A Linguistic Inspection of the Law of Defamation

Jason Harkess*
Winner of the Law Review Prize for 1998

I: INTRODUCTION

> The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or acadaemic linguist.[1]

In a case of defamation, the foundation of the plaintiff's claim is that the defendant's publication was defamatory. Establishing what the publication means will therefore be one of the primary issues addressed in court. In other areas of the law, questions of interpretation are left to the judge. The law of defamation, however, is unique in that the question of meaning is ultimately considered to be one of fact, and therefore deemed to be a matter best determined by a jury.[2] This rule of law is one based on common sense. It is, after all, an ordinary person, devoid of legal expertise, to whom the allegedly defamatory material is usually published. Accordingly, courts have often held that the question of construction is not a legal one.[3] A publication is defamatory only if a defamatory sense is conveyed to an ordinary person.[4]

In subjecting printed material to the scrutiny that necessarily comes with a court trial, one of the inherent problems that arises is that the publication is no longer located in its original context. That is to say, the words complained of are no longer being skimmed over on page 5 of the morning paper by Mr Jones whilst he eats his breakfast. Rather, the plaintiff, by bringing the defamation action, effectively puts a proverbial magnifying glass over the words in dispute through which a judge, lawyers, and jury laboriously attempt to ascertain their

---

* BA LLB(Hons). I would like to thank Rosemary Tobin for encouraging me to write this article.

1 *New Zealand Magazines Ltd v Hadlee*, Court of Appeal, CA 74/96, 24 October 1996, 5 per Blanchard J.

2 *Laws NZ*, "Defamation" para 215; *Hyams v Peterson* [1991] 3 NZLR 648 (CA); *New Zealand Magazines Ltd v Hadlee* supra at note 1. See also s 52 of the Defamation Act 1992.

3 *Christchurch Press Co Ltd v McGaveston* [1986] 1 NZLR 610, 616 (CA); *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1245 (HL).

4 *Laws NZ*, supra at note 2, at para 43.

"actual" meaning. Care must therefore be taken when constructing the meaning of such a publication. Indeed, basic linguistic principles of natural language usage suggest that ascertaining the precise meanings of words is a less than simple task. There is a myriad of semantic[5] and pragmatic[6] factors which can affect a person's understanding of a publication. With regard to defamation, one commentator has noted that "communication research and theory suggest that there are many variables that may influence the amount of harm to reputation caused by a defamatory message".[7] When constructing the defamatory sense, it is these variables which ought to be explicitly taken into account by the finder of fact.

However, despite the overall appearance of maintaining a "natural and ordinary" approach to the construction of meaning in defamation cases, legal rules of construction have long been established. The very notion of a "right-thinking"[8] or "reasonable"[9] person, for example, is a legal interpretative constraint which has no part to play in the interpretation of everyday discourse. Further still, courts of some common law jurisdictions espouse the notion that some imputations are defamatory per se if they fall within one of several legally defined categories.[10] Such rules of interpretation are justified on the grounds that, whilst the question of defamatory sense is ultimately one of fact for a jury, it is for the judge to determine at the pre-trial stage what is *capable of being* defamatory.[11] What is capable of being defamatory is therefore a question of law. Consequently, it is also a question which can be appealed. As will be demonstrated, appellate courts are only too ready to offer guidelines for interpreting allegedly defamatory matter, and it is these guidelines which are often stated in a judge's directions to a jury.

It is at this stage that the distinction between what is *capable of being* and what is *in fact* defamatory becomes unclear. Consider, for example, the recent Court of Appeal decision of *New Zealand Magazines Ltd v Hadlee*, in which

---

5 Semantics is essentially the study of word meaning. For a full description, see Cruse, *Lexical Semantics* (Cambridge: Cambridge University Press, 1986); Lyons, *Semantics* (Cambridge: Cambridge University Press, 1977).

6 Pragmatics concerns the role of context in the interpretative process and its ultimate effect on meaning. See Levinson, *Pragmatics* (Cambridge: Cambridge University Press, 1983); Brown and Yule, *Discourse Analysis* (Cambridge: Cambridge University Press, 1983); Garza-Cuarón, *Connotation and Meaning* (New York: Mouton de Guyter, 1991); Harris, *Interpretive Acts: In Search of Meaning* (New York: Oxford University Press, 1988).

7 Calvert, "Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations" (1995) 26 Pacific LJ 933, 947.

8 *Sim v Stretch* (1936) 52 TLR 669 (HL).

9 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157.

10 See *Note*, "Court Distinguishes Statements which may be Considered Defamatory per se or per quod" in (1993) 37 Trial Lawyer's Guide 471. See *Kolegas v Heftel Broadcasting Corp* 154 Ill 2d 1 (1992).

11 *Laws NZ*, supra at note 2, at para 215; *Kirk v AH & AW Reed* [1968] NZLR 801 (SC). In New Zealand, this rule of common law has now effectively been codified by s 36 of the Defamation Act 1992.

Blanchard J stated the following:[12]

> If a newspaper prints that X is under investigation by the police an ordinary and fair minded reader will not conclude that X is guilty of something but will proceed on the basis that the investigation will reveal no criminal conduct.

With respect, his Honour's words offer a definitive view on how a particular type of publication is to be interpreted.[13] This leads one to suspect that appeals of this kind essentially become exercises in determining whether a given publication was *in fact* defamatory. The question now raised is this: to what extent do such legal interpretative guidelines concur with the subconscious guidelines we follow in everyday natural language use?

Drawing upon linguistic tools of analysis, this article seeks to compare legal rules of construction in ascertaining defamatory meaning as opposed to the rules which all natural language users would follow absent from a legal context. For it is an academic linguist, perhaps more so than anybody else, who attempts to locate words in their original context in order to ascertain how those words were actually understood. Proceeding from the assumption that the tort was originally designed to protect a person's reputational interest,[14] it will become clear that there are instances where the law of defamation deviates significantly from certain linguistic maxims. The inference which might then be made is that the concept of defamation is often little more than a legally generated fiction.

II: WHAT IS "DEFAMATORY"?

New Zealand's Defamation Act 1992 does not provide a definition of what amounts to a defamatory publication. The essential reason expressed for not introducing a statutory definition was that it was considered to be too difficult a task, and therefore deemed inappropriate.[15] This should not be considered an unreasonable decision, as Professor Burrows would agree: "[i]t is extraordinarily difficult to propound a single comprehensive definition of what amounts to a

---

12 Supra at note 1, at 7.

13 This is not an isolated example. In *Charleston v News Group Newspapers Ltd* [1995] 2 WLR 450, 456 (HL) Lord Bridge's words similarly presuppose certain facts about the interpretative process: "[T]he proposition that the prominent headline, or as here the headlines plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines, is to my mind quite unacceptable."

14 *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (1977) 7.

15 Ibid, 20-22. Consideration was given to the statutory definitions used in other jurisdictions. However, none were considered satisfactory.

defamatory statement":[16]

After reviewing the case law, the McKay Committee on Defamation (the "McKay Committee") concluded that the various common law formulations, which had evolved over time, required no modification.[17] These formulations are:

(i) A statement which may tend to lower the plaintiff in the estimation of right-thinking people generally;[18]
(ii) A false statement about a man to his discredit;[19]
(iii) A publication without justification which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule;[20] and
(iv) A statement about a man which tends to make others shun and avoid him.[21]

Significantly, there is no single definition. A criticism of this could be that a series of definitions is inconsistent with the principle of certainty in the law. However, because defamation deals with language as it is being used in its natural environment, namely society, an assortment of definitions perhaps more accurately reflects the generally volatile nature of the interpretative process inherent in natural language use:[22] a single definition would be too restrictive. Furthermore, the McKay Committee acknowledged that none of the four formulations provided an exhaustive definition of defamatory matter in itself.[23] The concept of "defamatory" should therefore be regarded as an amalgam of definitions, sufficiently broad and flexible to cover a variety of situations as they arise. Such situations have included publications making reference to a plaintiff's sexual propriety,[24] mental competence,[25] sobriety,[26] and many more.[27]

There is nevertheless a common theme running through all four definitions: the sum and substance of a defamatory publication is that it must do harm to the

16 Burrows, *News Media Law in New Zealand* (Auckland: Oxford University Press, 3rd ed 1990) 10.
17 Supra at note 15.
18 Supra at note 8.
19 *Scott v Sampson* (1882) 8 QBD 491.
20 *Parmiter v Coupland* (1840) 6 M and W 105.
21 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.
22 See generally, Aitchison, *Words in the Mind: An Introduction to the Mental Lexicon* (Oxford: Blackwell, 1987).
23 Supra at note 14, at 20.
24 *Sefton v Baskin* (1918) 37 NZLR 157 (SC); *New Zealand Magazines Ltd v Hadlee* supra at note 1.
25 *Pearce v Symes* (1909) 28 NZLR 562 (SC).
26 *Pattison v Jones* (1828) 108 ER 1157; *Irwin v Brandwood* (1868) 159 ER 397; *McRae v Australian Consolidated Press Ltd*, noted in *The Press*, 28 April 1994. *McRae* was heard before Tompkins J and jury in the High Court, Auckland.
27 One text lists fifty-five distinct categories of defamatory imputations, including a catch-all "general" category. See Brown, *The Law of Defamation in Canada* (Ontario: Carswell, 1994).

plaintiff's reputation.[28] Although the concept of "reputation" is itself problematic, for the purposes of this article it is enough to know that a person's reputation is an evaluative social construct which manifests itself in the minds of other members of society.[29] A defamatory publication is therefore one which induces its audience to change its opinion about the plaintiff in a negative direction.[30] A publication should *not* be considered defamatory if the audience to whom it is published thinks no less of a person after having read it.

