Marijuana Use</i>	94	31%	196	65%	10	3%
<i>Criminal Parentage</i>	91	30%	200	67%	9	3%
<i>Conducting Abortions</i>	61	20%	230	77%	9	3%
<i>Male Homosexuality</i>	53	18%	242	81%	5	2%
<i>HIV Positive</i>	43	14%	248	83%	9	3%
<i>Sex Before Marriage</i>	36	12%	259	86%	5	2%
<i>TOTAL</i>	879	29%	2,035	68%	86	3%

No. of respondents: 3,000 (300 per report). All percentages are rounded.

⁴⁹³ $p < .001$.

Those respondents who said they would think less of the subject of the media report put to them were then asked to estimate on a scale of 1 to 5 (where 1 means just a little less and 5 means a great deal less) the extent to which they would think less of that person. Table 17 below reveals that, taking the ten reports overall, a score of 3 was most commonly given as a measure of disapproval. But that was not always so. In the case of the doctor reported to conduct lawful abortions, 28% of those who would disapprove of her rated their disapproval at the highest level, while only 6% of those who disapproved of the young woman in *Sex Before Marriage* rated their disapproval at the highest level.⁴⁹⁴

Table 17: Number and proportion of phone survey respondents who said they would think less of the subject of the media report in relation to how much less they would think of that person

Media report	To what extent would you think less of the subject of the media report?										
	1 <i>(little less)</i>		2		3		4		5 <i>(great deal less)</i>		N
<i>Conducting Abortions</i>	7	11%	9	15%	19	31%	9	15%	17	28%	61
<i>Male Homosexuality</i>	12	23%	7	13%	14	26%	8	15%	12	23%	53
<i>Extramarital Affair</i>	9	6%	28	17%	56	35%	33	20%	36	22%	162
<i>Marijuana Use</i>	19	20%	22	23%	24	26%	11	12%	18	19%	94
<i>HIV Positive</i>	8	19%	10	23%	12	28%	6	14%	7	16%	43
<i>Drunkenness</i>	24	18%	24	18%	39	29%	25	19%	21	16%	133
<i>Recreational Sex</i>	16	15%	22	21%	30	28%	22	21%	16	15%	106
<i>Criminal Parentage</i>	20	22%	16	18%	33	36%	11	12%	11	12%	91
<i>Informing Police</i>	22	22%	21	21%	24	24%	21	21%	12	12%	100
<i>Sex before Marriage</i>	7	19%	11	31%	10	28%	6	17%	2	6%	36
<i>TOTAL</i>	144	16%	170	19%	261	30%	152	17%	152	17%	879

N: Number of respondents who said they would think less of the subject of the media report. All percentages are rounded.

⁴⁹⁴ $p < .002$.

Those respondents who said they would *not* think less of the subject of the media report put to them were asked whether they would think more of that person, or whether the report would make no difference to how they regard her or him. The results are given in Table 18 below. In each case only a very small minority (averaging at 3%) of those who said they would not think less of the subject of the media report indicated that the report would actually increase their regard for that person.

Table 18: Number and proportion of phone survey respondents who said they would not think less of the subject of the media report in relation to whether they would think more of that person

Media report	Would you think more of the subject of the media report, or would the report make no difference to how you regard that person?						
	More		Same		Don't know		N
Informing Police	26	14%	152	83%	6	3%	184
Conducting Abortions	14	6%	209	91%	7	3%	230
Recreational Sex	7	4%	175	95%	3	2%	185
Drunkenness	4	2%	159	98%	0	0%	163
Male Homosexuality	4	2%	237	98%	1	0%	242
HIV Positive	4	2%	240	97%	4	2%	248
Sex Before Marriage	4	2%	255	98%	0	0%	259
Marijuana Use	3	2%	192	98%	1	1%	196
Criminal Parentage	3	2%	193	97%	4	2%	200
Extramarital Affair	0	0%	124	97%	4	3%	128
TOTAL	69	3%	1,936	95%	30	1%	2,035

All percentages are rounded.

Combining the results for the above questions, it is possible to construct a seven-point scale for responses to the subject of each media report. On this scale 1.0 means that the respondent thought more of that person as a result of the report, 0.0 indicates that the report did not change the respondent's regard for that person, -1.0 means that the respondent thought just a little less of the subject of the media report and -5.0 indicates that the respondent felt the highest possible disapproval of that person. The results are given in Table 19 below.

Table 19: Combined responses of ALL phone survey respondents to questions relating to whether the respondent would think less or more of the subject of the media report put to them, or whether the report would make no difference to how the respondent regards that person

Media report	Would the report make you think more of the subject of the media report, less of that person or would it make no difference to how you regard that person?							
	1.0 (more)	0.0 (no difference)	-1.0 (little less)	-2.0	-3.0	-4.0	-5.0 (great deal less)	Don't know
<i>Extramarital Affair</i>	0%	43%	3%	9%	19%	11%	12%	3%
<i>Drunkenness</i>	1%	53%	8%	8%	13%	8%	7%	1%
<i>Recreational Sex</i>	2%	59%	5%	7%	10%	7%	5%	3%
<i>Informing Police</i>	9%	53%	7%	7%	8%	7%	4%	5%
<i>Marijuana Use</i>	1%	64%	6%	7%	8%	4%	6%	3%
<i>Criminal Parentage</i>	1%	66%	7%	5%	11%	4%	4%	3%
<i>Conducting Abortions</i>	5%	72%	2%	3%	6%	3%	6%	3%
<i>Male Homosexuality</i>	1%	79%	4%	2%	5%	3%	4%	2%
<i>HIV Positive</i>	1%	81%	3%	3%	4%	2%	2%	3%
<i>Sex Before Marriage</i>	1%	85%	2%	4%	3%	2%	1%	2%
TOTAL	2%	66%	5%	6%	9%	5%	5%	3%

Notes:

No. of respondents: 300 per media report (total 3,000).

All percentages are rounded.

The respondents in the 'don't know' column answered 'don't know' to the initial question whether they would think less of the subject of the media report put to them.

Overall, around two thirds of respondents indicated acceptance, or at least tolerance of the imputed acts and conditions. A significant majority indicated one of those attitudes in the case of eight of the ten media reports. In the case of *Drunkenness*, although a majority (54%) said they would not think less of the reportedly inebriated secretary, this figure narrowly fails to reach significance.⁴⁹⁵ In just one case, *Extramarital Affair*, a majority of respondents (54%) said

⁴⁹⁵ $p < .15$.

they *would* think less of the subject of the report, but this majority also failed to reach significance.⁴⁹⁶

On average, only 2% of respondents said they would think more of the subject of the media report put to them. The two people most likely to attract positive attitudes were the wife in *Informing Police* (9%) and the doctor who conducts lawful abortions (5%). Given that 28% of those who would disapprove of the doctor's actions (6% of all respondents) rated their disapproval at the highest level, there is some evidence that, out of the issues explored in the research, abortion is one that polarises opinion the most (in terms of strong feelings for and against the potential plaintiff).

THE EFFECT OF DEMOGRAPHIC FACTORS ON ATTITUDES TO THE MEDIA REPORTS

Respondents were asked their age group, highest completed level of formal education, household income bracket, their religion (if any) and whether they consider themselves to be a practising member of that religion. They were also asked to confirm their postcode. The following section reports the relationship between those demographic factors and respondents' propensity to say they would think less of the subject of the media report put to them.

As explained above, in this section only results for PVP⁴⁹⁷ respondents are given, unless the contrary is indicated. Table 20 below sets out the results for PVP respondents in relation to the question whether they would think more or less of the person referred to in the report put to them as a result of that report, or whether the report would not affect their views.

RELIGION

Of the PVP respondents, 63% said they belonged to the Christian faith, 3% to some other faith⁴⁹⁸ and 32% said they belonged to no religion. Of those who said they belonged to a religion, 44% considered themselves to be practising members of that faith. The respondents can therefore be broken down into the following major groups: 36% non-practising Christians,

⁴⁹⁶ $p < .2$. However, a significant *minority* said the report would make no difference to how they regarded the man $p < .02$.

⁴⁹⁷ PVP respondents are those respondents who were *not* asked about the response of a hypothetical person prior to being asked their own response to the media report described to them.

⁴⁹⁸ Among PVP respondents, the four faiths most frequently mentioned apart from Christianity were Buddhism (1.4%), Islam (0.8%), Judaism (0.5%) and Hinduism (0.3%).

32% belonging to no religion, 27% practising Christians and 2% practising a religion other than Christianity.⁴⁹⁹

Table 20: Combined responses of PVP phone survey respondents to questions relating to whether the respondent would think less or more of the subject of the media report put to them, or whether the report would make no difference to how the respondent regards that person

Media report	Would the report make you think more of the subject of the media report, less of that person or would it make no difference to how you regard that person?							
	1.0 (more)	0.0 (no difference)	-1.0 (little less)	-2.0	-3.0	-4.0	-5.0 (great deal less)	Don't know
<i>Extramarital Affair</i>	0%	45%	3%	9%	19%	7%	13%	4%
<i>Drunkenness</i>	1%	51%	9%	7%	15%	9%	7%	1%
<i>Recreational Sex</i>	0%	62%	3%	7%	9%	7%	7%	4%
<i>Informing Police</i>	7%	53%	7%	7%	7%	7%	5%	7%
<i>Marijuana Use</i>	0%	72%	7%	5%	5%	2%	6%	3%
<i>Criminal Parentage</i>	1%	70%	6%	3%	9%	3%	4%	3%
<i>Conducting Abortions</i>	5%	77%	1%	2%	6%	1%	5%	3%
<i>Male Homosexuality</i>	1%	82%	4%	3%	5%	1%	3%	3%
<i>HIV Positive</i>	1%	88%	2%	1%	3%	0%	1%	3%
<i>Sex Before Marriage</i>	1%	83%	4%	5%	3%	1%	1%	2%
TOTAL	2%	68%	5%	5%	8%	4%	5%	3%

No. of respondents: 150 per media report, save for 'conducting abortions' (149) and sex before marriage (151). Total: 1,500. All percentages are rounded.

Aggregating the results for all ten media reports, respondents who practised a religion, as well as those who belonged to a religion they did not practice, were significantly more likely than those who belonged to no religion to say they would think less of the subject of the media report put to them (35% and 26% respectively in the case of religious practitioners and non-practitioners, compared with 20% for the non-religious).⁵⁰⁰ Indeed those who practised a

⁴⁹⁹ Virtually identical proportions were found among the PVS respondents.

⁵⁰⁰ $p < .01$.

religion were also significantly more likely to say they would think less of the subject of the report than those who belonged to a religion they did not practice.⁵⁰¹

Practising Christians were more likely than non-practising Christians to say they would think less of the subject of the report (35% against 26%).⁵⁰² Practising Christians were also more likely to give that response than respondents who practise a religion other than Christianity (when all non-Christian religions are combined).⁵⁰³ Of those who belong to a religion other than Christianity, only Muslims (practising and non-practising combined) were significantly more likely than those belonging to no religion to say they would think less of the subject of the media report (50% against 20%).⁵⁰⁴

Taking each report individually, those practising a religion were significantly more likely than those belonging to no religion to think less of the subject of the following reports: *Recreational Sex* (55% against 19%), *Marijuana Use* (38% against 14%), *Conducting Abortions* (27% against 9%), *Male Homosexuality* (24% against 9%), *Sex Before Marriage* (20% against 0%) and *HIV Positive* (18% against 4.3%).⁵⁰⁵ Those belonging to a religion they did not practise were also more likely than those who belonged to no religion to say they would think less of the young woman who has a single sexual relationship before marriage (16% against 0%).⁵⁰⁶

Those practising their religion were significantly more likely than those who belonged to a religion they did not practise to think less of the subject of the following reports: *Recreational Sex* (55% against 24%) and *HIV Positive* (18% against 4%).⁵⁰⁷

AGE

Aggregating the results for the ten reports, no significant differences were found between major age groups⁵⁰⁸ when it came to respondents' propensity to think less of the subject of the media report put to them. Taking reports individually, however, a few differences emerged. In two cases, the young proved relatively intolerant. Those aged 18 to 39 were more likely to think less of the man with a criminal parent than those aged 60 or over (35% against 17%), 40 to 59 year-

⁵⁰¹ $p < .01$.

⁵⁰² $p < .01$.

⁵⁰³ 35% against 28%, $p < .05$.

⁵⁰⁴ $p < .05$.

⁵⁰⁵ In the case of *Recreational Sex*, *Marijuana Use* and *Sex Before Marriage*, $p < .01$. In the case of *Conducting Abortions*, *Male Homosexuality* and *HIV Positive*, $p < .05$.

⁵⁰⁶ $p < .01$.

⁵⁰⁷ In the case of *Recreational Sex*, $p < .01$. In the case of *HIV Positive* $p < .05$.

⁵⁰⁸ These were defined as 18 to 39, 40 to 59 and 60 or over.

olds falling between the two.⁵⁰⁹ Those aged 18 to 39 were more likely to think less of the man affected with HIV than those aged 40 to 59 (14% against 2%),⁵¹⁰ although this time no significant difference emerged as regards the youngest age group and respondents aged 60 or over. Conversely, in the case of the secretary's drunken antics, intolerance tends to grow with age, those aged 60 or over being significantly more likely to think less of her than those aged 18 to 39 (63% against 34%), with people in their 40s and 50s falling between these two extremes.⁵¹¹

GENDER

No significant difference was found between men and women when it came to the proportion of respondents who said they would think less of the subject of the media report put to them.⁵¹²

LOCATION

When results for the ten reports are combined, New South Wales proved to be the least tolerant state, with its respondents significantly more likely to say they would think less of the subject of the media report put to them than those in Queensland or Tasmania.⁵¹³

On a comparison between metropolitan and non-metropolitan Australia, however, no significant difference was found when the results for the ten reports were aggregated, nor when each report was taken separately, with the exception of *Using Marijuana*, where the drug user was more likely to find tolerance in metropolitan Australia (30% against 15%).⁵¹⁴

EDUCATION

The findings question the adage that education broadens the mind. Aggregating the results for all ten reports, those respondents who had obtained some kind of qualification (academic or vocational) after leaving school were significantly more likely to say they would think less of the subject of the media report than those who had not completed their High School Certificate or equivalent (29% against 23%), with the result for those whose highest formal educational

⁵⁰⁹ $p < .02$.

⁵¹⁰ $p < .02$.

⁵¹¹ $p < .01$.

⁵¹² Combining PVP and PVS respondents, women were significantly more likely than men to say they would think less of the drunken secretary ($p < .05$), and men were significantly more likely than women to say they would think less of the homosexual man ($p < .05$).

⁵¹³ In the case of Queensland, $p < .02$. In the case of Tasmania, $p < .05$.

⁵¹⁴ $p < .02$.

qualification is the HSC coming between the two.⁵¹⁵ The same pattern emerged when it came to *Recreational Sex* (39% against 24%),⁵¹⁶ but no significant results could be detected when it came to the other nine reports.

HOUSEHOLD INCOME

Combining the results for the ten imputations, as well as when each report was taken separately, no significant differences emerged between the responses of those living in a household with an annual income of \$40,000 or below, those with an annual household income of between \$40,001 and \$80,000 and those with a household income of \$80,001 and above. Respondents with household incomes from \$80,001 to \$90,000 are significantly more likely to say they would think less of the subject of the report than those with household incomes between \$10,001 to \$20,000,⁵¹⁷ \$70,001 to \$80,000⁵¹⁸ or \$90,001 to \$100,000⁵¹⁹. It is difficult to conclude from these rather fragmented findings that household income is a significant determinant.

SUMMARY

Concern is frequently expressed about the supposedly unrepresentative nature of juries. In particular, a large number of judges and practitioners interviewed for the research project referred to the undesirable under-representation of well-educated professionals on juries, which were said to consist largely of the unemployed and retired.

The phone survey results suggest that, in the case of a few imputations, variables such as age, gender and geographical location might significantly affect outcome. Otherwise, when it comes to the question whether jurors would think less of a plaintiff as the result of a media report, these factors seemed to have surprisingly little overall significance. Income level emerged as particularly inconsequential. The only real predictors of opinion were education level and, to a greater extent, religious affiliation and practice. As might be expected, the latter are particularly important when it comes to imputations that could be said to relate in some way to sexual morality or the use of drugs. Interestingly, no interviewee expressed concern that any particular religious group is over- or under-represented on juries.

⁵¹⁵ $p < .02$.

⁵¹⁶ $p < .05$.

⁵¹⁷ $p < .05$.

⁵¹⁸ $p < .05$.

⁵¹⁹ $p < .01$.

COMPARING THE NDRP FINDINGS WITH OTHER SOCIAL RESEARCH

A useful exercise is to compare the *National Defamation Research Project* (NDRP) results with those collected in other social attitudes surveys conducted in Australia in recent years. Not only do they provide a check on the plausibility of the NDRP results, they also illuminate the significance of variations in question content. No survey asks precisely the same questions as the NDRP, but some are sufficiently related to make comparisons worthwhile.

Table 21: Relationship between some of the hypothetical media reports and statements and questions used in other research surveys

<i>NDRP media report</i>	<i>Conduct imputed by the NDRP media report</i>	<i>Corresponding research question or statement used by other research organisations</i>	<i>Relevant research undertaking</i>
<i>Sex Before Marriage</i>	A young woman had a single sexual relationship before getting married.	Sex before marriage is acceptable.	ASHR ⁵²⁰
<i>Conducting Abortions</i>	A medical doctor conducts lawful abortions.	Abortion is always wrong.	ASHR
<i>Drunkenness</i>	A 37 year-old secretary in the Prime Minister's office has got drunk at an office party and then danced on the tables with her skirt lifted.	Do you personally approve or disapprove of regular use of alcohol by an adult?	AIHW ⁵²¹
<i>Extramarital Affair</i>	A married man who holds a powerful public office has an affair with an intelligent and glamorous married woman, and neither of them tells their spouse.	Having an affair when in a committed relationship is always wrong.	ASHR
<i>Male Homosexuality</i>	A man is homosexual.	Sex between two adult men is always wrong.	ASHR
<i>Marijuana Use</i>	A man occasionally smokes a little marijuana socially or for relaxation.	Do you think that regular (ie at least monthly) use by an adult of marijuana is OK or not OK?	AIHW

⁵²⁰ Australian Study of Health and Relationships. This study was based on a phone survey of 19,307 people in Australia aged between 16 and 59 years, completed just 18 months before the NDRP phone survey (May 2001 to June 2002). Although the survey questions were mainly concerned with respondents' sexual behaviour, the ASHR also included a battery of questions relating to attitudes to sexual and other matters. Respondents were asked whether they agreed or disagreed with certain statements, four of which correspond in varying degrees with the hypothetical media reports used in the NDRP survey. Various of the results of the Study are published in 27(2) *Australian and New Zealand Journal of Public Health* (2003).

⁵²¹ Australian Institute of Health and Welfare, 2004 *National Drug Strategy Household Survey: First Results* (2005) AIHW cat no PHE 57. The AIHW conducted its survey in 2004 using a sample of Australians aged 14 years and above.

Table 21 above associates six of the NDRP hypothetical media reports with research questions asked in other polls. The first two columns list the relevant reports and the conduct imputed by them, while the third sets out a summary of questions used by other research organisations. These research questions might take the form of a question posed to respondents, or a statement which respondents are invited to agree or disagree with. The fourth column identifies the research study involved.

Table 22: Results from the NDRP phone survey compared with corresponding results from related surveys

Media Report	Proportion of respondents indicating disapproval of the relevant act or condition (with ratio to NDRP findings in italics)				
	NDRP	ASHR		AIHW	
<i>Sex Before Marriage</i>	12%	11%	<i>92%</i>		
<i>Conducting Abortions</i>	20%	18%	<i>90%</i>		
<i>Drunkenness</i>	44%			23%	<i>57%</i>
<i>Extramarital Affair</i>	54%	78%	<i>69%</i>		
<i>Male Homosexuality</i>	18%	32%	<i>56%</i>		
<i>Marijuana Use</i>	31%			76%	<i>41%</i>

Ratio = the lower of the two survey findings divided by the higher. The closer the ratio is to 100%, the more similar are the two findings. All percentages are rounded.

Table 22 above compares the NDRP findings with those of the corresponding research undertakings. The first column summarises the act or condition imputed by the relevant NDRP media report, while the second gives the proportion of NDRP respondents who said they would think less of the subject of that report. The third column then gives the proportion of respondents to other research surveys whose responses suggest disapproval of the conduct imputed by the report. The table also gives ratios to allow for easy comparison of the degree of similarity between the NDRP results and those from other surveys.

The outcomes of this comparative exercise, together with other relevant research findings, are discussed below, alongside additional comments concerning research into some of the relevant areas of social behaviour.

SEX BEFORE MARRIAGE

The best match between research questions asked by the NDRP and another survey is found in relation to attitudes to pre-marital sex. While the NDRP asked respondents whether they would think less of a young woman as a result of a media report that she had a single sexual relationship before getting married, the Australian Study of Health and Relationships (ASHR) asked respondents whether they agreed with the statement 'sex before marriage is acceptable'.⁵²² Not only do the questions match, so do the results. 12.0% of NDRP respondents asked about the young woman said they would think less of her,⁵²³ almost exactly the proportion of ASHR respondents who disagreed that sex before marriage is acceptable (11.4%).⁵²⁴

According to the ASHR, the median age for a woman's first experience of vaginal intercourse is 17 years,⁵²⁵ with 13% having such sex while under 16 years of age.⁵²⁶

CONDUCTING ABORTIONS

It is reasonable to expect that someone who disapproves of sex before marriage would also think less of a young woman to whom pre-marital sex is imputed. It is harder to draw direct inferences from the ASHR question relating to abortion. The study asked interviewees whether they would agree with the statement 'abortion is always wrong', while the NDRP asked whether respondents would think less of a medical doctor reported to have conducted lawful abortions.

The opinion that abortion is always wrong need not imply poor regard for doctors who conduct abortion. Many might expect doctors to provide women with a service to which they are entitled, even if that entitlement exists only in law. Conversely, the view that abortion is not

⁵²² Chris Rissel et al, 'Attitudes Towards Sex in a Representative Sample of Adults', above n 522, 119.

⁵²³ 13.3% in the case of PVP respondents.

⁵²⁴ The two proportions are not significantly different even at a level of $p < .5$. The ASHR found that a further 3.4% of their respondents neither agreed nor disagreed with the statement that sex before marriage is acceptable. It is impossible to know how those respondents would have reacted to our media report, but if half of them would have said they *would* think less of the woman (along with all of those who disagreed with the ASHR statement) then there would be a statistically significant difference between the two findings when PVP and PVS respondents are combined ($p < .002$) but not when PVP respondents are considered in isolation.

Conversely, 86% of NDRP respondents asked about the young woman imputed to have had pre-marital sex said they would not think less of her, while the ASHR found that 85% of their respondents considered sex before marriage to be acceptable, a difference statistically insignificant even at $p < .5$. According to the ASHR 86.2% of men and 83.7% of women agree that sex before marriage is acceptable, with 11.1% of men and 11.8% of women disagreeing (2.5% of men and 4.3% of women neither agreeing nor disagreeing, 0.2% of men and 0.1% of women refusing to answer).

⁵²⁵ Chris Rissel et al, 'First Experiences of Vaginal Intercourse and Oral Sex Among a Representative Sample of Adults' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 131, 133.

⁵²⁶ *Ibid* 135.

always wrong does not necessarily suggest approval of doctors who operate under the law, since it might be felt that those legal powers are too broad.

Despite there being good reason to expect variance between the ASHR and NDRP findings, the two are strikingly similar. 20% of NDRP respondents said they would think less of a medical doctor as a result of a media report that she conducts lawful abortions,⁵²⁷ while 18% of ASHR respondents agreed with the statement that abortion is always wrong, a discrepancy that is statistically insignificant.⁵²⁸ 77% of NDRP respondents said they would *not* think less of the doctor,⁵²⁹ compared with 72% of ASHR respondents who said they disagreed that abortion is always wrong, a discrepancy which is significant only when PVP responses are taken in isolation.⁵³⁰

DRUNKENNESS

In 2004 the Australian Institute of Health and Welfare (AIHW) found that 77% of Australians aged 14 years and over thought that regular use by an adult of alcohol is acceptable.⁵³¹ A number who would approve (or disapprove) of daily, moderate drinking might react differently to the drunken antics described in the NDRP media report, so it is unsurprising that this proportion does not match the 44% of NDRP respondents who said they would think less of the secretary in *Drunkenness*.⁵³²

Research suggests that alcohol consumption in Australia is culturally ubiquitous: 13% consume at levels deemed a risk to health.⁵³³ A qualitative study published in 2002 found evidence of considerable social pressure and expectation to drink, non-drinkers being regarded by drinkers with either sympathy or suspicion.⁵³⁴ Excessive drinking was rarely curbed on the basis that it is

⁵²⁷ 15% in the case of PVP respondents.

⁵²⁸ $p < .5$ (PVP/PVS combined and PVP alone).

⁵²⁹ 83% in the case of PVP respondents.

⁵³⁰ $p < .2$ (PVP/PVS combined), $p < .05$ (PVP alone). According to the ASHR 70.7% of men and 72.5% of women disagree that abortion is always wrong, with 18.9% of men and 17.3% of women disagreeing (10.2% of men and 10% of women neither agreeing nor disagreeing 0.2% of men and 0.2% of women refusing to answer): Chris Rissel et al, 'Attitudes Towards Sex in a Representative Sample of Adults', above n 522, 119.

⁵³¹ Australian Institute of Health and Welfare, 2004 *National Drug Strategy Household Survey: First Results*, above n 521, 8. The survey was conducted by means of an anonymous, written questionnaire.

⁵³² 47% in the case of PVP respondents. 54% said they would not (52% in the case of PVP respondents).

⁵³³ Australian Bureau of Statistics, 4364.0 *National Health Survey: Summary of Results, 2007-2008*, 7 & 12

<www.abs.gov.au/Ausstats/abs%40.nsf/e8ae5488b598839cca25682000131612/cac1a34167e36be3ca2568a900139364!OpenDocument> at 23 August 2010. This publication presents summary results from a survey conducted from August 2007 to June 2008 of a national sample of approximately 20,800 people.

⁵³⁴ Patrick Shanahan, Maggie Wilkins & Nicole Hurt, 'A Study of Attitudes and Behaviours of Drinkers at Risk: Research Report' (Sept 2002) Department of Health and Ageing, <www.health.gov.au/pubhlth/publicat/document/drinkrisk.pdf> at 16 Feb 2006, 14.

itself 'bad', but rather out of concern for the social or work situation involved. Legitimate grounds for moderation included the need to show responsibility, respect, deference or courtesy.⁵³⁵

Men drink more regularly than women, with 59% of males and 51% of females reporting consumption of alcohol in the week leading up to a survey in 2001, while 18% of men but 22% of women reported they had not consumed alcohol for at least one year.⁵³⁶ Combining the results of all NDRP respondents asked about *Drunkenness*, there emerges a significant difference between the attitudes of men and women, with the latter more likely to say they would think less of her on the basis of the report.⁵³⁷ Qualitative research among young women has found a tendency for them to seek to maintain considerable self-control and decorum when drinking socially.⁵³⁸

EXTRAMARITAL AFFAIR

When it comes to survey questions relating to marital infidelity, a greater discrepancy opens up between the NDRP and similar surveys.⁵³⁹ Returning to the Australian Study of Health and Relationships (ASHR), 78% of its respondents agreed with the statement 'having an affair when in a committed relationship is always wrong' (16% disagreeing).⁵⁴⁰ In comparison, only 54% of NDRP respondents said they would think less of a married man who holds a powerful public office and has an affair with an intelligent and glamorous married woman, where neither of them tells their spouse (43% said they would not).

Why would so many who consider it *always* wrong to have an affair when in a committed relationship nevertheless *not* think less of an alleged adulterer, especially when it is said that he has not told his wife? An explanation might lie in the detail of the description of the NDRP

⁵³⁵ 35-6.

⁵³⁶ Australian Bureau of Statistics, *4364.0 National Health Survey: Summary of Results, 2007 – 2008*, above n 533, 26-7. Another research study conducted in 2004 found that 12% of men and 6% of women aged 14 years and over described themselves as daily drinkers, 48% of men and 35% of women as weekly and 28% of men and 39% of women as less than weekly. 13% of men and 20% of women had not consumed alcohol in the last 12 months and 7% of men and 12% of women said they had never drunk a full glass of alcohol: Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, above n 521, 16.

⁵³⁷ $p < .05$.

⁵³⁸ Paul Williams (ed), 'Alcohol, Young Persons and Violence', Australian Institute of Criminology Research and Public Policy Series No 35 (2001) <www.aic.gov.au/publications/rpp/35/RPP35.pdf> at 16 Feb 2006, 35.

⁵³⁹ The ratio of the lower finding to the higher is 69%.

⁵⁴⁰ According to the ASHR 77.5% of men and 77.7% of women agree that having an affair when in a committed relationship is always wrong, with 16.1% of men and 15.8% of women disagreeing (6.1% of men and 6.3% of women neither agreeing nor disagreeing 0.3% of men and 0.2% of women refusing to answer): Chris Rissel et al, 'Attitudes Towards Sex in a Representative Sample of Adults', above n 522, 119.

media report. The man is said to hold a powerful public office, while the woman is intelligent and glamorous. It will be recalled that the report is inspired by comments made in the New South Wales Court of Appeal in the course of litigation brought by Jim Cairns and Junie Morosi.⁵⁴¹ Upholding a jury verdict that an imputation of an affair between them was not defamatory, Hutley JA suggested that Morosi and Cairns' mutual interest may raise their standing in public eyes, because Morosi was 'intelligent and glamorous' and Cairns was important.⁵⁴² This explanation discounts the fact that so many respondents in the ASHR survey agreed that having an affair when in a committed relationship is *always* wrong.

Perhaps a more plausible explanation is that while the ASHR statistic indicates widespread condemnation of extramarital affairs in the abstract, the NDRP survey asks respondents about their reaction to someone involved in an affair. It is possible that, even though many believe that affairs outside a committed relationship are always wrong, they nevertheless resist disparagement of someone involved in one. This attitude may reflect the maxim that it is sins and not sinners that should be condemned. Christ's edict that 'he that is without sin ... let him first cast a stone'⁵⁴³ might seem relevant in light of the ASHR finding that 5% of men in regular heterosexual relationships had had concurrent sexual partners in the 12 months preceding the study, while the corresponding figure for women in regular heterosexual relationships was 3%.⁵⁴⁴

MALE HOMOSEXUALITY

Numerous surveys suggest that homophobia is still commonplace in Australia. At worst this expresses itself in violence. It is generally accepted that victimisation rates for lesbian women and gay men are higher than for heterosexuals and between 1989 and 1999 there were 37 male victims of gay-hate related homicide in New South Wales.⁵⁴⁵ An extensive survey of gay men,

⁵⁴¹ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708. See above on page 128.

⁵⁴² 710D, Mahoney JA agreeing that it was open to the jury to conclude that a romantic or a sexual association in breach of the obligations of marriage was not discreditable: 719G. Samuels JA disagreed: 717D. See above on page 128. See also above on page 128 in relation to a reference to this case in *Chappell v TCN Channel Nine Pty Ltd* (1998) 14 NSWLR 153.

⁵⁴³ John 8:7.

⁵⁴⁴ Chris Rissel et al, 'Selected Characteristics of Regular Sexual Relationships' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 124, 130. According to a further ASHR finding, 2.4% of men and 0.8% of women who are married but not separated reported having sex with more than one member of the opposite sex in the year preceding the survey: Richard de Visser et al, 'Heterosexual Experience and Recent Heterosexual Encounters Among a Representative Sample of Adults' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 146, 151.

⁵⁴⁵ Australian Institute of Criminology, 'Gay-Hate Related Homicides: An Overview of Major Findings in New South Wales', (2000) *Trends & Issues in Crime and Criminal Justice* (no 155) <<http://www.aic.gov.au/documents/4/D/3/%7B4D3405AD-0BD1-4140-A1DD->

conducted in Queensland in 2009, found that 76% of those surveyed had received verbal abuse, 32% had been physically assaulted and 12% had been attacked with some form of weapon.⁵⁴⁶

The largest variance between the NDRP and ASHR findings is in relation to male homosexuality. The ASHR suggests that 32% agree that sex between two adult men is always wrong, with 56% disagreeing.⁵⁴⁷ Meanwhile the Australian Election Study conducted in 1998 suggests that only 56% of Australians approve of homosexuals teaching in schools and just 72% approve of homosexuals holding responsible positions in public life.⁵⁴⁸

On the other hand, only 18% of NDRP respondents asked about a media report that a man is homosexual said they would think less of the man.⁵⁴⁹ This suggests that a significant proportion of the population, while thinking that sex between two adult men is always wrong, would not think less of a man whom the media report to be homosexual.

The argument advanced above in relation to extra-marital affairs, whereby acts can be conceptualised as distinct from the actor, might apply here. It is conceivable that some respondents condemn homosexuality, while maintaining that they do not think less of homosexuals. Compounding this phenomenon may be the fact that, unlike the questions relating to affairs, the ASHR asks about an act (sex between men) while the NDRP asks about a condition (being homosexual). The construct of homosexuality does not necessarily involve sexual activity, in that an abstinent man might be regarded as homosexual on the basis of his desires or self-identification. Individuals are more likely to be condemned for behaviour perceived as under their control (eg sexual activity) than something construed as a given (eg sexual desire). It is a common debate within popular discourse whether homosexuality is a choice, the argument that it is innate being taken as a challenge to homophobia.

Men surveyed by the NDRP were significantly more likely than women to say they would think less of the man reported to be homosexual (23% as opposed to 14%).⁵⁵⁰ This reflects the results of the ASHR, where men were found to be less tolerant of male homosexuality.⁵⁵¹ The ASHR

2544B9050875%7Dti155.pdf> at 23 August 2010. See also Stephen Tomsen, *Gay Killings in New South Wales: Victimisation and the Legal Response* (1996) 4 and 8.

⁵⁴⁶ Alan Berman and Shirleene Robinson, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland* (2010), 43.

⁵⁴⁷ Chris Rissel et al, 'Attitudes Towards Sex in a Representative Sample of Adults', above n 522, 119.

⁵⁴⁸ Adele Horin, 'A Moral Majority', *The Sydney Morning Herald*, 23 March 2002, 33.

⁵⁴⁹ 15% in the case of PVP respondents.

⁵⁵⁰ $p < .05$ (PVP and PVS respondents combined). When PVP respondents were taken in isolation the difference between the genders failed to reach significance ($p < .1$).

⁵⁵¹ 36.9% of men and 26.6% of women agreed with the statement 'sex between two adult men is always wrong', with 54.0% of men and 58.1% of women disagreeing. 8.7% of men and 15.1% of women neither agreed nor disagreed (0.4% of men and 0.2% of women refusing to answer). Contrast these findings with

found that more women than men have had some homosexual experience (9% of women and 6% of men),⁵⁵² but more men than women identify as homosexual (1.6% of men and 0.8% of women).⁵⁵³

HIV POSITIVE

By the end of 2008, it was estimated that over 28,000 people in Australia had been diagnosed as infected with HIV.⁵⁵⁴ There were over 10,000 people diagnosed as having AIDS and there had been over 6,700 deaths following the syndrome. 91% of people infected with HIV are men, with 76% of infections attributed to male homosexual contact. Of all infections, 14% are believed to have arisen from heterosexual contact and 4% purely from injecting drugs.⁵⁵⁵

Given the statistical and cultural association between homosexuality and HIV, comparison between the two relevant NDRP findings is inevitable. 18% of respondents said they would think less of the man reported to be homosexual,⁵⁵⁶ while 14% indicated disapproval of the man reported to be HIV positive.⁵⁵⁷ The difference between these proportions is so small as to be statistically insignificant.⁵⁵⁸ Since no respondent was asked about more than one media report, it is impossible to report whether there is any correlation between disapproval of male homosexuality and HIV infection.

those relating to lesbianism: 21.4% of men and 25.1% of women agreed with the statement that sex between two adult women is always wrong, with 67.3% of men and 59.6% of women disagreeing and 11.0% of men and 15.1% of women neither agreeing nor disagreeing (0.4% of men and 0.2% of women refusing to answer): Chris Rissel et al, 'Attitudes Towards Sex in a Representative Sample of Adults', above n 522, 119.

⁵⁵² Andrew Grulich et al, 'Homosexual Experience and Recent Homosexual Encounters' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 155, 158.

⁵⁵³ An additional 0.9% of men and 1.4% of women identify as bisexual and 0.1% of men and 0.1% of women are undecided or categorised as 'other': Anthony Smith et al, 'Sexual Identity, Sexual Attraction and Sexual Experience Among a Representative Sample of Adults' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 138, 141.

⁵⁵⁴ Australian Bureau of Statistics, *1301.0 Year Book Australia, 2009-10*, above n 291, 365.

⁵⁵⁵ The proportion of newly diagnosed cases of HIV infection attributed to heterosexual contact has risen considerably in recent years (27% in 2008): *ibid*, 366.

⁵⁵⁶ 15% in the case of PVP respondents.

⁵⁵⁷ 8% in the case of PVP respondents.

⁵⁵⁸ $p < .3$ (PVP and PVS combined), $p < .1$ (PVP respondents).

MARIJUANA USE

Research conducted in 2004 suggests that 38% of Australians aged 14 and over have used marijuana at least once in their lifetime, with 15% having used it in the last 12 months.⁵⁵⁹ Earlier research had found that of recent users, 41% took the drug at least once a month.⁵⁶⁰

In light of these figures, a high degree of acceptance of marijuana use might be expected. In fact the 2004 study found that 23% of the population thought that regular use by an adult of marijuana is acceptable, smaller than the proportion who say they have themselves used the drug.⁵⁶¹

The NDRP phone survey found that 31% of respondents would think less of the man reported by the media to occasionally smoke a little marijuana socially or for relaxation. This proportion is considerably less than the 76% of respondents who in 2001 thought that it was 'not OK' for an adult to use marijuana once a month or more. Three explanations might account for this. The first is that the subject of the NDRP media report was said to '*occasionally*' smoke '*a little marijuana*'.⁵⁶² It is likely that these words suggest something more innocuous than the 'regular use' (defined as 'at least once a month') which so many find unacceptable. Regularity and quantity of use are strong determinants of attitudes to marijuana use, with qualitative research published in 1995 finding strong support for the view that when cannabis is 'taken in moderation' it is acceptable. In fact it was believed to be a more sociable drug than excessive alcohol consumption, largely because the latter was seen to encourage male aggression, while marijuana was perceived as calming.⁵⁶³

A second explanation is that this is another example of a *laissez faire* attitude that distinguishes act from actor. This hypothesis gets little support from a survey conducted in 2004, which found that the proportion of Australians aged 14 and over favouring the legalisation of the personal use of marijuana was 27%.⁵⁶⁴ Even so, it is not inconceivable that many who perceive marijuana

⁵⁵⁹ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, above n 521, 23. Cannabis was the most prevalent illicit drug used, with 3.4% using ecstasy, 3.2% using meth/amphetamines and 3.1% using pain-killers/analgesics: *ibid*, 3.

⁵⁶⁰ Australian Institute of Health and Welfare, *1998 National Drug Strategy Household Survey: Detailed Findings*, above n 425, 29. 17% of regular users used the drug daily and 25% at least once a week.

'Recent' was defined as having used the drug in last 12 months.

⁵⁶¹ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, above n 521, 8. The survey was conducted by means of an anonymous written questionnaire.

⁵⁶² Emphases added.

⁵⁶³ National Task Force on Cannabis, 'Public Perceptions of the Health and Psychological Consequences of Cannabis Use' (1995) *National Drug Strategy Monograph Series* No 29, 17.

⁵⁶⁴ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, above n 521, 9. A survey conducted in 1995 found that around 50% of the population thought the law relating to marijuana should stay the same and 11% wanted it tightened, with just 38% for

to be undesirable would favour retention of its prohibition so as to avoid proliferation, while nevertheless balking at the idea of personally disparaging the occasional, light user. Obviously the position might be different if the alleged user were someone in authority who is expected to set an example.

RECREATIONAL SEX

35% of NDRP phone survey respondents said they would think less of a single woman who is reported to sleep with a number of men each year simply to enjoy having sex with them. While the difference between the proportion of male and female respondents indicating disapproval was statistically insignificant, participants to the qualitative phase of the research frequently referred to a social 'double standard', whereby a man displaying similar conduct as regards bedding women would not attract widespread disapproval (although none of the participants attributed such inconsistency to their own views).

Table 23: Australian Study of Health and Relationships findings concerning number of sexual partners of the opposite sex

<i>Time period</i>	<i>No. sexual partners of opposite sex</i>	<i>Men</i>	<i>Women</i>
Lifetime	2 or more	83%	70%
	3 or more	77%	59%
	10 or more	44%	19%
	50 or more	7%	1%
Last 5 years	2 or more	36%	25%
	3 or more	28%	16%
	10 or more	9%	3%
	50 or more	1%	0.1%
Last year	2 or more	13%	7%
	3 or more	8%	3%
	10 or more	2%	0.3%
	50 or more	0.1%	Under 0.1%

All percentages are rounded unless the proportion is under 1%

The Australian Study of Health and Relationships has produced detailed findings concerning the number of sexual partners of the opposite sex which respondents reported having during their

liberalisation (23% favouring decriminalisation and 15% supporting legalisation): Wayne Hall and Joan Nelson, 'Public Perceptions of the Health and Psychological Consequences of Cannabis Use', National Drug Strategy Monograph Series No. 29, Wayne Hall, National Drug and Alcohol Research Centre and Joan Nelson, Reark Research Prepared for the National Task Force on Cannabis Australian Government Publishing Service Canberra 1995, 7.

lifetime, the last five years and the last year. The results, set out in Table 23 above, suggest that, unsurprisingly, the proportion of men reporting multiple sex partners exceeds that of women.⁵⁶⁵

INFORMING POLICE

No general data could be found on the extent to which wives report suspicions of their husbands' criminal behaviour to police. Research has been conducted which gives some indication of the extent to which wives report husbands who assault them.⁵⁶⁶ Obviously it is questionable whether any assault by a man on his wife would be considered by many to be 'extremely trivial', the description given to the offence which the wife suspects the husband to have committed in the NDRP's hypothetical media report. Perhaps many respondents would have had some kind of property-related crime in mind. For instance, surveys suggest that only 26% of thefts from employers by their employees were reported to the police (presumably by the employer, generally).⁵⁶⁷

SUMMARY

Table 21, on page 220 above, matched six of the NDRP hypothetical media reports with corresponding survey questions asked by other research undertakings. In the case of two the proportions of NDRP respondents indicating disapproval of the imputed act or condition was not substantially different from the proportion doing likewise in the corresponding survey.⁵⁶⁸ In the case of one report (*Sex Before Marriage*) the two proportions were almost identical

⁵⁶⁵ De Visser et al, above n 544, 150.

⁵⁶⁶ Government figures suggest that around 38,000 women aged 18 years or over fall victim to sexual assault in Australia each year. 40% of the most recent incidents occurred in a home (not necessarily the victim's) and in 58% of cases the assailant was known to the woman. 20% of sexually assaulted women aged 18 years or over reported the most recent incident to the police, indicating that at least 20% of women sexually assaulted each year (around 7,600 women) experience the incident in a home and/or at the hands of someone known to them, yet do not report the matter to the police. As regards non-sexual assault, in the same period over 358,000 women were assaulted, 42% of whom said the most recent incident occurred in their own home. 73% knew the person who committed the most recent incident, with that person being the woman's partner in 5% of cases and ex-partner in 14%. 34% reported the most recent incident to the police. From this it can be surmised that at least 8% of women assaulted in their own home do not report the matter to police. 16% of assault victims who did not report the matter to the police said they felt the incident was a personal matter: Australian Bureau of Statistics, *4509.0 - Crime and Safety, Australia* (2005)
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/669C5A997EAED891CA2568A900139405?OpenDocument>> at 23 August 2010, 7 - 9, 22 - 7.

⁵⁶⁷ Walker, J, 1994, *The First Australian National Survey of Crimes against Businesses*, Australian Institute of Criminology, Canberra. The reporting of other kinds of property-related crime is often more common: 38% for robbery, 74% for household break-ins, 31% for attempted household break-ins and 90% for motor vehicle thefts: Australian Bureau of Statistics, Australian Bureau of Statistics, *4509.0 - Crime and Safety, Australia* (2005), above n 566, 7 - 9.

