In most of Australia juries are used in defamation trials to assess whether a publication is defamatory. One commonly used definition of a defamatory publication is that it tends to cause ordinary reasonable people to think less of the plaintiff. By dissecting the concept of the ‘ordinary reasonable person’ as representative of the community, this paper explores two crucial issues. The first is the extent to which juries are permitted and encouraged to consider the views of sub-communities within wider society. The second is the accuracy with which jurors are likely to assess community attitudes, given the phenomenon known as the ‘third person effect’, which hypothesises that jurors will consistently underestimate the tolerance of others.

The paper explores the impact of minor, apparently insignificant modifications to the way juries are instructed and their broader ramifications for other forms of jury trials, as well as for freedom of expression in Australia.

This paper presents research-in-progress of the National Defamation Research Project, an unprecedented examination of Australian social attitudes in relation to defamation law. Run by the Communications Law Centre at the University of New South Wales, the Project uses quantitative and qualitative social research methodologies, supplemented by interviews with journalists, defamation lawyers and judges.

The defamation climate in Australia

Sydney has been proclaimed ‘Defamation Capital of the World’ (eg Knox 2003). While London offers serious competition for the title, the UK produces fewer writs per head of population.¹ Far more striking is the awning gap between Australia and the United

¹ Around one writ per 128,000 Australians, compared with one writ per 200,000 people in England and Wales. The last major statistical survey of defamation actions in Australia can be found in Edgeworth and Newcity (1992) and Newcity (1991).
States. On a rough estimate, Australians start 35% more defamation actions than do the entire American population. Put differently, on average an Australian is 20 times more likely to sue than an American. Sydney alone sees a level of defamation litigation equivalent to 60% of that in the US.2

The gulf between Australia and the US can readily be accounted for by the latter’s Constitution, the First Amendment of which requires that ‘Congress shall make no law … abridging the freedom of speech, or of the press’. This led to a fundamental shift in America’s defamation law. Like Australia, the US had inherited the English common law of defamation whereby, as a general rule, publishers can be required to prove in court the truth of any defamatory allegation they publish, with all the expense and uncertainty that entails. It was during the 1960s that the US Supreme Court determined that the resulting ‘chilling effect’ was an impermissible infringement of free speech (New York Times Co. v. Sullivan, 376 U.S. 254). The focus of US defamation law shifted from what publishers could prove to how they had behaved, with it becoming incumbent on the plaintiff, in many situations, to demonstrate a publisher’s reckless disregard for the truth (ibid., pp. 279-80).

In contrast, Australia has largely retained the common law of defamation. Many see the system as hopelessly skewed in favour of plaintiffs, something arguably demonstrated by publishers’ success rate at trial of around 32%. The expense and uncertainty involved in defending defamation proceedings is such that the media settle the bulk of defamation actions brought against them, which generally involves paying damages and legal fees. Australia’s major newspaper publishers, who receive threats of defamation proceedings almost daily, bear millions of dollars of defamation pay-outs each year.

**The National Defamation Research Project**

It was in this climate of vigorous litigation that the Communications Law Centre at the University of New South Wales was awarded funding from the Australian Research Council (ARC) to conduct extensive research into defamation law. The project, known as the National Defamation Research Project (NDRP) is supported by industry partners John Fairfax Holdings, the Seven Network, the Australian Publishers Association and law firm Cornwall Stodart.

What distinguishes this project is our decision to ground it in social research. Using quantitative and qualitative research methodologies we shall explore social attitudes to a range of issues relating to defamation law. We shall conduct a phone survey of 3,000 randomly selected Australians. This will be supplemented not only with an extensive series of focus groups around the country, but also by interviews with journalists, defamation lawyers and judges.

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2 During the years 1997 to 2002 inclusive the number of defamation writs started in the NSW Supreme Court (which sees the bulk of the state’s defamation actions) has averaged at 68 per year. The number of defamation actions started in the USA has been estimated at 110 pa (Newcity 1991, p. 63).
Defamation law discourse tends to revolve around reforms that would narrow the gap with America and our research will contribute popular opinion to that debate. For instance, we shall seek out some measure of the extent to which the public think the award of defamation damages should be contingent on a lack of care by the publisher, rather than being related more to the latter’s ability to prove truth.