The tort, however, has now developed to the extent that damage to reputation is not an indispensable element in a defamation action.[31] In a recent New Zealand decision, for example, a prominent businessman succeeded in a claim and was awarded $40,000 in general damages, yet there was no evidence which suggested his commercial life had been adversely affected.[32] Decisions of this kind raise serious linguistic concerns. How can a publication be deemed defamatory if a plaintiff has not actually been defamed? To understand the nature of these concerns, we must examine the method by which meaning is constructed. How is the defamatory sense determined?

III: CONSTRUCTING MEANING

Suppose the evening news broadcasts a story which informs us that "George Smith, popular local government councillor, was spotted soliciting the services of a prostitute". How do we know that the publication is defamatory? Is it the meaning of a particular word, say "prostitute", which leads us to that foregone conclusion, or is it a combination of the meanings of several words? At some point, when we were watching the broadcast, our opinion of Mr Smith changed — in a negative direction. Thus, it may be that Mr Smith's case is one upon which we can all agree that the publication was *obviously* defamatory, and a court would find likewise. But to end the analysis there would leave the concept of "defamatory" in an esoteric state; in ascertaining the defamatory, we would be having recourse to mere "gut feeling".

Fortunately, the common law recognises the need for a systematic analysis of allegedly defamatory matter. A number of basic legal maxims exist which are

---

28 Supra at note 14, at 7; Watterson, "What is Defamatory Today?" (1993) 67 ALJ 811, 812; "[D]amage to one's reputation is the essence and gravamen of an action for defamation": *Gobin v Globe Publishing Co* 649 P 2d 1239, 1243 (1992).

29 Supra at note 7, at 940. The *Concise Oxford Dictionary* (Oxford: Clarendon Press, 7th ed 1987) defines reputation as "what is generally said or believed about a person's or thing's character or standing".

30 Calvert, ibid.

31 See generally, Watterson, supra at note 28, in which the author draws upon cases from several common law jurisdictions which demonstrate that "defamatory" imputations do not necessarily have to be disparaging of a plaintiff.

32 *Cushing v Peters (No 3)* [1996] DCR 322.

to be applied at the preliminary stage of constructing the meaning of a publication. However, although not entirely contradictory of these legal rules, certain fundamental linguistic principles would suggest that a different method of inquiry be followed. The basic methodologies of these two schools of thought — legal and linguistic — are set out below for comparison.

1. The Basic Legal Methodology

The McKay Committee recognised that the common law has made a distinction between different types of defamatory meaning:[33]

(a) Natural and ordinary meaning:
  (i) The literal[34] meaning; or
  (ii) The "false" or "popular" innuendo (inference).

(b) "True" or "legal" innuendo.

As will be explained, it is difficult to identify any linguistic premise which could justify the legal distinction made between (a) and (b). However, for practical legal purposes, the distinction becomes important with regard to procedure in defamation cases.[35] An explanation of each type of meaning is now given.

(a) Natural and Ordinary Meaning

The McKay Committee was of the view that the "natural and ordinary" meaning is that meaning which the ordinary person would place upon the words in the context in which they are published.[36] Indeed, the common law approach to constructing meaning has been summarised thus:[37]

> [Words] are to be construed in their appropriate, common, natural, ordinary, plain, popular and usual sense, and given their fair, natural, obvious and ordinary meaning .... The natural and ordinary meaning is not necessarily the literal meaning of the words, but that meaning which they would naturally convey to those reading or hearing them, giving the words their ordinary signification. It includes any inferences and implications which the words reasonably may bear.

---

33 Supra at note 14, at 24.

34 Cf Justice Blanchard's words supra at note 1.

35 See s 37 of the Defamation Act 1992.

36 Supra at note 14, at 24.

37 Supra at note 27, at 5-4 to 5-6, citing a different authority for each adjective in this quotation; *Hill v National Bank of New Zealand Ltd* [1985] 1 NZLR 736, 749 (HC); *New Zealand Magazines Ltd v Hadlee* supra at note 1, at 6.

The rule can first be seen as having developed from the notion that interpretation on language varies infinitely.[38] For the sake of certainty, some kind of objective criteria was therefore required to assess meaning and identify the defamatory sense. Secondly, policy reasons have further constrained the legal interpretative process. In the High Court of Australia, Mason J expressed:[39]

> A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. It is one thing to say that a statement is capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first, not the second, proposition.

Hence, objectivity is the key consideration when constructing meaning in the law of defamation. The many different adjectival phrases which riddle the common law, such as "ordinary", "plain", and "fair", are merely variations on a theme.

(b) "True" or "Legal" Innuendo

In contrast, where a plaintiff pleads that the publication contained a "true" or "legal" innuendo, the court is being asked to consider subjective meaning. That is, the defamatory sense is not apparent to an ordinary reader, but apparent only to a select class of readers. These readers are privy to certain extraneous facts, not expressed in the publication, which allow the inference of a defamatory sense to be made.[40] An often cited example of this type of defamatory publication is *Cassidy v Daily Mirror Newspapers Ltd.*[41] In that case, a picture of Mr Cassidy and a young woman was published with a caption which read: "Mr Cassidy, the racehorse owner, and Miss X, whose engagement has been announced". Mrs Cassidy successfully sued in defamation on the grounds that, whilst the average reader would not infer any defamatory sense, those who knew Mrs Cassidy might think she had never been legitimately married and was therefore living in sin. Recourse was therefore had to the actual thoughts of actual readers of the publication.

---

38 Lord Shaw's words in *Stubbs Ltd v Russell* [1913] AC 386, 398 epitomise this view.

39 *Mirror Newspapers Ltd v Harrison* (1982) 56 ALJR 808, 812. In *New Zealand Magazines Ltd v Hadlee* supra at note 1, at 9-10, Barker J expressed similar policy reasons.

40 Supra at note 14, at 24.

41 [1929] 2 KB 331 (CA), cited in Burrows supra at note 16, at 25.

The McKay Committee emphasised that the importance of this second category of defamatory meaning is that it constitutes a completely separate cause of action from an action brought under the "natural and ordinary meaning" head.[42] However, the linguist would draw attention to the view of the common law, as expressed by the McKay Committee, that words can actually "bear some extended meaning beyond their natural and ordinary meaning".[43] The distinction is highly artificial. In this respect, the assumption which the common law makes about natural language interpretation is dubious.

(c) Critical Observations

Firstly, the essential difference between the two types of meaning is that, on the one hand, the "natural and ordinary" meaning is determined objectively, whilst on the other hand "true" or "legal" innuendo is determined subjectively. Thus, there exists an irreconcilable inconsistency in the law's approach to constructing meaning. This inconsistency does not arise in the basic linguistic methodology discussed below.

Secondly, the phrase "natural and ordinary" suggests that the application of this common law rule is a relatively simple task: given any publication, after asking oneself what the natural and ordinary meaning of that publication is, one should naturally and ordinarily be able to arrive at a conclusion as to its defamatory sense fairly quickly. Yet this approach bears an uncanny resemblance to the "gut feeling" approach described earlier. The rule provides no further assistance in tracing the source of the defamatory sense. It is perhaps for this reason that Fleming has described the rule as a "strange dogma".[44]

Judges have seldom ventured into a deeper analysis of the semantics and pragmatics of the English language in defamation cases. Nevertheless, one of the most astute judicial observations on the subject of language interpretation was made by Brennan J in the High Court of Australia:[45]

> That simple question [of whether the words conveyed a defamatory sense] embraces two elements of the cause of action: the meaning of the words used (the imputation) and the defamatory character of the imputation.

Although his Honour did not proceed to elaborate upon the distinction, his words reflect a basic methodology which would be applied by a linguist in a defamation case. This linguistic methodology is now outlined.

---

42 Supra at note 14, at 24.

43 Ibid.

44 Fleming, *The Law of Torts* (Sydney; Law Book Co, 8th ed 1992) 530.

45 *Readers Digest Services Pty Ltd v Lamb* (1982) 56 ALJR 214, 216.

2. The Basic Linguistic Methodology

Linguists also make distinctions between types of meaning, of which all are assumed to be "natural and ordinary". For the purposes of this article, the linguistic distinction of primary importance is that one made between *denotative* meaning and *connotative* meaning.[46]

(a) Denotation, Connotation, and the Defamatory Sense

As a preliminary illustration of the distinction between denotation and connotation, consider the following two sentences:

> "Ms White is *clever* when it comes to filing her tax return."
> "Ms White is *cunning* when it comes to filing her tax return."

