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WHEN IS MATTER CONSIDERED "DEFAMATORY" BY THE COURTS?*

The various tests for determining whether matter is defamatory are discussed, with the writer pointing out that the "ridiculous light" test has the potential to stifle caricature and satirical writing. The writer then argues that the standard by which the defamatory quality of matter is judged in culturally diverse countries should not be that of the community as a whole, but could equally be that of a respectable minority. Finally, the writer discusses the shift in community attitudes towards sexist advertising, extra-marital relationships, homosexuality and lesbianism, abortion and communism, and the consequences of any such shift for the law of defamation.

I. INTRODUCTION

IT is a great honour and a great privilege for me to be able to deliver the Second David Marshall Public Lecture and by doing so to inaugurate the Fortieth Anniversary celebration of the Faculty of Law being accorded Faculty status by the National University of Singapore. Before I deliver the lecture I should like to make two personal observations. I lectured in the Faculty in its early years and even then, it was quite clear that it was going to be an excellent Law School: that promise has certainly been fulfilled. Its alumni have achieved great distinction in the law and in public life and I congratulate the Dean of the Law School, Professor Chin Tet Yung, and his excellent Faculty on the contribution that the Faculty continues to make to the legal profession and the public life of Singapore. My second personal observation concerns David Marshall, after whom this lecture is named. When I arrived in Singapore two weeks before Merdeka Day,[1] the best part of his political life was nearly over, but he was beginning to be regarded as a revered elder statesman, even though he was barely fifty and he was without doubt the leading criminal advocate at the Singapore and Malaysian Bar. He had also started to take on constitutional and administrative law

* The Second David Marshall Public Lecture delivered in the Chamber of the City Hall, Singapore, on 26 March 1999 under the auspices of the Faculty of Law, National University of Singapore.

1 31 August, 1963.

cases and I had the good fortune to be asked to write a few opinions for him in cases which he argued most impressively. My wife and I were the recipients of much hospitality from David and his wife Jean in their lovely home in Changi and later in the ambassador's residence in Paris where he served Singapore with great distinction for many years as its Ambassador to France. I am delighted that Jean Marshall is here this evening and I am very pleased to say that I regarded David Marshall not only as a very distinguished lawyer but also as a warm and very friendly person. David Marshall strongly supported the establishment of the Faculty of Law at its inception. When doubts were expressed by some as to whether the time was ripe for its establishment, David Marshall thought otherwise and devoted his considerable energy to gathering support for its establishment. The David Marshall Lecture Series is therefore a very fitting tribute and Mr Joe Grimberg and the trustees of the David Marshall Visiting Professorship deserve our congratulations for conceiving the idea of this Visiting Professorship and for implementing it so successfully. I am grateful to the trustees and to the Dean of the Faculty for their invitation to deliver the Second David Marshall Public Lecture this evening.

The title of my lecture is: "When is Matter Considered 'Defamatory' by the Courts?" This is not an easy question as even Lord Atkin, a very distinguished member of the House of Lords, acknowledged in 1936, when he said that "judges and text book writers alike have found difficulty in defining with precision the word 'defamatory'."[2] More recently, in 1996, in *Berkoff* v *Burchill*, a decision of the English Court of Appeal to which I shall refer later in this lecture, Lord Justice Neill, another distinguished English judge, and the author of an excellent text book on the law of defamation, said: "I am not aware of any entirely satisfactory definition of the word 'defamatory'."[3] With these two rather pessimistic observations in mind, what I shall endeavour to do in this lecture is to discuss and analyse the tests which the courts, principally in England, Australia and Singapore, have used in determining whether an imputation in alleged defamatory matter is capable of being defamatory. I shall then consider the important and related question, by whose standard is the matter adjudged to be defamatory and whether the defamatory nature of an imputation is ascertained, or should be ascertained, only by reference to general community standards or whether it can be ascertained by reference to sectional attitudes. The discussion of this second question requires us to consider whether the law of defamation in England, Australia and Singapore sufficiently takes into account the

[2] See, *Sim* v *Stretch* (1936) 52 TLR 669, 671.
[3] See, *Berkoff* v *Burchill* [1996] 4 All ER 1008, 1011 *per* Neill LJ.

