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NOW WHO'S LAUGHING? : An examination of the law in relation to humorous defamation

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STATEMENT ON WORD LENGTH

The text of this paper (excluding table of contents, footnotes and bibliography) comprises exactly 8,360 words.

I INTRODUCTION

[1]

The use of humour to comment on current events and on the views and actions of other members of society, is a device employed by many individuals, including newspaper columnists, cartoonists, entertainers, playwrights, politicians and talkback hosts. Humour provides the opportunity for a unique perspective to be taken on issues as it combines laughter with information and criticism, thus contributing to a better informed and more diverse society.[2] However as the above cartoon illustrates not all humorous commentary is met with a warm response and as some defendants have learned to their financial detriment, a sense of humour or, worse still, a joke, often finds no favours in the courts. [3]

Defamation actions for unwelcome humour are based upon Baron Parke's classic definition of defamation in *Parmiter v Coupland*[4] where his honour held " A publication without justification or lawful excuse which is calculated to injure the reputation of another by exposing him to hatred, contempt, *or ridicule* is a libel" (emphasis added). Of course it was not intended that all ridicule should be enough to support a defamation action, otherwise every newspaper, magazine, (especially those that specialise in

[1] Cartoon republished with the permission of Andrew Weldon, (freelance cartoonist and contributor to Walker Online Magazine <http://magazine.walkleys.com>).
[2] Tony Fitzgerald J "Telling the Truth, Laughing" (13 November 1998) *Communications Update* Sydney 11, 14.
[3] Duncan Lamont "Let the Judges do the Jokes" (9 June 2003) *The Guardian* London.
[4] *Parmiter v Coupland* (1840) 6 M & W 105, 108 per Baron Parke.

humorous commentary) would find themselves perpetually subject to actions being brought against them.[5] As Learned-Hand, J recognised "a man must not be too thin-skinned or a self-important prig…a line must be drawn" and "statements which any reasonable person would be able to laugh off should not be defamatory".[6]

Unfortunately this line has proven to be somewhat of a legal enigma and there is a great disparity with regards to when a comment made in jest becomes actionable.[7] This inconsistency has led to a call for reform in this sub-section of the law, with the honourable Tony Fitzgerald stating that currently "humour is extremely vulnerable, and numerous publications, broadcast and print, involve [an unacceptable] degree of legal risk…the law needs to develop sophisticated responses which do not unduly inhibit the message which readers and listeners have the ability and wit to comprehend".[8]

This paper analyses the problems facing humour when it encounters defamation law and attempts to formulate possible resolutions to these issues. Part II looks at the disparity that has arisen in judicial decisions in this area, while Part III looks at the changing societal attitudes towards humour and its relationship with the right to free speech. Finally Part IV reviews the possible options of reform concluding that the appropriate answer is through an amendment to the Defamation Act 1992, which would make humour a protected form of free speech. The potential scope of this submission is also canvassed.

II THE NEED FOR REFORM: PROBLEMATIC JUDICIAL APPLICATION

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[5] *Odger v Mortimer* (1873) 28 LT 472, 473 per Bovil CJ.
[6] *Burton v Crowell Publishing Co* (1936) 82 F 2d 154 per Learned-Hand J.
[7] Paul Satouris "The Role of Media Satire in Australia and its Relation to Defamation Law" (2002) 21 Communications Bulletin 3.
[8] Tony Fitzgerald J "Telling the Truth, Laughing" (13 November 1998) *Communications Update* Sydney 11, 16.

Generally speaking, the law recognises that all persons are entitled to their good name and to the esteem in which they are held by others. Defamation is the area of the law that seeks to protect ones reputation from being injured by unjustifiable attacks. Although codified in the Defamation Act 1992, the area still remains very much a common law subject.[9] Essentially for an action to succeed the following elements must be present:

- A statement published to a third party
- The statement was defamatory of the plaintiff
- No justifiable excuse exists for making the statement

Although these factors appear straightforward, a significant amount of complexity and subtlety is involved when applying them to cases involving humorous remarks.[10] This section highlights the difficulty that has been encountered by the judiciary and the inconsistent and at times erroneous judgements that have resulted.

It is pertinent to note at this stage, that this is an area of the law that still remains largely unexamined, if one is to look in the index of most defamation textbooks, terms such as humour or satire will not appear. Additionally satire, parody, cartoons and other forms of humorous commentary have been the subject of very few defamation actions. There are numerous possible reasons for this, including the complexity and cost involved in any defamation action, the realisation that litigation will bring more attention to an already embarrassing situation and the assumption that statements made in jest would infrequently be capable of being found defamatory. Whatever the reason the fact remains that there is a substantial lack of depth in case law or academic commentary within this

[9] John Burrows and Ursula Cheer *Media Law in New Zealand* (Oxford University Press, Auckland, 1999) 11.
[10] Tony Fitzgerald J "Telling the Truth, Laughing" (13 November 1998) *Communications Update* Sydney 11, 16.

area, subsequently this section therefore draws on a number of foreign cases in order to achieve a more comprehensive analysis.[11]

A Defamatory Matter

The first half of any defamation action involves the court determining whether the statement made was one that is actionable. This involves a two-step procedure where the courts must first determine what the words are capable of meaning (i.e. what imputations arise from the allegedly defamatory matter) before determining whether or not that meaning could be held to be defamatory. If this criteria is answered in the affirmative the matter is then passed to the jury to determine whether or not the statement was in fact defamatory.

In determining these criteria, the court will have regard to the views of that cornerstone of tort law; the hypothetical reasonable person. For the purposes of defamation law the reasonable person as been defined as "a person of ordinary intelligence, general knowledge and experience of worldly affairs".[12] The court will thus consider, under the circumstances in which the words were published, what would the ordinary and reasonable person understand them to mean and additionally would they be likely to regard them in a libellous sense.[13]

It is however universally accepted that the court in undertaking the assessment is not solely limited to the literal meaning of the statements, the court must consider the publication as a whole, as it is recognised that the reasonable person can and does read between the lines.[14] Consequently the context of a publication may be of fundamental

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[11] As noted by the authors of *Gatley on Libel and Slander* 9th ed. (Sweet and Maxwell: London 1998) although some variations exist between the law of the different countries, especially the USA where there is vigorous recognition of the first amendment right to free speech, the principles of defamation law (in particular what constitutes a defamatory matter) remain sufficiently similar so that foreign decisions may be usefully cited.