Denotatively, these propositions have identical meanings. The cognitive linguist would point out that the semantic cores of the words "clever" and "cunning" both *denote* the attribute of "ingenuity" — the words are synonymous. Hence, the two propositions both function to attribute this quality to Ms White in respect of her tax return filing ability.

On the other hand, the connotative meaning of the two propositions differs. The connotative meaning of a word essentially refers to that word's "capacity to produce a certain emotional effect upon the hearer or listener".[47] It is that aspect of meaning which allows us to infer that Ms White is bad for being "cunning" but leaves us feeling envious (or indifferent) when she is called "clever". The connotation of a proposition is defined by the associations of images, experiences, and values we make with the denoted proposition.[48]

The distinction between denotation and connotation may appear to be highly theoretical and often unclear at points.[49] However, it is a useful distinction to make for the purposes of the law of defamation. Consider, for example, the word "communist". In the United States, cases which involved a publication imputing the plaintiff to be a communist are inconsistent in their determinations as to whether such publications convey a defamatory sense.[50] The denotative meaning of "communist" has never changed. The connotative meaning, however, has

---

46 The terminology of the denotative/connotative dichotomy differs amongst linguists. The distinction is also known as the cognitive/affective or referential/emotive dichotomy. See Garza-Cuarón, supra at note 6, at 175.

47 Ibid.

48 Ibid, 120.

49 "The varieties of connotation are countless and indefinable and, as a whole, cannot be clearly distinguished from denotative meaning." Bloomfield, *Language* (London: Allen & Unwin, 1961) 155 as cited ibid, 157.

50 *Washington Times Co v Murray* 299 F 903 (1924) (imputation held to be defamatory); *Garriga v Richfield* 20 NYS 2d 544 (1940) (held not to be defamatory); *Herrmann v Newark Morning Ledger Co* 140 A 2d 529 (1958) (held to be defamatory).

fluctuated with the political climate of the day. The general public was more hostile towards communism in the 1950s and was therefore likely to associate far more hostile values with the word then, as opposed to ten years earlier. As the connotative meaning has changed, so has the defamatory meaning. It is here that one draws the conclusion of the defamatory sense having its origins in the connotative meaning of a publication.[51] Negative values can breed negative connotative meaning. This, in turn, can result in an opinion change in a negative direction, thereby breeding a defamatory sense.[52]

(b) The Volatile Nature of the Defamatory Sense

The history of "communist" demonstrates how easily connotative meaning, and consequently the defamatory sense also, can change over time. Perhaps the essential reason for this volatility is that connotative meaning is dependent on extra-linguistic factors of language use which are unique to a particular language user's social identity. As explained earlier, connotative meaning derives itself from language users' own images, experiences, and beliefs. This suggests an inherently subjective meaning in the defamatory sense. This in turn suggests that the legal distinction between "natural and ordinary" and "true" or "legal" innuendo is a linguistically redundant one. One academic linguist has noted:[53]

> Different speakers may hold partly different beliefs about the meaning and applicability of words, so that the set of implications that one speaker will accept as following from a given utterance may differ, to a greater or lesser degree, from the set of implications that another speaker will accept as following from the same utterance.

From a linguistic perspective, this passage indicates that it is dangerous to assume that any publication can possibly be defamatory in itself.[54] Furthermore, the question of whether a publication is defamatory should not be reduced to simply requiring a "yes" or "no" answer. Rather, it is a question of degree. Certainly, there are those publications where it would seem that very little argument needs to be made to establish a lowering of a person's esteem in the minds of others. The case of a newspaper article which imputes criminal conduct on the part of the plaintiff poses a classic example.[55] Yet whether a defamatory sense should be deemed to attach to a humorous publication, or to words which bear negative connotation to only a specific section of the community, is more debatable. "Defamatory" is a difficult concept.

---

51 Hence the astuteness of Justice Brennan's distinction between "the imputation" (ie, the denotation) and the "defamatory character of the imputation" (ie, the negative connotation).

52 See supra at notes 29 and 30 and accompanying text.

53 Lyons, supra at note 5, at 205.

54 Cf supra at note 10 and accompanying text.

55 *McKay v Southam* [1956] 1 DLR (2d) 1 (CA).

The difficulty arises from the fact that there are a great many variables that can come to determine connotative meaning:[56]

> The isolated word is inserted into a larger structure, which determines what is thought in the isolated word; that is to say, *context* determines meaning in a concrete linguistic situation.

Again, these words suggest that no word should be considered inherently defamatory. To determine whether particular words convey a defamatory sense, close consideration should be given to the *context* in which the words are published. The pragmatic linguist would advance the notion that the identification of relevant features of context should be a paramount function of courts in defamation cases. The following section of this article now considers certain features of context, their significance in everyday discourse, and the relative importance they have been given by courts in the law of defamation.

IV: CONTEXTUAL CONSIDERATIONS

Courts have often asserted that context is crucial in ascertaining the defamatory sense.[57] However, in 1994 a jury awarded $375,000 to a plaintiff who was referred to as being "regularly pissed".[58] The defence argued that the words were not meant to be taken seriously and that, by the very nature of the publication (a gossip column with a humorous and exaggerated tone), a defamatory sense should not be so easily inferred. Nevertheless, the case resulted in one of the highest awards of damages for defamation seen in this country in recent times. For the linguist, the result raises an elementary question: in interpreting the words, was any consideration at all given to the context of the publication?

As demonstrated by the denotation/connotation distinction outlined above, a fundamental principle that the linguist propounds is that understanding a publication involves a great deal more than knowing the dictionary definitions of the words published and the grammatical relations between them. Whether it be the speaker's sarcastic tone, or the general source credibility of the article, these are aspects of language use which may ultimately lead a reader to infer a defamatory sense or no defamatory sense. When such features of context are not duly considered in reconstructing the meaning of a publication, an unnatural interpretation results.

A problem arises, however, in determining exactly what features in a

---

56 Baldinger, *Teoría Semántica: Hacia una Semántica Moderna* (Madrid: Ediciones Alcalá, 1970) 36, as cited in Garza-Cuarón, supra at note 6, at 135 (italics in original).

57 *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174, 182 per Reynolds JA.

58 *McRae v Australian Consolidated Press Ltd*, supra at note 26.

situation of publication are relevant to the interpretation of that publication. The common law appears to offer no comprehensive definition of "context" which delimits its scope. As is the case with the phrase "natural and ordinary", the common law concept of "context" may then be prone to being labelled as a strange dogma. It is a concept ill-defined by the courts, in practice its reference being used more as a rhetorical device than as a substantively correct linguistic observation.

Yet academic linguists themselves have difficulty in providing a universal definition of context, and would agree that there is no adequate theory that can predict all features relevant to understanding.[59] There are a number of contextual features which have received more academic attention than others. Specifically, these include:[60] *participants* (typically, the addressor and addressee); *medium* (eg, a newspaper as opposed to verbal communication); *style* (which ultimately sets the tone of publication); *setting* (the time and place of the publication); *topic* (the subject matter of the publication); and *co-text* (the text which surrounds the words at issue). Any of these features may have a significant impact on the interpretation of a given publication. Each feature will now be examined in relation to the construction of the defamatory sense.

1. Participants

In evaluating the effect context has on the understanding of everyday language, what must be considered *minimally* are the beliefs, assumptions, state of knowledge and attentiveness of those participating in the communication at hand.[61] Participants relevant to defamation cases are those of publisher (the "speaker") and its audience (the "hearer").

(a) The Speaker

The common law position on whether a publisher's beliefs, assumptions, and state of knowledge can be taken into account in determining the publication's meaning has long been clear, as expressed by the McKay Committee:[62]

> In ascertaining the natural and ordinary meaning which the ordinary reader would place upon the words, ...the intention of the publisher [is] completely irrelevant.

To some, the reasoning here may seem logically sound: whether a publisher

59 Levinson, supra at note 6, at 25.

60 The terminology differs amongst linguists. The terms employed here are taken from Levinson, supra at note 6, Brown and Yule, supra at note 6, and Holmes, *An Introduction to Sociolinguistics* (London: Longman, 1992).

61 Levinson, supra at note 6, at 23.

62 Supra at note 14, at 25.

intended or did not intend to defame is irrelevant if the audience thinks less of the plaintiff either way. Hence, where a newspaper prints a story about a fictional character "Artemus Jones" and his adulterous exploits, but unbeknownst to the newspaper is the existence of a real Artemus Jones (happily married), the newspaper is liable in defamation.[63] Yet such a blanket rule which maintains the irrelevance of the publisher's intentions is not linguistically sound. Aspects of the mind of the publisher can certainly be linguistically relevant to the audience's understanding, given that those aspects are known to the audience:[64]

> The very possibility of understanding discourse depends on the user being able to calculate what the audience knows or is aware of and what attitudes it holds, and further to assume that *the audience will be aware that such calculations have occurred and such assumptions have been made.*

The truth of this linguistic phenomenon is perhaps illustrated best by the defendant publisher who actually intends to speak ill of the plaintiff. Consider, for example, the recent English case of *McLibel*,[65] where the defendant publishers, active members of the environmental group known as "Greenpeace", distributed a leaflet which allegedly defamed the McDonald's restaurant chain. For example, one passage stated that the McDonald's "fresh lettuce leaf" is treated with so many different chemicals that "[i]t might as well be a bit of plastic". As a matter of public record, Greenpeace is known to be a politically motivated organisation, and its communicative intentions are therefore also known to be politically motivated. With this in mind, the audience to whom the leaflet was published might at least subconsciously have made the inference that Greenpeace has a political axe to grind. The words published would be weighted by the audience accordingly.

