36 See note 23.

37 ACCC, Deeming of Telecommunications Services, p.iv (Table A),152.

38 Foxtel was granted an exemption from the *TPA* that meant the ACCC could not regulate how it opened its digital platform to third parties until 2015. Under s 152ATA, the *TPA* enables an access provider to apply for an exemption from the standard access obligations before an investment in a telecommunications service is made or that service becomes an active declared service.

39 "The channel's reserve price is $750,000 a year and it's estimated accessing Foxtel's set-top box infrastructure would cost a would-be pay tv channel operator about $250 a subscriber. In addition, a channel operator would need to have tv-production facilities to produce content as well as its own customer call centres and billing operations. Industry sources say that all up, running just one channel would cost at least $35 million...also...any new channel would not be included by Foxtel in its basic digital package, meaning the channel operator would have to market and advertise the channel to prospective subscribers itself": Nicholas K, "Seven, Ten `no' To New Channels" , *Australian Financial Review,* 12 May 2004.

40 Catalano C, "Pay tv ruling in Seven's favour", *The Sydney Morning Herald,* 1 October 2004.

41 Grant A (Ed), *The Communications Law Centre Guide Australian Telecommunications Regulation* 3rd Ed (UNSW Press, 2004) at 113.

42 See note 40.

43 s 87B of the *Trade Practise Act 1974 (TPA)* provides that the ACCC is able to accept a written undertaking in relation to a matter which it has power under the *TPA*. Undertakings given under s 87B are court enforceable through the ACCC applying to the Court when it considers the undertaking has been breached. Orders the Court may given include compensation and damages in addition to any other order that the court considers appropriate.

44 Optus Submission to the ACCC Report on Emerging Market Structures in the Communications Sector,07 Aug 2003

<http://www.dcita.gov.au/download/0,2720,4_116267,00.doc>

(Accessed 20 September 2004).

45 See note 44.

University student Daniel Yap is the Winner of the 2004 CAMLA Essay Prize Competition.

Defamation Law and the Fairness of the Objective Test

Sarah Krasnostein, highly commended in the 2004 CAMLA Essay Prize, discusses whether it is appropriate for defamation law to apply objective tests to determine liability in circumstances where the meaning of the text is subjective.

The law of defamation is particularly concerned with constructing meaning. This occurs at two stages. First, when determining the meaning of the contested words, the law "mimic[s] the ordinary publishee's response"[1]. Second, when determining whether that meaning is defamatory, the law anticipates the reaction it will elicit. However, both stages assume an idealised homogeneity of reader response in a society that is fundamentally heterogeneous in terms of, inter alia, age, language, ethnicity, experience and morality. If meaning is subjective, is it fair for defamation law to have such objective tests for determining the meaning of an imputation and whether it is defamatory?

IMPUTATIONS: MEANINGS AND DEFAMATION

The meaning of an imputation is determined by asking "*what an ordinary, reasonable publishee would understand from the material*"[2]. This question is, however, fundamentally at odds with postmodern literary and cultural theory which denies objectivity and the possibility of a homogenous reader response to a particular text. Current literary theory seems focused on asking, "What is the meaning of a text?" and "Is objective understanding possible, or is all understanding relative to a reader's particular situation?"[3]. Possible legal liability for defamation rests on the law's answers to these seemingly academic questions.

The same philosophical problems plague the second test for determining whether an imputation is defamatory. While there is no comprehensive definition provided by the case law, the suggested tests assume the same unrealistic homogenous reader response by asking "would the words tend to lower the plaintiff in estimation of right-thinking members of society generally?"[4]. Yet, while literary theories highlight problems with the way the law constructs meaning, they offer no pragmatic solutions to redress the clash of rights[5] at the heart of defamation law. Perhaps their value lies in highlighting alternative ways of understanding imputations, thus encouraging judges and juries to proceed self-consciously in selecting and justifying a text's dominant meaning and effect. This would be useful in exposing and understanding the policy behind defamation decisions by explicitly articulating why the right to reputation will sometimes trump freedom of speech.

TEST FOR DETERMINING MEANING

Unlike postmodern literary theory, the legal approach to determining the meaning of an imputation emphasises points of convergence in our understanding of language. These shared understandings come from living together in a liberal-democratic society. However, the impact of cultural differences on understanding may be relevant in that the term 'imputation' includes non-literal meanings. Natural and ordinary meanings (as distinguished from legal innuendoes) may not be 'natural and ordinary' to many in the community. This type of imputation is conveyed by inference. Such inferential meanings are called 'popular' or 'false' innuendoes and "depend on general community knowledge, such as knowing a common slang expression". However, given the diversity of the community, cultural and language barriers mean that slang may not be common and that certain types of knowledge may be absent in large sectors of the community.

Consequently, the role of evidence in determining meaning seems lacking.