cultural diversity in these three countries, and if it does not, whether it should do so. The third and last part of this lecture addresses the question of varying community standards and the further requirement imposed by the courts that the defamatory nature of an imputation is to be judged "according to the general community standards of the society *where*, and at the time *when* the imputation is made."[4] This requirement makes it difficult to apply previous cases as authorities in defamation cases because, as a Canadian judge said: " It is generally useless, and often misleading, to quote authorities to show that particular words have been held in particular cases to be defamatory, for the meaning of particular words may vary with the context and the circumstances in which they are published. Even when the meaning of the words has been ascertained, the defamatory tendency must be tested by the opinion of reasonable men, which varies from time to time with the changes of public opinion..."[5] You can therefore see the dilemma for the defamation lawyer. What is defamatory may not only vary according to the place where the alleged defamatory imputation was published, that is, England, Australia or Singapore, but the judgment as to its defamatory nature or quality may also vary according to the time at which the alleged defamatory words were published. Thus to call someone a "homosexual" or an "abortionist" or a "communist" may be defamatory in one of those countries but not in the others and those words may be defamatory at a particular period in time in a particular country's development and not at another. Decisions on the defamatory nature and quality of the words used may therefore have to be made without the comfort provided by authorities from the past and precedents from other jurisdictions, as these may be unreliable guides as far as the law of defamation is concerned.

Before I go on to discuss in detail the three main parts of this lecture, that is, firstly, the tests which the courts in England, Australia and Singapore have used to determine whether an imputation in alleged defamatory matter is capable of being regarded as defamatory, secondly the standard by which alleged defamatory matter is adjudged to be defamatory and thirdly the question of varying community standards, I should perhaps make clear that in the law of defamation the word *matter* has a much wider connotation than the word *statement* and that though actions in defamation are usually brought in relation to defamatory statements, there are other methods by which persons may be defamed. Pictures, photographs, cartoons, films, television or video footage, effigies and even signs, sounds, looks and

4 See, *Cairns and Morosi* v *John Fairfax & Sons Ltd* [1983] 2 NSWLR 708, 721 *per* Mahony JA.

5 See, *Herbert* v *Jackson* [1950] OR 255, 260 *per* Chevrier J.

gestures have all at one time or another been held to be capable of constituting defamatory matter. I should also perhaps explain that in order to succeed in an action for defamation, a plaintiff must prove that the defendant has published a defamatory *imputation* concerning the plaintiff which is contained in the matter published. What is an imputation? The actual defamatory meaning which the plaintiff alleges to arise from the matter published is called an imputation. Any act or condition asserted of or attributed to the plaintiff (usually to the plaintiff's discredit) is described in the law of defamation as an imputation. The task of the defamation lawyer is to draw imputations from alleged defamatory matter and to prove that the imputations conveyed by the matter published are defamatory of the plaintiff. But when is an imputation conveyed by matter, such as a published statement, regarded as defamatory by the courts? The answer to this question requires us to move to a discussion of the various tests which the courts have developed over the years to answer this difficult question. It should be noted, when considering these tests, that in coming to a conclusion that matter is defamatory, the courts do not ask whether the imputation being considered has *actually* damaged the plaintiff in the relevant way determined by the tests; it is sufficient that the imputation has a *tendency* to injure the plaintiff's reputation or is likely to injure his reputation. As the Australian Law Reform Commission in its 1979 Report put it, "the requirement is tendency not actuality."[6] Why this is so is not very clear but it may be that defamatory statements have a capacity to affect a person adversely even in the eyes of those not personally known to him and it would therefore be difficult to call those people to prove actual damage. Therefore the law of defamation deems it sufficient that the imputation in question has a *tendency* to injure the plaintiff's reputation.

II. The Tests Applied

There is no one clear and acceptable test for determining whether an imputation in alleged defamatory matter is capable of being defamatory of the plaintiff. What has happened is that over the last one hundred and sixty years, the courts have developed several tests for determining this question. At least five tests are discernible in the cases and none of them is capable, on its own, of offering an answer in every case. Every one of these five tests has some unsatisfactory aspects, as will become evident from the discussion that follows.