It is not suggested that taking into account Greenpeace's conspicuous hostile intentions would necessarily result in a finding for the defendant. However, personal experience has shown us that our minds are less easily swayed by the boy who cried wolf. To infer a defamatory sense may therefore prove more difficult.

That the law explicitly excludes consideration of the publisher's intentions may therefore be seen to occasionally constrain the interpretation of a publication unnaturally. A recent English decision, however, may be seen as relaxing this stringent rule. In *Berkoff v Burchill*, Neill LJ asserted that "the perceived intention of the publisher may colour the meaning".[66] The Lord Justice's remark correctly implies the qualification that the publisher's intention will not always be relevant. Intentions are linguistically relevant only insofar as they can be inferred by the publisher's audience.

---

63 *Hulton & Co Ltd v Jones* [1910] AC 20.

64 Harris, supra at note 6, at 60 (emphasis added).

65 *McDonald's Corp v Steel* 1990-M-No 5724.

66 [1996] 4 All ER 1008, 1018 (CA).

(b) The Hearer

The meaning of a statement is effective only to the extent of its registering in the mind of the hearer or reader. In relation to the defamatory sense, therefore, a particular publication should be considered defamatory only if the particular audience to whom it is addressed construes it in such a way. This assertion is founded both in basic linguistic theory and in common sense.

However, the law's stance towards this contextual feature is markedly different from that taken by linguist. Whilst there may have been a time when courts recognised the importance of an actual audience's understanding,[67] the position today is quite the opposite. The McKay Committee expressed the modern approach:[68]

> [I]t is not permissible to take into account or lead evidence concerning the natural and ordinary meaning which a reader or class of readers in fact placed upon the words .... What does matter is what the adjudicator at the trial thinks is the one and only meaning that the *readers as reasonable men should have collectively understood the words to bear.* That is "the natural and ordinary meaning" of words in an action for libel.

The general tenor of these words reflects the basic objective legal methodology involved in constructing the defamatory sense. In examining a given publication, one must ask whether a hypothetical "reasonable man" or "right-thinking member of society" would think less of a plaintiff after having read it.

One of the main reasons for an objective test is that introducing evidence as to the understanding of the actual recipients of the publication would add to the length and expense of trial, and may ultimately confuse a judge or jury.[69] A right-thinking person's understanding offers a standard which "most nearly approximates to the actual meaning or meanings which the actual readers of the publication as a class are likely to have placed upon the words complained of".[70] This reasoning may have a certain appeal when considering publications which have been widely disseminated, such as a daily newspaper. Yet, when dissemination is limited to one reader or a class of readers who would understand the publication not as the wider public would understand it, the rule becomes problematic.

---

67 "[A] Court of Justice must read the words in the same sense in which the hearers would at the time they were spoken understand them": *Woolnoth v Meadows* 5 East 463 (1804), 471 per Grose J.

68 Supra at note 14, at 25 (emphasis added). The latter half of this passage is cited from *Slim v Daily Telegraph* supra at note 9, at 173.

69 Supra at note 14, at 25.

70 Ibid.

Consider the following scenario:[71]

> *A* receives a letter from *B* which states *C*, a young unmarried housekeeper, "went for confinement". This phrase was usually used in reference to pregnant women. However, *A*, ignorant of this usage of the words, did not understand the words in that way and therefore the questioning of *C*'s chastity was never effectively conveyed.

Because the right-thinking person would have understood the words as they are *usually* understood, *C* would be able to plead a strong case of defamation in a court of law, despite the fact that *A* thinks no less of her. The possibility that a plaintiff can sue in defamation despite not having had their reputation tarnished has been judicially acknowledged:[72]

> The plaintiff does not have to prove that persons to whom it was published in fact did think less of him; indeed a person may be defamed even though those to whom the statement is published know it to be untrue.

(c) Criticising the Right-Thinking Person

The concept of the right-thinking[73] person of society has been the subject of much legal criticism.[74] For the linguist, it would not be an exaggeration to state that the imposition of a right-thinking person is nothing short of heresy in natural language interpretation. This is because the right-thinking person effectively stifles the subjectivity dynamic that is an intrinsic feature of human discourse.[75] The courts have acknowledged the importance of context in constructing the defamatory sense. Yet the law of defamation has found it necessary to decontextualise publications in respect of their actual audiences. Although courts have not understood this as an affront to the concept of context itself, it has been observed that the right-thinking person makes meaning become artificial nonetheless.[76]

The artificial nature of an objective person might even obscure meaning to the extent that a statement is considered defamatory, yet *nobody* in society, after having read the publication, would actually have thought less of the plaintiff. If a jury is instructed to determine how a right-thinking member of society would

---

71 The scenario is based on the facts of *Farnya v Chorny* (1951) 4 WWR 171 (CA) where the plaintiff was successful in suing for defamation.

72 *Kerr v Conlogue* [1992] 4 WWR 258 (SC), per Prowse J. See, also, *Morgan v Odhams Press Ltd* supra at note 3, at 1252.

73 I use the term "right-thinking" generically here to cover the objective approach. It therefore includes the "ordinary", "reasonable", and "fair-minded" person.

74 See, generally, supra at note 27, at 5-23 to 5-24.

75 See supra at note 53 and accompanying text.

76 Supra at note 9, at 171-172.

have perceived the publication, the "third-person effect" suggests that such a jury is more likely to find for the plaintiff than if the jury members were directed to consider what inferences they themselves had made from the publication:[77]

> [P]eople tend to believe that *they* are not affected by media messages as strongly as are *others* exposed to the same message .... The third-person notion suggests that jurors in a libel trial may wrongly assume that the effect of defamatory publications is greater on others than on themselves.

The common law concept of a right-thinking person necessarily breaches a fundamental maxim of pragmatic linguistic theory — it has no regard to the thoughts of a subjective audience. Yet to be argued in court is that, by implication, the right-thinking person also breaches the New Zealand Bill of Rights Act 1990 ("NZBORA"). Section 13 of the Act states:

> **13. Freedom of thought, conscience, and religion —**
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

That is, if *A* is of the opinion that *C*'s reputation has come to no harm but a right-thinking person would think otherwise, by considering *A*'s understanding irrelevant the law can be seen as subtly impinging upon *A*'s freedom to think as she pleases.[78]

That a right-thinking person's understanding offers a standard which "most nearly approximates to the actual meaning"[79] is not a convincing argument for compromising the actual audience's understanding of a publication, nor for compromising its right under s 13 of the NZBORA. However, there are policy reasons which are advanced to support the right-thinking person approach to interpretation. Whilst the linguist is not concerned with making normative judgments about an audience's state of mind, the law does not wish to give credence to a "wrong-thinking" person's understanding:[80]

> Thus, it should not be actionable to call a Klansman a "nigger-lover" merely because it may lower the plaintiff's esteem in the Klan.

---

77 Cohen *et al*, "Perceived Impact of Defamation: An Experiment on Third-Person Effects" (1988) 52 Public Opinion Quarterly 161, 162 (emphasis in original); Davison, "The Third-Person Effect in Communication" (1983) 47 Public Opinion Quarterly 1.

78 Perhaps this argument has not been made because argument on rights and freedoms in defamation cases has always centred around the defendant's right to publish (see, generally, Huscroft and Rishworth (eds), *Rights and Freedoms* (Wellington: Brookers, 1995) 175-192). The right of the publisher's audience to think as they please would be considered subsidiary, especially in light of the fact that the audience is not party to a defamation action.

79 Supra at note 70.

80 Supra at note 27, at 5-23.

Specifically, the law has refused to give consideration to persons of a morbid or suspicious mind,[81] or perverse persons,[82] nor will consideration be given to a naive person's understanding.[83]

Whether or not the position held against the wrong-thinking person is a fair one, by ignoring an actual audience's understanding there exists the possibility that a plaintiff may be compensated for suffering no reputational harm. Surely this undermines the very essence of a defamation action.

2. Medium

The interpretation put on words can vary significantly, depending on the medium by which language is expressed. The morning newspaper, and likewise the late night television news, are mediums which are intrinsically authoritative, inevitably endowing every word used with the quality of seriousness. Conversely, the gossip column of a monthly lifestyle magazine might cast a certain degree of scepticism on every item under its head. Thus, the medium can have the effect of creating a number of assumptions in the minds of an audience. If not consciously, a reader's understanding of the words will subconsciously be coloured by these assumptions. In constructing the defamatory sense, therefore, the linguist would consider it essential to take into account the nature of this contextual feature.

