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IN DEFENCE OF THE STATUS QUO: APPROACHING MORALLY CONTENTIOUS BEHAVIOUR OR CHARACTERISTICS IN DEFAMATION

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Abstract

Is it defamatory to say that someone has a mental illness, or that they perform abortions? Is it defamatory to accuse a Green party staffer of voting ACT, or say someone is gay? Plurality of opinion is part and parcel of modern society, yet, this breadth of opinion can be a sticking point for courts when dealing with cases in defamation. Where courts are in dialogue with wider society, their rulings on contentious issues can have far reaching effects beyond just the parties to any given claim. This paper considers what approach a court should take when faced with allegations of morally contentious behaviour or characteristics, that is, specific behaviours or personal characteristics towards which members of a community can make legitimate conflicting value judgments. In particular, the current test for defamation is weighed up against an emerging alternative – the sectional standards approach – which changes the quantitative requirement contained in the current test for defamatory meaning. It becomes clear that, when dealing with allegations of morally contentious behaviour or characteristics, the best approach is one that does not change the current *Sim v Stretch* test and finds that such allegations have 'no defamatory meaning'. This approach best serves defamation's main interest; protecting against reputational harm. The sectional standards approach can be rejected because it comes at a large cost to wider moral communities by making it easier for bigoted values to be reinforced by the court. Highlighting in particular the normative capacity of a court's ruling in defamation, this paper therefore stands as a defence of the status quo in defamation so as to best balance its main reputational interest against a fostering of inclusive moral communities.*

Key words: defamation, moralism, sectional standards, reputation, right-thinking person

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I Introduction

When we think of defamation, we often think of some quite serious allegations. We think of allegations that someone is a sexual harasser, or a criminal; and courts are well versed in cases like these. However, courts run into complications when dealing with allegations of morally contentious behaviour or characteristics, that is, specific behaviours or personal characteristics towards which members of a community can make legitimate conflicting value judgments – can a court say it is defamatory to be called gay, or that someone performs abortions on others? Is it defamatory to say a Green Party staffer actually voted ACT?

Drawing on common law jurisprudence, this paper applies principle to solve a practical problem and asks what to do with allegations of morally contentious behaviour or characteristics in New Zealand's defamation landscape. Beginning with a discussion of the purposes behind defamation and the court's role in validating moral viewpoints, this essay will look to the status of the tort and the possible answers that currently lie within it. The current law of defamation is then evaluated against a recently proposed alternative – the 'sectional standards approach' – which alters the requirements for a successful claim in defamation.

Grounding ourselves in the principles of defamation shows that the current test does not need to change in order to appropriately address allegations of morally contentious behaviour or characteristics. Focusing on the normative capacity of a court's ruling in a defamation proceeding, this essay shows that such allegations should *not* be held to be defamatory under the current test for defamation. This allows the court to anchor itself in the key interest at the heart of defamation – protecting reputation – whilst also enabling the tort to reach its full aspirational potential. Although this approach is the lesser evils – leaving claims where the plaintiff has been defamed within a small section of the community without any relief – the social impact of a court's ability to set legal precedents that promote inclusion justifies the use of a 'no defamatory meaning' approach.

Understanding how defamation is formulated and applied helps us understand how to approach allegations of morally contentious behaviour or characteristics. The next section explores the framework of the law of defamation in New Zealand and the interest it protects.

II Defamation and its Interests

The tort of defamation in New Zealand is grounded both in statute and the common law.[1] The requisite elements are that a false and defamatory allegation is made,[2] that it identifies the plaintiff[3] and that it is published to a third party.[4]

In New Zealand, there is no distinction between libel and slander.[5] There is no need to allege or prove special damage,[6] nor does the defendant need any intention to defame.[7] Defamation is a unique tort in that a jury trial can be elected, although the role of the jury is now diminishing.[8] In a jury trial, it is a question of law for the judge to decide whether a statement is capable of bearing a defamatory meaning. It is then left to the jury – as a question of fact – to decide what particular defamatory meaning the words did actually bear (if any).[9] In a judge only trial, the judge answers both of these questions.

Our principled approach to this question means that knowing the different elements of the tort only gets us so far. To take our analysis to the next level, we need to know more about the why; why are the requirements of defamation formulated the way that they are? In other words, what are the interests we are trying to protect? Understanding this helps frame the test for defamatory capacity – that is, whether an allegation actually is defamatory in nature

[1] Defamation Act 1992.

[2] *Sim v Stretch* [1936] 2 All ER 1237 at 1240; *Youssoupoff v Metro-Goldwin-Meyer Pictures Ltd* (1934) 50 TLR 581, as cited in *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) at [28(5)].

[3] *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239.

[4] *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524.

[5] Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 845.

[6] Defamation Act, s 4.

[7] *Hulton v Jones* [1910] AC 20 at 24.

[8] *Durie v Gardiner* [2018] NZCA 278 at [56(e)].

[9] *New Zealand Magazines v Hadlee (No 2)* [2005] NZAR at 626.

– and how it protects these interests. This in turn allows us to decide which approach towards allegations of morally contentious behaviour or characteristics best protects the purposes of the tort.

A Truth or Reputation?

Defamation is often characterised as the balance between reputation and the freedom to express certain things in the public interest – with these statements of public interest presumed to be true.[10] It is widely assumed that protecting reputation is considered to be *the* primary function of the law of defamation.[11] There is something to be said, however, for the promotion of truth being viewed as an equally central concern. Because we can view defamation as a relationship between the arguably competing interests of protecting reputation and promoting truth, these will be looked at in further detail to ensure we get to the principled heart of this issue. All things considered, the better position is that protecting reputation is the primary focus of defamation, with the protection of truth being bound up, and auxiliary to, this main interest.

1 Protecting reputation

Firstly, we can consider arguments for viewing the protection of reputation as the conceptual essence of defamation. Defamation protects reputation in providing relief where an untrue allegation has caused damage to the way the people perceive the plaintiff.[12] A successful action also vindicates the idea that the plaintiff's reputation did not deserve to be disparaged by the untrue statement.

Arguably, reputation should be conceptualised as defamation's main interest because defamation sometimes protects untrue information. This is reflected in the defences available. For example, the defence of honest opinion allows a defendant to make an untrue statement where they can show it is their genuine opinion.[13] Qualified privilege allows the communication of any information on privileged occasions where there is 'need' for the

[10] Todd, above n 5, at 845.

[11] Todd, above n 5, at 1013.

[12] Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2013) at 3.

[13] *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 at [90].

communication, such as responding to a public attack made against someone's character.[14] Public interest communication allows the dissemination of potentially untrue information in the public interest where the communication was responsible.[15] Where pleaded as a particular of the defence, true reportage does not require verification of the contents of the allegation, as the public interest lies in the fact the allegation was made rather than in the truth of its contents.[16]

We can also look to academic and judicial commentary in their assumption of reputation as defamation's main interest. Carter-Ruck and Walker outline that a false statement, no matter how offensive or hurtful, cannot be defamatory unless the reputation of the person whom it concerns is negatively affected.[17] In *Reynolds v Times Newspapers*, Lord Nicholls of Birkenhead outlined that reputation is an integral part of an individual's dignity.[18] His Honour noted that the public good benefits from reputation being protected, for it is on the basis of reputation that people make routine decisions in a democratic society; such as choosing who to work for or who to vote for. This makes it clear that protecting reputation is integral to defamation.

