Defamation and Satire - Drawing the Line

Christina Moloney, in this 2005 CAMLA Essay Prize winning paper asks, is the line between legitimate satire and defamation drawn in the right place or is satire stifled to an unacceptable extent?

Introduction

As perhaps "the most important form of public humour", satire is fundamental to freedom of speech in a democracy, by making society "examine itself critically and confront its deficiencies". Defamation occurs when material is published 'which has the effect or tendency of damaging the reputation of another'. However, the current structure of defamation law, in claim and defence, ignores satire. Political satire aims to make "a political opponent look ridiculous, pricking pomposity, reducing authority by encouraging laughter, or by reminding readers or audience of a politician's less pleasant aspects".

Not only is satire "clever critique", but also a medium for the public representation of opposing and dissident voices.

The limited case law on satire suggests satirical subjects are either averse to litigation publicity, perhaps perceive the communication is defensible under 'fair comment', or may believe the "ordinary, reasonable person" would not acknowledge a defamatory imputation. Judges appear reluctant to imbue the ordinary reasonable person with the ability to identify satire, thereby stifling otherwise perhaps legitimate commentary, possibly contributing to the "chill effect" on the media. Current proposals for uniform national defamation laws, should include a specific statutory provision acknowledging satire and its "typically ironic or exaggerated message".

A Difficult Balance: Freedom Of Speech And Protecting Reputation

Freedom of speech enhances autonomy, promotes truth and enhances democracy through debate and criticism. Defamation law represents an inherent tension in a liberal democracy: balancing individual autonomy and freedom with the state's protective role by reference to communal standards of expression. While "freedom of the press is considered a cornerstone of democracy" providing space to challenge powerful institutions, the media itself "represent concentrated power", influencing society's opinions and understandings. Defamation laws recognise that democracy is harmed by careless, malicious, racist, sexist, untrue or commercially-driven reporting. Without a bill of rights, the Australian Constitution protects individual liberty and freedom of speech through our democratic system of representative, responsible government.

By protecting individual dignity, defamation law purports to protect individuals' integration into community membership while concurrently defining "the boundaries and nature of the general community". Post argues defamation law plays a central role in identifying "rules of civility" which govern society. Severely restricting satire via defamation laws potentially restricts a free flow of ideas and information so vital to a healthy democratic society.

Elements of Defamation

What are the imputations?

An imputation is "an act or condition attributed to a person". Handsley and Davis argue "defamation law tends to assume that words published are to be taken at face value." For example, in Hanson v Australian Broadcasting Corporation (Hanson), Pauline Hanson, ex-leader of the One Nation political party, obtained an interlocutory injunction against further broadcasting of the song 'Back Door Man'. Ms Hanson's own words were cut and pasted into song format. The imputations pleaded by Ms Hanson included that she was a homoseual, prostitute, man or transvestite, engaged in unnatural sexual practices and associated with the Ku Klux Klan. The song is clearly satire: "[when the language of another is reproduced in a way that accents its otherness, the act of report turns or returns to satire]."

Ambrose J, at first instance, held that "I can't imagine anybody... listening to that production... would not conclude that Pauline Hanson was... a homosexual and rejoiced in the fact". It appears, with respect, that there is little acknowledgment of the mode and circumstances of publication. The cutting and pasting indicated "that references to... sexuality, were not literal, but rather 'alluding in a satirical or ironic sense' to Hanson's conservative political views."

Commentators have criticised Hanson as implying that "ordinary Australian listeners can't be trusted to pick up subtext." Prior to each broadcast of the Hanson song, a disclaimer announced the song "was satirical and not to be taken seriously". Along with the choppy phrases and "retro-disco backing track", this constituted the broadcast's context, which is essential to obtaining the publication's meanings according to Charleston v Newsgroup Newspapers. Justice Michael Kirby criticised this as unrealistic according to people's ordinary casual or superficial interaction with media and that it overlooked defamation law's purpose: "to provide redress when reputations are damaged in fact". Perhaps a "grab" of this song could have led listeners to perceive that Ms Hanson had consented to or participated in the song's production. However, this highlights defamation law's inadequate approach to satire as a genre. As Chesterman argues, courts "should recognise that seemingly factual statements made in a satirical publication are unlikely to be taken literally by [audiences]."
but instead interpreted as expressing critique of a political attitude. Suggesting Pauline Hanson was a homosexual, prostitute or transvestite was ridiculous considering her extremely conservative political stance. Imputations should be assessed at a deeper level. A possible imputation could have been that she was too conservative and her policies did not reflect significant Australian groups. The court seems willing to take literally imputations which are