In *Masson v New Yorker Magazine Inc*, Judge Kozinski stated the following:[84]

> Readers of reputable magazines ... are far more likely to trust the verbatim accuracy of the stories they read than are the readers of the supermarket tabloids or even daily newspapers, where they understand the inherent limitations of the fact-finding process. The harm inflicted by a misstatement in a publication known for scrupulously investigating the accuracy of its stories can be far more serious than a similar misstatement in a publication not known.

These words have been said to represent an implicit recognition by the common law of the contextual feature of medium.[85] But notwithstanding Judge Kozinski's opinion, historically the common law has not given the attention to this contextual feature that it linguistically deserves. In short, the case law suggests that there is no limit to the types of medium by which a defendant can invoke a defamatory sense. Words are considered to be no less defamatory if

---

81 *Keogh v Incorporated Dental Hospital of Ireland* [1910] 2 Ir 577; *IW Holdsworth Ltd v Associated Newspapers Ltd* (1937) 53 TLR 1029; *Farquhar v Bottom* [1980] 2 NSWLR 380.

82 *Farquhar v Bottom*, ibid.

83 Supra at note 71. See, also, the words of Mason J supra at note 39.

84 960 F 2d 896 (1992), 901-902 n 5.

85 Supra at note 7, at 946. Calvert implies, however, that this judicial comment lacks a certain impact because of it being relegated to a footnote.

expressed via a letter[86] or in shorthand notes.[87] A plaintiff could also mount an action for expressions published in a gossip column,[88] on a tombstone,[89] on a footpath,[90] or even for expressions written on the wall of a public toilet.[91]

Another medium which has not been treated any differently by the law is one which is becoming increasingly salient in the information technology age, namely the Internet. In *Rindos v Hardwick*,[92] Ipp J found words on the Internet which denigrated an anthropology professor's academic competence and imputed misconduct to be defamatory. This finding can be criticised in that the Internet is a seemingly unbridled medium.[93] Those of us who have ventured into the world of cyberspace will realise that for much of the information we find on the net, there is always a certain amount of cynicism lurking in the back of the mind as to its credibility. Any person vaguely familiar with its mechanics can anonymously publish unedited and uncensored material to be seen by the rest of the world. Thus are words exchanged on the Internet likely to be taken seriously? Furthermore, could they ever lower a person's esteem in the minds of others?

The law's reluctance to take medium into account seems to lie in the belief that "a falsehood is still a falsehood regardless of how or where it is published".[94] This is, nevertheless, an unsophisticated belief as it presupposes that readers are prepared to accept whatever they read. That is not to say that scrawlings on a toilet wall or allegations made on the Internet are incapable of conveying a defamatory sense. The point, however, is that the contextual feature of medium is underrated in the law. Consequently, a legal construction of meaning may result in a harsher interpretation of a publication than how it was actually understood by an ordinary person. Decontextualisation is again in operation. Plaintiffs may then succeed in defamation claims when nobody actually thinks less of them.

3. Style

Communication comes in different styles of expression which ultimately set the tone of a publication and can have a profound effect on the reader's understanding. The tone of a piece of prose can either be authoritative, for

86 Supra at note 71.

87 *Ostrowe v Lee* 256 NY 36 (1931).

88 *McRae v Australian Consolidated Press Ltd*, supra at note 26.

89 *Ralston v Ralston* [1930] 2 KB 238.

90 *Haylock v Sparke* (1853) 118 ER 512.

91 *Hellar v Biaco* 244 P 2d 757 (1952).

92 Unreported judgment, Supreme Court of Western Australia, 31 March 1994, No 1994 of 1993.

93 For a comprehensive critique of the case, see Auburn, "Usenet News and the Law" [1995] 1 Web JCLI, http://webjcli.ncl.ac.uk/articles1.html.

94 "Digital Defamation: An Overview of the Emerging Law of Libel and Invasion of Privacy" (1996) Satterkee *et al*, http://www.ssbb.com/digital.html.

example an encyclopedia, or it may be of a more jocular nature for example, a satirical allegory. Different styles can have different effects on connotative meaning. Linguistic style should therefore be considered relevant in determining the defamatory sense.

In general, the common law has recognised that the style of communication can play an important part in constructing meaning. In *Willows v Williams*, it was held that terms which merely insult or are vulgarly abusive of a person "are only offensive to a man's dignity and do not lower him in the regard in which he is held by other members of society".[95] Similarly, in *Willis v Katevich*, Fisher J concluded that on the facts:[96]

> [T]he ordinary reasonable reader of this article would observe that the article as a whole is written in a racy and hyperbolic style .... [T]he ordinary reader could not fail to notice the consistent exaggeration and generally childish extremes of expression throughout the article.

A strong policy reason for prohibiting such statements from being actionable is to discourage vexatious litigation.[97] Yet often it is difficult to say whether a particular style leads to the inference of a defamatory sense. Two such styles are now examined.

(a) Humour

Humour is a nebulous area in defamation law. Of course "a man must not be too thin-skinned or a self-important prig".[98] Similarly, in *Donoghue v Hayes* it was held that if it is obvious to every bystander that only a joke is meant, then no harm has been suffered and therefore no action may be brought.[99] However, a publisher will not always be immune from liability if the matter published is ridiculous. There are those publications which the courts have held to have gone beyond a joke and have entered into the realm of defamatory imputations.[100]

An example of particular interest is a case in which an action was brought in respect of the following publication:[101]

---

95 (1951) 2 WWR (NS) 657, 658 per Egbert J (SCC).

96 HC, Auckland, CP 547/85, 21 August 1989 as cited in Burrows, supra at note 16, at 34.

97 "If all vituperation and ridicule were actionable per se, litigation, and much of it petty, would engulf society": *Fey v King* 190 NW 519 (1922), 522 per Evans J.

98 *Burton v Cromwell Publishing Co* 82 F 2d 154 (1936), 155.

99 (1831) (Ir Exch) R 265.

100 See for example, *Vander Zalm v Times Publishers* [1979] 96 DLR (3d) 172 (SC); *Triggs v Sun Printing & Publishing Association* 179 NY 144 (1904); *Taylor v Beere* [1982] 1 NZLR 81 (CA); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449.

101 *Metro*, September 1992, 22. The case is *McRae v Australian Consolidated Press Ltd* supra at note 26.

> The *Sunday Star*'s regularly pissed (shurely regular *Pssst*? — Ed.) gossip columnist **Mary ("Toni") McRae** has had her leg in plaster after she "slipped on ice" outside her door in Mt Eden. McRae was recently most unkind about *Metro* which she described as "poor" and "anorexic". Perhaps she should remember the fate of INL's *Sunday* magazine aka *TV Viewer* which was given away in the *Sunday Star* and which was so poor and thin that it died within months of birth.

McRae argued that the publication suggested she was an alcoholic, and was therefore defamatory.[102] An expert in applied linguistics was called by the plaintiff to testify as to the publication's meaning.[103] The expert stated that the pun which played on the words "pssst" and "pissed" essentially functioned as a "double-edged sword", that the words were not funny, and ultimately that the publication constituted nothing more than "a piece of gratuitous very nasty gossip". Hence, the expert considered the words defamatory. Perhaps supporting her evidence are the words of one American Court:[104]

> Another subtle type [of publication] is open abuse under colour of a jest. Words may be uttered with malicious intent to hurt, while the speaker hides behind a screen of friendly humour. The courts look through all such disguises, and take note of the real imputations of such utterances.

Even so, the validity of McRae's claim should not be viewed as one so clear cut. In McRae's case, and in the other examples given above,[105] it is doubtful whether the plaintiff's personal or professional reputation was truly subject to more than a trivial degree of damage, if any damage at all. Indeed, it is true that some humour may be so cruel and harsh on the plaintiff that any reasonable person could imagine that the plaintiff would not be laughing. But we must remind ourselves that the essence of defamation is damage to reputation; not the personal understanding or hurt feelings of the plaintiff.[106] Harsh humour is

---

102 See the cases supra at note 26 for judicial authority that imputations of insobriety are capable of being defamatory.

103 Her testimony begins at page 134 of the court transcript. That the judge allowed this evidence to be admitted is extraordinary. Where words are claimed to be defamatory in their natural and ordinary meaning, such evidence should be considered irrelevant and inadmissible (see *John Fairfax & Sons Ltd v Hook* (1983) 47 ALR 477, 480 (FCA)). It should be noted, however, that defence counsel did not challenge the admissibility of the expert witness' testimony; the judge therefore made no ruling on the matter.

104 *Berry v New York Ins Co* 98 So 290 (1923), 292 per Bouldin J.

105 Supra at note 100.

106 To hold otherwise would result in the plaintiff being able to sue in defamation solely for hurt feelings; the law of defamation is ultimately then seen to impinge on the torts of invasion of privacy and intentional infliction of emotional distress. Watterson argues that defamation is having its definitional boundaries extended by the courts in this very way, supra at note 28, at 823. See also Amspacher and Springer, "Humour, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs" (1990) 31 William and Mary L Rev 701.

