

Virtue and Vindication: An Historical Analysis of Sexual Slander and a Woman's Good Name

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I INTRODUCTION

Reputation is a tricky thing. Intangible, made of words and capable of being twisted: all of these elements of a reputation impact upon a person's good name. The loss of a good name can be startling. Shame and disgrace go hand in hand with failed business, lost friendships and other ruined prospects. For a long time in history, women were haunted by a particular brand of defamation that was pernicious in its effect. This was sexual slander, the verbal accusation that a woman had engaged in immoral or unchaste behaviour, such as adultery or premarital sex. For women of the 19th century, such slander was a cause of great stress and anxiety, a means by which very real damage could occur. Yet the law dictated that only those utterances that caused special damage — or actual material loss — were actionable. For women, often suffering intangible harm, this limitation effectively barred redress. Numerous common law jurisdictions in the 19th century consequently took steps to address this issue. The first part of this article adopts a comparative outlook in discussing these attempts. They show that legislation, as a form of legal change, had virtues that case law development lacked.

Some writers have argued that legal reform of sexual slander in the 19th century only reinforced a certain cultural conception of women that was ultimately detrimental to women's interests. Borden stated that the idea of keeping women "cage[d]" within the domestic sphere, and constructing their identities as "pious and virtuous servants in the domestic realm", was central to the tort of slander committed by imputing unchastity to a woman.¹ Pruitt, too, has argued that the removal of the special damage requirement, whether by legislative or judicial means, had negative consequences in reinforcing the social significance attached to women's

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¹ Diane L Borden "Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of *Hustler Magazine v. Falwell*" (1999–2000) 35 *Gonz L Rev* 291 at 302; Diane L Borden "Reputational Assault: A Critical and Historical Analysis of Gender and the Law of Defamation" (1998) 75 *Journal Mass Commun Q* 98 at 101. Note that Borden's work also addresses the continuation of sexual stereotyping perpetuated by law in more modern times.

purity.² However, enabling women to sue for sexual slander did have a significant practical benefit. It allowed women to sue for damage to their relationships with others and to address harms that were intangible. The second half of this article will consider actual sexual slander cases in New Zealand following the Slander of Women Act 1898, which removed the special damages requirement in sexual slander cases concerning women.³ These cases illustrate the issues at stake in a defamation case, such as dignity and reputation, as well as the networks of gossip and rumour within communities. This section aims to discuss the fuller social and cultural implications of these cases in a way that moves beyond labelling the ability to sue for such slander as reinforcing a sexual double standard.

II THE LAW OF SLANDER AND THE LEGAL ISSUE POSED

Traditionally, the law of defamation was divided into two parts. Slander dealt with the things people said to one another, while libel dealt with written communications. During the 19th century libel as a tort was actionable *per se*, meaning that the plaintiff did not need to prove that any actual damage resulted from the defamatory words.⁴ However, the tort of slander required the plaintiff to show special damage to prove that her reputation had been harmed and thus make the claim actionable.⁵ There were three exceptions to this rule: when the defamatory words charged the plaintiff with committing a crime; when the plaintiff was said to have a contagious disease that tended to exclude her from society; or when the words used concerned the plaintiff in her office, trade or profession.⁶ In such cases, the court would presume that the plaintiff's good name had been injured.⁷ All other claims, however, required the plaintiff to prove that some particular damage had occurred that was the "natural, immediate, and legal consequence" of the slanderous words in question.⁸ The loss of a material temporal advantage, such as profits or employment, would suffice, but not something as nebulous as loss of peace of mind.⁹

Proving special damage in a case of sexual slander could be difficult for women. Pruitt, in her analysis of 19th-century slander cases in the United States, argued that the requirement for special damage, when conceived

2 Lisa R Pruitt "'On the Chastity of Women All Property in the World Depends': Injury from Sexual Slander in the Nineteenth Century" (2003) 78 *Ind LJ* 965 at 1016. See also Penelope Pether "Sex, Lies and Defamation: The Bush Lawyer of Wessex" (1994) 6 *Cardozo Stud L & Lit* 171 at 182.

3 The details of many of these cases are found in historical newspaper articles, which can be accessed at Papers Past <paperspast.natlib.govt.nz>.

4 W Blake Odgers *A Digest of the Law of Libel and Slander* (2nd ed, Stevens and Sons, London, 1887) at 297.

5 *Ibid.*, at 53.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*, at 298.

9 *Ibid.*

as a form of property loss, was “ill-fitting” as the harm female plaintiffs claimed was often not (or at least not primarily) pecuniary.¹⁰ Instead, it was often related to women’s emotions, dignity and personal relationships.¹¹ Yet the requirement for special damage meant that women had to argue their injuries in a way that accorded with “masculine” (footnotes omitted) economic interests.¹² The courts thus tended to look for injuries that had tangible financial consequences, such as undermining the plaintiff’s prospects for engagement,¹³ for marriage was the “marketplace” where women’s virtue had a cognisable value.¹⁴ The special damage requirement was further male-biased as women at this time were far less likely than men to have property assets, so found it difficult to prove economic loss.¹⁵

Pruitt’s analysis was informed by the concept of “reputation as property” that Post identified as influential in the historical development of defamation law.¹⁶ This concept regards reputation as a form of intangible property, capable of being earned, such as the reputation a craftsman earns through his workmanship.¹⁷ Hence a person’s good name has a value, due to the institution of the market.¹⁸ When a person is defamed, her good name is diminished, and the resulting injury can be assessed in monetary terms.¹⁹ Defamation law thus exists to make sure a person’s reputation is not stripped of its proper market value.²⁰ Under this analysis, mere hurt feelings do not qualify for redress.²¹ Such a concept of the role of defamation, in which the harm is quantifiable, corresponds with the historical requirement of special damage.²² This requirement failed, however, to recognise more intangible harm suffered by female slander victims. Two English cases illustrate the inadequacy of the requirement for special damage in this respect.

In *Allsop v Allsop*, the plaintiff sued a man who allegedly claimed to have experienced “carnal connection” with her.²³ She argued that, as a result of his allegations, she had suffered disgrace, a loss of companionship, and had become unwell and unable to attend to her affairs. Her husband (also a plaintiff) had incurred much expense in trying to cure her.²⁴ Yet the English Court of Exchequer found that the plaintiff’s claim was not actionable.

10 Pruitt, above n 2, at 972–973.

11 Ibid, at 973.

12 Ibid, at 972.

13 Ibid, at 991–992.

14 Ibid, at 971–972.

15 Ibid, at 1015.

16 See Robert C Post “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) 74 CLR 691 at 693.

17 Ibid.

18 Ibid, at 694–695.

19 Ibid, at 695.

20 Ibid.

21 Ibid.

22 See John Townshend *A Treatise on the Wrongs Called Slander and Libel* (3rd ed, Baker, Voorhis & Co, New York, 1877) at 108–109.

23 *Allsop v Allsop* (1860) 5 H & N 534, 157 ER 1292 (Court of Exchequer) at 534.

24 Declaration as cited in *ibid*, at 534–535.

There was no special damage because the alleged loss had to be the natural consequence of the words spoken, and illness, being dependent upon the peculiarities of a person, was not within this rule.²⁵

In *Moore Gent v Meagher*, however, the claim was successful.²⁶ The defendant in error had previously enjoyed the friendship of a number of people who had entertained her in their homes, and gratuitously provided her with food and drink.²⁷ When the plaintiff in error imputed incontinency to her,²⁸ the defendant's friends no longer socialised with her.²⁹ She consequently incurred great expense in having to maintain herself while no longer enjoying these people's hospitality.³⁰ Mansfield CJ thought that the words had robbed this lady of material benefits, which would have assumedly continued if the slander had not occurred, hence there was special damage.³¹ Pruitt called this reasoning a "contorted conversion of a relational injury into a pecuniary one",³² showing that recognition had not been truly given to the personal aspects of the harm.

It is possible for common law to crystallise to a point, where an artificial set of rules has been created to discourage deviation. It is arguable that the requirement for special damage in sexual slander actions involving women reached this stage.³³ This is inherent in Martin B's statement in *Allsop* that "[t]he law is jealous as to actions for mere words".³⁴ Legal reform was to occur during the 19th century, however, as the examples of the United States of America, England and New Zealand show.