6 See, *Unfair Publication*: *Defamation and Privacy* ALRC Report No 11 AGPS (1979) at 45.

The oldest of the tests goes back to 1840 and the decision of the Court of Exchequer in *Parmiter* v *Coupland*.[7] In that case, the publication in the *Hampshire Advertiser* newspaper imputed to the plaintiff, the former Mayor of the borough of Winchester, partial and corrupt conduct and ignorance of his duties, as mayor and justice of the peace for the borough. The court held that in an action for libel, the judge is not bound to state to the jury, as a matter of law, whether the publication complained of be a libel or not; but that the proper course is for the judge to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition. Parke B then defined what is a libel and provided us with the common law's first test of when matter is considered defamatory by the courts when he said that a publication would be "defamatory" if it was calculated to injure the reputation of another "by exposing him to hatred, contempt or ridicule."[8]

Before I deal with the inadequacies of this test expounded by Parke B in *Parmiter* v *Coupland*, I should like to make a brief comment on the functions of the judge and jury, where both judge and jury participate in the determination of the question whether the matter under consideration is defamatory and on the situation where, as in Singapore, the determination of the question whether the matter is defamatory is made by the judge alone, because there are no juries in defamation cases or indeed in any cases. In England and in Australia generally both judge and jury participate in determining whether imputations conveyed by any published matter are defamatory and therefore in determining whether the matter is defamatory. The judge determines whether the matter is *capable* of bearing a defamatory meaning and the jury then determines, when the case comes to be tried, whether the matter is *in fact* defamatory of the plaintiff. If a judge determines that the matter is incapable of bearing a defamatory meaning then that is the end of the matter and the jury has no function to perform. Judges in England and Australia, however, are usually reluctant to rule that matter is incapable of bearing a defamatory meaning but sometimes they will do so.[9] In Singapore where there are no juries in defamation cases the judge must determine both questions, that is whether the matter is capable of bearing a defamatory meaning and whether the matter is in fact defamatory of the plaintiff. In Singapore, therefore, the role of the judge in determining whether the published matter is defamatory is greater than the role of the judge on this question both in England and in Australia.

7 (1840) 6 M & W 105.
8 *Ibid*, at 108.
9 See, *eg*, *Loukas* v *Young* [1968] 3 NSWR 549.

I indicated earlier that the test enunciated by Parke B in *Parmiter* v *Coupland*, that a publication would be regarded as defamatory if it was calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule in the mind of a reasonable man, has its inadequacies. These inadequacies stem from the fact that the test is incapable of covering all cases. This was well put by Scrutton LJ in *Tournier* v *National Provincial and Union Bank of England*,[10] when he said: "I do not myself think this ancient formula [propounded in *Parmiter* v *Coupland*] is sufficient in all cases, for words may damage the reputation of a man as a business man, which no one would connect with hatred, ridicule or contempt." Lord Justice Atkin in the same case echoed similar sentiments when he said that "an imputation of a clever fraud, which, however much to be condemned morally and legally, might yet not excite what a member of a jury might understand as hatred or contempt."[11] So where there is an imputation in published matter of a clever fraud or where the defendant writes that the plaintiff "is not conversant with business ethics", this may not be regarded as defamatory under the formula or test propounded in *Parmiter* v *Coupland*.

So a second test was formulated by Lord Atkin in *Sim* v *Stretch*.[12] The test is this: "Do the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"[13] In *Sim* v *Stretch*, itself, the defendant (the current employer of a domestic servant) had sent a telegram to the previous employer of that servant asking him to return the money he had borrowed from the servant. Applying this second test the House of Lords concluded that the words in the telegram were not defamatory. As Lord Atkin said: 'How could perusal of that communication tend to lower the plaintiff in the estimation of the right-thinking peruser who knows nothing of the circumstances but what he or she derives from the telegram itself?"[14] Although a certain class of society may think badly of persons who borrow money from their servants, the House of Lords did not think that society generally would regard the imputation as defamatory. A difficulty therefore with this second test is that it is not always clear who are the right-thinking members of society generally. In *Byrne* v *Deane*[15] a publication which contained the imputation that the plaintiff, a member of a golf club, had sneakily informed the police about the existence of an illegal gambling machine on the club's premises, was held not to be defamatory of the plaintiff