"humour" nonetheless, and humour in any form is likely to be taken considerably less seriously than non-humorous publications. A logical corollary to this is that the more ludicrous a statement, the more likely it is unbelievable and hence it should not be deemed defamatory.[107]

But we have already observed that the common law does not necessarily subscribe to this kind of logic.[108] Furthermore, one Australian commentator has noted that the common law now recognises a distinct category of defamatory imputations which does not require disparagement of the plaintiff's reputation; namely, publications which cast a "ridiculous light" on the plaintiff.[109] Watterson recounts the facts of a famous American case:[110]

> A nationally famous television evangelist is featured in a parody of a liquor advertisement, without his knowledge or consent, in a magazine renowned for its "black humour". The parody paints an outrageous and literally unbelievable picture of the evangelist as a drunk who has frequently committed incest with his mother in an outhouse.

Although on any reasonable interpretation of the advertisement, the depicted conduct of the evangelist is clearly untrue (and therefore is unlikely to disparage him), it is suggested that today such a publication would be considered defamatory.[111] Again, we are faced with the seemingly paradoxical proposition that a publication can be defamatory without the plaintiff incurring reputational harm. This common law position is perhaps refined by Judge Dalmer's words in the recent case of *Cushing v Peters*.[112] In that case the judge reasoned that, notwithstanding the fact that the plaintiff had suffered no reputational damage, the defamatory words still added a "gloss" to his reputation which was unsought and unjustified.

Judge Dalmer did not proceed to define what he meant by "gloss". In any case, a mere gloss is likely to be something quite different from a serious allegation which sits hard on the mind of a reader. For this reason, humorous publications of the kind described should be regarded with more caution. They are not prototypical of the concept of "defamatory".

---

107 "Commentators and courts have argued that because no reasonable person will believe what the court has deemed simple 'nonsense', such expression cannot be defamatory." Amspacher and Springer, supra at note 106, at 727; *Polygram Records v Superior Court* 170 Cal App 3d 543 (1985).

108 Supra at note 72.

109 Watterson, supra at note 28.

110 Ibid, 826. The facts are from *Hustler Magazine and Larry C Flynt v Jerry Falwell* 485 US 46 (1988).

111 Ibid, 826. The American jury of the actual case found that the publication was not defamatory because the parody could not reasonably be understood as describing actual facts about Falwell. Watterson cites *Boyd v Mirror Newspapers* [1980] 2 NSWLR 449 as authority for the non-disparaging "ridiculous light" defamatory imputation. Ibid, 819-820.

112 Supra at note 32, at 350.

(b) Opinion

Another style which writers might choose to adopt is to express their thoughts in the form of opinion. Expressions of opinion are statutorily protected by the law.[113] The reason they are protected, however, is not because such expressions are considered to convey no defamatory sense. Rather, the defence of "honest opinion" is generally regarded as "the very essence of freedom of expression";[114] everyone is entitled to express their own opinion. Consequently, the question of whether the words constitute "opinion" is usually considered post the determination of whether they convey a defamatory sense, that is, the words are defamatory *but* because they are expressed in the form of opinion, the defendant is saved. This method of analysis overlooks the reality that opinions, as opposed to assertions of objective fact, are recognised by readers for what they often are — patently subjective evaluations made by the publisher:[115]

> [F]actual statements describe a reality existing apart from the individual observer, while opinion statements necessarily implicate, at some deep level, the perspective or viewpoint of the speaker.

Hence, after having read a harsh opinion, the audience is left with this impression: the author holds an identified person in low esteem for having committed certain acts, but the author's view is not capable of objective verification.[116]

The distinction between "fact" and "opinion" is one of the most conceptually difficult areas in the law of defamation.[117] As Hansen has noted, the common law has recognised that the mere prefacing of obviously factual assertions by "I think ..." or "I believe ..." does not render such assertions harmless.[118] More problematic, however, are cases where what appears to be opinion, as defined by this article, is deemed by the court to be a statement of fact. Burrows has expressed with frustration:[119]

> A bare and unsupported statement will sometimes be classified as an assertion of fact rather than as a statement of opinion. Thus, to write "this man is a disgrace" would probably be held defamatory, for the statement is presented as a bald statement of fact .... In some ways, this is confusing terminology; it might be

113 Defamation Act 1992, ss 9-12. The defence of "honest opinion" was formerly known as "fair comment".

114 Burrows in Todd (ed), *The Law of Torts in New Zealand* (Wellington: Brooker's, 2nd ed 1997) 896; supra at note 14, at 37.

115 Hansen, "Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech" (1993) 62 Geo Wash L Rev 43, 55.

116 Ibid.

117 See, generally, ibid.

118 Ibid.

119 Supra at note 114, at 900 and at 900 n 265 (case citations omitted).

> clearer if the law stated simply that unsupported assertions are not defensible as honest opinion.

Conceptual difficulties aside, despite the law of defamation explicitly recognising that opinion is an identifiable linguistic style, issue is taken with the law's implicit assumption that it is a style not really relevant when it comes to constructing the defamatory sense. Opinion is equated with free speech by the law. Yet the semantic quality of words of opinionage is constituted much by connotative meaning, and consequently they should be considered relevant to the determination of defamatory meaning. The legal status of "opinion" in defamation needs some reconsideration.

4. Setting

> Whether a publication is defamatory depends on the circumstances of publication and will vary with time and place.[120]

Although the question of what something means ultimately turns on asking how a particular individual actually understood it, the broader social, cultural, and historical setting cannot be ignored. As social creatures, how we come to understand things is, to a certain extent, influenced by "the collective". No person could deny that such broader social forces were at work when we all came to understand the word "gay" as meaning something quite different from "happy".[121] In a similar way, a defamatory sense may attach to words depending on the prevalent social mores of the times.[122] What a word connotes will greatly depend on the attitude society has toward what that word denotes. Hence, in ascertaining the defamatory, it may often be of benefit to stand back and look at the publication as it is situated in the "big picture".

Whilst the law can be criticised by the linguist for its explicit rejection of actual participants' understandings, the same cannot be said when it comes to the broader setting as a contextual feature. The diversity of court rulings on imputations of communism is one example.[123] To illustrate further, to publicly announce of a person "[t]hou art a witch, and didst bewitch my mother's drink" may well have resulted in severe reputational injury back in 1628 when witchcraft was a serious community concern.[124] But with the advancement of scientific reasoning, a court today would recognise that such a nonsensical

120 *Short v Kirkpatrick* [1982] 2 NZLR 358, 366 (HC) per Eichelbaum J.

121 The example of the change in meaning of "gay" illustrates the linguistic phenomenon known as *semantic change*. It is a case of where not only the connotative meaning has changed, but its fundamental denotative meaning has also been redefined.

122 Reference to "social mores" was suggested by an anonymous author, "Blow up" (1994) 330 (7848) *Economist* 61.

123 See supra at note 50 and accompanying text.

124 *Hughs v Farrer* (1628) 79 ER 724.

accusation would make no reasonable person think any less of the accused individual.[125] Likewise, it has been suggested that whilst one celebrity was successful in suing a critic who said she had a fat bottom in 1987, she would have had little chance of success for the same allegation made in earlier times when fatness was in fashion.[126] Meaning will be constructed with close reference to the nature of the community.

The above examples illustrate the general tendency of connotative meaning to fluctuate with dynamics which are extrinsic to the core linguistic system. Yet whilst these examples may have been cases where there was a general community consensus as to the attitude held toward a particular state of affairs, ascertaining the defamatory becomes problematic when community values are indeterminate. An instance of the problem of indeterminacy today is the community stance towards homosexuality. Homosexuality will now be discussed in relation to constructing the defamatory sense.

(a) Publications Imputing Homosexuality

Individual perspectives on homosexuality are diverse in society, with some people having stronger views on the subject than others, at either end of the spectrum.[127] But one commentator, explicitly assuming society no longer views homosexuality as "taboo", has suggested that stating someone is gay will always be defamatory. This is not because we think less of a person for being homosexual, but rather "because the allegation would imply, falsely, that he was being underhand in hiding his sexuality".[128] But this deduction further begs the question of why some of us think him to be underhand — because he is homosexual?[129]

Case law concerning imputations of homosexuality is abundant in the United States, with decisions both supporting and rejecting the notion that such imputations can be defamatory.[130] But the reasoning in these cases has been criticised.[131] Rather than addressing the issue of what "homosexuality" connotes in the mind of the publisher's audience, the courts have determined the defamatory sense by merely having reference to the relevant state's sodomy

125 *Loukas v Young* [1968] 3 NSWR 549, 550.

126 Supra at note 122.

127 "Individual attitudes regarding homosexuality are as varied as the laws reflecting gay rights": Fogle, "Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech" (1993) 3 Law & Sexuality 165, 178.

128 Supra at note 122.

129 Compare, for example, the allegation that someone is a "closet stamp collector". We do not think less of her for having hidden this fact from us.