III LEGAL CHANGE IN THE UNITED STATES

Before the end of the 19th century, a number of jurisdictions in the United States had attempted to reform the law surrounding sexual slander. Some states relaxed the requirements of the common law; others adopted legislation. A few even engaged in judicial innovation.³⁵ According to King, judges involved in such legal change exhibited a paternalistic concern for the reputations of young women.³⁶ To these men, marriage was the means through which young women took their proper place within the

25 *Ibid.*, at 538–540.

26 *Moore Gent v Meagher* (1807) 1 Taunt 39, 127 ER 745 (Exchequer Chamber).

27 *Ibid.*, at 39–40.

28 "Incontinence" here means unchastity.

29 *Moore Gent v Meagher*, above n 26, at 40.

30 *Ibid.*, at 40–41.

31 *Ibid.*, at 44.

32 Pruitt, above n 2, at 971.

33 *Allsop v Allsop*, above n 23, at 539.

34 *Ibid.*

35 Andrew J King "Constructing Gender: Sexual Slander in Nineteenth-Century America" (1995) 13 LHR 63 at 72.

36 *Ibid.*, at 66.

community, but sexual slander could threaten that.³⁷ The ability to secure an unmarried woman's opportunity to marry thereby justified liberalisation of the law.³⁸ Legislators also responded in this paternalistic manner,³⁹ and together with judges, promoted the idea that "sexual propriety constituted the principal element of female reputation".⁴⁰ The subsequent sections will consider these people's attempts to provide redress for female sexual slander victims.

Attempts within the Common Law

One way to enable sexual slander claims was to use the existing structure of the common law. A plaintiff's claim could fit into one of the existing slander per se categories, such as the category that did not require special damage if the plaintiff had been charged with a loathsome disease.⁴¹ This category could be used if a woman was accused of suffering venereal disease alongside unchastity.⁴² Another useful category of slander per se was the imputation of a criminal offence. Adultery, fornication or prostitution led to criminal liability in a number of states, meaning that a plaintiff may not need to prove material loss if accused of committing one of these acts.⁴³ If a claim did require special damage, courts could also be creative in identifying the necessary special damage.⁴⁴ For example, when the slander harmed the plaintiff's familial and social relationships, courts often utilised "somewhat contorted analyses" to construe this as a marketplace injury, such as likening a broken engagement to a broken commercial contract.⁴⁵ However, not all claims could fit into a slander per se category, and courts could be inconsistent in their conceptualisation of special damage, showing the limitations of the common law structure of slander.

Judicial Innovation

It is unsurprising, then, that a few courts engaged in innovation that moved away from the common law position completely. This occurred in Ohio, where the common law was "pushed ... to its farthest extent" (footnotes omitted) in *Malone v Stewart (Malone)*.⁴⁶ Read J, in the Supreme Court of Ohio, held that words spoken of a female that wounded her feelings and

37 Ibid, at 72–73.

38 Ibid, at 66.

39 Ibid.

40 Ibid, at 68.

41 Pruitt, above n 2, at 983.

42 Ibid.

43 Ibid, at 982.

44 Ibid, at 986.

45 Ibid, at 992.

46 King, above n 35, at 102.

prevented “her from occupying such position in society as is her right, as a woman” were actionable per se.⁴⁷ This decision, affirmed by later judgments, signalled a significant departure from common law precedent. This trend did not escape criticism. Nash J, in *McKean v Folden*, noted that *Malone* cited no authorities, and termed the line of reasoning culminating in *Malone* as “emphatically, judicial legislation”.⁴⁸ He felt that for a court to make law was “to be guilty of retrospective legislation — the most odious and unjust of all legislation”.⁴⁹ Thus, innovation could lead to a charge of judicial activism, although not all judges were willing to change the law regarding women and slander. They saw legal reform as the proper role of the legislature.⁵⁰

Legislative Action

If the common law was too restrictive, and judicial innovation was regarded as being too activist, perhaps the best approach was legislative modification. In 1808, North Carolina became the first state to create a legislative cause of action for sexual slander that did not require the female plaintiff to prove special damage.⁵¹ In 1811, Kentucky followed suit, as did Indiana in 1813.⁵² In the 1820s, Illinois and South Carolina both used legislative means to make sexual slander actionable.⁵³ In 1835, Missouri made it actionable per se to publish of any person that they had engaged in fornication or adultery.⁵⁴ Arkansas adopted Missouri’s statute in 1837,⁵⁵ and in the following year, Maryland enacted legislation that limited the cause of action to “words spoken maliciously touching the character, or reputation for chastity of a feme sole”.⁵⁶ New York was one of the last states to make sexual slander a legislative cause of action, doing so in 1871.⁵⁷ Legislation could take away emphatically the common law requirement for special damage, and act prospectively in doing so. It made the legal position more certain than if judges alone had attempted to modify the common law, either by negotiating its parameters or outright innovation.

47 *Malone v Stewart* 15 Ohio 319 (1846) at 321.

48 *McKean v Folden* 2 West L Monthly 146 (Ohio Com Pl 1859) at 147.

49 *Ibid.*, at 149.

50 King, above n 35, at 70.

51 *Ibid.*, at 84–85.

52 *Ibid.*, at 85–86.

53 *Ibid.*, at 86–87.

54 *Ibid.*, at 88.

55 *Ibid.*

56 An act to protect the reputations of unmarried Women Ch 114, 598 Md Laws 105 (1838).

57 King, above n 35, at 73.

IV IN ENGLAND

The Ecclesiastical Courts

In England, the source of the common law, the requirement for special damage in sexual slander claims involving women was not abolished until the Slander of Women Act 1891 (UK).⁵⁸ Yet England had a feature that other jurisdictions did not. Until 1855, those who suffered sexual slander could make a claim in the ecclesiastical courts. In the 19th century these courts, while unable to hear defamation cases actionable at common law,⁵⁹ had jurisdiction over allegations that imputed a crime in ecclesiastical law.⁶⁰ Adultery and fornication remained crimes in these courts, meaning that a successful plaintiff had to show that the slanderous words imputed such an offence.⁶¹ While damages were not available, successful proceedings led to costs and an order for the performance of penance.⁶² Yet concerns as to the efficacy of the ecclesiastical courts emerged. When these courts' jurisdiction over this form of slander was abolished conclusively in 1855, this failed to be accompanied by any reform in the common law of defamation.⁶³ Reform did not occur until the last decade of the 19th century, when legislative action took place.

Judicial Reluctance

Two cases illustrate judicial reluctance to initiate reform in the period between the abolition of the ecclesiastical courts' defamation jurisdiction and the enactment of the Slander of Women Act 1891 (UK). The first of these was *Lynch v Knight*.⁶⁴ The plaintiff in error allegedly stated that the defendant in error had been "all but seduced" by Dr Casserly of Roscommon in her maiden years, and that if Dr Casserly ever came to Dublin, the defendant's husband (to whom these words were spoken) was not to let the doctor visit her.⁶⁵ The alleged special damage was that this lady's husband subsequently refused to live with her, meaning she had to leave her home and live with her father.⁶⁶ The judgment of the late Lord Campbell LC stated that the action was not maintainable because the loss

58 Slander of Women Act 1891 (UK) 54 & 55 Vict c 51.

59 SM Waddams *Sexual Slander in Nineteenth-Century England: Defamation in the Ecclesiastical Courts, 1815–1855* (University of Toronto Press, Toronto, 2000) at 18.

60 *Ibid.*, at 17.

61 *Ibid.*, at 17–18 and 27.

62 *Ibid.*, at 27. Penance was a means for the defendant to be canonically corrected. In the 19th century it was usually performed in the vestry room of the plaintiff's parish church. The defendant, before a small audience, asked for the "pardon of God and of the plaintiff, and promised not to offend again": *ibid.*, at 111.

63 *Ibid.*, at 187.

64 *Lynch v Knight* (1861) 9 H L Cas 577, 11 ER 854 (HL).

65 First paragraph of the complaint as quoted in *ibid.*, at 578.

66 Averment of special damages as cited in *ibid.*, at 580.

relied upon was not the natural and probable consequence of the slanderous words.⁶⁷ If the words had charged the defendant with actual adultery, then this — her husband's separation — would have been a natural and direct consequence.⁶⁸ Yet the words here only suggested that the husband remain vigilant.⁶⁹ Nevertheless, Lord Campbell lamented:⁷⁰

... the unsatisfactory state of our law, according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her;

Yet he went on to say that he was there “only to declare the law”.⁷¹ Lord Brougham, who delivered the Lord Chancellor's judgment, similarly thought that the state of law regarding special damage was “barbarous”.⁷² Like the other court members, however, he was unwilling to find for the defendant.⁷³ No remedy was therefore given for her emotional injury.

