"Ridiculousness":

Ridicule and defamatory meaning in the age of the Internet

College of Law, 27 August 2014

Judge Judith Gibson[1]

Introduction

The aim of defamation law has traditionally been for the protection of reputation from "hatred, ridicule or contempt"[2]", and to balance this protection with the right to speak freely. It is surprising that such a comparatively simple goal has resulted in complex principles of law, inconsistent judgments and apologies from academics, such as Professor Prosser's famous statement that "there is a great deal of the law of defamation that makes no sense"[3].

The main reason for many of these apparent inconsistencies lies in the history of defamation law: with the invention of the printing press, any publisher could become a potential subversive[4]. In those circumstances, it would not be surprising if the impact of the Internet (which makes everyone a potential "publisher") on defamation law were just as profound as the printing press.

Professor Brown, author of the landmark text on defamation law in the common law countries of the world[5], has described the process of publication on the Internet as "instantaneous, seamless, inter-active, blunt, borderless and far-reaching"[6]. The "far-reaching" impact of the Internet on defamation is, however, is only one part of the picture. The rapidly increasing complexity of defamation law can be easily demonstrated just by looking at Professor Brown's own loose-leaf service, which has grown from one to eight volumes over the twenty years since the Internet began. This month, he has added a ninth volume. It does not look as though defamation law is getting simpler.

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[1] Judge, District Court of NSW. The "Ridiculousness" logo © MTV is digitally altered to include the WWW logo.

[2] Hatred, ridicule or contempt was first stated as the test in Hawkins, "Pleas of the Crown" in 1716. See *Radio 2UE Sydney Pty Ltdv Chesterton* (2009) 238 CLR 460 at [3].

[3] W Prosser, "Handbook of the Law of Torts" (1941) 777; cited in Lawrence McNamara, "Reputation and Defamation", Oxford University Press, 2007 ("McNamara") at p. 1.

[4] Patrick George, "Defamation Law in Australia", LexisNexis, 2nd ed., 2012, chapter 2.

[5] Brown on Defamation: Canada United Kingdom, Australia, New Zealand, United States" (2nd ed., Carswell)

[6] *Brown on Defamation* ("Brown), 2nd ed., [5.8(5)]; see also Collins, "the Law of Defamation and the Internet", 3rd ed., 2010 ("Collins").

This discussion paper focuses on the changes to defamation law resulting from changes in how we communicate, and the increasing role the use of ridicule and humour may play in those communications.

The impact of the Internet and tabloid journalism on the language and imagery of modern communication has been profound. Not only is language cruder and less edited, but the use of illustration is not restricted to photography but can include new kinds of images, such as photoshopped or altered pictures, or illegally obtained photographs of private activities (or private parts). As to style, Eady J commented in *Smith v ADVFN*[2008] 1797(QB) that, unlike traditional journalism, Internet conversations are often merely:

> "… contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'."

Many of these Internet publications, as well as other more traditional forms of communication, feature this "repartee" element of joking and ridicule. Concern about the increasingly easy means for ordinary members of the community to publish material that is offensive or just plain silly (and thus defamatory) has been expressed in a series of recent publications[7] and judgments (for example, *AB Ltd v Facebook Ireland Ltd* [2013] NIQB 14 at [13]). The best-known example is *McAlpine v Bercow* [2013] EWHC 1342 where the defendant tweeted "why is Lord McAlpine trending?" with an "innocent face" emoticon. His name was trending because of false allegations of sex abuse of boys living in care. The defendant was not considered in the judgment of Tugendhat J to be ridiculing the plaintiff, but to be defaming him. There was no defence for this kind of "joke" publication, and the plaintiff settled the case by payment of damages.

The cases in Australia which led to these concerns being publicly aired - *Hanson v Bauer Media Pty Ltd* [2013] NSWSC 1306 and 2029 and *Kenny v Australian Broadcasting Corporation* [2014] NSWSC 190 - are the most recent in a series of controversial cases on what amounts to ridicule. They raise the question: what is the test for defamatory meaning for the "ridicule" element in "hatred, ridicule and contempt", and how has the Internet impacted on this?

In order to answer this question, it is necessary to trace the development of "ridicule" cases going back to the early formulations of the concept of "ridicule". In fact, no one refers to "hatred, ridicule and contempt" any more; it has been replaced by a series of modern "glosses", most famously the Lord Atkin formula of lowering the plaintiff in the estimation of "right-thinking members of society generally"[8]. This means that the courts have applied much the same test to the "ridicule" limb as to other defamatory publications. Is this appropriate for ridicule cases in general, and for Internet publications in particular? That is one of the problems for consideration.

"Ridiculousness" and the Internet

This brings me to the title of this paper. The hugely popular MTV programme, "Ridiculousness", is currently in its fifth season (despite what Wikipedia calls "overwhelmingly negative" responses from critics). The word "ridiculousness" is defined by

[7] Patrick George, "Social Media and the Law", *LexisNexis* 2014 at 4.158 - 4.218.
[8] *Radio 2UE Sydney Pty Ltd v Chesterton, supra,* at [4].

Oxford Dictionaries as "deserving or inviting derision or mockery"[9], which is pretty much what the show does, namely screen home videos of people having accidents and generally looking ridiculous.

From the time Internet use began[10], users have taken full advantage of its innovative and flexible capacities to publish a wide variety of words and images of an entirely new kind, including photoshopped pictures, fake websites and other allegedly humorous material. An early example is Georges Le Gloupier (a.k.a. "L'entarteur"),[11] whose specialty in the 1990s was to ambush famous persons, throw a cream pie in their faces, film the result, and (before YouTube was invented) post the film on the Internet. Le Gloupier (real name Nōel Godin) thought the Internet the perfect vehicle for ridicule, and famously claimed, after successfully posting film of Microsoft founder Bill Gates being cream-pied in 1998: "My work is done here"[12]. (Not everyone agreed, hence the 2011 cream pie attack on Rupert Murdoch[13] during his appearance before a House of Commons committee in relation to the phone hacking inquiry.)

Neither of these billionaires sued for defamation for being made to look ridiculous. They probably could have done so.[14] As examples like this demonstrate, the difficulty for lawyers and jokers alike is that, from the earliest judgment concerning defamatory ridicule (handed down as long ago as 1680[15]) to the recent public controversy about the dog skit in *Kenny* v *Australian Broadcasting Corporation* [2014] NSWSC 190, drawing the line between good-humoured ridicule and an insulting and defamatory publication is hard to do. The profound changes to communication methods resulting from electronic publishing have simply made the task harder.

The main problem arises from the nature of humour and ridicule generally. The punch line is the sting of the libel. Andrew Denton, asked in a radio interview: "When do you know that a

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[9] Memidex, http://www.memidex.com/ridiculousness .

[10] The first international conference on the World Wide Web, 25 May 1994, is generally regarded as the Internet's starting date: "A brief history of the Internet: how the World Wide Web gas changed our lives over the past 20 years", Felicity Sheppard, ABC News, 25 May 2014.

[11] The Honourable Tony Fitzgerald AC "Telling the Truth, Laughing", *Communications Update*, Issue 150, December 1998, pp. 1 - 4 .

[12] See it here: https://www.youtube.com/watch?v=W2Hcxt_HNZg .

[13] See it here: https://www.youtube.com/watch?v=H3SfSBjo7YE . "Jonnie Marbles", shown here with a close-up the pie, told Mr Murdoch: "you are a naughty billionaire": http://www.nydailynews.com/news/world/rupert-murdoch-attacked-shaving-cream-pie-hacking-scandal-rebekah-brooks-testifies-article-1.157233 . Georges Le Gloupier, perhaps wisely, has never publicly acknowledged the cultural links between these events.

[14] There have been defamation cases for people being called "naughty": *Orsborn v John Fairfax Publications Pty Ltd* [2013] NSWSC 653 ("naughty broker"); *Merivale v Carson* (1887) 20 QBD 275 ("naughty wife"); *TCN Nine Pty Ltd v Loosley* [1992] NSWCA 247 ("naughty boy").