130 See, for example, *Buck v Savage* 323 SW 2d 363 (1959); In *Mazart v State* 441 NYS 2d 600 (1981); *Moricoli v Schwartz* 361 NE 2d 74 (1977).

131 Supra at note 127.

laws.[132]

However, a law may not reflect contemporary values.[133] Today, despite the passing of such legislation as the Human Rights Act 1993, which prevents discrimination on the grounds of sexual orientation, individual prejudices remain. The essence of a defamatory publication is that it causes its audience to change its opinion of a person in a negative direction. Although anti-discrimination laws and political correctness will prevent, to a certain extent, the exhibition of discriminatory behaviour, ultimately this is irrelevant in determining the defamatory sense. Defamatory meaning manifests itself in thoughts, not actions. The word "gay" evidently invokes a diverse range of values and beliefs in society. Attempting to resolve a claim of defamation by referring to a static piece of legislation oversimplifies the inherently complex and abstract nature of reputation and reputational damage.

Perhaps the essential flaw in all of the proposed analyses of whether "gay" conveys a defamatory sense is the tacit assumption made that society has only one set meaning for the word. No doubt, the assumption arises due to the law's objective approach to the construction of meaning. Nevertheless, the diverse range of views on the connotative meaning that arises in respect of the word "gay" raises questions which fundamentally challenge the basic legal methodology — What is the definition of "community"? Is the meaning of a publication determined by what the majority of that community thinks? These questions would not arise were the law to adopt a subjective approach to language interpretation. Although consideration of the contextual feature of setting is certainly helpful in many cases, where society's values are diverse and extreme, recourse should be had to the minds of the particular individuals who read the publication. When it is found that any one of these individuals has changed their opinion of the plaintiff in a negative direction, that is when the linguist would conclude that the plaintiff has been defamed. In short, in light of my observations made above, a widely disseminated publication imputing a person to be homosexual is likely to be defamatory.

(b) Concluding Remarks

The linguist would acknowledge that the law does take into account the contextual feature of setting. However, because of the law's objective approach in constructing the defamatory sense, it is a contextual feature which is probably given more consideration that it actually merits linguistically. As Holmes has pointed out, certain features of context may not always be relevant in constructing meaning.[134] For ultimately, it is the particular language user's understanding of a statement which matters.

---

132 Ibid, 184.

133 Ibid, 186.

134 Supra at note 60, at 12.

5. Topic

The actual topic of discussion in a piece of discourse will also have a bearing on interpretation. In a case of defamation, the topic of the publication is the plaintiff.[135] Before we ask whether we think any less of the plaintiff after having read the publication, we must first consider the assumptions we have initially made about his or her character. Thus, to say that a woman engages in sexual intercourse fortnightly may not ordinarily be insulting, but if we know that woman to be a nun then the words can be said to have tarnished her good name. One notable case is where it was said of a rabbi that he was *not* qualified as a "slaughterer" and that the meat he was "slaughtering" was not religiously wholesome.[136] The rabbi, insulted by the suggestion that he did not know how to slaughter animals, sued successfully for defamation. Implicitly, the Court recognised topic as a relevant feature of context.

As a corollary example, words which impute fraud may carry a negligible sting if the person to whom they are attributed is already a well-known convicted fraudster. In is case, because we already hold a negative opinion of the fraudster, the direction of that opinion does not change and therefore, by definition, does not constitute a defamatory imputation. It is an example which also demonstrates that even imputations of criminal conduct should not be considered defamatory per se.

New Zealand has its own statutory provision which allows this contextual feature to be taken into account:[137]

> **30. Misconduct of plaintiff in mitigation of damages —**
> In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

Criticism comes, however, with regard to the stage at which the plaintiff's present reputation is to be considered. Section 30 applies only when deciding how much to award in damages. Hence, there lies the subsequent implication that the contextual feature of topic is considered *after* constructing the defamatory sense. This approach only serves to sustain the integrity of the mistaken legal belief that certain imputations are inherently defamatory.

---

135 Of course, the plaintiff must be sufficiently referred to in the publication to make out a claim; this is essential in maintaining any action of defamation: *David Syme & Co Ltd v Canavan* (1918) 25 CLR 234.

136 *Axelrod v Beth Jacob of Kitchener* [1943] OWN 708.

137 Defamation Act 1992, s 30.

6. Co-text

Lastly, I wish to consider the feature of co-text. Co-text refers to the other words and phrases which surround the particular words said to be defamatory. As a preliminary illustration of the feature, consider the following sentence:

"Mr Brown has accepted bribes on numerous occasions."

Let us assume that, on its own, the statement is defamatory. But now, suppose that the sentence were followed by the words:

"This, however, is completely untrue."

The above example demonstrates that interpretation of one piece of text can be forcibly constrained by the other text that surrounds it. On the one hand, co-text might have the effect of ascribing a defamatory sense to a seemingly innocent word. On the other, it might cure words which would be considered defamatory if isolated from the publication as a whole.

Co-text is a contextual feature which has been given a fair amount of weight by the courts and often a judge will provide a sophisticated linguistic analysis of a publication. Consequently, the common law has produced a number of well-founded rules of construction which a linguist would find agreeable. These are now discussed.

(a) Balance

Where imputations which cast a negative light on the plaintiff's character are amidst other imputations which are clearly favourable to the plaintiff, the publication might not be defamatory.[138] This effectively amounts to a balancing exercise; in theory a positive imputation will neutralise a negative one. However, unkind words said of a plaintiff may have a greater impact on an audience than the list of good deeds that follows. One favourable comment may certainly diminish the harm done to a reputation. However, whether the publication as a whole then falls outside the scope of "defamatory" altogether is a difficult question. The balancing exercise is a delicate process.

(b) Clarification

Co-text can also serve to function as a clarifying device. An early American case offers an example:[139]

[T]o say of a man that he is a murderer, but afterward, before the individuals

138 *Australian Broadcasing Corporation v Comalco Ltd* (1986) 68 ALR 259, 297 (FCA).

139 *Trabue v Mays* 3 Dana (33 Ky) 138, 28 Am Dec 61 (1835),63 per Ewing J.

> separate in whose hearing the charge is made, to qualify the charge by stating that he murdered a hare, is not slander; for no impression is left upon the minds of the hearers that he was guilty of the crime of murder.

The significance of co-text in this respect was considered in the recent House of Lords decision of *Charleston v News Group Newspapers Ltd*,[140] where the faces of the plaintiffs (two Australian soap stars) had been superimposed onto a photograph of two pornography stars. The end result was a picture which portrayed the plaintiffs as engaged in unseemly intercourse. The defendant published the picture (although the lower half of the bodies was obscured) under a headline reading "Strewth! What's Harold up to with our Madge?". The plaintiffs may have had a cut and dried case but for the body text and a less prominent caption that accompanied the article: "Soap stud: Harold and Madge's faces are added to porn actors' bodies in a scene from the game". It was held that the caption and the main body of the text made clear that it was not actually the plaintiffs who were photographed, thereby negating any defamatory sense which may have initially been inferred by the reader. Although the decision can be criticised because undue emphasis may have been given to a relatively inconspicuous caption, Lord Bridge's reasoning has, in essence, a solid linguistic foundation.[141]

(c) The "Bane and Antidote" Theory

The example of Mr Brown above, illustrates that where defamatory words are shortly followed by a statement to the effect that the words were wrong, a defamatory sense cannot be inferred. In *Linney v Maton*,[142] the plaintiff was called a "damned lying whore" but this was then immediately withdrawn by the defendant. Justice Wheeler held that the immediacy of the withdrawal effectively functioned as a negating device so that no defamatory impression was left in the minds of the hearers.[143]

The common law has termed this phenomenon of language the "bane and antidote" theory.[144] That is to say, the publication will be considered benign where:[145]

> [T]he antidote consists in a statement of fact destructive of the ingredients from which the bane has been brewed.

However, this attractive metaphor will not save the defendant in every case,

140 Supra at note 13.

141 See his Lordship's words, quoted supra at note 13, at 456.

142 13 Tex 449 (1855).

143 Ibid, 458.

144 *Chalmers v Payne* (1835) 150 ER 67.

145 *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418n, 420 per Samuels JA; *New Zealand Magazines Ltd v Hadlee* supra at note 1, at 8 per Blanchard J.

as was held in the recent Court of Appeal decision of *New Zealand Magazines Ltd v Hadlee*.[146] In *Hadlee*, the defendant publisher printed a story which concerned a rumour about the plaintiff, Lady Karen Hadlee. The relevant words are reproduced:[147]

> It's time to set the record straight and shut up the gossips — Anita McNaught is not having an affair with Sir Richard Hadlee's wife .... In fact, just about the only thing that didn't change was the extraordinary rumour that she had run off with Lady Hadlee .... "I just hope the poor woman .... hasn't had a year of people coming up to her saying 'Are you really having an affair with Anita McNaught?'"