The other instructive case from this period was *Roberts v Roberts*.⁷⁴ The female plaintiff had formerly belonged to a congregation and private society of a sect of Protestant Dissenters. The declaration alleged that the defendant claimed to have enjoyed sexual relations with the plaintiff.⁷⁵ As a result, the plaintiff was effectively banished from the sect.⁷⁶ Despite becoming ill and distressed,⁷⁷ the plaintiff's claim was found not to be actionable.⁷⁸ Cockburn CJ stated that the loss of society membership either amounted to the loss of *consortium vicinorum* or the loss of a nominal distinction because the plaintiff could no longer call herself a member of a sect society.⁷⁹ Either way, there was no loss of a real or material advantage.⁸⁰ Yet he asserted that the law was cruel for withholding redress in a case such as this.⁸¹ Crompton and Blackburn JJ similarly affirmed that the rule requiring special damage was not to be relaxed, even though both thought that the law in this regard was not ideal.⁸²

In other jurisdictions, like those in the United States, legislative

67 *Ibid.*, at 591.

68 *Ibid.*

69 *Ibid.*, at 592.

70 *Ibid.*, at 593.

71 *Ibid.*

72 *Ibid.*, at 594.

73 *Ibid.*

74 *Roberts v Roberts* (1864) 5 B & S 384, 122 ER 874 (KB).

75 *Ibid.*, at 385.

76 *Ibid.*, at 385–386.

77 *Ibid.*, at 386.

78 *Ibid.*, at 386–390.

79 *Ibid.*, at 389.

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*, at 389–390.

change was taking place however. In 1865, the colony of South Australia enacted legislation stating that words spoken of a woman imputing a lack of chastity shall be deemed to be slander, being sustainable “in the same manner and to the same extent as for words charging an indictable offence”.⁸³ The same solution was adopted in the colony of Victoria from 1887.⁸⁴ Some Canadian jurisdictions also pre-empted English legislative change. In 1889, legislation was passed in Ontario stating that if a woman had been accused of adultery, fornication or concubinage, it would be unnecessary to prove special damage, as it would be possible for the plaintiff to receive nominal damage.⁸⁵ Earlier, in Nova Scotia, the rules of practice stated that in any action for slanderous words spoken of a woman, imputing unchastity to her, it was not necessary to allege or prove special damage.⁸⁶ These examples show a trail of legislative change undertaken by jurisdictions around the world from the beginning of the 19th century.

The English Act

The English enactment — the Slander of Women Act 1891 (UK) — continued this line of development. Section 1 of the Act stated that words spoken and published that imputed unchastity or adultery to any female did not “require special damage to render them actionable”. Section 2 provided that this Act would not apply to Scotland, for an “imputation of unchastity was already actionable there without proof of special damage”.⁸⁷ It appears that the legislature, rather than the judiciary, was the body that needed to enact this modification. The year after the 1891 Act was passed, Lord Herschell stated that with an area of law such as slander, which is beset with artificial distinctions, any extension of the law must be made by the legislature.⁸⁸ The same sentiment was expressed in *Jones v Jones*, a House of Lords slander case from 1916.⁸⁹ All members of the panel referred to the Slander of Women Act 1891 (UK) as an example of the proper approach to take in this regard,⁹⁰ emphasising the importance of legislative action.

83 An Act to amend the Law of Slander 1865 (SA), s 2.

84 The Slander Act 1887 (Vic), s 2; Wrongs Act 1890 (Vic), ss 2 and 7.

85 The Law of Slander Amendment Act SO 1889 c 14, s 1(1).

86 Nova Scotia, Rules of Practice, ord 19, rule 29 as contained in The Nova Scotia Judicature Act RSNS 1884 c 104.

87 W Blake Odgers *A Digest of the Law of Libel and Slander* (3rd ed, Stevens and Sons, London, 1896) at 90.

88 *Alexander v Jenkins* [1892] 1 QB 797 (CA) at 801.

89 See *Jones v Jones* [1916] 2 AC 481 (HL) at 489.

90 *Ibid.*, at 493, 495, 499–500 and 505–506.

V IN NEW ZEALAND

The Social Context

New Zealand did not enact legislation changing the common law position until 1898. There existed at this time a cultural dichotomy that distinguished between “ideal” women, who were the moral purifiers of society, and the “fallen”, whose morality was questionable.⁹¹ Illicit sexual conduct was one means to join the ranks of the “fallen”, as sexual behaviour was only respectable within marriage.⁹² Such activity could result in “poverty, ill-health, emotional suffering, and humiliation” for a woman who became pregnant out of wedlock.⁹³ Disapproval did not even need to be sparked by actual sexual intercourse: being overly familiar with the opposite sex could be sufficient.⁹⁴ It was therefore important for women to maintain a reputation for chastity, as its loss could result in material consequences, such as lack of home or employment. Dalziel argued that during the 19th century, a New Zealand woman’s role was that of a colonial helpmeet, consisting of numerous facets, including nurturer of the domestic sphere and guardian of society’s morals.⁹⁵ Enabling women to sue for sexual slander would allow them to continue to fill these roles without facing the contempt reserved for those considered immoral.

The New Zealand Act

The politician at the forefront of legal reform concerning sexual slander was William Downie Stewart, who had been elected as a member for the House of Representatives for the first time in 1879 and was called to the Legislative Council in 1891.⁹⁶ Stewart’s first attempt to enact legislation removing the special damage requirement appears to have been undertaken in 1880.⁹⁷ This took the form of the Female Redress Bill, which had its first reading in the House of Representatives in early June.⁹⁸ The Bill provided that a single or married female did not need to prove special damage

91 Andrée Lévesque “Prescribers and Rebels: Attitudes to European Women’s Sexuality in New Zealand, 1860–1916” in Barbara Brookes, Charlotte Macdonald and Margaret Tennant (eds) *Women in History: Essays on European Women in New Zealand* (Allen & Unwin/Port Nicholson Press, Wellington, 1986) 1 at 2; Barbara Brookes “A Weakness for Strong Subjects: The Women’s Movement and Sexuality” (1993) 27 NZJH 140 at 143.

92 See Lévesque, above n 91, at 4.

93 Margaret Tennant *Paupers and Providers: Charitable Aid in New Zealand* (Allen & Unwin and Historical Branch, Department of Internal Affairs, Wellington, 1989) at 117.

94 See Caroline Daley *Girls and Women, Men and Boys: Gender in Taradale 1886–1930* (Auckland University Press, Auckland, 1999) at 107 [*Girls and Women*].

95 Raewyn Dalziel “The Colonial Helpmeet: Women’s Role and the Vote in Nineteenth-Century New Zealand” (1977) 11 NZJH 112.

96 Cyclopedia Company Limited “The Cyclopedia of New Zealand [Otago and Southland Provincial Districts]: The Hon. William Downie Stewart” (1905) New Zealand Electronic Text Centre <www.nzetc.org>.

97 Stewart mistakenly stated in 1898 that his first attempt was in 1879: (13 July 1898) 101 NZPD LC 458.

98 (3 June 1880) 35 NZPD HR 55; [1880] Journals of the House of Representatives of New Zealand at 14.

for spoken words imputing unchastity to her in order for a claim to be actionable.⁹⁹ At its second reading in the House of Representatives, Stewart invoked the case of *Roberts v Roberts* and the opinions of the judges therein as to the unsatisfactory nature of the current law.¹⁰⁰ He was also aware of developments in the United States and stated that his Bill was to some extent based upon the New York legislation.¹⁰¹ Yet the Premier, John Hall, felt that New Zealand should not enact this legislation until the “mother-country” had provided a model.¹⁰² Other politicians also wondered if the Bill would enable women of “abandoned” character to sue for slander, or if men would still have the ability to caution their male friends about women who were reputedly unchaste.¹⁰³ The Bill did not result in any legislative change.