[15] *Mason* v *Jennings* [1680] Raym Sir T 401, 83 ER 209, where the plaintiff successfully argued that a slang term denigrated him because it imputed he had been beaten by his wife, which ridicule lessened his standing in the community; cited in Lawrence McNamara, "Reputation and Defamation", Oxford University Press, 2007, at 162 - 169 ("McNamara"). Early cases discussed by Hunt J in *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443 include *Parmiter v Coupland* (1840) 6 M & W 105 at 108; 15 ER 340 at 342. Other early examples are *Dolby v Newnes* [1887] 3 TLR 393 (defamatory after-dinner speech); *Massey* v *New Zealand Times* [1911] NZLR 929 (a politician depicted in a cartoon as a donkey labelled "Ananias"); *Dunlop Rubber Co Ltd v Dunlop* [1921] 1 AC 367 (advertising photograph altered to make plaintiff look foolish); *Burton* v *Crowell Publishing Company* (1936) 82 F 2d 154 (photo appearing to show the plaintiff's genitals).

show is funny?" must have had this in mind when he replied: "When the lawyers don't laugh".[16]

The man on the Clapham omnibus

Being held up to ridicule, whether as an attempt at humour or in the course of a satirical attack, is an integral part of the visual and verbal "entertainment" on the electronic media and cable TV programmes. Yet "the ordinary reasonable reader" - or "the man on the Clapham omnibus"[17] - nowadays more likely to be holding a smartphone or an iPad rather than a newspaper, is expected to interpret the matter complained of in the same way as when his grandfather was sitting on that bus, even though methods of communication, and reading visual and verbal material, have significantly changed.

Very few courts have been prepared to suggest that "reasonable readers" on the Internet may not take a lot of what they see and read seriously[18], although psychologists and academics[19] have pointed to differences in the way that Internet publications are both viewed and interpreted which suggest that this is the case. Perhaps that is the first problem: the courts are failing to give adequate weight to context.

Traditionally, the question was essentially when a joking comment or ridicule conveyed a "serious" imputation, in which case it became a legal wrong. Smith, B. famously stated: "If a man in jest conveys a serious imputation, he jests at his peril."[20] Joy, C. B., in the same case, added: "The principle is clear that a person shall not be allowed to murder another's reputation in jest".

When, however, is an imputation not serious, and when is a joking remark or piece of ridicule capable of "murder" of a reputation? Judicial views about this were just as passionate a hundred years ago as they are today. The hotly argued differing views of the appellate judges in *Massey* v *New Zealand Times (Company)* [1911] 30 NZLR 929 (a cartoon showing the

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[16] Quotation taken from a LAAMS paper delivered by Lesley Power, "Ridicule, Satire and Defamation", 17 November 1999.

[17] For a consideration of the multicultural implications of the traditional "Clapham omnibus man" test, see *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 235 ALR 750 at [94].

[18] One example is *Barrick Gold Corp v Lopehandia* 239 DLR (4th) 577; *Barrick Gold Corp. v. Lopehandia*, 2004 CanLII 12938 (ON CA), where the appellate court considered that the trial judge (who awarded only $15,000) should not have discounted the defamatory meaning because of its context and presentation. Blair JA stated that the Internet 's nature and manner of presentation were "evolving", and that there was "nothing in the record to indicate that people did not take Mr Lopehandia's postings seriously (at [38]). The damages were increased to $75,000 and punitive damages of $50,000 were awarded. In a dissenting judgment, Doherty J A (at [91]) said that while he was "happy to take [Blair JA's] word" for the difference between Internet and non-Internet publication, he considered the trial judge's findings were amply justified by the evidence. Similar views about the dangers of the Internet have been expressed in *Sanchez-Pontigon v. Manalansan-Lord*, 2009 CanLII 28216 (ON SC). Compare, however, *Smith v ADVN Plc* [2008] EWHC 1797 (discussed in more detail below), *Toledo Heart Surgeons Inc v Toledo Hospital* (Court of Appeals, Ohio, 30 October 2003, http://caselaw.findlaw.com/oh-court-of-appeals/1053271.html), where the Court held (at [23]) that "the marketplace of ideas has widened to include computer communications, and an ordinary 'surfer' is attuned to the blend of hyperbole and exaggeration in the expression of opinion that is contained on the Internet".

[19] Jacquelyn Burkett and Ian R Kerr, "Electronic Miscommunication and the Defamatory Sense", (2000) 15 Canadian Journal of Law and Society 81 at 101 - 108 argue that, just as standards of obscenity have changed *(US v Thomas* 74 F 3d 701 (6th Cir., 1996), the community's tolerance of "hostile communication" have changed.

[20] *Donoghue v. Hayes* (1831), Hayes Irish Exchequer, 265, 266.

plaintiff and a woman on a donkey labelled "Ananias"[21]) raise some of the same issues as *Kenny v Australian Broadcasting Corporation* (which similarly involved the plaintiff and an animal, although in more disgusting circumstances). The jury did not consider Mr Massey's cartoon defamatory; in *Kenny*, Justice Beech-Jones (albeit at capacity level only) did.

Politicians and other public figures have long been lampooned in such a way as to make them appear absurd, but defamation claims by such persons feature infrequently in defamation lists[22].

With the Internet, the potential of jokes and ridicule for conveying defamatory imputations about ordinary members of the community has increased. The problem is, as *Gatley on Libel and Slander*, notes (at [2.4]), that ordinary citizens may not like the same kind of notoriety that public figures have to endure. Should ridicule cases be judged in the same way regardless of whether the plaintiff is a seasoned politician, used to caricature, or an ordinary member of the public? This is another issue to which recent Australian decisions have given scant attention.

Why is defamatory meaning so important in ridicule cases? The problem with ridicule is that humour does not fit into the paradigm of truth and falsity which forms the framework of defamation defences. (The defences of unlikelihood of harm and of honest opinion have failed in all cases under the new legislation, and not just in ridicule cases). It is particularly difficult to fit the "round peg" of humour into the "square hole" of defamation defences[23]. Additionally, as is set out below, summary dismissal applications (on the basis that the material is not defamatory) generally fail, and the controversial recent decision of *Bleyer* v *Google Inc* [2014] NSWSC 897, importing the concept of "proportionality" from English law (*Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 945), which would be of material assistance in ridicule cases, faces a hostile appellate reception over the next few years. A finding that the material is not defamatory may be the only defence.

Fifteen-minute fame and the Internet

As I have already noted, the history and separate development of the tort of defamation owe much to the dangers of access to a printing press. Additionally, while defamation law reconciles the tension between freedom of speech and the protection of personal reputation, the key question, until comparatively recently, was "whose reputation?"

Until the twentieth century, defamation actions were generally brought by members of the community sufficiently wealthy to bring such actions, and sufficiently important to be written about. Although barristers regularly assure juries (or judges) in their addresses that everybody had an entitlement to protection of their good name, most plaintiffs in media cases in the past were those who were sufficiently important to be written about. This is why the phenomenon of "celebrity" has played an important part in the history of defamation law[24].

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[21] Ananias was considered the great Biblical sinner. See also *Bennett v Australian Newspaper* [1894] AC 294 (newspaper described as the "Daily Ananias"). It is still considered grossly defamatory to be compared to him, and the Premier of the Cayman Islands commenced proceedings, for being compared to Ananias, as recently as 2011: http://www.compasscayman.com/story.aspx?id=87663 .

[22] *Gatley on Libel and Slander*, [2.4].

[23] Laura E Little, "Just a Joke: Defamatory Humour and Incongruity's Promise", (2011) 21 Southern California Interdisciplinary Law Journal 93 at 117.

[24] David Rolph, "Reputation, Celebrity and Defamation Law", Ashgate, 2008.

