

Defamation and Satire - Drawing the Line

Christina Moloney, in this 2005 CAMLA Essay Prize winning paper asks, is the line between legitimate satire and defamation drawn in the right place or is satire stifled to an unacceptable extent?

Introduction

As perhaps "the most important form of public humour",¹ satire is fundamental to freedom of speech in a democracy, by making society "examine itself critically and confront its deficiencies".² Defamation occurs when material is published 'which has the effect or tendency of damaging the reputation of another'.³ However, the current structure of defamation law, in claim and defence, ignores satire. Political satire aims to make

"a political opponent look ridiculous, pricking pomposity, reducing authority by encouraging laughter, or by reminding readers or audience of a politician's less pleasant aspects".⁴

Not only is satire "'clever critique', but also a medium for the public representation of opposing and dissident voices."⁵

The limited case law on satire suggests satirical subjects are either averse to litigation publicity, perhaps perceive the communication is defensible under 'fair comment',⁶ or may believe the "ordinary, reasonable person" would not acknowledge a defamatory imputation. Judges appear reluctant to imbue the ordinary reasonable person with the ability to identify satire, thereby stifling otherwise perhaps legitimate commentary, possibly contributing to the "chill effect" on the media. Current proposals for uniform national defamation laws, should include a specific statutory provision acknowledging satire and its "typically ironic or exaggerated message".⁷

A Difficult Balance: Freedom Of Speech And Protecting Reputation

Freedom of speech enhances autonomy, promotes truth and enhances democracy through debate and criticism.⁸ Defama-

tion law represents an inherent tension in a liberal democracy: balancing individual autonomy and freedom with the state's protective role by reference to communal standards of expression. While "freedom of the press is considered a cornerstone of democracy"⁹ providing space to challenge powerful institutions, the media itself "represent concentrated power",¹⁰ influencing society's opinions and understandings. Defamation laws recognise that democracy is harmed by careless, malicious, racist, sexist, untrue or commercially-driven reporting.¹¹ Without a bill of rights,¹² the Australian Constitution¹³ protects individual liberty and freedom of speech through our democratic system of representative, responsible government.¹⁴

By protecting individual dignity, defamation law purports to protect individuals' integration into community membership while concurrently defining "the boundaries and nature of the general community".¹⁵ Post argues defamation law plays a central role in identifying "rules of civility" which govern society.¹⁶ Severely restricting satire via defamation laws potentially restricts a free flow of ideas and information so vital to a healthy democratic society.

Elements of Defamation

What are the imputations?

An imputation is "an act or condition attributed to a person"¹⁷. Handsley and Davis argue "defamation law tends to assume that words published are to be taken at face value."¹⁸ For example, in *Hanson v Australian Broadcasting Corporation*¹⁹ (Hanson), Pauline Hanson, ex-leader of the One Nation political party, obtained an interlocutory injunction against further broadcasting of the song 'Back Door Man'.²⁰ Ms Hanson's own words were cut and pasted into song

format. The imputations pleaded by Ms Hanson included that she was a homosexual, prostitute, man or transvestite, engaged in unnatural sexual practices and associated with the Ku Klux Klan.²¹ The song is clearly satire:

"[w]hen the language of another is reproduced in a way that accents its otherness, the act of report turns or returns to satire."²²

Ambrose J, at first instance, held that

"I can't imagine anybody... listening to that production... would not conclude that Pauline Hanson was... a homosexual and rejoiced in the fact".²³

It appears, with respect, that there is little acknowledgment of the mode and circumstances of publication.²⁴ The cutting and pasting indicated

"that references to... sexuality, were not literal, but rather 'alluding in a satirical or ironic sense' to Hanson's conservative political views".²⁵

Commentators have criticised Hanson as implying that "ordinary Australian listeners can't be trusted to pick up subtext."²⁶

Prior to each broadcast of the Hanson song, a disclaimer announced the song "was satirical and not to be taken seriously".²⁷ Along with the choppy phrases and "retro-disco backing track",²⁸ this constituted the broadcast's context, which is essential to obtaining the publication's meanings according to *Charleston v Newsgroup Newspapers*.²⁹ Justice Michael Kirby criticised this as unrealistic according to people's ordinary casual or superficial interaction with media and that it overlooked defamation law's purpose: "to provide redress when reputations are damaged in fact".³⁰ Perhaps a "grab" of this song could have led listeners to perceive that Ms Hanson had consented to or participated in the song's production.³¹ However, this highlights defamation law's inadequate approach to satire as a genre. As Chesterman argues, courts