Stewart did not concede defeat so easily. In 1885, he introduced the Evidence Further Amendment Bill, which (among other reforms) contained a clause stating that a woman — whether married or not — need not prove any actual loss or special damage if she had been falsely accused of unchastity.¹⁰⁴ This Bill passed all three readings in the House of Representatives.¹⁰⁵ However, the clause containing the special damage amendment was dropped during the Council in Committee stage in the Legislative Council.¹⁰⁶ Doubts had been expressed during the second reading in the Upper House that such a change in the common law may result in an onslaught of claims, and that the sexual slander often complained of — common in a “certain class of life” — was often no more than everyday vulgar abuse that the law ought not to redress.¹⁰⁷

During the 1890s, further attempts were made to change the law. Legislative change finally came about in 1898, when Stewart introduced a final Slander of Women Bill into the Legislative Council.¹⁰⁸ During the Bill’s second reading in the Legislative Council, Stewart argued that judges had repeatedly condemned the old law in England, “and it was practically a disgrace to our colony that it was the law here still”.¹⁰⁹ He pointed out that special damage was not required in other places, such as in Scotland, England and parts of the United States.¹¹⁰ In the House of Representatives, the Premier, Richard Seddon, expressed the opinion that the Bill was “the

99 Female Redress Bill 1880 (44-1), cl 2.

100 (10 June 1880) 35 NZPD HR 211.

101 *Ibid.*

102 *Ibid.*, at 212.

103 *Ibid.*; “Thursday, June 10” *The Clutha Leader* (Otago, 18 June 1880) at 3.

104 Evidence Further Amendment Bill 1885 (46-1), cl 8.

105 Schedule of Public Bills [1885] Journals of the House of Representatives of New Zealand at XXXVIII.

106 Evidence Further Amendment Bill 1885 (46-3); [1885–1886] Journals of the Legislative Council of New Zealand at 104.

107 (28 July 1885) 52 NZPD LC 283.

108 [1898] Journals and Appendix to the Journals of the Legislative Council of New Zealand at 17.

109 (13 July 1898) 101 NZPD LC 458.

110 *Ibid.*

most useful and just Bill ever placed before Parliament".¹¹¹ On these high notes of praise, the Slander of Women Act 1898 came into being.

The Act specifically provided that: "Words spoken and published ... which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable".¹¹² New Zealand was not the last common law jurisdiction to pass such law. Two years later, Western Australia adopted legislation that stated there was no need to prove special damage in sexual slander cases relating to women.¹¹³ Thus ended a century of change in which the bar requiring special damage had been removed through legislative means.

VI THE IMPORTANCE OF REPUTATION

The second half of this article will consider actual sexual slander cases in New Zealand following the Slander of Women Act 1898. These cases potentially evidence a cultural code that limited women's fulfilment in society by emphasising the value of feminine purity. Yet these cases reveal rich insights into social and cultural life in New Zealand during the early 20th century. Victims of sexual slander were part of a kaleidoscope of family ties, neighbourhood networks and suspicious minds that enabled words to be mixed, intimations to be sent and sly hints to be made that ultimately resulted in a woman's good name being impugned. This article consequently aims to take a historical perspective that places sexual slander in New Zealand within its own cultural paradigm, without condemning the values it espoused. The reformed law of slander enabled defamed women to obtain a remedy for real harm, and it is these attempts that will be the focus of this article.

Reputation as Dignity

The sexual slander cases that form the focus of this article show that, for some women in early 20th-century New Zealand, a good reputation was an asset worth protecting through the expensive means of litigation. The cost of losing this asset can be conceived through Post's concept of "reputation as dignity", which recognises the personal cost of slander to its victim. Dignity is a private quality that forms part of a person's integrity, yet is dependent upon the "ceremonial observance" of rules of deference and demeanour by other people.¹¹⁴ When a slander occurs, such as when a

111 (26 October 1898) 105 NZPD HR 456.

112 The Slander of Women Act 1898, s 2. Consolidated in the Judicature Act 1908, s 101, which was subsequently repealed by the Defamation Act 1954, s 23(1).

113 Slander of Women Act 1900 (WA), s 1.

114 Post, above n 16, at 710.

woman has been accused of unchastity, there has been a breach of the “rules of civility”: the rules of deference and demeanour embodied in speech.¹¹⁵ The law of defamation is therefore a means by which society regulates these breaches of the “rules of civility” and so protects the dignity of its members.¹¹⁶

Post thought that it was not entirely clear how defamation litigation protected individual dignity, for dignity does not have a market value, so its loss cannot be compensated by monetary damages.¹¹⁷ However, the value of defamation law for an individual’s dignity can be seen in a number of early New Zealand slander cases, in which the plaintiff had unsuccessfully requested an apology from the defendant. The subsequent legal action could be conceived as a means to show conclusively that the defendant’s action in making the slander was inappropriate, which evidences the policing role of defamation law when a breach of the “rules of civility” occurs. This was particularly clear when aggravated damages were a possibility, as it showed strong condemnation of the slander. Hence court action could be a form of vindication, in that there was symbolic value to the plaintiff in the court confirming independently that she had not engaged in unchaste behaviour, meaning that she should be accorded due respect within the community while her slanderer’s action were marked as antisocial.

The use of the term “vindication” in this context varies from that postulated by Post. Post’s theory of “vindication” engages the concept of “reputation as honour”, in which defamation law protects the honour associated with social roles in a hierarchical society.¹¹⁸ Court action thereby serves to restore the plaintiff’s honour and punish the defamer.¹¹⁹ Enabling a woman to sue for sexual slander is not incommensurable with “reputation as honour”, particularly if she was a lady of some social standing defamed by a person of lower rank. However, this type of slander falls more naturally into the “reputation as dignity” approach. This is because it is concerned with the potential for the plaintiff, as an individual, to be excluded from proper society if she was deemed impure, rather than with restoring her status within a hierarchy. “Vindication” under the “reputation as dignity” approach thus posits the successful plaintiff as one worthy of respect and inclusion within the community, for she was justified in bringing her claim. This links defamation litigation with the plaintiff’s personal dignity: if loss of dignity occurs through exclusion from the community’s “rules of civility”, then successful proceedings affirm the plaintiff’s right to be treated with respect and regain their position in the community.¹²⁰

In this way, the “rules of civility” have the ability to distinguish between members and non-members of a group, as only those who

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*, at 712.

118 See *ibid.*, at 699–704.

119 *Ibid.*, at 703–704.

120 See *ibid.*, at 712–713.

are socially accepted will be shown due respect.¹²¹ Defamation law is therefore useful when resolving the ambiguity of whether a person is a member of a group or not when the “rules of civility” are breached.¹²² The defamation trial is an “arena” (footnotes omitted) where differing interpretations of the parties’ behaviour can compete.¹²³ The plaintiff’s place within the community and her right to be accorded respect — and consequently the plaintiff’s dignity — are “rehabilitated” if the court finds that the defendant’s breach of the “rules of civility” was unjustified.¹²⁴ “Rehabilitation”, like “vindication”, consequently works to clear the plaintiff’s character. However, if the court agrees with the defendant’s interpretation, the litigation will confirm the plaintiff’s stigma.¹²⁵ Thus, the trial demarcates “the boundaries of community membership”.¹²⁶ This shows that while protecting an individual’s dignity is a private interest, enforcing the “rules of civility” protects a public interest: “the maintenance of community identity”.¹²⁷

If a defamation trial determines community membership, then it becomes especially important in determining who should accrue the benefits that flow from that membership, such as job prospects. This is due to a defamation trial’s ability to “rehabilitate” the reputation of those who were defamed, and allow them to trade upon their reputation once more. Such “social currency” in the form of a good reputation may be required for ordinary events,¹²⁸ such as employment, but it may also be needed to obtain other benefits that come from community membership, such as business credit and charity.¹²⁹ In the early 20th century, if a person’s reputation had been lost through sexual slander and these benefits were denied, then a defamation action — so long as it affirmed her chastity — was a means to gain them once more.

An Unmarried Woman’s Reputation

A sexual double standard, in which women were blamed for illicit sexual conduct, persisted in the early 20th century.¹³⁰ It was therefore important

121 *Ibid.*, at 711.

122 *Ibid.*, at 712.

123 *Ibid.*

124 *Ibid.*, at 712–713.

125 *Ibid.*, at 713.

126 *Ibid.*

127 *Ibid.*, at 711 and 713.

128 Hansen termed good reputation in ante-bellum New England prior to the civil war a “social currency” because participation in the community necessitated a good name: Karen V Hansen *A Very Social Time: Crafting Community in Antebellum New England* (University of California Press, Berkeley, 1994) at 116.