[10] [1924] 1 KB 461, 477.
[11] *Ibid,* at 487.
[12] *Supra*, note 2.
[13] *Ibid*, at 671.
[14] *Ibid*.
[15] [1937] 1 KB 818.

even though it undoubtedly lowered him in the esteem of his fellow club members. Another difficulty is that the lowering of the plaintiff's reputation in the estimation of a small but respectable section of the community may not always be sufficient for the publication to be regarded as defamatory. In *Chiam See Tong* v *Ling How Doong*[16] in 1997 TS Sinnathuray J in the High Court of Singapore held that "the views of the community as a whole must be considered and not just that of a limited class."[17] His Honour held that "the mere allegation that Chiam has been very supportive of the PAP *per se* cannot lower him in the eyes of right-thinking members of the public."[18] This difficulty will be considered further in the second part of this lecture when I consider the standard by which alleged defamatory matter is adjudged to be defamatory.

The third test was formulated in *Yousoupoff* v *Metro-Goldwyn-Mayer Pictures Ltd*.[19] The alleged defamatory publication in this case was a film *Rasputin the Mad Monk*. The film did not explicitly contain a rape scene. There was, however, an incredibly evil expression on the face of Lionel Barrymore, who played Rasputin, a properly shocked expression on the face of the lady, and a fade out.[20] Nevertheless, the court held that the film contained an imputation that the plaintiff (Princess Irina Alexandrovna) had been raped by Rasputin, (an advisor to the Tsar of Russia). The plaintiff would have found it difficult to argue that that imputation was defamatory using the two tests already considered. She would have found it difficult to argue that the imputation had a tendency to expose her to hatred, contempt and ridicule and she would also have found it difficult to argue that her reputation had been lowered in the estimation of *right-thinking* members of society generally. Such members, surely, would only have feelings of sympathy and concern for her. Fortunately for Princess Irina the courts introduced a third test in that case. Do the words or matter tend to put the person to whom they refer in a position of being "shunned and avoided?"[21] By introducing this test, the English Court of Appeal was, in the factual situation in *Yousoupoff*, abandoning the right-thinking member of the community touchstone and asking themselves instead, "how in fact do most people react to such information?" As one of the judges in *Yousoupoff* said, "one may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered

16 [1997] 1 SLR 648.
17 *Ibid*, at 661-2.
18 *Ibid*, at 662.
19 (1934) 50 TLR 581.
20 See, Fricke, "The Criterion of Defamation", (1958) 32 ALJ 7, 10, fn 21.
21 *Supra*, note 19, at 587.

in social reputation and in opportunities of receiving respectful consideration from the world."[22] The imputation in the film that Princess Irina had been raped by Rasputin was therefore held to be defamatory. This test is useful for dealing with imputations of insanity or that the plaintiff has a contagious disease, and even perhaps with an imputation that a plaintiff has AIDS, but there is no evidence that it has been much used in defamation actions since *Yousoupoff's* case.[23]

The fourth test developed by the courts is that an imputation will be regarded as defamatory if it is likely to injure the plaintiff in the plaintiff's office, profession or trade. It appears that the imputation will be regarded as "defamatory" of the plaintiff even if the imputation does not disparage the plaintiff personally. In *Sungravure Pty Ltd* v *Middle East Airlines Airliban SAL*[24] the defendants published a piece of fiction in which they stated that passengers on the Arab plaintiffs' aircraft faced a serious risk of hijacking by Israelis. A majority of the High Court of Australia held that a statement that "potential air travellers by Arab aircraft to wit by plaintiffs' Middle East Airlines faced a serious risk of hijacking by Israelis with attendant danger of death, grievous injury, suffering, inconvenience and loss" was defamatory even though the statement could not be considered as a "disparaging imputation" as the plaintiffs' condition of being especially prone to hijacking by reason of their nationality was unconnected with any conduct on the plaintiffs' part. This decision represents the present position at common law.[25] This is confirmed, in my view, by the decision of the High Court of Singapore in *Bank of China* v *Asiaweek Ltd*.[26] There, the defendants were held liable in defamation for publishing the statement that the plaintiff's branch in Singapore after a total withdrawal of US$75m by its depositors had no funds or financial resources to meet further withdrawals by its depositors and had suspended business temporarily. LP Thean J said that there was not the slightest doubt that those words were defamatory of the plaintiff as they imputed an inability to discharge its obligations as a bank to its depositors, insolvency and lack of financial resources. Such words clearly injured the credit of the plaintiff as a bank.[27] He also held that the words were defamatory under the second test discussed earlier (the test