"so extravagant and improbable that they are clearly conveyed for the purpose of ridicule rather than to be believed".35 This reflects the English approach.34 While acknowledging the defendant's intention does not address the underlying object of restoring reputation, perhaps satirical intention could be assessed when the publisher's intentions are so clear that they

"colour the meaning the reasonable reader or reviewer would derive."55

Are the imputations defamatory?

Whether an imputation is defamatory is judged according to the ordinary, reasonable person: someone 'of fair, average intelligence... who is neither perverse... nor morbid or suspicious of mind... nor avid for scandal'.36 Applying this standard in Hanson, the Queensland Court of Appeal felt the ordinary person would have held Ms Hanson in "contempt or ridicule".37 The criticism of Hanson largely relates to with the judges' reasoning that the song inevitably conveyed a defamatory meaning - there is no apparent acknowledgment of satire.

Ambrose J in Hanson held that 0.5 to 5 per cent of the community were homosexual thus

"there's a significant percentage of [heterosexuals]... who hold homosexuals in contempt".38 Therefore publishing assertions that a politician was homosexual would generate "ridicule and contempt that would have a significant effect on that person's acceptability as a political candidate".39 In drawing literal imputations, the Hanson case applied the High Court's approach in Hepburn v TCN Channel Nine Pty Ltd60 ("Hepburn") whereby "reasonable" equates to "an appreciable and reputable section of the community".41 Baker argues

"Hepburn greatly extends the range of material that can be deemed defamatory."42

Whether or not the Court's assessment of community attitudes to homosexuality in Hanson was accurate, it demonstrates the Courts' restrictive application of the 'ordinary person' standard in assessing satire. Ordinary persons "are taken to share a moral or social standard"43. If defamation prescribes the "rules of civility"44, a narrow 'ordinary, reasonable person' standard will limit the extent of open discourse in our society.

Numerous cartoons fill Australian daily newspapers depicting politicians and public figures with oversized, grotesque features or animal characteristics. These ask audiences to critique or question persons or their policies. Satirical commentary aims to "push boundaries" and challenge assumptions unconventionally. 'Ridicule' is now recognised as a fourth basis for defamation45 (for example, in Boyd v Mirror Newspapers Ltd54 and Ettingshausen v Australian Consolidated Press55, Brander v Ryan56 ("Brander")57. Ridicule is a tool of satire, encouraging challenge to assumptions and the status quo. Defamation law recognises that community standards change over time,58 thus should recognise ridicule as a tool of satire.

Defamation law's assumptions regarding the 'ordinary, reasonable person' overlook satire's analytical and challenging function. Satire should be positively acknowledged in an area of law whose inherent role is to establish moral and ethical boundaries in reporting by encouraging both humour and humility:

"... a more relaxed self-perspective can undo much of the damage [of defamation], and even improve one's self image."59

Levine J's common jury direction52 in the New South Wales Supreme Court was:

"The ordinary reasonable reader is no-one in this courtroom, and that includes you. The ordinary reasonable reader is a hypothetical person."53

This approach may set up a "third-person effect" whereby 'individuals tend to perceive the adverse effect of a communication on themselves as less than that on others exposed to the same communication."54 United States research supports the argument that such an effect means 'perceived societal intolerance may become increasingly exaggerated"55. Even if left to the jury, the judge's direction as to the imputations and their effects will be influential. Most importantly, Magnuson warns that 'courts should be careful, in accepting a plaintiff's imputations, not to penalise satirical comment merely because it falls outside their own middle-class horizon."56

Defences

The most useful defences to satire are fair comment and the extended qualified privilege regarding political communication.