Readership surveys are not admissible, as they would erode the jury function to apply the test of the ordinary, reasonable recipient. However, such surveys could correct jury members' assumptions about the generality of certain types of knowledge. This point is subtly acknowledged by the law in making relevant the general manner and occasion of publication. Importantly, the publication's context can include the class of likely publishees. This allows consideration of "*the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used*"[6]. Attention to "*the kind of person who will receive the communication in question*"[7] provides a narrower objective test. This is closer to the justice of subjective consideration of what was actually interpreted.

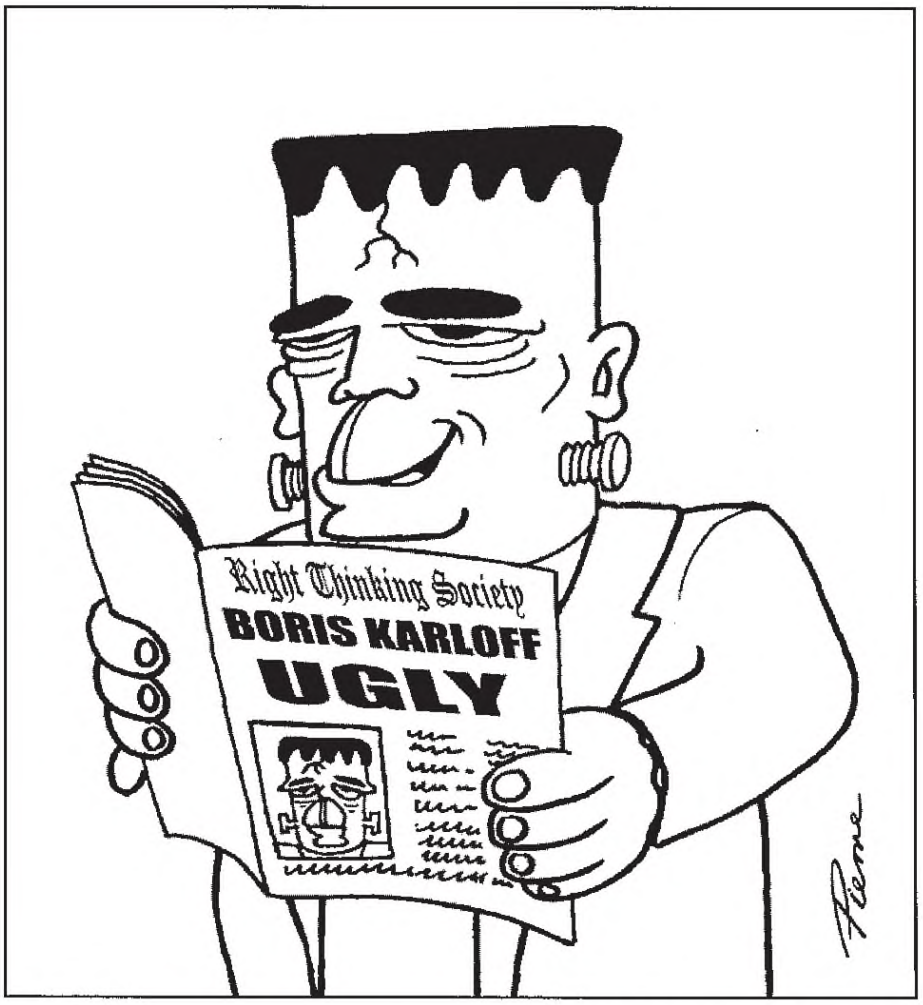
It seems strange that the question of whether the text is capable of conveying an imputation is characterised as a question of law when it concerns significant questions of fact. Further, reserving this question of fact for the judge can promote injustice because, in many instances, it is fundamentally connected to mainstream popular culture and average community norms. The ability of judges to fulfill this role is called into question by the Honourable Justice Kirby himself stating that:

> "*Some would consider it presumptuous for judges (many of who lead narrow lives...) to assert that they know what reasonable fellow citizens will make of a broadcast*"[8].

Currently limited to deciding whether a meaning is actually conveyed, the jury is arguably better placed than the judge to determine realistically (and fairly) whether a text is capable of conveying an imputation.

TEST FOR DETERMINING WHETHER A MEANING IS DEFAMATORY

Problems with the objective test similarly arise in the next stage of determining whether the decided meaning is defamatory. The law's



recognition that meaning changes over time because it is socially constructed is important to determining whether an imputation is defamatory. Thus, it was once considered defamatory to call someone a communist or a homosexual. However, this concession to the malleability of meaning is not extended across society to acknowledge that reactions to an imputation can change between different groups of people at the same time.

The various judicial approaches determine that the imputation relied on must be likely to cause "*ordinary decent folk in the community*"[9] (also described as "*right thinking members of society*"[10]) to think less of the plaintiff. However, in the absence of a subjective test or evidence for determining what the reaction actually was, it seems that this results in a finding of what people should think, rather than what they actually did[11]. Given the differences in our society, what exactly is "right-thinking"? By not making the variety of possible reactions explicit, judges expose themselves to criticism of biased policy choices determining outcome, rather than a realistic determination of majority reaction[12]. This is illustrated by the case discussed by Barendt, *Mycroft v Sleight*, where the court denied the plaintiff, a trade union official, damages in respect of an allegation that he had worked during a strike. However reactions to this imputation could have ranged from indifference to approval to anger "causing other persons to 'shun or avoid'" the plaintiff[13]. By finding that the claim had not damaged his reputation, the court made an ideological decision about the "right" reaction and subsequently which sectors of society are justly considered "right-minded" or "decent".