Even so, given our commitment to social attitudes research, we shall extend beyond contributing public attitudes to the law reform debate. We shall examine the public’s role in defamation law. Most obviously the public is the media’s audience for defamatory material, and in our research we shall look at how defamatory material is understood. In this paper, however, I touch on two aspects of our research which perceives the public in a different capacity, namely as a pool for defamation juries.

Identifying what is defamatory

In all parts of this country apart from South Australia and the Australian Capital Territory there is a potential for a jury to be involved in defamation proceedings. In some states their obvious role is as arbiter of the truth. They will be asked to determine, on the basis of evidence presented before them, whether the publisher has proved all charges it has levelled against the plaintiff. To this extent the defamation jury functions much like the jury in a criminal court.

Defamation juries have two additional and unique functions. First, they are asked what, if anything, the publication being sued over imputes about the plaintiff. The second, which is the function that concerns this paper, is the determination of whether that imputation meets the legal definition of what is defamatory.

Queensland and Tasmania are the only two states that have adopted a statutory definition of defamation. Those definitions are almost identical and Tasmania’s will suffice to illustrate both:

An imputation concerning a person or a member of his family, whether that member of his family is living or dead, by which -

(a) the reputation of that person is likely to be injured;
(b) that person is likely to be injured in his profession or trade; or
(c) other persons are likely to be induced to shun, avoid, ridicule, or despise that person;

is defamatory, and the matter of the imputation is defamatory matter. (Defamation Act 1957 s. 5(1)) (TAS).3

3 The Queensland definition will be found in Defamation Act 1889 s 4.(1) (QLD). In the case of both states, the person defamed must be a living person. Defamation of a dead person will only be actionable in as much as it also defames a living relative: Livingstone-Thomas v. Associated Newspapers Ltd (1969) 90 WN (Pt 1) (NSW) 223.
A close reading of this definition reveals a subtle distinction between subsections (b) on the one hand and (a) and (c) on the other. The last two necessarily involve an element of disparagement: some act or condition is imputed to plaintiffs that lead others to think less of them. Such denigration is not needed for a publication to meet the definition set out in subsection (b) (Sungravure Pty Ltd v Middle East Airlines Airliban SAL (1975) 134 CLR 1). For instance, an untrue report that a tradesperson has died is more likely to elicit sympathy than criticism, even though it will likely lead to a loss of custom, at least until such time as the truth becomes widely known.

The distinction between reports that denigrate and those that do not becomes crucially important in the remaining states and territories that have no statutory definition of defamation. In these areas the common law understanding of what constitutes defamation has been retained, meaning that, with limited exceptions, it is an essential ingredient of any action that plaintiffs show that some act or condition has been attributed to them which is to their discredit (eg Aqua Vital Western Australia v. Swan Television and Radio Broadcasters [1995] Aust Torts R 62,709).4

Untrue reports not meeting this requirement may be dealt with by a branch of law quite distinct from defamation, namely injurious falsehood. This law has more in common with the defamation law of America than that of Australia, including the former’s significantly less favourable treatment of plaintiffs.

Note, then, how in most of Australia the tradesperson whose death is prematurely announced may enjoy less protection under the law than the tradesperson about whom a mildly disparaging remark is made. This remains the case even though the first report may be deceitful and the latter entirely well-meant. Such iniquity is hard to comprehend while defamation law is understood simply as concerned with the protection of reputation.

**Defamation law as the arbiter of social inclusion**

American jurist Robert Post (1986) has argued that an account of defamation law requires an understanding of reputation that extends beyond conceiving it as a form of intangible property. We commonly think of reputation as akin to commercial good will, something that, like other forms of property, can not only be bought and sold, but also built up through hard labour and sound judgment. Like property it can also be stolen and defamation actions might be characterised as society’s restitution to those wrongfully deprived of what is theirs.