2 Promoting truth

The second alternative is that defamation exists to promote the dissemination of true information. The presumption that an impugned defamatory statement is untrue, and the defence of truth available where a defendant can show the substance of an allegation is true, suggest that falsity is central to the tort.[19] These indicate that the law aims to protect only those publications that are made with at least some belief in their truth.[20]

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[14] *Craig v Williams* [2019] NZSC 38 at [21].

[15] *Durie v Gardiner* [2018] NZCA 278 at [56].

[16] *Durie v Gardiner*, above n 15, at [71].

[17] Peter Carter-Ruck and Richard Walker *Carter-Ruck on Libel and Slander* (3rd ed, Butterworths, London, 1985) at 35.

[18] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1999] 4 All ER 609 at 622.

[19] Richard Parkes "Privacy, Defamation, and False Facts" in Mark Warby, Nicole Moreham and Iain Christie (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (2nd ed, Oxford University Press, Oxford, 2011) at 323; Defamation Act, s 8.

[20] *Reynolds v Times Newspapers Ltd*, above 18, at 622.

Upon reflection, the defences above could bolster the centrality of truth to the tort. With honest opinion, the court examines whether the statement made comes across as a statement of opinion or an assertion of fact, with the latter not afforded protection by the defence.[21] A defendant's knowledge of the falsity of any statement made is considered conclusive evidence of the kind of malice that defeats a qualified privilege defence.[22] In public interest communication and reportage, a publisher must take care not to subscribe to any belief in the truth of the statement reported or adopt it as their own.[23] In offering this scope to the truth requirement, the defences help where a defendant has made a mistake in evaluating the correctness of a statement and has an honest belief in its truth, or has taken care not to communicate the information as a statement of fact when it may not be.

Falsity is also essential in distinguishing defamation from other torts that may be used to litigate harmful statements, especially breach of privacy.[24] A necessary aspect of the *Hosking* privacy tort in New Zealand is that the highly offensive fact giving rise to the proceeding is true – it must actually *be a fact*.[25] As discussed in *Driver v Radio New Zealand*, this means that harm and distress caused by true statements is more properly dealt with in breach of privacy, rather than defamation.[26]

Ultimately, there is no public interest in protecting misinformation and therefore defamation can be thought to be about the promotion of truth.

B A Reputational Tort

It is easy to get bogged down by theory, so it is necessary to stop and ask why it is so important to distinguish between defamation as a reputational tort, or one that focuses on protecting truth. Put simply, correctly identifying the principled underpinnings of the tort has practical implications.

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[21] *Television New Zealand Ltd v Haines*, above 13, at [92].

[22] *Craig v Williams*, above n 14, at [30].

[23] *Durie v Gardiner*, above n 15, at [71].

[24] *A v Hunt* [2006] NZAR 557 at [58].

[25] *Hosking v Runting* [2005] 1 NZLR 1 at [117]. Tipping J's conception of the privacy tort preferred the word 'information' which may allow more space for the protection of untrue statements.

[26] *Driver v Radio New Zealand* [2019] NZHC 3275 at [112].

If we prefer a conception of defamation that aims to protect reputation, an attempt to gain a remedy for allegations of morally contentious behaviour or characteristics will only be successful where the plaintiff can show they have faced reputational damage of the serious level intended to be remedied by the tort.[27] The emphasis is not on the truth of the contents of the allegation but the effect it has on the plaintiff's interactions with other people in their community.

On the other hand, if defamation intends to deter the publication of false information to protect truth, a plaintiff would theoretically be entitled to relief whenever an incorrect statement has been made about them. Protecting truth is wider than protecting reputation, in that an action in defamation would be successful regardless of the amount of people whose judgment of the plaintiff has in fact changed, as long as the impugned statement is untrue.

Considering the above leads to the conclusion that defamation protects truth *insofar as it relates to reputation*. For example, Mullis and Parkes outline that a plaintiff will not receive protection for a reputation which they are not entitled to;[28] if the impugned allegations are true, then the reputation the plaintiff is alleging cannot be protected by the law. This highlights that there is an interplay between truth and reputation, in that the court aims to seek out whichever claim contains the truth; the reputation the plaintiff claims they have, or the publication that allegedly disparages it. As discussed above, the various defences also provide a way for the court to balance the promotion of truth against protecting reputation.

So yes, truth *is* bound up in our conception of the tort, but this is not the harm that is ultimately being mitigated. The harm the court is concerned with is reputational – *this is the compensable harm.* [29] As we will see when we outline the test for defamatory meaning, a focus on protecting reputation explains why the test places such an emphasis on the

[27] *X v Attorney General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365 at [21].
[28] Mullis and Parkes (eds), above n 12, at 21.
[29] Mullis and Parkes (eds), above n 12, at 20.

external judgments made of a person's character. We have other actions that can help us protect truth in widespread publications, for example with broadcasting standards or ordering corrections.[30] As we will soon see, the truth or falsity of a statement is not relevant when determining its defamatory; it simply depends on whether the imputation harms the plaintiff's reputation by causing 'right-thinking members of society' to think differently of them.[31] This shows that truth is not a direct concern of the defamatory meaning test, but primarily the domain of defences once defamatory capacity is established within itself.

Completing our deep dive into the interest behind defamation means we can look at how it is reflected in our current test for defamatory meaning. In taking our principle-based discussion through to what practical solutions are available to a court when dealing with morally contentious behaviour or characteristics we should continue to ground ourselves in the court's primary concern: damage to reputation

III Defamatory Meaning

For this essay, the main test for defamatory meaning is considered to be that of Lord Atkin in *Sim v Stretch;* this asks, 'would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'[32]

A Reflecting Interests in the Defamatory Meaning Test

Using the helpful analysis set out by Lawrence McNamara in his work *Reputation and Defamation* we can split the current defamatory meaning test into its 'quantitative' and 'qualitative' elements. This shows us how the protection of reputation is reflected in the *Sim v Stretch* test.[33] The use of the *Sim v Stretch* test, with its qualitative and quantitative requirements, is referred to as the 'general standards approach'.[34]

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[30] Defamation Act, s 26.

[31] Mullis and Parkes (eds), above n 12, at 8; *New Zealand Magazines v Hadlee (No 2)*, above n 9, at 624-625; *Sim v Stretch*, above n 2, at 1240.

[32] *Sim v Stretch*, above n 2, at 1240.

[33] *Sim v Stretch*, above n 2, at 1240.

[34] Lawrence McNamara *Reputation and Defamation* (Oxford University Press, Oxford, 2007) at 117.