[12] *New Zealand Magazines v Hadlee* (24 October 1996) Court of Appeal CA 74/96 Blanchard J.

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

[14] *Lewis v Daily Telegraph* [1964] AC 234.

importance as the meaning attributed to the words and the potential to defame will be coloured by their surroundings. [15]

Given the rules canvassed above, one could be forgiven for assuming that satire and other humorous commentary would be immune from successful defamation claims, as the reasonable person when reading such material would be competent enough to observe that piece was written or said in such an exaggerated or hyperbolic style,[16] such that any defamatory imputation could not seriously be said to arise.

Generally it would seem that the courts have accepted this viewpoint as valid. The case of *Massey v The New Zealand Times*[17] concerned a cartoon published by the newspaper defendant, which depicted a cart labelled "The Party" being hitched to a donkey, by a figure bearing the words "their idea of a politician". On top of the cart were various bundles branded with statements such as "Defamation", "Mud", "Pamphlets Free", "Private Calumny", as well as a figure of an old woman whose dress was inscribed with the phrase "Scandal Mongering". The plaintiff claimed that the cartoon imputed to him that he was responsible for, or was connected with the free distribution of a scurrilous pamphlet and was thus guilty of a mean and despicable act. Although it was found that the figure represented the plaintiff William Massey, the cartoon was said to simply be a political cartoon lampooning the party and its views and thus the claimed libel did not seriously arise and was not actionable.

This approach can be seen to have also been adopted in a number of other cases, with one of the most recent and perhaps most famous being that of *Falwell v Flynt*.[18] In this case the publisher produced a cartoon, which represented the controversial Reverend Falwell engaged in sexual relations with his mother in the family outhouse. The claim for defamation was rejected as, for among other things, it was held that the matter

[15] *Chalreston v Newspaper Ltd* [1995] 2 AC 65 (HL).
[16] *Willis v Katavich* (21 August 1989) High Court Auckland CP 547/85 Henry J.
[17] *Massey v The New Zealand Times* (1911) 30 NZLR 929 (SC).
[18] *Falwell v Flynt* 805 F.2d 484.

complained of was so over the top that it could not be said to have seriously arisen.

While this line of authority is logical, it creates an unsatisfactory situation where more subtle and intelligent forms of humour are vulnerable to litigation. The law clearly should provide protection for those who are capable of intelligent and subtle humour as those who produce offensive and outlandish farce. It would seem that when it comes to humour, the courts do not think all that highly of the reasonable person's intelligence. The recent case of *New Times Inc. (Dallas Observer) v Bruce Issacks and Darlene Whitten*[19] demonstrates such a disparaging approach.

Issacks concerned the publication of an article titled *"Stop the Madness"* in an edition of the Dallas Observer newspaper. The article was written as a critical response to the involvement of Justice Whitten and Deputy Attorney Issacks in the decision to incarcerate a 13 year old boy for writing a fictional horror story, in which the death of his teacher and two class mates was depicted.

The article parodied this situation by portraying a similar event happening to a 6-year-old girl (named Cindy) for reading, *"Where The Wild Things Are"* to her class. The article was written in a news report format and included apparent quotes from the judicial officers involved. The Dallas Observer was of the opinion that the article was one of competent fictional satire, the following exerts would support this conclusion:

> *Sources say that courthouse officials ordered shackles after they reviewed Cindy's school disciplinary record, which included reprimands for spraying a boy with pineapple juice and for sitting on her feet.*

> *Cindy scoffed at the suggestion that 'Where The Wild Things Are' was capable of corrupting young minds "Like I'm sure" she said "Its bad enough people think Sallinger and Twain are dangerous but Sedank? Give me a break for Christ's sake. Excuse my French".*

[19] *New Times Inc (Dallas Observer) v Bruce Issacks and Darlene Whitten* (2002) 91 SW.3d 844 (Tex App).

However a number of people missed the joke and the judicial officials received a number of complaints as to their treatment of Cindy, prompting the officials to enter a defamation suit against the paper. Unfortunately the Texas courts also failed to see the humour involved, holding that the public misconception was evidence that the article was capable of being defamatory.

While one can understand the reasoning involved it is questionable whether this is the right decision. Although there was evidence that the article misled a number of people, this does not automatically mean that this view was one that was reasonable, for example a number of people still insist on driving after they have been drinking, but we would hardly call these the actions of reasonable people. In fact such a finding paints a very dim view of the reasonable persons ability to distinguish between fact and fiction.

Furthermore a court when determining whether or not a statement is defamatory is required to determine an imaginary consensus of hypothetical people, in doing so the court has been seen to alternate between a realist approach (where they consider what people *actually* thought) and an idealist approach (where they consider what people *should* have thought)[20] depending upon which outcome seems more just. It is my submission that in cases involving humour the court should lean more towards an idealist approach and thus be entitled to impute a reasonably high standard of analytical ability into the hypothetical audience. In my mind the potential damage to reputation that such an approach may allow is outweighed by the chilling effect the opposite approach may have on humorous commentary.[21]

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[20] This approach is most often seen in cases where courts think it would be unjust to perpetuate inappropriate prejudices.

[21] For further justifications and a more comprehensive discussion of the benefits and detriments of permitting unfettered commentary, see Part III of this paper.

Also as the Court in *Issacks* noted, when dealing with cases that involve humour considerable regard should be had to the context of the publication, including whether the article is in a renowned satirical magazine or humour section of the newspaper. The court noted the decision of *Bay Guardian v Superior Court*[22] where a fictionalised letter to the editor in a satirical April Fools Day edition of the paper could not be defamatory as the average reader would recognize the April Fool's edition as a parody, rather than presenting false facts. The totality of circumstances approach is clearly of significant importance in humour cases, as it significantly colours the meaning that attaches to what will often otherwise be a defamatory statement. To use a more classical phrase, the nature of the publication provides the antidote to the statements bane.[23]

However it is my submission that the context of a publication is not always accorded its proper weight by the courts, the case of *Keith v Television New Zealand*[24] is arguably one such decision. The plaintiff in this case was the Chairman of the New Zealand National Art Gallery who claimed he had been defamed by a segment of the satirical sketch show "More Issues". The disputed segment emanated from what was at the time a recent purchase made by the National Art Gallery of two Goldie paintings for $900,000. The controversial purchase was consequently the subject of substantial media comment and discussion, not all of which was favourable towards the plaintiff. The More Issues show portrayed an interview with a fictitious character called 'Beamish Teeth' (which it was held represented Mr Keith). During the segment references were made about the character receiving a commission from the purchase, which Mr Keith argued implied he was dishonestly motivated in the purchase of the Goldie paintings.