Alongside this concept of reputation as property, Post suggests that reputation can be seen in terms of human dignity. Reputation is also an inherent and integral part of individual identity and self-identity. Post sees defamation law as governing ‘rules of

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4 Exceptions include publications that result in exposure to ridicule (eg Ettingshausen v. Australian Consolidated Press (1991) 23 NSWLR 442) and those tending to lead to exclusion from society, for instance due to contagious disease (Henry v. TVW Enterprises [1990] WAR 475 (hepatitis B)).
civility’ which develop and maintain personal identity. He suggests that acts of defamation can be characterised as a breach of these rules. Building on the work of Erving Goffman (1967) and the symbolic interactionist tradition in American sociology, Post shows how a breach of the rules of civility jeopardises two parties (1986, p. 711). Most obviously threatened is the dignity of the party to whom deference was not shown: the plaintiff. Also brought into question is the social competence of the party responsible for the breach: the publisher. An audience witnessing a breach of civility are invited to choose. Whichever side they choose, the other will suffer discredit and stigmatisation.

In this way Post argues that the dignity that defamation law protects is the ‘respect (and self respect) that arises from full membership of society’ (id.). Rules of civility operate to distinguish members from non-members and defamation law enforces society’s interest ‘in defining and maintaining the contours of its own social constitution’ (id.). Or, put differently, ‘enforcing rules of civility is a matter of safeguarding the public good inherent in the maintenance of community identity’ (ibid., p. 713).

Once defamation law is understood as a means of mapping the moral community, its indifference to the mistaken report of the tradesperson’s demise is clearly explicable: such a publication does not bring into question the tradesperson’s social membership. It also becomes clear why, as a general rule, the question whether publications cause damage to reputation is not decided by reference to evidence called by the plaintiff of actual damage to reputation. The issue for the law is not so much whether the plaintiff has suffered, but whether there has been a breach in the rules of civility that may have led to the dignity of the plaintiff or defendant being compromised.

**Identifying the moral community**

Defamation law not only helps determine social inclusion, it identifies which communities are worthy of its support. The way this is done is expressed in the common law definition of what is defamatory. There are numerous variations in the way this test is formulated, but for current purposes I choose that contained in what is probably Australia’s most commonly used reference on defamation law. As stated in Tobin and Sexton’s *Australian Defamation Law and Practice*:

> The test is whether the publication would have been likely to cause the ordinary reasonable man or woman to have thought the less of the plaintiff. (para. 3120, Service 28).

Thus defamation law limits its protection to those communities consisting of ‘ordinary, reasonable people’. Not surprisingly that excludes the ‘criminal classes’. This is typically exemplified by the law’s refusal to recognise as defamatory allegations of being a police informant. However much being labelled a dobber might expose a person to severe retribution, at least from the dobbed, there is no recourse in defamation law, the rationale being that no ordinary reasonable person would think less of someone for helping to enforce the law, however minor the offence (*Blair v. Mirror Newspapers Ltd* [1970] 2 NSWR 604).
Dealing with division within the moral community

Who, then are these ‘ordinary, reasonable people’? What are their values? And most interestingly, how homogenous are they? Put differently, what moral issues define the moral community and which divide it?

A few paragraphs prior to the above test as to what is defamatory, Tobin and Sexton had introduced defamatory publications as being those ‘likely to cause ordinary, reasonable persons to think the less of the plaintiff or to shun or avoid the plaintiff’ (para. 3010, Service 30). A tension between these two definitions is immediately apparent. The first, by making reference to ‘the ordinary reasonable man or woman’, constructs a single, hypothetical construct as arbiter of what will injure the plaintiff’s reputation: the ‘ordinary, reasonable person’. This ‘ordinary, reasonable person’ embodies the sentiments of those within the community of ‘ordinary, reasonable people’. While this does not necessarily imply a moral consensus, it at least requires the identification of the views of the majority as opposed to a minority of ‘ordinary, reasonable people’.

In contrast, the second definition, by referring to the opinions of ‘ordinary, reasonable persons’, appears to permit the attitudes of minorities within the community of ‘ordinary, reasonable people’. The most likely constraint on how small that minority can be is that the viewpoint must not be such that its possession disqualifies its adherents as regards the requirement of ordinariness.