129 See Polly Morris “Defamation and Sexual Reputation in Somerset, 1733–1850” (PhD Thesis, University of Warwick, 1985) at 1–2.

130 Daley, in her study of gender in Taradale, found that oral narrators recalled that by the 1920s, if an unmarried woman became pregnant, she was “the lowest thing in the world” (footnotes omitted), but little blame attached to the men: Interview with Michael Roper (Caroline Daley, Taradale, 10 February 1987) as quoted in Daley *Girls and Women*, above n 94, at 107.

for an unmarried woman to uphold a chaste reputation. A good sexual reputation was not merely maintained by resisting sexual behaviour, but also by keeping suspicion of such activity at bay.¹³¹ Sexual slander cases thus evidence these women's attempts to overcome suspicion when doubt was cast. A case from 1900 involved Catherine Nugent in an action against William Whitta.¹³² Whitta allegedly made statements to Miss Nugent's potential fiancé that she was a "dead strong piece" and had engaged in unchaste conduct.¹³³ Whitta was certain he had seen Miss Nugent engaging in wanton behaviour, but a witness for the plaintiff attested that Miss Nugent was not in the habit of staying out late at night nor of being intoxicated. The plaintiff, who lived away from her family, also attested that she was not promiscuous. She was successful in her action.¹³⁴

Interestingly, the third party to whom the slanderous statements had been made, John Donnolly, had known the plaintiff since childhood, and wished to marry her when circumstances permitted.¹³⁵ The fact that he had heard these statements did not seem to lower his estimation of her, for he appeared as her witness. This suggests that loss of a marriage proposal was not the motivating factor for Miss Nugent's legal action. One reason may have been that the slander could have damaged her job prospects. Miss Nugent was a "tailoress" and a reputation for unchastity could potentially curtail her business. In the late 19th to early 20th centuries, there was a growth in the number of women working in New Zealand.¹³⁶ These young women, engaged in occupations such as teaching, typing and factory work, had greater opportunity to have sexual relations when they lived away from home.¹³⁷ This opportunity for sexual behaviour may have heightened efforts to maintain a chaste reputation, particularly if a woman only had a single means of income.

A case from 1909 displays this sensitivity. Irene Ralston, a barmaid, sued Henry and Annie Baker, hotel keepers at Dannevirke.¹³⁸ While employed by the defendants, Miss Ralston and two other girls had gone to Mrs Baker to enquire about alleged statements she had made regarding their chastity. Mrs Baker responded that a man had been in the plaintiff's room the entire previous night. The defendant was concerned that all three girls "were in the habit of entertaining men at supper in their bedrooms", which could lead to "harm".¹³⁹ A nonsuit was entered against the plaintiff. It was argued by Mrs Baker's counsel that his client had a right to inform

131 Morris, above n 129, at 307.

132 "Action for Slander" *The Star* (Canterbury, 29 November 1900) at 3.

133 *Ibid.*

134 "Supreme Court" *The Ashburton Guardian* (Ashburton, 1 December 1900) at 3.

135 "Action for Slander", above n 132, at 3.

136 Stevan Eldred-Grigg *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840–1915* (Reed, Wellington, 1984) at 118.

137 *Ibid.*, at 118–119 and 143.

138 "No Slander" *The Feilding Star* (Feilding, 28 May 1909) at 4.

139 *Ibid.* It seems that the girls lived either within the hotel or in accommodation associated with it, so their behaviour was under the vigilance of their employers.

the girls that servants had made statements concerning their behaviour. The judge continued this line of reasoning in stating that the defendants did not mean to actually impute unchastity to the plaintiff and had no intention of arguing that the statements were true. Women employed at hotels and living away from home were capable of engaging in illicit behaviour.¹⁴⁰ Mrs Baker's action in warning the girls shows that a young woman's sexual activity was not only her own personal interest, but even if only suspected, was of interest to others, including her employers.

Married Women's Reputation

An unchaste reputation could also affect married women. Waddams' study of 19th-century sexual slander cases in the ecclesiastical courts showed that, in Norwich and York, married women constituted the highest number of plaintiffs.¹⁴¹ This statistic, alongside the fact that the preponderance of female defendants were also married, was unsurprising given that most women were married for a large portion of their adult lives.¹⁴² He therefore concluded that protecting the marriage prospects of single women was not the primary function of this law.¹⁴³ The experience of New Zealand showed that married women were prepared to defend a reputation for fidelity.

One case shows that for a married woman, the accusation of adultery could impact heavily upon her personal dignity. In 1924, Lucy England sued W Crowley for an allegation that, while Mr England had been away from home, his wife had entertained men at their house.¹⁴⁴ The plaintiff argued that, as a result of the allegation, which conveyed unchastity and impurity, she had experienced mental agony, had suffered in her reputation and had been "brought into disgrace amongst her friends and neighbors".¹⁴⁵ The defendant, however, did not argue justification. Instead, his counsel stated that Mr Crowley had been misled in his original slanderous comments. The defendant thought that the plaintiff would get a better vindication of her character at court, rather than if he gave an apology.¹⁴⁶ The magistrate awarded the plaintiff damages, stating that, as a result of the proceedings, she had shown herself to be "a woman of high character".¹⁴⁷ This shows the "rehabilitative" aspect of a slander action, whereby a woman is able to redeem her fair name through the courts so long as she was not, in fact, unchaste.

¹⁴⁰ See Tennant, above n 93, at 118.

¹⁴¹ Table 4 in Waddams, above n 59, at 197.

¹⁴² *Ibid.*, at 124.

¹⁴³ *Ibid.*

¹⁴⁴ "Out in the Open" *NZ Truth* (New Zealand, 25 October 1924) at 6.

¹⁴⁵ *Ibid.*

¹⁴⁶ Mr Crowley, a locomotive foreman, had another reason for not tendering an apology: Mrs England's husband was a locomotive driver, and the Railway Department was consequently holding an inquiry into the case to see if the defendant had caused unpleasantness in the workplace. Mr Crowley thought he would have a better defence before the Department if he allowed the case to go to court rather than if he apologised: *ibid.*

¹⁴⁷ *Ibid.*

The outcome was different in cases where the slander was actually justified. In 1924, Mrs Ethel Love sued Edward Rzepeki for the statement that his 15-year-old son had contracted venereal disease from her.¹⁴⁸ Mrs Love claimed that she had consequently been injured in her reputation as a wife and mother, had lost the society of her friends, and had suffered mental pain and anguish.¹⁴⁹ The Love family farm had also lost one customer of milk since the allegation had been made.¹⁵⁰ The breach of the “rules of civility” in making such a scandalous claim thus had consequences at a public level, in terms of Mrs Love’s social rejection and the potential lack of income her family would suffer, and at a private level, in terms of her personal suffering. Yet the magistrate held that the allegation was founded in fact, and the boy had contracted the disease from her.¹⁵¹ No vindication of the plaintiff’s character therefore took place.

Other cases involving alleged adultery evidence the battle-like quality of the courtroom proceedings. In 1904, Margaret Gason sued the male defendant for imputations of unchastity.¹⁵² He admitted to having said to the plaintiff’s alleged lover: “You have been a long time going out with that woman, and if it had been another man in [her husband’s] place he’d have shot you.”¹⁵³ Yet the defendant argued that the plaintiff was an immoral woman, and numerous witnesses attested to seeing Mrs Gason and her alleged lover engaged in acts of familiarity. The judge discussed the Slander of Women Act 1898 and stated that the plaintiff did not need to show pecuniary loss or loss of her husband’s confidence, as she had to protect her children’s reputation. This case shows, as Morris noted, that a person’s reputation reflects upon others, including their spouse and family.¹⁵⁴ Thus Mrs Gason’s action can be perceived as more than just personal but also protecting the reputational assets of others. The jury found that she had not been adulterous and awarded her £225 in damages.¹⁵⁵

These last two cases evidence the importance a married woman placed upon her reputation for fidelity. Women who chose to litigate underwent an adversarial process involving defence evidence designed to show they were adulterous, which required fortitude on their part. This process, however, may have been the best way to resolve the ambiguity and show that they were, indeed, faithful. In the case of Mrs Gason, the slander action vindicated her character, although the opposite was true for Mrs Love. The court process became important in delineating who was and was not deserving of contempt and opprobrium. It thus — as Post suggested — helped define community membership in proper society.

148 “Serious Statements” *NZ Truth* (New Zealand, 27 September 1924) at 6.