Up first is the 'quantitative' element. The *Sim v Stretch* test is predicated on the idea that any given jurisdiction comprises its own moral community.[35] The word 'generally' indicates that it is not enough to show that your reputation would be harmed in a small section of society, it must be lowered in the broader population.[36] If I belonged to a 'No Purple Shirt' club, it is not enough for me to say I am defamed by an allegation I have worn a purple shirt, where only members of the club would think less of me for doing so. The quantitative requirement needs me, the plaintiff, to show that the impugned statement would provoke negative judgment against me by members of my community by-and-large. This component emphasises the importance of reputation as a key interest, as it ensures an action in defamation can only be successful where there has been serious damage to reputation among the plaintiff's wider community.[37]

The quantitative requirement also protects pluralism; in order to allow for different perspectives to be expressed the general population cannot live in fear that expressing their views will result in a defamation suit against them.[38] The quantitative requirement provides a threshold whereby the untrue statement must be more than just an 'unpopular opinion' held by a minority, but a damaging allegation that would affect the minds of a large enough section of the population to make the damage to reputation worthy of legal protection.

'Generally' also denotes that any given community is taken to have a moral consensus towards contentious issues.[39] The 'right-thinking member of society' is the hypothetical

[35] McNamara *Reputation and Defamation*, above n 34, at 36.

[36] *Tolley v Fry* [1931] AC 333, [1931] All ER Rep 131 at 133.

[37] *X v Attorney General (No 2)*, above n 27, at [12]-[13]; An exception to the quantitative requirement is innuendo. This applies where only a minority of the community is aware of some extrinsic facts that would alter the words used to give them a defamatory imputation. For example, if someone says Mr Smith frequently visits 10 North Road, with some people being aware that 10 North Road is a drug house. Although this would allow a successful action in defamation, innuendo does not help with allegations of morally contentious behaviour or characteristics. This is because the issue at the heart of this paper is whether these allegations should be held to be defamatory *at all*, not whether the knowledge of extrinsic facts would give these allegations a defamatory meaning (*Lewis v Daily Telegraph Ltd* [1963] 1 QB 340).

[38] *Monroe v Hopkins* [2017] EWHC 433 (QB*)* at [50].

[39] Roy Baker "Defamation and the Moral Community" (2008) 13 Deakin LR 1 at 6.

realisation of this 'consensus,' forming the *qualitative* element of the test.[40] That being said, the law will not uphold an opinion held within a community, or section of a community, whose "standard of opinion the law does not recognise".[41] McNamara calls this "ethical recognition" and describes it as "a moral benchmark" whereby "some views will not be taken into account when determining actionability because they are qualitatively unacceptable to the court".[42] Put another way, an allegation's capacity to defame will not be judged against "qualitatively unacceptable" opinions that do not accord with the tenor of the law – such as an opinion that it is okay to drug-deal or drink-drive.[43] This qualitative element shows a focus on reputation by honing in on a discussion of what a 'right-thinking person' would think of the plaintiff having heard the impugned allegations.

The qualitative element also means a court is practically unable to have regard for or uphold two competing viewpoints on the same issue. For example, a court cannot hold that the 'right-thinking members of society generally' includes people that both do and do not believe that voluntary abortion should be performed.[44] Although it may be that rational people can hold either viewpoint, a court must decide which of these views *would not* form the opinion of 'right-thinking members of society' and apply the test accordingly.

Case law also helps us see how 'ethical recognition' occurs through the application of the 'right-thinking person' standard.[45] Looking to *Myroft v Sleight*, the plaintiff was a member of a Fisherman's Trade Union. During a general strike, it was alleged that the plaintiff continued to take ships out to sea. He argued that these allegations imputed dishonourable conduct and were therefore defamatory. Although the action failed for proof of special damage, it was found the allegation had defamatory capacity. Despite the fact that some people may not like trade unions, they are a perfectly legal part of working life, meaning

[40] *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at [38].

[41] *Myroft v Sleight (*1921) 90 LJKB 883, [1921] All ER Rep Ext 841 at 844; see also See Carter-Ruck and Walker, above n 17, at 35: "...the interests of public policy require that the law should decline to recognise the validity of opinions of those who are not in sympathy with it".

[42] McNamara *Reputation and Defamation*, above n 34, at 124.

[43] McNamara *Reputation and Defamation*, above n 34, at 124.

[44] *Sim v Stretch*, above n 2, at 1240.

[45] McNamara *Reputation and Defamation*, above n 34, at 124-125.

the alleged conduct could be measured against the 'qualitatively acceptable' standard of opinion of unionists who would view the alleged conduct as being underhanded or disloyal, with no validation given to the competing viewpoint. In *Radio 2UE Sydney*, the majority of the Court preferred to approach the exercise of 'ethical recognition' by describing the 'right-thinking person' test as a "rejection of the wrong standard".[46] They did not believe that the 'right-thinking person' test itself provides any particular standards to assess the imputations, instead, a given community provides these standards against which "loss of standing" is measured.[47]

Taking the quantitative and qualitative elements together, an allegation will only be defamatory where an imputation damages the plaintiff's reputation in the eyes of a large enough section of the community whose opinion the court believes to be in accordance with the general tenor of the law. With that being said, it is important to recognise that discussion surrounding morally contentious behaviour or characteristics – and therefore the focus of this paper – is *essentially a discussion on the qualitative element* of the test. This is because we are not asking whether enough people find the alleged imputations defamatory, we are asking whether the court should find these imputations convey a defamatory meaning *at all* based on the hypothetical 'right-thinking person' standard.

B Normative Potential

Taking this general standards approach, the role of a court in deciding the defamatory capacity of certain imputations is essentially a normative one.[48] For example, if the court holds that an imputation of gayness is defamatory, it is holding that gay men and lesbians would have their reputation lowered in the estimation 'right-thinking members of society generally'.[49] In other words, not only *should* the 'right-thinking' person look down upon gay men and lesbians, but enough 'right-thinking people' *would* look down on gay men

[46] *Radio 2UE Sydney Pty Ltd v Chesterton,* above n 40, at [38].

[47] *Radio 2UE Sydney Pty Ltd v Chesterton,* above n 40, at [37], [41]; Ultimately, the court found that because the allegations in question concerned the plaintiff's journalistic capabilities, the focus of the court was not on 'moral or ethical standards'.

[48] Lawrence McNamara "Bigotry, community and the (in)visibility of moral exclusion: homosexuality and the capacity to defame" (2001) 6 MALR 1 at 274.