This control over the meaning of words and the value of the reactions they elicit is cloaked under the objective claims of defamation law. However, disagreement between judges sitting on defamation cases shows the frailty of this fiction. The dissent by Millet LJ in *Berkoff v Burchill* demonstrates the malleability of meaning and,

subsequently, how tenuous a finding for legal liability for defamation can be. His Honour duplicates the defendant's contested statement by stating

> "*It is common experience that ugly people have satisfactory social lives – Boris Karloff is not known to have been a recluse...*"

He goes on to conclude

> "*if I have appeared to treat Mr Berkoff's claim with an unjudicial levity it is because I find it impossible to take seriously.*"

This is a serious contrast to Niall LJ's finding that the statements were

> "*capable of lowering his standing in the estimation of the public and of making him an object of ridicule*".

When the court cannot agree on the reaction to a statement, the subjectivity of meaning and variety of legitimate reactions to a text is demonstrated highlighting problems with the objective test.

CONCLUSION

Defamation law addresses the painful co-existence of freedom of speech and the "*interest all individuals have in safeguarding or vindicating their reputation*"[14]. Postmodern literary theory could make a valuable contribution to the law by encouraging claims to objectivity in meaning to be disregarded and the policy justification for erring on one side or the other to be made explicit. This would result in a clearer understanding of the uses of defamation law in society.

1 Andrew Kenyon, Media Law 2004: The Australian Plaintiff's Case, Melbourne University Course Material, 50.

2 Ibid.

3 See Terry Eagleton, *Literary Theory: An Introduction* (1983) 66.

4 *Sim v Strech* [1936] (Lord Atkin).

5 See Eric Barendt, 'What is the point of libel law?' (1999) 52 *Current Legal Problems* 110, 111-117.

6 *Sim v Strech* [1936] (Lord Atkin).

7 *Chakravarti v Advertiser Newspapers* [1998] (Kirby J).

8 *Bond Corp Holding v ABC* (1989) (Kirby J)

9 *Boyd v Mirror Newspapers* [1980] (Hunt J)

10 *Sim v Strech* (Lord Atkin)

11 See Lyrissa Barnett Lidsky, *Defamation, Reputation and the Myth of Community, Washington Law Review* (1996) 9.

12 See Ibid.

13 *Morgan v Lingen* (1863), *Yousoupoff v MGM* (1934).

14 Barendt, above n 5, 112.

University student Sarah Krasnostein received a Highly Commended Award in the 2004 CAMLA Essay Prize Competition.

Invasion of Electronic Communication Privacy

Yi-Jen Chen, highly commended in the 2004 CAMLA Essay Prize, considers the impacts of the recent decision of the United States Court of Appeals for the First Circuit in *United States of America v Branford C. Councilman*

With the rapid development of computer technology, individuals are becoming increasingly dependent on the Internet to communicate and conduct their every-day business activities. While the Internet has promoted greater access to public and private services, it has raised new concerns regarding personal privacy and security. Online users' communications, for example, may now be exposed to the wider public. Any person who has superior computer knowledge, or who employs particular software, could easily monitor other users' activities on the Internet. The legality of employers' and internet service providers ("**ISP**") monitoring online users' electronic communications, such as the use of electronic mail, instant messaging, forums and bulletin boars, has been discussed vigorously. On 29 June 2004, the ruling made by the United States Court of Appeals for the First Circuit in *United States of America v Branford C. Councilman*1 focused significant attention on the issue of electronic communication privacy. According to this decision, ISPs have the right to read and copy the inbound email of their clients.

THE COUNCILMAN DECISION

In the *Councilman* decision, the defendant was the Vice President of Interloc, Inc. ("**Interloc**"). Interloc is an ISP, which provides an online rare and out-of-print book listing service and email service for its clients. The defendant was accused of directing Interloc employees to write computer codes (procmail.rc or "the **promail**") to intercept and copy all incoming emails from Amazon.com before they were delivered to the clients. The employees were also instructed to read these emails to gain commercial advantage. The defendant's action allegedly violated sections 2511 (1)(a), (c) and 2511 (3)(a)2 of the *Electronic Communications Privacy Act* ("***Wiretap Act***"3). The violation included intentionally intercepting electronic communications, disclosing the contents of the intercepted communications, and causing a person to divulge the contents of the communications while in transmission to persons other than the addressee of the communication4.

The issue was whether there was an "intercept" of a communications within the meaning of the *Wiretap Act*5. In the email transfer protocol, an email message is locally stored, formatted and forwarded by mail transfer agent ("**MTA**") through the Internet from one MTA to another until it reaches the recipient's mail