149 “Alleged Slander” *The Evening Post* (Wellington, 3 October 1924) at 11.

150 “Serious Statements”, above n 148, at 6.

151 “Unusual Slander Action” *NZ Truth* (New Zealand, 8 November 1924) at 6.

152 “Alleged Slander at Kaiwarra” *The Evening Post* (Wellington, 10 May 1904) at 5.

153 *Ibid.*

154 Morris, above n 129, at 2.

155 “Alleged Slander at Kaiwarra”, above n 152, at 5.

This delineation consequently assisted in showing who did and who did not deserve the benefits that flow from community membership. An unchaste reputation could jeopardise a married woman's employment prospects, just as it did for the unmarried. In 1900, Mrs Hicks, a charwoman, sued a lawyer who had allegedly called her a prostitute.¹⁵⁶ Although Mrs Hicks had not lost her employment, the economic impacts of the slander remained relevant. While the defendant's counsel argued that the plaintiff could not claim special damage for loss of work, the judge said that her prospects may nevertheless be injured as no one would employ a person with such a stigma upon her. This case therefore shows that a chaste reputation was indeed an asset, one that needed to be maintained in order to remain part of the community, whether married or unmarried.

VII SEXUAL SLANDER AND GOSSIP

One way to breach the "rules of civility" was through rumour and gossip. The vulnerability of a good name is that it is made entirely of words and is both "held and conferred by people other than the person who is said to possess it".¹⁵⁷ A woman could therefore find herself at the receiving end of public disapproval without actually engaging in illicit behaviour. Successful slander actions arising from gossip are therefore examples of when gossip exceeded its permissible boundaries.¹⁵⁸

A case from 1929 illustrates this point. Iris O'Brien, a married woman, claimed to have been slandered by Mr and Mrs Gaby, who allegedly spread rumours in the small settlement of Faulkner's Mill that Mrs O'Brien had been having a "high old time" with a young male boarder residing with her family.¹⁵⁹ The Gabys denied ever uttering such slanders, although the magistrate refused to believe that the plaintiff and her witnesses had "deliberately perjured themselves".¹⁶⁰ Judgment was consequently awarded against Mr Gaby although a nonsuit was entered in regards to Mrs Gaby, the case against her being unsatisfactory. The Magistrates' Court's decision shows that such malicious and untruthful gossip was not to be tolerated within a small community, although it reinforced that the alleged activity — adultery — was socially unacceptable.

An unmarried woman could also become the subject of gossip. This could be spurred by her relative independence and the opportunity for sexual indiscretion. In 1924, a school mistress named Elizabeth Affleck sued Edward Lassen, a farmer and chairman of the local school committee,

156 "The Charwoman Case" *The Evening Post* (Wellington, 4 September 1900) at 6.

157 Peter J Wilson "Fletcher of Good Names: An Enquiry Into Anthropology and Gossip" (1974) 9 *Man* (NS) 93 at 100.

158 See King, above n 35, at 77.

159 "Gaby's Gaby Glide of Slander" *NZ Truth* (New Zealand, 14 November 1929) at 3.

160 *Ibid.*

for statements reflecting upon her chastity.¹⁶¹ Lassen had occasionally insinuated that Miss Affleck was pregnant, to her and in front of others. Miss Affleck had noticed that people in the district were avoiding her, and was subsequently informed that Lassen had made statements concerning her relations with a local man, although Lassen denied being the source of the rumours.

Miss Affleck's action has similarities with a 19th-century New England case, in which Sophia Bodwell — also an unmarried school teacher — sued Benjamin Osgood Esq, a wealthy local man, for libel.¹⁶² Osgood had written to the school committee stating that Miss Bodwell ought not to teach children because of her illicit conduct with men,¹⁶³ an allegation based entirely on hearsay and second-hand gossip.¹⁶⁴ The case shares parallels with Miss Affleck's slander action. Both Misses Bodwell and Affleck occupied positions in the community where, as teachers, their moral behaviour was important in setting an example for children.¹⁶⁵ The defendant in both cases was also a man whose sex and class rendered him less vulnerable to either legal or community verdict, and the consequences of spreading gossip.¹⁶⁶

The courtroom proceedings were therefore important for both plaintiffs. Hansen noted that Miss Bodwell's "battle" to restore her name needed a formal public jury, not just a social one comprising her local community, in that her victory in the courtroom vindicated her in a way that community negotiations could not.¹⁶⁷ Similarly, in the case of Miss Affleck, the Magistrate's Court's (now the District Court) affirmation that she was not unchaste was important in vindicating her character. She was successful in doing this; the Court believed that Lassen had been responsible for the slander.¹⁶⁸ However, the gossip and acts of defamation, concerning both Misses Bodwell and Affleck, warned other young women not to act in a "lusty" manner.¹⁶⁹ The fact that these women initiated legal proceedings to clear their names further warned that engaging in such activity was unacceptable by community standards.

161 "She Stoops To Conquer" *NZ Truth* (New Zealand, 19 July 1924) at 7.

162 Hansen, above n 128, at 127–129.

163 Letter from Benjamin Osgood to the Committee of School District No 8 in Methuen regarding the suitability of Sophia Bodwell as a teacher (3 May 1824) as cited in *ibid.*, at 128.

164 Hansen, above n 128, at 130.

165 *Ibid.*, at 132.

166 See *ibid.*

167 *Ibid.*

168 "She Stoops To Conquer", above n 161, at 7.

169 See Hansen, above n 128, at 132.

VIII REASONS FOR SLANDER

This article has so far canvassed some of the reasons that made certain women susceptible to sexual slander, such as the independence enjoyed by some young women that made sexual indiscretion a possibility. There were also other reasons, including the degree of power that a woman exercised. In her study of historical English cases, Morris found that women who exercised authority were vulnerable to insult, especially when their authority was exercised over men, or when women mediated disputes between men.¹⁷⁰ This gender dynamic is seen in the following New Zealand case. In 1920, Rhoda Fountain, who had been the housekeeper at the Pakarae Hotel, chastised James Mahoney, the man in charge of coach stables there, for using filthy language in front of children.¹⁷¹ She thus tried to exercise an authority over him in keeping with her position as the housekeeper. The defendant replied by saying: "You are no — good, and you allow every man that comes along to cuddle you."¹⁷² The magistrate was disdainful of the suggestion that there was no ill meaning in the word "cuddle". He held that the defendant had subjected the plaintiff to insults "couched in language calculated to hurt to the utmost the feelings of a woman", thereby vindicating her claim.¹⁷³

Women could also arouse suspicion if they lived with unrelated adult men other than their husbands. Male boarders could spur scandal, as it did in the case of Iris O'Brien, discussed earlier. A case from 1905 also displayed this susceptibility. Emma Espiner, a married woman separated from her husband, was accused by Joseph Bloomfield of being a "low common dirty thing".¹⁷⁴ The plaintiff lived on the defendant's farm with her children and milked his cows. A man called Price boarded with her, and it was during an altercation with Price that Bloomfield insulted the plaintiff. The insult concerned Mrs Espiner's relationship with Price.¹⁷⁵ Although the defendant denied ever making the insult, the plaintiff was successful in her claim.¹⁷⁶ The slander in this case exposed a vulnerability that some women faced. Women living in poverty could take in boarders to supplement their income, yet a male boarder could leave her open to charges of immorality, as sexual relations were a possibility.¹⁷⁷ Mrs Espiner was therefore vulnerable to this kind of insult, particularly as she was separated from her spouse.

The sensitivity concerning women separated from their husbands and

170 Morris, above n 129, at 731.

171 "What does 'Cuddle' Mean" *The Poverty Bay Herald* (Gisborne, 27 March 1920) at 5.

172 Ibid.

173 "A Woman's Vindication" *The Poverty Bay Herald* (Gisborne, 31 March 1920) at 6.

174 "District Court" *Hawera and Normanby Star* (Taranaki, 7 August 1905) at 5.

175 "A Stratford Slander Case" *The Wanganui Herald* (Manawatu-Wanganui, 5 August 1905) at 5.

176 "District Court", above n 174, at 5.