⁵⁶⁸ *Sex Before Marriage* (12% for the NDRP survey, 11% in ASHR) and *Conducting Abortions* (NDRP 20%, ASHR 18%).

(12.0%⁵⁶⁹ and 11.4%). In that case there was also a particularly close match between the two surveys' questions: the NDRP asked respondents whether they would think less of a young woman reported to have had a single sexual relationship before marriage, while the Australian Study of Health and Relationships (ASHR) asked its interviewees whether they would agree or disagree with the statement 'sex before marriage is acceptable'.

In the case of *Male Homosexuality*, and to a lesser extent *Extramarital Affair*, relatively close matches can be made between the NDRP and ASHR questions. Even so, the two surveys produced significantly different proportions indicating disapproval of the act or condition imputed by the NDRP report. In both cases the NDRP survey suggests a considerably higher degree of tolerance.

Plausible explanations have been offered for these anomalies, which in summary identify that the ASHR asks about an act, while the NDRP asks about the actor. The results might be taken to indicate compliance with the Christian maxim relating to condemning the sin but not the sinner. If so, it is ironic that there is a dearth of evidence to the effect that it is the avowed Christians, rather than the rest of the population, who are tending to obey that adage. Of the respondents asked about seven of the ten hypothetical reports, including *Extramarital Affair* and *Male Homosexuality*, those describing themselves as practising Christians were significantly more likely to say they would think less of the subject of the report put to them than those who said they belonged to no religion.⁵⁷⁰ What is more, in the case of seven reports, including *Male Homosexuality*, the same is true even when practising and non-practising Christians are combined for comparison with those belonging to no religion.⁵⁷¹ To put it differently, of the 787 practising Christians interviewed for the survey, 39% said they would think less of the subject of the media report put to them, while 28% of the 1,106 non-practising Christians and 22% of

⁵⁶⁹ 13.3% in the case of PVP respondents.

⁵⁷⁰ 65% as opposed to 45% in the case of *Extramarital Affair*, 27% against 10% regarding *Male Homosexuality*. In the case of the former report, $p < .05$ with PVP and PVS responses combined. In the case of the latter, $p < .01$ with PVP and PVS responses combined, $p < .05$ on the basis of PVP responses alone. The additional five reports were *Drunkenness* (54%:37% $p < .05$ PVP/PVS combined); *Sex Before Marriage* (16%:4% $p < .01$ PVP/PVS combined); *Conducting Abortions* (36%:13% $p \geq .01$ PVP/PVS combined); *Marijuana Use* (51%:16% $p < .01$ PVP/PVS combined); *Recreational Sex* (56%:23% $p < .01$ PVP/PVS combined). In the case of three of these additional five reports the difference remains significant even when PVP responses are taken in isolation: *Sex Before Marriage* (20%:0% $p < .01$); *Marijuana Use* (38%:14% $p < .01$); *Recreational Sex* (59%:19% (20%:0% $p < .01$)).

⁵⁷¹ In the case of *Male Homosexuality*, 22% (Christians) as opposed to 10% (those belonging to no religion) $p < .01$ with PVP and PVS responses combined. The additional six reports are *Criminal Parentage* (32%:23% $p < .05$ PVP/PVS responses combined); *Sex Before Marriage* (16%:4% $p < .01$ PVP/PVS responses combined); *Conducting Abortions* (36%:13% $p < .01$ PVP/PVS responses combined); *Marijuana Use* (38%:16% $p < .01$ PVP/PVS responses combined); *Recreational Sex* (40%:23% $p < .01$ PVP/PVS responses combined); *Drunkenness* (52%:37% $p < .05$, PVP responses alone). In the case of four reports the difference remains significant even when PVP responses are taken in isolation: *Sex Before Marriage* (17%:0% $p < .01$); *Marijuana Use* (30%:14% $p < .01$); *Recreational Sex* (39%:19% $p < .01$) *Drunkenness* (52%:37% $p < .05$).

the 955 respondents with no religious affiliation gave the same response. All three proportions are significantly different from the others.⁵⁷²

While it is an attractive hypothesis that many in Australia distinguish between particular conduct and those who indulge in such behaviour, it raises the question why a different attitude is apparently taken to young women who have sex before marriage. It may be that the hypothesis is inadequate and that the above results are better explained by particularities in the social construct of male homosexuality, or possibly the proposition of Hutley JA that, when it comes to extra-marital affairs, '[p]assions between the powerful and glamorous may have a quality that transcends middle-class morality'.⁵⁷³

An incidental point needs clarification. So far it has been assumed that respondents who answered 'no' to the question whether they would think less of the subject of the media report put to them did so because they did not disapprove of that person in light of the act or condition imputed to her or him. It is possible that a proportion of respondents gave a negative answer even though they disapproved of that person, on the basis that they would tend not to believe such a report, either assuming it to be baseless, or at least resisting any disparagement until such time as the allegation could be corroborated.

It seems difficult to imagine that responses were determined entirely, or even predominantly, by scepticism in relation to media credibility. While such an explanation might explain why, for instance, 32% of the population agree that sex between two adult men is always wrong while only around 18% would think less of a man the media reported to be gay,⁵⁷⁴ it raises the question why as many as 12% of respondents said they would think less of a single woman as the result of a media report to the effect that she had a single sexual relationship prior to marriage,⁵⁷⁵ given that only 11% of the population would disagree with the statement 'sex before marriage is acceptable'.⁵⁷⁶ Note also the wide variance among proportions who expressed disapproval in the NDRP survey, depending on the media report put to them. For example,

⁵⁷² With the comparison of practising and non-practising Christians, $p < .002$. With the comparison of practising Christians and those belonging to no religion, $p < .001$. With the comparison between non-practising Christians and those belonging to no religion, $p < .002$. Obviously no firm comparisons can be made regarding adherence to the edict of condemning sin but not sinners, since the proportion of the population who would disapprove of the acts imputed by the NDRP media reports but not the subjects of those reports can only be guessed.

⁵⁷³ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708, 710F. See above on page 128. For popular discourse on the 'forgiving' of adulterous politicians by their electorates, see Mark Coultan, 'Voters stand by their man who yielded to temptation, then admitted it', *The Sydney Morning Herald*, 2 Oct 2004, 1.

⁵⁷⁴ Australian Study of Health and Relationships: see above on page 221.

⁵⁷⁵ 13.3% in the case of PVP respondents.

⁵⁷⁶ Australian Study of Health and Relationships: see above on page 221.

while 54% of respondents said they would think less of the man reported to have had an extramarital affair, only 12% looked askance at the woman reported to have had sex before marrying. If these results were determined primarily by scepticism towards the media rather than the relative acceptability of sex before marriage and sex outside marriage then some explanation would have to be found as to why the proportion of the population who would find the first report credible is four times larger than the proportion who would give credence to the latter. Given that the ASHR, which did not relate to attitudes regarding the media, found that the ratio of people disapproving of extramarital sex to those disapproving of pre-marital sex was approximately 7:1, while the NDRP found the ratio of respondents who would think less of the alleged adulterer to those who would think less of the woman allegedly having pre-nuptial sex was not wholly dissimilar (9:2), it seems reasonable to conclude that NDRP respondents were motivated in their answers predominantly by their attitudes to the hypothetical persons to whom the specified acts or conditions had been imputed, rather than by their perceptions of media credibility. This conclusion is corroborated by the general reception to the phone survey questions in the qualitative stage of the research project.

A further incidental point might be mentioned. Each NDRP respondent was asked about just one media report. While this was done so as to reduce difficulties created by carryover effect,⁵⁷⁷ it precludes the examination of correlations among attitudes to the various reports. The ASHR, on the other hand, asked each interviewee an extensive battery of questions relating to sexual behaviour and attitudes. In so doing it established what it termed a 'scale of sexual liberalism'. An individual's position on this scale was determined by attitude to the following: sexual content in films, pre-marital sex, extramarital affairs, abortion, lesbian sex and male gay sex. It was found that this scale had good internal consistency, meaning that someone's attitude to one of these issues tended to indicate that person's attitude to all the others.⁵⁷⁸ Four of these issues relate directly to the NDRP reports and it is open to conjecture whether the NDRP survey, if designed differently, would have established similar correlations.

COMPARING THE FOUR ANSWERS AS TO WHAT IS DEFAMATORY

So far this thesis has offered four answers to the question whether the NDRP's ten hypothetical media reports are defamatory. The first was suggested by precedent, the second and third in interviews with judges and practitioners, who were asked to extemporise as to whether the reports could in law defame, as well as for their predictions as to whether a jury would find the

⁵⁷⁷ This refers to the impact on the answer to a survey question of preceding questions in the survey.

⁵⁷⁸ Cronbach's $\alpha = 0.74$.

imputations defamatory. The fourth answer came from a random sample of Australian adults, who were asked whether they would think less of the subjects of the reports.

The obvious question now arises: which answer is right? Many may choose the fourth as the most reliable guide, on the basis that the survey presents 'true', as opposed to estimated popular opinion. From that perspective, the phone survey results enable us to appraise the performance of trials, as well as the interviewed judges and practitioners, when it comes to estimating the public. After all, the interviewed judges and practitioners, even the moralists, made it clear that they were basing their responses largely on their perception of what most people think, particularly when it came to jury predictions.

While the survey results give some indication as to how well the judges and lawyers understand their compatriots, that does not necessarily take us any nearer to answering the question whether these reports are defamatory. As explored in Part A of this thesis, the difficulty with that question is that there exists a basic ambiguity in the test for defamation, one that casts doubt on the relevance of empirical measurement. The moralist position suggests that some rational or ethical threshold must be met before views should be taken into consideration. At its extreme, this challenges the basic premise that the phone survey can throw any light on what is defamatory. But it is hoped that the reader will by now accept that the test for defamation is not entirely normative, and the moralist position is implausible unless tempered with realism, at least to the extent that the realities of public opinion must be taken into account when deciding what the 'ordinary reasonable person' thinks.

Earlier sections of this thesis considered the meaning of the term 'reasonable' as used in that phrase. For moralists the word underpins their case, while realists see it as merely bolstering the importance of taking the middle ground of public opinion. Less thought has been given to the term 'ordinary'. This is equally imprecise. First, there is the issue, already explored, of how many 'ordinary' people must think less of the plaintiff for a cause of action to be established. Sectionalists, like Glass JA in *Hepburn v TCN Channel Nine*, suggest that it is enough if the plaintiff's reputation is damaged in the eyes of an 'appreciable and reputable section of the community'⁵⁷⁹ while Hutley JA thought that a 'substantial part of the population' would suffice.⁵⁸⁰ Neither term lends itself to objective measurement.

Secondly, even though, relative to 'reasonable', 'ordinary' invites empirical quantification, it may be overly obvious to point out that the ordinary person, like the average person, does not

⁵⁷⁹ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 694B. See above pages 65 to 73.

⁵⁸⁰ *Ibid* 686B. See above on pages 65 to 73.

exist. This raises the important distinction between means and majorities. To illustrate, imagine that it can be proved that a publication would not damage a person's reputation in the eyes of 51% of the population, while all of the remaining 49% would strongly disapprove of whatever that person had allegedly done. Adopting a majoritarian realist test of defamation the publication is not defamatory. It might be more convincing, however, to average out opinion, thus arguing that in the eyes of the 'ordinary person' this publication is moderately defamatory.

Defamation law's reasonable person is probably supposed to represent a judicious mix of decency and rationality. No doubt its ordinary person is similarly meant to reflect both majority and average opinion, tempering the one with the other. Even so, for present purposes it is instructive to separate the two. I start by analysing the research data as though the ordinary person were simply meant to represent the majority. There are good grounds for doing this. The law has created an artificial, binary opposition among all possible responses to a publication: it is either defamatory or it is not. Since binary oppositions do not permit an average, it is meaningful to determine the matter by reference to the majority response.

'ORDINARY' AS MAJORITY

The burden of proof on a plaintiff in a defamation action includes proving on a balance of probabilities that the matter complained of is defamatory. If the criterion for determining that a publication is defamatory were that it would cause at least half of the adult population⁵⁸¹ to think less of the plaintiff if that entire population were exposed to it, then it is possible to decide, on the basis of the phone survey results, whether the plaintiff's burden of proof would be met if, hypothetically, the subject of each media report chose to sue.⁵⁸²

The probability of half or more of all adult Australian residents saying they would think less of the man referred to in *Extramarital Affair* is 84%, meaning that in the case of that report the plaintiff's burden of proof has been discharged. The probability of obtaining a majority as regards the secretary in *Drunkenness* is less than 5%, while for the remaining eight reports it falls below 0.1%. On the basis of the phone survey, *Extramarital Affair* is the only report amongst the ten where the plaintiff's burden of proof should be considered discharged.

⁵⁸¹ 'Population' is here interpreted as all residents of Australia.

⁵⁸² To do so, certain assumptions must be made, the most important of which is that extending the survey to all adult Australian residents able and willing to take part (instead of stopping when 3,000 had been interviewed) would have given results similar to those that would be obtained if all adult Australian residents were interviewed. In other words, it is necessary to discount the possibility that the views of those able and willing to take part in such a survey differ from those who would refuse or would be unable to take part (for instance because they do not have a phone, are out at the time of the survey, etc).

Turning to the issue of capacity to defame, according to a realist interpretation of the law the mechanism whereby a defendant can apply to a judge to have a claim wholly or partially struck out on the basis that an imputation is incapable of defaming the plaintiff is essentially intended to safeguard defendants against perverse jury verdicts. Assuming a majoritarian realist interpretation of defamation law, capacity challenges should be upheld whenever there is no real possibility that a publication would cause at least half of the population to think less of the plaintiff if that entire population were exposed to it.

Should a judge, armed with the phone survey statistics, consider any of the hypothetical reports capable of being defamatory? Because the survey suggests that there is an 84% probability that over half of Australia's adult residents would think less of the subject of *Extramarital Affair*, obviously that report should be allowed to be put to a jury. Conceivably a cautious judge, particularly anxious to protect the plaintiff's interests, might want *Drunkenness* to undergo further scrutiny, on the basis that the odds against a majority in the community thinking less of the secretary in light of the antics imputed to her seem to be a 'mere' nineteen to one. But surely the legitimate interests of the publisher would be transgressed if any of the other reports were considered even capable of defaming, given that, based on the survey, the chances of any of their subjects discharging the plaintiff's burden of proof fall below one in a thousand.

If our history of recent defamation trials had indicated that *Extramarital Affair* is the only one out of the ten reports that is defamatory, and if our interviewed judges and practitioners had identified that as the only report likely to be found defamatory by a typical jury, then it might have been concluded that the law and lawyers are on the whole competent at identifying what ordinary people think. The results are somewhat less comforting.

Extramarital Affair is based on a publication that a jury in 1983 found to be not defamatory.⁵⁸³ It will be recalled that in the NSW Court of Appeal Hutley JA suggested that an adulterous relationship between married people where the woman is 'intelligent and glamorous' and the man is 'important' may raise the parties' standing in the public's eyes.⁵⁸⁴ Meanwhile Mahoney JA thought that '[p]assions between the powerful and glamorous may have a quality that transcends middle-class morality'.⁵⁸⁵ It would seem from the phone survey that the 'middle-class morality' the judge had in mind either extends further than he expected, or was invited by our phone survey.

⁵⁸³ *Cairns v John Fairfax & Sons Ltd; Morosi v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708. See also above at page 128.

⁵⁸⁴ 710D.

⁵⁸⁵ 710F.

Extramarital Affair was identified as defamatory by 63% of the judges and 86% of the practitioners interviewed. Even so, the average judge also identified an additional two to three reports as defamatory, while the average practitioner identified an additional three to four reports as defamatory. What is more, not one out of the eight judges and 28 practitioners identified *Extramarital Affair* as the only defamatory report. The same number of judges thought this report defamatory as thought *Drunkenness* and *Informing Police* defamatory, even though the last two reports would harm reputation in the eyes of just 44% and 33% of phone survey respondents respectively. Half of the judges thought *HIV Positive* would produce a verdict of defamatory, even though the phone survey suggests that only 14% of the population would think less of a man reported to carry the virus.

Admittedly, these findings have to be read with caution. Only eight judges were interviewed and they were not chosen randomly. But nor were they chosen on the basis that they were believed to have a propensity to find publications defamatory, rather that they would have particular insights into defamation law. What is more, note Table 24 below, which compares the predictions of the interviewed practitioners with those of the interviewed judges as regards the verdict most likely to be returned by a typical jury. Considerable similarity between the two groups' predictions emerge: majorities in both groups agreed as to the most likely jury verdict in the case of eight out of ten media reports, while they disagreed on the likely jury verdict in the case of just one out of the ten reports: *Recreational Sex*. The similarity between practitioners and judges also emerges when the media reports are ranked by reference to the proportion of interviewees who said that a defamatory verdict is probable (1 indicating the report most likely to be considered defamatory by an interviewee and 10 the report least likely). This ranking appears towards the bottom of the table.

Unlike the judges, the sample of defamation practitioners represents a sizeable proportion of Australia's population of such lawyers. Indeed, at a very rough estimate it is felt that the research project interviewed the lawyers responsible for giving around half of Australia's pre-publication defamation advice. The 28 practitioners were also selected for interview relatively randomly (provided they were understood to have some involvement in pre-publication defamation advice). Consequently, while the research findings may not demonstrate with any certainty what judges think, they give a pretty clear indication of what lawyers (meaning judges and practitioners combined) with experience of defamation think.

Table 24: Predictions of practitioners and judges as regards jury verdicts, compared with ranking by phone survey

<i>Media report ⇒</i>	<i>Extramarital Affair</i>	<i>Drunkenness</i>	<i>Informing Police</i>	<i>HIV Positive</i>	<i>Recreational Sex</i>	<i>Marijuana Use</i>	<i>Male Homosexuality</i>	<i>Criminal Parentage</i>	<i>Conducting Abortions</i>	<i>Sex Before Marriage</i>
<i>No. practitioners predicting jury verdict of defamatory</i>	24	24	20	19	14	11	7	5	3	2
<i>No. practitioners predicting jury verdict of not defamatory</i>	2	3	6	8	9	15	15	21	23	25
<i>No. practitioners who thought jury verdict impossible to predict</i>	2	1	2	1	5	2	6	2	2	1
<i>No. judges predicting jury verdict of defamatory</i>	5	5	5	4	3	3	0	1	1	0
<i>No. judges predicting jury verdict of not defamatory</i>	3	3	2	4	4	4	8	6	6	8
<i>No. judges who thought jury verdict impossible to predict</i>	0	0	1	0	1	1	0	1	1	0
<i>Ranking by proportion of practitioners predicting a jury verdict of defamatory</i>	1=	1=	3	4	5	6	7	8	9	10
<i>Ranking by proportion of judges predicting a jury verdict of defamatory</i>	2=	2=	1	4	5=	5=	9=	7=	7=	9=
<i>Ranking by proportion of phone survey respondents who said they would think less of subject of the media report</i>	1	2	4	9	3	5	8	6	7	10

Further inconsistencies between the practitioner predictions and the public's responses are also worth mentioning. While 86% of the practitioners identified *Extramarital Affair* as defamatory, an identical proportion thought the same about *Drunkenness*, which apparently damaged reputation in the eyes of 44% of the public. 72% of practitioners thought *Informing Police* defamatory, compared with 33% of the public. As with judges, however, the greatest anomaly came with *HIV Positive*, predicted to be defamatory by 68% of practitioners, but found defamatory by just 14% of phone survey respondents.

The reports are arranged left to right in Table 24 above by the proportion of practitioners who predicted a finding of defamation. The table also ranks the reports by proportion of judges who

predicted such a finding and phone survey respondents who said they would think less of the person involved. There is striking agreement between lawyers and judges, but far less between those groups and phone survey respondents. For instance, of the six reports considered most likely to be found defamatory by the lawyers, five appear among the six that attracted the highest proportion of respondents saying they would think less of the subject of the media report. In particular, the defamatory nature of *HIV Positive* seems to be overstated by lawyers and judges.

The lawyers' predictions of jury verdicts are graphically combined with the phone survey results in Figure 2 on page 240. This reinforces the striking similarity between the judges' and the practitioners' collective predictions, as well as the relatively weak correlation between the lawyers' predictions of a defamatory verdict and the proportion of phone survey respondents who indicated disapproval. This suggests a moderate ability on the part of lawyers to assess the *relative* incidence in the community of negative feelings towards certain types of individual. For instance, it indicates that lawyers are able to assess that there are more people who disapprove of extramarital affairs than sex before marriage.

Beyond this, Figure 2 must be read with care. For a report to be properly considered defamatory on the basis of majoritarian realism, the public response must appear above the 50% 'cut-off line', indicated in the graph by the horizontal broken line. What matters, then, is not so much whether the data value markers for the three lines (labelled 'judges', 'practitioners' and 'public') fall close to each other, but whether they all fall on the same side of this line. If all appear above the line then this suggests first majority disapproval among the public, secondly that a judge or practitioner is more likely than not to predict a defamation verdict in the case of that report. If all appear below the line then most of the population find the imputation innocuous and the average judge or practitioner will probably predict a non-defamatory verdict. If the data points straddle the dotted line then there is, to put it most bluntly, a problem.

Figure 2: Proportion of judges and practitioners who predicted a jury verdict of defamatory together with the proportion of phone survey respondents ('the public') who said they would think less of the subject of the media report put to them.

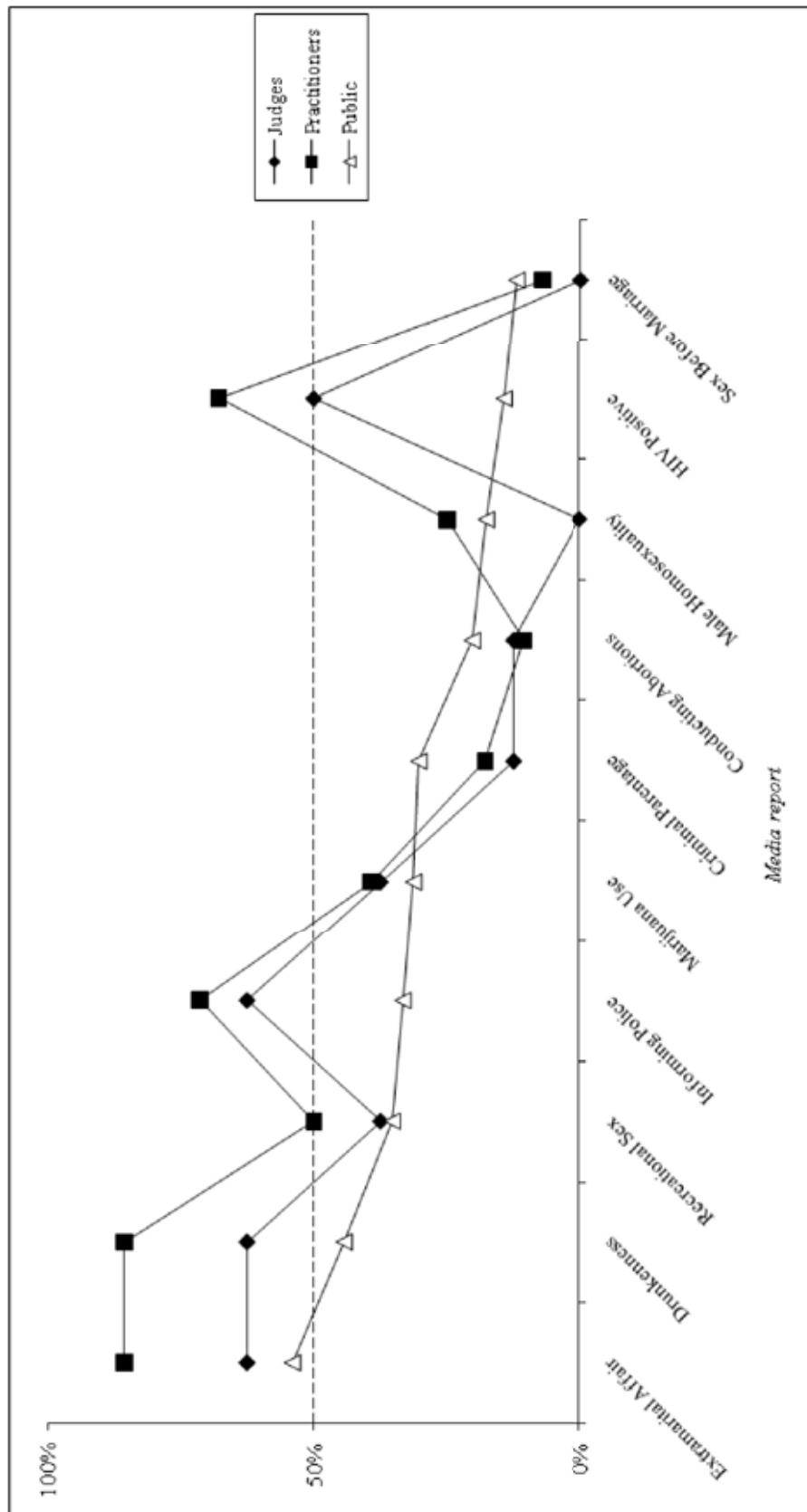


Figure 2 on page 240 suggests that if defamation is determined by majority opinion then judges are likely to 'get it right' in the case of seven or eight of the ten media reports.⁵⁸⁶ Their predictions were inaccurate in the case of two or three.⁵⁸⁷ As for the practitioners, the results suggest that a correct prediction of majority opinion is likely in the case of six out of ten media reports.⁵⁸⁸ While I repeat the caution about generalising from the judges' results, it may be said that their relatively strong collective performance does not support the popular perception of judges as out of touch with the mainstream.⁵⁸⁹ But the practitioners emerge from the exercise less well.

'ORDINARY' AS AVERAGE

I now turn to the 'ordinary person' as representative of average opinion. Abandoning the law's dyad of defamatory/non-defamatory, defamation should now be thought of as a question of degree. This concept is not entirely foreign to the law: an important component in the calculation of damages is the extent to which the plaintiff's reputation is perceived as damaged.

It will be recalled that phone survey respondents who said they would think less of the subject of the media report put to them were then asked to indicate on a scale of one to five how much less they would think of that person, where one meant a little less and five meant a great deal less. Similarly, when a judge or practitioner was of the opinion that a typical jury would find a report defamatory, that lawyer was asked to assess how defamatory that jury would consider the report to be. This assessment was made using a similar scale of one to five, where one meant mildly defamatory and five meant that the allegation would be considered extremely serious.

THE PUBLIC'S AVERSION AND DEFAMATION RATINGS

Using these scales, an average 'aversion rating' can be calculated for each media report. Taking *Extramarital Affair* as an example, nine respondents (6%) scored their aversion to the alleged adulterer at 1.0, 28 (17%) at 2.0, 56 (35%) at 3.0, 33 (20%) at 4.0 and 36 (22%) at 5.0. An average aversion rating can then be calculated as follows:

⁵⁸⁶ *Extramarital Affair, Recreational Sex, Marijuana Use, Criminal Parentage, Conducting Abortions, Male Homosexuality and Sex Before Marriage.*

⁵⁸⁷ *Drunkenness, Informing Police and possibly HIV Positive.*

⁵⁸⁸ *Extramarital Affair, Marijuana Use, Criminal Parentage, Conducting Abortions, Male Homosexuality, Sex Before Marriage and possibly HIV Positive.*

⁵⁸⁹ See, for instance, Charles Miranda and Cindy Wockner, 'You're Out of Touch', *The Daily Telegraph* (Sydney), 12 July 2004, 1, which cites a survey of 7,000 readers. See page 254 below.

$$\frac{(9 \times 1) + (28 \times 2) + (56 \times 3) + (33 \times 4) + (36 \times 5)}{9 + 28 + 56 + 33 + 36}$$

This gives an average aversion rating of 3.36 for the 162 phone survey respondents who said they would think less of the man.⁵⁹⁰

Does this calculation reflect reality? I believe it does. Suppose that a jury is asked to determine whether a report is defamatory and to award damages if it is. Let us assume that the jury is entirely representative of public opinion and its members believe themselves to be such. For simplicity, we shall also assume that damages are to be determined purely on the basis of perceived damage to reputation, that each juror's opinion is given equal weight and, for arithmetic convenience, the jury consists of twenty members.

We might expect the jurors to first vote on whether they would think less of the plaintiff as a result of the publication. Assume that all twenty agree that they would. The jurors might then use the methodology outlined above to calculate an average aversion rating, thereby having a tool by which to determine damages. While this might not be done consciously or with the arithmetical accuracy employed here, one can imagine that if about half the jurors thought the defamation worth around \$20,000 and the rest thought it worth approximately \$10,000, they might compromise with an award of \$15,000.

Imagine now that the same jury is asked to consider the report concerning the extramarital affair. When asked whether it is defamatory, eleven jurors (55%) vote yes, reflecting the proportion found in the survey. The jurors now have a choice. One alternative is for the eleven jurors in the majority, having won the vote, to proceed without regard for the views of their fellow jurors. The eleven jurors who found it defamatory might agree, in terms, that the publication scores an average aversion rating of 3.36 on a scale of 1 to 5 (in other words, it is worth mid-range damages).

Such a scenario seems unlikely. The majority jurors, particularly if they are keen to reflect the views of the 'average person', are likely to want to acknowledge that almost half of the jury are of the view that the plaintiff's reputation has not suffered to any significant degree. The obvious way to do this is to reflect the minority's views in the calculation of damages, using a method that can be illustrated as follows. If half of the jury of twenty considers an item to be grossly defamatory (scoring 5.0 on a scale of one to five) and worth the maximum available damages (imagine, for current purposes, this is \$5,000) while the other half do not think it defamatory at all (ie worth zero damages), it is not difficult to imagine a compromise whereby the plaintiff is

⁵⁹⁰ Calculated by dividing 545 by 162, with the result rounded to two decimal places.

awarded mid-range damages (in this case \$2,500 damages). Expressing this process arithmetically, the jury calculated its verdict by means of the following formula:

$$\frac{(10 \times 0) + (10 \times 5)}{20}$$

What has effectively happened is that the inclusion of the views of the jurors who did not find the publication damaging has converted a five-point scale into a six-point scale. The formula calculates the average response using this scale. The midpoint on a six-point scale (where zero means not defamatory at all and five means grossly defamatory) is 2.5, which is the result given by the above formula. This might be termed the publication's 'defamation rating'.

I do not pretend that jurors will approach their task with such methodological rigour. Nevertheless I propose that this arithmetical exercise captures the spirit of what is a highly plausible scenario in the jury room, whereby decisions are reached by a process of consensus building and compromise.

What would be the outcome if such a six-point scale were applied to the phone survey results relating to the report of an extramarital affair? Using the approach advocated above, the following formula is constructed:

$$\frac{(128 \times 0) + (9 \times 1) + (28 \times 2) + (56 \times 3) + (33 \times 4) + (36 \times 5)}{128 + 9 + 28 + 56 + 33 + 36}$$

This would give a 'defamation rating' of 1.88 (on a scale of 0-5), as opposed to the 'aversion rating' calculated above of 3.36 (on a scale of 1-5). While the first figure is below the midpoint of 2.5 on the six-point scale, the second figure is above the midpoint of 3.0 on a five-point scale. This means that by taking into account the views of the 43% of respondents who said they would *not* think less of the man, the report might now be said to be rated a 'low to moderate defamation' by the 'average person' when the population is viewed as a whole, whereas it is a 'moderate to high defamation' in the eyes of the average among the 54% of the population who *would* think less of the man.

The 'defamation rating' is a simple and convenient means to compare the preponderance of antipathy towards individuals on the basis of various imputed acts or conditions.⁵⁹¹ It can be

⁵⁹¹ It will be noted that what I have effectively done is allocate to all respondents who said they would not think less of the subject of the media report a score of zero. I have therefore combined those respondents who said the report would make them think more of that person with those who said the report would cause them to think neither more nor less of that person. This simplification of the data is necessary so that comparisons can be drawn between the phone survey results and the responses given by judges and

used to argue that one report should be considered more defamatory than another. What it does *not* indicate is whether a report should or should not be considered defamatory. This is because the law gives no clear indication as to the delimitation at which a publication causes so little damage to reputation that it should no longer be considered defamatory.

THE LAWYERS' DEFAMATION RATINGS

As well as calculating defamation ratings for the ten media reports on the basis of the phone survey, the same formula can be applied to the predictions of the judges and practitioners as to what verdict a typical jury might return. Continuing with the example of the report relating to adultery, the following formula applies for the judges' predictions:

$$\frac{(3 \times 0) + (1 \times 1.5) + (1 \times 2.75) + (1 \times 3) + (1 \times 3.5) + (1 \times 4)}{3 + 1 + 1 + 1 + 1 + 1}$$

This gives a judicial defamation rating of 1.84, a result remarkably similar to the defamation rating given by the phone survey respondents (1.88).⁵⁹²

The same exercise can now be repeated with the practitioners' predictions:

$$\frac{(2 \times 0) + (2 \times 0.5) + (1 \times 1) + (1 \times 1.5) + (2 \times 2) + (4 \times 2.5) + (7 \times 3) + (3 \times 3.5) + (6 \times 4)}{2 + 2 + 1 + 1 + 2 + 4 + 7 + 3 + 6}$$

This gives a practitioner defamation rating of 2.6, somewhat higher than the phone survey rating (1.88) and the judicial rating (1.84).⁵⁹³ This suggests that practitioners are overestimating the preponderance of negative feelings in the general community concerning adultery.

Once again, these findings must be treated with care, particularly given the small, non-random selection of interviewed judges. Even so, interesting patterns emerge once public, practitioner and judicial defamation ratings are calculated for the remaining nine media reports, using the

practitioners as to what verdict a typical jury might return, since the lawyers were not invited to consider whether typical juries might actually think more of the hypothetical plaintiffs. While consideration was given to asking this question, and its omission might be considered a methodological flaw, it was felt that the limited time available in the interviews with judges and practitioners was better spent on other issues. In any event, given that only a very small proportion of the phone survey respondents who said they would not think less of the subject went on to indicate that they would think more of the subject (3% on average) then I would argue that the distortion produced by this simplification can be considered inconsequential.

⁵⁹² Judges' rating predictions were rounded to the nearest quarter point (eg 2.5, 2.75 or 3.0). Given the very small sample of judges it was felt to be excessively distorting to round these predictions further. Where a judge found it impossible to predict whether a typical jury would find a report defamatory or not, their response was recorded as 0.5, ie half way between 0 (not defamatory) and 1 (slightly defamatory).

⁵⁹³ Practitioners' rating predictions were rounded to the nearest half point (eg 2.5 or 3.0). Where a practitioner found it impossible to predict whether a typical jury would find a report defamatory or not, their response was recorded as 0.5, ie half way between 0 (not defamatory) and 1 (slightly defamatory).

same formulae as outlined above. Table 25 below gives the results, which are also shown graphically in Figure 3 on page 246.

Table 25: Comparison of 'defamation ratings' by judges, practitioners and phone survey respondents ('public')

<i>Media report</i>	<i>Public</i>	<i>Judges</i>	<i>Practitioners</i>
<i>Extramarital Affair</i>	1.88	1.84	2.61
<i>Drunkenness</i>	1.33	1.56	1.63
<i>Recreational Sex</i>	1.09	1.06	1.34
<i>Informing Police</i>	0.99	1.94	1.30
<i>Marijuana Use</i>	0.93	0.69	0.95
<i>Criminal Parentage</i>	0.86	0.31	0.45
<i>Conducting Abortions</i>	0.70	0.19	0.23
<i>Male Homosexuality</i>	0.54	0.00	0.75
<i>HIV Positive</i>	0.42	1.69	2.28
<i>Sex Before Marriage</i>	0.32	0.00	0.09
<i>Mean</i>	0.91	0.93	1.16

The first thing that is striking about both Figure 2 and Figure 3 is the similarity between judicial and practitioner predictions concerning jury verdicts. Both groups displayed very similar opinions regarding the extent of negative feelings among the general population in relation to the ten imputed acts or conditions, both in terms of prevalence as well as overall intensity. It should come as no great surprise that these groups think alike: both consist of lawyers who are likely to display considerable cultural commonality, including knowledge of the same decided cases. The real significance of this striking similarity is to suggest that the judicial data is in fact very reliable, despite the caution I am repeatedly counselling about the small and non-random sample.

With this in mind, we return to the central question: are judges and practitioners good at assessing what 'ordinary people' think? Figure 2 on page 240 related to 'ordinary' in terms of majority. If the defamation question ('what do ordinary reasonable people think?') is interpreted as asking what *most* people think then this is the table to consider.

Figure 3: ‘Defamation ratings’ by judges, practitioners and phone survey respondents (‘public’)

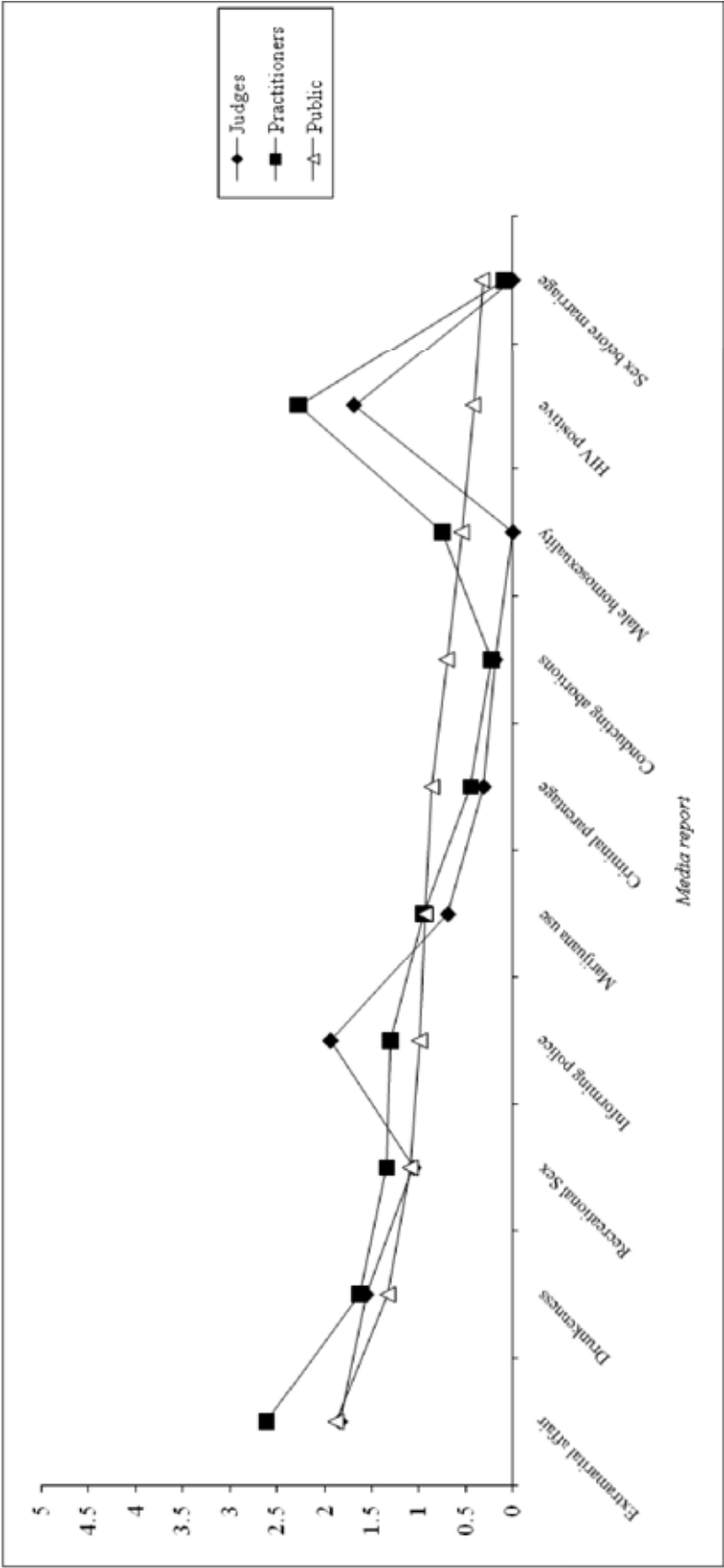


Figure 3 on page 246 interprets the defamation question as relating to the average person. It is easier to read than Figure 2 on page 240, since this time the lawyers' success is assessed simply by the proximity of the data value markers. If the lawyers had accurately predicted the overall level of antipathy each media report excites in the general public then their predictions would be marked in exactly the same point on the graph as the phone survey results, as has very nearly happened in the case of *Sex Before Marriage*.

Figure 3 suggests that lawyers, and particularly judges, might be adept at assessing what the average person thinks. With the exception of *HIV Positive*, the lines linking the lawyers' predictions closely hug the line that reflects the phone survey results, with the lawyers' predictions appearing above that line in around the same number of cases as it appears below.

The shortcoming of Figure 3 is that it throws no light on whether lawyers can predict what the public finds defamatory, as the term is understood in law. The problem derives from the six-point scale on which it is based. Use of this scale renders the difference between a score of 0.0 (meaning that the report causes no damage to reputation) and 1.0 (meaning that the audience would think a little less of the subject of the media report) no more significant than the difference between 4.0 (the publication is highly defamatory) and 5.0 (the publication is even more defamatory). This does not reflect defamation law, due to the latter's fundamental binary between defamatory and non-defamatory. Put simply, the difference to plaintiff and defendant between a verdict of defamatory and one of non-defamatory far exceeds the difference to the parties between a court's decision that a publication is 'highly defamatory' and a decision that it is just a little more highly defamatory. This is due not least to the general rule that the loser must pay the winner's costs: defendants will (unless they have made a judicious payment into court) pay the same costs whether a report scores anywhere from 1 to 5 (inclusive) on our defamation scale, whereas if it scores 0 they are likely to have a significant portion of their costs paid for them.

Figure 3 becomes more interesting once it is read in conjunction with Figure 2. If the interviewed lawyers' responses were determined entirely by their view as to how the *average* person would respond, Figure 3 suggests that they are surprisingly adept in their calculations. On the other hand, if they were answering by reference to their estimate as to what *most* people think, Figure 2 suggests they are less capable. Put differently, neither judges nor practitioners perform well when it comes to the task of assessing the distribution, as opposed to quantity, of antipathy among the population. Since, given the binary nature of defamation, the importance of distribution exceeds that of quantity, this is a point of concern.

To illustrate this argument, take the report relating to male homosexuality. If the interviewed lawyers were interpreting jury decisions as a reflection of what the average person thinks, then they are in effect estimating the level of homophobia in society by means of a six-point scale, where 0.0 would mean that there is no homophobia and 5.0 would mean that everyone is grossly homophobic. On this scale, homophobia in society is estimated by the practitioners at 0.75. This calculation would be remarkably precise, given that the phone survey suggests that the average level of homophobia in society is 0.54 on the same scale, a difference of less than 4%.

Less encouraging is that only around half of the practitioners predicted a non-defamatory jury verdict arising from a report that a man is homosexual, while the other half was approximately evenly split between those who thought a jury *would* find the report defamatory and those who thought the outcome too close to call. This response should be read in the light of the phone survey results, which suggest that homophobia is restricted to a relatively small section of the community, leaving a full 81% who would feel no antipathy towards a man reported to be gay.

Having considered the relevant case law, as well as the reactions of judges, practitioners and phone survey respondents to the ten hypothetical reports, Table 26 below is an attempt to see how all four compare.

In interpreting the table, it should be recalled that on a majoritarian realist interpretation of the defamation test, a publication should be considered incapable of defaming only where there is no realistic likelihood of it causing harm to reputation in the eyes of a majority of the population. The phone survey suggests that the probability that a majority of the population would think less of the subject of the media report exceeds 5% only in the case of *Extramarital Affair*. Even so, case law suggests that five reports are capable of defaming, a majority of the interviewed judges thought that six reports are thus capable and the majority of practitioners thought eight capable.

Only two reports were considered, on the basis of precedent, to be probably incapable of defaming: *Informing Police* and *Criminal Parentage*. The incapacity of the first is taken by many to indicate moralist leanings in the law. It is interesting to note, therefore, that there is a less than 0.1% chance that the majority of the population would think less of a wife who reports her husband for a trivial offence, a form of informing that might be considered particularly egregious. Conversely it might be noticed that there is roughly the same likelihood of the majority of the population disapproving of the man accused of illegally smoking marijuana, an imputation which on one reading of moralism should be automatically defamatory.