This "celebrity" persona is relevant to defamatory meaning as well as to damages. For example, when Andrew Ettingshausen brought defamation proceedings for a photograph showing his penis, he was a celebrity, which enabled his counsel to tell the jury "the bigger they are the harder they fall"[25] in relation to damages; on appeal, Andrew Ettingshausen was described by Gleeson CJ as "a prominent Rugby League footballer"[26]. However, this was what made the publication of the photograph so humiliating; if an ordinary person was photographed in the shower, would the same imputations have arisen?

The Internet, however, has changed celebrity. Modern "celebrities"[27] no longer have to be famous for achievements or social standing (in fact, a helpful definition of "celebrity" is "a person who is known for his well-knownness"[28]). Nowadays, the names of the plaintiffs in the defamation lists are increasingly those of ordinary members of the community. The barriers to being famous have been broken down by the Internet. As Andy Warhol foretold: "In the future everybody will be world famous for fifteen minutes "[29].

Added to these changes is the third and, from the point of view of this discussion paper, most important change to communication. The Internet, like tabloid journalism before it, has de-formalised the style of writing and language. Not only are new methods of instantaneous and international communication possible, but there are no "Internet police"[30]. This permits all manner of humour, insult and invective to be published (complete with photographs and video and to an extent only dreamed of by tabloids like *News of the World),* available to anyone with a computer and Internet access.

Not only has language changed, but the form of publication - which Professor Brown calls "seamless" publication - may include videos, photos and hyperlinks, published worldwide. This combination of uncensored language, personal opinion, private information and the sharing of humour is fertile ground for an avalanche of material which ridicules, belittles,

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[25] Rolph, *supra*, p. 12. Another footballer is reported to have said, "[b]ut really the average person, a battler, can't go and sue a big company like that because he hasn't got the money to do it in the first place" (at p. 13).

[26] For a similar description, see *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449, where the plaintiff is described in the headnote as an "outstandingly successful front row forward". In *Thompson v Australian Capital Television Pty Ltd & Ors* (1997) 129 ACTR 14 at 20, Miles CJ stated that the plaintiff was "in blunt terms, something less than a celebrity" and noted (but rejected) a submission that his lack of fame should result in smaller damages.

[27] David Rolph, Dirty pictures: Defamation, reputation and nudity, *Law Text Culture,* 10(1), 2005, p. 11

[28] Daniel J. Boorstin, *The image: A guide to pseudo-events in America,* New York: Vintage (1961), p. 12. Boorstin highlighted the concept of being "famous for being famous"; Malcolm Muggeridge was the first to use the term in his 1967 biography. The term was used in a pejorative way by the "red top" (i.e. tabloid) press in the United Kingdom and United States. One of their targets was actress Sienna Miller, vilified in newspapers such as the *Washington Post* (http://www.washingtonpost.com/wp-dyn/content/article/2009/08/09/AR2009080902084.html) publications as someone who is "famesque" but fundamentally talentless (see *Gawker*, "What Has the World Got Against Sienna Miller?", 8 October 2009). Ms Miller, her family and friends were subject to multiple phone hacking attacks lasting almost a decade. She obtained damages in proceedings she brought in relation to certain of these articles (http://www.bbc.com/news/uk-13390991 .) and was a witness in the Leveson Inquiry. The rise of vilification as news in "red tops" is extensively discussed by Nick Davies in "Flat Earth News" (2008) and "Hack Attack" (2014).

[29] These are the actual words taken from his 1968 Stockholm art gallery catalogue.

[30] Robert Shullich, "Risk Assessment of Social Media", 5 December 2011, http://www.sans.org/reading-room/whitepapers/privacy/risk-assessment-social-media-33940 . There are, however, Internet police in some countries, notably China, where Western social media is unavailable and blog communications require the use of pseudonyms to avoid being deleted.

insults and/or offends everyone from the politicians who represent us to the next door neighbour who annoys us.

How satisfactorily is the law of defamation, carefully crafted from centuries of controlled publications, able to respond to communications which contain so many new elements of meaning and such informality of speech? I shall start by looking at the test for "ridiculousness" in pre-Internet case law. What became apparent to me, as I considered these early cases, was that "ridicule" plays a surprisingly small role in the defamatory meaning.

"Ridiculousness" before the Internet[31]

What did "ridiculous" mean in the age before the Internet? Then, as now, an imputation must be disparaging of the plaintiff before it can be defamatory of him: *Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84.

Early cases stated that ridicule was actionable without explaining why, and failed to deal with the issue of whether the ridicule prompted a negative picture of the plaintiff[32]. An early example is *Villers v Monsley* (1769) 2 Wils 403, 95 ER 886, KB at 404, where Bathurst J baldly stated he had "no doubt at present" that "any [publication] which renders a man ridiculous is actionable". While no authority is cited for this proposition, the expression "hatred, ridicule and contempt" had been formulated fifty years earlier in Hawkins "Pleas of the Crown"[33] and applied in earlier cases.

In *Villers v Monsley*, the allegation - that the plaintiff had a disease called "the itch" - did not "bring any disgrace upon a man" (at 404) but rendered the plaintiff "ridiculous and miserable" as well as shunned (possibly by those wishing to avoid this infectious disease). However, imputations of disease were actionable per se in those disease-ridden times. As Lawrence McNamara has noted, this is not really a ridicule case at all, yet Bathurst J's reference to "ridicule" resulted in it being referred to as a precedent on ridicule in subsequent cases.

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[31] The photograph of Van Johnson, Ann Blyth gazing apprehensively at the typewriter is a publicity still from the 1957 film "Slander", an expose of the evils of tabloidism. The storyline, curiously prophetic concerning 21st century newspaper scandals, shows Van Johnson succumbing to tabloid pressure following threats to reveal his teenage criminal conviction.

[32] McNamara, *loc. cit.*, at 162 - 189.

[33] Published in 1716, this is the first formulation of the test. As McNamara points out at pp 162 – 3, *Villers v Monsley* continues to be cited as good law in recent times, notably in *Berkoffv Burchill* [1996] 4 All E R 1008 at 1014 (per Neill JA).

The next problem the courts faced was very similar to that faced by courts today as a result of the Internet: the invention of the typewriter 146 years ago, and the huge increase in low-cost "yellow journalism" (so-called because the cheap paper turned yellow) newspapers. It is often said that the catalyst for the development of privacy in the US was Warren's[34] distress in finding information about his family's home life being aired in public[35], although other writers have pointed to the gentrification of the United States and in particular to the "countless, little-noticed revolutions" in the form of inventions such as the bell telephone, the telegraph, sound recording devices and such simple changes to life as better window pane glass[36].

It was the combined effect of these inventions which led to what Henry James called "the newspaperization" of modern society (a concept which Warren and Brandeis would address as a privacy issue[37]), which he described as follows:

> "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."

The culture shock of mass communications methods was just as profound in the nineteenth century as now. The telegraph, the newspaper and the photograph permitted instantaneous and extensive communication about matters that had previously only been heard or seen by sympathetic friends and family. The possibility that private material might reach a wider public as a result is the explanation for the court's decision in *Cook v Ward* (1830) 4 Moo. & P. 99. Although the plaintiff himself was the original teller of the story, the trial judge held that:

> ".. .there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintances , and a publication of it to all the world through the medium of a newspaper" (at 415 - 6).

Almost as devastating as the newspaper was the impact of photography. Fear of its misuse for ridicule and invasion of privacy was the subject of anxious academic debate as long ago as 1869[38]. Writing in the *American Law Register,* the anonymous author, "J. J.", warned of the possibility of "a photograph clandestinely taken, and representing its original in a ridiculous light, or publishing his personal defects" . By the twentieth century, these concerns extended to portrayals on film (*Youssoupoff vMetro-Goldwyn-Maher Pictures Ltd* (1934) 50 TLR 581 at 587).