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[22] *San Francisco Bay Guardian Inc v Superior Court* 21 Cal Rptr. 2d 464.
[23] *Chalreston v Newspaper Ltd* [1995] 2 AC 65 (HL).
[24] *Keith v TVNZ* (December 1992) High Court Auckland CP780/91, Robertson J.

In finding that this matter was defamatory both the judge and jury seem to have given insufficient regard to the nature of the humorous nature of the show.[25] In his judgement of 3 December 1992, Robertson J stated that to him "this was a classical example of not wanting the facts to get in the way of a good story".[26] This assertion, as will be discussed below,[27] misses the point behind humour in particular satire, and evidences a lack of proper consideration of the comedic character of the show. While often based upon reality the purpose of most forms of humorous commentary is to lampoon and critique the actual event through exaggeration and overstatement. Additionally the "More Issues" show was not a novel programme at the time the decision was made, therefore the reasonable viewer would have been well acquainted with the concept and purpose of such shows. It is thus tenable that the reasonable person would have been able to realise that statements were made only in jest and were not supposed to be taken seriously.

Finally a discussion of judicial misconception when dealing with humour would not be complete without reference to the case of *Australian Broadcasting Corporation v Hanson.*[28] This case illustrates that even over the top humour may not be immune from successful defamation actions and shows how far wrong courts can go with a lack of appropriate and consistent regulation in this area of law. The complainant was the controversial Australian MP Pauline Hanson, the former parliamentarian had taken exception to a song created by artist Simon Hunt (aka Pauline Pantsdown) entitled *"(I'm a) Back Door Man"*.

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[25] However it should be noted that only ¾ of the jury thought the matter could be defamatory and given their nominal recommendation as to damages, it could be argued that even those in the majority were unsure whether the matter had caused Mr Keith to be lowered in the estimation of the public and was really defamatory or not.

[26] *Keith v TVNZ* (December 1992) High Court Auckland CP780/91, 8 Robertson J.

[27] See the discussion of the case in relation to the defence of honest opinion.

[28] *Australian Broadcasting Corporation v Hanson* (28 September 1998) Queensland Court of Appeal BC9805224.

The song consisted of words spoken by Ms Hanson, which had been digitally sampled, re-arranged and set to a funky rhythm for humorous effect.[29] The cut and paste lyrics included lines such as the following:

I'm a backdoor man; I'm a homosexual.

I still work it, I worked the other night.

I'm a backdoor man for the Ku Klux Klan.

As long as children come across. I'm a happy person.

I'm a very caring potato.

Ms Hanson contended that such lyrics would convey to the reasonable listener the insinuation that she was a homosexual, prostitute, a member of the KKK, a paedophile, as well as a potato. The Queensland Court of Appeal seemed to largely share this view. Their honours were of the opinion that "at least one or more of [the] imputations [pleaded by the plaintiff] arose",[30] and that if a jury were to find the opposite they were satisfied that "this court would on appeal set aside its verdict as unreasonable".[31] Thus not only could the imputations arise, but they were thought to be the only ones open to a reasonable person to find.

While the intention of the author is generally an irrelevant consideration in a defamation case, it has been accepted that sometimes the perceived intention of the author may be sufficiently obvious so as to colour the meaning the reasonable person attaches to the matter.[32] After listening to the song myself, it seems clear that the song was intended as a piece of

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[29] Roger Magnusson "Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges" (2001) 9 TLJ LEXIS 9, 31.

[30] The imputations that their honours found sufficiently present were that Ms Hanson was a homosexual man, a paedophile and a prostitute.

[31] *Australian Broadcasting Corporation v Hanson* (28 September 1998) Queensland Court of Appeal BC9805224 per De Jersey CJ.

[32] *Berkoff v Burchill* [1996] 4 All ER 1008, 1018 per Neil LJ.

political satire, to deride the controversial opinions of Ms Hanson. And as others have noted "it seems impossible to believe that an ordinary person listening to the song would seriously conclude that Pauline Hanson was a male homosexual, who enjoys paedophilia and anal sex"[33] "it is all to ridiculous for words".[34]

What's more the reference by the court to the song as being nothing more than an attempt at "cheap denigration" perhaps indicates the problem that whether material is found to be defamatory may depend upon whether judges find it to be amusing or not. A factor that could prove to be costly for those whose humour is outside the boundaries of the taste of the white upper-middle class.

Issacks, Keith and *Hanson* illustrate the potential danger and uncertainty which artists and editors currently face in deciding whether to include an element of humour in their work, under the current legal regime. Courts seem to be either unwilling, or unable to recognise that the people are capable of understanding forms of humour such as satire, resulting in a misapplication of the reasonable person test.

B Defences

The second half of any defamation action is in deciding whether any workable defences are available to the action, as Simpson J recognised in *Macquaire Bank v Berg* "it may often be relatively easy to establish, prima facie that a publication is defamatory, and thus the key to a defamation action, may lie in the defences advanced".[35] However the currently recognised defences are not particularly well suited to the protection of humour.

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[33] Roger Magnusson "Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges" (2001) 9 TLJ LEXIS 9, 36.
[34] Richard Ackland "Decision for Hanson has Disturbing Effect" (2 October 1998) *The Sydney Morning Herald* Sydney 23.
[35] *Macquaire Bank v Berg* [1999] A Def R 44,793, 53,035 per Simpson J.

1. Privilege

A defence of privilege makes a person immune from defamation proceedings unless they have been shown to have been motivated by ill will or malice. Privilege attaches to a publication when the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest of duty to receive it.[36] To obtain this defence there has to be some sort specific public interest in the material and general publication of material by the media is seldom covered by this defence.[37]

For humour this has a number of consequences, firstly unless the commentary is on an area that has been covered by privilege previously no defence will be available. In *Truth (NZ) Ltd v Holloway*[38] the Court of Appeal stated that the media had two main functions; on the one hand it had the role of publishing reports on various types of proceedings and the other to provide its readers with news and even gossip concerning current events and people, while privilege may be accorded to the first function it will not arise in the latter. It is submitted that humour is more likely to be found to be analogous with the latter category and will seldom achieve protection under this defence.