[49] *Sim v Stretch*, above n 2, at 1240.

and lesbians so as to make it a viewpoint that is taken in society generally.[50] However, if the court found that an imputation of gayness is not capable of bearing a defamatory meaning, it is holding that to look down upon gay men and lesbians would exclude one from the scope of the 'right-thinking members of society,' and the court will have no regard to that opinion.[51] In this way, the court's determination of whether an imputation is defamatory serves to validate certain moral standards or positions.[52]

We now have a clear picture of the way the *Sim v Stretch* test focuses on reputational harm by providing us with a quantitative element ensuring damage to reputation is at a serious level, and a qualitative element that evaluates potentially defamatory allegations against external judgments that hypothetical 'right-thinking people' would make about a plaintiff.[53] To the extent that truth is protected as an auxiliary interest in the *Sim v Stretch* test, the allegation is still faced with a presumption of falsity that can be rebutted by recourse to the available defences.[54]

C Issues with the Test

It has been recognised that the current general standards test does not adequately outline a solution towards allegations that contain contested values.[55] The diversity of perspectives in any moral community means that the reputation of a person within a subsection of society with whom they identify – for instance race or religious community – may be damaged by a statement that a community as a whole would not view as disparaging.[56] As above, because the court must look to the section of the community it deems to be 'right-thinking' at the exclusion of all others, it cannot have equal regard to competing

[50] *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682 at 694.

[51] McNamara "Bigotry, community and the (in)visibility of moral exclusion: homosexuality and the capacity to defame," above n 48, at 275-276.

[52] McNamara "Bigotry, community and the (in)visibility of moral exclusion: homosexuality and the capacity to defame," above n 48, at 274; *Sim v Stretch*, above n 2, at 1240.

[53] *Sim v Stretch*, above n 2.

[54] *Sim v Stretch*, above n 2.

[55] McNamara *Reputation and Defamation*, above n 34, at 4; Andrew Burrows and Ursula Cheer (eds) *Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 40.

[56] *Arab News Network v Jihad al Khazen* [2011] EWCA Civ 118 at [30].

viewpoints. This presents difficulties to the court in defining who the 'right-thinking person' is, and to the plaintiff in showing that their reputation has suffered in the eyes of enough 'right-thinking people'.

Having examined the formulation of the law of defamation – and pointed to issues in the current test for defamatory capacity – we can now canvass the possible ways to deal with allegations of morally contentious behaviour or characteristics. This ultimately shows us that the 'no defamatory meaning' approach is preferable, in that best serves the key interest of protecting reputation whilst also allowing a court to maximise the normative potential of defamation.

IV The Present Position

The first two approaches that can be taken when dealing with allegations of morally contentious behaviour or characteristics exist within the current law of defamation. The examples below help to show that an approach finding there is 'no defamatory meaning' is the best option when dealing with these allegations, with discussion surrounding defamatory capacity regarding imputations of queerness aiding our discussion.

Firstly, let us imagine an article saying the plaintiff has a mental health illness. The plaintiff has noticed their relationships have changed, with many people beginning to act differently towards them.

In the second example, there exists a devoutly religious plaintiff. Almost all of their friends and family are members of specific church that requires its members to pray seven times a day. A false rumour begins that the plaintiff has not done so for many years. This causes members of their church to doubt their faith and they begin to associate less with them.

A No Defamatory Meaning – the Preferred Approach

The first option open to any court in dealing with the two scenarios above is that an untrue statement imputing morally contentious behaviour or characteristics will *not* be successful in defamation.

1 Qualitative test not met

One way a judge could find the alleged imputation is not capable of bearing a defamatory meaning under the *Sim v Stretch* test is if the qualitative element is not met.[57] This would be in finding that there is no possible meaning the words could bear that would lower the plaintiff in the estimation of 'right-thinking people'. This approach can be seen in imputations of queerness, with an in-depth analysis in the litigation surrounding Rene Rivkin.[58] Certain publications included material that questioned Rivkin's involvement in a model's death.[59] Among the alleged imputations was one suggesting Rivkin had a sexual relationship with a male employee.[60] Here, the New South Wales Supreme Court and the High Court of Australia overturned previous authority to find that imputations of gayness were not capable of being defamatory.[61] Bell J in the New South Wales Supreme Court held it was "no longer open to contend" that the shared moral standards we take the hypothetical 'right-thinking member of society' to represent included holding gay men in lower regard simply for being gay.[62] In the High Court, Kirby J reinforced that it *ought* not to be the case that publishing a statement saying two men were involved in consensual sexual activity was considered defamatory.[63] This reasoning shows a failure of the qualitative element of the test, as the courts highlighted that the standards of opinion against which impugned defamatory allegations were judged did not include a 'qualitatively unacceptable,' homophobic viewpoint.[64]

A similar approach could be taken with imputations of intellectual disability,[65] which can be analogised to the hypothetical regarding the allegation of a plaintiff with a mental illness (in that these both concern imputations regarding the relative mental state of the claimant).

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[57] *Sim v Stretch*, above n 2.

[58] *Rivkin v Amalgamated TV Services Pty Ltd* [2001] NSWSC 432; *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50, (2003) 201 ALR 77.

[59] *John Fairfax Publications Pty Ltd v Rivkin*, above n 58, at [180].

[60] *John Fairfax Publications Pty Ltd v Rivkin*, above n 58, at [180].

[61] For example *Horner v Goulburn City Council* [2001] NSWSC 432.

[62] *Rivkin v Amalgamated TV Services Pty Ltd*, above n 58, at [30].

[63] *John Fairfax Publications Pty Ltd v Rivkin*, above n 58, at [140].

[64] McNamara, *Reputation and Defamation*, above n 34, at 124.

[65] *Malik v McGeown* [2008] NSWCA 230.

In *Malik v McGeown,* the plaintiff asserted that an article conveyed the imputation that she was 'demented'.[66] Acknowledging that in the past it may have been defamatory to impute someone had an intellectual disability,[67] nowadays a community member's response to intellectual disability would likely be one of sympathy – not hatred, ridicule or contempt that usually presents with a defamatory statement.[68] There is a slight difference between imputations of mental illness and imputations of queerness; although the former may affect one's ability to work, the latter does not. This does not prevent a 'no defamatory meaning' approach from being taken. Where a plaintiff could show that a defendant made allegations of mental illness with imputations of a negative effect on that plaintiff's professional capacity, this would fit more squarely into defamation as it stands now anyway – as it has often been held to be defamatory to disparage someone in their profession[69] – or allow relief under analogous proceedings like malicious falsehood. This is distinct from a statement claiming that someone has a mental illness and arguing that this is defamatory in itself.

These discussions suggest that untrue statements with imputations of ascriptive, immutable characteristics may not be defamatory.[70] If we were to take this approach, then our first hypothetical plaintiff be unlikely to find any relief in defamation (where having a mental health illness could be considered ascriptive). Where failure to adhere to a religious practice is a 'choice', our second hypothetical plaintiff may still be successful in defamation under this approach provided they could show that their reputation was harmed in a wide enough section of the community.

2 Quantitative test not met

A judge could also find that an allegation is not defamatory where it fails the quantitative element of the *Sim v Stretch* test, that is, the untrue statement alleging morally contentious

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[66] *Malik v McGeown,* above n 65, at [54].

[67] *Malik v McGeown,* above n 65, at [56].

[68] *Malik v McGeown,* above n 65, at [87].

[69] *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688, [1970] All ER 1094; *Radio 2UE Sydney Pty Ltd v Chesterton,* above n 40; *Hepburn v TCN Channel Nine Pty Ltd,* above n 50.