The common claim with these kinds of publications, whatever the medium of publication, was that the plaintiff was shown in a "ridiculous light" by reason of ridicule of that person's appearance *(Boyd* v *Mirror Newspapers Ltd* [1980] 2 NSWLR 449) or the circumstances in

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[34] Samuel Warren and Louis Brandeis, "The Right to Privacy" 4 *Harvard Law Review* 193 (Dec. 15, 1890); Dorothy J. Glancy, "The Invention of the Right to Privacy" 21 *Arizona Law Review* 1 (1979).
[35] Glancy, *supra,* at p. 6.
[36] Glancy, *supra,* at pp. 7-8.
[37] Warren and Brandeis, *loc. cit.,* at p. 196.
[38] John A. Jameson, "The Legal Relations of Photographs" 17 *U. Pa. L. Rev.* 1 (1869).

which he was depicted {*Burton v Crow ell Pub Co* (1936) 82 F (2d) 154 at 155). However, judges did not always agree on what looked ridiculous.

More importantly, neither did juries. In *Massey* v *New Zealand Times Company (Limited)* (1911) 30 NZLR 929, one of the few ridicule cases to go to trial, the matter complained of was a cartoon of the plaintiff, a politician, on a donkey labelled "Ananias", in the company of an old woman. He sued for libel, but the jury found: "we are of opinion that this is a political cartoon pure and simple, and is not libellous" (at 931). In other words, the plaintiff was made to look ridiculous, but no defamatory imputation was conveyed - the true test of ridicule.

The plaintiff sought a new trial. Stout CJ and Chapman J dismissed the application, and upheld the jury verdict, and the plaintiff appealed.

The four judges on appeal split 2:2. Williams J considered the question of how far the cartoon would affect the personal character of the plaintiff was a jury question and the appeal should be dismissed. Denniston J considered the verdict was against the weight of evidence and the appeal should be allowed (at 958); Edwards J concurred. Sim J considered the question was "which side had offered the more plausible explanation of the cartoon" (at 971) and that the question of libel or no libel was for the jury to determine. The plaintiff therefore lost, although only just, in this interesting but now largely forgotten case, one of the few genuine "ridicule" examples.

The two most influential decisions in this area of defamatory meaning during the early twentieth century were *Youssoupoff* and *Burton.* Both have been largely misunderstood. *Youssoupoff* is often described as a case where the plaintiff was portrayed as Rasputin's rape victim. In fact she was portrayed as having believed in and admired Rasputin, and as having gone to his house to become his mistress[39]. Publications about women which portrayed them as unchaste or otherwise in a sexually degrading way conveyed a defamatory meaning per se; the real issue in *Youssoupoff* was whether the plaintiff was able to be identified as this loose-moralled woman, as the means of identification was that the woman in question was the wife of the man who murdered Rasputin[40].

Burton, however, was the first fully reasoned decision on ridicule as a test for what is defamatory. This was crucial to the result because the publication (a photograph of the plaintiff with saddle straps apparently hanging like enormous testicles, under a caption "Get a Lift with a Camel") did not convey any imputation that might have lowered the plaintiff in the estimation of the community.

Judge Learned Hand first noted that there were cases not concerned with ridicule where a slur on the plaintiff (such as insanity, or being a negro) was capable of being defamatory. While a man must not be too thin-skinned, and ridicule would not be actionable if only a morbid person would not laugh it off, a publication could be actionable if it exposed the plaintiff to "more than trivial ridicule" (at 156). Exposure to such ridicule could affect a man's

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[39] "The Princess and Rasputin", H. Montgomery Hyde, "Their Good Names", 1970, p. 332. During the trial Prince Youssoupoff supplied the necessary identification details by describing to the court, in some detail, exactly how he had killed Rasputin; the transcript is at pp. 339 - 341.

[40] Lisa R. Pruitt, *"On the Chastity of Women All Property in the World Depends": Injury from Sexual Slander in the Nineteenth Century,* 78 IND. L.J. 965, 984 (2003); see also Lisa R. Pruitt, *"Her Own Good Name: Two Centuries of Talk About Chastity",* (2004) 63 Maryland Law Review 3.

reputation if it affected his position in the minds of others, and he becomes "known indefinitely as the absurd victim of this unhappy mischance" (at 155).

This decision expanded the law of ridicule considerably[41]. There was no requirement for any negative moral judgment of the plaintiff, or to any other requirement for actionability. Additionally, and more seriously, Learned Hand J confirmed that the truth of the publication (in that this was not a doctored photograph) was irrelevant where ridicule was the sting of the libel.

Surprisingly, as McNamara observes[42], this expanse of actionable defamation did not result in a rush of claims. There were cases where a plaintiff was ridiculed (such as *Liber ace v Mirror Newspapers Ltd, The Times,* June 17, 1959[43]), but these were conducted as defamation and not ridicule cases. The next decision to consider the *Burton* ridicule test was not handed down until over forty years later. That decision, *Boyd* v *Mirror Newspapers Ltd* [1980] 2 NSWLR 449, would revive the concept of ridiculous light in defamatory meaning and lead to the bringing of a series of cases on "ridiculous light".

Boyd v Mirror Newspapers Ltd and Ettingshausen v Australian Consolidated Press

The plaintiff, a footballer, was the subject of an opinion piece highly critical of his football skills and athletic condition, under the headline "BOYD FAT, SLOW AND PREDICTABLE". One of the imputations pleaded was that the plaintiff was so fat as to appear ridiculous when he came onto the field to play. Hunt J held that "ridiculous" meant "deserving to be laughed at or absurd" (at 453) and that the article put the plaintiff in a ridiculous light, notwithstanding an absence of any moral blame on his part (at 453).

Although there was an imputation of looking ridiculous, a sportsman who let his condition go and became so fat he let his team down was arguably someone to whom moral blame could be attributed. Hunt J's comments about ridicule, made in the context of exploring meanings, were to the effect that an imputation of looking ridiculous (because he was too fat) was capable of being defamatory, but the wider issue of whether this was actually ridicule, as opposed to criticism of the plaintiff as a fat and lazy footballer who had let his condition go, was not explored.

Eleven years later, a more difficult case, also involving a footballer, came before Hunt J. Andrew Ettingshausen *(Ettingshausen v Australian Consolidated Press Ltd (\99\)* 23 NSWLR 443) had been photographed in the shower, and the photograph (published in GQ Magazine) showed (or appeared to show) his penis. The imputation that the plaintiff had consented to the photograph taken was straightforward; the problem was the fall-back imputation, which was simply that he was a person whose genitals were exposed.

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[41] McNamara, *loc. cit.,* p. 171.
[42] McNamara, *ibid.,* p. 172.
[43] H. Montgomery Hyde, *loc. cit,* pp. 348 - 391. Liberace was described as: "this deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother-love"; "the biggest sentimental vomit of all time"; a "slag heap of lilac-covered hokum" and so on. The jury found that the publication imputed the plaintiff was a homosexual, answered questions for the defence of comment (including whether the meaning was true in fact) in the negative and awarded £8,000. When Liberace died of AIDS on 4 February 1987, the *Mirror* ran a story asking for its money back.

Hunt J applied the *Burton* test to the fall-back imputation, holding that the publication of an imputation that the plaintiff's genitals were exposed to magazine readers was capable of exposing an entirely blameless plaintiff to more than a trivial degree of ridicule.

McNamara is critical of Hunt J's decision, stating that protection of the plaintiff's self-worth, rather than of his reputation, had become the focus, and that his Honour's reasoning for accepting *Burton* is not exposed, beyond noting that "text writers" had accepted *Burton* as authority for defamation by the exposure of the plaintiff to ridicule.

However, *Ettingshausen* was one of a number of claims brought by persons whose photographs were unfairly used or doctored (see Levine J's series of decisions in the Supreme Court of NSW: *Breunis v Penthouse Publications Pty Ltd* (20 August 1993), *Wild v John Fairfax & Sons Pty Ltd* (8 August 1997), *Darbyshir v Daily Examiner* (28 August 1997), *McGuiness v J T PublishingPty Ltd* [1999] NSWSC *All),* in circumstances where imputations of sexual or other wrongful conduct were conveyed. This was the principal imputation, and on this basis, a defamatory imputation was conveyed. There were strong hints in the article accompanying the photograph that the plaintiff had given his consent, as well as a description of his body as seen in the shower.