"should recognise that seemingly factual statements made in a satirical publication are unlikely to be taken literally by [audiences]".³²

but instead interpreted as expressing critique of a political attitude. Suggesting Pauline Hanson was a homosexual, prostitute or transvestite was ridiculous considering her extremely conservative political stance. Imputations should be assessed at a deeper level. A possible imputation could have been that she was too conservative and her policies did not reflect significant Australian groups. The court seems willing to take literally imputations which are

"so extravagant and improbable that they are clearly conveyed for the purpose of ridicule rather than to be believed".³³

This reflects the English approach.³⁴

While acknowledging the defendant's intention does not address the underlying object of restoring reputation, perhaps satirical intention could be assessed when the publisher's intentions are so clear that they

"colour' the meaning the reasonable reader or viewer would derive."³⁵

Are the imputations defamatory?

Whether an imputation is defamatory is judged according to the ordinary, reasonable person: someone 'of fair, average intelligence... who is neither perverse... nor morbid or suspicious of mind... nor avid for scandal'.³⁶ Applying this standard in Hanson, the Queensland Court of Appeal felt the ordinary person would have held Ms Hanson in "contempt or ridicule".³⁷ The criticism of Hanson largely relates to with the judges' reasoning that the song inevitably conveyed a defamatory meaning - there is no apparent acknowledgment of satire.

Ambrose J in Hanson held that 0.5 to 5 per cent of the community were homosexual thus

"there's a significant percentage of [heterosexuals]... who hold homosexuals in contempt",³⁸

therefore publishing assertions that a politician was homosexual would generate "ridicule and contempt that would have a significant effect on that person's acceptability as a political candidate".³⁹ In drawing literal imputations, the Hanson case applied the High Court's approach in *Hepburn v TCN Channel Nine Pty Ltd*⁴⁰ ("**Hepburn**") whereby "reasonable" equates to "an appreciable and reputable section of the community".⁴¹ Baker argues

"Hepburn greatly extends the range of material that can be deemed defamatory."⁴²

Whether or not the Court's assessment of community attitudes to homosexuality in Hanson was accurate, it demonstrates the Courts' restrictive application of the 'ordinary person' standard in assessing satire. Ordinary persons "are taken to share a moral or social standard"⁴³. If defamation prescribes the "rules of civility",⁴⁴ a narrow 'ordinary, reasonable person' standard will limit the extent of open discourse in our society.

Numerous cartoons fill Australian daily newspapers depicting politicians and public figures with oversized, grotesque features or animal characteristics. These ask audiences to critique or question persons or their policies. Satirical commentary aims to "push boundaries" and challenge assumptions unconventionally. 'Ridicule' is now recognised as a fourth basis for defamation⁴⁵ (for example, in *Boyd v Mirror Newspapers Ltd*⁴⁶ and *Ettingshausen v Australian Consolidated Press*⁴⁷, *Brander v Ryart*⁴⁸ ("**Brander**")⁴⁹). Ridicule is a tool of satire, encouraging challenge to assumptions and the status quo. Defamation law recognises that community standards change over time,⁵⁰ thus should recognise ridicule as a tool of satire.

Defamation law's assumptions regarding the 'ordinary, reasonable person' overlook satire's analytical and challenging function. Satire should be positively acknowledged in an area of law whose inherent role is to establish moral and ethical boundaries in reporting by encouraging both humour and humility:

"... a more relaxed self-perspective can undo much of the damage [of defamation], and even improve one's self image."⁵¹

Levine J's common jury direction⁵² in the New South Wales Supreme Court was:

"The ordinary reasonable reader is no-one in this courtroom, and that includes you. The ordinary reasonable reader is a hypothetical person."⁵³

This approach may set up a "third-person effect" whereby 'individuals tend to perceive the adverse effect of a communication on themselves as less than that on others exposed to the same communication'.⁵⁴ United States research supports the argument that such an effect means 'perceived societal intolerance may

become increasingly exaggerated'⁵⁵. Even if left to the jury, the judge's direction as to the imputations and their effects will be influential. Most importantly, Magnusson warns that 'courts should be careful, in accepting a plaintiff's imputations, not to penalise satirical comment merely because it falls outside their own middle-class horizon'.⁵⁶

Defences

The most useful defences to satire are fair comment and the extended qualified privilege regarding political communication.