[70] McNamara, *Reputation and Defamation,* above n 34, at 193.

behaviour or characteristics falls outside of the scope of defamation because the plaintiff's esteem is not lowered in the minds of enough people.[71] Although this reasoning cannot apply to our first plaintiff who has had many people think differently of them, it would apply squarely to our second example where the change in the reputation of, and behaviour towards, the plaintiff has only occurred in their church group and not the wider community.

Where the quantitative test requires a plaintiff to show that a statement would likely have an adverse effect on their reputation across a population 'generally', the same allegation cannot be found to defame one person, but not defame another, even where a plaintiff can show that their reputation would be harmed in a section of the community they identify with.[72] For example, although calling someone a criminal informant might be defamatory within the sphere of criminals, not only is this a 'qualitatively unacceptable' viewpoint, but it is not what a broader population would think.[73] Similar reasoning presents in *Rivkin* at the New South Wales Court of Appeal.[74] Bell J acknowledged that many people with religious convictions may consider same-gender relationships to be a sin, and look down upon someone accordingly,[75] but this is not enough to find that an imputation of queerness would be defamatory as this is not what the community on the whole would think. This shows that our second plaintiff will run into problems where they cannot show that their reputation was harmed in a large enough section of the community.

3 Striking the balance between protecting reputation and inclusion

The benefits of taking a 'no defamatory meaning' approach in dealing with allegations of morally contentious behaviour or characteristics are mostly to do with the normative capacity of defamation. Where a court declares what imputations are capable of being defamatory, they have the ability to declare exactly what value judgments comprise those of 'right-thinking members of society generally'.[76] More importantly, this means they can

[71] Noting innuendo.

[72] *Brown v Bower* [2017] EWHC 2637 (QB) at [55]. *Monroe v Hopkins*, above n 38, at [50].

[73] *Monroe v Hopkins*, above n 38, at [50]. McNamara *Reputation and Defamation*, above n 34, at 1024.

[74] *Rivkin v Amalgamated TV Services Pty Ltd*, above n 58.

[75] *Rivkin v Amalgamated TV Services Pty Ltd*, above n 58, at [22].

[76] *Sim v Stretch*, above n 2, at 1240.

define exactly what moral viewpoints fall *outside* of this. In requiring a large enough portion of a community view an imputation as being defamatory, the quantitative element of the general standards approach has the ability to prevent bigoted, minority views from being legally validated – it is one thing for a member of the community to say that having a mental illness or not praying seven times a day is wrong, but it is another thing for a court to rule that it is. In this way, both the qualitative and quantitative elements of the test mean that the court is conversing with society in reflecting social norms back on itself, and has the ability to do so aspirationally.[77] McNamara highlights that where there is no good reason to hold otherwise, inclusive moral presumptions are to be preferred over exclusive ones.[78] For example, a finding that imputations of mental illness do not carry defamatory capacity is an inclusive viewpoint in that it includes more people in the community's definition of those with equal moral worth.[79] When taken in consideration of the court's role in determining defamatory capacity, this means that a court can act proactively in validating inclusive viewpoints and prevent the law from recognising that damage to reputation can happen via prejudicial allegations.

The 'no defamatory capacity' approach protects reputation in a more holistic sense. Holding that a particular allegation is not defamatory means that a person's reputation cannot be damaged by any discriminatory values that exist within it. For example, in saying that reputation cannot be damaged by allegations of mental illness – because 'right-thinking people' would not think less of you – asserts that it is not wrong to have a mental illness. As discussed above, where a court is in dialogue with society, this would have a beneficial impact on the reputations of those outside of just the parties to the claim.

Where a purpose of defamation is promoting truth, one could argue that a claim should be successful wherever a plaintiff has been harmed by an untrue statement, and the quantitative requirement of the general standards test fails to acknowledge the situation for

[77] Dean Knight "I'm Not Gay – Not That There's Anything Wrong with That!: Are Unwanted Imputations of Gayness Defamatory?" (2006) 37 VUWLR 2 at 268.
[78] McNamara *Reputation and Defamation*, above n 34, at 212.
[79] McNamara *Reputation and Defamation*, above n 34, at 226.

many people bringing claims in defamation who have faced reputational damage within their close communities. It is true to say that this approach does not centre the protection of truth, but first principles tell us that protecting reputation remains the primary role of defamation. Where a plaintiff is seeking redress in defamation, often what they are really looking for is the vindication that their reputation did not deserve to be harmed in the way it was by the false statement, and this is best protected by a general standards approach that centres on the reputational effect of a defamatory allegation. As noted above, a plaintiff could turn to other legal avenues like broadcasting standards or malicious falsehoods in order to protect truth. If a court is still wary that this 'no defamatory meaning' approach would not provide enough protection to truth, it could look to its powers to order corrections.[80]

Going back to our examples, we would not want to find there to be defamatory meaning in an allegation of having a mental illness, as this suggests it is wrong to have one and is therefore exclusionary. We would also not want our second plaintiff to be successful, as it has not been shown that they have suffered widespread reputational harm of the nature that is intended to be remedied by defamation. As shown above, the current general standards approach allows us to reject these claims based on the 'qualitative' and 'quantitative' elements respectfully. Although this approach is not perfect, not finding defamatory meaning for allegations of morally contentious behaviour or characteristics enables the court to protect serious instances of reputational damage without reinforcing antagonistic viewpoints.

B A Finding of Defamatory Capacity

The second approach available to the court under the current *Sim v Stretch* test is to find that the untrue statement *is* capable of being defamatory.[81] With the examples above, this means the court would find that it is defamatory to allege someone has a mental illness, or that one is not adhering to strict religious practices.

[80] Defamation Act, s 26.

[81] *Sim v Stretch*, above n 2.

1 The imputations being defamatory themselves

The first way a court could find defamatory capacity in a statement is if the words themselves convey a defamatory meaning. Such reasoning was historically used when assessing imputations of queerness. For example, the New Zealand Court of Appeal in *Hadlee* conceded that an imputation that the plaintiff was lesbian or bisexual was capable of bearing a defamatory meaning.[82] Similarly in *Horner v Goulburn City Council,* Levine J held that, at best, people will only ever show 'sympathetic tolerance and understanding' towards queer members of the community.[83]

2 Allegations carry some other defamatory imputation

Another way that a court could find an allegation of morally contentious behaviour or characteristics to be defamatory is in searching for auxiliary imputations that are more squarely defamatory.[84] Using the examples above, a court could find there were imputations of violence that pushed the first example of mental illness to have defamatory capacity. This was so in *Chow v Un*, where the Court found it was defamatory for the defendant to say they lived in fear of being assaulted by someone they thought was mentally ill.[85] In the second example, a court may find the primary imputation of a failure to adhere to religious practice brings with it an imputation of dishonesty. Both Bell and Kirby JJ highlighted that imputations of gayness could be defamatory where there is another squarely defamatory imputation implied – such as one of hypocrisy or infidelity.[86] Similarly, courts have avoided ruling on whether imputations of engaging in casual sex could be defamatory, instead clinging onto imputations of manipulation or sexual misconduct.[87]

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[82] Knight, above n 77, at 260; *New Zealand Magazines v Hadlee (No 2),* above n 9.