[22] *Ibid*, at 587 *per* Slesser LJ.

[23] See, Report of the Committee on Defamation (Faulks Committee) Cmnd 5909 (1975) Appendix V.

[24] (1975) 134 CLR 1.

[25] Although *Sungravure* was an action in defamation brought under a provision of the Defamation Act 1958 of New South Wales then in existence, it is arguable that the decision would not have been different in the absence of that statutory position.

[26] [1991] 2 MLJ 505.

[27] *Ibid*, at 509.

laid down by Lord Atkin in *Sim* v *Stretch*) because the words tend to lower the plaintiff in the estimation of right-thinking members of society generally.[28] It should be noted that the words were held to be defamatory even though the statement in the Chinese language magazine indicated that the run on the Bank of China's Singapore branch was as a protest against what has come to be called the Tienanmen massacre. So the statement was held to be defamatory even though there were no allegations of disparaging conduct on the part of the plaintiff bank. The English Court of Appeal in *Drummond-Jackson* v *Medical Association* [29] also held that "...words may be defamatory of a trader or business man or professional man, though they do not impute any moral fault or defect of personal character. They can be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, or business or professional activity."[30]

There are two observations that I should like to make in relation to this fourth test. The first is that because a statement can be defamatory under this test even though there are no allegations of disparaging conduct on the part of a plaintiff, it could be, for example, defamatory to say that a farmer has diseased stock without disparaging his husbandry in any way.[31] Secondly the question whether the words are defamatory (using this test) cannot be decided by reference to a wholly objective standard but will depend very much on the occupation of the plaintiff. Thus, it would be defamatory to say that a music teacher is tone deaf or that a professional art critic is colour blind or that a professional accountant has no understanding of accounts even though such allegations would not be defamatory if made of persons whose profession or business does not require such attributes, skills or talents. A statement that a High Court judge in England had fallen asleep during a murder trial was recently held to be defamatory,[32] even though the imputation was not necessarily disparaging. We would probably all agree that it would be defamatory to say that a night watchman (or jaga) had fallen asleep during his night shift but should it affect the High Court

[28] *Ibid*.

[29] [1970] 1 WLR 688.

[30] *Ibid*, at 698 *per* Lord Pearson.

[31] Note, however, Hunt J's observation in *Boyd* v *Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452 that "at common law, *in general*, an imputation, to be defamatory of the plaintiff, must be disparaging of him"(emphasis added). See also *Dawson Bloodstock Agency* v *Mirror Newspapers Ltd* [1979] 1 NSWLR 16.

[32] See, *The Times*, 18 November 1992 where it is reported that the High Court judge Mr Justice Popplewell accepted undisclosed damages, said to be £2500 plus costs, from INS News Agency of Reading, Berkshire which suggested that he had fallen asleep during a murder trial.

judge in the same way? Perhaps the case was decided using the fifth test for determining whether matter is defamatory which I shall now discuss and that is that a statement will be regarded as defamatory if it displays a person in a ridiculous light.