Furthermore even when humour attaches to a protected category, the defence may not be capable of giving it protection. For example commentary on political figures in their public role has been accepted as an area to which privilege can attach, however satire or parody often may distort or lampoon aspects of a political public figure but in doing so may also comment on their private life and thus make the comment fall outside the boundaries of privilege.[39] In *Australian Broadcasting Corporation v*

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[36] *Adam v Ward* [1917] AC 309, 334 per Lord Atkinson.
[37] *Lange v Atkinson* [2000] 3 NZLR 385 per Richardson P.
[38] *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA) per Gresson P.
[39] It was noted in *Lange v Atkinson* [2000] 3 NZLR 385, 390 that commentary of political figures does not extend into commentary on private life.

Hanson[40] for example the defence of qualified privilege would fail because the comment related to matters seemingly of a personal nature, however on closer reflection it can be seen that the literal sexual references were in fact intended as an ironic statement relating to Ms Hanson's controversial political views and policy statements.

Finally, it was noted in *Lange* that it was doubtful whether one-line references and throwaway comments would be protected by the defence of qualified privilege.[41] While this doesn't affect more considered pieces of satire (such as political cartoons) it could mean that a one-line zinger or a clever turn of phrase, even on a political figure in relation to their performance of their public duty, may not be capable of protection.

2. Truth

If a defendant can establish that the statement alleged to be defamatory is true, then he or she has a complete defence to a defamation action. The humour in most situations however, comes from the exaggeration of factual events or the false or twisted meanings given to words stated, and although the defence does not require 100 percent accuracy the remarks made have to be substantially true[42] (i.e. not materially different form the truth) and this defence will almost without exception be unavailable to satirists.

3. Honest Opinion

Honest opinion grants an individual the right to express their opinion on

[40] *Australian Broadcasting Corporation v Hanson* (Qld CA, 28 September 1998) BC9805224.
[41] *Lange v Atkinson* [2000] 3 NZLR 385, 391 per Richardson P.
[42] Defamation Act 1992 (NZ), s 8(3)(a) requires the statement to be true or not materially different from the truth.

any matter[43] so long as that opinion is honestly held and the speaker got their basic facts right, it is does not matter how unusual or damaging the opinion may be.[44]

Honest opinion is the defence that is regarded as being the most appropriate for humorous commentary cases,[45] however a number of technicalities required to be satisfied often makes it less applicable than previously assumed.

Firstly, the opinion must be an opinion and not a statement of fact. Humorous commentary will often fall foul of this requirement due to the intermingling of fact with the satire. Furthermore most forms of humour involve hyperbolic exaggeration which does not lend itself well to an honest opinion defence, as it has been held that "the legal defence of fair comment will very rarely protect [sensationalist] defamatory matter…because of the impossibility of achieving sensations and still effecting a clear separation of the facts from the opinion".[46]

Secondly the facts upon which the commentator relies must be true, although the remarks will be based upon some reality, the nature of satire is such that it can only be effective and funny if it is possible to make the stance or opinions of its target appear ridiculous. This desired effect often cannot be achieved without the recourse to some literalistic licence to magnify and exaggerate events or to include events, which did not in fact occur. For example in *Keith*[47] to increase the satirical effect of the segment, the writers included the idea of beamish teeth receiving monetary kickbacks from the purchase. Furthermore, even when it may be possible, proving that the facts upon which the humour is based are true may prove difficult. Take for example the following jokes from recent opening monologues on the Jay Leno show:

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[43] At common law the matter was restricted to one of public interest but this requirement has seemingly been abolished by the Defamation Act 1992.
[44] John Burrows and Ursula Cheer *Media Law in New Zealand* (Oxford University Press, Auckland, 1999) 64.
[45] John Burrows and Ursula Cheer *Media Law in New Zealand* (Oxford University Press, Auckland, 1999) 15.
[46] *Smith Newspapers Ltd v Becker* (1932) 47 CLR 279, 303 per Evatt J.
[47] *Keith v TVNZ* (December 1992) High Court Auckland CP780/91, 8 Robertson J.

"Did you hear that Britney Spears was driving to Disneyland at the weekend. After driving for four hours she finally saw a sign that said 'Disney Land, Left' so she turned around and went home"

"Apparently Sony Playstation 2 are coming out with a new Britney Spears video game. Its very realistic, in fact the chips are made from the same silicone as Britney"

The jokes are obviously comments upon Britney's intelligence level (the idea being that it is not very high) and the insinuation that she has had breast augmentation. Although its unlikely that Britney would consider suing over these jokes (not wanting to seem to self-important) if she did decide to sue, proving in court the facts upon which the jokes are based would be rather difficult, despite all the possible evidence which may seemingly support such statements.

Finally as discussed above the nature of much satire involves a significant deal of exaggeration, such over the top statements may be viewed as falling outside the realms of opinions which the person could reasonably said to have held.

C Damage to Reputation

A defamation action will not succeed if there is no damage to a person's reputation, as without this the remark cannot truly be said to be defamatory. In keeping with the spirit of other facets of defamation, reputation is a nebulous concept difficult to succinctly define. However one of the better attempts states that "reputation means an attitude of minds so that a mass of opinions go to make up the reputation which has been acquired by the person to whom the individual opinions relate…it is for damage to this that a person can sue and not for damage to a person's personality or disposition".[48]

[48] *Plato Films Ltd v Spiedel* [1961] AC 1090, 1138 per Lord Denning.