[83] *Horner v Goulburn City Council,* above n 61, at 5.

[84] *Arab News Network v Jihad al Khazen,* above n 56, at [31].

[85] *Chow v Un* [2017] NSWDC 254.

[86] *Rivkin v Amalgamated TV Services Pty Ltd,* above n 58, at [30]; see the discussion around 'gayness plus' in Knight, above n 77, at 267.

[87] *Costello v Random House Australia Pty Ltd* [1999] ACTSC 13.

3 A legal fiction

An evaluation of this approach shows us that where a strength of the 'no defamatory meaning' approach was in its inclusivity, the same cannot be said here. Once again, if a court were to find a defamatory meaning for our first hypothetical plaintiff, it would be holding that it is wrong to have a mental illness and others would look down on you for it. In this way, a court's finding of defamatory meaning reinforces any exclusionary values contained within it.

Although this approach would allow more plaintiffs relief under the law, the strain to look for auxiliary defamatory meanings allows a court to avoid addressing whether the primary imputation is actually defamatory, providing only a purported protection of reputation that is not adequately reasoned. For instance, avoiding a ruling as to whether imputations of queerness would be defamatory by focusing on auxiliary imputations instead means a plaintiff would not be able to hear from the court that 'right-thinking members of society' should not think less of those who are queer, and misses out on this validation of their intrinsic moral worth. This is not to say that auxiliary imputations of something like dishonesty can never be defamatory – for example if someone was to allege that Elton John was not gay – and there can be legitimate secondary imputations that would cause the sting of an allegation. In these situations, a finding of defamatory capacity regarding a secondary imputation is a perfectly legitimate one. But a court should take caution in digging for these secondary meanings, otherwise they may be used as a form of legal fiction allowing the court to avoid discussing the imputation pleaded, and in reality, the imputation actually at the heart of the allegation. When a court prevents itself from discussing these value judgments, it is allowing exclusionary views to continue to be perpetuated by not openly denouncing them, stunting the aspirational potential of the tort.

As far as the current law for defamation is concerned, the best option available to us has been shown to be where 'no defamatory meaning' is found for imputations of morally contentious behaviour or characteristics. This is for two main reasons; it protects reputation and it is not exclusionary. But what if we changed the *Sim v Stretch* test? Would this mean

a better balance of reputation and inclusivity, whilst also allowing relief for the kinds of allegations at question?

V A Sectional Standards Approach

McNamara and Speker note that taking a 'sectional standards approach,' as opposed to our current general standards approach, may help defamation navigate plurality of opinion.[88] This section of the paper outlines this method, and why it is not a suitable alternative to the 'no defamatory meaning' approach in dealing with morally contentious behaviour or characteristics.

A What Is It?

In *Arab News Network,* Lord Justice Keene noted that plurality of opinion and the ability of reputational damage to occur within sub-sections of a community are issues that need addressing by the court in the context of defamation.[89] This could be achieved by lowering the quantitative requirement of the *Sim v Stretch* test whereby the plaintiff's esteem must be lowered in the estimation of 'right-thinking' members of only a "substantial part of the population".[90] This is known as the 'sectional standards approach'.[91]

Adjusting the quantitative requirement of the test has happened in very few defamation cases. In *Drummond-Jackson*, the claim concerned the defendant's research into anaesthesia being declared unsafe by a scientific publication.[92] There, Lord Denning outlined that the question of whether the words were capable of bearing a defamatory meaning was asked to 'the sort of people likely to read them'.[93] As such, the plaintiff needed to show that the words were capable of defaming him within the eyes of medical

[88] Adam Speker, 'Paradise and Prostitutes: Time for a Sectional Standards Test?' (16 November 2017) Inforrm < https://inforrm.org/2017/11/16/paradise-and-prostitutes-time-for-a-sectional-standards-test-adam-speker/>; McNamara, *Reputation and Defamation,* above n 34, at 122.

[89] *Arab News Network v Jihad al Khazen,* above n 56, at [30]

[90] McNamara *Reputation and Defamation,* above n 34, at 121; in reference to *Hepburn v TCN Channel Nine Pty Ltd,* above n 48.

[91] McNamara *Reputation and Defamation,* above n 34, at 120.

[92] *Drummond-Jackson v British Medical Association,* above n 69, at 1097.

[93] *Drummond-Jackson v British Medical Association,* above n 69, at 1099.

professionals who read the British Medical Journal.[94] In the case of *Hepburn v TCN Channel Nine*, the court was asked whether it was defamatory to allege that a registered doctor performed lawful abortions. [95] The court took the approach that the plaintiff only need to show reputational damage in an "appreciable and reputable section of the community",[96] and lowering the quantitative threshold down to an "appreciable" part remedied the inherent issues that come with identifying what 'right-thinking people' are the representatives of any moral community.[97]

B Applying Sectional Standards to New Zealand

Although a sectional standards approach may sound appealing, we must dig deeper in asking whether it would really provide courts with a better alternative. A sectional standards approach would increase the likelihood of relief under defamation by lowering the quantitative threshold required to be successful and, on this basis, it may arguably better honour defamation's key interest where it becomes more likely that someone will receive redress for any reputational harm. The sectional standards approach would also be beneficial regarding the biggest issue with the general standards approach,[98] whereby imputations that are not defamatory of one person could substantially damage the reputation of another due to their affiliation with certain groups (like our church group example). Allowing the court to place itself in the community within which the plaintiff's reputation is likely to suffer – such as among doctors in *Drummond-Jackson* – could be said to allow the court to deliver the just outcome in the given situation.[99]

Authorities are, however, unclear in regards to whether a sectional standards approach would be applicable to 'personal defamation'. Both *Drummond-Jackson* and *Hepburn* concern 'business defamation', where the plaintiff is asserting that their reputation in

[94] *Drummond-Jackson v British Medical Association,* above n 69, at 1099.
[95] *Hepburn v TCN Channel Nine Pty Ltd,* above n 50, at 686.
[96] *Hepburn v TCN Channel Nine Pty Ltd,* above n 50, at 694.
[97] *Hepburn v TCN Channel Nine Pty Ltd,* above n 50, at 694.
[98] Section III.
[99] *Drummond-Jackson v British Medical Association,* above n 69.

regards to their profession is being disparaged.[100] Once placed in this context, it becomes clear why the court in *Drummond-Jackson* was willing to adjust the quantitative requirement and analyse the claim's defamatory capacity from the eyes of others in the plaintiffs' respective profession.[101] This is because it can be argued that those who operate outside of the medical field would not have known how to evaluate the impugned statement. Following this reasoning, a sectional standards approach would be useful in a situation where an allegations was made disparaging someone's professional capacity. But, as discussed above, if an allegation of morally contentious behaviour or characteristics carries with it a legitimate and secondary imputation disparaging someone's professional capacity, this will likely be considered defamatory under the current *Sim v Stretch* test anyway.[102] What we are concerned with are allegations imputing that morally contentious behaviour or characteristics are in and of themselves defamatory, and therefore discussion around business defamation is of limited use to us.[103]

Were we to extend the sectional standards test to 'personal' defamation, it is still unlikely that it would be of any help in our situation. The biggest limitation is that it only helps where a plaintiff has failed to meet the quantitative requirement of the *Sim v Stretch* test;[104] it would only be useful to our second hypothetical plaintiff who has allegedly failed to adhere to religious practice. This is because, whilst a sectional standards approach reduces the number of people among whom the esteem of the plaintiff must be lowered, there would

[100] *Drummond-Jackson v British Medical Association,* above n 69; *Hepburn v TCN Channel Nine Pty Ltd,* above n 50.