With the benefit of hindsight, the courts were struggling to come to terms with the new (some might say declining) standards of tabloid journalism, which would end sadly with closure of the *News of the World* and the revelations of the Leveson Inquiry. Ridicule of their victims was an important part of tabloid journalist's trade. Many of these cases (some of which were considered in *Hanson* v *Bauer Media Pty Ltd)* conveyed serious defamatory meanings about the plaintiff, independently of whether the plaintiff looked ridiculous (such as Mr Wild being tricked into standing in front of the scantily clad models so that his photograph could illustrate an article on voyeurism).

However, one of these cases, *McDonald v The North Queensland Newspaper Company Limited* [1997] 1 Qd R 62, did not involve any imputation of wrongdoing. The plaintiff was, once again, a footballer, and a photograph of him playing football was published. His shorts and underwear had come away during the game and his penis was exposed.

The Queensland Court of Appeal was initially cautious about the approach taken by Hunt J, observing:

> "Our initial reaction to Hunt J's imputation(b) was unfavourable. The imputation concerning the respondent which the photographs seem to us to make is that his penis was, or became, exposed, while playing football. Hunt J.'s conclusion in respect of imputation (b) in Ettingshausen at 449 is more readily understood if reference is made back to an earlier statement at 447; namely:
>
> > The condition of the plaintiff which imputation (b) expresses is simply that, as a result of the exposure of his genitals, he has been held up (or exposed) to ridicule.
>
> His Honour then went on to state that imputation (b) "relies upon the oft quoted statement of principle expressed by Parke B, in *Parmiter v Coupland* (1840) 6 M. & W. 105 at 108, 151 ER 340 at 342". Baron Parke's statement cannot readily be literally applied to the present circumstances, but the relevant principle stated there can be applied; that is, a publication which exposes another to ridicule is defamatory. In our opinion, that is the effect, briefly stated, of the Queensland Act; and material published concerning a person which exposes him to ridicule must make an imputation concerning him as the basis for that ridicule."

The difference between these publications, however, was that the principal imputation in *Ettingshausen* was that the plaintiff consented, and there was an article attached to the photograph that appeared to convey this. Mr McDonald's photograph simply showed his penis accidentally coming through his underwear.

Associate Professor Rolph[44] discusses the other Australian photograph cases referred to above, concluding that the test for defamatory meaning includes a notion of reputation as property, but adding that the imputation must still reflect adversely on the plaintiff's reputation (for example, the first imputation in *Ettingshausen).* In my view, the photograph cases which do not convey any adverse imputation (such as *McDonald),* which form a special category in ridicule cases, show the court accepting that publications offending the dignity of a person should, without more, be actionable. In the absence of a cause of action for privacy, the courts in Australia, like the courts in the United Kingdom, were responding to the intrusion of the tabloid press. Although the English courts were initially cautious *(Charleston v News Group Newspapers Ltd* [1995] 2 AC 65), the tabloid press in the United Kingdom went to such extremes that the result was a series of decisions by Eady J creating and defining privacy rights. The general high standards of the Australian press, which did not participate in the excesses of *News of the World* journalism, meant that the law in Australia did not develop beyond this extension of "ridicule" into full-blown privacy law.

It was English journalism (although from the more up-market sister of *News of the World,* namely the *Sunday Times)* which would result in the landmark decision *of Berkoff v Bur chill* [1996] 4 All E R 1008, the decision most often referred to by the courts today. The matter complained of (set out in full in *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at [85]-[89], extracted below) was a throwaway line by English opinion writer and humorist Julie Burchill, who was writing a review of the latest "Frankenstein" film. Frankenstein flat head and neck screws were unattractive, she said, "a lot like Stephen Berkoff, only marginally better-looking". Mr Berkoff, a respected actor, sued for libel.

The Court of Appeal struggled to determine what to make of these remarks; I have set out McColl JA's summary of the case in *Radio 2UE Sydney Pty Ltd v Chesterton* below, and her Honour's analysis of their differing views. By a majority, the Court of Appeal held that the publication was capable of conveying a defamatory meaning. It remains, however, a controversial decision.

The real problem, in my view, is that even before the Internet became widespread, changes in newspaper content and style, due largely to the voracious appetite for sex and celebrity gossip fed by tabloid journalism, had changed newspaper language and content. The courts were simply out of touch with these changes. The UK public were reading tabloids which contained not news but complete rubbish, such as, for example, "My seven lovers in one week, my two debs in one bed", "The hot blood of an ice cream salesman" or "Secrets of girls who don't love men.. .Our own Olympic orgies by model Delia"[45]. Thanks to the

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[44] Rolph, *loc. cit,* at p. 65).

[45] These are actual headlines from stories from the Easter 1981 issue of *News of the World,* the contents of which were summarised by Auberon Waugh for *Private Eye* (reproduced in the *Arkansas Leader,* 22 July 2011). Matthew Engel ("Tickle the Public", London, 1996, p. 292) examined front-page stories for *News of the World* for a whole year (1988) and found that, out of the 51 published Sunday issues, the main page 1 story on 25 occasions was illicit heterosexual liaison, on 11 occasions sexual deviance, and on 10 occasions involved the Royal Family. When *News of the World* closed and the *Daily Mail* listed its top stories for all time (July 8, 2011), all but two consisted of sex/drug exposés involving the famous or royals. The other two were the Pakistani cricket sting and the much-criticised "named and shamed'VSarah's Law campaign.

Leveson Inquiry, we now know that many of these stories were complete inventions, that campaigns of vilification were run against people the *News of the World* did not like, and that insulting remarks about the physical appearance of such persons were stock in trade. In such a publishing climate, Ms Burchill's throwaway remark might not be seen as harmful to the reputation or standing of Mr Berkoff. Far worse was said in the tabloids on a regular basis. The British public had become immune to this kind of disparaging remark. What set this remark apart was that it was published in a responsible newspaper that did not ordinarily include tabloid-style writing.

As the next cases for consideration shows, the courts' lack of understanding of new tabloid language was at times compounded by its lack of understanding of new technology used for publications containing ridicule and satire. The case demonstrating this is *Hanson v Australian Broadcasting Corporation* (Supreme Court of Queensland, 1 September 1997; Queensland Court of Appeal, 28 September 1998; special leave refused 24 June 1999). Fortunately, the Full Court of the Supreme Court of South Australia, in *Brander v Ryan* [2001] Aust Torts Rep 81-953, took a more realistic view of the role of ridicule.

Hanson v Australian Broadcasting Corporation and Brander v Ryan

Pauline Hanson, a populist anti-immigration conservative, was elected to Parliament in 1996, and her lack of political skills (evidenced by her "Please explain" response to questions she did not understand) quickly attracted ridicule, with the result that she was a frequent target for satire. The matter complained of was a song entitled *(I'm a) Backdoor Man*, performed on the defendant's highly popular radio station. The performer, Simon Hunt (under the name "Pauline Pantsdown") cut and paste public statements made by Ms Hanson to put words into meaningless and inconsistent sentences, with a music-backing track. It would have been evident to any listener, both from the context (which included an announcement beforehand that it was a satire) and from the jerky result of the cuts between the words, that this was not Ms Hanson speaking.

The lyrics, which were absurd, included the following:

> "I like trees and I like shrubs and plants and trees and shrubs and plants but I've put the fence up now so that can't get in - yeh. Please explain me me, please me me, please explain. Poor Pauline. Poor Pauline. I'm a tory and indeed, Pauline and her family. I'm a backdoor man. I'm very proud of it. I'm a backdoor man. I'm homosexual and I'm back here. This is a circular driveway..."

The key words causing the controversy were:

> "I'm a backdoor man for the Klu Klux Klan with a very horrendous plan. I'm a very caring potato".