Following on from the reference to ‘ordinary, reasonable persons’, Tobin and Sexton saw two consequences as likely to flow from a defamatory publication, each distinct from the other:

(a) a likelihood to cause damage to the reputation of the plaintiff in the eyes of right-thinking members of the community in general;

(b) a tendency to exclude the plaintiff from society (para. 3010, Service 30).

The scope for considering minority viewpoints might seem tempered by the term ‘right-thinking members of the community in general’ (my emphasis). ‘General’ can mean ‘relating to … all members of a class or group’ (Macquarie Concise Dictionary, 3rd edn.), and thus indicating an opinion shared among all right-thinkers. But ‘general’ is as likely to be interpreted as ‘common to many or most of a community’ (ibid.), which need not mean majority. What is more, the words ‘in general’ may simply identify the community to be considered: the views to be heeded are those of at least some right-thinking members of the general, broad community, rather than of any sub-community.
Similar ambiguities are not limited to Tobin and Sexton: they exist in many of the commonly quoted formulations of the defamation test. Our research indicates that the matter is barely clarified by judicial directions to juries. Take, for instance, the following direction given to a jury by Levine J, who hears the bulk of defamation cases in New South Wales:

[D]efamatory means likely to lower the plaintiff in the eyes or estimation of fair minded, right thinking members of the community, likely to injure the plaintiff in his good name or reputation. You are members of the community and as such are best placed to apply community standards to this issue (Purcell v. Cruising Yacht Club of Australia, unreported, NSW Supreme Court, 16 October 2001).

This is shortly followed by a reference to ‘the ordinary, decent folk’ and moments later by a direction that the benchmark to be applied is ‘fair minded, decent, ordinary members of the community’.

The law has not been blind to the issue as to whether the defamation can be determined by reference to minority attitudes. Tobin and Sexton, for instance, immediately clarify that there is assumed to be a uniform community standard in determining what is defamatory. ‘In other words, the jury must decide whether the meanings conveyed are defamatory or not by reference to “general community standards and not by reference to sectional attitudes”’ (para. 3130, Service 28). They cite as authority (para. 3125, Service 28) Brennan J in Reader’s Digest Services Pty Ltd v. Lamb:

Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation, being a standard common to society generally ((1982) 150 CLR 500 at 505-506).

Curiously absent from Tobin and Sexton’s discussion of the issue is a subsequent case often quoted as authority that certain minority viewpoints can be considered. Hepburn v. TCN Channel Nine [1983] 2 NSWLR 682 concerned an imputation that a registered medical practitioner ‘is an abortionist’. One question for the court was whether this imputation could be considered defamatory to the extent to which it relates to lawful terminations.

Hutley JA thought the argument that such in imputation is not capable of being defamatory to be ‘startling’:

For example, ‘right thinking members of the community’ (where ‘right thinking’ is understood to mean ‘a man of fair average intelligence’): Slatyer v. Daily Telegraph Newspaper Co. Ltd. (1908) 6 CLR 1 at 7 (Griffith CJ); ‘right thinking people generally’: Tolley v. J.S. Fry & Sons Ltd. [1930] 1 KB 467 at 479; right-thinking members of society generally’: Sim v. Stretch (1936) 52 TLR 669 at 671 (Lord Atkin); ‘ordinary reasonable people’: Queensland Newspapers v. Baker [1937] St R Qd 153; ‘Ordinary decent folk in the community, taken in general’, Gardiner v. John Fairfax & Sons (1942) 42 SR (NSW) 171 at 172 (Jordan CJ); ‘The recipient as an ordinary person’, Mirror Newspapers v. World Hosts (1979) 141 CLR 632 (Mason and Jacobs JJ); ‘Ordinary people of reasonable intelligence’, Mount Cook Group v. Johnstone Motors [1990] 2 NZLR 488 (Tipping J).
As any abortion is regarded as wicked by a substantial part of the population on moral grounds, to say of a person that he is an abortionist may bring him into hatred, ridicule or contempt of ordinary reasonable people. As the objection to abortion is on moral grounds, to a substantial part of the community, legality is relatively irrelevant ([1983] 2 NSWLR 682 at 686B).