[101] *Drummond-Jackson v British Medical Association,* above n 69.

[102] *Drummond-Jackson v British Medical Association,* above n 69; *Radio 2UE Sydney Pty Ltd v Chesterton,* above n 40; *Hepburn v TCN Channel Nine Pty Ltd,* above n 50.

[103] Lord Denning noted that malicious falsehoods may be the correct action where imputations are impersonal in nature and require the court to look to a smaller section of the community to analyse the claim – for example with 'business defamation.' Malicious falsehoods concern untrue and damaging statements, made with a relevant degree of fault. They must be likely to cause pecuniary damage and require an intent to injure. Allegations of morally contentious behaviour or characteristics are not confined to disparaging someone in their professional capacity and are extremely personal in nature. They can cause reputational harm without pecuniary loss or an intent to injure and as such malicious falsehoods are of limited use here (*Drummond-Jackson v British Medical Association,* above n 69, at 1098).

[104] *Sim v Stretch,* above n 2.

still be an operating qualitative requirement. As previously noted, *our discussion is one that centres around the qualitative element* of the test by asking whether or not a court should find imputations of morally contentious behaviour or characteristics capable of being defamatory in themselves. For our first hypothetical plaintiff, their issue is not that *not enough* people think less of them, it is whether people should think less of them for an allegedly having a mental illness *at all.* A court would still need to rule on whether this hypothetical plaintiff would – and should – have their esteem lowered in the minds of 'right-thinking people', begging the question of what to do with morally contentious behaviour or characteristics. There is also limited guidance on what 'substantial' means, and the court would need to rule on this threshold in itself.

Taking this point further, there is little scope to argue that we could also do without our current qualitative component. A qualitative component becomes crucial if a problematic viewpoint asserted in an allegation were held by a majority of the population, rather than a minority. Going back to our criminal informant example,[105] even if a majority of the community thought that it was acceptable to commit crimes, this is a "qualitatively unacceptable" opinion for the law to uphold as it goes against our established system of criminal liability.[106] Although this would theoretically pass our quantitative test, it would be stopped by the qualitative element which ensures that the standards of opinion against which impugned allegations are evaluated are in accordance with the law.

McNamara argues that a sectional standards test could be used where opinion on an issue is split more-or-less down the middle because it is more "realistic" in recognising the "diversity of moral taxonomies" in a given jurisdiction'.[107] It certainly is more realistic in recognising diversity of opinion, but at what cost? Firstly, you would be hard-pressed to find issues where public opinion is split cleanly 50/50, or even 45/55. Next, McNamara also notes the "ethical recognition" that occurs in using the 'right-thinking person' test, but does little to address how reducing the quantitative requirement in defamation would not

[105] *Monroe v Hopkins,* above n 38, at [50].

[106] McNamara *Reputation and Defamation,* above n 34, at 124.

[107] McNamara *Reputation and Defamation,* above n 34, at 122.

then lead to poor outcomes.[108] The main concern is that where defamation is normative and aspirational, a sectional standards approach would make it easier for prejudicial views to be reinforced. For example, we can pretend that an imputation of queerness has been held as defamatory taking a sectional standards approach, with the 'substantial section' of the community being a church of conservative Christians to which the plaintiff belongs. Because the quantitative requirement is reduced, it would be easier for the plaintiff to assert that their reputation has been lowered in a legally cognisable section of the community. The presence of the qualitative 'right-thinking person' element means a court would still be ruling that reasonable, 'right-thinking people' would think less of someone who is queer. Where principle has shown us that reputation is the primary interest in defamation, we must also consider how defamation can be used to vindicate the reputations of people outside of the claim. Although the court could caveat that its judgment was confined to viewing the claim from the eyes of a conservative Christian community within which the plaintiff identifies, ultimately, the court is endorsing the viewpoint that being said to be queer is capable of being so bad as to warrant legal action and judicial remedy. Even if we caveated judgments by outlining that the court has placed itself within a section of the community within which the plaintiff identified – as in *Drummond-Jackson* – the way defamation reflects society's norms back on itself means that any judgment has a ripple effect on community values. A caveat will not be enough to restrict a case to its facts and could vitiate the reputation of those outside of the courtroom by declaring an intrinsic part of their being or behaviour to be 'right' or 'wrong'; such as their sexuality or gender identity. In this way, the cost to wider society is a big one.

Finally, where a plaintiff can only show that their esteem has been lowered in a small section of a community, it is questionable that they have faced reputational damage to the level intended to be remedied by an action in defamation. It is not in the court's interest to allow absolutely any allegation of reputational harm to be litigated through defamation. This would, theoretically, open the court to litigation for every untrue statement made against someone that caused minor reputational harm. To mitigate against this possibility,

[108] McNamara *Reputation and Defamation*, above n 34, at 124.

a quantitative restriction means we only allow a claim to be successful where the reputational damage is disruptive to the plaintiff's day-to-day life; that is, we allow claims to be successful only where the allegations disparage the plaintiff in a large enough section of the population that they are be prevented from living a normal life. Further, unlike places like the United Kingdom, we do not have a serious harm requirement in order for a plaintiff to bring an action in defamation.[109] This means that it may be easier for a plaintiff to succeed in an action concerning an allegation of morally contentious behaviour or characteristics, as they do not have this higher threshold to pass when bringing a claim in defamation.

For the reasons above, I do not believe adopting a sectional standards approach would help in attempting to answer how a court should address untrue statements whose imputations include those of contested moral values. Although it might be useful in situations of business defamation, we have seen how it is likely that these would meet the current defamation test anyway. The only way that this approach would be useful to us is if we could think of a situation whereby the court could adopt a sectional standards test towards a morally contentious issue but not reinforce a prejudicial viewpoint in turn. By virtue of these allegations containing imputations that are morally contentious, it is near impossible to conceive of any such circumstance.

VI Conclusion

This paper has shown that the best approach for a court to take regarding allegations of morally contentious behaviour or characteristics is to deny them defamatory capacity. This allows the tort to achieve its aspirational potential by denying validation to discriminatory viewpoints that are often minorities in moral communities, and promotes its key interest of protecting reputation. Although this leaves a gap for those who have had their reputation disparaged in the eyes of a small section of the community, this must be weighed against the cost to wider society that would arise in finding such claims to be defamatory.