Lady Hadlee claimed that under the natural and ordinary meaning of these words, the defamatory imputations which are inferred are: (i) that she is or was having an affair with Ms McNaught; and (ii) that she is a lesbian or, alternatively, bi-sexual. Defence counsel's argument centred on the point that throughout the article the writer made many statements to the effect that the rumour was false, and that Ms McNaught's words further proved the falsity of the imputations — hence the "antidote" argument. The defence's argument is convincing, and Blanchard J thus held that the first defamatory imputation was dispelled.[148] However, his Honour refused to hold the same as per the second imputation:[149]

> Mr Latimour argues that with [the dispulsion of the first alleged defamatory imputation] goes any suggestion that Lady Hadlee is a lesbian or bi-sexual. Not so, I think. To say of someone that they have been conducting themselves on a particular occasion or with a particular person in a way which is regarded by many people as improper may in the circumstances carry an inference that the person is the kind of man or woman who would indulge in such behaviour on other occasions or with other people.

Implicitly, Blanchard J has correctly identified what linguists call *linguistic presupposition*.[150] Whilst the defendant's article never explicitly stated the plaintiff to be a lesbian, it nevertheless presupposed the fact. Hence, although the explicitly stated imputation of Lady Hadlee having had an affair with Ms

146 Supra at note 1.

147 Cited by Blanchard J, supra at note 1, at 2.

148 Ibid, 9 (dissenting on this point).

149 Ibid. Justices Henry and Barker disagreed with Blanchard J in respect of his finding that the first imputation was incapable of being defamatory; they found that the plaintiff had a valid claim in both statements of claim. In the opinion of the author, the approach of Blanchard J should be preferred over that of Barker J who reasoned that there is "no smoke without fire". Justice Barker's judgment is more reflective of the common law's general disdain for malicious gossip and rumours, and does not bear the sophisticated analysis of the bane/antidote doctrine apparent in Blanchard J's judgment.

150 The concept of presupposition is dealt with by Lyons, supra at note 5, and Levinson, supra at note 6.

McNaught was rebutted, to escape liability entirely the defendant should have also categorically denied the underlying presupposition and did not. Justice Blanchard's judgment should therefore be regarded as a carefully considered application of the "bane and antidote" theory, the distinction he makes being one which would be made by an academic linguist.[151]

(d) The Apology

An apology functions similarly to the bane and antidote theory, although it goes further in respect of its social effect. By publishing an apology, the publisher voluntarily declares that the plaintiff had unequivocally been wronged by the initial publication, but also that the publisher had no excuse, defence, justification, or explanation for committing that wrong.[152] In *Pilcher v Knowles*, Edwards J held in this respect:[153]

> In some cases the subsequent action of the defendant might be such as really to wipe out the injury, and to disentitle the plaintiff to more than nominal damages.

It is for this reason that it can be argued that the existence of an apology can be relevant in constructing the defamatory sense. Consideration must be given not only to the words complained of, but also to other words which might subsequently remedy the harm done.

However, this raises two points of concern. First, if an apology is not framed carefully, the defendant can often exacerbate the initial harm done.[154] The case of *McRae v Australian Consolidated Press Ltd* offers such an example:[155]

> APOLOGY
>
> **Mary Asunta ("Toni") McRae**, the *Sunday Star*'s gossip columnist, has taken strong exception to comments made about her in September's Ferret column. *Metro* wishes it to be known that the comments about drinking were meant to be a pun and were intended to be taken humorously. *Metro* unreservedly withdraws the comments. If anyone has taken them seriously and holds Ms McRae in lower esteem, either personally or professionally, as a result of what was published, *Metro* sincerely apologises to Ms McRae for any damage,

---

151 Again, note the irony of his Honour's words supra at note 1. The author, however, ultimately disagrees with all three judgments that any of the imputations alleged were capable of being defamatory. The Court did not address the issue of whether the "gossipy" nature of the magazine could have diminished the story's credibility (ie, consideration was not given to the contextual feature of medium).

152 Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991) 17.

153 (1901) 19 NZLR 368, 378 (SC).

154 "Retractions are often dilatory, offensive, and ineffective": *Kehoe v New York Tribune Co* 241 NYS 679 (1930), 680.

155 Supra at note 101, at 30.

personal or professional, she may have suffered.

At trial, the expert witness was asked to comment on the effect of these words.[156] She concluded that the published apology did not have the effect that an apology ought to have. Focusing on *Metro*'s use of the word "if", the expert submitted that the conditional tenor of the words expressed suggested that *Metro* lacked sincerity.[157] Indeed, the words expressed can be seen more as what linguists would call an *account*, as opposed to an apology.[158] In particular, the second sentence of the "apology" expresses a justification of the original article complained of. An apology must amount to a full and frank withdrawal of the charges conveyed.[159]

Secondly, assuming that an apology is worded appropriately, its publication may ultimately be ineffectual depending on its prominence and its distance (both in space and time) as compared to the initial publication.[160] This problem raises the issue of delimiting the definition of "co-text" — how far away can the co-text be? In *McRae*, apart from the general inadequacy of the words expressed in the apology, the defendant also had the added disadvantage of having published it two months later. Despite the fact that *Metro* is only published monthly, it would be unrealistic to assume that every reader of the September issue also read the November issue. Most apologies will never be published in immediate proximity to the disparaging words. Perhaps this is why the effect of apologies, as a co-textual feature, is considered in the assessment of damages, and not at the preliminary stage of constructing the defamatory sense.[161] Co-text will only be relevant to the interpretation of language insofar as it is read with the words complained of.

(e) Concluding Remarks

Co-text is a contextual feature which the common law has considered more thoroughly than other features. Issues of contention in the courts regarding the interpretation of co-text are also likely to be considered contentious by an academic linguist. In this respect, the linguist would find solace in the law of defamation.

---

156 Supra at note 103, at 137.

157 Ibid.

158 An account occurs where the publisher "projects the offensive act as something not to be taken literally, that is, seriously, or after the act claims that he was not acting seriously": Owen, *Apologies and Remedial Interchanges: A Study of Language Use in Social Interaction* (New York: Mouton Publishers, 1983) 19.

159 *Kerr v Conlogue*, supra at note 72; *Risk Allah Bey v Jonstone* (1868) 18 LT 620; *Risk Allah Bey v Whitehurst* (1868) 18 LT 615 (QB); *State v Fleming* 186 NE 613 (1933).

160 See, generally, s 29 of the Defamation Act 1992.

161 Ibid.

V: CONCLUSION

The features of context considered above do not provide an exhaustive list of the different ways in which language understanding can be influenced. However, it is clear that they are illustrative of the point that the interpretative process cannot be explained so simply as being "natural and ordinary". Natural language use necessarily entails more than just looking at words on a page and identifying their denotative meaning, and this is particularly apparent when it comes to understanding words as reflecting badly on an individual. Whether it be the credibility of the medium or the disposition of the audience, these are features of context which may ultimately determine the extent to which any given words damage a reputation.

However, in ascertaining the defamatory sense, the common law approach to constructing meaning can be criticised for imposing rules which do not reflect the complex nature of the interpretative process. Though the academic linguist would, to a certain extent, probably applaud the consideration courts have given such features as co-text, topic, and setting, courts would incur an equal amount of linguistic displeasure when it appears that others are being passed over. Decontexualisation is a notion that runs contrary to the very basics of pragmatic linguistic theory. Nevertheless, publications are being deemed defamatory in law when a particular feature of context would oblige a different conclusion being reached in the non-legal world.

The objective right-thinking person may be perceived as the core problem associated with constructing defamatory meaning. The connotative roots of the defamatory sense would linguistically suggest that recourse be had to the understandings of the particular audience in the particular situation of publication. However, the right-thinking person is an artificial creation which has effectively rendered subjective connotative meaning an anomaly within the law. As long as the right-thinking person remains, the linguist would maintain that the law of defamation will be fundamentally flawed in its approach to natural language interpretation.

The conceptual problem of "defamatory" is aggravated further by the common law's murky pool of vaguely defined interpretative "maxims" from which courts can selectively draw in any given case. The legal concepts of "natural and ordinary meaning", "ridiculous light", and reputational "gloss", can be used to extend the boundaries of the tort to cover cases which involve no reputational harm whatsoever. Here lies the seemingly bizarre implication that the essence of a defamatory imputation may no longer be that it must disparage the plaintiff's reputation. The notion that defamation is truly a "plaintiff's tort" is being given a whole new meaning.

Why us?

Andy Roberts *Summer Clerk 1997 - 98*

"The bottom line is the people. I applied to nine firms and received six offers, but Bell Gully was my first choice.

Bell Gully has got such a distinctive culture you can feel it the moment you walk into the place.

What I've enjoyed the most is that everyone is keen to make you feel at home and part of the team. Sure you are challenged, but if you're not being challenged you're wasting your time.

Being assigned to a 'Responsible Partner' with each rotation also helps. They bring you straight into the team and give you a feel for the big picture. There's also a continuous programme of seminars and training, right throughout the summer covering a high spectrum of legal, information technology and commercial topics."

Auckland - Jan Blair, Ph (09) 309 0859
Wellington - Jeremy Caird, Ph (04) 473 7777

Bell Gully
BARRISTERS AND SOLICITORS