Table 26: Comparison between different rankings of media reports and indicators given by precedent as to whether the report is defamatory

Media report	Ranking by proportion of phone survey respondents indicating disapproval of the subject of media report		Issue at hand (capacity to defame or whether the report is actually defamatory)	Indication given by precedent as to the issue at hand	Ranking by proportion of lawyers who thought the report capable or defamatory			
	Rank	Proportion			Judges		Practitioners	
					Rank	Proportion	Rank	Proportion
Extramarital Affair	1	54%	Capable?	Almost certainly	1=	100%	1=	100%
			Defamatory?	Probably not	1=	63%	1=	86%
Drunkenness	2	44%	Capable?	Almost certainly	1=	100%	1=	100%
			Defamatory?	Probably	1=	63%	1=	86%
Recreational Sex	3	35%	Capable?	Probably	6	75%	3=	93%
			Defamatory?		5=	38%	5	50%
Informing Police	4	33%	Capable?	Probably not	1=	100%	7	82%
			Defamatory?	N/A	1=	63%	3	71%
Marijuana Use	5	31%	Capable?	Probably	1=	100%	3=	93%
			Defamatory?		5=	38%	6	39%
Criminal Parentage	6	30%	Capable?	Probably not	10	13%	9=	36%
			Defamatory?	N/A	7=	13%	8	18%
Conducting Abortions	7	20%	Capable?	Probably (using a sectionalist test)	8=	38%	6	86%
			Defamatory?		7=	13%	9	11%
Male Homosexuality	8	18%	Capable?	Unclear	7	50%	8	75%
			Defamatory?	Recent precedents suggest not	9=	0%	7	25%
HIV Positive	9	14%	Capable?	Almost certainly	5	88%	5	89%
			Defamatory?	Probably	4	50%	4	68%
Sex Before Marriage	10	12%	Capable?	Possibly	8=	38%	9=	36%
			Defamatory?	Unclear	9=	0%	10	7%

Based on precedent, it was felt that four reports are probably defamatory: *Drunkenness*, *Recreational Sex*, *Marijuana Use* and *Conducting Abortions*. Based on a majoritarian realist interpretation of the law, the phone survey suggests that none of these should be defamatory.⁵⁹⁴

SUMMARY

In interpreting the data given above, some tentative steps have been made to answer the question whether courts, judges and the media's legal advisors are able to correctly assess what is defamatory. No straightforward answer can be given, largely due to the lack of clarity as to the precise criteria of a defamatory imputation. What is more, no attempt was made during research to replicate an actual media report or real trial conditions.

Even so, I suggest that the research data can be used to draw certain basic conclusions as to how well the legal process is working. All the interviewed judges and practitioners agreed that the test as to what is defamatory related to the views of 'ordinary reasonable people' and the overwhelming majority were clearly basing their responses very largely, if not necessarily entirely, on their perceptions of prevailing social attitudes.

On that basis, there seems to be a general and considerable overestimation by practising defamation lawyers of the amount the public disapprove of the acts and conditions investigated, with the average practitioner predicting defamation verdicts in the case of between four and five of the reports. Judges seem to also exaggerate public disapproval, although to a lesser extent than the practitioners, with an average of between three and four predictions of defamation verdicts. The failure of lawyers appears to lie not so much in estimating average levels of antipathy but rather its distribution among individuals. This may be symptomatic of a reification of public opinion as a monolith, as opposed to an understanding of community attitudes as the interplay of fragmented opinions held by atomised individuals.

Secondly, the results suggest that in many cases capacity hearings are failing to accurately identify those imputations that need weeding out of the defamation litigation process because they attract relatively little public antipathy.

⁵⁹⁴ Only 20% of respondents said they would think less of the doctor reported to be conducting lawful abortions, an imputation that was found capable of defaming in *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682. As described above, that case employed a sectionalist approach and it might be argued that 20% represents a 'significant' or 'appreciable and reputable' proportion of the community. See above on pages 65 to 73.

Thirdly, if *Conducting Abortions* is to be considered defamatory on the basis of a sectionalist test then, subject to the minority in question meeting any ethical or rational threshold requirement, so too must at least six of the other reports, all of which attracted a greater proportion of responses in the phone survey to the effect that reputational damage would flow.⁵⁹⁵

Finally, the question as to whether the test as to what is defamatory is realist or moralist might now be reconsidered, but this time in terms of the law's outcomes rather than intentions. The research findings suggest that the law does not reflect majoritarian realism in that courts appear to be frequently mistaken as to the majority's attitudes to imputed acts or conditions. If, on that basis, we are to conclude that the law is moralist, how does the law's morality differ from that prevalent in the community?

For the law to be internally consistent in its moralism, all imputations of criminal conduct must be considered defamatory. It is interesting to note, therefore, that only a minority of judges and practitioners seemed to consider the report concerning the illegal use of marijuana to be defamatory, a view reflected in the community. Equally unexpectedly, clear majorities among the lawyers considered the informant imputation defamatory, even though only 30% of the phone survey respondents said they would think less of the woman who reported her husband to the police on suspicion of an extremely trivial offence. Rather than enforcing legal norms, the lawyers were most likely to consider the imputation of adultery defamatory, even though this is not conduct the law penalises. Even so, it was apparent that the lawyers did so on the basis that the latter imputation can be characterised as dishonesty, a frequent concern of the law.

The law's morality seems to reflect an attitude to the behaviour imputed in *Drunkenness* which is rather more priggish than that exhibited by the general population, but far more startling is the inconsistency of the results for the report imputing that a man is HIV positive. While only 14% of phone survey respondents said they would think less of this person, 86% of practitioners thought the report capable of being defamatory, while 50% of judges and 68% of practitioners predicted a defamation verdict. A partial explanation for this anomaly is not hard to find. A number of the interviewed lawyers referred to the line of authority to the effect that imputations of contagious disease are capable of defaming, even though ostensibly they might suggest no wrongdoing on the part of the plaintiff. It is easier to imagine a jury finding an imputation of HIV infection defamatory once it has received instructions to this effect.

⁵⁹⁵ *Extramarital Affair* (54%), *Drunkenness* (44%), *Recreational Sex* (35%), *Informing Police* (33%), *Marijuana Use* (31%) and *Criminal Parentage* (30%).

If the law is to be understood as moralist then it should be of great concern that so many lawyers understand it to impute to the reasonable person the avoidance of an individual on the basis of HIV infection.

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INTRODUCTION

So far this thesis has examined four answers to the question whether ten hypothetical media reports are defamatory: those given by precedent, by judges, by practitioners and by a sample of the general community asked to give their own views. These findings suggest that judges, and even more so practising lawyers, tend to overestimate the propensity of Australians to think less of people to whom the media impute a range of acts and conditions. In the case of the practising lawyers, it has also been established that the longer their legal experience, the more likely they are to make this error. The conclusion might be drawn that exposure to legal practice, at least in the area of defamation law, increasingly distorts perceptions of community attitudes.

A hackneyed criticism of lawyers, and particularly judges, is that they do not understand ‘ordinary’ people. In 2004 a survey, conducted among readers of Sydney’s leading tabloid newspaper, found that a majority of respondents thought that judges and magistrates are out of touch with the community in regard to a range of issues.⁵⁹⁶ The newspaper used the results to contend that penalties for crime are generally perceived as overly lenient. In that case, it is curious why the journalists did not simply ask respondents whether they believed judges to be out of touch with the respondent’s own values. Clearly it was considered unnecessary to distinguish between community values and the community’s perception of community values. The evident assumption is that it is the public that knows the public best. Thus the newspaper’s headline, which read ‘You’re out of touch’, was obviously intended as a rebuke to the judiciary, not the paper’s own readership.

⁵⁹⁶ Miranda and Wockner, above n 589, 1. The issues in question included drug possession, in relation to which 67% thought that judges and magistrates are out of touch with the community. The article reports that the survey was conducted in paper and online on 3 June 2004. It also states that around four out of every five of the 7,000 respondents thought that New South Wales’ judicial system favours criminals.

Returning to defamation, this thesis has not assumed that the test for what is defamatory relates solely to community values. Legal norms also have a role. But clearly community values are highly relevant. Equally obvious is that the true test for defamation is not how lawyers perceive community values. Nor is it how a jury, or individual jurors, perceive community values. The very possibility of a finding of perversity in a jury verdict demonstrates that what matters is not what a jury thinks the community thinks, but rather what the community actually thinks. The jury is no more than a means to measuring actual social attitudes.

The last chapter indicates that lawyers, particularly experienced defamation practitioners, tend to exaggerate the extent to which various potentially defamatory publications would damage reputation. The hypothesis presented in this chapter is that lawyers and judges do so not because they are out of touch with the community. The true distinction is not between lawyers and non-lawyers, but between social values and society's understanding of social values. In fact lawyers and judges are very much in touch with other sections of society, in that they share the same basic misperceptions about social values.

INTRODUCING THE THIRD-PERSON EFFECT

My hypothesis is that a factor of paramount importance in determining what is defamatory is a phenomenon of social psychology known as the 'third-person effect'. This is concerned with the tendency for individuals to perceive the adverse impact of communications on others (the third persons) as greater than that on themselves (the first persons).

Sociologist W Phillips Davison was the first to propose the third-person effect hypothesis.⁵⁹⁷ When introducing it in 1983 he related the anecdote that prompted him to consider the phenomenon. During World War II the Japanese dropped leaflets on a unit of African-American troops, encouraging them to surrender or desert rather than fight a 'white man's war'. Even though there was no evidence that the leaflets led to surrenders or desertions, the next day the soldiers' white officers withdrew the black unit.

This incident bears many of the hallmarks of the third-person effect as typically conceived in the literature on the subject. First, what was perceived by the first-person group (the white

⁵⁹⁷ W Phillips Davison, 'The Third-Person Effect in Communication' (1983) 47 *Public Opinion Quarterly* 1.

officers) to be the potential impact of the leaflets on the third-person group (the black troops) was, in the eyes of the first-person group, undesirable (ie reduced morale and the danger of insubordination). Secondly, it can be presumed that the officers imagined their men to be more susceptible to this influence than themselves. Indeed, the officers probably did not see themselves as affected by the propaganda at all, even though in fact it goaded them into a substantial redeployment of personnel. One can imagine them regarding their response to the propaganda as pro-active, not reactive. Thirdly, the anecdote concerns not so much perception as misperception: according to Davison's anecdote there was never any evidence that the leaflets actually affected the black troops' commitment to the war effort.

Finally, the story illustrates how the third-person effect hypothesis does not deny that communications can have very real influence: the propaganda resulted in the Allies wasting time and resources in reallocating infantrymen, which may even have been the enemy's intent. What is important is that the message's outcome was mediated through the third-person effect and differed from what was at least the *ostensible* intent behind the propaganda: to encourage surrender and desertion. The third-person effect can thus be taken as further rejection of the 'silver bullet' model of communications effect, by which a message has a direct and predictable impact on its recipient. As Joseph Klapper noted as early as 1960, mass communication 'ordinarily does not serve as a necessary and sufficient cause of audience effects, but rather functions among and through a nexus of mediating factors and influences'.⁵⁹⁸

Having told his story involving the US military, Davison defines the third-person effect thus:

In its broadest formulation, this hypothesis predicts that people will tend to overestimate the influence that mass communications have on the attitudes and behavior of others. More specifically, individuals who are members of an audience that is exposed to a persuasive communication (whether or not this communication is intended to be persuasive) will expect the communication to have a greater effect on others than on themselves.⁵⁹⁹

In this example we might surmise that the white officers would not have redeployed the troops if they had not considered the leaflets to be influential. But the leaflets were seen in terms of their effect on the troops, not on the officers themselves. The officers, according to Davison, were demonstrating the third-person effect.

The phenomenon of the third-person effect has been widely studied, particularly in the field of mass communication studies. One scholar recently estimated it has been the subject of some 150

⁵⁹⁸ Joseph T Klapper, *The Effects of Mass Communication* (1960) 8.

⁵⁹⁹ Phillips Davison, 'The Third-Person Effect in Communication', above n 597, 3.

articles.⁶⁰⁰ Unsurprisingly the precise meaning of the third-person effect not only varies from one scholar to another but has evolved over time. Even so, some generalities emerge as to how the phenomenon is defined.

The next two sections explore those generalities and outline the way in which the term will be employed in this thesis. Having dealt with these definitional issues, this chapter examines the evidence for the third-person effect. Having established that it appears from the existing literature to be genuine, the chapter proceeds to explore the effect's possible psychological explanations. Finally, this chapter focuses on the effect's relevance for defamation law, reviewing preceding research and then analysing the findings of the *National Defamation Research Project*.

DEFINING THE THIRD-PERSON EFFECT

TENDENCIES AND PERCEIVED TENDENCIES

It is important to be precise as to how we define the third-person effect. It is not simply the perception that the effect of a message on others will be different from that on oneself. Many will assume, with good reason, that the impact of a communication will vary across its audience. An appreciation of the scope for individuals to differ in terms of how they respond to a message is not the same as displaying the third-person effect. Third-person effect studies are concerned only with the extent to which individuals feel able to draw distinctions between the *general* character of a message's impact on others and the same communication's impact on themselves.

For instance, individuals might be said to be exhibiting the third-person effect if they think a violent film will *tend* to engender blood thirst in others who see it, whereas it would have no such effect on themselves. It would not be necessary to believe that everyone else would be incited to violence, or that no one among the third-person group would be deterred from acting violently. But if someone thought that the film in question would not affect her or his own attitude to violence, then that person would not normally be said to be exhibiting the third-person effect if that person perceived others as equally divided between those persuaded towards violence, those deterred from it, and those unaffected by the film. In such an instance,

⁶⁰⁰ Albert C Gunther in an e-mail to the author.

others are perceived as affected differently, but there is no perception of a general tendency in relation to others.

It should also be noted that the third-person effect hypothesis is itself a prediction of a tendency and nothing more. As will be seen later, in any given situation it is unlikely that everyone will display the phenomenon. Indeed in many situations some, albeit generally a small minority, will display a *reverse* third-person effect, perceiving media impact on themselves as greater than on others. So, to extend the above example, someone who thinks that a violent film will excite aggression in themselves more than it will in the general audience could be said to be displaying the reverse third-person effect.

The precise proportion that displays the third-person effect varies from survey to survey, depending on subject matter and methodology. But typically the population seems to divide more or less evenly between those who display the effect and those who do not, with a small minority displaying the reverse third-person effect.

IS IT AN EFFECT OR A PERCEPTION?

The third-person effect hypothesis, as originally presented by Davison, proposed that the perception that media impacts are greater on others than on the self may affect the behaviour of those displaying the effect.⁶⁰¹ For instance, those who see others as more provoked than themselves when it comes to violence in the media might actively support tighter censorship.

While there is robust evidence that the third-person effect exists as a perceptual hypothesis, there is weaker evidence that there is a resultant behavioural effect. For instance, Perloff found only three studies on that issue and concluded that 'the behavioural component of the third-person effect hypothesis remains unsubstantiated at the present time'.⁶⁰² Interestingly, one of the three studies related to the third-person effect in the context of defamation law. This is examined at length below.⁶⁰³ This study found no significant association between the effect and the amount of money respondents thought should be awarded in damages to the subject of a defamatory and untrue news story.

⁶⁰¹ Phillips Davison, 'The Third-Person Effect in Communication', above n 597, 3.

⁶⁰² Richard M Perloff, 'Third-Person Effect Research 1983-1992: A Review and Synthesis' 5(2) *International Journal of Public Opinion Research* 167, 172.

⁶⁰³ See pages 270 to 280.

Although many studies define the third-person effect hypotheses as having not only perceptual outcomes but also attitudinal or behavioural consequences,⁶⁰⁴ for the purposes of this thesis the ‘third-person effect’ will be limited to a perceptual hypothesis unless the contrary is stated. Put differently, when I identify individuals as displaying the third-person effect, this will be on the basis that they appear to perceive the impact of a message on others as different from that on themselves. It does not necessarily follow that I assume that they will act on that perceived difference (apart from voice a belief in it). Just because a respondent considers someone’s reputation wrongly damaged in the eyes of others, while the respondent would not think less of that person, it need not follow that the respondent considers a remedy in order. Davison later preferred the term ‘third-person perception’ to ‘third-person effect’, finding it more descriptive.⁶⁰⁵ While some commentators have adopted the former term, most have not. Accordingly, the original and more widely used term is generally retained here, even though it is not necessarily being used to describe an ‘effect’ at all.

IS IT UNIQUE TO MASS MEDIA?

Even though the third-person effect, as originally conceived by Davison, had particular application to the mass media, it is not assumed here that the third-person effect is restricted to messages which receive a large audience. In the case of communications to a select few, or even one-to-one exchanges, individuals might imagine others to be likely to react differently from themselves if those others were to receive similar messages in analogous circumstances. Where such a perception exists, there can be said to be a third-person effect.

A PERCEPTION OR MISPERCEPTION?

If the majority of individuals in a population display the third-person effect when it comes to anticipating the reaction to a message of the majority of others in the *same* population then there has necessarily been a collective misapprehension. For instance, if the majority in a population think that most others in the same population will be more inclined to aggression than themselves as a result of seeing violence on the movie screen, then either that majority is overestimating the reaction of others or underestimating the effect of violent images on themselves.

⁶⁰⁴ For instance, William P Eveland Jr and Douglas M McLeod, ‘The Effect of Social Desirability on Perceived Media Impact: Implications for Third-Person Perceptions’ (1999) 11 *International Journal of Public Opinion Research* 315, 315.

⁶⁰⁵ W. Phillips Davison, ‘The Third-Person Effect Revisited’ (Summer 1996) 8(2) *International Journal of Public Opinion Research* 2, adopting a term used by Perloff, ‘Third-Person Effect Research 1983-1992: A Review and Synthesis’, above n 602.

Even so, it is a mistake to conceive the third-person effect as necessarily involving a misperception by the individual who displays it. Certainly the use of the term in this thesis should not be taken as conveying that individuals who demonstrate the third-person effect are necessarily making some kind of mistake, either as to the effect of a particular message on themselves or on others. There are occasions when it is reasonable to predict that some material difference between oneself and others will lead to a disparity of effect. There will be situations where people will predict the reaction of others and themselves as different and yet be accurate in both regards. As the term is used in this thesis, such people will nevertheless be said to demonstrate the third person effect.

Even so, the most interesting scenarios giving rise to an observable third-person effect will be those that also involve some form of demonstrable, collective misperception. For this reason, Davison's anecdote relating to the Japanese propaganda in World War II is not the most enlightening instance of the third-person effect. Given the leaflets' play on white-black relations, it is probably reasonable to expect some difference between their overall effect on the white officers and that on the black troops. While it does not necessarily follow that the latter would be more prone to disaffection towards the war effort, the racial contrast between the officers and their subordinates becomes in this instance a material factor when anticipating the two groups' collective responses.

The third-person effect becomes most interesting when individuals see the impact on others as different from that on themselves, even though there is no obvious material difference between the first and third-person groups. Thus, adopting Davison's anecdote, the classic third-person effect exercise might not be a comparison of the reactions of the white officers with those of the black troops, but rather an examination of how black soldiers predict the reaction of other black soldiers to being shown the leaflets, or how white officers would expect black soldiers to respond to a leaflet that did not play on racial tensions but which, for instance, simply predicted defeat for the Allies.

ARE THIRD PERSON RESPONSES OVER OR UNDERESTIMATED?

Davison was particularly interested in the third-person effect as a form of collective misperception. Originally he defined it as the tendency for individuals to overestimate the

influence of messages on others rather than to underestimate the impact on themselves. Some research suggests that this is indeed the explanation for the effect.⁶⁰⁶

Just as my use of the term ‘third-person effect’ should not be understood as necessarily indicating the view that those manifesting it are mistaken, either individually or collectively, as to a message’s impact on others, nor should the term be taken to automatically indicate that those displaying it are overestimating the effect of a communication on others, rather than underestimating its effect on themselves.

A QUANTITATIVE OR QUALITATIVE DIFFERENCE BETWEEN THE EFFECT ON SELF AND OTHERS?

The third-person effect can be said to be in evidence where the effect on others is seen to be of the same quality as the effect on the self, provided others are perceived as being influenced more profoundly. For instance, people who see violence in the media as having a pernicious effect on everyone, including themselves, can be said to display the third-person effect, just as if they perceived no effect on themselves, provided the effect on others is seen to be on the whole greater. People can also be said to display the third-person effect even if they exempt a group of others from the media’s harmful effect (such as fellow intellectuals, other middle-class families, etc) provided they see the harm to others as generally greater than to the group of which the individual feels a part.

Definitional difficulties arise where the effects on oneself and others are seen as equally profound, but in different directions. I might, for instance, think that a violent movie will engender aggression in others, while reconfirming my own antipathy to violence to an equal degree. Some writers define the third-person effect as the perception that others are more influenced by a message than oneself, suggesting that the above is not an example of the phenomenon.⁶⁰⁷

Such definitional problems are avoided if we identify the third-person effect as the perception that the *negative* effect of a message is greater on others than on the self. It is the person displaying the effect who determines whether effects are negative. The message effect need not

⁶⁰⁶ J Cohen et al, ‘Perceived Impact of Defamation: an Experiment on Third-Person Effects’ (1988) 52 *Public Opinion Quarterly*, 161; Dominic L Lasorsa, ‘Real and Perceived Effects of “Amerika”’ (1989) 66 *Journalism Quarterly* 373; Richard M Perloff et al, ‘Perceptions of “Amerika”’ (1992) 19 *Mass Communication Review* 42; Albert C Gunther, ‘What we Think Others Think: Cause and Consequence in the Third-Person Effect’ (June 1991) 18(3) *Communication Research* 355.

⁶⁰⁷ See, for instance, Perloff, ‘Third-Person Effect Research 1983-1992: A Review and Synthesis’, above n 602, 167.

be perceived as counter to the interests of the message's audience. Accordingly, the above would be an instance of the third-person effect provided I consider the aggression engendered in others to be undesirable, even though I might see those others as benefiting from the aggression. What matters is that I consider it undesirable that those others are violent.

Unless clear from the context, in this thesis I limit the term 'third-person effect' to the subjective perception that the *negative* impact of a message is greater on others than on the self. I display the effect if I believe that a film will make others only fractionally more violent, even though I anticipate that the film will have a profound effect on myself, provided I consider the film's effect on me to be benign relative to that on others, for instance that the film will strengthen my aversion to violence.

I go so far as to suggest that the third-person effect can be said to be in evidence even when a communication is thought to impact negatively on the self as well as on others, and even when the difference in impact might be more naturally characterised as qualitative rather than quantitative, meaning that it is not so much that others are seen as *more* affected by the message, but that others are seen to be affected differently. Thus I display the third-person effect when I expect others to become more aggressive after watching a certain movie, while I, to the same (or even greater) extent merely grow more complacent about violence. What matters is that I consider the others' perpetration of violence more egregious than my growing indifference to it. In all these cases, the third-person effect remains extant due to the relative negativity of outcomes.

Certainly the overwhelming majority of third-person effect studies relate to the kind of message likely to be seen as affecting its audience negatively, such as pornography and television violence.⁶⁰⁸ What is more, the focus is very much on the negative consequences of such material. But interesting work has also been done in connection with positive messages. For instance, in 1999 William Eveland and Douglas McLeod tested reactions of university students to four sets of rap lyrics.⁶⁰⁹ In each set, one song can be characterised as anti-social (glamorising either street violence or the mistreatment of women), while the other was pro-social (condemning the same). The students were asked to estimate the effects of 'listening to songs with this type of lyrics' on themselves relative to other students at their university.

As expected, Eveland and McLeod found a clear third-person effect for the anti-social lyrics. But when it came to the anti-violence song, no significant difference emerged between the

⁶⁰⁸ Ibid 172.

⁶⁰⁹ Eveland and M McLeod, above n 604.

effects students perceived on themselves as compared with the effects they perceived on others. Indeed, students tended to regard the anti-misogyny song as having a *greater* effect on other students than on themselves. One explanation given by the researchers is that the students did not consider it particularly desirable to be influenced by pro-social rap lyrics.⁶¹⁰ Perhaps a more interesting test would have been to have people rate the relative potential for self-improvement (of themselves compared with others) that comes with high art, since there may be greater willingness for individuals to acknowledge that they have something to learn from the likes of Shakespeare than from anti-misogyny rap music, which they may dismiss as telling them nothing they did not know already.

DEFAMATORY MATERIAL AND THE THIRD-PERSON EFFECT

When it comes to material advocating street violence or misogyny, it is easy to predict which responses will be thought of as pro-social and which will be viewed as anti-social. Such assumptions as to what is considered desirable are harder in the case of potentially defamatory material. Here, two intertwined issues need unpicking. On the one hand there is the issue of message credibility. If the source of the allegation is unreliable then it is undesirable to be misled by it. As Perloff comments, '[m]essages such as defamatory news coverage ... are likely to cause an audience member of say "the effect of that message may not be so good for me", or "it is not smart to be influenced by" that message'.⁶¹¹

But what if the allegation derives from a source that is wholly credible, one that it is desirable to believe and to be seen to believe? What then matters is whether the imputed conduct warrants censure: it is undesirable to reproach someone for behaviour that does not reflect poorly on them, or to overstate the importance of some peccadillo.

The problem can be illustrated by the following example. A person is asked 'would you think less of a woman as a result of a media report that she had pre-marital sex?' The answer is yes. Such a response suggests two things: first, that the report is assumed to be true, or at least potentially true; secondly, that the respondent views pre-marital sex as discreditable.

A second question is then asked: will her reputation have suffered in the eyes of others more than in your eyes? If the respondent answers yes, that would appear to be a response consistent with the third-person effect. Not only are others seen as more affected by the message, but the

⁶¹⁰ Ibid 328.

⁶¹¹ Perloff, 'Third-Person Effect Research 1983-1992: A Review and Synthesis', above n 602, 172.

effect on others is undesirable, assuming that interviewees consider their personal responses to be proportionate, since it implies that others are expected to overreact.

But what if the answer is that the woman's reputation will be affected less in the eyes of others than in those of the respondent? In classic media effects parlance, this could be described as evidence of a reverse third-person effect: others are less affected by the message. On the other hand, the effect on the general community could be seen negatively: the community has either failed to give due regard to a relatively credible report, or it is unable to appreciate that pre-marital sex is wrong, or both. In that case, such a response should surely be categorised as evidence of the third-person effect. If so, any perceived difference between first and third-person response is describable as a third-person effect, regardless of the direction of the disparity (others more condemning, or others less condemning).

Given the potential for such confusion, in the context of potentially defamatory publications, I shall restrict use of the term 'third-person effect' to a perception by an observer that the reputation of a person will be more adversely affected by a message in the eyes of others, while the term 'reverse third-person effect' will indicate the opposite. If the observer identifies no tendency for others to disapprove more or less strongly than the observer will be described as displaying neither effect.

PROVING THE THIRD-PERSON EFFECT

IS IT AN ARTEFACT OF RESEARCH METHODOLOGY?

By 1996, 13 years after Davison's article coining the term 'third-person effect', there were 16 published studies relating to the phenomenon. According to a review conducted by Richard Perloff of 14 of these studies, all but one supported the hypothesis to some extent.⁶¹² He concluded that there is 'abundant evidence' of its existence.⁶¹³

⁶¹² Ibid 170. The exceptional report was by Glynn and Ostman in 1988. This found no general tendency across the population of a third-person effect. However, a third-person effect was found in a subset of the population: CJ Glynn and RE Ostman, 'Public Opinion about Public Opinion' (1988) 65 *Journalism Quarterly* 299.

⁶¹³ Richard M Perloff, 'Perceptions and Conceptions of Political Media Impact: The Third-Person Effect and Beyond' in Ann N Crigler (ed), *The Psychology of Political Communication*, 177.

In 2000 Bryant Paul, Michael Salwen and Michel Dupagne published a meta-analysis of 32 published and unpublished studies relating to the third-person effect. These 32 studies (none of which related specifically to defamatory material or defamation law) dated from 1985 to 1998 and in total involved 121 separate effect sizes for comparison.⁶¹⁴ The principal goal of the meta-analysis was to measure the strength of overall support for the third-person effect hypothesis in academic literature and to establish whether more mundane explanations for the phenomenon, such as those deriving from methodological practices, could be discounted.

Paul's meta-analysis converted all third-person effect findings to a common statistical metric for comparison. He used the Pearson's product-moment correlation co-efficient r , where a positive r indicates greater perceived effects on self than on others. They found an overall effect size between estimated media effects on self and others of $r = .50$ ($r^2 = .25$), considering this to indicate a 'moderate relationship'.⁶¹⁵ However, when compared with other meta-analyses in mass communications, the effect size is 'rather substantial'. For instance, a meta-analysis of studies of the effect of television violence on anti-social behaviour returned $r = .31$, one of studies of the effect of pornography on aggression gave $r = .13$ and one of studies relating to the spiral of silence theory⁶¹⁶ measured $r = .05$.⁶¹⁷

THE 'FILE DRAWER PROBLEM'

Paul investigated whether the evidence for the third-person effect was exaggerated as a result of the 'file drawer problem'. This refers to the prediction that studies reporting significant findings stand a greater chance of being published. A preference by researchers, referees or journals for significant results would exaggerate support for the third-person effect. With this in mind, Paul compared 14 published and 18 unpublished studies. No significant difference was found between the two as regards the level of support for the third-person effect.⁶¹⁸

SURVEYS VERSUS EXPERIMENTS

Paul also considered whether studies adopting an experimental as opposed to survey approach might be more likely to report a third-person effect. The meta-analysis compared six

⁶¹⁴ Bryant Paul, Michael B Salwen and Michel Dupagne, 'The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis' (2000) 3(1) *Mass Communication & Society* 57.

⁶¹⁵ Ibid 78.

⁶¹⁶ This refers to the idea that individuals will be more likely to express views they perceive to be widely supported and less likely to express those they see as receiving little support. It draws on the work of Elisabeth Noelle-Neumann (eg 'The Theory of Public Opinion: the Concept of the Spiral of Silence' in J A Anderson (ed), *Communication Yearbook 14* (1991) 256.

⁶¹⁷ CJ Glynn, AF Haynes and J Shanahan, 'Perceived Support for One's Opinions and Willingness to Speak Out: A Meta-Analysis of Survey Studies on the "Spiral of Silence"' 61 *Public Opinion Quarterly* 452.

⁶¹⁸ Paul, Salwen and Dupagne, above n 614, 75.

experiment-based studies with 26 surveys and found no significant difference between the two.⁶¹⁹

SAMPLING

Ideally, both experiments and surveys would use samples that are considered representative of the population under study. To save costs, however, non-random, non-probabilistic samples known as ‘convenience samples’ are often used. Typically these consist of university undergraduates.

A major shortcoming in much third-person effect research is reliance on convenience samples. Paul found there to be a significant difference between studies using probabilistic samples and those using non-probabilistic samples, with the latter studies reporting larger third-person effects. What is more, studies using college student samples yielded significantly greater third-person effects than those studies not using college students. Paul suggests two reasons for this:

... [C]ollege students may perceive that their educational status makes them smarter and less vulnerable to harmful media messages than others. It is also possible that the students’ tendency to conform might make them especially more likely to express the desirable response that they are more resistant to media messages than others.⁶²⁰

Indeed other studies have found that respondents with high levels of self-assessed knowledge, such as college students, might exhibit greater third-person effect than others:⁶²¹

Paul described the discrepancies apparently caused by non-random sampling to be ‘intriguing and perhaps disturbing’. Paul’s finding suggests that it is sensible to discount some support for the third-person effect hypothesis due to the use of non-representative and particularly student samples.

Overall Paul concluded, however, that his meta-analysis affirmed that the third-person effect’s perceptual hypothesis is a ‘moderate to robust finding’, not only in terms of the consistency of the findings but also in the overall effect size.

⁶¹⁹ Ibid.

⁶²⁰ Ibid 78.

⁶²¹ PD Driscoll and MB Salwen, ‘Self-Perceived Knowledge of the OJ Simpson Trial: Third-Person Perception and Perceptions of Guilt (1997) 74 *Journalism & Mass Communication Quarterly* 541; Dominic L Lasorsa, ‘Real and Perceived Effects of “Amerika”’, above n 606, 529.

EXPLAINING THE THIRD-PERSON EFFECT

The most obvious explanation for the third-person effect lies in individuals' sense of or desire for superiority over others. It suggests a wish to develop or re-enforce self esteem, as well as the esteem of others. The basic message is this: 'I learn from the media, others are manipulated by it'.

While such a self-perception will be familiar to many, the third-person effect conflicts with two well-established phenomena of social perception: the looking-glass view and false consensus theory.⁶²² Both assume that people tend to overestimate the similarity between their own and others' views on social and political issues. This being so, it is worth looking deeper into the third-person effect's possible causes.

ATTRIBUTION THEORY

Attribution theory draws on the work of F Heider, who argued that people assess the behaviour of themselves and others as caused by a combination of dispositional factors (ie things internal to the person, such as moods, needs, traits, knowledge etc) and situational factors (things external to the person, such as task difficulty, luck, etc). Heider argued that people behave like 'naïve psychologists', attributing their own behaviour to situational factors, but the behaviour of others to dispositional factors, provided that behaviour differs from their own.⁶²³ Later Jones and Nisbett modified Heider's proposition by removing the caveat: they proposed that one's own behaviour tends to be differently attributed from that of others, even when the behaviour is the same.⁶²⁴

They concluded that 'there is a pervasive tendency for actors to attribute their actions to situational requirements, whereas observers tend to attribute the same actions to stable personal dispositions.' For instance, if I am late to work then it is because my bus was delayed, while my colleagues' tardiness arises from their indolence. There is thus a tendency to underestimate the impact of situational factors (like late-running buses) on others. Empirical support for the

⁶²² Perloff, 'Third-Person Effect Research 1983-1992: A Review and Synthesis', above n 602, 176.

⁶²³ F Heider, *The Psychology of Interpersonal Relations* (1958).

⁶²⁴ EE Jones and RE Nisbett, 'The Actor and the Observer: Divergent Perceptions of the Causes of Behavior' in EE Jones et al (eds) *Attribution: Perceiving the Causes of Behavior* 79.

attribution theory has been found, with subjects assessing the impact of television on themselves by reference to situational factors and the effect of TV on others in terms of disposition.⁶²⁵

In the context of the third-person effect, the others' dispositional factors are likely to be gullibility, naivety, stupidity, or whatever makes them unable to resist a message's persuasiveness.

Gunther points out that although situational attribution for one's own behaviour is predictable when the outcome is undesirable, it is not generally the case when the outcome is positive. In those cases individuals may be motivated to take credit for the benefit. However, Gunther claims that situational attributions for one's own reactions is appropriate in the case of the third-person effect. This is because attributing one's own modest attitude change to the discounting of source motives is consistent with 'effectance motivation', the idea that acknowledging a situational response is acceptable if it does not threaten one's sense of control or self-esteem.

BIASED OPTIMISM

'Biased optimism', sometimes referred to as 'unrealistic optimism', 'impersonal impact', 'personal optimism' or 'societal pessimism', is the other common explanation for the third-person effect. It is grounded in the idea that people consider themselves less likely than others to experience negative consequences. It has been suggested, for instance, that people, at least in the West, see themselves as receiving better health care than others.⁶²⁶

If biased optimism explains the third-person effect, then it must also limit the third-person effect to media impacts that are regarded as undesirable. Being 'manipulated' by the media might be considered a negative event, something more likely to happen to others than oneself. But we want the media to 'inform' and 'educate' us. The outcome of a third-person effect study may reflect little more than the language used to describe the same media effect.

Hans-Bernd Brosius and Dirk Engel attempted to measure the impact of the wordings of questions in third-person effect studies.⁶²⁷ They had noticed that nearly all studies examined by him used negative language. For instance, a question might refer to people being 'influenced

⁶²⁵ TC Standley, 'Linking Third-Person Effect and Attribution Theory' unpublished Master's thesis, Southern Methodist University, Dallas, Texas, unseen, cited in Paul, Salwen and Dupagne, above n 614, 60.

⁶²⁶ HM Culbertson and GH Stempel 'Media Malaise: Explaining Personal Optimism and Societal Pessimism about Health Care' (1985) 35(2) *Journal of Communication* 180.

⁶²⁷ Hans-Bernd Brosius and Dirk Engel, 'The Causes of Third-Person Effects: Unrealistic Optimism, Impersonal Impact, or Generalized Negative Attitudes Towards Media Influence?', (Summer 1996) 8(2) *International Journal of Public Opinion Research* 142, 143.

by', as opposed to 'learning from' the media. Being 'influenced' presents the media as yet another external danger, to which people may, through unrealistic optimism, consider themselves immune, while others are not. The team conducted surveys so as to compare third-person effect levels when questions characterise effects positively (for instance advertisements 'stimulate' rather than 'influence') and also when the recipient of the message is presented as active rather than passive (for example, 'I let myself be stimulated by advertising' rather than 'advertising stimulates me').

Brosius and Engel found no significant difference between third-person effect levels when respondents were presented as active rather than passive. However, it seems that in certain circumstances there will be a significantly smaller third-person effect when questions characterise the media impact positively. This does not seem to make a difference when the media being asked about is advertising (political or commercial). In those cases, the third-person effect remains extant more or less regardless. But when questions related to television news (questions related to its impact on attitudes to recent events) and radio music programs (in terms of influence on taste in music) desirability of effect seemed to significantly determine responses to the extent that the third-person effect disappeared altogether if the media impact was described positively. The researchers concluded that 'only for genres with medium or high credibility can the third-person effect be reduced or even erased by suggesting that media influence is beneficial'.⁶²⁸

APPLYING THE THIRD-PERSON EFFECT TO DEFAMATION LAW

Prior to the National Defamation Research Project, there were three reported studies of the third-person effect in the context of defamation law. All consisted of relatively small-scale experiments conducted in the United States, the findings of which were published between 1988 and 1995.

The oldest was among the first experiments to test Davison's hypothesis in any context. Appearing in a paper for which Jeremy Cohen is first-named author,⁶²⁹ it was conducted at Stanford University, using as a sample 132 of that college's undergraduate students. The second, conducted in 1988 and published under the name of Albert Gunther, similarly used

⁶²⁸ Ibid, 155.

⁶²⁹ Cohen et al, above n 606.

undergraduates, on this occasion 128 students enrolled in the University of Minnesota's introductory communications course. The respondents in the third experiment, conducted two years after Gunther's and published under the name of Laurie Mason, were 79 prospective jurors called for duty in a Californian court.

The experiments of Cohen and Gunther bear many similarities in terms of goals and methodology and below are examined together.⁶³⁰ While Mason's also bears similarities, it is discussed separately.

THE EXPERIMENTS OF COHEN AND GUNTHER

Jeremy Cohen's starting point is America's sectionalist definition of what constitutes a defamatory publication. According to the *Second Restatement of the Law of Torts*, harm to reputation must be 'in the eyes of a substantial and respectable minority' of the community.⁶³¹ Cohen supplements this with a definition from libel attorney Robert Sack. His measure of what is defamatory is 'what "right thinking" people might think'.⁶³² Cohen continues:

The jury's job, then, requires a determination of whether the opinions of substantial numbers of "right thinking" people in their community have been affected by a specific communication carried in the mass media. Davison's identification of the belief that the "greatest impact will not be on 'me' or 'you', but on 'them' - the third persons" takes on special relevance here.⁶³³

The relevance is clear:

Jurors who systematically assume others are more susceptible to media influence than they are may overcompensate the plaintiff whose reputation is damaged far less than is perceived.⁶³⁴

Accordingly, Cohen and Gunther wanted to test the basic third-person effect hypothesis in the context of defamation law.⁶³⁵ The relevance of this key research goal to the Australian context is clear. As in the United States, Australian judges and juries are not asked whether they themselves would think less of the plaintiff as a result of the material in question, but whether some third person or group, typically described in Australia as 'ordinary reasonable people', would do so.

⁶³⁰ Indeed Albert C Gunther was a co-author of Cohen's article publishing the findings of his research.

⁶³¹ Cohen, above n 606, 164.

⁶³² Ibid.

⁶³³ Ibid.

⁶³⁴ Ibid 162.

⁶³⁵ The hypothesis was defined by the researchers as the tendency for individuals to perceive others (third persons) as more influenced by media reports than themselves.

BASIC METHODOLOGY

Cohen's and Gunther's experiments both involved simulated newspaper articles, each typeset and photocopied to resemble clippings from actual papers. For these articles, fictional stories were concocted about real people. Cohen reports that all the subjects were successfully persuaded that the articles were authentic.

In the case of Cohen, four stories were prepared, two about the then Californian Supreme Court Chief Justice and two about Stanford's varsity football coach. One article about each of these people was intended to be understood as defamatory, while the other was not. In the case of the Chief Justice, the defamatory article was to the effect that he was corrupt, while the non-defamatory article reported that he was attending an upcoming state bar conference. As regards the coach, the allegation in the first article was that he provided financial favours for his players in violation of the rules of his sport. The other article said that he was due to serve on a university committee to oversee the improvement of campus facilities.

The non-defamatory articles were intended to act as controls, devised to construct baselines of pre-existing attitudes to the personalities involved. Cohen hoped to thereby present a 'relatively objective measure of the libellous article's "actual" impact', by comparing the opinions of subjects who were exposed to the defamatory communication with those who read the non-defamatory article about the same person. Cohen hoped to thereby demonstrate the accuracy of subjects' perceptions of impact on themselves and on others, so as to determine whether the third-person effect represents an underestimation of the impact of media on the self or an overestimation of its impact on others.

For Gunther's experiment, only one fabricated news story was prepared. This involved a real chief of police of a major city in the American mid-west. The article alleged that the police chief, a prominent and respected supporter of handgun control, had contradicted his own position regarding guns in out-of-state speeches.

THE BIAS HYPOTHESIS

Cohen and Gunther had various secondary research goals which are of less clear relevance in Australia than they are in the US legal context. The first was that they wished to consider the effect on the third-person effect of elements of defamation law which are of particular importance in the United States: the intentions of the publisher and the extent to which they are at fault in publishing untrue allegations. Cohen sought to determine how readers' assumptions about the intention behind a libellous article might mediate their perceptions of its effect on

themselves and others. Do readers discount reports from sources they see as biased against the person being accused, while assuming that others do not do so?

Cohen distinguished between perceived bias for and perceived bias against the accused. His hypothesis was that defamatory material from sources perceived to be adversely biased ('anti source') would have less impact on actual reputation than the same message from a source seen to favour the object of the libel ('pro source'). As for *perceptions* of damage to reputations, he predicted that people would see themselves as discounting anti source material more than pro source. While Cohen suggested that the ability of others to discount both anti and pro source material would be perceived by subjects to be inferior to their own, he imagined that this ability would be seen as declining more rapidly in the case of anti source than pro source messages as the apparent distance between the subject and the 'other' grew. In other words, the community, when understood in the broadest sense of 'public opinion at large', would be particularly susceptible to influence from sources unfriendly to the defamed.

For Gunther, exploring the relationship between perceptions of bias and the third-person effect was a natural corollary of his theorisation of the latter. Drawing on the work of F. Heider, Gunther sought an explanation for the third-person effect through attribution theory, one of the two most common explanations for the third-person effect.⁶³⁶

Gunther drew on 'fundamental attribution error', defined as 'the tendency for attributors to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior'.⁶³⁷

According to Gunther:

Attribution theory is pertinent to the third-person effect simply because of the consistent bias in estimating the situational response. There may or may not be specific dispositional attributes assigned to the greater persuasibility of others, but the relevant point is that observers see others as less responsive to the situation.⁶³⁸

Gunther presents a publisher's apparent intention, such as bias, as an important situational factor in determining how people perceive the reactions of others to that publisher's messages.

The third-person effect follows logically from the attribution prediction that each person believes that he or she responds to situations and can discount a message that

⁶³⁶ Heider, above n 623. See page 267 above.

⁶³⁷ L Ross, 'The Intuitive Psychologist and his Shortcomings: Distortions in the Attribution Process' in L Berkowitz (ed), *Advances in Experimental Social Psychology* 173, 183.

⁶³⁸ Gunther, 'What We Think Others Think: Cause and Consequence in the Third-Person Effect', above n 606, 357.

might have manipulative intent but that others are too innocent and naïve to do likewise.⁶³⁹

Accordingly, Gunther suggests a propensity for overestimating a news story's effect on the opinions of others, rather than underestimating its effect on oneself.⁶⁴⁰ He also suggested that as perceived untrustworthiness of the source of the message increases, so too will the third-person effect.