The traditional approach to damage in defamation law is not well suited to dealing with comments involving humour. Defamation arising from ridicule is conceptually different from other bases of defamation. Although being satirised may involve having ones feelings hurt, it doesn't automatically follow that it will result in a loss of esteem in the eyes of others, as Millet LJ, discerned "it is one thing to ridicule a man; it is another to expose him to ridicule".[49] If the damage requirement is applied too leniently[50] then "the ridicule test becomes a vehicle for remedy to harm to the plaintiffs self-image or sense of self worth, as distinct form the plaintiffs standing in the eyes of others".[51]

One commentator has even gone so far as to suggest that "the ridicule part of the 'hatred, contempt or ridicule' test …[has] been pressed into service in order to compensate plaintiffs who have suffered no disparagement and hence no injury to their reputations".[52] The rationale behind this statement can be seen by consideration of the decision, of the English Court of Appeal, in *Berkoff v Burchill*.[53]

The complaint arose from the publication of two unflattering references to the plaintiff in articles written for the Sunday Times by Miss Burchill. The offending excerpts being as follows:

> *"...film directors from Hitchcock to Berkoff, are notoriously hideous looking people..."*
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> *"The creature is made as a vessel for Waldman's brain, and rejected in disgust when it comes out scarred and primeval. It's a new look for the Creature – no bolts in the neck or flat-top hairdo – and I think it works; it's a lot like Stephen Berkoff, only marginally better looking"*

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[49] *Berkoff v Burchill* [1996] All ER 1008, 1020 per Lord Millet (dissenting).
[50] Which it arguably has been in many cases, especially given the courts tendency to exercise great caution before concluding that words are incapable of a being defamatory.
[51] Roger Magnusson "Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges" (2001) 9 TLJ LEXIS 9, 27.
[52] Sally Walker *Media Law: Commentary and Materials* (LBC Information Services, Sydney, 2000) 137.
[53] *Berkoff v Burchill* [1996] All ER 1008.

The majority upheld the complaint, finding that calling a person (especially one who made his living in part as an actor) 'hideously ugly' could be defamatory, since it was capable of lowering his standing in the estimation of the public and of making him an object of ridicule. It was therefore a remark for which the plaintiff deserved to be compensated.

However not all members of the court were convinced, Lord Justice Millett was of the opinion that the proceedings were as frivolous as the articles complained of stating "How then can the words complained of injure Mr Berkoff's reputation? They are an attack on his appearance and not on his reputation" and "I have no doubt that the words complained of were intended to ridicule Mr Berkoff, but I do not think they made him look ridiculous or lowered his reputation in the eyes of ordinary people".[54]

The case of *McRae v Australian Consolidated Press*[55] illustrates that when damages are given, the amount awarded is often extremely high and arguably out of proportion to the damage suffered by the humorous attack. In this case the plaintiff, herself a notorious gossip, successfully sued and was awarded damages of $375,000, for the publication of a statement[56] in "Metro" magazine that McRae alleged, implied that she was regularly drunk.

While one could perhaps understand such a verdict if the statement had been published in a Metro article of a serious nature, it was in fact published as part of the Felicity Ferret column, a column known for its satirical commentary on famous personalities and socialites. As Shelia McCabe, counsel for the defendants, noted "it is a column which readers

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[54] *Berkoff v Burchill* [1996] All ER 1008, 1020.

[55] *McRae v Australian Consolidated Press* (27 April 1994) High Court Auckland CP 1161/92 Tompkins J.

[56] The statement noted that the plaintiff was seen to be "regularly pissed" which was followed by the comment "surely regularly pssst? –Ed", and was thus a play on words of the title of Ms McRae's gossip column PSSST.

take with a very large pinch of salt" and "is not regarded as a document of truth".[57]

The words were obviously play on words of the title of Ms McRae's gossip column and given the satirical nature of the statement, the context of the publication, it is submitted that no damages let alone such an excessive amount should have been awarded. Damages being awarded in cases like these have the ability to stifle the publication of a large amount of humorous material, as very few publishers would want to risk their publication being subject to a similar fate.[58]

III NEED FOR REFORM: CHANGING SOCIETAL ATTITUDES

The ability and right to express oneself freely and openly is a concept, which has received increasing acceptance and importance both locally and internationally. It is a concept that has been enshrined in international law[59] and is the cornerstone of the constitution of many countries of the world, including New Zealand.[60] The right to free speech is expressly provided for in section 14 of the Bill of Rights Act 1992. It provides:

> **Freedom of Expression** – Everyone has the right to freedom of expression, including the freedom to seek, receive and *impart* information and opinions of any kind *in any form* (emphasis added).

While the section itself provides for a seemingly broad coverage of free expression, the right to free speech guaranteed by the Act is not unlimited. Section 5 of the Bill of Rights Act permits for constraints to be imposed

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[57] "Ferret Decision Surprises Expert on Libel" (29 April 1994) *The New Zealand Herald* Auckland, 9.
[58] The chilling effect this decision has was noted by Canterbury Journalism Lecturer, Jim Tully in "Gossip Columnists Slug it Out" (22 April 1994) *National Business Review* Auckland, 12.
[59] For example see Article 19 of both the International Declaration of Human Rights and the International Covenant on Civil and Political Rights.
[60] A Bill of Rights for New Zealand: A White Paper (1985) described freedom of expression as being of central importance in a democratic state.

upon any of the freedoms, so long as the constraint is one, which is " a reasonable limitation prescribed by law and can be demonstrably justifiable in a free and democratic society".

It should be noted that there still exists some controversy over whether the Bill of Rights Act 1990 applies to private law, such as defamation at all. Although this matter is far from settled, even those commentators who oppose the idea have conceded that in appropriate cases, the common law is affected by public interests reflected in the Bill of Rights.[61] Defamation would seem to be an area where such an indulgence is appropriate. As Elias J noted "The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation".[62]

In determining whether a constraint is one that is permissible pursuant to section 5, one must first determine whether the limitation is one that is prescribed by law (i.e. that it is ascertainable and intelligible).[63] It is arguable that the inconsistency in rulings, which deal with the liability of humorous commentary, means that the current limitation is not sufficiently certain so as to be prescribed by law.[64]

More important however is whether the current regulation and limitation placed upon humorous commentary is demonstrably justified. Unfortunately rights such as freedom of expression are not amendable to the creation of a formulaic test,[65] but it can be detected that what is essentially required is that the limitation be a rationale and proportionate

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[61] Compare Rishworth's comments in "The Potential of the Bill of Right" 1 [1990] NZLJ, 70 and the above concession in Huscroft, Optican and Rishworth "The Bill of Rights – getting the basics right" (NZLS Seminar, Wellington, November 2001).
[62] *Lange v Atkinson* [1997] 2 NZLR 22, 32 (HC).
[63] Huscroft, Optican and Rishworth "The Bill of Rights – getting the basics right" (NZLS Seminar, Wellington, November 2001).
[64] However it is not possible in an essay of this size to discuss this point in detail.
[65] Huscroft, Optican and Rishworth "The Bill of Rights – getting the basics right" (NZLS Seminar November 2001).

response to its intended objective.[66] Whether the current limitation and regulation of humorous commentary is justified is subsequently analysed through the evaluation of both the detriments and benefits of humour and through consideration of whether the damage that such statements may cause, is nevertheless outweighed by the importance of permitting unfettered humorous commentary.