Fair Comment

This defence protects legitimate criticism and expression of diverse opinions, recognising "an important aspect of freedom of speech".57 A satirical publication cannot personally attack individuals, rather it must address general public profile or policies. Furthermore, '[to] allow public debate to descend to the levels of the gutter is not in the public interest, however amusing it may be'.58 Herald and Weekly Times v Popovic59 ("Popovic") confirmed the objective test in assessing the comment's 'fairness': the defendant need not prove that they actually held the opinion, merely that it was an opinion that an ordinary reasonable person could have held however prejudiced he might be... however exaggerated or obnoxious his views.60 Non-acknowledgment of satiric subtext delimits such assessments. The Commonwealth's proposals are more limiting than current common law or code law, by protecting only comments which are "fair and reasonable" and rejecting grossly exaggerated, biased or prejudiced opinions.61 To remain effective in protecting satire, the objective element must retained but given wider interpretation.

Qualified Privilege

While satire may be protected if relating to government and political matters according to the implied freedom of political communication, the strict approach adopted by Lange v Australian Broadcasting Corporation62 may unduly constrain political satire.63 The Lange High Court defined "political speech" as

"[the ability of] 'the people' to communicate with each other with respect to matters that could affect their choice in federal elections or
constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government..."

Political speech has thus far been interpreted widely. Yet Lange emphasised that ‘the freedom of communication... the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution’.65

Lange imposed a further requirement: the defendant’s conduct in publishing the material must have been reasonable.66 In considering reasonableness, courts recognise the media’s inherent power for good and ill,67 therefore aiming to deter what courts have described as ‘slipshod’ journalism.68 This presumably includes misrepresentation of facts and lack of context, as in Popovic. “Reasonableness” requires the defendant to believe the imputation was true, take steps to verify the truth of the imputation, seek a response from the plaintiff and publish this if feasible.69 In Popovic,70 Winneke ACJ and Warren J acknowledged that satisfying reasonableness will depend on all the circumstances, the nature of the publication and the published matter. The reasonableness factors above seem particularly restrictive of political satire and seeming to protect only ‘sober, dispassionate dissemination of evidence of impropriety’71 by a political figure.

A conservative interpretation of a satirical publication is unlikely to be protected. Chesterman argues that the courts’ unwillingness to grant the defence in the Hanson and Brander72 (on first appeal) does not conform to ‘the spirit of the implied freedom of political communication, so as to specifically provide greater freedom for political satire’.73 Brander concerned a satirical article on a politician in South Australia. On appeal, the imputations of effeminacy and homosexuality were held not to be defamatory in the context of the entire article. However, the imputations that Brander did not hold his political beliefs sincerely, did not hold credible views on immigration or was motivated by juvenile attention-seeking were upheld. They were ultimately not deemed defamatory as the defendants had sought to verify their truth and had reasonable grounds for believing they were true.74 The Full Court of the Court of Appeal upheld the defence of extended qualified privilege, adopting a more relaxed approach to the defence requirements, in order to reach the most appropriate overall result. However, this approach lacks sufficient certainty.

England offers greater protection to satire: qualified privilege has been extended to communications concerning matters of “public concern”, not just political discussion. Whereas Lange was guided strictly by the Constitution, English decisions take a wider frame of reference including ‘freedom of expression’ provisions in international treaties and the media’s fundamental role in communicating matters of public interest.75 This approach recognises that every issue which resonates with the public is ‘potentially relevant to democratic self-governance, and hence potentially of public concern’.76 Distinguishing political from non-political is not “neutral” or “value free”77 and will result in divergence of opinion,78 as demonstrated in Popovic where three judges differed as to what they considered ‘political’. This makes the state of the common law in Australia unclear, especially for those publishing satire on issues of public concern or current affairs which may be indirectly political. This uncertainty may translate into an over-cautious approach by publishers, thereby stifling legitimate criticism and debate. Both Queensland and Tasmania provide a defence for publications concerning subjects of public interest, where discussion is for the public benefit.80 The national legislation might adopt this provision to provide greater certainty.