Glass JA addresses the issue more fully and concludes:

\[\text{[A] man can justly complain that words, which lower him in the estimation of an appreciable and reputable section of the community, were published to members of it, even though those same words might exalt him to the level of a hero in other quarters. Where a television programme has been beamed to a large audience it can be presumed, without special proof, that its viewers will include some who advocate the “right to life” and abhor the destruction of foetuses, whatever the circumstances. In the estimation of such persons the plaintiff can claim to have been disparaged even if abortionist meant lawful abortionist. If it also meant unlawful abortionist, she can also claim to have been denigrated in the eyes of a different but substantial section of the viewers who support the existing law but do not want it extended ([1983] 2 NSWLR 682 at 694B, emphasis added).}\]

In the case of the mass media, at least, the defamation test as formulated in Hepburn means that every ‘reputable’ viewpoint on a moral issue is reflected in defamation law, provided that viewpoint is one held by an ‘appreciable/substantial’ group. Clearly Hepburn, like all defamation test formulations, evolves from the standard construct of the community of ordinary, reasonable people. According to Hepburn, ‘ordinary’ pertains to an ‘appreciable’ or ‘substantial’ section of the community’, while ‘reasonable’ is equated with ‘reputable’.

It is not hard to see how a general application of Hepburn greatly extends the range of material that can be deemed defamatory. Whether or not juries are routinely referred to the case is of no great import: the potential for juries to interpret the defamation test, as frequently formulated, in a way that permits consideration of views perceived to be those of the minority is still there.

Nothing short of extensive jury research will establish how often this happens. While the NDRP will not tackle such a task, we shall measure the extent to which people perceive issues as dividing, as opposed to defining, the community of ordinary, reasonable people. Part of our research will be to collect quantitative data on how much certain imputations damage reputation in the eyes of a representative sample of the population. We shall also ask respondents to tell us whether the same imputations would be defamatory in the eyes of people they consider ‘ordinary’. Finally we shall ask the same respondents to think about people who would come to the opposite conclusion as to what is defamatory. Are these people ‘ordinary’ and ‘reasonable’?

The degree to which the application of Hepburn would lead to an expansion of what is deemed defamatory will be in proportion either to the extent to which people consider others who disagree with them as to what is derogatory to be ‘ordinary’ and reasonable’, or the extent to which the population is prepared to characterise both sides of a debate as
to whether a statement stigmatises as ‘ordinary’ and ‘reasonable’. The question as to which is the better measure will depend on a second limb of our research: whether the term ‘ordinary, reasonable person’ is more likely to be considered tautological or an oxymoron.

**The ordinary reasonable person: tautology or oxymoron?**

A central issue in our research is popular understanding of ‘ordinary’ and ‘reasonable’ in the context of the phrase ‘ordinary reasonable person(s)’. The above enquires into the extent to which the quality of ordinariness permits consideration of attitudes perceived to be minority.

Attention now shifts to ‘reasonable’. Given the context, this term could be considered tautological, particularly when perceived synonyms relate to the concept of rationality. At times this is the understanding of the law, and when used by some judges the word seems entirely redundant in the defamation context, connoting no more than endowment with at least average intelligence. Based on this understanding of reasonableness, it is likely that there will be no significant difference between asking people for the views of ordinary people and asking for those of reasonable people.

At the other end of the scale, the moral quality of reasonableness is more readily discerned. What most seems to distinguish ‘ordinary’ from ‘reasonable’ is that the former invites perceptions of norms, whereas the latter extends greater licence for subjective interposition. The reasonability requirement is the most obvious means by which arbiters of the moral community can colour it with their personal values. At this point there is potential for objection to the term ‘ordinary reasonable people’ as an oxymoron.

Our hypothesis is that in the present context ‘ordinary’ and ‘reasonable’ will not necessarily be seen as synonymous. One way to test this in our quantitative research would be to compare responses to questions about ordinary people with the same questions posed in relation to reasonable people. We consider this exercise to be unnecessary on the basis that our respondents will be asked about their own opinions. Since our research will be premised on the perception of the reasonable person standard as a moral one, determined by reference to personal morality, then personal morality will necessarily equate with the values of the reasonable person and there is no need to enquire about the latter separately from the former.