A Detrimental Effect of Humour

A century ago a person who had mastered the art of ridicule could potentially strip a man of their social standing and associated reputation with one carefully turned phrase. Humour against ones enemies or brethren was regarded as perhaps the most potent weapon against a public man.[67] The famous French philosopher Voltaire has in fact been quoted as saying "I have made but one prayer to God; please Lord make my enemies look ridiculous".[68]

The perceived power behind ridicule led to the desire to protect people's reputation from unjustifiable attack, with rather severe penalties being handed out for those who sought to besmirch reputations humorously. In 1831cartoonist Philipon was charged with defamation of King Louis-Phillipe, after Philipon had drawn a cartoon depicting him as a pear "La Poire" which as that time in France also stood for fool. Philipon was found guilty and subsequently sentenced to 6 months imprisonment.

However one of the essential elements of defamation is that it acts as a living doctrine and consequently what is and what is not defamatory changes with time and place so as "to reflect the changing needs of society to which it applies".[69] It is my submission that it is possible that todays society places a different value upon ridicule and humorous

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[66] For further discussion of this point see, *R v Oakes* [1986] 15 CR 103; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
[67] *Odger v Mortimer* (1873) 28 LT 472, 473 per Bovil CJ.
[68] M Gilooly *The Law of Defamation in Australia and New Zealand* (Federation Press, Sydney, 1998) 28.
[69] *Lange v Atkinson* [1997] 2 NZLR 22, 32 (HC) per Elias J.

comment and that we have moved to a point where ridicule no longer hjas the extent of damaging power it once had. In fact it may be questionable whether in today's society being ridiculed is capable of causing harm to a person's public image at all.

Humour abounds in all formats of media from television shows such as The Late Show with David Letterman, right through to more traditional formats such as newspaper columnists and cartoonists like Tom Scott. Society (at least the Australasian society) it would seem has developed an entirely new and legitimate form of ridicule, which has been colloquially described as "the art of taking the piss".[70]

It has been accepted that it is possible for words and phrases, which although once may have had previous hurtful and damaging connotations, may often be disempowered through their absorption into common usage.[71] It is thus tenable that the power of ridicule has been correspondingly minimised through the common convention that it has obtained. These days people (especially public figures against whom the majority of ridicule is inflicted) genuinely expect some form of humorous slating if they are unfortunate enough to make an erroneous decision or hold a controversial opinion. The time has perhaps come when we can honestly say as a society we have learned to take a joke.

This is not to say that anyone really enjoys being the subject of humorous commentary, and commentators do argue that despite its jovial intention humour can be equally as damaging as a mean spirited attack. That to call someone hurtful names or to insinuate that they have been guilty of immoral actions, even in jest can be damaging to ones reputation as

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[70] Walkley Magazine Online *"The Art of Taking the Piss"* <http://magazine.walkleys.com> (last accessed 26 August 2003).

[71] For further discussion of this idea see writings that relate to the disempowering of hate speech such as Judith Butler *Excitable Speech* (Routledge, New York, 1997).

people internalise and attribute the humorous comment to that person as one of fact.[72]

Others argue that satire et al, have only a minimal and fleeting effect on the shared view that the public holds of a person[73], and that fundamentally the only people who seem to take a negative view of the plaintiff, because of a humorous statement are those who already held such an opinion, the comment acting simply as personal affirmation of that belief.[74] Furthermore those people who can be seen to take a joke are often raised in the estimation of others.

Unfortunately during my research it became obvious that there was a real lack of statistical or factual evidence on this point, most commentators relying on personal feelings and logical assertions. The one study of some relevance[75] to this argument was *"The Late Night Effect"* by Mark Phillip Fernando.[76] Through his research Fernando attempted to evaluate and analyse the effect humorous late night variety shows, such as The Late Show with David Letterman, The Tonight Show with Jay Leno, Saturday Night Live, had on peoples perceptions of public figures (in particular political personalities).

Through survey and focus group research Fernando found that the effect that satire and other forms of humour utilised by the shows, has a varying effect on individuals attitudes towards the target depending upon various personal factors. Perhaps the key findings of his research can be summarised as being:

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[72] See the comments of Paul Holmes in relation to the *McRae* case in "Gossip Columnists Slug it Out" (22 April 1994) *National Business Review* Auckland, 12.

[73] Roger Magnusson "Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges" (2001) 9 TLJ LEXIS 9, 29.

[74] Duncan Lamont "Let the Judges do the Jokes" (9 June 2003) *The Guardian* London.

[75] This study is only of partial value to this topic, as firstly the participants in the research where American citizens who possibly have differing values to those of the ordinary New Zealander, and more importantly the survey sample sizes were relatively small, and the need for more comprehensive and extensive research in this area was noted by the author. Additionally the research was solely based upon one type of humour and its effect on political figures.

[76] Mark Fernando *"The Late Night Effect"* Thesis submitted for Degree of Arts Masters, Georgetown University available online at <http://cct.georgetown.edu/thesis/MarkFernando.pdf> (last accessed 26 August 2003).

- Youth (i.e. those 18-25) were more likely to be influenced by the humour, however this result was also due in part to this groups lack of political interest and ignorance other sources of information.
- Influence was more noticeable in those without or with low levels of education.
- Conversely the influence of humour was negligible in relation to those with higher educations.

From this study it can be contended that for those who are older, more educated and more interested in public events, humour is not a significant operational factor in the esteem in which they hold others. However for those who are younger, less educated and who have little interest in current events the effect was significant. For the purposes of defamation it is the view of the reasonable person which is important, where this person resides among this spectrum of situations is somewhat of a subjective judgment, however it is my belief that one should look towards the higher end of the scale, preferring to risk the creation of a more literate and intelligent reasonable person than to risk putting the threshold to low.