Conclusion

The ubiquitous nature of the Australian media necessitates protection of people’s reputation because of the media’s powerful discourse-shaping role. Furthermore, everyone, regardless of occupation or social status, is entitled to preservation of their reputation. However, freedom of speech implies protection of diverse opinions and open discourse on matters of public concern. Currently, the defamation action and defences fail to provide this by ignoring satire. The national defamation legislation should provide specifically for satire in the action by imbuing the ordinary person with a broader capacity to interpret this genre. This protects diver-
sity of expression and accountability of those in power, while retaining the strict approach to defences acknowledges the media's potential for unscrupulousness or malice.

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2 Fitzgerald, above n 1, 14.
7 Ibid.
8 Lawrence McNamara, "Free Speech" in Butler and Rodrick, above n 3, 6-11.
11 Other accepted restrictions on freedom of speech which are thought to preserve democracy include laws prohibiting racial vilification, sex discrimination, commercially misleading and deceptive speech and obscenity: see Dan Meagher, "What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication" (2004) 28 Melbourne University Law Review, 438, 442.
12 The US First Amendment confers 'private rights' on individuals by guaranteeing freedom of speech.
13 Commonwealth of Australia Constitution Act 1900 (UK).
14 Dan Meagher, above n 11, 453.
16 Post, above n 15, 712.
18 Handsley and Davis, above n 6, 1.
19 Unreported, Queensland Supreme Court, 1 September 1997.
20 The injunction was affirmed by the Queensland Court of Appeal in Australian Broadcasting Corporation v Hanson (Unreported, 28 September 1998), and subsequently the Australian Broadcasting Corporation were refused leave to appeal to the High Court in Australian Broadcasting Corporation v Hanson (9401998, 24 June 1999).
21 Handsley and Davis, above n 6, 2.
23 Cited in Handsley and Davis, above n 6, 5
24 Butler and Rodrick, above n 3, 38.
26 Ibid, 19.
27 Fitzgerald, above n 1, 12.
28 Handsley and Davis, above n 6, 2.
31 Ambrose J, at trial, and Jersey CJ, on appeal, alluded to this as another reason why the imputations were reasonable.
33 Ibid, 150.
34 Berkoff v Burchill [1996] 4 All ER 1008, 1018 (Millet LJ).
35 Magnusson, above n 5, 290.
36 Jianpu v Bottom [1980] 2 NSWLR 380, 386 (Plunt). The High Court of Australia appears to have confirmed this 'reasonable person' test in Chakravarti v Advertiser Newspapers Ltd (1998) 193 CLR 519, 573 (Kirby).
37 Eisenberg, above n 25, 18.
38 Handsley and Davis, above n 6, 5.
39 Handsley and Davis, above n 6, 5.
40 [1983] 2 NSWLR 682. In Hepburn v TCN Channel Nine Pty Ltd, the term 'abortionist' was held to be defamatory.
41 Hepburn v TCN Channel Nine Pty Ltd [1983] 2 NSWLR 682, 694 (Gless).
43 Readers Digest Services Pty Ltd v Lamb (1982) 150 CLR 500, 505-506 (Brennan).
44 Robert Post, above n 15, 712.
49 However, in this case the satirical material was protected by extended qualified privilege.
50 Mount Cook Group v Johnstone Motors [1990] 2 NZLR 488.
51 Fitzgerald, above n 1, 11.
53 Heggie v Nationwide News Pty Ltd, unreported, NSW Supreme Court, 27 May 2002.
54 Roy Baker, above n 51, 17.
55 Ibid.
56 Magnusson, above n 5, 291.
57 Butler and Rodrick, above n 3, 92.
63 The implied freedom of political communication in the Commonwealth Constitution was established by the High Court of Australia in Theophanous v Herald and Weekly Times Ltd (1996) 182 CLR 140 and Stephens v West Australian Newspapers (1994) 182 CLS 211. The freedom is not a personal right in itself.
69 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 574.
70 [2003] VSCA 161, para 8 (Winneke ACJ) and paras 92-93 (Warren J). 
71 Chesterman, above n 32, 102.
73 Chesterman, above n 32, 150.
75 Magnusson, above n 5, 290.
78 Baker, above n 76, 94.
79 Don Meagher, above n 11, 466.
80 Defamation Act 1889 (Qld) s. 16(1)(h); Defamation Act 1957 (Tas) s. 16(1)(h).