Under this fifth test an imputation can be held to be defamatory even though it is not necessarily disparaging of the plaintiff, if it displays the plaintiff in a ridiculous light. In *Boyd* v *Mirror Newspapers Ltd*.[33] the defendants were held liable in defamation for publishing an article in their newspaper concerning Les Boyd, a well-known Australian Rugby League player, under the heading BOYD IS FAT, SLOW AND PREDICTABLE. Hunt J said one of the imputations conveyed was "that he was so fat as to appear ridiculous as he came onto the field to play a first grade Rugby League Match." His Honour held that "an imputation which displays the plaintiff in a ridiculous light, notwithstanding the absence of moral blame on his part, will be defamatory."[34] A similar decision was arrived at in *Ettingshausen* v *Australian Consolidated Press Ltd*[35] where the defendant published a photograph of the well-known Rugby League footballer Andrew Ettingshausen leaving the shower naked after a game of football. In the photograph his genitals were faintly visible. An imputation pleaded from the publication of the photograph was simply that "the plaintiff is a person whose genitals have been exposed to the readers of the defendant's magazine HQ, a publication with a widespread readership."[36] Hunt J held that the publication of this imputation was "capable of subjecting the entirely blameless plaintiff to a more than trivial degree of ridicule and accordingly the imputation is capable of defaming the plaintiff."[37] The plaintiff was awarded damages of $350,000 later reduced on appeal to $150,000. This test of displaying a plaintiff in a ridiculous light has been applied recently in England by the Court of Appeal in *Berkoff* v *Burchill and another*.[38] In that case the journalist Julie Burchill wrote of the well-known actor and director Steven Berkoff that he was not only unattractive but also physically repulsive in appearance, comparing him unfavourably with Frankenstein's monster. The

[33] *Supra*, note 31.
[34] *Ibid*, at 453.
[35] (1991) 23 NSWLR 443.
[36] *Ibid*, at 445.
[37] *Ibid*, at 449. See also, *McDonald* v *The North Queensland Newspaper Company Ltd* (1997) 1 Qd R 62 and *Forsyth* v *Beat Magazine*, Unreported. Decision of Meagher J of the County Court of Victoria, 23 February 1998.
[38] *Supra*, note 3. For a discussion of this decision and of the "ridiculous light" test, see J Cottrell, "What does 'Defamatory' Mean? Reflections on *Berkoff* v *Burchill*," (1998) *The Tort Law Review* 149 and R Watterson, "What is Defamatory Today" (1993) 67 *Australian Law Journal* 811.

Court of Appeal decided that an imputation that the plaintiff was "hideously ugly" was capable of being defamatory if the "words were plainly intended to convey that message by way of ridicule."[39]

This fifth test, that matter is defamatory if it displays a person in a ridiculous light, is capable of great development and it may well be used also to protect privacy which, as you know, is not protected by the common law in England, Australia and Singapore. At the same time, the test is also capable of stifling the efforts of journalists and cartoonists at caricature or parody and their attempts at comical or satirical writing. They have to be careful that they do not portray or display persons in a ridiculous light. Let me give some examples of the possible benefits and the possible dangers of determining that matter is defamatory by the application of this test.

In relation to possible benefits, I should like to discuss the decision in *Charleston and Another* v *News Group Newspapers Ltd and Another.*[40] There the plaintiffs Anne Charleston and Ian Smith, who played Madge Ramsay and Harold Bishop in the TV Soap Opera *Neighbours*, brought an action in defamation in relation to "disgusting" pictures in a British newspaper article headed "Strewth, What's Harold up to with our Madge?" One picture depicted "Madge" lying on her front with "Harold" astride her in a position they claimed suggested he was committing an indecent act and a smaller picture appeared to be of "Madge" wearing a leather garment exposing her breasts. *The News of the World* article explained that the soap stars' faces had been added to porn actors' bodies in a scene from a computer game marketed by a mail order firm. The plaintiffs' action in defamation failed because even though the judges had little doubt that the headlines, photographs and captions "standing alone" were capable of being defamatory, the article had to be read as a whole and the explanation that the plaintiffs' faces had been superimposed on porn actors' bodies without the plaintiffs' consent prevented the plaintiffs from arguing that the ordinary reader could in the circumstances have gained the impression that the plaintiffs were engaged in making pornographic films. What if the plaintiffs had argued instead that they had been displayed in a ridiculous light? Would the action in defamation have been successful? I should think that it might have been. After all, applying the test laid down in *Ettingshausen*'s case there can be little doubt that the publication of the headlines, photographs and the captions were capable of subjecting the entirely blameless plaintiffs to a more than trivial degree of ridicule and of making the plaintiffs look ridiculous, in the sense of deserving to be laughed at or absurd. It would therefore