To test the effect of perceived bias on the third-person effect, both Cohen and Gunther presented versions of their concocted news cuttings as though coming from different papers. Cohen prepared three versions of each of his defamatory news items, attributing one to a fictional paper identified as 'anti source' and one to a fictional paper identified as 'pro source', while the third did not identify the source newspaper. Gunther created two versions of his defamatory story. One was attributed to the *New York Times*, which he presumed would be considered reputable in terms of intent and accuracy. The second was identified as coming from the tabloid *National Enquirer*, which was expected to be thought of as untrustworthy.

The nature of Gunther's enquiry is therefore subtly different to Cohen's. The latter concerned himself more with perceptions of source bias, particularly in terms of the source's political or sporting loyalties. While individual respondents would no doubt prefer one source over another in terms of reliability of information, that preference would probably be contingent on their own political or sporting allegiances. Gunther, on the other hand, chose two journals which probably would, by general agreement, be seen as opposites in terms of factual reliability. Gunther describes the *New York Times* as 'a newspaper generally considered to be careful about the accuracy of its information', while he expected subjects to find the *National Enquirer* 'an untrustworthy source of potentially harmful intent, one that would make careless or misleading use of facts or even fabricate information in order to sensationalize its stories'.

THE DISTANCE HYPOTHESIS

The relevance of Cohen and Gunther's other secondary research goal to Australian law is more contentious. The 'distance hypothesis' refers to the possibility that there is a greater third-person effect when the community of third persons the first person group is asked to consider increases in breadth. For instance, there may be a greater third-person effect if respondents are asked about Americans generally, as opposed to the residents of their own town. This is of undoubted relevance under America's sectionalist approach, where a plaintiff's reputation is often assessed

⁶³⁹ Ibid, 359.

⁶⁴⁰ Ibid.

according to the standards of a particular community. The extent to which Australian law is sectionalist, even more so the extent to which consideration should be given only to a particular geographical region if the plaintiff's reputation does not exceed outside that region is, as we have seen from preceding chapters, not entirely clear, although the weight of evidence favours the view that the relevant population cannot be narrowly defined geographically.⁶⁴¹

In order to test the distance hypothesis, Cohen had respondents estimate how much the articles would affect the opinions of three groups: other Stanford students, other Californians and public opinion at large. In the case of Gunther, the three groups of 'others' were other students in the subject's class, other University of Minnesota students and Minnesota residents in general.

BEHAVIOURAL OUTCOMES HYPOTHESIS

Gunther had an additional aim which makes his experiment more interesting in an Australian context. He tried to establish the second component to Davison's third-person effect, that people act on their perception that the media adversely affect others more than themselves. In the case of a defamation jury, this action might take the form of finding for the plaintiff or awarding damages. Gunther suggested that a person's perception of harm to the subjects of a negative news story will be relative to the person's susceptibility to the third-person effect.

One reason people may take an action in connection with the third-person effect is embedded in the distinction between self and others. One would expect people to say the effect they estimate for themselves is about right - an appropriate response to the situation. So each individual sees effect on self as a benchmark, and sees the amount of additional impact on others as the skewed social effect. For each person the difference is the degree to which naïve others are misled, the socially dysfunctional effect.⁶⁴²

From this, Gunther proposes that as the perceived self-other discrepancy grows, so too will the idea that harm has occurred to the subject of a negative news story. He also suggested that those people are likely to be willing to act on that idea.

In order to test the behavioural outcomes from the third-person effect, Gunther devised two additional aspects to his questionnaire. First, subjects were asked to indicate how much they

⁶⁴¹ Cohen found an indication that the distance hypothesis was supported. Gunther, on the other hand, did not find a significant difference between perceptions of classmates and other University of Minnesota students. Even so he detected an increased third-person effect when the students compared themselves with Minnesota residents generally. Gunther acknowledged that there is no reliable way of determining the accuracy with which the respondents gauged the opinions of the entire university student population, as well as that of the state. Gunther claimed, however, that the phenomenon of increased third-person effect as the comparison group got broader was not due to question order, since the different social groups were not presented in logical ascending order of size. Instead, the questions about Minnesota residents preceded those asking about the University's students.

⁶⁴² Gunther, 'What We Think Others Think: Cause and Consequence in the Third-Person Effect', above n 606, 362.

thought the police chief's reputation was harmed by the article. Secondly, as a final stage of the questionnaire, Gunther incorporated the information that the defamatory information was not true. Respondents were then asked if the chief of police should sue and, if so, how much he should collect. It was explained to subjects that they could make the newspaper pay in two ways: compensatory damage for actual harm to reputation, and/or punitive damage purely as punishment for the paper's error.

RESULTS

Since both experiments used the same 19-point scale in relation to attitudinal shifts actually and perceptually brought about as a result of the articles, their results can to a large extent be directly compared. Table 27 below thus combines the results of both experiments, while Figure 4 to Figure 6 below show the same results graphically.

'Actual opinion change'

In the case of Cohen's experiment, the column headed 'actual opinion change' is based on respondents' own opinions of the subject of the media report. The opinions of those reading the non-defamatory article were taken as a baseline and so appear at zero. The other figures in that column are taken as indications of mean opinion change resulting from the various versions of the defamatory stories. For instance, the article about the Chief Justice attributed to a paper biased against him is taken to have dropped his standing to -1.64 . All versions of the defamatory stories seem to have resulted in harm to reputation, but the expectation that a perception of negative and positive bias on the part of the newspaper will respectively decrease and increase damage to reputation is only partially met.

As for Gunther's test, the control group's mean opinion of the police chief formed the baseline. This group had read neither version of the defamatory article. The 'actual opinion change' is then derived from the mean response of respondents who read the defamatory articles as to how they rated the defamed person. As expected, the defamatory article appears to have done more harm when appearing in a newspaper which subjects are likely to consider reliable. Indeed the *National Enquirer* article seems to have had almost no effect on reputation.

Table 27: Cohen and Gunther's experiments: mean opinion change scores (actual and perceived).

	<i>Actual Opinion Change</i>	<i>Estimated Opinion Change</i>				
		<i>Self</i>	<i>Others in class</i>	<i>Other students at same university</i>	<i>Other residents of state</i>	<i>Public opinion at large</i>
Cohen - Chief Justice						
Non-defam. / unnamed source	0.00	+.51	-	+.13	+.59	+.61
Defam. / anti source	-1.64	-.88	-	-3.45	-3.89	-3.81
Defam. / pro source	-2.50	-1.19	-	-1.94	-2.69	-2.97
Defam. / unnamed source	-3.31	-2.58	-	-2.87	-4.45	-4.18
Cohen – Football coach						
Non-defam. / unnamed source	0.00	+.64	-	+.48	+.38	+1.06
Defam. / anti source	-3.28	-2.52	-	-2.94	-3.76	-3.03
Defam. / pro source	-2.47	-2.34	-	-2.79	-3.15	-3.30
Defam. / unnamed source	-3.28	-1.97	-	-2.69	-2.59	-2.88
Gunther – Police chief						
<i>National Enquirer</i>	0.2	-0.3	-2.3	-2.1	-3.4	-
<i>New York Times</i>	-2.4	-2.9	-4.5	-4.4	-4.8	-

For Cohen's experiment, no. of respondents is 33 per cell. For Gunther's, no. of respondents is approximately 43 per cell.

Estimates of effect of article on self and others

Table 27 above (as well as Figure 4 to Figure 6 below) show subjects' mean estimates of opinion change for themselves and for the various groups of third persons as a result of the defamatory articles. As regards estimates of opinion change on self, Cohen found an underestimation for both articles, regardless of source. As for perceptions of the effect on others, a number of overestimates were found.

The third-person effect hypothesis

The basic purpose of both research teams was to test for the third-person effect. Taking the mean results, a third-person effect exists for each *defamatory* article and as regards all of the third-person groups. As for Cohen's *non-defamatory* articles, however, respondents tended to think that the articles would influence themselves more than the articles would influence others.

Figure 4: Cohen's experiment: mean opinion change scores (actual and perceived) relating to the Chief Justice

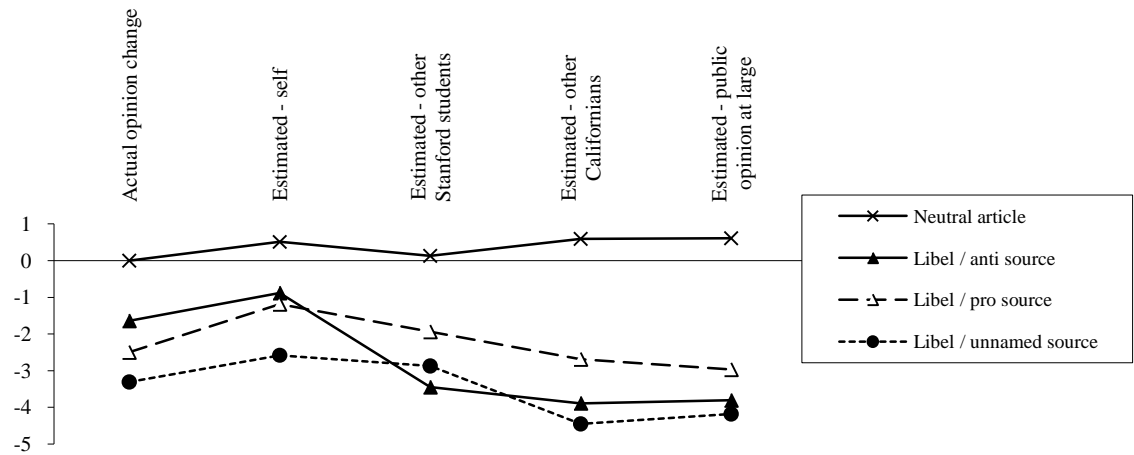


Figure 5: Cohen's experiment: mean opinion change scores (actual and perceived) relating to the football coach

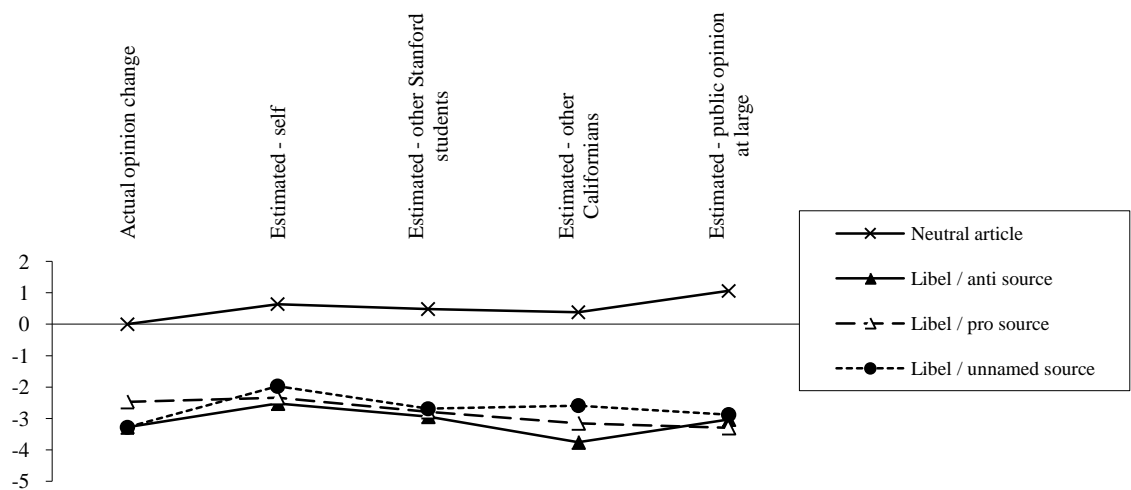
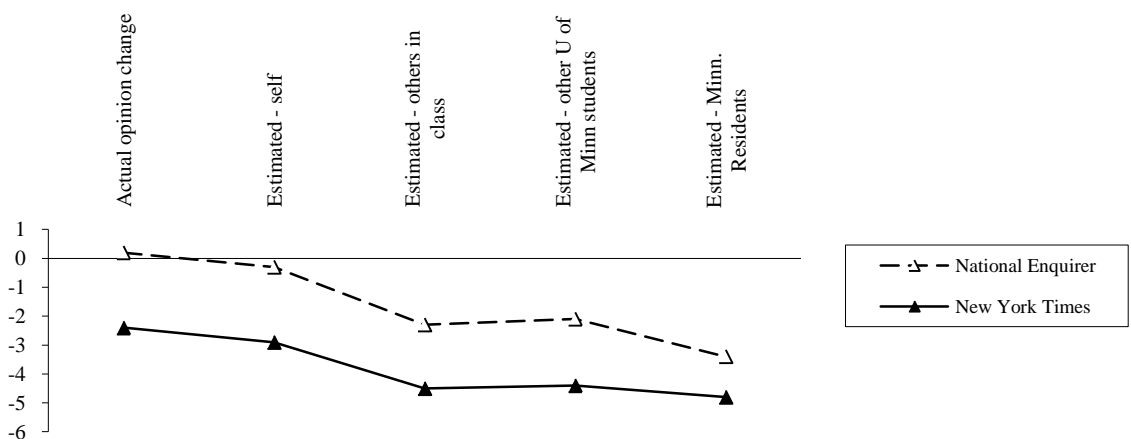


Figure 6: Gunther's experiment: mean opinion change scores (actual and perceived)



The question then arises: do people tend to underestimate the impact of defamatory material on themselves or overestimate its effect on others? Gunther hypothesised that the latter was the case and found his hypothesis supported, even when the ‘others’ were the respondents’ classmates and so likely to be considered by subjects to be similar to themselves. Using actual opinion change as a baseline, paired-samples *t* tests revealed that subjects substantially overestimated the negative effect on their classmates, whichever paper was presented as the source. Meanwhile, they did not misjudge their own opinion change to any significant degree.⁶⁴³

Even so, Cohen’s results are more equivocal. Cohen tested under- and overestimation of effects using orthogonal contrasts in a repeated measures analysis of variance. This suggested that in the case of the defamatory articles, students significantly underestimate effects on self when the cuttings were presented as though coming from positively biased or unnamed sources.⁶⁴⁴ However, they seemed to accurately predict influence on other Stanford students, assuming that the actual opinion change registered for the sample would reflect that which would exist throughout the population of Stanford students. When it came to the articles presented as though from a negatively biased source, students appeared to significantly overestimate the effect on others, even when those ‘others’ are fellow Stanford students.⁶⁴⁵ It appears from these findings that the third-person effect reflects some underestimation of message impact on self as well as overestimation of effect on others.

The distance hypothesis – results

Cohen and Gunther had predicted that the third-person effect will grow as the third person group appears increasingly remote from the first person. Both researchers found a significant trend of progressively greater estimated change as the third person group became more broadly defined.⁶⁴⁶ This is corroborated by research conducted among students at Kwangju University in Korea, where 22% expected other Kwangju University students to be more affected, 38% expected ‘citizens of Kwangju’ city to be more affected and 55% expected the ‘general public living outside Kwangju’ to be more affected.⁶⁴⁷

⁶⁴³ Ibid 366.

⁶⁴⁴ $F(1,64) = 9.69, p < .01$.

⁶⁴⁵ $F(1,32) = 6.28, p < .05$.

⁶⁴⁶ For Cohen’s experiment, $F(1,63) = 33.45, p < .001$.

⁶⁴⁷ Y Kim, J Ahn and J Song, ‘Perceived Media Influence on Self and Others on a Controversial Issue’, paper presented at the meeting of the International Communication Association, Chicago, May 1991, unseen, cited in Dominic L Lasorsa ‘Policymakers and the Third-Person Effect’ in J David Kennamer (ed), *Public Opinion, The Press and Public Policy* (1992) 163, 170.

The bias hypothesis - results

Cohen predicted that perceived bias would magnify the third-person effect by diminishing estimates of impact on self but magnifying perceptions of impact on others. To test whether this was so, Cohen combined the three third-person groups into one. Using a two-factor analysis of variance with one within-subjects and one between-subjects factor, the hypothesised transverse interaction proved statistically significant. This suggests that when the defamatory article appears to come from a positively biased source, it is perceived to have greater impact on the self than when it is published by a negatively biased source. On the other hand, defamatory material from a negatively biased source seems to be perceived to affect the minds of others more than the self. This phenomenon might be crudely encapsulated in the following maxim: 'if material is defamatory and comes from a source that favours the defamed then *I* will believe it, whereas if the source is antithetical to the defamed then *they* will believe it'.⁶⁴⁸

Gunther had similar ideas to Cohen about the relationship between perceived bias and perceived impact on others. He had hypothesised that as the apparent distance between the subject and the third-person group grows, the difference between the perceived impact on others of trustworthy versus untrustworthy sources will diminish. Or, put more simply (but less precisely), others will be seen as gullible when it comes to unreliable news sources, particularly when those others appear distinct from the respondent. This hypothesis was found to be supported, as can be seen graphically in Figure 6 above, where the two lines converge towards the right of the graph.

Gunther concluded that subjects seem to think that, in contrast to themselves, it is not so much a case of others being more influenced by reliable media sources as more credulous toward unreliable sources:

This interaction is consistent with the judgment bias in attribution theory - subjects' assumption that others do not take sufficient account of situational factors such as source intention ... [I]t is striking that subjects should say this even about others in the same class, others who are quite similar to themselves.⁶⁴⁹

⁶⁴⁸ Overall, it was noted by Cohen that his hypothesis were less strongly supported by the article concerning the coach than the one about the Chief Justice. He suggests this may be due to people seeing what was intended to be understood as the positively biased source (the coach's home college newspaper) as negatively biased, albeit less so than the rival college's paper. Cohen concludes that it 'may be that readers simply equate a clearly negative treatment in an article with negative bias'. This conclusion is supported by the fact that the defamatory articles from unnamed papers were still rated as moderately negative in their bias.

⁶⁴⁹ Gunther, 'What We Think Others Think: Cause and Consequence in the Third-Person Effect', above n 606, 368.

Behavioural outcomes - results

Gunther suggested that those who displayed a particularly large third-person effect would be most likely to perceive harm to have occurred to the subject of the negative news story. Even so, first-order correlations, controlling for estimated effect on self did not support this hypothesis, either for the *National Enquirer* or the *New York Times*.

In addition, there were no significant first-order correlation between the magnitude of perceived self-other difference (third-person effect size) and the amount of money that respondents thought should be awarded if the allegations turned out to be false, whether to compensate the plaintiff or punish the defendant. Even so, Gunther thought it premature to discount the behavioural component of the third-person hypothesis, pointing to various factors, including his small sample size.

MASON'S SURVEY

Cohen and Gunther's experiments involved the media reporting certain allegations first hand. The point that interested Laurie Mason when she conducted her experiment two years after Gunther's was that in defamation law the media can be liable for simply relaying the defamatory utterances of others.⁶⁵⁰ She was also interested in the assumption that an allegation in a newspaper will inflict more damage to a person's reputation than if it is communicated by word of mouth. As she pointed out, 'jurors and judges may even follow common-law wisdom about the magical power of the printed word and come down harder on the re-publisher of the defamation than on the person who first uttered the damaging words'.⁶⁵¹ Pointing to conflicting research relating to the comparative impact of interpersonal and mass media messages, Mason sought to compare the third-person effect of the original communication of a message, which may be fixed or transient, mass or interpersonal, with that arising from its republication, that is the delivery of the original message as a quotation through any medium.⁶⁵²

The subjects for Mason's experiment, conducted in 1990, were 79 jurors in Santa Clara County Superior Court, California, intended to be representative of adults available for jury duty. For the study, four scenarios were created and put to each interviewee. Each scenario involved the subject being presented with two alternative explanations for a phenomenon. For instance, in the first scenario the subject was asked to imagine approaching a table where several people are

⁶⁵⁰ Laurie Mason, 'Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect' (Autumn 1995) 72(3) *Journalism and Mass Communication Quarterly* 610.

⁶⁵¹ Ibid.

⁶⁵² Mason, above n 650, 611.

playing poker, whereupon someone turns to the subject and suggests that one of the players ‘has either been extremely lucky tonight or he has been cheating’.⁶⁵³

As jurors were released from trials or from jury duty at the end of a week, they were handed a questionnaire to complete. Each questionnaire contained all four scenarios (randomly ordered), but in the case of each scenario a respondent might either be presented with the scenario simply described, or with a fabricated newspaper clipping, relating the scenario but presenting it as a media report. For instance, in the case of the first scenario, the respondent would be presented with the following:

You read a newspaper article that begins as follows: At a recent poker game, John Smith was overheard to say that Phil Clark, “has either been extremely lucky tonight or he has been cheating.”

Respondents were asked to say whether they believed the negative alternative (in this case that the player, called Phil Clark in the fabricated newspaper report, has cheated) and whether ‘another person filling out this questionnaire’ would believe the negative alternative. They were given a yes/no choice and the order of the two questions was varied between (but not within) questionnaires.

Mason’s methodology is based on the premise that ‘[e]quivocal answers that could imply the negative are typically taken by receivers to be polite efforts to say something harsh in a nice way’.⁶⁵⁴ Effectively, therefore, the respondents are being asked whether they and others would believe an allegation, however equivocally expressed, that, for instance, Phil Clark has cheated at cards.

All scenarios supported the premise that defamatory allegations are less likely to be believed when originally communicated face-to-face than when repeated in print, although the difference between the two presentations was significant in the case of only two scenarios.⁶⁵⁵

A clear third-person effect was found in relation to all four scenarios.⁶⁵⁶ Mason then sought to test her hypothesis that respondents were more likely to see others as persuaded by a message

⁶⁵³ Scenario 2 involves the subject in line at an out-of-town convention behind a married man called Ralph and an attractive woman. Another man taps the subject’s shoulder and indicating Ralph says ‘Ralph is either a dedicated researcher, or he’s having an affair with Marcie’. Scenario 3 involves the subject admiring a new invention at a trade show when a man says to the subject that the inventor is ‘either a genius or he stole someone’s design’. In Scenario 4 the subject joins friends at a restaurant. A male friend then points to the next table at Hal and says to the subject ‘Hal’s wife was either in a terrible accident or he beat her up’.

⁶⁵⁴ Mason, above n 650, 613.

⁶⁵⁵ Scenario 2: $p < .001$; Scenario 4: $p < .05$.

conveyed in a newspaper than one conveyed in face-to-face conversation. She found her hypothesis supported in all scenarios, although in the case of Scenario 1 the perceived difference in the effect on others between the newspaper and the original message was not significant.⁶⁵⁷

Finally, Mason sought to test her hypothesis that re-publication enhances the third-person effect, meaning that subjects are more susceptible to the third-person effect when considering a newspaper report than when thinking about the impact of interpersonal communication. Mason found a significantly greater third-person effect in relation to just one scenario. Mason ascribed the failure of two scenarios to support her hypothesis to the unusually high number of respondents who chose the defamatory allegation when it was presented as coming from a newspaper. She thought the two stories in question, which concerned adultery and wife-beating, to be best suited for a tabloid gossip column.

SUMMARY OF FINDINGS RE THIRD-PERSON EFFECT AND DEFAMATION

The most basic aim of all three experiments outlined above was to measure the extent to which the third-person effect operated when it came to perceptions of damage to reputation arising from potentially defamatory allegations. A third-person effect was perceived in the case of all seven of the defamatory or potentially defamatory allegations used by the researchers.

Table 28: Gunther's survey: proportion of subjects perceiving themselves to be more, less or equally influenced by the report compared with others

<i>Perception</i>	<i>New York Times</i>	<i>National Enquirer</i>	<i>Mean for two publications</i>
<i>Less influence on self than others in class (third-person effect)</i>	58%	66%	62%
<i>Equal influence on self and others in class</i>	30%	27%	29%
<i>More influence on self than others in class (reverse third-person effect)</i>	12%	7%	10%

Cohen does not state what proportion of respondents displayed the third-person effect, but Gunther and Mason do. Table 28 above gives the proportions of Gunther's subjects in relation

⁶⁵⁶ $P < .0001$ in all four scenarios.

⁶⁵⁷ Scenario 1: $p = .09$.

to whether they saw the influence of the articles on themselves as compared to others in their student class as less, more or equal.⁶⁵⁸

As for Mason's jurors, Table 29 below shows the extent to which they proved susceptible to the third-person effect. As can be seen, most respondents who display the effect will not do so consistently.

Fewer of Mason's respondents show the effect, but care must be taken when comparing survey results. In Gunther's experiment, respondents were asked to rate their own and others' reactions on a 19-point scale. Mason, on the other hand, gave respondents only two choices as to whether they or others would believe the negative alternative about the subject of the imputation: yes or no. Consequently there was far less scope for fine distinctions to be drawn between first and third person reactions, thus reducing the scope for the third-person effect.

Table 29: Mason's survey: number and proportions of subjects showing the third-person effect

	<i>No. (and %) of subjects</i>
<i>Subjects displaying the third-person effect for all four scenarios</i>	7 (9%)
<i>Subjects displaying the third-person effect for at least three scenarios</i>	12 (15%)
<i>Subjects displaying the third-person effect for at least two scenarios</i>	23 (29%)
<i>Subjects displaying the third-person effect for at least one scenario</i>	34 (43%)
<i>Subjects displaying the third-person effect for none of the four scenarios</i>	43 (54%)
<i>Subjects displaying <u>reverse</u> third-person effect for one or more scenarios</i>	2 (3%)

Even so, it is interesting to note that the mean finding for the two experiments conducted by Gunther and Mason as regards the proportion of subjects who display the effect is 53%, strikingly consistent with Lasorsa's review of literature relating to the phenomenon, which found that the overall finding of surveys and experiments was that around 50% are susceptible to the effect in any given study.⁶⁵⁹ Similarly, the reverse third-person effect is displayed in Gunther's and Mason's surveys by a typically small minority.

⁶⁵⁸ Similar information is not given for comparisons with the other two third-person groups asked about in Gunther's experiment.

⁶⁵⁹ Lasorsa, 'Policymakers and the Third-Person Effect', above n 647, 169.

EVALUATING PRECEDING RESEARCH ON THE THIRD-PERSON EFFECT AND DEFAMATION

Although the precise aims and methods of the three experiments vary, they relate to one common issue: the relationship between the third-person effect and perceptions of message credibility. Thus Gunther contrasts one of America's most respected news sources with one of its least, Mason compares print with interpersonal communication and Cohen relates the third-person effect to perceptions of bias, which are in turn likely to affect perceptions of message reliability. Clearly what motivated all three surveys was the hypothesis that the third-person effect derives from a perception on the part of individuals that others are more likely than they are to believe the media. Assuming that individuals see themselves as putting just the right amount of faith in the media, this must mean that others are understood to be, in one way or another, gullible.

Gullibility is an attribute few would wish to identify with, but Gunther rejects the idea that the third-person effect is an instance of 'disowning projection', which occurs when people indirectly exhibit their own socially undesirable qualities by projecting them onto others. This is because in his survey subjects assessed the influence of the reports on themselves relatively accurately, while tending to overestimate that on others.⁶⁶⁰ Instead, Gunther accounts for the third-person effect, especially the credulity perceived on the part of others when it comes to the *National Enquirer*, as 'consistent with the judgment bias in attribution theory - subjects' assumption that others do not take sufficient account of situational factors such as source intention'.⁶⁶¹

Whatever the explanation for the tendency to see others as more easily misled by the media than the self, a principal shortcoming of all three research projects is that they exaggerate the role in defamation litigation of perceptions of audience gullibility. Defamation law and procedure are such that judges and jurors are unlikely to interpret their function as arbiter of whether the ordinary reasonable person would have believed whatever allegation has given rise to the litigation.

For a start, it behoves neither party to argue that the imputation would not be believed, the plaintiffs because they want to establish harm and the defendants, particularly media defendants, because it is not easy for a media organisation to argue that its publications are widely regarded as untrustworthy, particularly when it may have to go on to present itself as a responsible

⁶⁶⁰ Gunther, 'What we Think Others Think: Cause and Consequence in the Third-Person Effect', above n 606, 368.

⁶⁶¹ Ibid.

broadcaster or publisher in order to prove truth or take advantage of some form of privilege or comment defence.

Note that credibility needs to be distinguished from the issue of meaning as generally understood in defamation law. Particularly in the case of satire, publishers will frequently argue that the audience will recognise irony, sarcasm or hyperbole. In that sense it is argued that literal meanings will not be ‘believed’. Similarly, when creators of fiction are sued over some alleged allusion to the plaintiff, there will often be argument as to how an audience would distinguish between the work’s imaginary components and what it has to say about real life. But in neither case is credibility in issue: novelists and satirists number among the most celebrated commentators on the world.

Secondly, the common law test speaks of establishing whether a publication is ‘calculated’ to have damaged reputation. This term is misleading, at least to the lay person, since what is being asked is not the intention of the publisher. But neither is it whether reputation has been, or is even likely to have been damaged. A publisher cannot defend itself on the basis of evidence that no one who saw or was ever likely to see the publication would have believed it, even if they felt it expedient to do so. Defamation litigation proceeds on the basis of certain irrebuttable presumptions: not only that at least one ordinary reasonable person saw or heard the publication (otherwise why ask what ordinary reasonable people would make of it?) but also that at least one ordinary reasonable person *believed* whatever defamatory imputations it conveyed. It is mistaken, therefore, to concentrate research efforts on establishing whether perceptions of credulity on the part of others increases or decreases the third-person effect. Other questions need asking first.

DENOTATIVE VERSUS CONNOTATIVE MEANING

Earlier I identified denotative meaning as the information the publication purports to convey about plaintiffs, particularly in terms of their motives and actions.⁶⁶² Denotative meaning is never determined by perceptions of publisher credibility: if the *National Enquirer* calls someone a thief then, putting aside any argument such as that the paper would be considered satirical, that person has been accused of theft just as much as if the words had appeared in a more reliable organ such as the *New York Times*. That much is likely to be clear to the judge as well as the well-directed jury.

⁶⁶² See page 6 above.

I have also suggested the concept of *connotative* meaning: the evaluation by a message's audience of a person's moral character, based on the message's denotative meaning. Thus the denotative meaning might be that P is a liar, while the connotative meaning might be that P is therefore unworthy of our respect.

Once defamation proceedings are understood in terms of deciding denotative and connotative meaning, at least three shortcomings emerge from the preceding research. First, the experiments do not sufficiently demonstrate how the third-person effect might play a role in determining these two discrete meanings. Secondly, the preceding research might falsely present the third-person effect as predictable in its strength and direction, masking its potential to favour not only plaintiffs but even defendants. And thirdly, the possibility arises that it may be mistaken to characterise the third-person effect as related to perceptions of intellectual, as opposed to moral, shortcomings in others. Put differently, previous researchers tended to assume that people see others as failing to appreciate the limits of what the media can teach us about the thoughts and deeds of those they write about. But it may be more a case of seeing others as unable to properly assess a person's moral worth, even after the latter person's actions and motivations become known.

THE THIRD PERSON EFFECT AND DENOTATIVE MEANING

To explore the basis for these claims, I refer back to the discussion in preceding chapters relating to the meaning of 'reasonable' as a quality of the ordinary reasonable person, and the (somewhat artificial) division between 'reasonable' as 'rational', as opposed to 'reasonable' as 'moral' or 'ethical'. Both rationality and morality could be characterised (albeit unsatisfactorily) as two spheres of what might more broadly be termed *intelligence*. The ability to distinguish a good from a bad person might be termed an attribute of 'moral intelligence', while being able to correctly decide whether to believe or reject a message calls for some rational thinking. In the context of defamation law, this particular facet of intelligence ranks as relatively unimportant, particularly when compared to other aspects of intelligence that together determine a person's interpretation of a text's denotative meaning, such as the breadth of that person's vocabulary, familiarity with media conventions and genre, the ability to see fire where there is smoke, and so on. Collectively, these might be termed textual analysis skills.

There is infinite scope for experiments that measure the third-person effect in the context of textual analysis. For instance, respondents could be asked to identify whether a particular piece of writing has ironic intent, as well as whether others would identify irony. But little is revealed about these aspects of the third-person effect by the preceding experiments. Cohen and Gunther

do not even present the text of the hypothetical publications read by respondents. Instead they interpret their denotative meanings (eg that the judge was corrupt, the chief of police had contradicted his normal position on gun control, etc) as though each is a given.

Similarly, textual interpretation plays little part in Mason's survey, with the respondents' understanding of the equivocal explanations for the hypothetical scenario presented them (as 'polite efforts to say something harsh in a nice way') being supplied by the researchers rather than sought in the questions posed to subjects. Thus the subjects are asked which of the alternative explanations should be believed, rather than what the equivocation actually means. There are numerous interpretations open to someone confronted with the statement 'Hal's wife was either in a terrible accident or he beat her up', besides that this is a polite way of suggesting that Hal is a wife beater. It could be that the person making the statement is suggesting that the injuries provide reasonable grounds for suspecting Hal of assault, while leaving open the possibility that they result from an accident. To suggest that the imputation of assault has to be wholly accepted or rejected does not reflect the nuanced nature of such a communication, nor the way in which defamation pleadings would treat those nuances.

THE THIRD-PERSON EFFECT AND CONNOTATIVE MEANING

In addition to surveys relating to denotative meaning and textual interpretation, there is vast scope to explore the third-person effect in the context of *connotative* meaning. By characterising the third-person effect in terms of a tendency to perceive others as guileless, Gunther, Cohen and Mason have failed to fully explore the potential for the third-person effect to distort the effects of potentially defamatory material.

The weakness in their research is that no attempt is made to separate out two separate issues: perceptions of how audience decide what to believe, and perceptions of how audiences judge moral character. The problem lies partly in the choice of text employed in the surveys. These have been deliberately chosen to convey imputations in relation to which there will be minimal disagreement in terms of what is right or wrong. Thus we have the harmful (corruption, wife beating, etc) and the harmless (attending a bar conference, and so on). The researchers assume, reasonably enough, that respondents will disapprove of judicial corruption. In turn, respondents also assume, again perfectly sensibly, that respondents will perceive others as sharing their disapproval. Accordingly, there is little scope for the third-person effect to arise from a perceived difference between the first and third persons in terms of moral values, since the values of the first-person group and the perceived values of the third-person group in relation to the imputed conduct are likely to more or less accord.

What is not explored is whether the third-person effect arises not because the third person is seen as gullible, but because that person is perceived as overly censorious. This would have been more apparent if the judge had been accused of behaviour that meets neither widespread approbation nor universal condemnation. For instance, if it had been reported that the judge had attended a lesbian and gay parade then the results may have been far more interesting.

The problem is particularly evident in Mason's research. She attributes a perception that the third person group would believe the negative interpretation of conduct (for instance that a man cheated at cards rather than enjoyed good fortune) as a perception that the media has had a greater influence on the third person group, in other words that they were sucked in. But if the third person group were perceived as gullible, then it would seem just as likely that they would be fooled into believing that the media were suggesting luck, not fraud. There is no need to presume that 'media manipulation' is always about getting readers to think the worst, rather than best, about those who feature in media reports.

A more plausible explanation for why an audience is seen as more likely to believe negative rather than positive press is not that they are regarded as easily fooled but that they are thought to be overly suspicious, to lack fairmindedness. These are moral rather than intellectual shortcomings. To believe, on the sole basis of a highly equivocal message, that a man has cheated at cards is certainly to condemn him on the scantiest of evidence. Undesirable though naivety may be, being of uncharitable disposition is surely worse. From Matthew onwards we have been reminded to seek out the good in others, to avoid being too quick to judge.⁶⁶³ Indeed, the biblical injunction against judgmentalism could be seen as a warning against what Gunther identifies as the source of the third-person effect, the 'judgment bias in attribution theory', meaning the tendency to see others' failings as due to deficiencies in their character, rather than arising from situational factors over which they have little or no control.⁶⁶⁴ If the third-person effect arises because we are too quick to judge, then perhaps one of the hasty judgments we reach is that others are too quick to judge.

Unexplored, then, is the hypothesis that the third-person effect derives not just from a tendency to see others as easy prey to media manipulation. The effect may arise from a perception of

⁶⁶³ Matthew 7:1-2 (King James version): 'Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again'.

⁶⁶⁴ See above page 284.

those around us mean-spirited moralisers, with the censoriousness of the pedant, the self-righteousness of the prude or the captiousness of the shrew.⁶⁶⁵

If this hypothesis holds then the perception of the third person by the respondents in the above surveys is more complex than the experimenters suggest. The third-person group, whether it consists of ‘other Californians’, Minnesota residents or others filling out the same questionnaire, might be perceived as almost childlike innocents in the face of a manipulative press. But they might also represent judgmental prigs. In both cases the third-person group will be ‘mistaken’ in its response to the media, but the latter mistake goes to the group’s ethics. In that case, the potential for the third-person effect to influence defamation proceedings is even greater than that suggested by preceding research.

First, publications may be considered defamatory even though they cause little or no damage to reputation, because the publication’s readership are seen as gullible and judgmental when in fact they are not. Secondly, if others are seen as quick to condemn and slow to acquit, then positive reports (which might include retractions of or apologies for previous defamatory reports) will be perceived to have little effect on salvaging reputation relative to the harm already done. Thirdly, as established by Mason, reports which are ambiguous or equivocal as regards a person’s culpability will be considered to convey to others the fact of that person’s guilt, even though the first-person group may be fully aware of the reports’ ambiguities and equivocations. Finally (and this was not established by the previous researchers), reports which suggest no moral shortcoming in the eyes of those who see them might nevertheless be thought to attract censure when viewed by others, even when those others are thought to share the respondent’s views in terms of the conduct or motives the publication imputes, and whether it is appropriate to give the publication credence.

POTENTIAL AVENUES FOR RESEARCH

In order to explore the various questions raised above, several research strategies need implementing. The first is to design surveys that, as much as possible, separate denotative from connotative meaning. For instance, to measure the first, respondents might be asked ‘what does this statement mean to you, as well as to others?’ In relation to the second, the questions might be phrased ‘would this statement make you / others think less of its subject?’, since what matters is not what the report imputes precisely, but whether it harms reputation.

⁶⁶⁵ It is interesting to note that this moral transgression, like many others, has come to be identified as pertaining to women more than to men.

To research the third-person effect and denotative meaning, it seems sensible to choose text that contains some particular ambiguity. Since perceptions of message credibility are now of limited interest, the message source need no longer be manipulated. To take an example, it might be more fruitful to compare actual and perceived responses to allegorical writing, the enquiry being whether the allegory is understood, as well as perceived to be understood by others. When it comes to the third-person effect and connotative meaning, it would be interesting to select texts where the uncertainty lies less in relation to what conduct is imputed, but more in the propriety of that conduct: text that imputes some act or condition over which people divide in terms of whether it is right or wrong.

THE NDRP RESEARCH

Bearing in mind the foregoing guidelines, the NDRP conducted two separate quantitative surveys in order to explore the third-person effect further. The first constituted a relatively small-scale survey designed to examine the third-person effect in the context of denotative interpretation. Given the limits on the project's resources, this was conducted among undergraduate students. For convenience, this will be referred to as the 'student survey'. The second survey was intended to look at the third-person effect and connotative interpretation. This formed part of the larger-scale phone survey, results from which were examined in Chapter Six.

THE STUDENT SURVEY

METHODOLOGY

As mentioned above, this survey was intended to examine the role of the third-person effect in the context of denotative interpretation. In order to isolate denotative from connotative interpretation as much as possible, it was helpful to centre the survey around conduct which almost everyone would consider wrong. The sexual abuse of school pupils by a teacher seemed an ideal subject matter. Since this was a study in denotative meaning, it was also important that the chosen text should be relatively ambiguous. Therefore a text was chosen that does not make it entirely clear whether the teacher in question is guilty of abuse, or is simply under investigation in relation to the same. Since perceived credulity was not considered relevant, message source was not a manipulated variable. Indeed the *Sydney Morning Herald* was chosen, an upmarket broadsheet which, it was thought, would be considered relatively credible.

Indeed, a report of a police investigation into alleged wrongdoing was an easy choice. Such stories regularly present defamation problems for the media, particularly because of the risk that the report will be taken to suggest that the suspicions that gave rise to the investigation are well-founded. This is a real danger for the media, given that the burden of proving that a published allegation is true rests with the publisher. If challenged about a report relating to police charges, a media organisation's lawyers will typically seek to argue that the report conveys no more than that there are reasonable grounds to suspect the accused party of the offence in question, since this is likely to be relatively easy to prove. Meanwhile the plaintiff may claim that the publication imputes actual guilt, thus increasing the publisher's burden of proof.

Plaintiffs who mount such an argument face a legal obstacle. Reports of police investigations constitute one area of journalism where the judiciary has departed from its general policy of not stipulating specific guidelines as to how the ordinary reasonable person interprets the media. According to judicial decisions, a report that a person has been charged with an offence does not in itself convey to the ordinary reasonable reader that the person is in fact guilty of that offence.⁶⁶⁶ Even so, it may convey that there are reasonable grounds to believe that that person is guilty, a less serious (albeit still defamatory) imputation. As well as investigating the third-person effect, this survey presents an opportunity to explore whether the law correctly understands how people read reports of police investigations.

The student survey was conducted at the start of a number of undergraduate classes relating to defamation law during the period from late 2003 to early 2005. Most of the classes consisted of students from the University of New South Wales in Sydney, but a small number came from Victoria University in Melbourne and the University of Sydney. Of the 300 students surveyed, 43% were studying towards a degree in law, while the remainder were from a wide range of other disciplines.⁶⁶⁷ In all cases the surveys were conducted prior to any coursework or teaching relating to defamation law.

Respondents were asked to read an imaginary newspaper article, although they were told it was taken from the *Sydney Morning Herald*. Having read the article, students were asked to choose which of five statements best captured what the newspaper is saying in relation to someone referred to in the article. Respondents were then asked to choose which of the same five

⁶⁶⁶ *Lewis v Daily Telegraph Ltd* [1964] AC 234, followed in *Mirror Newspapers v Harrison* (1982) 149 CLR 293.

⁶⁶⁷ The full breakdown as regards student institution and discipline is as follows: UNSW law students 130 (43%), UNSW non-law students 108 (36%), University of Sydney non-law students (11%), Victoria University non-law students (10%).

statements reflects what they think the ordinary reasonable person would understand the newspaper to be saying in relation to that man.

The text of the article, which can be found at Appendix IV, reported that two male school teachers had been charged with sexual offences against school students.⁶⁶⁸ The five possible interpretations of the article from which respondents were asked to choose imputed various degrees of guilt to one of the two teachers, ranging from an imputation that he had probably been wrongly charged, through to the suggestion that there is every reason to think that he is guilty. The five statements were presented in order depending on how defamatory I considered them to be, with Statement 1 being the least defamatory (that he has probably been wrongly charged) and Statement 5 the most (that there is every reason to consider him guilty). A list of these statements can be found in Appendix V.⁶⁶⁹

In order to compare the survey's findings with the actual operation of defamation law, the text of the hypothetical article very closely followed the wording of a real report that appeared in the *Sydney Morning Herald* in 1992 and which gave rise to defamation proceedings in the NSW Supreme Court in 1994. That report had also accused two male schoolteachers of sexual offences against their students. Apparently the charges against at least one of the men were later dropped and he commenced defamation proceedings against that paper.⁶⁷⁰ The version of the story used for the student survey was not significantly different from the original article, although names were changed and the school moved to a different part of Sydney to avoid identification.⁶⁷¹

Special efforts were made to keep survey conditions consistent. At the outset it was stressed to all participants that their participation was voluntary. They were also assured anonymity. Subjects were then given a questionnaire. On page one was the article, which participants were told was taken from the *Sydney Morning Herald*. They were then asked to read the piece as they might an article they had found in that paper and which they found interesting. They were also requested not to turn the page to preview the forthcoming questions. Respondents were given what was felt to be enough time to read the article fairly carefully, but not enough time for its

⁶⁶⁸ See page 373 below.

⁶⁶⁹ See page 375 below.

⁶⁷⁰ *Rigby v John Fairfax Group Pty Ltd* [1996] NSWCA (unreported, Kirby P, Priestley and Meagher JJA, 1 February 1996).

⁶⁷¹ Two other minor changes were made. The original article had referred to 'a police investigation that covered allegations stretching back to 1983', nine years before the article's publication. To make the article relevant to the time of the survey, this was altered to 'a police investigation that covered allegations stretching back nine years'. For the same reason, a reference in the original to the men answering the charges 'in (sic) March 19' was changed to answering the charges 'later this month' (the article having been published on 4 March 1992).

prolonged study. They were then asked to turn the page, where they were given one of the following instructions, depending on which version of the questionnaire the student had been allocated:

Below are five statements. Tick the box next to the statement which best summarises what you think the newspaper is saying. *Choose only one statement.*

Below are five statements. Tick the box next to the statement which best summarises what you think the ordinary reasonable person would understand the newspaper to be saying. *Choose only one statement.*

Half of the students were presented with the first instruction, while half were given the second, students being randomly allocated one or other version of the questionnaire. The instruction was deliberately worded so as to ask what the newspaper was saying or would be understood to be saying, rather than the extent to which the article might be believed, or even the extent to which it might affect reputation. In answering the question, students were asked not to look back at the article.