The temporal effect of humour not being evaluated, it is my submission that humour does not have a strong effect upon the reputation of those who are the subject of such an attack. It is conceded however, that there may be rare instances where there occurs an overbearing amount of ridicule, where comments have obtained a parasitic connection with the plaintiff.[77] In these situations where the statement has caused the plaintiff to constantly remain a "preposterously ridiculous spectacle"[78] could it properly be said that they have genuinely lost standing in the eyes of others and consequently be entitled to some form of redress. However this situation can still be protected without the need to have recourse to a

[77] Roger Magnusson "Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges" (2001) 9 TLJ LEXIS 9, 29.
[78] *Burton v Crowell Publishing Co* (1936) 82 F.2d 154, 155.

ridicule based test, for once a statement has obtained such notoriety it is in reality no longer one of humour but one of contempt. This approach is advantageous as it ensures that the rare cases of actionable defamation based upon a humorous comment can be protected while preventing the current situation where lesser, non-deserving claims are unpredictably permitted to succeed.

B Beneficial Aspects of Humour

Humour (in particular satire) has been lauded on a number of occasions because of the beneficial aspects that it brings to the reporting and discussion of current events, in fact it has been said that "To those slightly more liberal (and intelligent), the importance of [humorous] commentary which causes a society to examine itself critically and confront its deficiencies is self-evident".[79]

Wilkinson J, has noted that "satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony it is a form of irreverence as welcome as fresh air"[80] and further on that "Nothing is more thoroughly democratic than to have the high and mighty lampooned and spoofed".[81]

The power of humour lies in its ability to tackle an issue from a different angle or present an argument in a distinctive light in such a way that the audience's perceptions are challenged or expanded to include arguments they had previously not considered. By holding a person or particular issue up to ridicule, society is able to think more critically about itself and may be able to similarly analyse subsequent situations later on.

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[79] Tony Fitzgerald J "Telling the Truth, Laughing" (13 November 1998) *Communications Update* Sydney 11, 14.
[80] *Falwell v Flynt* 805 F.2d 484, 487 per Wilkinson J.
[81] *Falwell v Flynt* 805 F.2d 484, 487 per Wilkinson J.

Additionally humour has the power to reach a greater audience than that of traditional straight reporting, a significantly large section of society enjoys comedy and are therefore more likely to read about an issue they may otherwise have avoided if it had not been presented in a humorous or creative way[82]. This point was illustrated in *Issaks*, when explaining her intentions behind the article, the author, Rose Farley, noted it was constructed in the way it was so that readers would be attracted to it and appreciate the satire, thus effecting a critique on the previous decision without overly emotive journalism.[83] Humour can effectively lighten the load of a serious topic and make it more palatable to the audience.[84]

Alternatively the failure to protect humour could have the potential to result in a chilling of humorous discussion and of satirical forms of publication. In a study on the chilling effect of defamation law on various forms of media, it was observed that in all forms of media (but in particular regional newspapers, magazine and book publishers) the potential of a defamation action was an influential factor in deciding whether material would be published.[85]

Although it is acknowledged that there is currently no real perceptible lack of humour and most victims of satirical attack tend to avoid litigation in the hope that the embarrassing remarks will blow over, decisions such as those in *Keith,*[86] *Burchill,*[87] *Hanson*,[88] have the ability to create a precedent of limited allowance for humour.

Until some method of reform is enacted there will continue to be uncertainty about when a joke or humorous statement may result in the

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[82] Walkley Magazine Online *"The Art of Taking the Piss"* <http://magazine.walkleys.com> (last accessed 26 August 2003).
[83] *New Times Inc (Dallas Observer) v Bruce Issacks and Darlene Whitten* (2002) 91 SW 3d 844, 857 (Tex App).
[84] Mark Fernando *"The Late Night Effect"* Thesis submitted for Degree of Arts Masters, Georgetown University available online at <http://cct.georgetown.edu/thesis/MarkFernando.pdf> (last accessed 26 August 2003).
[85] *Burton v Crowell Publishing Co* (1936) 82 F.2d 154, 155.
[86] *Keith v TVNZ* (December 1992) High Court Auckland CP780/91, Robertson J.
[87] *Berkoff v Burchill* [1996] All ER 1008.
[88] *Australian Broadcasting Corporation v Hanson* (28 September 1998) Queensland Court of Appeal BC9805224.

exposure to a costly defamation suit. Leaving the law in this lottery-like state has the potential to remove more acerbic forms of expression in favour of more polite discussion only as publishers may who are in doubt err on the side of caution and strike the problematic material out.[89] For why would anyone risk making a joke when the consequences of a defamation action are so high?[90]

In my opinion, as the potential detriment caused by humorous commentary is no longer as severe as it once was and given the submitted benefits of such discourse, restraint on its use through defamation actions is no longer a limitation that is demonstrably justified.

IV REFORM

Although the law has had to deal with only a relatively small number of satirical defamation cases, the proceeding discussion highlights the fact that the law in its present state is clumsy and ill-equipped to satisfactorily handle them when they do arise. Clear and certain safeguards are needed to provide protection for and prevent self-censorship of a valuable method of discourse.

This section looks at the way in which an appropriate adjustment could be achieved. Rather than purporting to be a definitive answer, the following should instead be regarded as a basis for further and more comprehensive investigation.

A Type of Reform

The first aspect that needs to be decided upon is whether change is to be made through legislative intervention and statutory amendment, or

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[89] Eric Barendt, et al *Libel and the Media: The Chilling Effect,* (1997, Clarendon Press, Oxford) 191.
[90] G Huscroft &P Rishworth "Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993" (Brookers, Wellington, 1995).

through judicial reformulation of the common law. While the latter obviously allows for more flexibility, the case law previously canvassed illustrates that it may not be possible to rely on the judiciary for consistent, and in some instances fair, treatment of humorous commentary.

Additionally, although parallels can be drawn with the creation of the political privilege defence in *Lange,*[91] the alteration in this instance, while still only in relation to a relatively small section of the law, nonetheless represents a more extensive development of the law and is not simply a refinement in the application of existing law.

It is my submission that it would be more practicable to instead create a specific defence for cases of humorous commentary, which would make such statements immune from defamation litigation. The main benefits being that the defence could be tailored to cover only those statements deemed worthy of protection, providing an appropriate balance between the need to protect reputations and giving proper consideration to free speech and the benefits of satire. And that the creation of an express coherent rule reduces the potential for continued judicial inconsistency.