[39] *Supra,* note 3, at 1021 *per* Phillips LJ.
[40] [1995] 2 WLR 450.

be held to be defamatory. The imposition of the bodies of porn actors on the faces of respectable people and computer-generated images which enable this to be done have been made possible by the new technologies now in existence. The tort of defamation (using the ridiculous light test) might protect some of those celebrities who as an American judge recently said were being "violated by technology."[41] This was said in a case involving Dustin Hoffmann where a magazine published a computer-generated image of him that appeared to show him wearing a butter-coloured silk dress by Richard Tyler and high heeled shoes by designer Ralph Lauren.

At the same time, we should be careful that the ridiculous light test of defamatory matter does not inhibit caricatures or parodies and comical or satirical cartoons and writing. In 1993 an Australian television newsreader succeeded in a defamation action when the *Australian Penthouse* magazine published a caricature that depicted her as wearing only a jacket and blouse and seated at a news desk in front of the words *News Flash*.[42] The caricature not only placed her in a ridiculous light but it also cast a sexist slur. The conclusion that it was defamatory is therefore possibly defensible though the English Faulks Committee on Defamation would have regarded it only as a publication in bad taste.[43]

But what about the following statement in a newspaper concerning two barmen: "One of the barmen looked like Lazarus before he came out of retirement. The other fellow was the reverse: he looked like him when he went back again."[44] Both barmen recovered damages for defamation undoubtedly on the basis that they had been displayed in a ridiculous light even though many would regard such writing as humour and not ridicule. There is also the case from Northern Ireland[45] where Belfast's foremost criminal barrister and one of the Belfast Bar's leading civil silks both brought actions in defamation against the *Sunday World* which published an item headed "Who nearly had a bun fight." The item said that the two QC's had each gone into a County Down cake shop hoping to buy chocolate

[41] US District Judge Tevrizian used these words in an action brought by the actor Dustin Hoffmann against a Los Angeles magazine owned by Disney unit ABC Inc Hoffmann claimed copyright infringement, violation of his right of publicity and unauthorised use of his likeness. The judge awarded Hoffmann US $1.5 million. See *Sunday Times*, Singapore 24 January 1999.

[42] See, *The Australian*, May 19, 1993.

[43] See, Report of the Faulks Committee, *supra*, note 23, para 71.

[44] See, *Thorpe & Lee* v *Ames*, The *Irish Times* 23 November 1977. The decision is mentioned in the Consultation Paper on the Civil Law of Defamation (Ireland, The Law Reform Commission) March 1991 para 13 at 12.

[45] I have relied for a report of this case on *The Independent*, 18 October 1988.

eclairs, adding: "Unfortunately there were very few left and some other shoppers were amazed as the two had words about who saw them first." The defendant newspaper admitted that the incident never occurred: there was no shop, no encounter between the QC's and no eclairs. The freelance journalist who contributed the story described it in the witness box as "a trivial, humorous item" but the QC's were not amused. One of them said "When you have put as much effort as I have into achieving a position as a respected, I hope, and reputable QC, then to be portrayed in a totally pernicious and lying article as some form of contemptible, senseless clown who would make an exhibition of himself in a bakery shop made me very distressed and angry." Counsel for the other QC described the report as garbage and claimed his client was being held up to ridicule. The article may have been about chocolate eclairs, he said, but it was not a trivial matter. The QC's succeeded in obtaining substantial damages in relation to the article which was held to be defamatory as it had displayed them in a ridiculous light.