The real name of the teacher who had been referred to in the actual article and who had sued the paper's publisher in defamation was Rigby. In order to hide his identity from the survey respondents he was renamed Stephen Massey in the article as presented to them. After the above instruction the following statements were listed in this order (the numbering being added subsequently):

1. The Police have charged Massey with a sexual offence, but it is unlikely that they had reasonable grounds for doing so. It is unlikely that Massey is guilty.
2. The Police have charged Massey with a sexual offence. We are not saying whether they had reasonable grounds for doing so or not, nor are we saying whether Massey is guilty or innocent.
3. The Police have charged Massey with a sexual offence and they probably had reasonable grounds for doing so. Even so, it does not necessarily follow that he is guilty. We are not saying whether Massey is innocent or guilty.
4. The Police have charged Massey with a sexual offence and they probably had reasonable grounds for doing so. Massey is probably guilty.
5. The Police have charged Massey with a sexual offence and definitely had reasonable grounds for doing so. There is every reason to think that he is guilty.

Each of these five possible interpretations is more defamatory than those preceding it, in that they progressively implicate the teacher. Participants were asked to tick the statement which best answered the question that had been put to them. They were instructed not to turn the page to the next question until this part of the exercise had been completed. When they did turn the page, they were met with whichever of the above instructions they had *not* already been given,

so that students who had already answered as to what they thought the newspaper was saying were now asked how they thought the ordinary reasonable person would understand the article, and *vice versa*. The same five statements were then presented, it being pointed out to the students that they were identical to the ones they had already read and that they were in the same order.

Before considering the results, it is interesting to examine what transpired when Rigby, the teacher who sued over the virtually identical article that appeared in the *Sydney Morning Herald*, brought his case before the NSW Supreme Court. He had claimed that the article conveyed various imputations about him, one of which was to the effect that he had so conducted himself to reasonably warrant the suspicion of police that he was guilty of a sexual offence, while another was that he was in fact guilty of sexually assaulting several schoolchildren. In response, the newspaper applied to Levine J for an order that the article was not reasonably capable of carrying any of the imputations pleaded by the plaintiff.

The paper relied on the leading case on this issue, the High Court decision in *Mirror Newspapers Ltd v Harrison*.⁶⁷² That case had dealt with a newspaper report that four people had been arrested following an assault on State Labour MP Peter Baldwin. The arrests were said to have followed a month of 'intensive investigation by a special squad of detectives' who had 'worked around the clock to fulfil a directive from the Deputy Premier, Mr Ferguson, that the culprits be found'.⁶⁷³ The article continued that those arrested were expected to appear in court later that day amidst tight security, to be charged with conspiracy and fraud. The plaintiff had claimed that the article meant he was guilty of being directly or indirectly involved in Mr Baldwin's bashing. He lost at first instance, but successfully appealed to the Court of Appeal. The newspaper then appealed to the High Court.

In the principal opinion of that court, Mason J saw a strong current of authority supporting the view that a report which does no more than state that a person has been arrested and charged with a criminal offence is incapable of bearing the imputation that he is guilty, or probably guilty, of that offence. Those decisions he thought were soundly based:

The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with a criminal offence are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted.

⁶⁷² (1982) 149 CLR 293.

⁶⁷³ The facts are set out by the judge at first instance in *Mirror Newspapers Ltd v Harrison*, Hunt J at (1981) 1 NSWLR 628.

In this situation the reader will view the plaintiff with suspicion, concluding that he is a person suspected by the police of having committed the offence and that they have ground for laying a charge against him. But this does not warrant the conclusion that by reporting the fact of arrest and charge a newspaper is imputing that the person concerned is guilty. A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. It is one thing to say that a statement is capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first, not by the second, proposition. Its importance for present purposes is that it focuses attention on what is conveyed by the published material in the mind of the ordinary reasonable reader.⁶⁷⁴

Applying this decision, Levine J in *Rigby v John Fairfax* found against the teacher and for the *Sydney Morning Herald*. The teacher then appealed to the Court of Appeal, where Priestley JA, considering the above passage from Mason J, thought that the judge had been careful to make clear that what he was saying applied only to a publication which stated that a person had been arrested and charged and no more.⁶⁷⁵ If an article went on to say or suggest that the charge was well founded then that would be a different matter.

Priestley JA pointed out that in the case of the article about the teacher, apart from mentioning the charge against him, the publication reported the following facts:

1. the allegations stretched back nine years from the date of publication;
2. there had been a lengthy investigation by a police child-mistreatment unit;
3. there had been complaints from several students;
4. the plaintiff had been transferred from a boys' to a girls' school after the allegations were made, and
5. he had been suspended from teaching duties while the court case continued.

Priestley JA also thought that the article was capable of imputing that the plaintiff, at least in some matters, had 'been acting as one of "a pair" in the sexual assaults with the other man charged'. It seemed to Priestley JA that these features of the article had the effect of taking the publication beyond one that simply reports the making of a charge against the plaintiff into

⁶⁷⁴ *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293, 300-301.

⁶⁷⁵ *Rigby v John Fairfax Group Pty Ltd* [1996] NSWCA (unreported, Kirby P, Priestley and Meagher JJA, 1 February 1996). Meagher JA concurred with Priestley JA.

something reasonably capable of carrying the imputation that the plaintiff was in fact guilty. He ordered that it should be left to the jury to decide whether the article bore that meaning.

Kirby P agreed:

There may be reasons of legal policy, grounded in our history, past practice, modern communications technology and the open administration of justice, to exempt from liability in defamation the publication of the simple fact that a person named has been charged and brought before a court. But to say that, in every case, such information is incapable of bearing the imputation that the person charged is guilty or probably guilty of that offence is a conclusion which rests more on judicial thinking, lawyerly refinement and, perhaps, defence of open justice than it does upon a real description of what the average Australian citizen probably thinks when he or she reads, hears or sees a report of that fact.

If well informed about the justice system, with a lot of time to think about the matter, that citizen may indeed consider the legal presumption of innocence the instances of police and prosecution mistakes and the accused's chances of acquittal. But the citizen will also know that an expert professional police and prosecution service will ordinarily not cause a person to be charged unless they have what they feel is sufficient evidence to support proof of the charge, that the whole weight of the State is then pitched against the accused and that the overwhelming majority of people charged either plead guilty or are found guilty.

If the remedy in defamation is to redress harm actually done to the reputation of an individual (as distinct from only harm that should be done or that lawyers feel might be done) it would be left to the tribunal of fact in every case to decide what the ordinary reasonable reader, listener or viewer would understand to be the imputations of the matter published.

Kirby P thought it 'a trifle puzzling' that the article that gave rise to *Harrison* could ever be described as one that simply reported 'the fact of arrest and charge'. Indeed he pointed to the rule in many 'civilised countries' that, prior to conviction, suspects may only be identified by initials in any report of their arrest. 'Such societies', he added, 'put a greater store than we do upon defending the presumption of innocence and confining trials to courtrooms'.

Applying the 'rather unsatisfactory rules' to the article about the teachers, he agreed with Priestley JA that it went beyond a report that a person has been arrested and charged:

The more melodrama and sensation, or prejudicial comment, in a news report, the more ready will the court be to permit the plaintiff to plead an imputation of guilt. After all; this merely ensures that the tribunal of fact can then decide whether the available imputation is in fact established.⁶⁷⁶

In the event the case never reached trial, settling after mediation on confidential terms.

⁶⁷⁶ Ibid.

All of the factors identified by Priestley JA as rendering the article about the teachers capable of imputing their guilt are to be found in the virtually identical article used in the survey. Analysing the outcomes in *Rigby v John Fairfax* in terms of those various interpretations, it could be said that Levine J was effectively ruling that the article could not be interpreted by the ordinary reasonable person as meaning anything stronger than the third statement, which reads:

3. The Police have charged [the teacher] with a sexual offence and they probably had reasonable grounds for doing so. Even so, it does not necessarily follow that he is guilty. We are not saying whether [the teacher] is innocent or guilty.

The Court of Appeal, on the other hand, is suggesting that the article is capable of meaning in the eyes of the ordinary reasonable reader either of statements 4 or 5, namely:

4. The Police have charged [the teacher] with a sexual offence and they probably had reasonable grounds for doing so. [The teacher] is probably guilty.
5. The Police have charged [the teacher] with a sexual offence and definitely had reasonable grounds for doing so. There is every reason to think that he is guilty.

Indeed, I suggest that the Court of Appeal is doing something more than suggesting mere capacity to convey these meanings, given that Priestley JA refers to the factors he identifies as ‘taking the publication beyond one that reports the making of a charge’, together with Kirby P’s coded reference to the article as melodramatic.

RESULTS

In the absence of a jury outcome in *Rigby* it might be instructive to consider how 300 undergraduates responded to the article. For the purposes of Figure 7 and Figure 8 below the results for all respondents are combined, regardless of whether they were first asked for their own understanding of the article or for that of the ordinary reasonable person.

As indicated in Figure 7 below, when asked what the article meant to them, 55% selected Statement 3. This reflects the imputation which, according to *Harrison*, is conveyed by a publication that does no more than report that someone has been charged with an offence. A further 20% chose Statement 4 (that the teacher is probably guilty) and just 3% chose Statement 5 (that there is every reason to think that he is guilty). It seems that less than one quarter of students were likely to give the article the interpretation that the Court of Appeal thought the ordinary reasonable person could give it. Meanwhile, around the same proportion of students (22%) chose Statement 2, which is to the effect that the paper is not expressing any view on the teacher’s guilt or as to whether the police had even reasonable grounds for charging him. In summary, although 78% of students think the paper is suggesting that it is at least probable that

the police had reasonable grounds for charging the teacher and no student thought the article was saying that it is unlikely that the teacher is guilty, 76% did not think that it followed that the paper was suggesting that the teacher is probably guilty.

Figure 7: Proportion of students choosing each statement when asked which best summarises what they themselves think the newspaper is saying in relation to the teacher

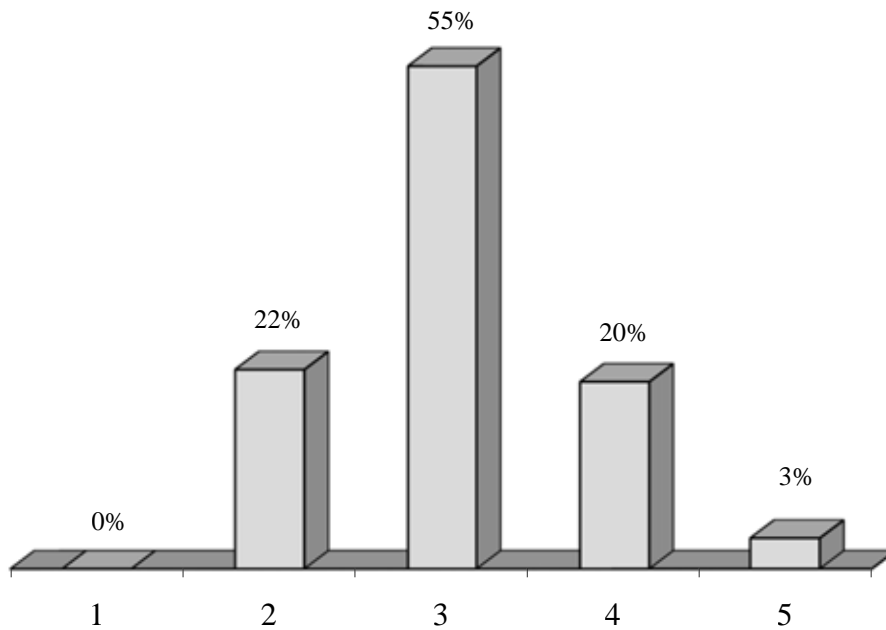
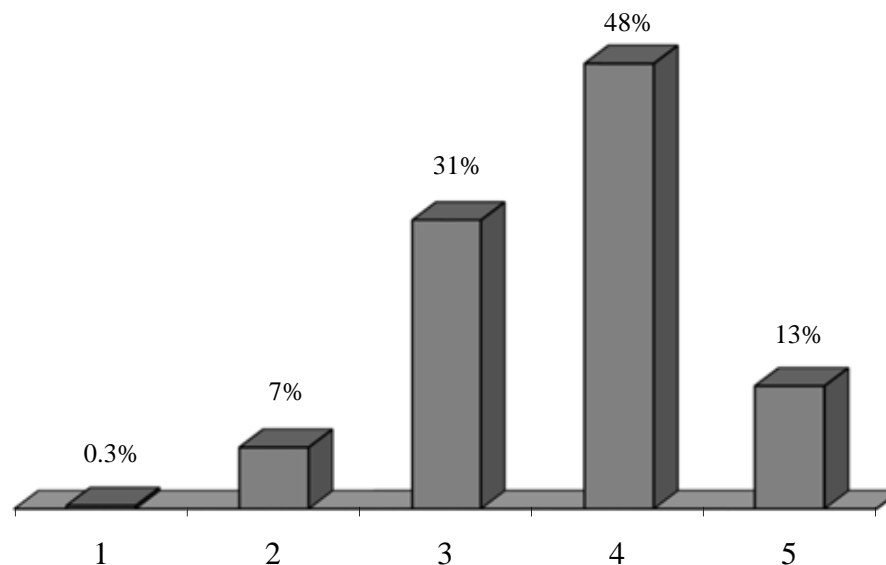


Figure 8: Proportion of students choosing each statement when asked what they think the 'ordinary reasonable person' would understand the newspaper to be saying about the same man



In stark contrast are the results of the question posed to students as to what they thought the ‘ordinary reasonable person’ would understand the newspaper to be saying. These are illustrated in Figure 8 above. The proportion choosing Statement 2 has now dropped from 22% to 7%, while that selecting Statement 3 has reduced from 55% to 31%. Instead, 48% chose Statement 4 (as opposed to 20% when first person views were canvassed) and 13% chose Statement 5. While 22% thought the paper was suggesting less than that the police were probably acting reasonably when charging the teacher, only 7% thought the ‘ordinary reasonable person’ would interpret the article in that way. Conversely, while 76% thought the article was *not* suggesting that the teacher was probably guilty, only 38% thought that that was how the ‘ordinary reasonable person’ would read the article, leaving 62% who thought that the ‘ordinary reasonable person’ would understand the article to impute probable guilt (as opposed to 24% when it came to first person views).

Table 30: Proportion of students displaying the third-person effect

<i>Order of questions relating to the report's interpretation by the respondent and the 'ordinary reasonable person' (ORP)</i>	Respondent first, ORP second	ORP first, respondent second	All respondents combined
<i>Proportion (and number) displaying the third-person effect</i>	71% (107)	48% (72)	60% (179)
<i>Proportion (and number) displaying neither the third-person effect nor the reverse third-person effect</i>	22% (33)	33% (49)	27% (82)
<i>Proportion (and number) displaying the reverse third-person effect</i>	7% (10)	19% (29)	13% (39)

These results are evidence of a collective third-person effect. But as with previous findings, not all respondents displayed the effect in their responses. Table 30 above sets out the number and proportion who displayed the third-person effect, the reverse third-person effect and neither effect. Of the 300 undergraduates, 179 (60%) displayed the effect, meaning that they thought themselves to be less inclined than the ordinary reasonable person to interpret the article as suggesting the teacher's guilt. Just 39 students (13%) displayed the reverse third-person effect, while 82 (27%) thought that the ordinary reasonable person would choose the same interpretation of the article as themselves. These proportions roughly accord with those found in other research studies.

It is interesting to note the impact of question order when it comes to the proportion displaying the third-person effect. Table 30 above compares the students who were asked for their own response to the article before that of the 'ordinary reasonable person' with those students for whom these questions were reversed. Although there is a net third-person effect in both cases, the effect is significantly more marked among students asked for their own opinion first. Students were more likely to distinguish themselves from the ordinary reasonable person if they had already identified their own interpretation of the article before being asked about that person, possibly because, having been already asked what they thought, they were more likely to understand the question about the ordinary reasonable person to be asking something different.

As has already been discussed, there is some evidence that the use of undergraduate convenience samples in third-person effect research tends to lead to an exaggeration of the third-person effect in the general population. While no claim is made that the student survey findings necessarily reflect what would be found among the general population, it is perhaps interesting to note the results when the same survey was conducted among respondents who were not university students. The opportunity arose to conduct the survey at the start of several training sessions in defamation law provided for personnel involved in publishing. As with the student surveys, the survey was carried out before any instruction in defamation law was given. In all 80 respondents took part in the survey, half of whom were editorial staff employed by various Australian book publishers, while the other half were journalists working for several Australian newspapers and magazines. As with the students, half the respondents were given a questionnaire that asked for their own interpretation of the article first, while the other half was asked about the ordinary reasonable person first, the allocation being random.

Table 31 below presents the same information as Table 30, but this time in relation to the journalists and book publisher personnel. As with the students, a net third-person effect was found, and once again this is reduced if respondents were asked for the 'ordinary reasonable person's' response prior to their own.⁶⁷⁷ This time, however, the proportion displaying the third person effect has significantly reduced (50% as against 60%).⁶⁷⁸ This might be taken as limited support for the proposition that the use of undergraduates gives an exaggerated impression of the size of the third-person effect among the general population, although it is questionable whether the latter are represented by media workers attending defamation law workshops.

⁶⁷⁷ As regards the difference between those asked their own opinion first and those asked about the ordinary reasonable person first, $p < .05$.

⁶⁷⁸ $p < .02$. There was no significant differences as regards the reverse third-person effect ($p < .1$) or those who showed neither effect ($p < .1$).

Table 31: Proportion of publishing personnel and journalists displaying the third-person effect

<i>Order of questions relating to the report's interpretation by the respondent and the 'ordinary reasonable person' (ORP)</i>	Respondent first, ORP second	ORP first, respondent second	All respondents combined
<i>Proportion (and number) displaying the third-person effect</i>	63% (25)	38% (15)	50% (40)
<i>Proportion (and number) displaying neither the third-person effect nor the reverse third-person effect</i>	35% (14)	48% (19)	41% (33)
<i>Proportion (and number) displaying the reverse third-person effect</i>	3% (1)	15% (6)	9% (7)

If undergraduates are particularly inclined to display the third-person effect, it may be because they tend to consider themselves an intellectual elite likely to interpret newspaper articles differently from the 'ordinary reasonable person'. This might be particularly true of those studying towards a law degree, since Australian law schools (and particularly the University of New South Wales, the law school that dominates in the survey) generally admit only those who have performed particularly well academically. Even so, the law students surveyed were not significantly more likely to display the third-person effect than the media personnel (65% against 56%), a group also likely to regard themselves as something of an elite.⁶⁷⁹ Similarly the law students were not significantly more likely to display the third-person effect than the non-law students (65% against 56%).⁶⁸⁰

QUALITATIVE RESULTS

As already described, these surveys were designed to explore the third-person effect in the context of denotative meaning: what information is the publication conveying to the reader? The majority of students (62%) and of the media personnel (55%) thought that the ordinary reasonable person would understand its message to be that there is a probability, at least, that the teacher in question was guilty of the crimes he was charged with. What does this reveal about the 'ordinary reasonable person' as perceived by these respondents? One obvious conclusion is

⁶⁷⁹ $p < .2$. There was no significant difference as regards the reverse third-person effect ($p < .4$). The law students were less likely than the media personnel to consider their own interpretation of the article to be the same as that of the ordinary reasonable person but the difference is not statistically significant (26% against 38%, $p < .15$).

⁶⁸⁰ $p < .15$. The non-law students were neither significantly more likely to display the reverse third-person effect (16% against 9%, $p < .1$) nor to identify their own interpretation as that of the ordinary reasonable person (28% against 26%, $p > .5$).

that such a person is gullible, easily lead by the media. Another is that this person is prone to pre-judge, to condemn on insufficient evidence.

The question posed to the respondents was not whether the ‘ordinary reasonable person’ would believe the teacher to be guilty, but rather what the ‘ordinary reasonable person’ would understand the newspaper to be saying. Might it be that the third-person effect was produced by something other than a perception of credulity or distrustfulness on the part of others? It is conceivable that the ‘ordinary reasonable person’ is perceived as suspicious not of teachers but of those who prepared and published the story. It is possible that the ‘ordinary reasonable person’ is perceived as particularly adept (more so than the respondent) at identifying journalists’ mendacious attempts to concoct a newsworthy story, this report’s newsworthiness arising from the teacher’s alleged guilt, rather than the simple fact of the prosecution.

I suggest that this possibility is implausible, given in particular four factors. First, it seems counter-intuitive to think that individuals would perceive others as less credulous than themselves. Secondly, such a proposition goes against the evidence presented by the surveys of Cohen, Gunther and Mason. Thirdly, a third-person effect was produced even when the student survey was conducted among journalists who, one might suspect, would have a relatively positive regard for other journalists. Fourthly, this explanation is not supported by qualitative work conducted for the NDRP.

The qualitative research derived from a series of focus group meetings conducted around Australia. At five of these meetings the same survey involving the *Sydney Morning Herald* report was conducted at the start of the meeting and prior to any substantial discussion.⁶⁸¹ These meetings were held in Adelaide, Alice Springs, Cairns, Brisbane and Ipswich (near Brisbane). In the case of the first three, the group members were intended to represent a cross-section of the local community. The Brisbane group consisted of Family Association members, while the Ipswich group was made up of regular church-goers. In each case the survey produced a marked net third-person effect, something perfectly encapsulated in the following from the Brisbane group:

The general public tend to think that what they read in the paper is true. We all know it’s garbage most of the time, but we’re not the general public. The general public will tend to think that most of it’s true. Where there’s smoke there’s fire in their eyes.

62-year-old male, semi-retired metal worker

⁶⁸¹ For the purposes of the focus group meetings question order was not reversed. Otherwise, the conduct of the survey was virtually identical to that involving the students and media personnel.

The predominant feature of all the focus group discussions was an antipathy towards the media. In particular there was frequent reference to the media's search for sensationalism. This was also expressed in the context of the survey article.

I think it leaned more towards saying that [the teacher was guilty]. It's as though the reporter knew what he was saying to get that report going out into the media. I think a normal person reading it thinks the guy is guilty.

57-year-old male, former soldier, Adelaide group

To me that was the angle they were pushing. You could have written the same article a different way.

64-year-old male, retired builder, Adelaide group.

Participants in other groups agreed.

Did you think the report was saying that the teacher is guilty?

Yes.

Does the newspaper actually say that?

It's more the way the journalist is actually writing the article, just the way it sounds even. ... It implies that the person that's writing the article believes that they're guilty of everything. Rather than just being an informative article, just stating that there has been something charged, they're going through details pointing specifically towards his guilt, not putting anything else that would be remaining neutral.

64-year-old retired woman, Ipswich group

The way the article was written was pushing towards that he was guilty. Just the information that was contained within it.

20-year-old female, university student, Ipswich group

It's a classic case of trial by media. They've named people, they've got no chance of a fair trial. None whatsoever. It's a typical situation where the media dictate to the people what's right and what's wrong. That's a way to create interest in people buying papers and everything like that.

67-year-old male, retired public servant, Ipswich group

Indeed there was general consensus at all meetings that the article had not only defamed the teacher but had jeopardised his chances of a fair trial to the extent that the paper should be held in contempt. This view was widely held, even though it was suggested to group members by the facilitator that, leaving aside any implication of guilt in the article, every express statement contained therein was true:

I agree we're becoming very Americanised now and litigious, if that's the word. We're litigating on anything and everything. A friend of mine fell over in Woolworth's and did his back and he's suing, you know. ... But in this situation here, I believe even though everything they said was true, this person has been named and the way the story has been written, it's led the average person to believe that he is guilty. ... [H]e was

never given the opportunity to prove his innocence in court ... It's left the way open and it's destroyed his reputation and I believe he's got every right and I feel *very* strongly that he's got every right to sue them for defamation.

64-year-old retired woman, Ipswich group

[The journalist] planned to portray that that person's guilty. I think that he himself as a journalist is guilty by being allowed to write in that manner. He hasn't been given the guidelines or he's not controlled in what he's submitted to print. ... The way I see it is that he shouldn't have been able to say or he should have only been allowed to say that these people were arrested today after a lengthy police investigation and charges have been laid of a sexual nature. No names or anything like that. ... There's no control, that old story about freedom of the press has gone too far the other way, you know? There should be some control. Self-regulated, you know? Not to say that we don't go down the road of government controls and things like that, but newspapers should be self-regulated there. They shouldn't imply or implicate people until they've been given due process.

20-year-old female, university student, Ipswich group

Some were less critical of the report's author, but still felt that it implicated guilt:

I saw it as a fair article. They were outlining all the facts and that the people claim they were not guilty and the reason why the police had carried it through. But I'd agree that people reading that would assume they are guilty, based on the way the press has been for 20 years. People have been accused and either found not guilty or guilty, but when found not guilty, nothing's mentioned, not in equal prominence to the accusation. So I read the article and I said well that was a fair article, but even though the article was probably a fair one, the interpretation of the article based on the climate of the times would be that those guys are guilty.

50-year-old male schoolteacher, Brisbane group.

What was most striking was the tendency for participants to feel that only they were able to correctly assess the article's merits.

I've had some firsthand experience with media where they try to put a totally different spin on it to what you are trying to portray, so I tend not to believe all of what is written there anyway.

33-year-old salesman, Adelaide group

I'm really sceptical about the media. I always think "am I reading the truth?"

57-year-old female, age care worker, Adelaide group

Some people are functionally illiterate. They perceive what they wish to see in a media report. We're all reasonable people, but some people get some reason out of what they read and some don't.

57-year-old male, war veteran, Adelaide group

I've got a friend who works with African immigrants and when they read something in the paper or see it on telly they believe it's true. John Howard says this on telly, well he's the prime minister so it's true. Or they see an advert. Well it's on television so it's true. It's a bit scary to go out and buy things because someone said it's a good idea. So this particular group of immigrants is not used to it at all. They are not silly people:

when you talk about the 'ordinary reasonable person', they're reasonable. They're not unreasonable people, they just haven't got to the same point of view, I guess.

33-year-old salesman, Adelaide group

Just 6% of the focus group members who completed the same survey as the students demonstrated the reverse third-person effect. Perceptions that others would be less likely to think the report imputed guilt were notably absent from all discussions. Perhaps the following most closely reflects the reverse-third-person-effect position:

I think my generation anyway have been brought up to believe that everything they see in the media is probably right. And we believe it and I think that gradually the next generation and our coming generation are a lot more cynical about it. But that is the case with most generation changes. It's not a gradual change: you go from one side of the spectrum to the other. It's a reaction rather than an interaction, you know? And I think that the younger generation have become much more critical of the media ...

64-year-old retired woman, Ipswich group

Even so, this person later revealed that she had answered the question about the ordinary reasonable person's response differently from that asking about her own:

I wouldn't judge them before the trial but there are people that would. Therefore I said that some people might think that they're guilty.

The predominant view was that suspicion of journalists was entirely appropriate:

I just question everything all the time. I always have. It's just one of my traits. I just like to know why things are happening the way they are and what's going on and why.

45-year-old mother, Ipswich group

Others saw the ordinary reasonable person as the same as themselves:

Do you think the ordinary reasonable person would think they were definitely guilty?

Yeah, I would imagine so.

Why is that?

Cos I've not been sexually assaulted but I've had a couple of guys try it when I was a kid. I just think anyone that seems to be wanting a job where they're amongst children all the time ... well, not the lot of them but certainly 9 out of 10, seem to be suspect to me.

23-year-old female, nurse, Cairns group

Only a few admitted to a degree of credulity:

I have had personal experience, through emergency services, stuff like that, of misrepresentation through the media of certain things that have occurred on the subject that didn't really happen. However, it's amazing, even after that I'll still read the paper and ... You'll still believe everything this newspaper says usually. You'll say "oh, you

know, I'm a bit sceptical", but you'll still believe it. [Laughs] ... So yes my vote would be yep I would put a noose around the neck ahead of letting them go.

23-year-old male, first aid instructor, Cairns group

PHONE SURVEY

Taking the qualitative and quantitative results together, what seems to emerge is a public understanding of the ordinary reasonable person as someone who is rather too quick to condemn, lacking the charity to think the best of people, as well as somewhat naïve when it comes to the iniquity of the media.

But what about connotative interpretation? Is the ordinary reasonable person characterised by liberalism or narrow-mindedness? To answer these questions, we return to the phone survey referred to in Chapter Six. It will be recalled that the survey involved 3,000 respondents, selected so as to represent adult residents of Australia. One of the ten hypothetical media reports was described to each respondent, so that 300 respondents were asked about each report. The report was described using a set script which also provided the interviewees with the wording of subsequent questions.⁶⁸² One key question was whether the respondent would think less of a specified subject of the media report as a result of the report. Results from that and related questions were given in Chapter Six. These will be referred to as the 'first-person responses'.

In addition to being asked about their personal reaction to the report, each respondent was also asked questions relating to the respondents' perception of how a particular, hypothetical person would respond to the report. Answers to these questions will be referred to as the 'third-person responses'. The 300 respondents asked about each of the ten media reports were randomly allocated one of three hypothetical third persons whose response they were asked to predict.⁶⁸³ One of these hypothetical third persons was described as 'the ordinary reasonable person living in Australia'. This third person formed the basis of questions for 100 respondents per media report (1,000 respondents altogether). In addition, question order was varied within each of these groups, half the respondents being asked for their own response before any mention was made of the third person ('PVP respondents'),⁶⁸⁴ while the other half was first asked about the relevant third person before being asked about their own response and without prior warning that they would also be asked for their own response ('PVS respondents').⁶⁸⁵ Accordingly the 1,000 respondents asked about the ordinary reasonable person were divided into 20 sub-samples

⁶⁸² The phone survey interview script is included as Appendix III, see page 367 below.

⁶⁸³ Apart from one reference to the media report being 'heard', efforts were made to avoid specifying the nature of the medium reporting the allegations. In any event, Paul's meta-analysis suggested that medium was not a significant moderator of third-person effect: Paul, Salwen and Dupagne, 77.

⁶⁸⁴ PVP = personal view prior.

⁶⁸⁵ PVS = personal view subsequent.

according to the media report used and question order, so that 50 respondents were asked questions about the same media report, about the same third person and in the same order.

Table 32: Comparison of proportions of phone survey respondents indicating that the media reports are defamatory in their own eyes with proportions indicating they are defamatory in the eyes of the ‘ORDINARY REASONABLE PERSON living in Australia’

Media Report	First person responses	Third person responses
Sex Before Marriage	11%	38%
HIV Positive	16%	77%
Male Homosexuality	14%	71%
Conducting Abortions	21%	56%
Criminal Parentage	27%	77%
Marijuana Use	32%	64%
Informing Police	31%	62%
Recreational Sex	31%	80%
Drunkenness	46%	85%
Extramarital Affair	56%	83%
MEAN	29%	69%

Figure 9: Bar chart illustrating the data shown in Table 32

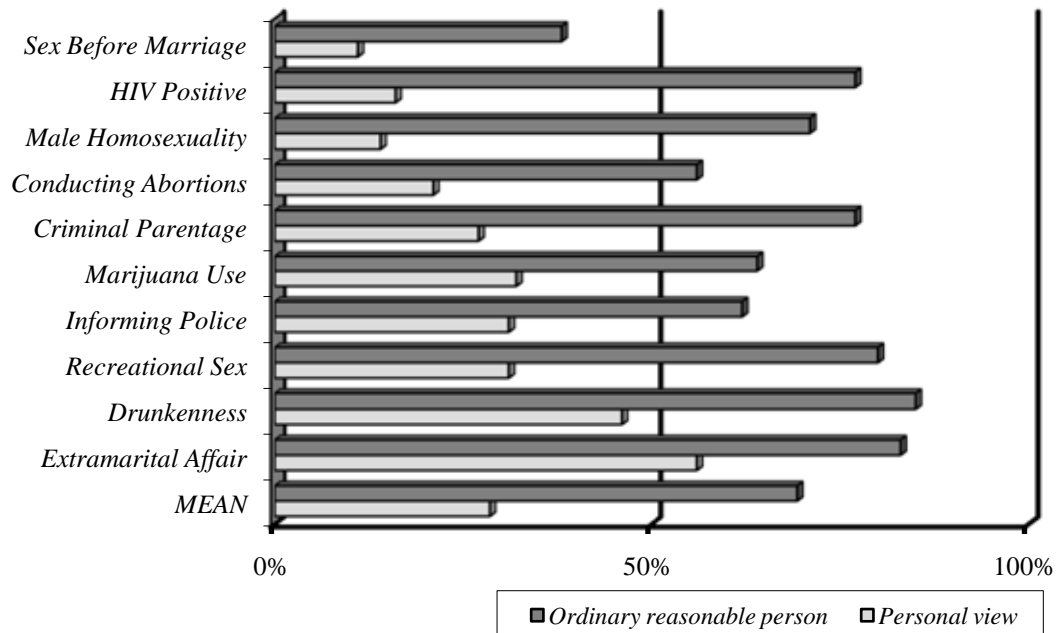


Table 32 above compares the two principal responses of the 1,000 respondents asked about the ordinary reasonable person. For each media report two proportions are given. The first is the

proportion who said that they themselves would think less of the subject of the media report put to them. The second is the proportion who said they would expect the ordinary reasonable person living in Australia to think less of that person.

Figure 9 above presents the same information as a bar chart.

In the case of each of the ten media reports, the proportion who thought that the ‘ordinary reasonable person’ would think less of the subject of the media report is significantly greater than the proportion saying they themselves would think less of the subject of the media report.⁶⁸⁶ When results for the ten reports are aggregated, the proportions are 29% in relation to first-person responses and 69% for third-person responses.

Based on the definition of the third-person effect established above, it can be said that those respondents who answered that they would not think less of the subject of the media report put to them, whereas the ‘ordinary reasonable person’ would, display the effect. The proportion displaying the third-person effect when asked about the ordinary reasonable person was 44%, similar to the finding in previous studies relating to various third person groups. Meanwhile a typically small proportion display the reverse third-person effect: 2.6%.

ORDINARY REASONABLE V ORDINARY V REASONABLE

As already mentioned, not all respondents in the phone survey were asked to consider the opinion of the ‘ordinary reasonable person living in Australia’. One third were instead asked about the ‘ordinary person living in Australia’ and another third about the ‘reasonable person living in Australia’.

It might be anticipated that questions relating to the ‘reasonable person’ would produce a weaker third-person effect. This would happen if respondents were relatively comfortable with identifying themselves as a ‘reasonable person’ as well as with other ‘reasonable’ people. Intuitively we might expect people to be far more comfortable with the self-ascription ‘reasonable person’, compared with ‘ordinary’ or even ‘ordinary reasonable person, terms which might be expected to produce far larger third-person effects.

Surprisingly, the three third persons (the ‘ordinary’, ‘ordinary reasonable’ and ‘reasonable’ person) each produced strikingly similar results. The data given in Table 33 below and illustrated by Figure 10 below are the same as in Table 32 above, except that they relate to

⁶⁸⁶ $p < .001$, except in the cases of *Sex Before Marriage*, *Marijuana Use*, *Informing Police* and *Extramarital Affair*, where $p < .002$.

respondents asked about the ‘ordinary person’. Table 34 and Figure 11 below are also similar, save that this time the third person is the ‘reasonable person’. In the case of all three third persons, the results follow broadly similar patterns.

Table 33: Comparison of proportions of phone survey respondents indicating that the media reports are defamatory in their own eyes with proportions indicating they are defamatory in the eyes of the ‘ORDINARY PERSON living in Australia’

Media Report	First person responses	Third person responses
Sex Before Marriage	8%	45%
HIV Positive	16%	79%
Male Homosexuality	20%	70%
Conducting Abortions	23%	67%
Criminal Parentage	39%	77%
Marijuana Use	31%	72%
Informing Police	39%	74%
Recreational Sex	38%	83%
Drunkenness	43%	83%
Extramarital Affair	59%	94%
MEAN	32%	74%

Figure 10: Bar chart illustrating the data shown in Table 33

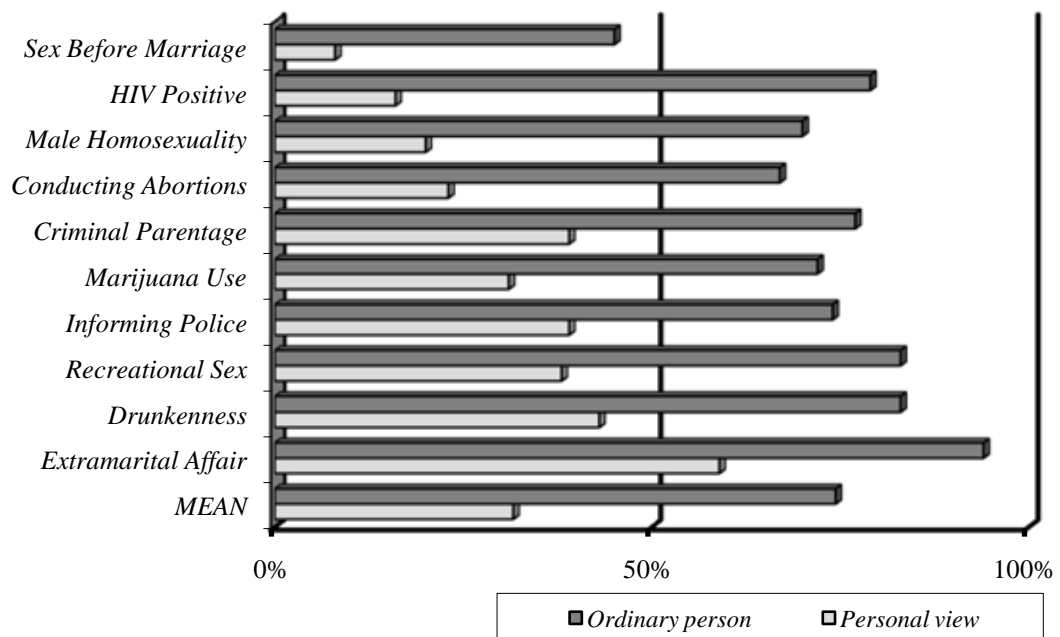
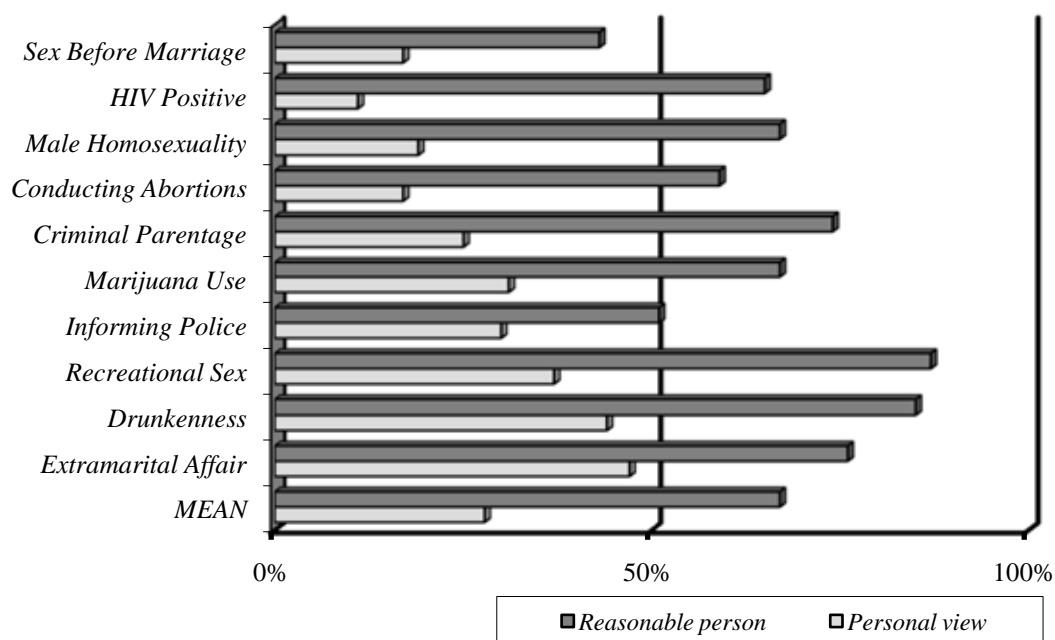


Table 34: Comparison of proportions of phone survey respondents indicating that the media reports are defamatory in their own eyes with proportions indicating they are defamatory in the eyes of the 'REASONABLE PERSON living in Australia'

Media Report	First person responses	Third person responses
<i>Sex Before Marriage</i>	17%	43%
<i>HIV Positive</i>	11%	65%
<i>Male Homosexuality</i>	19%	67%
<i>Conducting Abortions</i>	17%	59%
<i>Criminal Parentage</i>	25%	74%
<i>Marijuana Use</i>	31%	67%
<i>Informing Police</i>	30%	51%
<i>Recreational Sex</i>	37%	87%
<i>Drunkenness</i>	44%	85%
<i>Extramarital Affair</i>	47%	76%
MEAN	28%	67%

Figure 11: Bar chart illustrating the data shown in Table 34



In the case of every media report, and regardless of the description of the third person, the proportion saying the third person would think less of the subject of the media report is

significantly greater than the proportion saying they themselves would think less of the subject of the media report.⁶⁸⁷

Striking though it is that such large third-person effects should be found, what is just as surprising is how little the various descriptions of the third person seems to alter the *overall* third-person effect (although there are significant differences when reports are looked at separately). The proportions of respondents showing the third-person effect, the reverse third-person effect and neither effect in relation to each third person description are given in Table 35 below.

Table 35: Proportions of phone survey respondents displaying the third-person and reverse third-person effects when asked whether they or a specified third person would think less of the subject of the media report: all reports aggregated

Third person description	Ordinary reasonable person	Ordinary person	Reasonable person	MEANS
Proportion displaying third-person effect	43.6%	45.3%	43.2%	44.0%
Proportion perceiving the third person's reaction to the report as the same as their own	48.6%	49.4%	49.5%	49.2%
Proportion displaying reverse third-person effect	2.6%	1.8%	3.4%	2.6%
Proportion answering 'don't know' in relation to their own and/or the third person's reaction to the report	5.2%	3.5%	3.9%	4.2%

The overall proportion displaying the third-person effect remains strikingly consistent, ranging from just 43.2% to 45.3%, with no significant variations.⁶⁸⁸ The only significant finding is that fewer respondents show the reverse third-person effect when asked about the 'ordinary' person than when asked about the 'reasonable' person.⁶⁸⁹ Even so, the reverse third-person effect remains typically small, while the proportion displaying the third-person effect hovers around the 50% mark, a finding that is characteristic of third-person effect surveys.

⁶⁸⁷ Where the third person was described as the *ordinary* person: $p < .001$. Where the third person was described as the *reasonable* person: $p < .001$, except in the cases of *Sex Before Marriage*, *Extramarital Affair* and *Informing Police*, where $p < .002$.

⁶⁸⁸ As regards the difference between 'ordinary' and 'reasonable' person, $p < .35$; as regards 'ordinary' and 'ordinary reasonable' person, $p < .45$; as regards 'ordinary reasonable' and 'reasonable', $p > .5$.

⁶⁸⁹ $p > .05$.

REFINING THE THIRD-PERSON EFFECT FINDINGS

Table 36: Combined responses of phone survey respondents in relation to whether the third person would think less or more of the subject of the media report put to them, or whether the report would make no difference to how that person would regard the subject of the report.