Ms Hanson brought proceedings for defamation and an interlocutory injunction, arguing that the matter complained of conveyed imputations that she was (and was proud to be) a paedophile, homosexual and prostitute, and engaged in unnatural sex practices, including anal sex, with members of the Klu Klux Klan. The broadcaster argued that the ordinary reasonable listener would understand the matter complained of as satirical or ironic comment about Ms Hanson's conservative political and social views and as no more than vulgar abuse.

The Chambers Judge's finding (reproduced in part in the appeal judgment) was that the imputations the plaintiff complained of were conveyed and that the injury done to the

plaintiff "and indeed to members of her family" meant that "the balance of convenience favours the granting of an injunction".

The ABC appealed, arguing that the wrong test was applied, that the defences had not been considered (or the submission that the matter complained of might amount to no more than vulgar abuse), and that the Chambers Judge had failed to take into account that the publication was intended as satire or irony.

The Queensland Court of Appeal dismissed the appeal in a few bare paragraphs, without any consideration of any of the cases on ridicule. There was "no room for argument" that the ordinary reasonable reader would not find one or more of the imputations conveyed. The critical difficulty, in the court's unanimous opinion, was that the matter complained of conveyed an imputation that the plaintiff was a homosexual with a "preference" (I assume this is a reference to sodomy, as this is what "backdoor man" was asserted to mean), which was indefensible. These were "grossly offensive" imputations about a member of parliament. The appeal was dismissed unanimously. Leave to appeal was refused.

Both the first instance and appeal judgments were uniformly criticised in subsequent academic and law case note reviews, and have not worn well with time. There is a total failure to come to terms with the law of ridicule. Additionally, there are significant errors of law; Lawrence McNamara dismisses the court's interpretation of the ordinary reasonable reader as "frankly bizarre"[46]. As to defamatory meaning, assuming an imputation that Ms Hanson was a homosexual was conveyed, the South Australian District Court has recently held that an imputation of being a homosexual is not defamatory: *Tassone* v *Kirkham* [2014] SADC 134 (a similar findings was made in 2012 in New York: *Yonalty* v *Mincolla* 945 NYS 2d 774 (App. Div 2012)).

The Queensland courts were clearly floundering with, and intimidated by, both the technology used to produce the matter complained of and a sense of humour outside their comprehension. Today, YouTube abounds with dubbed singing politicians, such as the Barak Obama singing channel[47], and social media with parodies of politicians; what, one wonders, would the Queensland Court of Appeal have made of such publications in 1998?

Political satire is particularly pungent. @Rudd2000[48] is one such example, with Twitter entries (deliberately misspelled) such as:

> "Corey Bananardi [sic] call for inquiry into exact nature of relationship between Simpson and Simpson's Donkey"
>
> "Chris Kenny wear same dog to Midwinter Ball as Corey Barnardi very awkward."

The Queensland Supreme Court's interpretation of the ordinary reasonable reader test is inconsistent with the more practical approach taken by the Full Court of the South Australian

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[46] Lawrence McNamara, *loc. cit.*, at p. 181. McNamara cites similar views by E Handsley and G Davis in "Defamation and Satire: *Hanson v Australian Broadcasting Corporation"* (2000) 9 Torts Law Journal 1 at 9; such as the criticism that the court completely overlooked the satirical nature of the song and that the obvious absurdity of the lyrics meant that many imputations were not capable of being conveyed.

[47] https://www.youtube.com/watch?v=b8tFaU571xg. This channel had 661,670 subscribers at the time of watching (August 13 2014) and just under 7 million people had viewed the latest song. "Call Me Maybe" had been viewed by over 42 million people.

[48] http://www.buzzfeed.com/markdistefano/australias-best-parody-twitter-account-shocks-everyone-and-r .

Supreme Court in *Brander v Ryan* [2001] Aust Torts Rep 81-953. Mr Brander, also the leader of a right-wing anti-immigration party, brought proceedings over the following editorial:

> "It's Little Mikey and the big bad racists. How did little Mikey Brander get to be the leader of the racist gang National Action? Did he beat all the other, bigger NA chaps in a peeing contest or something? It's hard to imagine how you can piddle higher than everyone else if you sit down to take a pee."

This last sentence was, Mr Brander complained, imputing that he was effeminate or homosexual, since sitting down to pee was not what men do. The Full Court of the South Australian Court dismissed this argument, taking the view (at [77] - [78]) that the ordinary reasonable reader would have understood that the editorial intended to ridicule the plaintiff.

The South Australian interpretation, unlike the Queensland (and High Court) interpretations of defamatory meaning, took into account the role of ridicule in determining whether the imputations were capable of being conveyed. While this is a more rational interpretation of the ordinary reasonable reader's approach to the meaning of publications ridiculing the plaintiff, the South Australian courts did not go on to consider whether, if the article was ridiculing the plaintiff, that was sufficient to satisfy the "ridicule" component for defamatory meaning.

Whatever the legal niceties of defamatory meaning, and the dangers of modern technology, all of the commentators seem to agree that the courts, in Queensland in particular, needed " a better appreciation of satire... and there are no legal obstacles preventing that"[49]. A better appreciation was certainly going to be needed.

Ridicule and the first cases on Internet publication

To give an example of the level of informality of Internet speech, here is how a respected Australian academic was described by a fellow academic at an online international anthropology seminar:

> "His entire career has been built not on research at all, but on an ability to berate and bully all and sundry. In the local pub, drinking and chain smoking all the while, for that matter."

This bulletin board post went on to make a meandering and generalised series of allegations suggestive of paedophilia and general academic dishonesty. While some of this publication sounds like a wedding toast gone very wrong, the factual background showed (perhaps also like some of those bad wedding toasts) a prior history of ill will.

The academic in question was Professor David Rindos, and he became the first Australian to sue for Internet defamation: *Rindos v Hardwick* (Supreme Court of Western Australia, Ipp J, 31 March 2014). Professor Hardwick (who resided in the United States) did not file a defence, and Ipp J conducted the hearing as an assessment of damages only.

The first point to notice is that this publication consisted of words of abuse and insult, rather than ridicule. The second feature is the level of rudeness and abuse. How could an anthropologist be so unaware of the implications of abusive language? Academics have suggested that the reasons for ill-considered and abusive remarks to be found so commonly

[49]Lawrence McNamara, *loc. cit.,* at p. 182.

on the Internet are that it is a "vast electronic wasteland" or a place of "cultural nihilism"[50]. If this suggests that different public expectations apply to publications on the Internet, then this may be relevant to what the ordinary reasonable reader considers to be defamatory meaning.

The reasons why so many ordinary members of the public, when posting content on the Internet, appear to become consumed by the electronic equivalent of road rage clearly require more study. It is unfortunate that the forum for their first recorded use in defamation proceedings was an anthropology conference; one would have thought that anthropologists, at least, were attuned to the social meaning of Mr Hardwicke's attack. Meanwhile, the problem for lawyers is how to distil the imputations from this kind of angry and discursive publication, and attach defamatory meaning to them.

The current test for ridicule

This brings us to the current test for ridicule is as set out in *Radio 2UE Sydney Pty Ltd* v *Chesterton* (2008) Aust Torts Reports ¶81-946 at [85]-[89].