Fair Comment

This defence protects legitimate criticism and expression of diverse opinions, recognising 'an important aspect of freedom of speech'.⁵⁷ A satirical publication cannot personally attack individuals, rather it must address general public profile or policies. Furthermore, '[t]o allow public debate to descend to the levels of the gutter is not in the public interest, however amusing it may be'.⁵⁸ *Herald and Weekly Times v Popovic*⁵⁹ ("**Popovic**") confirmed the objective test in assessing the comment's 'fairness': the defendant need not prove that they actually held the opinion, merely that it was an opinion that an ordinary reasonable person could have held 'however prejudiced he might be... however exaggerated or obstinate his views'.⁶⁰ Non-acknowledgment of satiric subtext delimits such assessments. The Commonwealth's proposals are more limiting than current common law or code law, by protecting only comments which are "fair and reasonable" and rejecting grossly exaggerated, biased or prejudiced opinions.⁶¹ To remain effective in protecting satire, the objective element must be retained but given wider interpretation.

Qualified Privilege

While satire may be protected if relating to government and political matters according to the implied freedom of political communication, the strict approach adopted by *Lange v Australian Broadcasting Corporation*⁶² may unduly constrain political satire.⁶³

The *Lange* High Court defined "political speech" as

"[the ability of] 'the people' to communicate with each other with respect to matters that could affect their choice in federal elections or

constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government..."

Political speech has thus far been interpreted widely.⁶⁴ Yet Lange emphasised that 'the freedom of communication... the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.⁶⁵

Lange imposed a further requirement: the defendant's conduct in publishing the material must have been reasonable.⁶⁶ In considering reasonableness, courts recognise the media's inherent power for good and ill,⁶⁷ therefore aiming to deter what courts have described as 'slipshod' journalism.⁶⁸ This presumably includes misrepresentation of facts and lack of context, as in *Popovic*. "Reasonableness" requires the defendant to: believe the imputation was true, take steps to verify the truth of the imputation, seek a response from the plaintiff and publish this if feasible.⁶⁹ In *Popovic*,⁷⁰ Winneke ACJ and Warren J acknowledged that satisfying reasonableness will depend on all the circumstances, the nature of the publication and the published matter. The reasonableness factors above seem particularly restrictive of political satire and seeming to protect only 'sober, dispassionate dissemination of evidence of impropriety'⁷¹ by a political figure.

A conservative interpretation of a satirical publication is unlikely to be protected. Chesterman argues that the courts' unwillingness to grant the defence in the *Hanson and Brander*⁷² (on first appeal) does not conform to 'the spirit of the implied freedom of political communication, so as to specifically provide greater freedom for political satire'.⁷³ *Brander* concerned a satirical article on a politician in South Australia. On appeal, the imputations of effeminacy and homosexuality were held not to be defamatory in the context of the entire article. However, the imputations that *Brander* did not hold his political beliefs sincerely, did not hold credible views on immigration or was motivated by juvenile attention-seeking were upheld. They were ultimately not deemed defamatory as the defendants had sought to verify their truth and had reasonable grounds for believing they were true.⁷⁴ The Full Court of the Court of Appeal upheld the defence of extended qualified privilege, adopting a



more relaxed approach to the defence requirements, in order to reach the most appropriate overall result.⁷⁵ However, this approach lacks sufficient certainty.

England offers greater protection to satire: qualified privilege has been extended to communications concerning matters of "public concern", not just political discussion. Whereas *Lange* was guided strictly by the Constitution, English decisions take a wider frame of reference including 'freedom of expression' provisions in international treaties and the media's fundamental role in communicating matters of public interest.⁷⁶ This approach recognises that every issue which resonates with the public is 'potentially relevant to democratic self-governance, and hence potentially of public concern'.⁷⁷ Distinguishing political from non-political is not "neutral" or "value free"⁷⁸ and will result in divergence of opinion,⁷⁹ as demonstrated in *Popovic* where three judges differed as to what they considered 'political'. This makes the state of the common law in Australia unclear, especially for those publishing satire on issues of public concern or current affairs

which may be indirectly political. This uncertainty may translate into an over-cautious approach by publishers, thereby stifling legitimate criticism, and debate. Both Queensland and Tasmania provide a defence for publications concerning subjects of public interest, where discussion is for the public benefit.⁸⁰ The national legislation might adopt this provision to provide greater certainty.