Media report	Third person	1.0 (more)	0.0 (no differ- ence)	-1.0 (little less)	-2.0	-3.0	-4.0	-5.0 (great deal less)	Don't know	Esteem rating	
										First person view	Third person view
EA	ORP	0%	16%	6%	12%	32%	20%	13%	1%	-2.01	-2.71
	OP	0%	5%	6%	18%	37%	20%	13%	1%	-1.91	-2.98
	RP	4%	19%	4%	19%	21%	20%	12%	1%	-1.53	-2.41
D	ORP	2%	10%	7%	12%	34%	15%	17%	3%	-1.21	-2.76
	OP	0%	13%	9%	11%	29%	17%	17%	4%	-1.25	-2.71
	RP	3%	11%	6%	22%	31%	13%	13%	1%	-1.44	-2.57
RS	ORP	2%	15%	5%	14%	27%	18%	16%	3%	-0.99	-2.64
	OP	1%	14%	2%	13%	30%	22%	16%	2%	-1.18	-2.85
	RP	1%	10%	7%	21%	36%	15%	8%	2%	-0.94	-2.56
MU	ORP	1%	32%	13%	13%	28%	4%	6%	3%	-0.93	-1.68
	OP	0%	15%	6%	12%	32%	16%	11%	8%	-1.11	-2.45
	RP	2%	28%	8%	17%	24%	11%	7%	3%	-0.93	-1.91
IP	ORP	3%	28%	9%	15%	18%	12%	8%	7%	-0.83	-1.78
	OP	4%	21%	6%	17%	33%	14%	4%	1%	-0.97	-2.11
	RP	2%	43%	11%	13%	18%	6%	3%	4%	-0.74	-1.28
CA	ORP	3%	37%	4%	13%	24%	8%	7%	4%	-0.72	-1.66
	OP	1%	26%	9%	18%	37%	5%	3%	1%	-0.80	-1.90
	RP	0%	24%	6%	16%	31%	13%	8%	2%	-0.71	-2.23
CP	ORP	0%	14%	8%	14%	32%	13%	10%	9%	-0.65	-2.34
	OP	4%	24%	9%	11%	31%	11%	5%	5%	-0.72	-1.89
	RP	0%	32%	4%	19%	23%	13%	4%	5%	-0.59	-1.83
MH	ORP	1%	22%	10%	17%	21%	10%	13%	6%	-0.45	-2.11
	OP	2%	27%	6%	19%	20%	10%	15%	1%	-0.52	-2.17
	RP	1%	32%	3%	16%	27%	9%	4%	8%	-0.45	-1.71
HIV	ORP	1%	15%	9%	13%	30%	15%	10%	7%	-0.42	-2.34
	OP	2%	10%	6%	12%	35%	16%	10%	9%	-0.43	-2.47
	RP	3%	50%	6%	11%	18%	7%	1%	4%	-0.43	-1.12
SBM	ORP	2%	57%	4%	9%	15%	6%	4%	3%	-0.23	-1.09
	OP	1%	53%	7%	12%	16%	3%	7%	1%	-0.23	-1.25
	RP	3%	26%	5%	16%	28%	8%	8%	6%	-0.34	-1.90
Ms	ORP	2%	25%	8%	13%	26%	12%	10%	5%	-0.84	-2.11
	OP	2%	21%	7%	14%	30%	13%	10%	3%	-0.91	-2.28
	RP	2%	28%	6%	17%	26%	12%	7%	4%	-0.81	-1.95

Key: EA = Extramarital Affair, D = Drunkenness, RS = Recreational Sex, MU = Marijuana Use, IP = Informing Police, CA = Conducting Abortions, CP = Criminal Parentage, MH = Male Homosexuality, HIV = HIV Positive, SBM = Sex Before Marriage, Ms = Means
 ORP = ordinary reasonable person, OP = ordinary person, RP = reasonable person

No. of respondents: 100 per media report (total 1,000). All percentages are rounded.

The respondents in the 'don't know' column answered 'don't know' to the initial question whether the ordinary reasonable person would think less of the subject of the relevant media report.

There is a potential for the third-person effect to impact not only on decisions as to whether a publication is defamatory but also the extent of damages that should be awarded as a result of a defamatory publication. Even if judges or jurors would personally think less of the plaintiff if a particular allegation were true, they might think that the ordinary reasonable person would think even less of that individual. In this way the third-person effect is relevant not only in the case of publications that are borderline as to whether they are defamatory but also those that ‘obviously’ cross that line.

In order to explore the likely effect on award of damages, respondents who answered that the third person would think less of the subject of the media report were also asked to indicate, using a five-point scale (where 1 means just a little less and 5 means a great deal less) how much the third person would disapprove. Conversely, if respondents indicated that the third person would not think less then they were asked whether the third person would even think more positively of the potential plaintiff as a result of the publication. Table 36 on page 312 above gives the results.

With these seven-point scales constructed for each third person, the third-person effect can now be recalculated. The proportions showing the effect are given in Table 37 below.

Table 37: Proportions of phone survey respondents displaying third-person effect and reverse third-person effect once severity of reputational damage is taken into account: all reports aggregated

<i>Third person description</i>	<i>Ordinary reasonable person</i>	<i>Ordinary person</i>	<i>Reasonable person</i>	<i>MEANS</i>
<i>Proportion displaying third-person effect</i>	54.2%	56.4%	52.7%	54.4%
<i>Proportion perceiving the third person's reaction to the report as the same as their own</i>	31.0%	31.0%	33.1%	31.7%
<i>Proportion displaying reverse third-person effect</i>	9.6%	9.1%	10.3%	9.7%
<i>Proportion answering 'don't know' in relation to their own and/or the third person's reaction to the report</i>	5.2%	3.5%	3.9%	4.2%

Obviously these proportions are greater than the ones in Table 35 above now that account is being taken of respondents who indicated that while both they and the third person would

disapprove, the latter would disapprove more. Even so, the general picture remains the same: around half display the third-person effect and there is minimal reverse third-person effect. What is more, there remains no significant differences between third persons when it comes to the proportion displaying either effect.

Considering each report individually, however, a few significant variations in the proportion displaying the third-person effect emerge. Those asked about the ordinary person's response to *HIV Positive* were more likely to display the third-person effect than those asked about that of the reasonable person.⁶⁹⁰ Conversely, respondents were significantly more likely to identify their own views with those of the reasonable, as opposed to ordinary person in the case of *HIV Positive*,⁶⁹¹ whereas in the case of *Criminal Parentage* respondents were more likely to identify their own views with those of the reasonable, as opposed to ordinary reasonable person.⁶⁹² It is possible, of course that a survey with larger sample sizes would have produced more significant variances, but there is little from these results to infer that any such variations would be striking or even consistent. If we include findings that failed to reach statistical significance, respondents were more likely to identify their own views with those of the reasonable as opposed to ordinary person in the case of just six out of ten reports.⁶⁹³

Two possibilities emerge. One is that people interpret 'reasonable' and 'ordinary' as more or less similar in meaning, which is probably something akin to 'average', or an allusion to majority opinion. The other possibility is that, once respondents had given their own opinion, they tended to interpret any follow-on questions about the third person as requiring a different response, since respondents would hardly expect to be asked twice about the same aspect of their own views. The same would be true of respondents who answered questions about the third person before answering on their own behalf. That being so, subsequent questions might be interpreted as a reference to people other than themselves, even if they are framed so as to refer to the 'reasonable person'.

QUESTION ORDER

With the last-mentioned hypothesis, attention must now turn to the issue of question order. A mundane explanation for the third-person effect, although not one examined in Paul's meta-analysis, is that the answers of respondents in experiments or surveys ostensibly demonstrating

⁶⁹⁰ $p < .02$.

⁶⁹¹ $p < .005$.

⁶⁹² $p < .05$.

⁶⁹³ *HIV Positive* (27% against 11%, $p < .005$), *Criminal Parentage* (33% against 28%, $p < .45$), *Conducting Abortions* (32% against 29%, $p > .5$), *Informing Police* (39% against 38%, $p > .5$), *Marijuana Use* (38% against 33%, $p < .5\%$), *Male Homosexuality* (37% against 32%, $p < .5$).

the effect are, at least in part, determined by the order in which questions are posed. The effect of a preceding question on the answer to a subsequent question (known as ‘consistency’ or ‘carryover’ effect) is something that is of concern in all survey and experiment design. In particular, it has long been recognised that in making self-others comparisons people might respond in a self-serving manner so as to appear superior to others. In the case of third-person effect research that might mean attempting to seem less gullible and more perceptive of media manipulation. This could involve either understating impacts on the self (if the question about others precedes that about self), or exaggerating the effect on others (if asked about them second).

Interestingly, despite my suggestion that back-to-back self-then-others or others-then-self questions might exaggerate the third-person effect, Dupagne suggested that they could lead to its under-calculation, at least in the case of back-to-back self-then-others questions, by encouraging respondents to move ‘the answer to the second question closer to the first’.⁶⁹⁴ One study supports this proposition, with a significantly smaller third-person effect being found when the questions were ordered self-other, compared to another-self order, at least when the media effect was considered highly undesirable.⁶⁹⁵ However, in a survey of the literature on the issue in 1999 Dupagne found this to be the only report of question order having a significant impact in third-person effect research.⁶⁹⁶

Typically, steps will be taken to allow for carryover effects by producing different versions of a questionnaire with questions re-ordered. It has been suggested that this is insufficient to guard against carryover effect. Price and Tewksbury designed their experimental studies so that some respondents were not asked to contrast media effects on others with themselves but to give only an estimate of impact on self *or* others. After two experiments designed along these lines they still found no consistent differences and declared the third-person effect to be ‘a robust observation, occurring in every measurement condition and in response to four different stimuli’.⁶⁹⁷

⁶⁹⁴ Michel Dupagne, Michael B Salwen and Bryant Paul, ‘Impact of Question Order on the Third-Person Effect’ (1999) 11(4) *International Journal of Public Opinion Research* 334, 335.

⁶⁹⁵ P David and M Johnson, ‘The Role of Self in Third-Person Effects about Body Image’ (1998) 48(4) *Journal of Communication* 37.

⁶⁹⁶ Dupagne, Salwen and Paul, above n 694, 336.

⁶⁹⁷ Vincent Price and David Tewksbury, ‘Measuring the Third-Person Effect of News: The Impact of Question Order, Contrast and Knowledge’ (1996) 8 *International Journal of Public Opinion Research* 120.

A further test of the effect of question order was conducted in 1999 by Michel Dupagne, using a phone survey of a random sample of 721 adults in the United States.⁶⁹⁸ Respondents were asked to measure the effects on society and themselves of one of the following: violence on television, TV coverage of courtroom trials and negative political advertising. Dupagne was concerned not only to gauge carryover effects on the third-person effect's perceptual hypothesis but also on its behavioural element. Respondents were therefore asked how strongly they supported further controls on television violence, bans on televising live trials or restrictions on negative political advertising. Each adult was randomly assigned to one of four question orders: restrictions-others-self, restrictions-self-others, others-self-restrictions, or self-others-restrictions.

Dupagne found that question order had no impact on the third-person effect as regards respondents' perception of the impact of the media on others compared to themselves. Even so, he thought the results were more ambiguous in relation to the behavioural hypothesis. When support for media controls was compared between those asked about restrictions first and those asked about restrictions last, it was found that the latter groups demonstrated greater support.

Generally, however, third-person effect research has found that comparisons of answers given by respondents asked about themselves first with those asked about others first have not revealed any significant distortions due to question order.⁶⁹⁹

Even so, in the case of the NDRP phone survey (as well as the student surveys reported above) the order of the questions relating to the respondent's personal response and questions relating to that of the third person was varied. PVP respondents were asked about their own response first, while PVS respondents were asked such questions after they had responded in relation to the third person.

As already described, there are two ways of measuring the third-person effect resulting from the phone survey. The first is to take respondents' answers when asked whether they personally would think less of the subject of the media report put to them. This answer is then compared with that given to the same question when asked about the anticipated response of the third person. No/yes response combinations (meaning 'I would not think less of the subject but the third person would') is then taken as a third-person effect response, yes/no combinations as a reverse third-person effect and no/no and yes/yes combinations as evidence of neither effect.

⁶⁹⁸ Dupagne, Salwen and Paul, above n 694, 334.

⁶⁹⁹ See for instance, J T Tiedge et al, 'Discrepancy Between Perceived First-Person and Perceived Third-Person Mass Media Effects' (1991) 68 *Journalism Quarterly* 141.

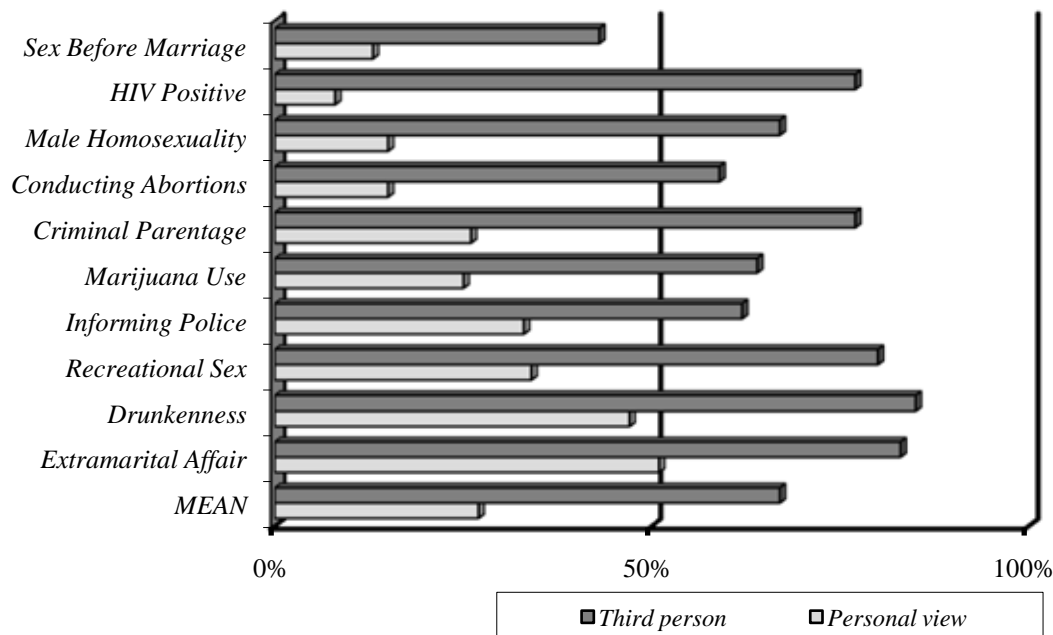
The other way of measuring the third-person effect is by using the seven-point scale, constructed by taking into account responses to supplementary questions relating to how much the respondent and/or the third person would disapprove, as well as whether either person would think more of the subject of the report.

Whichever way the third-person effect is calculated, the results are similar: on the whole PVP respondents were more likely to display the third-person effect than PVS respondents.⁷⁰⁰ It would seem, then, that as a general rule respondents are more likely to identify their own response to a report as that of others if they are asked about the others' response before being asked about their own.

It is possible to eliminate from the NDRP survey any carry-over effects by comparing the first person answers given by PVP respondents with third person answers given by PVS respondents. In other words, just first answers are compared. Figure 12 below does this, combining the results for all three third persons. However the figures are presented, the same pattern emerges: consistent and striking third-person effects.

⁷⁰⁰ Using just the yes/no questions, PVP respondents were significantly more likely than PVS respondents to display the effect in the case of six of the ten reports, as well as when the results for all ten reports are aggregated: *Sex Before Marriage* (45% against 19%): $p < .002$; *Marijuana Use* (51% against 29%): $p < .002$; *Male Homosexuality* (61% against 43%): $p < .002$; *Extramarital Affair* (44% against 29%): $p < .01$; *Conducting Abortions* (52% against 39%): $p < .05$; *Informing Police* (60% against 43%): $p < .05$; aggregated reports (50% against 38%): $p < .001$. Using the scale, the number of reports was five rather than six, but PVP respondents were still significantly more likely than PVS respondents to display the effect when the results for all ten reports are aggregated: *Sex Before Marriage* (52% against 24%): $p < .001$; *Marijuana Use* (58% against 39%): $p < .002$; *Male Homosexuality* (67% against 50%): $p < .002$; *Extramarital Affair* (58% against 41%): $p < .005$; *Conducting Abortions* (57% against 45%): $p < .05$; aggregated reports (59% against 50%): $p < .001$. In the case of two additional reports (three when the seven-point scale was used) PVP respondents exceeded PVS respondents as regards third-person effect display, but not to a significant extent. Using the 'yes/no' questions the reports were *Criminal Parentage* (51% against 41%): $p < .1$; *HIV Positive* (65% against 57%): $p < .2$. Using the seven-point scale, the reports were *HIV Positive* (69.3% against 68.7%): $p > .5$; *Criminal Parentage* (65% against 60%): $p < .35$ and *Informing Police* (47% against 39%): $p < .2$. In the case of just two reports (one when the seven-point scale is used) the trend was in the other direction, although again not to a significant degree. Using the 'yes/no' questions the reports were *Drunkenness* (41% against 43%): $p > .5$; *Recreational Sex* (49% against 50%): $p > .5$. Using the seven-point scale the report was *Drunkenness* (57% against 60%): $p > .5$. In the case of just one report, *Recreational Sex*, a significantly larger number of PVS as opposed to PVP respondents displayed the effect when measured using the seven-point scale: 59% versus 72%, $p < .02$. Conversely, when only the 'yes/no' responses are taken into consideration, PVS respondents were significantly more likely than PVP respondents to identify their own response as that of the third person in the case of seven reports: *HIV Positive* (37% against 23%): $p < .02$; *Sex Before Marriage* (76% against 49%): $p < .001$; *Conducting Abortions* (51% against 37%): $p < .02$; *Extramarital Affair* (63% against 50%): $p < .02$; *Informing Police* (62% against 49%): $p < .02$; *Marijuana Use* (63% against 44%): $p < .002$; *Male Homosexuality* (51% versus 32%): $p < .002$; aggregated reports (56% against 43%): $p < .001$. Using the seven-point scale PVS respondents are more likely to identify with the third person in the case of nine reports, although the difference is significant in just case of just four: *Sex Before Marriage* (69% against 38%): $p < .001$; *Extramarital Affair* (38% against 23%): $p < .005$; *Marijuana Use* (43% against 28%): $p < .01$; *Male Homosexuality* (39% versus 25%): $p < .01$; aggregated reports (37% against 27%): $p < .001$.

Figure 12: Comparison of proportions of PVP phone survey respondents indicating that the media reports are defamatory in their own eyes with proportions of PVS respondents indicating they are defamatory in the eyes of the third person – ‘ordinary person’, ‘reasonable person’ and ‘ordinary reasonable person’ combined



COMPARING BETWEEN REPORTS

In his research, Paul concluded that the role of specific message content as a moderator of the third-person effect is ‘at best ambiguous’.⁷⁰¹ But this was not the finding with the NDRP research, where the level of third-person effect was found to vary widely from report to report.

On average (using the seven-point scale and when the results relating to all three third persons are combined), a report produced a third-person-effect response from 54% of respondents. In the case of three reports the third-person effect was significantly larger than average: *HIV Positive* (69%),⁷⁰² *Recreational Sex* (65%)⁷⁰³ and *Criminal Parentage* (63%),⁷⁰⁴ while in the case of five reports that proportion was significantly smaller: *Sex Before Marriage* (38%),⁷⁰⁵ *Informing Police* (43%)⁷⁰⁶ *Marijuana Use* (48%).⁷⁰⁷ *Extramarital Affair* (49%)⁷⁰⁸ and *Conducting Abortions* (51%).⁷⁰⁹

⁷⁰¹ Paul, Salwen and Dupagne, above n 614, 79.

⁷⁰² $p < .002$.

⁷⁰³ $p < .01$.

⁷⁰⁴ $p < .05$.

⁷⁰⁵ $p < .001$.

⁷⁰⁶ $p < .001$.

One explanation as to why a report might produce a greater third-person effect than another relates to the finite nature of the seven-point scale produced by the survey questions: the higher on the scale respondents rate their own disapproval, the less scope there is to rate the third person's disdain as even higher. Thus it is not particularly surprising that *HIV Positive* should produce a third-person effect significantly greater than the average.⁷¹⁰ The report particularly stood out in terms of the large third-person effect it produced when the third person was described as 'ordinary' as opposed to 'reasonable'. In that condition it produced a third-person effect that was significantly greater than eight of the other nine reports.⁷¹¹ An easy explanation is that the proportion of respondents saying that they themselves would think less of the subject of the report was the second smallest for any report.⁷¹²

The size of the third-person effect for *Criminal Parentage* is a little more surprising, since the proportion of respondents who expressed antipathy for the son was around average for the ten reports.⁷¹³ When the results relating to the three third persons are combined, or when the third

⁷⁰⁷ $p < .002$.

⁷⁰⁸ $p < .002$.

⁷⁰⁹ $p < .01$.

⁷¹⁰ Using the seven-point scale and with the three third persons combined the third-person effect produced by *HIV Positive* was significantly greater than that produced by seven reports: *Drunkenness* (69% against 59%): $p < .01$; *Sex Before Marriage* (38%): $p < .001$; *Conducting Abortions* (51%) $p < .002$; *Extramarital Affair* (49%) $p < .001$; *Informing Police* (43%) $p < .001$; *Marijuana Use* (48%) $p < .001$; *Male Homosexuality* (59%): $p < .01$. The report produced the largest third-person effect when the third person was described as the 'ordinary' or the 'ordinary reasonable person' but not when that person was described as the 'reasonable person'.

⁷¹¹ Calculating the third-person effect by means of the seven-point scale the eight reports were: *Sex Before Marriage* (39%): $p < .001$; *Informing Police* (49%), *Extramarital Affair* (52%), *Marijuana Use* (52%) and *Conducting Abortions* (54%): $p < .002$; *Drunkenness* (58%): $p < .01$; *Criminal Parentage* (58%): $p < .01$; *Male Homosexuality* (60%) $p < .02$. Using just the 'yes/no' questions, *HIV Positive* produced a also produced a significantly larger third-person effect than eight of the other nine reports when the third person was described as the 'ordinary person': $p < .01$, except *Conducting Abortions* ($p < .05$). The exception was *Male Homosexuality*, where the difference was not statistically significant ($p < .084$). When the third person was described as 'reasonable' and using the seven-point scale, *HIV Positive* produced a significantly higher third-person effect than only two out of the other nine reports: *Sex Before Marriage* (39%) and *Informing Police* (40%): $p < .005$. Using just the 'yes/no' questions, *HIV Positive* the third-person effect was significantly greater than that produced in the case of five other reports: in the case of *Sex Before Marriage* (32%), *Extramarital Affair* (37%) and *Informing police* (28%), $p < .01$; in the case of *Drunkenness* (42%) and *Marijuana Use* (41%), $p < .05$. When the third person was described as the 'ordinary reasonable person' and using the seven-point scale, *HIV Positive* produced a significantly higher third-person effect than five out of the other nine reports: *Sex Before Marriage* (36%): $p < .001$; *Informing Police* (41%), *Marijuana Use* (45%), *Extramarital Affair* (46%) and *Conducting Abortions* (47%): $p < .002$. Using just the 'yes/no' questions, *HIV Positive* produced a third-person effect significantly greater than six other reports: *Sex Before Marriage* (28%): $p < .001$; *Extramarital Affair* (35%), *Informing Police* (36%) and *Marijuana Use* (37%): $p < .002$; *Drunkenness* (41%) and *Conducting Abortions* (41%): $p < .005$. It also produced an insignificantly greater third-person effect than three reports: *Recreational Sex* (49%) and *Criminal Parentage* (50%): $p < .1$; *Male Homosexuality* (57%): $p < .5$.

⁷¹² The proportion was 14%.

⁷¹³ The proportion was 30%. The average was 29%.

person was described as the 'ordinary reasonable person', the third-person effect this report produced was significantly greater than five other reports.⁷¹⁴

Even more remarkable is the relatively *small* third-person effect produced by *Sex Before Marriage*. The proportion of respondents who said they would think less of the subject of this report was not significantly less than those who said they would think less of the man infected with HIV (12% as opposed to 14%).⁷¹⁵ What is more, *Sex Before Marriage* was only fractionally behind *HIV Positive* when it came to the seven-point scale rating (0.4 as opposed to 0.3 on a scale of -1 to 5). Even so, the proportion displaying the third-person effect in the case of *Sex Before Marriage* was just 38%, not much above half that produced for *HIV Positive* (69%).

The report that produced the largest third-person effect was *HIV Positive*, while the smallest came from *Sex Before Marriage*.⁷¹⁶ Earlier the question was mooted whether the third-person effect derives principally from a perception that others are gullible, or whether it arises more from a perception that those in the general community are prone to prejudiced and pre-judgment. If the predominant cause is the first then this implies at least one of two things: that respondents anticipated that a media report of HIV infection is more likely to be false than one of pre-marital sex, or that respondents thought that the public is particularly likely to fall for a false report of HIV infection.

It is not easy to see why respondents should draw either of those conclusions. Indeed, of those who displayed the third-person effect in relation to *HIV Positive*, 54% said they themselves

⁷¹⁴ In the case of the three third persons combined, *Sex Before Marriage* (38%) $p < .001$; *Conducting Abortions* (51%) $p < .005$; *Extramarital Affair* (49%) $p < .002$; *Informing Police* (43%) $p < .002$; *Marijuana Use* (48%) $p < .002$. In the case of the 'ordinary reasonable person': *Sex Before Marriage* (36%) $p < .001$; *Conducting Abortions* (47%) $p < .002$; *Extramarital Affair* (46%) $p < .002$; *Informing Police* (41%) $p < .002$; *Marijuana Use* (45%) $p < .002$. When the third person was described as the 'reasonable person' the third person was significantly greater than in the case of two other reports: *Sex Before Marriage* (39%) $p < .005$; *Informing Police* (40%) $p < .005$. When the third person was the 'ordinary person' it was significantly greater than in the case of one report: *Sex Before Marriage* (39%) $p < .01$. Calculating the third-person effect just by reference to the 'yes/no' questions produced less impressive results. When results for the three third persons are combined, as well as when the third person was described as the 'ordinary reasonable person', this report produced a third-person effect significantly greater than that produced by three other reports. In the case of the three third persons combined these were *Sex Before Marriage* (32%) $p < .002$; *Extramarital Affair* (37%) $p < .02$; *Informing Police* (34%) $p < .005$. In the case of the 'ordinary reasonable person' they were *Sex Before Marriage* (28%) $p < .002$; *Extramarital Affair* (35%) $p < .05$; *Informing Police* (36%) $p < .05$. When the third person was described as the 'reasonable person' the third person was significantly greater than in the case of just two other reports: *Sex Before Marriage* (32%) $p < .02$; *Informing Police* (28%) $p < .002$. However it was not significantly greater than for any other report when the third person was the 'ordinary person'.

⁷¹⁵ $p < .4$.

⁷¹⁶ 69% compared with 38% when all three third persons are combined. When the third person is the 'ordinary person': 76% versus 39%; when the 'reasonable person': 60% versus 39%; when the 'ordinary reasonable person': 71% versus 36%.

would think less of the subject of the report, something they are hardly likely to say if they anticipated that the report to be untrue.⁷¹⁷ This proportion is greater than that found for eight of the other nine reports, suggesting that the unusually high third-person effect produced by *HIV Positive* has little or no connection with a widespread perception that such a report is particularly likely to be untrue.⁷¹⁸

A more plausible answer lies in how the subject of HIV infection is situated in public discourse, particularly when compared to a subject such as pre-marital sex. Not only is it commonplace for Australian young women to enter into a sexual relationship prior to marriage, such relationships are disclosed far more readily than HIV infection. The consequence is that individuals can hardly fail to notice their widespread acceptance. Adding to this, in recent decades disdain for people infected with HIV has widely been characterised as a form of irrational prejudice. Respondents are far more likely to perceive discrimination against those with HIV as a social 'issue' sufficient to warrant not only extensive public information campaigns but even anti-vilification legislation.

With this in mind, it is interesting to compare the results of *HIV Positive* with *Male Homosexuality*. Homosexuality, like HIV infection, is relatively inconspicuous in most Australian communities, certainly compared with pre-marital sex. What is more, homosexuality shares with HIV infection a place in anti-discrimination discourse. Even so, the proportion displaying the third-person effect for homosexuality (59%) was not significantly higher than average (using the seven-point scale) and was significantly less than that for *HIV Positive*.⁷¹⁹

⁷¹⁷ Indeed this proportion is greater (although not significantly so) than the proportion of respondents who displayed the third-person effect in relation to *Sex Before Marriage* and who also said they would think less of the subject of the report (42%): $p < .3$.

⁷¹⁸ The difference was statistically significant in the case of *Conducting Abortions* (54% against 20%, $p < .002$), *Extramarital Affair* (24%, $p < .005$), *Informing Police* (16%, $p < .002$) and *Marijuana Use* (26%, $p < .01$) but not in the case of the other four reports where a similar difference was found.

⁷¹⁹ 69% as opposed to 59%, $p < .01$. With the three third persons combined and using the seven-point scale, *Male Homosexuality* produced a significantly greater third-person effect than four other reports: *Sex Before Marriage* (38%) $p < .001$; *Extramarital Affair* (49%) $p < .05$; *Informing Police* (43%) $p < .002$; *Marijuana Use* (48%) $p < .02$. When the third person was described as the 'ordinary reasonable person' the third-person effect was greater than that produced by five other reports: *Sex Before Marriage* (36%) $p < .002$; *Conducting Abortions* (47%) $p < .05$; *Extramarital Affair* (46%) $p < .02$; *Informing Police* (41%) $p < .002$ and *Marijuana Use* (45%) $p < .01$. When the third person was described as 'ordinary' or 'reasonable', the third-person effect was significantly greater than that produced by just one report: *Sex Before Marriage* (39% in both instances), in the case of 'ordinary' $p < .005$, in the case of 'reasonable' $p < .05$. When the third-person effect is measured using just the 'yes/no' questions, however, a somewhat more significant effect emerges. The report created the second largest third-person effect when three third persons were combined, significantly more five other reports: *Sex Before Marriage* (32%) $p < .001$; *Informing Police* (34%) and *Extramarital Affair* (37%): $p < .002$; *Marijuana Use* (40%) $p < .005$; *Drunkenness* (42%) $p < .01$. When the third person was described as the 'ordinary person' it produced a significantly greater third-person effect than three other reports: *Sex Before Marriage* (37%) $p < .05$, *Extramarital Affair* (38%) $p < .05$, *Informing Police* (39%) $p < .05$. When the third person was

Perhaps the explanation lies, at least in part, in another factor that distinguishes *HIV Positive* from *Male Homosexuality* and *Sex Before Marriage*: the condition imputed by the first report is frequently perceived as misunderstood by the general community. During focus group discussion some reference was made to ‘innocent’ contamination with HIV, particularly through blood transfusion. It is possible that a number of respondents perceived others in the community as ignorant about ‘innocent’ contamination, anticipating instead that people would automatically connect HIV with sex or drugs. It may be that in the case of *HIV Positive*, more than with any other report, a perception of others as ill-informed compounds with an impression that others are bigots.

This argument might account for, as well as draw support from the finding that *HIV Positive* was the only report where there was a significant difference between the proportion displaying the third-person effect when the third person was described as ‘ordinary’ and that displaying the effect when the third person was the ‘reasonable person’.⁷²⁰ Presumably some respondents distinguish between the qualities of reasonableness and ordinariness and imbue the latter with greater moral and intellectual shortcomings. Consequently a significantly larger proportion expected the ‘ordinary’ person to think less of the man with HIV than expected the ‘reasonable’ person to harbour such disdain.

Besides *HIV Positive*, two other reports stand out as producing particularly large third-person effects.⁷²¹ Measuring the latter using the seven-point scale, *Recreational Sex* produced a third-person effect that was significantly larger than that created by four other reports when the third person was described as the ‘ordinary’ or ‘ordinary reasonable person’⁷²² and seven other reports when the third person was the ‘reasonable person’.⁷²³ This is noteworthy, since

described as the ‘reasonable person’ this dropped to two other reports: *Sex Before Marriage* (32%) $p < .05$; *Informing Police* (28%) $p < .005$, but when the third person was described as the ‘ordinary reasonable person’ it produced a significantly greater third-person effect than six other reports: *Drunkenness* (41%) $p < .05$; *Sex Before Marriage* (28%) $p < .002$; *Conducting Abortions* (41%) $p < .05$; *Extramarital Affair* (35%) $p < .002$; *Informing Police* (36%) $p < .005$; *Marijuana Use* (37%) $p < .005$.

⁷²⁰ 76% for ‘ordinary person’, 60% for ‘reasonable person’, $p < .02$.

⁷²¹ With the three third persons combined and using the seven point scale, *Recreational Sex* (third-person effect rate 65%) and *Criminal Parentage* (63%) were the two reports (other than *HIV Positive*) that produced a third-person effect that was significantly greater than the mean: *Recreational Sex*: $p < .01$; *Criminal Parentage*: $p < .05$.

⁷²² In the case of the ‘ordinary person’: *Sex Before Marriage* (39%) $p < .002$; *Marijuana Use* (52%) $p < .05$; *Informing Police* (49%) $p < .02$; *Marijuana Use* (52%) $p < .05$. In the case of the ‘ordinary reasonable person’: *Sex Before Marriage* (36%) $p < .002$; *Extramarital Affair* (46%) $p < .05$; *Informing Police* (41%) $p < .01$; *Marijuana Use* (45%) $p < .05$.

⁷²³ *Drunkenness* (55%) $p < .05$; *Sex Before Marriage* (39%) $p < .002$; *Conducting Abortions* (52%) $p < .01$; *Extramarital Affair* (50%) $p < .005$; *Informing Police* (40%) $p < .002$; *Marijuana Use* (48%) $p < .002$; *Male Homosexuality* (53%) $p < .02$. When the three third persons are combined, *Recreational Sex* produced a third-person effect that was significantly greater than five other reports: *Sex Before Marriage* (38%) $p < .001$; *Conducting Abortions* (51%) $p < .001$; *Extramarital Affair* (48%) $p < .002$; *Informing Police* (43%) $p < .001$; *Marijuana Use* (48%) $p < .001$.

Recreational Sex registered a higher than average defamation rating which, because of the finite seven-point scale in use in this research, should reduce the potential for a large third-person effect. It is also interesting to compare the comparatively high rate of third-person effect for this report with the low rate for *Sex Before Marriage*, given that both relate to female sexual behaviour outside of marriage. One can only assume that respondents tend to perceive others as critical, relative to themselves, of a woman motivated by a sexual desire for multiple partners, something not suggested in *Sex Before Marriage*.⁷²⁴

Interesting though these comparisons between particular reports may be, it is worth emphasising the most plausible explanation for the wide variation in the level of third-person effect produced by the ten reports. The results are compatible with the hypothesis that individuals who display the third-person effect in the context of defamation do so not simply because they perceive the general community as vulnerable to an unreliable and manipulative media, although no doubt that is part of what is happening. But the more important factor seems to be that others are seen in terms of qualities that are rather less attractive than naivety: prejudice and pre-judgment.

THE THIRD-PERSON EFFECT AND THE SECTIONALIST TEST

Applying a simple majoritarian test to the question what is defamatory (whereby it suffices that over 50% of the population would think less of the plaintiff), the survey findings suggest that at most one of the ten reports should be considered defamatory.⁷²⁵ On the other hand, once the third-person effect has intervened, the results suggest that the likelihood of any of the reports being considered defamatory by a judge or juror is greater than 50:50 in the case of all but one of the reports.⁷²⁶ The precise probability ranges from 38% (*Sex Before Marriage*) to 85% (*Extramarital Affair*), averaging at 69%, better than 2:1 odds favouring a defamation verdict.

Even so, uncertainty has been expressed in this thesis as to whether the law intends such a straightforward majoritarian test. Some, for instance, favour a sectionalist approach. They may

⁷²⁴ *Recreational Sex* also stands out when the third-person effect is measured purely by reference to the 'yes/no' questions in relation to whether the first and third persons would think less of the woman. When results for the three third persons are combined, *Recreational Sex* produced a significantly greater third-person effect than five other reports: *Drunkenness* (42%) $p < .05$; *Sex Before Marriage* (32%) $p < .002$; *Extramarital Affair* (37%) $p < .002$; *Informing Police* (34%) $p < .002$; *Marijuana Use* (40%) $p < .02$. When the third person was the 'reasonable person', *Recreational Sex* produced a significantly greater third-person effect than three other reports: *Sex Before Marriage* (32%) $p < .005$; *Extramarital Affair* (37%) $p < .05$ and *Informing Police* (28%) $p < .002$. When the third person was the 'ordinary reasonable person', *Recreational Sex* produced a significantly greater third-person effect than two other reports: *Sex Before Marriage* (28%) $p < .002$ and *Extramarital Affair* (35%) $p < .05$. Interestingly, however, the third-person effect produced by the report was not significantly greater than that produced by any other report when the third person was the 'ordinary person'.

⁷²⁵ *Extramarital Affair*.

⁷²⁶ *Sex Before Marriage*.

query why the survey asked respondents to consider a single hypothetical third person: for instance ‘*the* ordinary person’ as opposed to ‘ordinary people’, even though this reflects how many juries are directed. *The* ordinary person is likely to be understood as embodying the qualities of the average or majority in society. For instance, if asked whether ‘the ordinary person’ is right-handed or left-handed, many might answer right-handed, since they no doubt consider left-handedness to be a minority condition. On the other hand, they probably perceive left-handedness to be far from unusual, so if asked whether ‘ordinary people’ are left-handed they may well say yes. Such an answer does not necessary suggest that most people are left-handed. It simply suggests that the qualities of left-handedness and ordinariness are not mutually excluding. The point is even more strongly made with the question ‘could you think of a left-handed person as ordinary?’ I imagine that most would not hesitate in saying yes.

Glass JA suggested that a publication would be defamatory if an ‘appreciable and reputable section of the community’ would think less of the plaintiff.⁷²⁷ There are good grounds for assuming that if the ‘ordinary’, ‘reasonable’ or ‘ordinary reasonable’ person would think less of someone, then this would pass such a sectionalist test. But what about those respondents who said the ‘ordinary reasonable person’ would *not* think less of the subject of the media report put to them? Might a substantial and reputable section of the public nevertheless do so?

The survey did not directly ask that question. Instead, it asked whether respondents, when considering those who *would* bear antipathy towards the subject of the report, could think of such people as ‘ordinary’ and ‘reasonable’, even though *the* ordinary, reasonable person would *not* think less of the subject.

To illustrate the point, take for instance those respondents who thought that the ‘ordinary reasonable person’ would *not* think less of someone for smoking marijuana. Those respondents are probably indicating a belief that most people at least tolerate marijuana. Even so, it may be that they perceive those who disapprove of marijuana as so prevalent in society that they could still be referred to as ‘ordinary’. If so, they would probably agree that they also constitute a ‘substantial’ section of the public. Similarly, if those who disapprove of marijuana are also considered ‘reasonable’ then one might expect them to be also considered ‘reputable’.

⁷²⁷ *Hepburn v TCN Channel Nine* [1983] 2 NSWLR 682. Hutley JA seemed to favour the term ‘substantial part of the community’. Note also the Attorney-General proposal.

‘Reasonable’ and ‘reputable’ are not synonymous, but they are at least associated: ‘reasonable’ people are surely deserving of good repute, while the ‘unreasonable’ are less so.⁷²⁸

Table 38: Proportion of ‘no/no’ phone survey respondents in relation to whether they could nevertheless regard someone who would think less of the subject of the media report as ordinary and/or reasonable

<i>Media Report</i>	<i>Could you think of someone who would think less of the subject of the media report as:</i>						<i>N</i>
	<i>ordinary?</i>		<i>reasonable?</i>		<i>ordinary and reasonable?</i>		
	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes, both ordinary and reas'ble</i>	<i>No, neither ordinary nor reas'ble</i>	
<i>Extramarital Affair</i>	67%	19%	78%	22%	59%	11%	27
<i>Conducting Abortions</i>	72%	22%	59%	32%	51%	15%	88
<i>Marijuana Use</i>	72%	21%	58%	38%	49%	14%	78
<i>Male Homosexuality</i>	81%	15%	51%	44%	46%	12%	78
<i>Drunkenness</i>	69%	29%	60%	37%	46%	17%	35
<i>Criminal Parentage</i>	71%	25%	49%	51%	41%	18%	51
<i>Informing Police</i>	66%	23%	45%	48%	38%	18%	82
<i>Sex Before Marriage</i>	58%	37%	42%	54%	32%	29%	158
<i>Recreational Sex</i>	69%	26%	38%	54%	31%	18%	39
<i>HIV Positive</i>	60%	34%	30%	60%	21%	25%	53
<i>TOTALS</i>	67%	26%	49%	46%	40%	19%	689

⁷²⁸ Indeed the third-person effect suggests that ‘reputable’ is an easier criterion for the plaintiff to fulfil than is ‘reasonable’, since ‘reputable’ may be taken to mean ‘well regarded by others’ as opposed to ‘deserving of good regard’.

Table 38 above relates only to respondents who said that neither they nor the third person would think less of the subject of the media report. For shorthand, these might be known as ‘no/no respondents’, since they answered ‘no’ when asked whether they would think less of the subject as well as ‘no’ when asked the same question about the third person. These are probably the respondents who saw the acts or conditions portrayed in the reports as broadly acceptable, not only to themselves but to the general community.

Table 38 gives the proportions of these no/no respondents who said that, regardless of their own views and those they probably saw as prevailing in society, they could nevertheless regard as ordinary or reasonable (or both) those who *would* think less of the subject of the media report. In other words, the table indicates the extent to which non-disapproving respondents are prepared to include within the community of ordinary reasonable people those who disapprove. As one might expect, on the whole more no/no respondents are prepared to identify those who disagree with them as ‘ordinary’ than as ‘reasonable’, suggesting that at least some distinguish between those two terms.

When the results for all ten media reports were aggregated, 19% of no/no respondents said that they could regard those who *would* think less of the subject of their report as neither ordinary nor reasonable. These respondents, who constitute just 9% of all respondents, are probably the ones who feel most strongly that the conduct or condition in question not only *should* be accepted, but indeed *is* widely accepted. It is likely that this section of the population, or at least much of it, would, if asked whether an ‘appreciable and reputable section of the community’ disapprove of the conduct in question, answer no. It seems reasonable to conclude that for at least many of these respondents the publication is not defamatory even under a sectionalist test. But the proportion of such respondents is always small: never greater than 20% of all respondents in relation to any particular media report.⁷²⁹

Given that most respondents are prepared to accommodate those who disapprove within their definition of ‘ordinary’ and ‘reasonable’, what might be the overall effect of framing the test for defamation so that it is clearly sectionalist? Obviously more publications would be found to be defamatory, but how many more?

In order to get an impression of the likelihood of any of our ten media reports being considered defamatory under a sectionalist test, we need to make a few assumptions. Let us assume the following:

⁷²⁹ The proportion ranges from 20% in the case of *Sex Before Marriage* down to 3% in the case of *Extramarital Affair*.

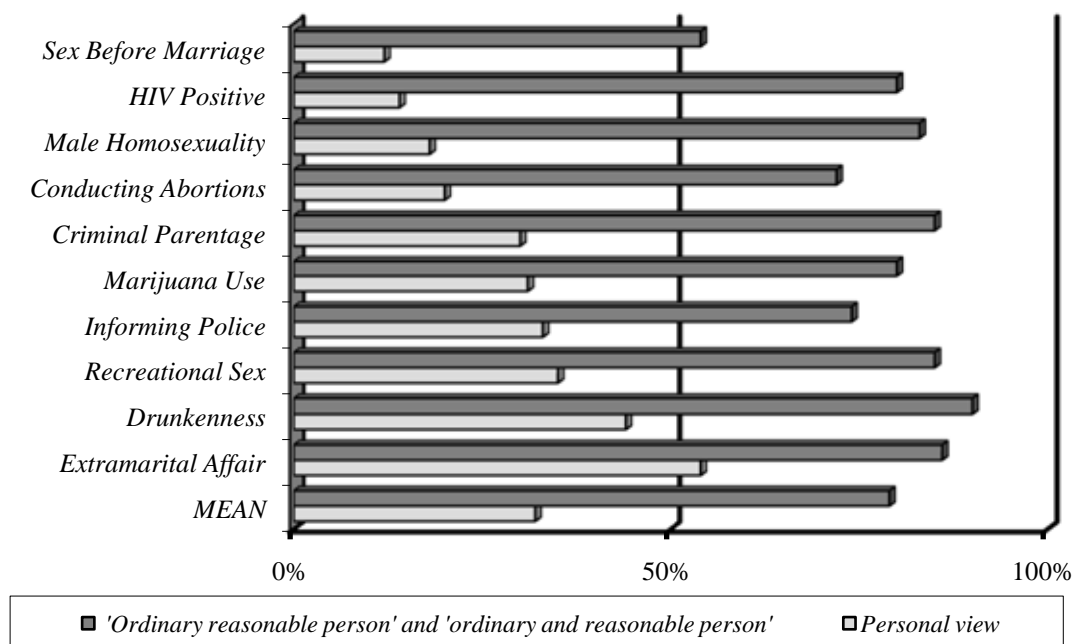
1. all respondents who believe that the ‘ordinary reasonable person’ would think less of the subject of the media report would find the publication defamatory;
2. the sectionalist test under consideration is that the plaintiff’s reputation would suffer in the eyes of a ‘substantial and reputable section of the population’⁷³⁰;
3. all respondents who are able to consider those who disapprove ‘ordinary’ and ‘reasonable’ would also take the view that a ‘substantial and reputable section of the public’ would consider the publication defamatory.