[109] Defamation Act 2016 (England and Wales), s 1.

This paper then canvassed another potential solution for this issue in lowering the quantitative requirement of defamation and adopting a ‘sectional standards approach’. Although doing so would likely bring more claims within the scope of protection that defamation affords, this approach does not provide the court with any guidance on how to rule in relation to morally contentious behaviour or characteristics themselves, only helping in situations where the plaintiff cannot show reputational damage in a broader population. Much like with an approach that would rule allegations of morally contentious behaviour or characteristics to be defamatory, this method also runs the risk of reinforcing discriminatory viewpoints by making it easier for these vocal minorities to have their views accepted by a court.

Overall, whilst denying defamatory capacity may deny a plaintiff remedy under the tort, this approach is the best in ensuring that defamation is not used as a tool by those with prejudiced values to find reinforcement in the courts.

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Bibliography

A Legislation

1 New Zealand

Defamation Act 1992

2 England and Wales

Defamation Act 2016 (England and Wales)

B Cases

1 New Zealand

A v Hunt [2006] NZAR 557

Bowles v Truth (NZ) Limited [1965] NZLR 768

Craig v Williams [2019] NZSC 38

Driver v Radio New Zealand Ltd [2019] NZHC 3275

Durie v Gardiner [2018] NZCA 278

Hosking v Runting [2005] 1 NZLR 1

New Zealand Magazines v Hadlee (No 2) (Hadlee) [2005] NZAR 621

P v D [2000]

Peters v Attorney General [2021] NZCA 355

Television New Zealand Ltd v Haines [2006] 2 NZLR 433

Television New Zealand v Quinn [1996] 3 NZLR 24

Wu v Moncur [2016] NZHC 3017

X v Attorney General (No 2) [2017] NZHC 1136, [2017] NZAR 1365

Young v Television New Zealand Limited [2014] NZCA 50

2 Australia

Australian Broadcasting Corp v Lenah Game Meats Pty Ltd [2001] HCA 63

Costello v Random House Australia Pty Ltd [1999] ACTSC 13

Favell v Queensland Newspapers Pty Ltd [2005] HCA 52

Hanson v Australian Broadcasting Corporation [1998] QCA 306, BC9805224

Hepburn v TCN Channel Nine [1983] 2 NSWLR 682

Horner v Goulburn City Council [2001] NSWSC 432, BC6706561

John Fairfax Publications Pty Ltd v Gacic [2007] HCA 28

John Fairfax Publications Pty Ltd v Rivkin [2003] HCA 50, (2003) 201 ALR 77

Malik v McGeown [2008] NSWCA 230

Radio 2UE Sydney Pty Ltd v Chesterton [2008] NSWCA 66

Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16

Random House Australia Pty Ltd v Costello [1999] FCA 1538

Reader's Digest Services Pty Ltd v Lamb (1982) 38 ALR 417

Rivkin v Amalgamated TV Services Pty Ltd [2001] NSWSC 432

3 Canada

VMY v SHG [2019] OJ No. 6702

4 England and Wales

Arab News Network v Jihad al Khazen [2001] EWCA Civ 118

Ash v McKennitt [2006] EWCA Civ 1714

AVB v TDD [2014] EWHC 1442 (QB)

Berkoff v Burchill [1996] 4 All ER 1008

Brown v Bower [2017] EWHC 2637 (QB)

Drummond-Jackson v British Medical Association [1970] 1 All ER 1094

Hulton v Jones [1910] AC 20

Jeynes v News Magazines Ltd [2008] EWCA Civ 130

Lewis v Daily Telegraph Ltd [1963] 1 QB 340

McKennitt v Ash (McKennitt) [2005] EWHC 3003 (QB)

Morgan v Odhams Press Ltd [1971] 1 WLR 1239

Monroe v Hopkins [2017] EWHC 433 (QB)

Myroft v Sleight [1921] All ER Rep Ext 841

P v D [2000] 2 NZLR 591

P v Quigley [2008] EWHC 1051 (QB)

Pullman v Walter Hill & Co Ltd [1891] 1 QB 524

R (on the application of Wood) v Commissioner of Police for the Metropolis [2009] EWCA Civ 414

Reynolds v Times Newspapers Ltd [2001] 2 AC 127, [1999] 4 All ER 609

Sim v Stretch [1936] 2 All ER 1237

Stephens v Avery [1998] 2 All ER 477

Terry (Previously LNS) v Persons Unknown (Terry) [2010] EWHC 119 (QB)

Thornton v Telegraph Media Group (Thornton) [2010] EWHC 1414 (QB)

Tolley v Fry [1931] All ER Rep 131

Youssoupoff v Metro-Goldwin-Meyer Pictures Ltd (1934) 50 TLR 581

ZXC v Bloomberg LP [2020] EWCA Civ 611

5 United States of America

Jews for Jesus Inc v Rapp 977 So 2d 1098 (2008)

Peck v Tribune Co. 214 US 185 (SCOTUS – 1909)

Seaquist v Calder 8 Wn App 2d 556

Yonaty v Mincolla 97 A.D 3d 141 (2012)

C Books and Chapters in Books

Andrew Burrows and Ursula Cheer (eds) *Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015)

Peter Carter-Ruck and Richard Walker *Carter-Ruck on Libel and Slander* (3rd ed, Butterworths, London, 1985)

Lawrence McNamara *Reputation and Defamation* (Oxford University Press, Oxford, 2007)

N A Moreham “Privacy Rights” in Mark Warby, N A Moreham and Iain Christie (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (2nd ed, Oxford University Press, Oxford, 2011)

N A Moreham ‘Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort’ in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Borrows QC* (LexisNexis, Wellington, 2008)

Alistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London 2013)

G Palmer ‘The Law of Defamation in New Zealand – Its Recent Evolution and Problems’ in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Borrows QC* (LexisNexis, Wellington, 2008)

Richard Parkes “Privacy, Defamation, and False Facts” in Mark Warby, Nicole Moreham and Iain Christie (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (2nd ed, Oxford University Press, Oxford, 2011).

Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016)

Adam Speker ‘Paradise and Prostitutes: Time for a Sectional Standards Test?’ (16 November 2017) Inforrm <https://inforrm.org/2017/11/16/paradise-and-prostitutes-time-for-a-sectional-standards-test-adam-speker/>

Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019)

D Journal Articles

Roy Baker ‘Defamation and the Moral Community’ (2008) 13 Deakin LR 1

Dean Knight ‘I’m Not Gay – Not That There’s Anything Wrong with That!: Are Unwanted Imputations of Gayness Defamatory?’ (2006) 37 VUWLR 2

Lawrence McNamara ‘Bigotry, community and the (in)visibility of moral exclusion: homosexuality and the capacity to defame’ (2001) 6 MALR 1

N A Moreham ‘Privacy and Police Investigations: *ZXC v Bloomberg’* (2021) 80 CLJ 5

E Law Commission Reports

Australian Law Reform Commission *Unfair Publication: Defamation and Privacy* (ALRC Report 11, 1979).