In contrast, we anticipate that questions about the views of ordinary people will in a number of cases elicit replies different from those to questions about respondents’ personal opinions. Put differently, people will not necessarily consider themselves ordinary and this should be clearly demonstrable in our research.

We shall also test the difference between asking about the ‘ordinary person’ and asking about the ‘ordinary reasonable person’. To the extent that the responses of those asked about the ‘ordinary reasonable person’ differ from the same respondents’ responses when
asked for their personal views, this will indicate that respondents do not entirely prioritise the quality of reasonableness over ordinariness when framing their answers.

**Relating our research to the defamation jury**

The virtue of the jury system is typically characterised as the involvement of a representative sample of the community in the legal process. In the case of the defamation trial, one potential of the jury is as a measure of the damage to the plaintiff’s reputation resulting from a publication. Another is the democratisation of the process whereby the moral community is defined. Arguably this could be achieved by asking the jury to consider the views of (the) reasonable person(s).

An obvious method of achieving these goals would be to ask juries to apply their own personal values in determining whether a publication would cause the community to think less of the plaintiff. The alternative approach is to treat jurors not as representatives of the community but as its observers, requiring them to apply their expertise in social norms derived from their engagement with public discourse. To the extent that jurors are asked to consider the views of the ordinary person, this is the law’s perception of the jury’s role.

Assuming that defamation law seeks to reflect the attitudes of the actual community, which of these approaches is preferable? A common objection to asking jurors to apply their personal standards is the lack of certainty as to whether the jury, given their small number and selection process, is truly representative of the community whose attitudes the law is seeking to access.

The evidence is that the law prefers to employ juries as observers of community standards. Take, for instance, this direction to a defamation jury by Levine J, the judge who hears the bulk of defamation actions in the New South Wales Supreme Court:

> The ordinary reasonable reader is no-one in this courtroom, and that includes you. The ordinary reasonable reader is a hypothetical person … (Heggie v. Nationwide News Pty Ltd, unreported, NSW Supreme Court, 27 May 2002).

Effectively, therefore, the law asks the jury to consider the impact of a communication on a third person. Is there an inherent risk to this strategy?

**The third person effect**

W. Phillips Davison (1983) first proposed the third-person effect phenomenon. Put simply, the hypothesis is that individuals tend to perceive the adverse effect of a communication on themselves as less than that on others exposed to the same communication.
Clearly the defamatory impact of a publication will relate to the degree of tolerance of its audience. The less the imputed conduct is tolerated, the greater will be the defamatory effect of the publication. If an individual is tolerant of imputed behaviour, does the third person effect suggest that the same individual will tend to perceive others as less tolerant of the same conduct? If so, as tolerance for an activity grows, so too will the perception of others as intolerant. In this way the third person effect acts as a brake to social change. To the extent that defamation juries are asked to consider the viewpoint of some third person, the third person effect suggests that perceived societal intolerance may become increasingly exaggerated, leading in turn to the unnecessary silencing of speech.

Research involving application of the third person effect on defamation law is limited to one small study involving 132 Stanford students (Cohen et al. 1988). The results suggest that readers:

(a) underestimate the effect defamatory material has on their regard for people they read about;

(b) overestimate how much effect the same material has on the opinions of other readers;

(c) perceive the impact of defamatory material on people they believe to be similar to themselves to be less than that on people they identify as more remote from themselves;

(d) consider the latter less capable of identifying media bias and thus less likely to appropriately discount the cogency of defamatory material.

Our research will seek to measure the third person effect in relation to the Australian public and ten different imputations. Each of these imputations relates to a social issue we consider potentially divisive, for instance sexual permissiveness, drunkenness and abortion. The third person effect will be measured by asking each respondent for their own views in relation to the imputation and also asking for their perception of the views of a third person, that is the ‘ordinary reasonable person’ and also the ‘ordinary person’.

If the third party effect operates within defamation law, an irony emerges. The third person effect derives from the individual’s self-perception as elite and therefore distinct from the bulk of the community. The third person effect also implies a challenge to the community’s morality issued by the very party charged with arbitrating the moral community’s boundaries. To the extent that the third person effect distorts legal outcomes, defamation law’s process of mapping the moral community will be frustrated.

Roy Baker
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