The matter complained of in *Radio 2UE Sydney Pty Ltd v Chesterton* was a radio broadcast calling the plaintiff a "bombastic, beer-bellied buffoon" and "a bit of a creep". This is yet another case where the matter complained of was tabloid-style invective conveying clear imputations, rather than ridicule. However, McColl JA gives a helpful summary of the conflicting views about ridicule in the UK Court of Appeal in *Berkoff v Bur chill:*

> "[85] A publication is capable of being defamatory even though it arguably does no more than expose the plaintiff to ridicule, but that exposure has to be such as to tend to injure the plaintiff's reputation. *Berkoff v Burchill* was such a case. There the question arose whether the following words published in a review of a film version of "Frankenstein" were capable of being defamatory of Mr Berkoff:
>
> > 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 very 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.
>
> [86] Although the Court divided as to the capacity of the matter complained of to convey, as a question of law, a defamatory imputation, O'Neill LJ and Phillips LJ holding it could, Millett LJ dissenting, all were of the view that to be capable of being defamatory the matter complained of had to tend to injure the plaintiff's reputation. After reviewing a number of authorities on what constituted defamation, O'Neill LJ concluded (at 1013):
>
> > It will be seen from this collection of definitions that words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor any lack of skill or efficiency in the conduct of his trade or business or professional activity, if they hold him up to contempt, scorn or ridicule or tend to exclude him from society. *On the other hand, insults which do not diminish a man's standing among other people do not found an action for libel or slander.* The exact borderline may often be difficult to define. (Emphasis added)
>
> and (at 1018):

[50] See the discussion of *Rindos* v *Hardwick* in Jacquelyn Burkell and Ian R Kerr, "Electronic Miscommunication and the Defamatory Sense", (2000) Canadian Journal of Law and Society 2000 81 at 82 - 3; A Joinson, "Causes and Implications of Disinhibited Behaviour on the Internet", in J Gackenbach (ed.), "Psychology and the Internet: Intrapersonal, Interpersonal and Transpersonal Implications", Academic Press, 1998, at 43 and 45. It is not possible, in this short discussion paper, to do justice to the extensive research in this area, but *The Oxford Handbook of Internet Psychology,* A N Joinson & Ors, OUP, 2007, is helpful.

> It is trite law that the meaning of words in a libel action is determined by the reaction of the ordinary reader ... it would, in my view, be open to a jury to conclude that in the context the remarks about Mr Berkoff gave the impression that he was not merely physically unattractive in appearance but actually repulsive. *It seems to me that to say this of someone in the public eye who makes his living, in part at least, as an actor, is capable of lowering his standing in the estimation of the public and of making him an object of ridicule.* (emphasis added)

> [87] Phillips LJ recognised (at 1020) that the law of defamation protects reputation and that reputation was not generally dependent upon physical appearance. He acknowledged that "with one possible exception, [there was] no precedent for holding it defamatory to describe a person as ugly". While he concluded (at 1021) that "a statement that a person is hideously ugly does not fall into that category of statements that are defamatory because they tend to make people shun or avoid the plaintiff he was also of the view that the words described the plaintiff as hideously ugly by way of ridicule and that the question whether they exposed him to ridicule to the extent that his reputation has been damaged must be answered by the jury.

> [88] In a strongly worded dissent, Millett LJ observed (at 1019) that defamation had never been satisfactorily defined, that "[a]ll attempted definitions are illustrative [and not] exhaustive [and that] [a]ll can be misleading if they cause one to forget that defamation is an attack on reputation, that is on a man's standing in the world." While he did not doubt "that the words complained of were intended to ridicule Mr Berkoff, [he did] not think they made him look ridiculous or lowered his reputation in the eyes of ordinary people"

> [89] It is not necessary to consider this aspect of defamation law further. For present purposes Berkoff underscores the proposition that even in the case of an imputation which exposes a person to ridicule, the Court was of the view that the plaintiff's standing (O'Neill LJ) or reputation (Phillips LJ and Millett LJ) had to be lowered before the imputation was capable of being defamatory."

How does this test apply to publications in the age of the Internet? Does it take into account the informality, level of abuse and crude humour that have seeped out from the Internet portals and into other mainstream media? Two recent cases, *Hanson-Young v Bauer Media Limited* [2013] NSWSC 1306 and *Kenny v Australian Broadcasting Corporation* [2014] NSWSC 190 show, once again, a different approach to publications showing the plaintiff in a "ridiculous light".

Kenny v Australian Broadcasting Corporation and Hanson-Young v Bauer Media Limited

The defamation proceedings brought by Senator Hanson-Young were similar in format to the matter complained of in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (although, curiously, *Charleston* was not referred to in argument), namely that a photograph of the plaintiff's head was very obviously photoshopped onto a picture of a scantily clad young woman. Beside this picture was the magazine's offer to house the next boatload of asylum seekers if the Senator would agree to a lingerie shoot. "We know she'll have her knockers if she agrees", said the publication (in a quotation placed near the breasts of the scantily clad figure), "but we're confident she'll agree it's for the good of the country." The Senator sued for defamation and the defendants brought an application to strike out the imputations pleaded.

McCallum J traced the history of ridicule cases from *Burton* and *Ettingshausen* to modern times, including a series of decisions by Levine J, before concluding that a publication holding a plaintiff up to ridicule can be defamatory even if it does not attribute any moral blame. The plaintiff was "entirely blameless" and the level of ridicule "more than a trivial degree." Her Honour thought the difficulty lay in formulating the imputation (all imputations

were struck out, although with leave to replead) and regretted that Hunt J had not, in *Ettingshausen,* said what the imputation should have been in *Burton.*

In *Hanson-Young v Bauer Publications Pty Ltd (No 2)* her Honour considered that the imputations issue had been clarified. Imputations that the plaintiff was not a serious politician, that the plaintiff was a joke, that being a sex object was all the plaintiff was good for, and that the plaintiff, by reason of her pro asylum-seeker stance, had justifiably exposed herself to the ridicule of the defendant were held to be conveyed and defamatory, on the basis of the law as set out in *Ettingshausen.*

This second judgment shows the danger of assuming some defamatory meaning can be found in ridicule cases, and that it is just a matter of finding the right imputation. The publication certainly belittles the plaintiff, in circumstances where women have had to endure a great deal of this kind of derogatory commentary in the past. The explanation, like *Ettingshausen,* is that the excesses of tabloid humour have been curbed by the court in circumstances where the cause of action was probably something other than defamation (such as a complaint under the anti-discrimination legislation). The matter complained of was simply offensive and, worse, not even funny.

A clearer (and even more obviously offensive) form of ridicule can be seen in *Kenny* v *Australian Broadcasting Corporation* [2014] NSWSC 190 ("Kenny"), where the matter complained of was a skit on a comedy programme called "The Hamster Decides". The matter complained of was a television skit about Mr Kenny's immediate proposal of ABC funding cuts after the Prime Minister's victory speech by showing a doctored photograph of Mr Kenny engaged in sex with a dog while strangling it (the sting of the photograph was also described by the performers).

This is not the first time that a cartoon or photograph of a person in such circumstances has been depicted. In 2006 an Indonesian newspaper showed the Prime Minister and Foreign Minister as copulating dingos, following which the *Australian* cartoonist portrayed the Indonesian President as a dog mounting a Papuan with a bone in his nose, saying "Don't take this the wrong way".[51] In November 2013 a cartoon of the current Prime Minister engaged in self-abuse while spying on Indonesia (in response to the discovery that Australian officials had phone-tapped the Indonesian President and his wife) caused further indignation[52]. (Dogs, in Muslim culture, are second only to pigs in uncleanliness, which is why these cartoons were particularly offensive.)

Cartoons and visual images have been a significant (sometimes the only) source of political commentary for centuries[53]. Although the plaintiff sued on the whole segment, including the language used to describe the picture, the picture was the key to the meaning. There are no separate rules for interpreting cartoons. That was the first problem. Images like this should not be taken literally, and that was the second.

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[51] "Downer slams new cartoon", *Sydney Morning Herald* April 1 2006: http://www.smh.com.au/news/national/downer-slams-new-cartoon/2006/04/01/1143441369654.html

[52] The cartoon was reproduced in many newspapers, including Andrew Bolt's column: http://blogs.news.com.au/dailytelegraph/andrewbolt/index.php/dailytelegraph/comments/indonesias_shame_and_rudds_not_ours_and_abbotts/.

[53] Benjamin Franklin's "Join or Die" cartoon of a segmented snake (1764), warning that this would happen to America if the States did not join together, is generally acknowledged as the first American political cartoon.

The imputations pleaded were:

(a) The Plaintiff is a pervert who had sexual intercourse with a dog.
(b) The Plaintiff is a low, contemptible and disgusting person.
(c) The Plaintiff's attacks on the ABC were so dishonourable and disgusting that he deserved to be compared to, and portrayed, as a person who has had sexual intercourse with a dog.