177 Tennant, above n 93, at 121.

the males they resided with could lead to slander in other circumstances. In 1929, Dorothy Nicholls, who was separated from her husband, sued Thomas Bowen after the defendant accused her of unchaste behaviour.¹⁷⁸ The plaintiff was the housekeeper of Mr Pruden, who was proprietor of the Cheviot brewery and separated from his wife. Bowen, after a failed attempt to purchase beer at the Pruden household one evening, made “vile and objectionable” comments about Mrs Nicholls.¹⁷⁹ It appears that these comments related to Mrs Nicholls’ relationship with Mr Pruden. The plaintiff revealed that in 1927 her husband had commenced divorce proceedings against her and had cited Mr Pruden as co-respondent on the grounds of impropriety, although the petition and allegations had been withdrawn by leave of the court. Mrs Nicholls won her case and was awarded £50, although it is possible that an affair did occur.¹⁸⁰

Bowen’s slanderous words really arose, however, out of his frustration at being unable to buy beer at the Pruden household. This shows that quarrels and arguments not originally related to sexual misdemeanour could result in slander. Waddams, in his study of ecclesiastical court cases, stated that insults could arise out of a “collateral quarrel that originally had nothing to do with the plaintiff’s reputation” (footnotes omitted).¹⁸¹ This quarrel may have pre-dated the actual occasion of slander or induced it, but if a woman was involved, the possibility of sexual insult existed.¹⁸² This suggests that sexual slander was not always occasioned by the fact that the plaintiff was female, but could arise because there was some other argument or cause of tension between the parties. However, the choice of words — imputing impure behaviour to the plaintiff — shows the gendered nature of the insult, in impugning a woman’s valuable reputation for chastity.

IX DUTIES TO WARN

So far, this article has mainly canvassed sexual slander cases in which the court saw the defendant’s breach of the “rules of civility” as being unjustified. Defendants could avert such a finding by claiming the truth of the imputation or stating that they had never uttered it in the first place. Interesting though, as to what it reveals about conceptions of gender, is the defence of qualified privilege. This defence could be invoked if the slanderous words were, in fact, false. To fit it into the “reputation as dignity” approach, this defence did not demarcate the defendant’s actions as antisocial, but the opposite: the fulfilment of community obligations.

178 “*Barbed Tongue of Scandal*” *NZ Truth* (New Zealand, 18 July 1929) at 2.

179 *Ibid.*

180 ““Hope Your Hubby Don’t Get This”” *NZ Truth* (New Zealand, 5 December 1929) at 2.

181 Waddams, above n 59, at 136.

182 *Ibid.*, at 172.

An occasion was privileged when the defendant had a social, legal or moral duty to make the communication, or had a legitimate interest in doing so, and the person receiving it had a corresponding interest or duty.¹⁸³ An example of this was a case heard in Invercargill in 1928, in which Miss Rita Lantsbury sued Florence Dieley and her husband for slander.¹⁸⁴ Mrs Dieley had been told by a third party that the plaintiff, who was a waitress, had given birth to a child. The defendant apparently relayed this news to her nephew, who was due to marry Miss Lantbury's sister. The magistrate held that although there was no truth in the story, the occasion was privileged. The defendant had a social duty to tell her nephew of the character of his soon-to-be sister-in-law. The magistrate thought it necessary that relatives should be able to tell younger people that their associates were behaving improperly without facing legal action. This case also affirms that it was socially unacceptable for young women to engage in sexual activity that could result in pregnancy, for even suspicion of such activity was enough to justify breach of the "rules of civility" if the occasion was privileged.

But it was possible to defeat the defence of privilege, particularly if the slander was made maliciously. When Mrs Daisy O'Sullivan informed family members that the plaintiff, her own sister, was known as Grey Lynn's woman of ill repute, a magistrate found that the comments were not privileged as the plaintiff had asked the defendant unsuccessfully to apologise twice.¹⁸⁵ This was sufficient to prove malice.¹⁸⁶

Judicial opinion also existed that meddlesomeness was to be discouraged. In *Heap v Green*, the defendant had allegedly imputed to the plaintiff's husband that the plaintiff was adulterous and dishonest, and to the plaintiff's employer that the plaintiff was dishonest.¹⁸⁷ In a summons to strike out the pleas of privilege and justification before trial, counsel for the defendant argued that their client had acted out a "kind of 'social or moral duty'" in informing the plaintiff's employer and husband — both strangers to her — of these things.¹⁸⁸ Alpers J did not find in the case law, however, "any tendency to encourage such a very disagreeable conception of 'duty'".¹⁸⁹ He stated that:¹⁹⁰

... if such a tendency did exist it would hasten the reign not of the righteous, which all men pray for, but of the self-righteous, which most men, one hopes, abhor.

Whether such a privilege in fact existed was a question of law for the judge

183 *Heap v Green* [1926] NZLR 302 (SC) at 303.

184 "Woman's Word" *NZ Truth* (New Zealand, 26 April 1928) at 5.

185 "Court Action Reveals Family Feud" *NZ Truth* (New Zealand, 4 December 1930) at 8.

186 *Ibid.*

187 *Heap v Green*, above n 183, at 302.

188 *Ibid.*, at 303.

189 *Ibid.*

190 *Ibid.*

who tried the case.¹⁹¹ Yet Alpers J's statement reveals a judicial opinion that the defence of privilege was not to be extended to those who engaged in needless scandal mongering.

X YOUNG WOMEN AND CHANGE

Throughout the period covered by this article, a woman's reputation for chastity was a valuable asset worth protecting through litigation. It seems that the dichotomy between "pure" or "fallen" women remained. Yet some of the slander cases reveal an ambiguity in this dichotomy.

One particularly illuminating case occurred during World War One. As women exercised greater independence during this period, including in their relationships with men, their actions were increasingly labelled as amateur prostitution.¹⁹² "Prostitution" thus became a metaphor for women whose conduct placed them in a middle ground between the "ideal" and the "fallen".¹⁹³ In 1917, a slander case took place in Wellington that concerned these issues. Two sisters who worked as dressmakers — Isabel and Gladys Davey — sued Arthur Schaeff, their landlord, for £1,050 in damages.¹⁹⁴ The girls alleged that Schaeff had conspired against them and committed slander by telling certain others they were prostitutes. Whether they were or not was therefore the central issue in this case.

The backdrop to this legal action was the concern over "one-woman brothels" in New Zealand during the early 20th century.¹⁹⁵ These businesses, which involved women working as prostitutes by themselves in their own premises, were largely located in Auckland and Wellington's central residential and mercantile areas.¹⁹⁶ They commonly used legitimate businesses as a front, thereby challenging other people's attempts to distinguish between respectable and fallen women.¹⁹⁷ In 1916, concern over the incidence of venereal disease among New Zealand soldiers led to regulations designed to suppress these businesses.¹⁹⁸ It became an offence for any person "to keep or manage any house of ill-fame or brothel" (footnotes omitted), which was defined as a place used by at least one woman for prostitution.¹⁹⁹ It appears that Schaeff sought to evict the Davey sisters under these regulations. The charge of prostitution rendered the girls liable to two years' imprisonment, and if true, the defendant would also

191 Ibid.

192 Bronwyn Dalley "Lolly shops 'of the red-light kind' and 'soldiers of the King': Suppressing One-Woman Brothels in New Zealand, 1908–1916" (1996) 30 NZJH 3 at 5.

193 Ibid, at 5–6.

194 "Sued for Slander" *NZ Truth* (New Zealand, 8 September 1917) at 6.

195 Dalley, above n 192, at 3–4.

196 Ibid, at 6.

197 Ibid, at 6 and 11.

198 Ibid, at 17–18.

199 Ibid, at 18.

have been liable unless he took steps to keep the property respectable.²⁰⁰ The ambiguity over whether the sisters were, in fact, prostitutes needed to be resolved.

In the Supreme Court (now the High Court), this task was not straightforward. Gladys had already consummated her relationship with a soldier and was due to give birth. The Court consequently focused on Isabel's state of virginity. A doctor who had tested her felt it was highly improbable she was a prostitute, and unlikely that she had ever been intimate with a man, although medical experts for the defence disputed this. In her evidence, Isabel stated she had never experienced improper relations, although the defendant had propositioned her for sexual favours. Many people gave evidence of the girls' respectable and hard-working character, including nearby business owners, showing that the girls were part of a wider network of support within the urban community. Yet Schaef, a photographer, was adamant that the sisters were prostitutes. He gave evidence of hearing men's voices in their room at night while working in his studio overhead and of using a ladder to look through a window into the girls' premises to witness their indecent behaviour.