Conclusion

The ubiquitous nature of the Australian media necessitates protection of people's reputation because of the media's powerful discourse-shaping role. Furthermore, everyone, regardless of occupation or social status, is entitled to preservation of their reputation. However, freedom of speech implies protection of diverse opinions and open discourse on matters of public concern. Currently, the defamation action and defences fail to protect this by ignoring satire. The national defamation legislation should provide specifically for satire in the action by imbuing the ordinary person with a broader capacity to interpret this genre. This protects diver-

sity of expression and accountability of those in power, while retaining the strict approach to defences acknowledges the media's potential for unscrupulousness or malice.

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- ¹ Justice Tony Fitzgerald "Telling the truth, laughing" 92 (1999) *Media International Australia incorporating Culture and Policy*, 11, 14.
- ² Fitzgerald, above n 1, 14.
- ³ Des Butler and Sharon Rodrick, *Australian Media Law* (2004), 25.
- ⁴ David Robertson, *Routledge Dictionary of Politics* (2004) 436.
- ⁵ Roger S Magnusson, "Freedom of speech in Australian defamation law: Ridicule, satire and other challenges" (2001) 9 *Torts Law Journal*, 269, 290.
- ⁶ Elizabeth Handsley and Gary Davis "Defamation and satire: *Hanson v Australian Broadcasting Corporation* (2001) 9 *Torts Law Journal*, 1, 1.
- ⁷ *Ibid.*
- ⁸ Lawrence McNamara, "Free Speech" in Butler and Rodrick, above n 3, 6-11.
- ⁹ Friedrich in Dean Alger "Whose Media; Media for Whom? Ownership of the Media, Regulation, Law, and the Access Issue" *The Media and Politics*, (1989) 74.
- ¹⁰ Rodney Tiffen *Scandals: Media, Politics and Corruption in Contemporary Australia* (1999) 219.
- ¹¹ Other accepted restrictions on freedom of speech which are thought to preserve democracy include laws prohibiting racial vilification, sex discrimination, commercially misleading and deceptive speech and obscenity: see Dan Meagher, "What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication" (2004) 28 *Melbourne University Law Review*, 438, 442.
- ¹² The US First Amendment confers 'private rights' on individuals by guaranteeing freedom of speech.
- ¹³ *Commonwealth of Australia Constitution Act 1900* (UK).
- ¹⁴ Dan Meagher, above n 11, 453.
- ¹⁵ Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691, 715.
- ¹⁶ Post, above n 15, 712.
- ¹⁷ Sally Walker, *Media Law: Commentary and Materials* (2000) 120.
- ¹⁸ Handsley and Davis, above n 6, 1.
- ¹⁹ Unreported, Queensland Supreme Court, 1 September 1997.
- ²⁰ The injunction was affirmed by the Queensland Court of Appeal in *Australian Broadcasting Corporation v Hanson* (Unreported, 28 September 1998), and subsequently the Australian Broadcasting Corporation were refused leave to appeal to the High Court in *Australian Broadcasting Corporation v Hanson* (B40/1998, 24 June 1999).
- ²¹ Handsley and Davis, above n 6, 2.
- ²² Stewart Justman, *The Springs of Liberty: The Satiric Tradition and Freedom of Speech* (1999) 10.
- ²³ Cited in Handsley and Davis, above n 6, 5.
- ²⁴ Butler and Rodrick, above n 3, 38.
- ²⁵ Julie Eisenberg "The Perils of Pauline" 148 (1998) *Communications Update*, 18, 18.
- ²⁶ *Ibid.*, 19.
- ²⁷ Fitzgerald, above n 1, 12.
- ²⁸ Handsley and Davis, above n 6, 2.
- ²⁹ *Charleston v Newsgroup Newspapers Ltd* [1995] 2 AC 65.
- ³⁰ *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 574-575 (Kirby).
- ³¹ Ambrose J, at trial, and Jersey CJ, on appeal, alluded to this as another reason why the imputations were reasonable.
- ³² Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 151.
- ³³ *Ibid.*, 150.