The drawback however, is that legislative reform can be notoriously slow, especially in relation to defamation law. The difficulty being that politicians are unlikely to push for a change which favours defendants, when they are collectively the most likely group of potential plaintiffs.[92]

B Scope of Reform

As with all defences, it will need to be ensured that in permitting humour to be a protected form speech, the protection granted goes no further than is necessary and that a general 'just kidding' defence is not created. Such

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[91] *Lange v Atkinson* [1998] 3 NZLR 424; *Lange v Atkinson* [2000] 3 NZLR 385.
[92] As noted by Former Prime Minister David Lange in *"Defamation Reform in Media and Advertising Law"* (Legal Research Foundation Seminar, 1992).

a defence would unjustifiably allow unworthy defendants the opportunity to take advantage of a sophisticated literary concept to excuse a mean spirited and damaging attack.[93]

An example of this problem can be illustrated by a recent event in the United States, where a fraternity sought to invoke the 'just kidding' defence where it was arguably not suitable.[94] The Zeta Psi fraternity was known for publishing a periodical newspaper in which exploits of its brothers was discussed and reported, however in one edition the fraternity published a number of unsavoury comments about female students including the suggested size of personal anatomy and disparaging comments about their sexual promiscuity. While the case did not proceed to a defamation trial the chapter was derecognised by the university due to the potential liability it could face. The fraternity's defence to this situation, "it was satirical" and "we were only joking".

To be a workable and valuable addition to the law of defamation, a defence based upon humour needs to be clearly defined and drafted so as to allow the courts to distinguish authentic defendants from those who are undeceiving of this protection. In developing a standard for identifying protectable material, some consideration of the defence of honest opinion could be of value. For while that defence covers a broad range of statements and viewpoints, it also requires them to be genuinely held before granting them immunity from litigation.

It is therefore submitted that an aspect of genuineness should be required for a defence based upon humour. In this respect regard should be had to three main elements – the author, the reader and the text itself - which when combined give a complete and authentic meaning to the statement published. The defence should be drafted in such a way so as to allow the courts to consider these factors in order to answer the following questions;

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[93] Lana Whitehead *"Harassment? Just Kidding"* <www.roanoke.com> (last accessed 24 August 2003).
[94] For a more comprehensive discussion of the event see Lana Whitehead *"Harassment? Just Kidding"* <www.roanoke.com> (last accessed 24 August 2003).

firstly was there a genuine attempt at humour? and secondly can it be recognised as such?

1. Authorial Intent

In some respects giving consideration to the intent of the author represents a major departure from traditional defamation law, as it has generally been accepted that this intention is irrelevant.[95] However strict adherence to this principle has been somewhat reduced by the recognition that intention may be relevant when it is so obvious as to colour the meaning of the words.[96] It is submitted that the intention should be considered for those cases where humour is involved, for it has been established that the readers interpretation of material is based in part upon the meaning the author is trying to convey.[97]

It is by no means suggested that this aspect should be decisive, but simply that before going any further in determining whether the defence applies it is necessary to distinguish between cases where there has been a genuine intent to satirise, or lampoon and those where the statement was nothing but malicious invective. As with the defence of honest opinion a simple assertion of intent will not suffice, there must be some evidence that supports the claim.

2. Textual Analysis

Under this facet, courts should firstly examine the circumstances of the publication, with contextual factors, such as the presence of any disclaimers, the publication of the material within a renowned satirical magazine or television programme being strong factors in favour of the defendants case for protection.

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[95] *Lewis v Daily Telegraph* [1964] AC 234.
[96] *Berkoff v Burchill* [1996] All ER 1008.
[97] Leslie Treiger *"Protecting Satire form Libel Claims: A new reading of the First Amendments Opinion Privilege"* (1989) 98 Yale L.J. 1215, 1230.

When no obvious contextual clues are present the court should then look at the actual text and words used to examine whether any element of humour is present, i.e. does the piece lampoon political views, or present a criticism of a societal flaw in a farcical way? In undertaking this assessment the court should not be concerned with the merits of the humour, or whether they think it was funny and instead look to see whether there is any evidence that would support a claim for protection. Finally, as Leslie Treiger notes: "courts should be careful not to look to the facial, seemingly factual message of a satiric piece, but instead focus on its underlying point".[98]

3. *The Reader's Interpretation*

This aspect has been traditionally the factor with which the courts determined the liability arising from humorous commentary, focusing on whether the statement was an outrageous, implausible exaggeration or instead a believable description of actual events or imputation of facts. This aspect is undoubtedly an important consideration and it is recommended that it be retained, but with a number of applicational changes.

Firstly the hypothetical audience should be reduced from the general public, to the ordinary readers of views of the material in question. This reduces the potential for surprise reactions to an authors work, as they should have fairly competent idea of what type of humour their readers or viewers would be able to understand and what meanings they would likely attach to words spoken or written and thus decide whether to publish it or not[99]. In doing so Judges will need to be open to all sorts of humour and tastes. Thus what was seen by the judges in *Hanson*[100] as nothing but

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[98] Leslie Treiger *"Protecting Satire form Libel Claims: A new reading of the First Amendments Opinion Privilege"* (1989) 98 Yale L.J. 1215, 1231.

[99] Of course the joke may reach others outside this target audience, but unless the plaintiff can establish that there was a substantial amount of "outsiders" who heard the statement their reaction will not need to be evaluated.

[100] *Australian Broadcasting Corporation v Hanson* (28 September 1998) Queensland Court of Appeal BC9805224.

cheap denigration was likely a very humorous piece for the young audience of the Triple J radio station.

Finally I believe the court needs to give greater recognition to the ability of the reasonable person to discern when something is only meant in jest. It may be argued that raising the current bar pushes the defence too far in favour of defendants and is representative of an idealist rather than realist society. However it is my belief that a greater expectation of the reasonable person to "get the joke" is properly in accordance with the philosophy to use defamation law not only as a barometer but architect of social norms.

V CONCLUSION

Humour comes in may forms, satires, parodies, caricatures and so on, it provides society with a much needed relief from what can otherwise often be solemn and morose dialogue. We have perhaps been fortunate that so far, for a number of possible reasons, most figures that fall target to humorous commentary have refrained from suing. However as this paper has shown when a defamation action is persisted upon, the current state of the law means the outcome is far from certain. The law of defamation needs to be amended so that humour, or at least genuine attempts at humour are protected. For as Magnusson contends "Are we really content with a society where lawful satire can never get beyond gentle gibes and friendly caricatures so that public figures feel loved at the end of the day?"[101] What would surely be a most undesirable result indeed.

[101] Roger Magnusson "Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges" (2001) 9 TLJ LEXIS 9, 28.

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