Table 39 and Figure 13 below show the proportion of respondents who would, on the basis of such a definition, consider each report defamatory. Under such a sectionalist test, the probability is that all ten media reports would be found defamatory, even *Sex Before Marriage*, which attracted disapproval among only 12% of respondents. While the mean proportion of respondents who said they would think less of the subject of the media report put to them was just 29%, the probability that a random Australian would, under a sectionalist test, consider a report defamatory averages at almost 4:1, up from around 2:1 when a simple majoritarian approach had been adopted.

Table 39: Comparison of proportion of phone survey respondents who would think less of the subject of the media report, compared with the proportion who (a) believe that the ‘ordinary reasonable person’ would think less of the subject, or (b) could consider someone who would think less of the subject to be both ‘ordinary’ and ‘reasonable’

<i>Media Report</i>	<i>First person responses</i>	<i>Third person responses</i>
<i>Sex Before Marriage</i>	12%	54%
<i>HIV Positive</i>	14%	80%
<i>Male Homosexuality</i>	18%	83%
<i>Conducting Abortions</i>	20%	72%
<i>Criminal Parentage</i>	30%	85%
<i>Marijuana Use</i>	31%	80%
<i>Informing Police</i>	33%	74%
<i>Recreational Sex</i>	35%	85%
<i>Drunkenness</i>	44%	90%
<i>Extramarital Affair</i>	54%	86%
<i>MEAN</i>	29%	79%

⁷³⁰ This is a blend of the two sectionalist tests expressed in *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, one by Hutley JA (‘substantial part of the population’: 686C) and one by Glass JA (‘appreciable and reputable section of the community’: 694B). See above at pages 65 to 73.

Figure 13: Bar chart illustrating the data shown in Table 39

THE THIRD-PERSON EFFECT AND THE AWARD OF DAMAGES

Some judges and lawyers interviewed for the NDRP objected to any indepth analysis of the test for defamation on the basis that the defamatory nature of the imputed act or condition is rarely in serious dispute. For instance, in an examination of 290 Australian defamation verdicts dating from 1977 to 2002, Patrick George found that 29% related to imputations of crime, 20% arose from imputed dishonesty and 36% he categorised as concerning ‘misuse of position’: misconduct in employment, abuse of office, unethical behaviour and the like.⁷³¹ Few would contend that such imputations are not damaging to reputation in the eyes of very many people.

None of the ten hypothetical media reports used for the phone survey was regarded at the outset as obviously defamatory. But if we had used reports that imputed conduct that is unacceptable by consensus, might the third-person effect nevertheless impact on the outcome of trials? The survey findings suggest that it would, for two reasons. First, as demonstrated by the student surveys discussed above, the third-person effect does not only distort perceptions as to how many people condemn the imputed behaviour. It also colours judgment when it comes to the more fundamental question of what behaviour has been imputed: for instance, whether the

⁷³¹ P George, ‘Damages Survey for Defamation’, paper presented at ‘Media Law and Defamation’ seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March 2003, 7.

publication imputes actual guilt or mere suspicion. Secondly, the phenomenon will influence decisions not only as to what is defamatory, but also as to an appropriate remedy where the plaintiff is successful. It is to this latter issue that we now turn.

We might anticipate that those who see a media report as both damaging to reputation and untrue might want to see some form of redress made available to the wronged party. The third-person effect raises an important question: might such a desire derive primarily from an individual's personal antipathy towards anyone guilty of the imputed conduct, or might it spring quite independently of such disdain, originating instead in expectations as to how others think, regardless of how little the individual would agree? For instance, if I believe that a man should be compensated when wrongly accused of adultery, is it because I dislike adulterers or because I think others will be disapproving of his reported dalliances? If our perceptions of others are often false then this is clearly an important issue.

The third-person effect, as originally conceived by Davison, was the hypothesis that the phenomenon will have a behavioural as well as attitudinal outcome. For instance, jurors who do not personally think less of the plaintiff might be more likely to award substantial damages if perceiving harm to reputation in the eyes of others than if not.

While it may seem entirely predictable that the third-person effect phenomenon will have such concrete consequences, as explained above there has been very little evidence that such 'real world' ramifications exist.⁷³² As Perloff concluded, 'the behavioural component of the third-person effect hypothesis remains unsubstantiated'.⁷³³

As far as I am aware, Gunther was the only researcher to previously examine the third-person effect as a behavioural phenomenon in the context of defamation law. His experiment using 128 American undergraduates failed to establish a significant link between perception and behaviour, although he ascribed his failure in part to his small sample size.⁷³⁴

Now I believe I have the evidence Gunther sought. The results relating to that issue will be explored shortly. But first it must be noted that the third-person effect was not the only interest driving the NDRP research. Another aim was to measure the effect on attitudes towards damages of a finding that a media defendant to a defamation action behaved irresponsibly in publishing the material complained of.

⁷³² See above pages 258 to 259.

⁷³³ Perloff, 'Third-Person Effect Research 1983-1992: A Review and Synthesis' 5(2), above n 602, 172.

⁷³⁴ See above pages 270 to 280.

Following on from the questions relating to respondents' perceptions of their own and the hypothetical third person's reaction to the media report, respondents were told that sometimes untrue media reports are published despite the media organisation in question having taken all reasonable care to avoid any untruths. Respondents were then asked what should happen if that situation applied to the report just described to them. Should the media organisation be made to publish a correction putting the record straight or pay the person compensation? Respondents were then asked the same question again, but this time in relation to a situation where the media organisation had *not* taken all reasonable care when publishing the report described to them.⁷³⁵

Overwhelmingly respondents wanted corrections published. Aggregating the results for all ten hypothetical media reports, in the case of the organisation who took all reasonable care (the 'careful organisation'), the proportion who considered a published correction appropriate was 90%. This rose to 95% in the case of the organisation that did *not* take all reasonable care (the 'negligent organisation'). 74% also thought that the negligent organisation should be required to pay compensation.

Most interesting, however, are the findings relating to the payment of compensation by the *careful* media organisation. A central issue in defamation law is the extent to which the defence of qualified privilege should be extended to the media. That question hinges, in part, on the degree to which it is proper for media publishers to escape liability for untrue publications on the basis that they took reasonable steps to avoid publishing any untruth.

Table 40 below demonstrates the impact of the third-person effect on demands that the careful organisation should pay compensation. For the purpose of this table, respondents have been divided into four groups. Group A consists of those respondents who anticipated damage to reputation neither when asked what *they* would think (the first person condition) nor when asked about the reaction of the third person (the third person condition). Group B consisted of those few respondents to display the reverse third-person effect, meaning that they thought the third person would not think less of the subject of the report, whereas they would. Group C respondents displayed the far more common third-person effect, whereas Group D respondents expected damage in both conditions (ie both they and the third person would think less of the person concerned).

⁷³⁵ It was assumed that if both a correction and compensation were demanded from the careful organisation then both would also be called for in the case of the negligent organisation.

Table 40: Proportions of phone survey respondents who thought compensation should be paid by the careful media organisation in relation to perceptions of damage to reputation in the eyes of the first and/or third persons

<i>Respondent group</i>	<i>No. respondents in group</i>	<i>Indicating defamatory in the first person condition?</i>	<i>Indicating defamatory in the third person condition?</i>	<i>Proportion saying compensation should be paid by the <u>careful</u> media organisation</i>
A	690	No	No	32%
B (reverse third-person effect)	78	Yes	No	32%
C (third-person effect)	1,268	No	Yes	47%
D	788	Yes	Yes	52%

The proportion of respondents requiring that the careful organisation pay damages is almost identical as regards categories A and B (both 32%). This is despite the former saying they themselves would not think less of the respondent, while the latter said they would. Similarly there is no significant difference between categories C and D, even though the same distinction arises between the two groups. What this suggests is that personal disapproval of the imputed conduct has very little bearing when it comes to attitudes to whether a non-negligent media should pay compensation.

In contrast, note the significant distinction between group A and C. Respondents in neither group indicated that they themselves would think less of the subject of the media report. What distinguishes the two groups is that respondents in C anticipated that the third person would do so. This perception of damage to reputation in the eyes of the third person appears to bring with it a 46% increase (from 32% to 47%) in the proportion who want the careful media organisation to pay damages.

When groups B and D are compared, the increase in demands for compensation is even more striking. Again, both groups indicated personal disapproval of the imputed conduct or condition: what distinguishes them is perception of third person reaction. Expectation of harm in the third person condition leads to a clearly significant 61% increase in the proportion who want damages paid (32% to 52%).

The conclusion can be drawn from these results that perception of damage to reputation in the eyes of the first person, when taken in isolation from the perception of damage to reputation in the eyes of the third person, has no significant bearing on the desirability of compulsory compensation from careful publishers. Put more simply, if I believe that someone should receive damages for, say, an untrue reference to being gay, then the likelihood is that this has less to do with my attitudes to homosexuality than with my perception as to how others view sexual orientation.

A similar finding emerges with a closer examination of those respondents who anticipated some degree of harm to reputation (groups B, C or D). Respondents who said they (or the third person) would think less of the subject of the media report were asked to indicate the extent to which they (or the third person) would think less of that person. They were requested to do so using a scale of one to five, where one means 'just a little less' and five means 'a great deal less'.

Figure 14 below relates only to respondents in groups B or D: those who said they themselves would think less of the subject of the media report. It shows the relationship between the extent to which they would do so and demands that the careful media organisation pay compensation.

As might be expected, the proportion requiring that damages be paid increases from 44% in relation to those who said they would think 'just a little less' of the subject of the media report, up to 58% in the case of those who ranked at mid-scale the extent to which they think less of that person. However, that proportion then starts to decline as we proceed up the scale of reputational harm, to the extent that those who would think 'a great deal less' of the person require damages barely more than those who feel only a slight degree of antipathy towards the behaviour or condition in question. This suggests that there is no meaningful correlation between the extent to which a respondent would think less of the subject of the media report and a desire to see the careful media organisation pay compensation.

Compare now the same exercise in relation to perceptions of reputational harm in the eyes of the third person. Figure 15 below relates to respondents in groups C or D. The difference between this and Figure 14 is that respondents who did *not* indicate damage to reputation in the eyes of the third person have been removed and replaced by respondents who *did* indicate such damage, even if they themselves would not think less of the subject of the media report. Whereas the respondents in Figure 14 personally disapprove of the imputed behaviour, those in Figure 15 anticipate reputational damage in the eyes of the third person.

Figure 14: Proportions of phone survey respondents in groups B or D who thought the careful media organisation should pay damages.

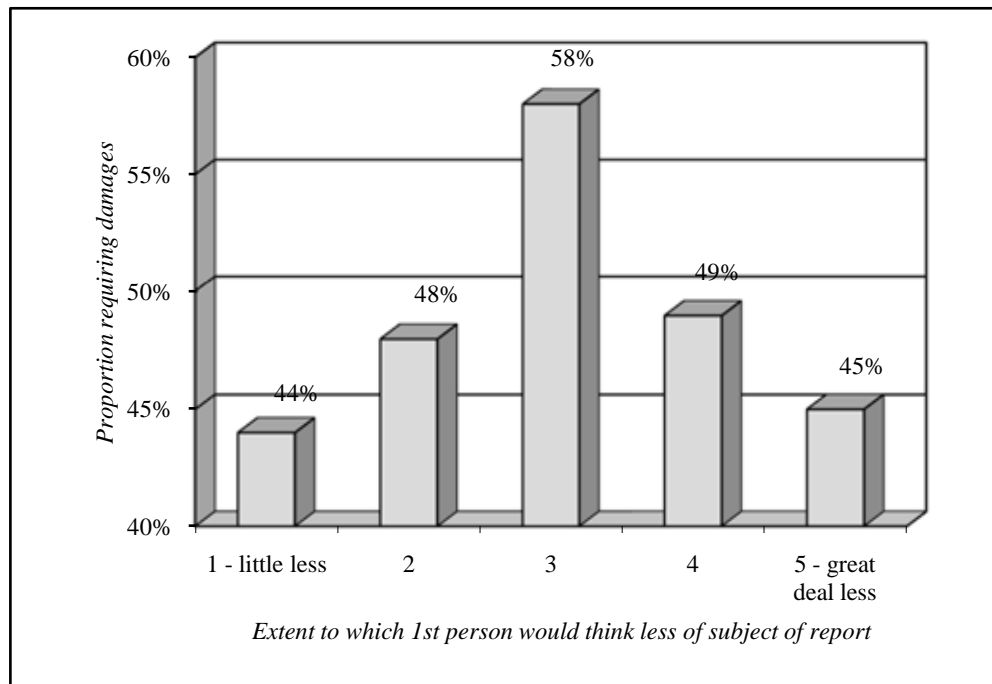
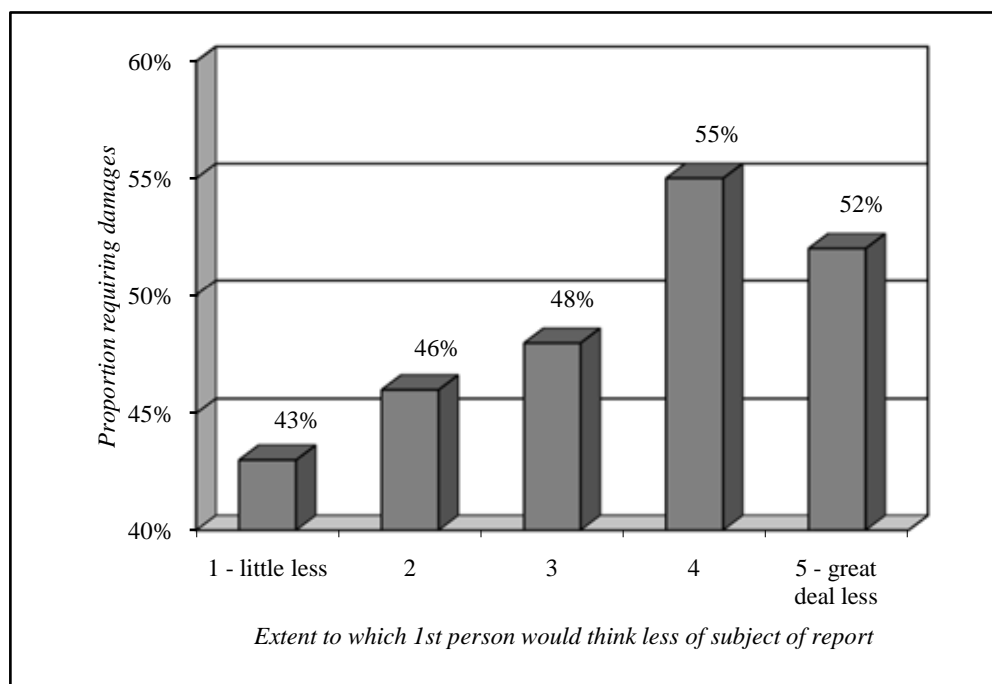


Figure 15: Proportions of phone survey respondents in groups C or D who thought the careful media organisation should pay damages.



This time a correlation appears: the greater the perceived antipathy of others towards what is said about the plaintiff, the more people demand that damages be paid if the allegation seen to give rise to that antipathy turns out to be untrue. Although there is a small, unexpected drop in the proportion wanting compensation once perceived damage to reputation exceeds level 4 on the scale, the difference between the proportions shown for levels 4 and 5 is not significant and may simply be the product of our relatively small sub-samples in those categories. On the other hand, significantly more respondents estimating the third person's reaction at level 4 wanted compensation paid than those who anticipated the third person's reaction at levels 1, 2 or 3.⁷³⁶

This result is significant for two main reasons. First, it corroborates the third-person effect findings reported above. The correlation between perceptions of damage to reputation in the third person condition and calls for damages further diminishes the possibility that the third-person effect is some illusory product of survey methodology. Secondly, the results give some indication as to what happens when a plaintiff sues over the imputation of conduct that attracts general disapproval.

The overarching lesson of our research must be that what matters is not widespread antipathy but a perception of widespread antipathy. In the minds of those respondents who thought that the 'ordinary reasonable person' would not only think less, but would think a great deal less of the subject of the media report put to them, the conduct imputed in that report is presumably understood to be the very type of behaviour which, by consensus, is opprobrious. It is telling, therefore, that those respondents were among those most likely to demand compensation from a careful media organisation, even though they tended to be personally far less critical of the imputed conduct than their perception of the community generally.

WHO DISPLAYS THE THIRD-PERSON EFFECT?

What type of person tends to display the third-person effect? In defamation law this question has a very practical ramification. If certain sections of the community are particularly prone to this behavioural pattern then the problem will be compounded if these are over-represented in the judiciary or on juries.

With such issues in mind, the survey sought some basic demographic information from respondents. As well as recording their gender and postcode, interviewers asked respondents their age, formal educational attainment, household income, which religion (if any) they belong to and whether they practise that religion.

⁷³⁶ In the case of level 1 and 2, $p < .001$. In the case of level 3, $p < .002$.

Before exploring the relevance of those demographic factors, it must be noted that those who said they would *not* think less of the subject of the media report described to them were almost twice as likely to display the third-person effect as those who said they would.⁷³⁷ This suggests that the third-person effect distortion will be compounded in the case of a liberally-minded judge or jury.⁷³⁸

While respondents who did not disapprove of the subject of their media report were more likely to display the third person effect than those who did, it does not seem to follow that the latter were more likely to identify themselves with the reasonable or ordinary reasonable person. Instead, large proportions of those who expressed disdain displayed a reverse third person effect. Only in the case of those asked about the ordinary person were those who expressed disdain significantly more likely to identify with the third person than were those who expressed no disdain.⁷³⁹

Gender

However the third person was described, when the results for the ten media reports are aggregated the proportion of men displaying the third-person effect is not significantly different from that of women. Only in the case of *Recreational Sex* did significant differences emerge (once results for the three third persons were combined), with more women displaying the effect than men,⁷⁴⁰ even though men were not significantly more likely to express disdain for the subject of that report.⁷⁴¹ In focus groups social disapproval of female serial monogamy was frequently associated with widespread approval of the same behaviour in men. It may be that women are more likely to perceive (albeit, it seems, in exaggerated terms) what focus group participants frequently identified as a sexist double standard.

Education and age

The question whether education and age are significant predictors as to whether an individual will display the third-person effect is important given the propensity for many surveyors to rely on convenience samples of undergraduate students who, of course, tend to be young and well

⁷³⁷ 63% against 33%, $P < .001$.

⁷³⁸ The survey's finding can only partly be explained by the finite nature of the scale offered to those who expressed disdain. While 17% of respondents who said they would think less of the subject of the media report rated their disdain at the top of that scale, thus rendering a third-person effect response impossible, 83% of respondents expressing disdain were able to indicate a third-person effect response. Even so, the proportion of those respondents who displayed the third-person effect was just 40%, significantly smaller than the proportion of those not expressing disdain who displayed the third-person effect (63%): $p < .001$.

⁷³⁹ 38% against 29%, $p < .02$.

⁷⁴⁰ 71% for women against 57% for men ($p < .01$).

⁷⁴¹ $p < .2$.

educated. Those with good education might consider themselves an elite, better able to make appropriate moral judgments about others' behaviour.

In his meta-analysis of 32 published and unpublished studies into the third-person effect, Paul found a significantly larger third-person effect yielded by studies using college student samples compared with those using non-college samples.⁷⁴² Tiedge found education relevant,⁷⁴³ while Lasorsa found that the correlation between the third-person effect and education fell just short of statistical significance.⁷⁴⁴ But Kim and his colleagues found that education made no difference,⁷⁴⁵ as did Glynn and Ostman.⁷⁴⁶

It will be recalled that the NDRP survey found that better educated respondents were more likely to think less of the subject of the report put to them.⁷⁴⁷ Even so, education does not seem to significantly lead to a propensity towards the third-person effect. There was virtually no difference when respondents with any kind of post-school qualification were compared with those without,⁷⁴⁸ or even when the former were compared with those who failed to complete their secondary education.⁷⁴⁹

While the NDRP's findings in relation to education give some support to the use of undergraduates in third-person-effect surveys, students' comparative youth must also be considered. Here some clearly significant findings emerged, results which suggest that our tendency to display the third-person effect diminishes as we mature. While 61% of adults aged below 40 displayed the effect, 50% of those aged 40 or over did likewise.⁷⁵⁰ Predisposition towards the third-person effect seems to decrease more or less steadily throughout adult life: the age group least likely to display the effect was the over-70s.⁷⁵¹ As for respondents aged 18 to 24, the typical age range for undergraduates, 61% showed the effect, a significantly greater proportion than was found among those aged 35 and over.⁷⁵² It would seem, then, that age tends to lend the perception that we are more like others than we may have thought in our youths.

⁷⁴² Paul, Salwen and Dupagne, above n 614, 77.

⁷⁴³ Tiedge, above n 699.

⁷⁴⁴ Lasorsa, 'Real and Perceived Effects of "Amerika"', above n 606.

⁷⁴⁵ Kim, Ahn and Song, above n 647.

⁷⁴⁶ Glynn and Ostman, above n 612.

⁷⁴⁷ See page 218 above.

⁷⁴⁸ 54.48% against 54.35%.

⁷⁴⁹ 54.48% against 54.10%.

⁷⁵⁰ $p < .001$. There was no significant difference between those aged 40 to 59 and those aged 60 and over (50.8% against 49.6%).

⁷⁵¹ 47% against 55%, $p < .001$.

⁷⁵² $p < .05$. However the difference between those aged 18 to 24 and those aged 25 and over fell short of significance ($p < .1$).

Here the NDRP results are inconsistent with preceding research findings. Glynn and Ostman found age a strong predictor, with older respondents more likely to display the effect.⁷⁵³ Tiedge found age relevant, with older people seeing themselves as not influenced by the media.⁷⁵⁴ Brosius also reported that older people seem more prone to the third-person effect.⁷⁵⁵

In summary, the NDRP findings cast some doubt on the reliability of student surveys as guides to the general population, suggesting that such surveys might exaggerate the third-person effect, although the problem may come not so much from the students' education as their self-perception as educated, along with their youth.

Income level

There is some indication that those from low-income backgrounds are slightly less likely to display the third-person effect, although the correlation with income is weak. Respondents living in a household with an annual income over \$40,000 but below 80,000 were more likely to display the third-person effect than those whose yearly household income was \$40,000 or less,⁷⁵⁶ although there was no significant difference between the latter and those with a household income of over \$80,000 per annum.

Geographical location

To some extent respondents' propensity to display the third-person effect depended on where they lived. While there was no significant difference between those inside and outside capital cities,⁷⁵⁷ a few significant differences emerged between states. When results for the ten reports were combined, the people of New South Wales proved to be the least tolerant and, along with Tasmanians, the least likely to display the third-person effect, a significant difference emerging between those states and Queenslanders⁷⁵⁸ or, when considered collectively, Australians from all other states and territories.⁷⁵⁹

Being more specific, Sydneysiders were less likely to display the third-person effect than respondents from Brisbane, those from non-metropolitan areas of Queensland and Victoria as

⁷⁵³ Glynn and Ostman, above n 612.

⁷⁵⁴ Tiedge, above n 699.

⁷⁵⁵ Brosius and Engel, above n 627, 142.

⁷⁵⁶ 57.7% against 53.4%, $p < .05$.

⁷⁵⁷ 57% against 53%, $p < .1$.

⁷⁵⁸ 51% for New South Wales and Tasmania against 60% for Queensland ($p < .005$ in the case of New South Wales and Tasmania)

⁷⁵⁹ In the case of New South Wales, 51% against 56% for the rest of Australia ($p < .002$). In the case of Tasmania, 51% against 55% for the rest of Australia ($p < .005$).

well as other Australians when considered overall.⁷⁶⁰ Non-metropolitan Tasmanians were less likely to display the third-person effect than Victorians or Queenslanders (whether or not these lived in their respective capital cities) or residents of Perth, or their fellow Australians when viewed collectively.⁷⁶¹

Culture

There has been some research into whether the third-person effect is a product of particular national or cultural characteristics, particularly since the bulk of third-person effect surveys and experiments (at least in the English language) have been conducted in the United States.

Paul's meta-analysis compared US studies with those from other countries. His study fails to distinguish between studies conducted outside the States, the comparison being simply between US and non-US studies. To that extent, at least, country was not found to be a significant moderator.

Since Paul's meta-analysis, however, a large international survey has examined the third-person effect in eight countries in Europe and Asia in relation to the cultural influence of American media.⁷⁶² The study involved written questionnaires being completed by 1,968 undergraduates in Japan, Indonesia, Hong Kong, China, Spain, Germany, Britain and the Netherlands during 1998. The students were asked how much influence they thought general American news and entertainment media has on the cultural values of themselves, others in their country and others in other countries on their continent (Asia or Europe). Similar questions asked about the influence of US news and entertainment media containing a lot of violence has on the same three groups. Respondents were also asked whether these influences were positive, negative or neutral.

British and Dutch students were the only respondents to feel on average that general US media has a negative impact on themselves. In the case of every Asian country studied the students saw the US media as having more impact on themselves than did European students. Every country's students saw the effect of violent US media on themselves as negative and although the impact was seen as greater by Asian students than Europeans, the gap was substantially narrower than that relating to American media generally.

⁷⁶⁰ 49% against 60% for Brisbane ($p < .01$), 60% for non-metropolitan Queensland ($p < .02$), 60% for non-metropolitan Victoria ($p < .05$), 56% for the rest of Australia overall ($p < .002$).

⁷⁶¹ 47% against 53% for Melbourne ($p < .05$), 60% for non-metropolitan Victoria ($p < .01$), 60% for Brisbane ($p < .001$), 60% for non-metropolitan Queensland ($p < .005$), 57% for Perth ($p < .05$), 55% for the rest of Australia ($p < .001$).

⁷⁶² Lars Willnat et al, 'Perceptions of Foreign Media Influence in Asia and Europe: The Third-Person Effect and Media Imperialism', (2002) 14(2) *International Journal of Public Opinion Research*, 175.

This might suggest that the third-person effect is more of a European than Asian phenomenon. Indeed, the phenomenon known as biased optimism, which has been suggested as a cause of the third-person effect, was found by one study to be less prevalent in Japan than Canada.⁷⁶³ But on the other hand evidence of the third-person effect has been found among college students in Korea.⁷⁶⁴

Religion

To qualify for the NDRP survey, respondents needed to be residents of Australia, but beyond that their cultural background was not explored. Even so, respondents were asked their religious affiliation. Unfortunately the number identifying with faiths not traditionally associated with Australia's majority, Anglo-Celtic population were too small to permit comparisons to be made between faiths such as Islam, Hinduism, Buddhism and so forth.

Even so, when it came to comparisons between Christians and non-Christians, as well as between believers and non-believers, religious affiliation and practice emerged as among the most significant predictors as to whether respondents would think less of the subject of the media report put to them. Respondents who said they practise their religion (religious practitioners) were significantly more likely than those who said they belonged to a religion they did not practise (religious non-practitioners) to think less of the subject of the media report, and both groups were significantly more likely than those who belonged to no religion to say they would think less of the subject of the media report put to them.

Religious practitioners were less likely to display the third person effect than Christians who said they did not practise their religion, or those respondents who said they belonged to no religion.⁷⁶⁵ Those who said they belonged to a religion other than Christianity (whether or not they practised it) were less likely to display the third-person effect than those who said they belonged to no religion.⁷⁶⁶ As far as I can ascertain, the NDRP is the first study to explore the relationship between religious affiliation and the third-person effect.

⁷⁶³ SJ Heine and DR Lehman, 'Cultural Variation in Unrealistic Optimism: Does the West Feel More Invulnerable than the East?' (1995) 68 *Journal of Personality and Social Psychology* 595.

⁷⁶⁴ Kim, Ahn and Song, above n 647.

⁷⁶⁵ 49% (practising Christians) and 51% (practitioners of other religions) against 57% for non-practising Christians and for those who belonged to no religion ($p < .002$ in the case of practising Christians, $p < .01$ in the case of practitioners of other religions). Practising Christians were less likely to display the effect than other Australians when viewed collectively (49% to 56%, $p < .002$).

⁷⁶⁶ 52% against 57% ($p < .05$).

CONCLUSION

The above findings indicate that the third-person effect is likely to shape legal outcomes when it comes to determining three fundamental issues in defamation litigation: what message about the plaintiff the publication conveys, whether that message is defamatory and, if so, what will suffice to compensate the plaintiff, assuming that no legally recognised defence arises.

As regards the issue of remedies, the findings lead to two conclusions. First, the third-person effect has behavioural as well as perceptual ramifications in defamation law. This is the first time this has been convincingly shown. Secondly, the results suggest that people tend to be motivated to demand that the media pay damages to those they wrongly defame not because individuals themselves disapprove of the behaviour the media have imputed to those unfortunates, but because they perceive such disapproval in the minds of others. This is also a significant finding.

There is good reason to assume that the third-person effect extends well beyond court deliberations. It is likely to influence a publisher's decision whether to settle out of court. Even more fundamentally, it will affect the decision whether to publish the story in the first place. In all of these ways, the phenomenon will contribute to the pervading chilling effect of defamation law, whereby legitimate speech is silenced.

CHAPTER 8: CONCLUSION

This thesis has examined an aspect of defamation law often passed over in the literature. Much is said about the need for the law to facilitate open, *bona fide* discussion in relation to matters of public interest. For good reason, emphasis is given to the law's chilling effect, particularly for the media. Consequently, efforts have been made, with varying degrees of success, to tailor defences that respect the right to freely impart and receive facts and opinions about those who matter in public life.

Less attention has been paid to the more basic consideration that always arises for those who see themselves as potential defamation plaintiffs or defendants, together with their legal advisers, as well as the judges and jurors charged with hearing defamation actions: is the relevant material defamatory in the first place? If the answer to that question is no, neither the potential parties to defamation litigation, nor the courts before which they appear, need to give any thought to the material's defensibility.

Most of the lawyers and judges interviewed for the NDRP were of the view that the test for defamation rarely proves problematic. Justice David Levine, who was for many years the principal judge for defamation trials in the New South Wales Supreme Court, has publicly stated that he has never been troubled by the 'ordinary reasonable person' test:

With what would it be replaced? With all its faults, the [ordinary reasonable person] provides essentially an objective test.⁷⁶⁷

Indeed, most lawyers were generally more concerned to talk about the defences or, particularly in New South Wales, trial procedure and the rules relating to pleadings. When it came to deciding what is defamatory, all were familiar with the complexities inherent in distilling imputations from published material, the process I have referred to as determining denotative meaning. But few acknowledged that connotative meaning creates any real difficulty.

Although supposedly free of complications, the test for defamation is full of ambiguities and uncertainties. In Chapter One I identified a key ambiguity in terms of the realist / moralist

⁷⁶⁷ Michael Pelly, 'Take me to your Reader', *Sydney Morning Herald*, 1 October 2005, 5.

debate. Whether the test is framed in terms of the ‘ordinary reasonable reader’,⁷⁶⁸ the ‘right minded reader of average intelligence’,⁷⁶⁹ ‘right-thinking members of society generally’⁷⁷⁰ or ‘ordinary decent folk in the community’,⁷⁷¹ it is unclear how the law should deal with situations in which the court thinks that the response of most people to a publication would be anything but ‘reasonable’, ‘right minded’, right-thinking’ or ‘decent’. The problem of the unreasonable response becomes particularly relevant once the view is taken that questions of defamation can be determined not just by reference to what most people think, but by heeding relatively small sections of the community.

Despite these uncertainties, the test for defamation is in other respects quite clear. For instance, it is not a straightforward empirical exercise. Apart from a few isolated instances, the adoption of social scientific methodologies in order to decide what is defamatory proved unsuccessful in the United States, and there is no indication that any such attempt has been made in Australia. In Chapter Two I explained how the relevant audience of ‘ordinary reasonable people’ is clearly a legal construct. It is also evident that the sentiments of certain subcultures, particularly any real or imagined criminal underworld, cannot determine the matter. The normative character of defamation law is beyond dispute.

On the other hand, it is implausible that the question of what is defamatory is meant to be answered without very considerable regard for the values of most people in the relevant jurisdiction, as well as the way in which those people interpret the messages they read, hear and see. Clearly the institution of the jury is intended to represent a cross-section of society, and it is to a jury that these issues of defamation have traditionally been entrusted.

Between these two, equally unlikely characterisations of defamation law, first as a pure numbers game and secondly as an abstract exercise in ethics, I have presented, from various primary and secondary legal sources, a variety of interpretations of the test for defamation. In Chapter Three I suggested that any plausible definition of the test can be placed into one of four categories, depending on whether they are moralist or realist, majoritarian or sectionalist. Through interviewing practitioners of defamation law, as well as judges, I have found evidence of support for these various positions in the ‘real world’ of defamation litigation. Certainly sectionlists are in the minority, as are moralists, but among the judiciary and the legal profession there are those who put considerable store by the views of certain sub-communities,

⁷⁶⁸ *Farquhar v Bottom* [1980] 2 NSWLR 380, 385G.

⁷⁶⁹ *Slatyer v Daily Telegraph Newspaper Co Ltd* (1907) 7 SR (NSW) 488, 504.

⁷⁷⁰ *Sim v Stretch* (1936) 52 TLR 669, 671.

⁷⁷¹ *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 172.

and can see that every so often the law, for policy reasons, can and will bypass mainstream views that are bigoted or unreasonably biased.

Even so, out of the four categories, the weight of evidence supports majoritarian realism. In other words, a publication will be defamatory only if most people would think less of the plaintiff, assuming they are exposed to the publication and are aware of any factors that give rise to a true or legal innuendo. Given that opinion polls are an everyday means of gauging public support for any given proposition, it is not immediately obvious why the law has so decisively rejected such empirical evidence. If the reasons are rational then they must be grounded in pragmatism, not principle.

In fact, it can be said that the law has not rejected empiricism altogether. The jury can be characterised as a focus group; one selected, more or less randomly, from the general population, so as to get a snapshot of how messages are interpreted and what values are held. Given the cost and inconvenience involved in large-scale surveys, such an approach is not without its merits. What is more puzzling, however, is the way in which the law uses the jury. Probably out of somewhat naive concern about the representativeness of the jury, particularly in light of its small size, courts use jurors not so much as a sample of the general population but as experts on it. This represents not only a reification of the public and public opinion but the separation of judges from both.

With these issues in mind, this thesis constitutes, in short, a comparative exercise. What have been compared are various answers to the same basic question: what would lead ‘ordinary reasonable people’ to think less of somebody? The answers I have given derive from four sources:

1. an examination of the decisions of judges and juries made in the course of actual defamation proceedings;
2. interviews with judges and defamation law practitioners, asking them in particular to predict what would happen if certain imaginary media reports resulted in trials for defamation;
3. a phone survey of 3,000 adults, selected to represent Australia’s resident population, asking if they would think less of the subjects of the same reports;
4. questions asked as part of the same phone survey, seeking views as to how various hypothetical persons would regard the said subjects.

The reports in question were chosen with various aims in mind. First, a comparison was made between two types of publication. The first type impute criminal conduct. The imputation of serious crime is clearly defamatory, but because this study was concerned with the margins of defamation, I chose an offence which would generally be considered both minor and victimless: the recreational use of marijuana. The second type of publication imputes efforts to assist with the apprehension of criminals.

Unsurprisingly, no authority casts doubt on the capacity of the first type to defame. But there is plenty of authority to the effect that the second cannot be defamatory, even if the alleged informant owes a particular duty of loyalty to the suspect, and even if the latter is only suspected of some minor misdemeanour. A number of commentators point to this as evidence of moralism: a policy decision to deny defamation status to imputations of informing, in disregard for the population's alleged dislike of informants. Perceptions of such widespread antipathy were shared by most of the interviewed practitioners and judges, although a large proportion were unaware of the case law relating to informant imputations.

However, it transpired from the phone survey that the proportion of the public who would think less of a wife who informs on her husband, despite the suspected offence being 'extremely trivial', is not significantly greater than the proportion who would think less of a man who smokes marijuana recreationally. In both cases the proportion was around 32%. Arguments for moralism that draw on the informant imputation cases are based on a false premise: the widespread disavowal of the informant. Given that informant imputations are generally considered non-defamatory, there is all the more reason to believe that defamation law is intended, broadly speaking, to reflect what most people think.

The second area of study was into reports that can be predicted to excite bigotry, particularly in relation to men who are homosexual, HIV infected or have a criminal for a parent. Out of those three categories of imputation, the one which emerges from a study of precedents as most clearly incapable of defaming is the one relating to criminal parentage. There was a widespread view, both in published commentary and among the lawyers interviewed for this project, that imputations of HIV infection can be and indeed are defamatory, while there are conflicting recent Australian authorities in relation to imputations of homosexuality. Curiously, then, the phone survey suggests that the proportion of Australians who would think less of a man on the basis that he has a criminal for a parent is around twice as large as the proportion who would

think less of a man for being gay or affected with HIV. And in the case of all three imputations, less than one in three Australians would disapprove.⁷⁷²

The third category of imputations under study relate to shifts in morality. Over time there have undoubtedly been changes in attitudes to sex outside marriage, as well as to drunken flirtation and high spirits among women. Even so, relatively recent authorities can be cited for the proposition that imputations of pre-marital or extramarital sex are both capable of being defamatory, as well as the same proposition in relation to reports of a woman indulging in behaviour that might once have been termed promiscuous. According to the phone survey, while around half of the population indeed disapproves of men who cheat on their wives, only around a third thinks less of women who let their hair down (and skirts up) at office parties, or who sleep around. And a mere 12% disapprove of premarital sex. If the test for defamation is what most people think, then of the ten imaginary reports that form the main vehicle for this study, no more than one should be considered defamatory.

Why, then, does a trawl through relatively recent Australian case law suggest that at least eight of those imaginary reports is capable of being defamatory?⁷⁷³ Why, in the case of eight reports (but not quite the same eight reports) did a majority of the interviewed lawyers (judges and practitioners combined) consider them capable of defaming?⁷⁷⁴ Why does my search through Australian cases suggest that around six of the reports would in fact result in a finding of defamation?⁷⁷⁵ And why, in the case of four reports, did a majority of my legally qualified interviewees predict a verdict of defamation from a properly instructed jury?

From these figures, there appears to be a degree of disconnect between mainstream opinion and how defamation courts are deciding borderline cases of defamation. The law appears to overestimate levels of disapproval, both when it comes to deciding what is defamatory and also to assessing how seriously a plaintiff has been defamed, a consideration relevant to calculating appropriate damages. Trials appear biased towards findings of defamation, even when relatively small proportions of the population would actually disapprove of the imputed behaviour or condition. Based on the interviews with defamation practitioners, it can be surmised that there is

⁷⁷² In the case of *Criminal Parentage* the proportion was 30%. In the case of *Male Homosexuality* and *HIV Positive* it was 18% and 14% respectively. In each case, PVP and PVS respondents have been combined.

⁷⁷³ I exclude as incapable of being defamatory *Informing Police* and *Criminal Parentage*.

⁷⁷⁴ The two reports *not* considered by a majority to be capable of being defamatory were *Sex Before Marriage* and *Criminal Parentage*.

⁷⁷⁵ Of the reports that appear to be capable of being defamatory, I exclude as probably non-defamatory *Sex Before Marriage* and *Male Homosexuality*.

a similar disparity between, on the one hand, the advice given to plaintiffs and defendants as to what is defamatory and, on the other, what Australians actually think.

No doubt the latter disparity is caused by the first. Indeed, the evidence suggests that experience of defamation practice (and therefore familiarity with defamation trial outcomes) leads towards a tendency for defamation lawyers to think alike in considering many of the imputations examined in this report to be defamatory, when in fact they are not.

Building on research in communications studies, I have offered as an explanation for these phenomena the third-person effect: the tendency for individuals to perceive the negative impact of media messages to be greater on others than on themselves. I am not the first to apply the third-person effect hypothesis to defamation law: there have already been a few small-scale American studies. But, as far as I am aware, I am the first to demonstrate that the third-person effect distorts perceptions not only of the meanings others attribute to media communications (which I have termed denotative meanings) but also perceptions of what others consider relevant to moral character.

In terms of denotative meaning, the role of the third-person effect is clearly apparent in the student survey. That survey relates to one of the most vexed issues for any journalist or defamation lawyer: when does a report of a police investigation become an allegation of guilt on the part of the investigated party? It would seem that students, at least, tend to perceive others as reading into such reports imputations of guilt, even though they themselves keep a more open mind.

As for connotative meaning, the term I use for the message conveyed by a communication in relation to the amount of respect due to its subject, strong third-person effects emerge in the case of all ten of the imaginary media reports used for the phone survey. Overall, respondents were more than twice as likely to identify the 'ordinary reasonable person' as thinking less of the subject of the report than they were themselves.

It is entirely possible, indeed probable, that in the real world of the newsroom, lawyer's office, court or jury room, factors will come into play that ameliorate these marked third-person effects. Indeed, a great deal of valuable research could be done in terms of what those factors are. Even so, the third-person effect hypothesis is one of the best researched in communications studies. It is hard to believe that it does not shape the decisions journalists make as to what to write, the advice they receive from their lawyers, the propensity for plaintiffs to sue for defamation, the willingness of defendants to settle and the outcome should matters reach trial.

The third-person effect, by definition, represents a collective misapprehension as to public opinion. It is a misapprehension that disturbs the balance sought by defamation law between rights to free expression and interests in reputation. It tips that balance in favour of the plaintiff, thus exaggerating the well-documented chilling effect of defamation law. What permits the phenomenon to affect the law is the latter's reliance on the hypothetical 'ordinary reasonable person', as opposed to being guided by the responses of real people. It transpires that many decisions in defamation law are not made by 'ordinary reasonable people' at all. The paradox is that, in our collective imagination, the 'ordinary reasonable person' emerges as a censorious bigot; quick to condemn, slow to question, open to insinuation, closed to reason.

As a consequence of the way in which the law determines what damages reputation, defamation may well be in the hands of a hypothetical audience that is thoroughly unreasonable. Despite what is written in legal commentaries, and in the face of doctrine, an unintended by-product of defamation law may be that the true arbiters of defamation are 'ordinary *unreasonable* people'. That such constructs are shaping outcomes in our legal system should be of concern to all, not just those whose business it is to publish.

Certainly support for the 'ordinary reasonable person' test is far from universal. Discontent with it has even reached the High Court of Australia. Speaking in 2005, Kirby J said:

It would be preferable to drop this fiction altogether. Judges should not hide behind their pretended reliance on the fictitious reasonable recipient of the alleged defamatory material, attributing to such a person the outcome that the judges actually determine for themselves.... If the third party fiction were dropped, it is likely that a new formulation would emerge to explain more precisely and accurately the considerations according to which one imputation is accepted and goes to the tribunal of fact for its decision, and why another is not, so that the tribunal is spared the necessity of considering it. Or why one imputation is held defamatory and another is not.⁷⁷⁶

But the good news is that the general community, which the 'ordinary reasonable person' may or may not be intended to reflect, could be rather more tolerant and accepting than many of us think. Those among whom we live and work may be rather less susceptible to media manipulation than some of us would ever imagine. The possibility exists that many of us consistently underestimate the ability of ordinary men and women to sensibly interpret media messages and to reasonably assess moral character. The task for defamation law is to ensure that, through its practice, such reasonableness comes to the fore.

⁷⁷⁶ *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186, 194.