Beech-Jones J considered that the programme was a comedy, and that the subject was the absurdity of the 2013 election coverage. His Honour struck out imputation (a), holding:

> "... the tone and context of the programme are critical. The programme was meant to be funny and its general topic was the election coverage. The reasonable viewer, in my view, could not possibly have considered that such a lightweight show as this would be the forum for exposing actual instances of bestiality.

The problem with the remaining imputations was that the matter complained of was "a massive exercise in ridicule that is vastly out of all proportion to that which precedes it" (at [32]). It was because the words and images were so disproportionate that these imputations were conveyed. Both imputations (albeit with some surgery to their form) survived. Beech-Jones J referred to *Hanson-Young v Bauer Media Ltd* [2013] NSWSC 1306 and 2029, and agreed with McCallum J that the issue was essentially one of identifying the defamatory meaning.

As to the law of ridicule, Beech-Jones J was referred to *Charleston* v *News Group Newspapers Ltd* [1995] 2 AC 65, where the Court refused to consider a publication in which copies of the plaintiff's head were superimposed onto naked bodies in an obscene position as being defamatory. The only imputations pleaded were that the reader would conclude that the plaintiff had willingly participated in the production of the photographs (an imputation based on *Youssoupoff v Metro-Goldwyn-Maher Pictures Ltd, supra,* at 587). However, the reason for the court's rejection of the imputations was that the text accompanying the pictures made it clear there had been no consent at all and that their images had been stolen. His Honour found *Coleman v John Fairfax Publications Pty Ltd* [2004] NSWSC 300 (where a footballer's bad playing was humorously attributed to childhood neglect by his mother) of more assistance, but considered it inapplicable as the literal meaning of these claims was not intended.

However, the punchline to the skit was not that Mr Kenny actually did this; it was that Mr Kenny planned to do to the ABC what he was portrayed doing to the dog.

The analogy of having sex with a person while murdering them is a horrifying one, although such scenes occur in detective stories and television series such as "Game of Thrones" without public outrage occurring. In *To Be Or Not To Be,* where Mel Brooks plays a very bad Shakespeare actor, one of the characters makes a similar (but much milder joke) to the effect that what Mel Brooks' bad acting was doing to the theatre was what Hitler planned to do to Poland (perhaps only Mel Brooks can make jokes about the Holocaust). To use this kind of analogy for a political figure, while strong language, is still within the range of political discourse. What made this skit so horrifying that Beech-Jones J publicly regretted having to set out its contents in the judgment?

The answer is the dog. We can objectify the millions dead in Auschwitz when watching a Mel Brooke movie, but the sight of one dog - at the mercy of a rapist as well as a murderer - is emotional overkill. On any test - even if the person shown raping and strangling the dog was Adolf Hitler himself- this image is too shocking, and the shock value, rather than the ridicule, makes it defamatory. In other words, like so many of the other cases discussed above, it is not a ridicule case at all.

Interestingly, though, now that the shock of this image has passed into popular culture, jokes with the sting of this libel in it abound on the Internet, as the @Rudd2000's ongoing jokes about Mr Kenny, and about Simpson and his donkey, show. One of the features of metaphor is the passage from shocking to cliché due to repetition of the image - the ordinary reasonable reader develops a tolerance. This gradual watering down of imagery by repetition is a feature of language change and development. Courts could benefit, in arguments about defamatory meaning, from consideration of language study and semiotics.

Conclusions

Jokes and ridicule are an essential part of interaction and communication. The question is when ridicule, unaccompanied by imputations lessening the plaintiff's standing, can be defamatory. What do the cases discussed above tell us about the test for defamatory meaning for "ridicule" cases? My observations are as follows:

1. Many of the cases discussed above are not actually ridicule cases, and it is unnecessary to apply the ridicule test to them[54]. It is only in rare cases such as *Burton* that the plaintiff is made to look ridiculous without some non-ridicule meaning being conveyed.

2. The first problem is that there is no real "ridicule" test at all. This lack of a unified theory of defamatory meaning leads to inconsistencies as courts struggle to fit non-verbal and non-written communications into traditional definitions and categories[55]. Instead, the courts first look at the facts of other cases (for example, *Hanson-Young* v *Bauer* at [36] - [37]), and then opine that the problem is one of identification of the correct imputations. The result is that there is a series of individual responses by judges rather than an objective test.

3. Both *Hanson-Young v Bauer* and *Kenny* v *Australian Broadcasting Corporation* were published in the context of vulgar comedy, and both judgments refer to context, but only to note that the programme was a comedy, rather than to analyse the metaphor. Context, especially where the programme forms part of a larger publication all of which is intended to be taken into account, should be given greater prominence when determining defamatory meaning.

4. Courts should be more aware of changes in style and presentation, especially in relation to humorous material, arising from changing means of communication such as the Internet. Publications on social media may not be regarded as being as serious

[54] McNamara, *loc. cit.,* at p. 188.
[55] Smolla, "Law of Defamation", 2002, at [1.12]; D Kluft, "Beyond Words" (2003) 83 Boston University Law Review 619 at 624.

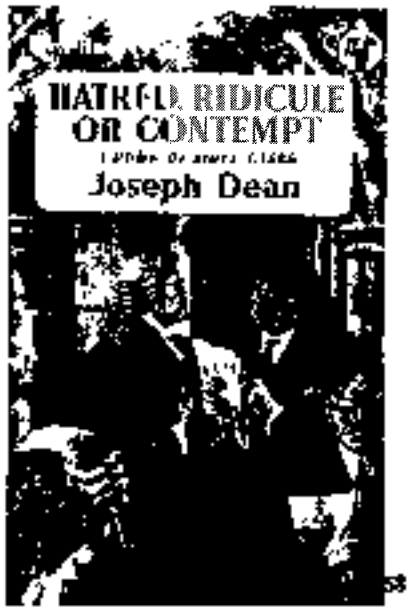
as publications in a financial newspaper: *Barrick Gold Corp* v *Lopehandia* 239 DLR (4th) 577; *Barrick Gold Corp.* v *Lopehandia,* 2004 CanLII 12938 (ON CA),

5. Not all ridicule is the same. In particular, political satire is an essential part of freedom of speech. Where the courts have recognised that importance *(Brander v Ryan, Massey v New Zealand Times Company (Limited))*, publications made in the context of political comment have been held not to be defamatory. *Hanson* v *Australian Broadcasting Corporation* is a ridiculous and embarrassing judgment, but one wrong judgment nearly 20 years ago does not mean that the law is not working.

6. Not all plaintiffs are the same. As Gatley notes (at [2.4]) ordinary members of the community may not like the same kind of notoriety that public figures have to endure. Should there be one set of standards for celebrities and another for the rest of us, or does the "fifteen minutes of fame" level the celebrity playing field?

In conclusion, while some of the cases may have been misread or even wrongly decided, that does not mean that ridicule cases should fall outside the test for defamatory meaning, as some academics, such as McNamara and Magnusson, have suggested[56].

If damage to reputation is indeed the interest to be protected by defamation law, courts could be more robust when confronted by sensitive footballers or tearful politicians, and take into account not only the context of the publication but also (and this is controversial) the relationship between the publication and the asserted harm, but this is a matter for courts to determine on a case by case basis. As to the nature and extent of that harm, if *Bleyer v Google Inc* [2014] NSWSC 897 survives appeal, joke-tellers and ridiculers may be the real beneficiaries of the "proportionality" rule (namely the relationship between the publication and the harm). If that occurs, it may be safe for @Rudd2000 to return, and follow up ridiculous issues like the inquiry into the relationship between Simpson and his donkey[57].



[56] R Magnusson, "Freedom of speech in Australian defamation law. ridicule, satire and other challenges" (2001) 9 Aust Torts Journal 269

[57] See p. 14 of this paper, and see http //www.buzzfeed.com/markdistefano/australias-best-parody-twitter-account-shocks-evervone-and-r

[58] The front cover for Joseph Dean, "Hatred, Ridicule and Contempt", Pan Books, 1953