- ³⁴ *Berkoff v Burchill* [1996] 4 All ER 1008, 1018 (Millett LJ)
- ³⁵ Magnusson, above n 5, 290.
- ³⁶ *Farquhar v Bottom* [1980] 2 NSWLR 380, 386 (Hunt). The High Court of Australia appears to have confirmed this 'reasonable person' test in *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 573 (Kirby).
- ³⁷ Eisenberg, above n 25, 18.
- ³⁸ Handsley and Davis, above n 6, 5.
- ³⁹ Handsley and Davis, above n 6, 5.
- ⁴⁰ [1983] 2 NSWLR 682. In *Hepburn v TCN Channel Nine Pty Ltd*, the term 'abortionist' was held to be defamatory.
- ⁴¹ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 694 (Glass).
- ⁴² Roy Baker, "Defining the Moral Community: The 'Ordinary Reasonable Person' in Defamation Law", *Submission for the Communications Research Forum 2003*, Communications Law Centre, 12.
- ⁴³ *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505-506 (Brennan).
- ⁴⁴ Robert Post, above n 15, 712.
- ⁴⁵ Ray Watterson, "What is Defamatory Today?" (1993) 67 *Australian Law Journal* 811, 819.
- ⁴⁶ [1980] 2 NSWLR 449.
- ⁴⁷ (1991) 23 NSWLR 449.
- ⁴⁸ (2000) 78 SASR 234, 245.
- ⁴⁹ However, in this case the satirical material was protected by extended qualified privilege.
- ⁵⁰ *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488.
- ⁵¹ Fitzgerald, above n 1, 11.
- ⁵² Levine J hears the majority of defamation actions in the NSW Supreme Court: see Roy Baker, "Defining the Moral Community: The 'Ordinary Reasonable Person' in Defamation Law", *Submission for the Communications Research Forum 2003*, Communications Law Centre. Accessed: <<http://www.dcitia.gov.au/crf/papers/03/bakerpaperdefamation18final.pdf>> at 18 September 2005, 16.
- ⁵³ *Heggie v Nationwide News Pty Ltd*, unreported, NSW Supreme Court, 27 May 2002.
- ⁵⁴ Roy Baker, above n 51, 17.
- ⁵⁵ *Ibid.*
- ⁵⁶ Magnusson, above n 5, 291.
- ⁵⁷ Butler and Rodrick, above n 3, 92.
- ⁵⁸ *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, 51 (Higgins).
- ⁵⁹ [2003] VSCA 161 (21 November 2003).
- ⁶⁰ *Herald and Weekly Times v Popovic* [2003] VSCA 161 (21 November 2003), 263.
- ⁶¹ Angus Martyn, "The Commonwealth plan for reforming defamation law in Australia", 2004 (4) *Research Note: Information Analysis and Advice for the Parliament*, 1, 2.
- ⁶² (1997) 189 CLR 520.
- ⁶³ The implied freedom of political communication in the Commonwealth Constitution was established by the High Court of Australia in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers* (1994) 182 CLR 211. The freedom is not a personal right in itself.
- ⁶⁴ David Wiseman, "Implied Political Rights and Freedoms", in Sarah Joseph and Melissa Castan, *Federal Constitutional Law* (2001) 333. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Stephens v West Australian Newspapers* (1994) 182 CLR 211.
- ⁶⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 521.
- ⁶⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 573.
- ⁶⁷ *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 317.
- ⁶⁸ *Herald and Weekly Times v Popovic* [2003] VSCA 161, para 14 (Winneke ACJ); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 317.
- ⁶⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.
- ⁷⁰ [2003] VSCA 161, para 8 (Winneke ACJ) and paras 92-93 (Warren J).
- ⁷¹ Chesterman, above n 32, 102.
- ⁷² (2000) 76 SASR 212, 219-222.
- ⁷³ Chesterman, above n 32, 150.
- ⁷⁴ (2000) 78 SASR 234, 249-250.
- ⁷⁵ Magnusson, above n 5, 290.
- ⁷⁶ Roy Baker, "Extending Common Law Qualified Privilege to the Media: A Comparison of the English and Australian Approaches" (2002) 7(2) *Media and Arts Law Review*, 87, 91.
- ⁷⁷ Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*" (1990) 103 *Harvard Law Review* 601, 670.
- ⁷⁸ Baker, above n 76, 94.
- ⁷⁹ Dan Meagher, above n 11, 466.
- ⁸⁰ *Defamation Act 1889* (Qld) s. 16(1)(h); *Defamation Act 1957* (Tas) s. 16(1)(h).