BIBLIOGRAPHY

BOOKS AND JOURNALS

Amerasinghe, A Ranjit B, *Defamation in the Law of South Africa and Ceylon* (1969)

Arend, Patrice S, 'Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?' (1997) 18 *North Illinois University Law Review* 99

Australian Institute of Health and Welfare, *1998 National Drug Strategy Household Survey: Detailed Findings* (2000)

Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results* (2005)

Balkin, Rosalie and Jim Davis, *Law of Torts* (4th ed, 2008)

Berman, Alan and Shirleene Robinson, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland* (2010)

Bezanson, Randall P and Kathryn L Ingle, 'Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law' (1986) 90(3) *Dickinson Law Review* 585

Bogad, Lawrence, 'Electoral Guerrilla Theatre in Australia: Pauline Hanson vs Pauline Pantsdown' (2001) 45(2) *The Drama Review* 70

Braithwaite, Nick (ed), *The International Libel Handbook* (1995)

Brosius, Hans-Bernd and Dirk Engel, 'The Causes of Third-Person Effects: Unrealistic Optimism, Impersonal Impact, or Generalized Negative Attitudes Towards Media Influence?', (Summer 1996) 8(2) *International Journal of Public Opinion Research* 142

Brown, Raymond E, *The Law of Defamation in Canada* (2nd ed, 1994)

Butler, Des and Sharon Rodrick, *Australian Media Law* (3rd ed, 2007)

Calvert, Clay, 'Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique' (1995) 16 *The Northern Illinois University Law Review* 111

Calvert, Clay, 'Harm to Reputation: an Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations' (1995) 26 *Pacific Law Journal* 933

Calvert, Clay, 'The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship' (1998) 6 *CommLaw Conspectus* 165

Cohen, Jeremy et al, 'Experimental Test of Some Notions of the Fact/Opinion Distinction in Libel' (1989) 66 *Journalism Quarterly* 11

- Cohen, Jeremy et al, 'Perceived Impact on Defamation: An Experiment on Third-Person Effects', (1988) 52 *Public Opinion Quarterly* 161
- Combined Media Defamation Reform Group, *Submission in Response to 'Outline of Possible National Defamation Law'*, Attorney-General's Discussion Paper – March 2004, May 2004
- Culbertson, HM and GH Stempel 'Media Malaise: Explaining Personal Optimism and Societal Pessimism about Health Care' (1985) 35(2) *Journal of Communication* 180
- David, P and M Johnson, 'The Role of Self in Third-Person Effects about Body Image' (1998) 48(4) *Journal of Communication* 37
- Davison, W Phillips, 'The Third-Person Effect in Communication' (1983) 47 *Public Opinion Quarterly* 1
- Davison, W. Phillips, 'The Third-Person Effect Revisited' (Summer 1996) 8(2) *International Journal of Public Opinion Research* 2
- De Visser, Richard, 'Heterosexual experience and Recent Heterosexual Encounters Among a Representative Sample of Adults' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 146
- Dean, Joseph, *Hatred, Ridicule or Contempt* (1964)
- Dent, Chris, 'Defamation Law's Chilling Effect: a Comparative Content Analysis of Australian and US Newspapers' (2004) 9(2) *Media & Arts Law Review* 89
- Donoghue, Denis, *England, their England: Commentaries on English Language and Literature* (1989)
- Driscoll, PD and MB Salwen, 'Self-Perceived Knowledge of the OJ Simpson Trial: Third-Person Perception and Perceptions of Guilt (1997) 74 *Journalism & Mass Communication Quarterly* 541
- Dupagne, Michel, Michael B Salwen and Bryant Paul, 'Impact of Question Order on the Third-Person Effect' (1999) 11(4) *International Journal of Public Opinion Research* 334
- Eldridge, Laurence H, *Law of Defamation* (1978)
- Eveland Jr, William P and Douglas M McLeod, 'The Effect of Social Desirability on Perceived Media Impact: Implications for Third-Person Perceptions' (1999) 11 *International Journal of Public Opinion Research* 315
- Fleming, John G, *The Law of Torts* (9th ed, 1998)
- Fogle, Randy M, 'Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech' (1993) 3 *Law & Sexuality* 165
- Fricke, G L, 'The Criterion of Defamation' (1958) 32 *Australian Law Journal* 7
- George, Patrick, 'Damages Survey for Defamation', paper presented at 'Media Law and Defamation' seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March 2003
- Gillooly, Michael, *The Law of Defamation in Australia and New Zealand* (1998)

- Gillooly, Michael, *The Third Man: Reform of the Australasian Defamation Defences* (2004)
- Glasser, Charles J Jr (ed), *International Libel & Privacy Handbook* (2nd ed, 2009)
- Glynn, CJ and RE Ostman, 'Public Opinion about Public Opinion' (1988) 65 *Journalism Quarterly* 299
- Glynn, CJ, AF Haynes and J Shanahan, 'Perceived Support for One's Opinions and Willingness to Speak Out: A Meta-Analysis of Survey Studies on the "Spiral of Silence"' 61 *Public Opinion Quarterly* 452
- Grulich, Andrew et al, 'Homosexual Experience and Recent Homosexual Encounters' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 155
- Gunther, Albert C and Paul Mundy, 'Biased Optimism and the Third-Person Effect' (1993) 70(1) *Journalism Quarterly* 58
- Gunther, Albert C and Esther Thorson, 'Perceived Persuasive Effects of Product Commercials and Public Service Announcements: Third-Person Effects in New Domains' (1992) 19(5) *Communication Research* 574
- Gunther, Albert C, 'What We Think Others Think: Cause and Consequence in the Third-Person Effect' (June 1991) 18(3) *Communication Research* 355
- Harkess, Jason, 'A Linguistic Inspection of the Law of Defamation' (1998) *Auckland University Law Review* 653
- Hart, Jonathan D 'Why Expert Testimony on the Meaning of Language has no Place in Libel Suits' in *Practising Law Institute, Libel & Newsgathering Litigation – Getting & Reporting the News* (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, June-July 1998) 517
- Heider, F, *The Psychology of Interpersonal Relations* (1958)
- Heine, SJ and DR Lehman, 'Cultural Variation in Unrealistic Optimism: Does the West Feel More Invulnerable than the East?' (1995) 68 *Journal of Personality and Social Psychology* 595
- Hooper, David, *Public Scandal, Odium and Contempt* (1984)
- Jones, EE and RE Nisbett, 'The Actor and the Observer: Divergent Perceptions of the Causes of Behavior' in EE Jones et al (eds) *Attribution: Perceiving the Causes of Behavior* 79
- Kelley, Thomas B, 'Evidentiary and Procedural Issues: Libel and Privacy Trials', Attachment A to *Practising Law Institute, Newsgathering & Libel Litigation 2000* (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, June 2000) 143
- Kenyon, Andrew T, *Defamation: Comparative Law and Practice* (2006)
- Kim, Y, J Ahn and J Song, 'Perceived Media Influence on Self and Others on a Controversial Issue', paper presented at the meeting of the International Communication Association, Chicago, May 1991, unseen, cited in Dominic L Lasorsa 'Policymakers and the Third-Person Effect' in J David Kennerly (ed), *Public Opinion, The Press and Public Policy* (1992) 163, 170
- Klapper, Joseph T, *The Effects of Mass Communication* (1960)

- Krasnostein, Sarah, 'Defamation Law and the Fairness of the Objective Test' (2004) 23(4) *Communications Law Bulletin* 6
- Kundu, Anita, 'Defamation, Reputation and the Community: an Analysis of the Doctrine of Presumed Harm in Defamation Law' (2005) 10(1) *Media & Arts Law Review* 53
- Lasorsa, Dominic L, 'Real and Perceived Effects of "Amerika"' (1989) 66 *Journalism Quarterly* 373
- Lasorsa, Dominic L, 'Policymakers and the Third-Person Effect' in J David Kennamer (ed), *Public Opinion, the Press, and Public Policy* (1992) 163
- LexisNexis Australia, *Australian Defamation Law & Practice*
- Lidsky, Lyrissa Barnett, 'Defamation, Reputation, and the Myth of Community' (1996) 71(1) *Washington Law Review* 1
- Lloyd Jones, Marina, 'Imputations of Homosexuality in Defamation Actions' (2001) 5(6) *TeleMedia* 94
- Magnusson, Roger, 'Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges' (2001) 9 *Torts Law Journal* 269
- Mason, Laurie, 'Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect' (Autumn 1995) 72(3) *Journalism and Mass Communication Quarterly* 610
- McCraw, David, 'How do Readers Read? Social Science and the Law of Libel' (1991) 41 *Catholic University Law Review* 81
- McLeod, Douglas M, Benjamin H Detenber, William P Eveland Jr, 'Behind the Third-Person Effect: Differentiating Perceptual Processes for Self and Other' (2001) 51(4) *Journal of Communication* 678
- McNamara, Lawrence, 'Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame' (2001) 6(4) *Media & Arts Law Review* 271
- McNamara, Lawrence, *Reputation and Defamation* (2007)
- Milmo, Patrick and WVH Rogers (eds), *Gatley on Libel and Slander* (11th ed, 2008)
- More, Daniel, 'Informers Defamation and Public Policy' (1989) 19 *Georgia Journal of International and Comparative Law* 503
- Mutz, Diana C, 'The Influence of Perceptions of Media Influence: Third Person Effects and the Public Expression of Opinions' (1989) 1(1) *International Journal of Public Opinion Research* 3
- Newcity, Michael, 'The Sociology of Defamation in Australia and the United States' (1991) 26(1) *Texas International Law Journal* 1.
- Noelle-Neumann, Elisabeth 'The Theory of Public Opinion: the Concept of the Spiral of Silence' in J A Anderson (ed), *Communication Yearbook 14* (1991) 256
- Paul, Bryant, Michael B Salwen and Michel Dupagne, 'The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis' (2000) 3(1) *Mass Communication & Society* 57
- Perloff, Richard M et al, 'Perceptions of "Amerika"' (1992) 19 *Mass Communication Review* 42

- Perloff, Richard M 'Third-Person Effect Research 1983-1992: A Review and Synthesis' (1993) 5(2) *International Journal of Public Opinion Research* 167
- Perloff, Richard M, 'Perceptions and Conceptions of Political Media Impact: The Third-Person Effect and Beyond' in Ann N Crigler (ed), *The Psychology of Political Communication*, 177
- Post, Robert C, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *Calif L Rev* 691
- Pound, Roscoe, 'Interests of Personality' (1915) 28(4) *Harvard Law Review* 343
- Price, David, Nicole Cain and Korieh Duodu, *Defamation Law, Procedure and Practice* (4th ed, 2009)
- Price, Vincent and David Tewksbury, 'Measuring the Third-Person Effect of News: The Impact of Question Order, Contrast and Knowledge' (1996) 8 *International Journal of Public Opinion Research* 120
- Prosser and Keeton on the Law of Torts* (5th ed, 1984)
- Rissel, Chris et al, 'Attitudes Towards Sex in a Representative Sample of Adults' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 118
- Rissel, Chris et al, 'Selected Characteristics of Regular Sexual Relationships' (2003) 27(2) *Australian and New Zealand Journal of Public Health* 124
- Rolph, David, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (2010)
- Rolph, David, *Reputation, Celebrity and Defamation Law* (2008)
- Ross, L, 'The Intuitive Psychologist and his Shortcomings: Distortions in the Attribution Process' in L Berkowitz (ed), *Advances in Experimental Social Psychology* 173
- Salwen, Michael B and Michel Dupagne, 'The Third-Person Effect: Perceptions of the Media's Influence and Immoral Consequences' (1999) 26(5) *Communication Research* 523
- Shah, Dhavan V, 'Susceptibility and Severity: Perceptual Dimensions Underlying the Third-Person Effect' (1999) 26(2) *Communication Research* 240
- Smith, Anthony et al, 'Sexual Identity, Sexual Attraction and Sexual Experience Among a Representative Sample of Adults' (2003) 27.2 *Australian and New Zealand Journal of Public Health* 138
- Standley, TC, 'Linking Third-Person Effect and Attribution Theory' unpublished Master's thesis, Southern Methodist University, Dallas, Texas, cited in Bryant Paul, Michael B Salwen and Michel Dupagne, 'The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis' (2000) 3(1) *Mass Communication & Society* 57
- Tewkesbury, David, 'The Role of Comparison Group Size in the Third-Person Effect' (2002) 14(3) *International Journal of Public Opinion Research* 247
- Tiedge, JT et al, 'Discrepancy Between Perceived First-Person and Perceived Third-Person Mass Media Effects' (1991) 68 *Journalism Quarterly* 141

Tomsen, Stephen, *Gay Killings in New South Wales: Victimisation and the Legal Response* (1996)

Treiger-Bar-Am, Leslie Kim, 'Defamation Law in a Changing Society: the Case of *Youssouppoff v Metro-Goldwyn Mayer*' (2000) 20 *Legal Studies* 291

Ven-hwei Lo, Wei, 'Third-Person Effect, Gender, and Pornography on the Internet' (2002) 46(1) *Journal of Broadcasting & Electronic Media* 13.

Walker, J, 1994, *The First Australian National Survey of Crimes against Businesses*, Australian Institute of Criminology, Canberra

Willnat, Lars et al, 'Perceptions of Foreign Media Influence in Asia and Europe: The Third-Person Effect and Media Imperialism', (2002) 14(2) *International Journal of Public Opinion Research*, 175

Yatar, Eric K M, 'Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence' (2003) 12 *Law & Sexuality* 119

Zimmerman, Diane Leenheer, 'Curbing the High Price of Loose Talk' (1985) 18(2) *UC Davis Law Review* 359

GAZETTE OF LAW AND JOURNALISM

Ackland, Richard, 'Separate Trial on Imputations in Katrina Lee Case' (May 1986) 1 *Gazette of Law and Journalism* 6

Anonymous, '\$1.5 Million: NZ Defamation Record' (December 1994) 28 *Gazette of Law and Journalism* 19

Anonymous, 'At a Glance' (October 1994) 25 *Gazette of Law and Journalism* 20

Anonymous, 'Brown v Time Australia' (July 1987) 6 *Gazette of Law and Journalism* 3

Anonymous, 'Defamation Table of Quantum', (November 1996) *Gazette of Law and Journalism* 5

Anonymous, 'Dossier' (August 1994) 24 *Gazette of Law and Journalism* 2

Anonymous, 'Ellis' Teenage Tales Deflated', (August 1994) 24 *Gazette of Law and Journalism* 3

Anonymous, 'No Separate Trial for Imputations' (May 1986) 1(1) *Gazette of Law and Journalism* 4

Anonymous, 'Nothing Loose in "Love Boat" Remarks' (May 1993) 18 *Gazette of Law and Journalism* 13

Anonymous, 'Record Settlement in Eason Case' (October 1987) 7 *Gazette of Law and Journalism* 2

Anonymous, 'Rene Rivkin Loses Defamation Case against Fairfax' (April 2001) *Gazette of Law and Journalism* <lawpress.com.au/genews/ge127_Rivkin_Fairfax.html> at 24 April 2001

Banham, Cynthia, 'Racist Successful in Action against Satirical Article' (25 May 2000) *Gazette of Law and Journalism* <www.lawpress.com.au/genews/ge114_Brander-v-Ryan.html> at 2 July 2002

Freckelton, Ian, 'Ian Botham Struck for Six: the Sticky Wicket of Libel and Contempt' (February 1987) 4 *Gazette of Law and Journalism* 13

Friedgut, Mark, 'Commentary: Justice Levine Gets it Wrong' (August 1994) 24 *Gazette of Law and Journalism* 5

Good, Ron, 'Central Coast Copper Fails in Action against SMH' (29 February 2000) *Gazette of Law and Journalism*

Good, Ron, 'Gay Teacher Furore Goes to Trial' (3 November 2000) *Gazette of Law and Journalism* <www.lawpress.com.au/genews/ge123_NNews.html> at 2 July 2002

Good, Ron, 'Harris Gets Perkins' (August 1994) 24 *Gazette of Law and Journalism* 15

Good, Ron, 'Nasty Crack' (1995) 33 *Gazette of Law and Journalism* 14

Good, Ron, 'Not a Banana Queen', (May 1994) 22 *Gazette of Law and Journalism* 10

Good, Ron, 10 Nov 2000 *Gazette of Law and Journalism*
<www.lawpress.com.au/genews/ge123_Bishop_NSW.html> at 3 October 2003

Kux, Y C, 'Charmyne Palavi v Radio 2UE Sydney Pty Ltd, Con Ange v Fairfax Media Publications Pty Ltd' (22 September 2009) *Gazette of Law and Journalism*
<<http://www.glj.com.au/1372-article>> at 30 October 2010

Kux, Y C, 'Corby v Channel Seven Sydney Pty Ltd/Davis v Nationwide News Pty Ltd' (2 June 2008) *Gazette of Law and Journalism* <<http://www.glj.com.au/1211-article>> at 30 August 2010

Kux, Y C, 'Dossier' (10 August 2009) *Gazette of Law and Journalism*
<<http://www.glj.com.au/1353-article>> at 30 August 2010

Kux, Y C, 'Mercedes Corby v Channel Seven Sydney Pty Ltd & 5 Ors' (12 May 2008) *Gazette of Law and Journalism* <<http://www.glj.com.au/1201-article>> at 30 August 2010

Kux, Y C, 'Michael Blomfield v Nationwide News Pty Ltd and News Digital Media Pty Ltd' (10 September 2009) *Gazette of Law and Journalism* <<http://www.glj.com.au/1368-article>> at 30 August 2010

Norman, Leanne, 'Victory for Fairfax in Sinclair Defamation Trial' (1986) 1(2) *Gazette of Law and Journalism* 5

GOVERNMENT DOCUMENTS

Attorney-General's Department, *Outline of Possible National Defamation Law*, March 2004

Australian Bureau of Statistics, *1301.0 Year Book Australia, 2009-10* (2010)
<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1301.0>> at 23 August 2010

Australian Bureau of Statistics, *4364.0 National Health Survey: Summary of Results, 2007-2008* <www.abs.gov.au/Ausstats/abs%40.nsf/e8ae5488b598839cca25682000131612/cac1a34167e36be3ca2568a900139364!OpenDocument> at 23 August 2010

Australian Bureau of Statistics, *4509.0 - Crime and Safety, Australia* (2005) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/669C5A997EAED891CA2568A900139405?OpenDocument>> at 23 August 2010

Australian Institute of Criminology, 'Gay-Hate Related Homocides: An Overview of Major Findings in New South Wales', (2000) *Trends & Issues in Crime and Criminal Justice* (no 155) <<http://www.aic.gov.au/documents/4/D/3/%7B4D3405AD-0BD1-4140-A1DD-2544B9050875%7Dti155.pdf>> at 23 August 2010

National Task Force on Cannabis, 'Public Perceptions of the Health and Psychological Consequences of Cannabis Use' (1995) *National Drug Strategy Monograph Series* No 29

New Zealand Committee on Defamation, Report of the Committee on Defamation (1977)

Report of the Committee on Defamation (Cmnd 5909) (March 1975)

Report of the Committee on the Law of Defamation (Cmnd 7536) (1948)

Shanahan, Patrick, Maggie Wilkins & Nicole Hurt, 'A Study of Attitudes and Behaviours of Drinkers at Risk: Research Report' (Sept 2002) Department of Health and Ageing <www.health.gov.au/pubhlth/publicat/document/drinkrisk.pdf> at 16 Feb 2006

Williams, Paul (ed), 'Alcohol, Young Persons and Violence', Australian Institute of Criminology Research and Public Policy Series No 35 (2001) <www.aic.gov.au/publications/rpp/35/RPP35.pdf> at 16 Feb 2006

NEWSPAPER REPORTS

Ackland, Richard, 'Cairns Admits Sex, and Breathtaking Hypocrisy', *The Sydney Morning Herald*, 20 September 2002

Ackland, Richard, 'Gay Balance in the Scales of Justice', *The Sydney Morning Herald*, 8 June 2001, 15

Ackland, Richard, 'High Price to Pay for a Deflated Ego', *The Sydney Morning Herald*, 21 May 2004, 11

Anonymous, 'A House Divided', *The Australian*, 29 January 1998

Anonymous, 'Duchess of York's Sister Settles Court Dispute', *Reuter News*, 4 June 1993

Anonymous, 'Law - Private Eye Judgement - Cash Lottery that is still Bananas' *The Independent* (London), 27 October 1989, 11

Anonymous, 'No Basis for Action', *The Sydney Morning Herald*, 24 July 1987

Borrill, Rachel, 'Jason Donovan Awarded £200,000 Damages for "Queer" Libel - The Face Magazine', *The Independent* (London), 4 April 1992, 1

- Byrne, Ciar, 'Cruise Wins £6m over "Gay" Allegations', *The Guardian* (London), 17 January 2003
- Cameron, Michael, 'Rivkin Settles Defamation Case', *The Australian*, 8 July 2004, 18
- Chenoweth, Neil, 'Costs Next Battle in Rivkin-Fairfax Case', *Australian Financial Review*, 19 May 2004, 12
- Connolly, Ellen, 'Rivkin Takes Stock After Second Jury Rebuffs Him', *The Sydney Morning Herald*, 29 May 2001, 3
- Dean, Annabel, 'Fergie's Sister Awarded \$300,000 for "Slut" Reports', *The Sydney Morning Herald*, 28 November 1990, 3
- Fife-Yeomans, Janet, "'Smut Circus", says Chappell Case Judge', *The Sydney Morning Herald*, 21 July 1988, 7
- Graff, Vincent, 'Gay? Not Gay? So What! Why Should it be a Matter for the Libel Lawyers?', *The Independent* (London), 11 December 2005
<news.independent.co.uk/media/article332261.ece> at 8 February 2006
- Gregory, Peter, Ewin Hannan and Caroline Milburn, 'Kennett faces huge bill after libel defeat', 12 March 1999 *The Age* (Melbourne) 1
- Harvey, Claire, 'Rivkin Defamed by Witness Sex Report', *The Australian*, 29 May 2001
- Haslem, Benjamin, 'Judge Lets Nine Spell Out Why Watt's a "Tart"', *The Australian* 24 October 1997
- Honigsbaum, Mark, 'Robbie Williams Wins Damages over "Secret Homosexual" Claims', *The Guardian* (London), 7 December 2005
- Horin, Adele, 'A Moral Majority', *The Sydney Morning Herald*, 23 March 2002, 33
- Hughes, Gary, 'Defamation has been a Nice Little Earner for Politicians', *The Age* (Melbourne), 13 October 1994, 4
- Jays, David, 'Wilde Disappointment', *New Statesman* (London), 25 September 2000
<<http://www.newstatesman.com/200009250040>> at 22 February 2010
- Le Grand, Chip, "'Tart" a Just Cause for Watt Action', *The Australian*, 20 February 1997, 3
- Lewis, Daniel, 'Fairfax Lawsuit Settled' *The Sydney Morning Herald*, 27 July 1991, 6
- Miranda, Charles and Cindy Wockner, 'You're Out of Touch', *The Daily Telegraph* (Sydney), 12 July 2004, 1
- Papadopoulos, Nick, "'Crack" Jibe not Defamation', *The Sydney Morning Herald*, 19 May 1995, 10
- Papadopoulos, Nick, 'Councillor Sues Over "Crack" Jibe', *The Sydney Morning Herald*, 17 May 1995, 9
- Pelly, Michael, 'Take me to your Reader', *Sydney Morning Herald*, 1 October 2005, 5

Robertson, John, 'Woman Wins Hearing in Comedy Defamation Case', *The Scotsman* (Edinburgh), 14 February 1997

Scheikowski, Margaret, 'NSW – Jury Finds Teacher Defamed, but Department not Responsible', *Australian Associated Press*, 9 November 2000

Silverii, Jason, 'Kennett's Huge Bill', *Herald Sun* (Melbourne), 12 March 1999

Stephens, Tony, 'Junie and Me: Cairns Concedes a Very Real Kind of Love', *The Sydney Morning Herald*, 17 Sept 2002, 2

Stephens, Tony, 'Oh Yes, Minister', *The Sydney Morning Herald*, 21 September 2002, 27

Wheen, Francis, 'Francis Wheen Examines the Bloodied Victims of the Libel Juggernaut', *The Observer* (London), 19 June 1994, 4

APPENDIX I

DESCRIPTION OF THE IMAGINARY MEDIA REPORTS AS GIVEN TO INTERVIEWEES

HIV Positive

A man is HIV positive.

Drunkenness

A 37 year-old secretary in the Prime Minister's office has got drunk at an office party and then danced on the tables with her skirt lifted.

Criminal Parentage

A man has a parent who is a criminal.
(Is this report defamatory of the son?)

Sex Before Marriage

A young woman had a single sexual relationship before getting married.

Extramarital Affair

A married man who holds a powerful public office has an affair with an intelligent and glamorous woman who is also married. Both people keep their relationship secret from their spouses.
(Is this report defamatory of the man and/or the woman?)

Informing Police

A woman has reported her husband to the police because she suspects him of committing an extremely trivial offence.
(Is this report defamatory of the woman?)

Marijuana Use

A man occasionally smokes a little marijuana socially or for relaxation.

Recreational Sex

A single woman sleeps with a number of men each year simply to enjoy having sex with them.
(Is this report defamatory of the woman?)

Male Homosexuality

A man is homosexual.

Conducting Abortions

A (female) medical doctor conducts lawful abortions.

APPENDIX II

NOTE ON PHONE SURVEY METHODOLOGY AND SAMPLE

SELECTION OF SAMPLE AND INTERVIEW METHODOLOGY

The phone survey was conducted by Australian Fieldwork Solutions of Melbourne during late 2003. The survey was of 3,000 respondents who were intended to be broadly representative of Australia's adult resident population. Accordingly, interviews only went ahead once interviewees had confirmed they were Australian residents aged 18 or over.

The extent to which a sample is representative of a population will depend on a number of factors. One is the method used to select potential respondents. In order to achieve a representative sample for this survey, residential phone numbers were randomly selected by computer from the May 2003 electronic edition of Australia's residential phone directory. The use of this directory automatically excludes from the survey anyone living in a household which has requested no phone directory listing, as well as those that have no land-line phone.

Some indication of the proportion of Australia's resident adults who could potentially have been included in the survey can be derived from the fact that the directory used lists 6,974,082 residential phone numbers, while according to the 2001 census there are around 7,790,000 private dwellings in Australia, including those accommodating people in improvised homes, tents and sleeping out. While some allowance must be made for those homes with more than one phone line listed in the directory, these figures suggest that the sample could have potentially included any of the adults living in about 90% of Australian households.

The nature of a sample will also be affected by the conditions under which a survey is conducted. As is standard with phone polling, our survey used CATI (Computer-Assisted Telephone Interview), a computer-based questionnaire system which allows interviewers to read out pre-determined questions and then code the replies given. The entire script, as well as the response codes, can be found at Appendix III on page 367. Interviewers were told not to deviate from the standard wording of the questions. If respondents asked for clarification or embellishment on what was being asked, interviewers were to encourage interviewees to rely on

their own interpretations of what was being asked. Interviewees were assured that they would not be identified in any subsequent publications. The average length of interview was six minutes and 17 seconds. Phone interviews were conducted between 5pm and 9pm weekday evenings and between 10am and 6pm on weekends, between 25 November and 17 December 2003.⁷⁷⁷

A commonly encountered problem in phone surveys is that calls made to residences tend to be answered by women more often than by men. Efforts were made to ensure that respondents were not necessarily the person in the household who answered the phone. This was done by interviewers asking to speak to the next resident adult in the household to have a birthday. That process is intended to randomise selection of gender. If that person was unavailable, an appointment was booked to call back at a more appropriate time. If the adult next due for a birthday was not willing to be interviewed, the interviewer moved on to another household. To further increase the proportion of male respondents, our pollsters selected appointments made with men as those to follow up. Even so, the final outcome in our survey was that 57% of our respondents were female and 43% were male, as opposed to the 51% female / 49% male split found in Australia's population of resident adults.⁷⁷⁸

However carefully samples for this kind of survey are chosen, respondents are to some extent self-selecting, since anyone can refuse to take part. What is more, not everyone is available for interview at the time when a survey is conducted. In the case of this survey, the proportion of contacted households who actually took part was reported to be higher than usual for a survey of this kind.

Some measure of the extent to which the surveyors were successful in achieving a representative sample comes from comparing our interviewees' responses to the demographic questions they were asked (such as age, household income, etc) with the demographic profile for Australia's entire resident adult population presented by the 2001 census. The tables below give these comparisons. Unfortunately, no meaningful comparative data could be found in terms of educational attainment.

⁷⁷⁷ Times given were local to respondent's residence.

⁷⁷⁸ 2001 census figures: Australian Bureau of Statistics.

**COMPARISONS BETWEEN THE PHONE SURVEY SAMPLE AND AUSTRALIA'S
RESIDENT ADULT POPULATION**

Table 41: Comparison of the phone survey sample with Australia's resident adult population by gender

	<i>Proportion of sample</i>	<i>Proportion of Australia's resident adult population</i>
<i>Male</i>	43%	49%
<i>Female</i>	57%	51%
<i>TOTAL</i>	100%	100%

Table 42: Comparison of the phone survey sample with Australia's resident adult population by age

<i>Age group</i>	<i>Proportion of sample</i>	<i>Proportion of Australia's resident adult population</i>
<i>18 – 19</i>	4%	4%
<i>20 – 24</i>	7%	9%
<i>25 – 29</i>	8%	9%
<i>30 – 34</i>	10%	10%
<i>35 – 39</i>	10%	10%
<i>40 – 44</i>	11%	10%
<i>45 – 49</i>	11%	9%
<i>50 – 54</i>	9%	9%
<i>55 – 59</i>	9%	7%
<i>60 – 64</i>	7%	6%
<i>65 – 69</i>	5%	5%
<i>70 – 74</i>	4%	4%
<i>75 +</i>	6%	8%
<i>TOTAL</i>	100%	100%

Table 43: Comparison of the phone survey sample with Australia's resident adult population by place of residence

<i>State / territory</i>	<i>Place of residence</i>	<i>Proportion of sample</i>	<i>Proportion of Australia's resident population</i>
NSW	Sydney	22%	21%
	Rest of state	11%	12%
	TOTAL STATE	33%	33%
ACT	TOTAL TERRITORY	1%	2%
VIC	Melbourne	18%	18%
	Rest of state	7%	7%
	TOTAL STATE	25%	25%
QLD	Brisbane	9%	9%
	Rest of state	9%	10%
	TOTAL STATE	18%	19%
SA	Adelaide	6%	6%
	Rest of state	3%	2%
	TOTAL STATE	9%	8%
WA	Perth	7%	7%
	Rest of state	3%	3%
	TOTAL STATE	10%	10%
TAS	Hobart	1%	1%
	Rest of state	2%	1%
	TOTAL STATE	3%	2%
NT	Darwin	0.4%	0.6%
	Rest of territory	0.4%	0.5%
	TOTAL TERRITORY	0.8%	1.1%
	TOTAL	100%	100%

Table 44: Comparison of the phone survey sample with Australia's resident adult population in terms of residence within or without a capital city

	<i>Proportion of sample</i>	<i>Proportion of Australia's resident population</i>
<i>Within a capital city</i>	65%	64%
<i>Outside a capital city</i>	35%	36%
<i>TOTAL</i>	100%	100%

Table 45: Comparison of the phone survey sample with Australia's resident adult population by household income

<i>Income band used in survey</i>	<i>Proportion of sample</i>	<i>Nearest comparable band of ABS data⁷⁷⁹</i>	<i>Proportion of Australia's households⁷⁸⁰</i>
<i>\$10,000 or below</i>	4%	<i>\$10,000 or below</i>	5%
<i>\$10,001 - 20,000</i>	10%	<i>\$10,000 - 21,000</i>	16%
<i>\$20,001 - 30,000</i>	9%	<i>\$21,000 - 31,000</i>	13%
<i>\$30,001 - 40,000</i>	10%	<i>\$31,000 - \$42,000</i>	11%
<i>\$40,001 - 50,000</i>	12%	<i>\$42,000 - \$52,000</i>	9%
<i>\$50,001 - 60,000</i>	10%	<i>\$52,000 - \$63,000</i>	8%
<i>\$60,001 - 80,000</i>	13%	<i>\$63,000 - 78,000</i>	8%
<i>\$80,001 - 100,000</i>	7%	<i>\$78,000 - 104,000</i>	10%
<i>\$100,001 plus</i>	11%	<i>\$104,000 plus</i>	8%
<i>Refused</i>	15%	<i>Income not stated / partially stated</i>	11%
<i>TOTAL</i>	100%	<i>TOTAL</i>	100%

Table 45 above suggests that adults from wealthier households are slightly over-represented in our sample. For instance, the median household income in our sample lies in the \$50,001 to \$60,000 bracket, whereas the median household income discovered during the 2001 census lay between \$42,000 and \$52,000. The mean household income for our respondents measured against an approximation of the mean household income indicated by the census (taking mid-points for above income brackets but excluding first and final open brackets, since these are open) suggests that the mean household income for the sample is \$47,300, whereas that

⁷⁷⁹ Bands are rounded to the nearest \$1,000.

⁷⁸⁰ Represents income for occupied private dwellings, ABC Census 2001.

indicated by the census is \$44,600. Before concluding that adults from wealthier households are over-represented in our sample, thought should be given to the possibility that individuals overstate their incomes in phone surveys so as to make a better impression with interviewers.

Table 46: Comparison of the phone survey sample with Australia's resident adult population by religion

<i>Religion</i>	<i>Proportion of sample</i>	<i>Proportion of Australia's resident population</i>
<i>Christian</i>	63%	67%
<i>Buddhist</i>	1.1%	1.9%
<i>Muslim</i>	0.9%	1.5%
<i>Hindu</i>	0.7%	0.5%
<i>Jewish</i>	0.4%	0.4%
<i>Other</i>	0.6%	0.5%
<i>None</i>	32%	15%
<i>Refused / unknown</i>	1.3%	12%
<i>TOTAL</i>	100%	100%

A significant difference between our sample and the census results was that the proportion of our sample that stated they had no religious affiliation is more than double that in the census. Note, however, that almost 10% of census returns did not respond to the question relating to religion. It is possible that many of these felt no religious affiliation.

Note, however, that even if that were true of all who failed to respond to the census question relating to religion, this would still suggest an under-representation in our sample of people who identify with a religion. Perhaps the answer lies, at least in part, in the phenomenon whereby Christians appear under-represented in our sample, whereas adherents to other religions are neither significantly over nor under-represented. It is possible that some individuals of Christian heritage, but who feel no particular affiliation with Christianity, tend to answer government censuses with what they consider to be their 'official' religion (which they were possibly baptised into) while feeling more comfortable in less formal surveys such as ours to declare themselves as belonging to no religion.

APPENDIX III

PHONE SURVEY SCRIPT

INTRODUCTION

Good morning / afternoon / evening. My name is *[interviewer's name]* from Australian Fieldwork Solutions and I am calling on behalf of the University of New South Wales. We're conducting research on what damages and what doesn't damage people's reputations and would like your agreement to take part in a short phone interview which will last no more than seven minutes. The research consists of a few quick questions that will help the University measure opinions within Australia on moral and legal issues.

In order that we interview a good cross section of the community we need to speak to the person in your household over 18 years who is next to have a birthday. Would that be you?

Yes: continue

No: ask for qualifying person or book call back for the qualifying person and re-introduce if necessary.

Are you willing to take part? Thank you for your assistance.

As this is carried out in compliance with the Privacy Act, the information and opinions you provide will be used only for research purposes and any publications that follow will in no way identify you. The interview may be recorded by my supervisor for quality control purposes. If you do not wish for this to happen please let me know.

QS1 First of all, can I confirm you are an Australian resident?

Yes: continue

No: end call.

QS2 And can I confirm you are aged 18 or over?

Yes: continue

No: end call.

INITIAL DEMOGRAPHIC QUESTIONS

QD1 *Record gender*

QD2 Which of the following age groups do you fall into? Would you be under or over 40?

Read out ranges. If respondent refuses, say it is only for analysis purposes and will help us greatly to classify our results.

18 to 19

20 to 24

25 to 29

30 to 34

35 to 39

40 to 44

45 to 49

50 to 54
55 to 59
60 to 64
65 to 69
70 to 74
75+
Refused (end call)

THIRD-PERSON EFFECT

I want you to start by imagining that the media, while talking about a particular, named [P], have reported that [pn] [imputation].

Q1: We are interested to know whether the media report would make you think less of the [p]. Would you think less of the [p] as a result of the media report?

*If yes, proceed to Q2-D.
If no, proceed to Q2-ND.*

Q2-D: On a scale of 1 to 5, where 1 means just a little less and 5 means a great deal less, to what extent would you think less of the [p] as a result of the report?

Q2-ND: Would you think more of the [p], or would the report make no difference to how you regard the [p]?

Q3: Now we are interested to know whether you think the media report would damage the [p]'s reputation in the eyes of someone you might think of as the [OP / RP / ORP] living in Australia.

Do you think the [p]'s reputation has been damaged in the eyes of the [OP / RP / ORP] living in Australia?

*If yes, proceed to Q4-D.
If no, proceed to Q4-ND.*

Q4-D: On a scale of 1 to 5, where 1 means just a little less and 5 means a great deal less, how much do you think the [OP / RP / ORP] living in Australia would think less of the [p] as a result of the report?

Q4-ND: Do you think the [OP / RP / ORP] living in Australia would think more of the [p], or would the report make no difference to how the [OP / RP / ORP] living in Australia regards the [p]?

The abbreviations used in square brackets above and below have the following meanings:

<i>P (upper case)</i>	=	<i>plaintiff (ie P1, P2, etc).</i>
<i>p (lower case)</i>	=	<i>abbreviated plaintiff reference (ie p1, p2, etc).</i>
<i>pn</i>	=	<i>pronoun.</i>
<i>IMP</i>	=	<i>imputation.</i>
<i>OP</i>	=	<i>ordinary person⁷⁸¹</i>
<i>RP</i>	=	<i>reasonable person⁷⁸²</i>
<i>ORP</i>	=	<i>ordinary reasonable person⁷⁸³</i>

⁷⁸¹ Interviewers should offer no guidance on the meaning of 'ordinary' or 'reasonable'. Questions relating to the meaning of these terms might be dealt with by a response such as 'we are interested in the way you understand these terms.'

⁷⁸² Ditto.

⁷⁸³ Ditto.

The word(s) inserted in place of the abbreviations (P, p, pn etc) will be determined by the topic allocated to the particular respondent:

Topic 1: HIV Positive

P1: man
p1: man
pn1: he
IMP1: is HIV positive.

Topic 2: Drunkenness

P2: 37 year-old secretary in the Prime Minister's office
p2: secretary
pn2: she
IMP2: has got drunk at an office party and then danced on the tables with her skirt lifted.

Topic 3: Criminal Parentage

P3: man
p3: man
pn3: he
IMP3: has a parent who is a criminal.

Topic 4: Sex Before Marriage

P4: young woman
p4: woman
pn4: she
IMP4: had a single sexual relationship before getting married.

Topic 5: Conducting Abortions

P5: medical doctor
p5: doctor
pn5: she
IMP5: conducts lawful abortions.

Topic 6: Extramarital Affair

P6: married man who holds a powerful public office
p6: man
pn6: he
IMP6: has an affair with an intelligent and glamorous married woman, and neither of them tells their spouse.

Topic 7: Informing Police

P7: woman
p7: woman
pn7: she
IMP7: has reported her husband to the police because she suspects him of committing an extremely trivial offence.

Topic 8: Marijuana Use

P8: man
p8: man
pn8: he
IMP8: occasionally smokes a little marijuana socially or for relaxation.

Topic 9: Recreational Sex

P9: single woman
p9: woman
pn9: she
IMP9: sleeps with a number of men each year simply to enjoy having sex with them.

Topic 10: Male Homosexuality

P10: man

p10: man

pn10: he

IMP10: is homosexual.

REMEDIES

Q5: Sometimes untrue media reports are published despite the media organisation in question having taken all reasonable care to avoid any untruths. If this happened in the case of a media report that a [P] [IMP], do you think the media organisation in question should be made to:

- I. publish a correction putting the record straight;
- II. pay the person compensation;
- III. do both of these things;
- IV. do neither of these things?

If I, II or IV, go to Q6.

If III, go to Q7.

Q6: I want you to now imagine the same situation, but this time the media organisation did NOT take all reasonable care when publishing the report we have been talking about. In that case, do you think they should be made to:

- I. publish a correction putting the record straight;
- II. pay the person compensation;
- III. do both of these things;
- IV. do neither of these things?

DISSENT

You said earlier that in your opinion you **would / would not** think less of a [P] if you heard a media report that [pn] [IMP]. I would now like you to think about those people who would disagree with you, and who **would not / would** think less of the [p].

Q7: Could you think of these people as ordinary?

Interviewer: if respondent hesitates, ask 'are you clear on the question? Would you like me to read it again?' If not clear after the 2nd reading and respondent cannot answer, record as don't know.

Q8: Could you think of these people as reasonable?

(Questions 7 and 8 were reversed for half the respondents to check for carry-over effects).

DEMOGRAPHIC QUESTIONS

Finally, I would like to ask a few questions to make sure we have a good cross-section of people in our study.

QD3: Would you please tell me your postcode?

QD4: Would you please tell me your highest education level completed? Would it be (read out):

- 1. No school
- 2. Primary/elementary school

3. Some high/secondary school
4. Completed HSC or VCE
5. Some university/TAFE
6. TAFE diploma
7. Undergraduate degree
8. Post graduate qualification (masters or higher)
9. Other = specify
10. Refused (*do not read out*).

QD5: Which of the following groups best describes your total annual household income from all sources including pensions and allowances before tax? This is for analysis purposes only. Would it be under or over \$40,000? [*Read out ranges.*]

1. \$10,000 or below per year
2. \$10,001 to 20,000
3. \$20,001 to 30,000
4. \$30,001 to 40,000
5. \$40,001 to 50,000
6. \$50,001 to 60,000
7. \$60,001 to 70,000
8. \$70,001 to 80,000
9. 80,001 to 90,000
10. 90,001 to 100,000
11. 100,001 to 120,000
12. 120,001 to 140,000
13. 140,001 to 160,000
14. \$160,001 plus.

QD6: Finally, would you please tell me which religion (if any) you belong to?

QD7: Would you describe yourself as a practising member or a non-practising member of that religion?

1. Yes
2. No

CONCLUSION

Thank you very much for your time and assistance.

Can I confirm your phone number is [*respondent's phone number*]?

That is the end of the interview. As this is market research, it is carried out in compliance with the Privacy Act and the information you provided will be used only for research purposes. As part of quality control procedures someone from our project team may wish to re-contact you to validate a couple of questions verifying some of the information we have just collected from this interview, so could I please ask you for your first name?

In case you missed it earlier, my name is [*interviewee's name*] from Australian Fieldwork Solutions.

Thank you for your time.

APPENDIX IV

TEXT OF HYPOTHETICAL NEWSPAPER ARTICLE USED IN STUDENT (DENOTATIVE MEANING) SURVEY

Please read the following article taken from the Sydney Morning Herald and then answer the questions that follow:

Two Sydney school teachers have been charged with sexually assaulting students, after a police investigation that covered allegations stretching back nine years.

Andrew Biggs, 44, has been charged with four counts of indecent assault on a male aged under 16 and with one count of sodomy. Stephen Massey, 47, has been charged with sodomy.

The pair pleaded not guilty to the charges in Parramatta Local Court late last month and have been bailed to appear again in a fortnight.

The charges arise from a lengthy investigation by the Parramatta police child-mistreatment unit.

Police allege that complaints from several students about the men sparked the inquiries.

Both men have been suspended from teaching duties by the Department of School Education while the court case continues.

The names of the schools at which the alleged offences occurred have been suppressed under the Child Abuse and Protection Act.

However, the court was told that Biggs was an English and history teacher at a Parramatta area high school.

Massey had been transferred from a Parramatta area boys' school to a girls' school after the allegations were made.

The men will answer the charges in Parramatta Local Court later this month.

NB: It was explained to respondents immediately after the survey that the teachers had been given fictional names and that the location of the real school had been changed.

APPENDIX V

STATEMENTS USED IN STUDENT (DENOTATIVE MEANING) SURVEY

1. The Police have charged Massey⁷⁸⁴ with a sexual offence, but it is unlikely that they had reasonable grounds for doing so. It is unlikely that Massey is guilty.
2. The Police have charged Massey with a sexual offence. We are not saying whether they had reasonable grounds for doing so or not, nor are we saying whether Massey is guilty or innocent.
3. The Police have charged Massey with a sexual offence and they probably had reasonable grounds for doing so. Even so, it does not necessarily follow that he is guilty. We are not saying whether Massey is innocent or guilty.
4. The Police have charged Massey with a sexual offence and they probably had reasonable grounds for doing so. Massey is probably guilty.
5. The Police have charged Massey with a sexual offence and definitely had reasonable grounds for doing so. There is every reason to think that he is guilty.

⁷⁸⁴ This is a fictional name given to one of the two teachers referred to in the news report used for the survey as having been charged with sexual offences relating to school students.