The judge, in his summing up, said it would be difficult for the evidence to support the claim that the defendant and a neighbour had conspired to procure the girls' conviction. In terms of the slander claim, the jury awarded the sisters £625 in damages. This case illustrates historical trends regarding femininity. World War One had accentuated the social freedoms achieved by New Zealand women of this period, who were more visible and mobile in urban communities than ever before.²⁰¹ Women could enjoy men's companionship without a chaperone, and many socialised with soldiers in parks, at restaurants and at dances.²⁰² Consequently, there was an ambiguity as to who were "pure" and who were "fallen". The case of the Davey sisters in their action for slander shows this ambiguity. The sisters did have relationships with soldiers: Isabel was engaged to one and Gladys was pregnant.²⁰³ Thus while the sisters were found innocent of prostitution by a court of law, neither could they fit squarely into the traditional mould of the "pure".

Other cases from the early 20th century also illustrate differences of opinion as to what constituted proper femininity. One case was when Miss Ella Miller sued Ellen Williams for slander.²⁰⁴ The plaintiff was a nurse who, along with her friend Ruby White, boarded with the defendant. Both young women attended a party one night and Miss White, who occupied a separate bedroom to the plaintiff, brought back a male guest to entertain. The following morning, the plaintiff allegedly heard the defendant on the

200 "Sued for Slander", above n 194, at 6.

201 Dalley, above n 192, at 19.

202 Ibid.

203 "Sued for Slander", above n 194, at 6.

204 "Surely You Don't Think I had a Man in my Room?" *NZ Truth* (New Zealand, 17 July 1930) at 7.

telephone telling the matron of the Nurses' Institute that Miss Miller had also entertained the man during the night. When the plaintiff went on the phone to deny the accusation that she had had a man in her room, the defendant shouted over her shoulder: "She did, Matron, she did!"²⁰⁵ The plaintiff said that as a result she had been prevented from obtaining work. The slander action was therefore important in clearing her name, although the defendant denied ever making the charge.

Miss Miller was successful,²⁰⁶ and her case suggests that young women could be subject to sexual slander if their forms of fun and recreation did not conform to others' ideas of the same. The actions of Miss Miller and Miss White in attending parties and returning home late at night may well have been unseemly behaviour in the defendant's eyes; Miss White's action in bringing home a man certainly was. As well, Miss Miller was a fan of playing her gramophone, an action the defendant similarly disliked because of the noise and disturbance it created. It is therefore possible to discern different ideas as to what constituted proper femininity in this case, particularly when young women showed no signs of always acting in a chaste and demure manner. Such issues could be exposed by a sexual slander case.

XI RELATIONSHIP WITH SEXUAL HISTORY

Sexual slander cases have the ability to tell modern audiences something about sexual history in New Zealand. While the ability to sue for sexual slander may, to some, represent enforcement of a detrimental moral code that prescribed chastity and modesty for women, these cases reveal more than that. Those discussed above show that young women in New Zealand during the early 20th century did have sex before marriage, did enjoy themselves at parties and did have casual relationships with men that could be construed as unchaste. Other cases show that married women had the opportunity to engage in adultery and form illicit sexual liaisons. The fact that people gossiped about these transgressions shows that those in the community were interested in the sexual activities of others. When the issue came to court, the debate and scandal were transferred to a very public forum.

Many of the details of the cases described in this article have been preserved in the pages of *NZ Truth*, a publication that was able to build up one of the largest circulations in New Zealand by engaging in sex gossip.²⁰⁷ This newspaper allowed the dissemination of sexual details to an audience beyond the immediate community. Curious readers could learn

205 Ibid.

206 "Slandered Nurse Gets £75 Damages" *NZ Truth* (New Zealand, 7 August 1930) at 7.

207 Eldred-Grigg, above n 136, at 122.

that the man Miss Ruby White smuggled into her room was a well-known Wellington businessman with a wife and family.²⁰⁸ They could also learn that when Miss Quinn of Carterton sued Mr Browne for slander in 1916, Browne gave evidence of the plaintiff standing thinly clad at his doorway and subject to playful teasing by a male third party.²⁰⁹ This was not a world exclusively occupied by prudes, either those who absorbed the details of *NZ Truth* or those who transgressed moral boundaries themselves.

The study of sexual slander cases has important implications for the writing of sexual history in New Zealand. Daley has shown that writings concerning sex and sexuality in late 19th and early 20th-century New Zealand have focused on sexual crime and punishment, with themes of puritanism and suppression.²¹⁰ Some legal resources, such as criminal records involving prostitution and abortion, and their interpretation by historians, have supported this reading of the past.²¹¹ Yet while the “puritans may have had a more prominent place in our historiography, ... the pleasure seekers were always present in our history”.²¹² The sexual slander cases allow glimpses of these pleasure seekers, such as the married women found guilty of sexual indiscretion and thus denied damages for defamation.

Defendants could also be among this number. In 1915, the highly righteous defendant in a sexual slander case, Robert Garden, based his allegation of infidelity upon an incident he witnessed through a crack in a shed — an incident that he continued to watch for an hour and a quarter.²¹³ Such “Peeping Tom” behaviour also occurred when Schaef accused the Davey sisters of prostitution, as his ladder antics show. In that case, the judge reportedly stated that just because Gladys was pregnant and unmarried, “doesn’t prove that a girl’s a bad girl”.²¹⁴ To be a pleasure seeker, then, was not to be completely beyond the bounds of respectable society.

Daley’s intention is not to replace the puritanical image of New Zealand that appears in some history writing with a picture of an entirely relaxed society.²¹⁵ The fact that women sued for sexual slander, often motivated by the loss of employment prospects that a tarnished reputation entailed, shows that there were contemporary understandings of proper and improper behaviour. However, that applies equally to understandings of sexuality in the 21st century. While conceptions of a puritanical past have often been juxtaposed with images of a more liberal present, in reality, all historical periods have understandings of what is and is not appropriate

208 “Slandered Nurse Gets £75 Damages”, above n 206, at 7.

209 “A Victory for Virtue” *NZ Truth* (New Zealand, 18 November 1916) at 5.

210 Caroline Daley “Puritans and Pleasure Seekers” in Allison Kirkman and Pat Maloney (eds) *Sexuality Down Under: Social and Historical Perspectives* (University of Otago Press, Dunedin, 2005) 47 at 48 [“Puritans and Pleasure Seekers”].

211 See *ibid*, at 50–54.

212 *Ibid*, at 48.

213 “Presbyterian Pillar Plays the Part of ‘Peeping Tom’” *NZ Truth* (New Zealand, 1 May 1915) at 7.

214 Hosking J quoted in “Sued for Slander”, above n 194, at 6.

215 Daley “Puritans and Pleasure Seekers”, above n 210, at 62.

behaviour, as well as those willing to transgress it. The sexual slander cases of the early 20th century in New Zealand bear witness to the complexities of human behaviour and show that sexuality was not a hidden topic in this era, but an active source of debate and scandal, both in the community and in the courts.

XII CONCLUSION

The core of defamation law is protecting a person's reputation. While "reputation" can be conceptualised in different ways, this article has highlighted the issues of dignity and harm to relationships that occur when a person's good name is smeared. Adopting a historical perspective, this article considers female victims of sexual slander in New Zealand in the 19th and early 20th centuries. Of key interest has been the court as a site of cultural contestation, revealing insights into femininity and the courts' protection of sexual character. What use does this analysis have for present times? It shows the social and cultural importance of a good sexual reputation. In the past, if a woman's reputation was impugned, it could result in a lack of prospects, both at a personal level and at a more public one. This is recognised today, as defamation suits involving sexual reputation continue to occur. There will always be ideas as to what constitutes appropriate sexual behaviour, and so long as there is, the courts will remain one avenue of redress for those who are defamed.

It is instructive to consider the actions that courts and legislatures undertook in the past to protect female sexual virtue, including the particular legal means and the ideas of womanhood that spurred legal reform of slander law in the 19th century. It allows modern audiences to see how the law developed in response to a social issue, and the practical advantages that removing the requirement for special damage in sexual slander suits entailed for women. Negative aspects, such as the law's enforcement of a certain cultural conception of womanhood, can also be discerned in this process, although that is largely from a modern perspective. People of today are like people of the past: interested in scandal, gossip and other people's sexual activities. The courts, then as now, hold the power to restore a person's good character when such prurient interest exceeds its permissible boundaries, or when a more direct attack upon a person's reputation occurs. The courts truly then can vindicate virtue.