I do not know what your reaction is to this decision and whether you think, as I do, that the QC's were much too thin skinned and should, perhaps, have been told so by the judge. Journalists are beginning to complain that this test stifles their creativity and satirical and comic talent and Radio Television of Ireland recently made a submission to the Irish Law Commission which was considering the reform of the law of defamation that "there is a trend towards holding comical or satirical statements to be defamatory and that this inhibits their presentation of comedy on television."[46] Perhaps the courts are taking heed of criticisms and submissions of this kind. Quite recently Peter Gibson LJ in the English Court of Appeal declined to indulge the delicate sensibilities of the opera diva Jessye Norman and said that she had suffered a failure of her sense of humour when she sued for defamation in relation to an article in *Classic CD* magazine suggesting she was fat.[47] The article described how Ms Norman once became trapped in swing doors and was advised to turn sideways to release herself. She was said to have replied "Honey, I ain't got no sideways". In an attempt to soothe her feelings the article hastily added that Ms Norman had lost a great deal of weight since then. But Ms Norman was not appeased and sued the publishers for defamation. She claimed the story was untrue, vulgar and undignified and that the attribution to her of the six words she never

[46] See, The Consultation Paper on the Civil Law of Defamation of the Irish Law Reform Commission, *supra*, note 44, para 13, pp 11-12.

[47] I have relied for reports of this case on *The Times*, 20 November 1998 and *The Age,* Melbourne, 21 November 1998.

said, held her up to ridicule, mockery and contempt as it conformed to a "degrading racist stereotype of a person of African-American heritage." She argued that the defendant had been guilty of "patronising mockery of the modes of speech stereotypically attributed to certain groups or classes of black Americans." She was in effect arguing that the article had displayed her in a ridiculous light. Peter Gibson LJ declined to hold that the words were defamatory of Ms Norman (or even to hold that the words were capable of conveying those defamatory meanings) and added ruefully that if Ms Norman had related the anecdote herself "it would have shown that, in addition to possessing the remarkable vocal and dramatic talents which have made her world famous as a distinguished opera singer, she had an engaging sense of humour." In Australia, Levine J of the Supreme Court of New South Wales in a recent case[48] refused to expand the reach of the "ridiculous light" test when he held that it was not defamatory to say that the plaintiff required his lover to cut his toenails and put on his socks and shoes for him – he being too corpulent to do so, even though the statement, arguably, displayed the plaintiff in a no less ridiculous light than the plaintiff in *Berkoff* v *Burchill* who was called "hideously ugly". So perhaps caricature and parody and satirical and comical writing might be safe after all from the threat of actions in defamation on the basis of the ridiculous light test of defamatory matter.

III. The Standard Applied

I have discussed the five tests which the courts have used in determining whether matter is defamatory. But by whose standard is the matter adjudged to be defamatory or not? What is the standard judges use when they determine whether matter is capable of being defamatory and what is the standard juries use when they determine that the matter is in fact defamatory? And what is the standard judges use in determining both these questions when they sit without a jury? The standard is supposed to be that of the ordinary person, the ordinary citizen of fair average intelligence.[49] These ordinary citizens or "hypothetical referees" have been described at different times as "reasonable men",[50] "right-thinking members of society generally",[51] or

[48] See, *Warren* v *Nationwide News Pty Ltd* (unreported, Supreme Court of New South Wales) No 21322 of 1995, 7 July 1996.

[49] See, *Slatyer* v *Daily Newspaper Co Ltd* (1908) 6 CLR 1, 7, *per* Griffith CJ.

[50] See, *Capital and Counties Bank* v *Henty & Sons* (1882) LR 7 App Cas 741, 745, *per* Lord Selborne.

[51] See, *Sim* v *Stretch, supra*, note 2, at 671 *per* Lord Atkin.

as "ordinary men not avid for scandal".[52] In Singapore it appears that the courts will look at the words from the point of view of the "law-abiding citizen",[53] that of "the average thinking man",[54] the "ordinary reasonable person",[55] or that of "right-thinking members of society in general".[56] No evidence can be led as to this standard. As Brennan J (as he then was) said in *Readers Digest Services Pty Ltd* v *Lamb*[57] "the moral or social standard by which the defamatory character of an imputation is determined is not amenable to evidentiary proof, it is pre-eminently a matter for the jury (or a judge sitting alone) to give effect to a standard which they consider to accord with the attitude of society generally."

The application of this standard does cause some difficulties particularly in increasingly multicultural societies like England, Australia and Singapore where an imputation in alleged defamatory matter may reduce a person's reputation in the eyes of a particular group or section of the community but not in the eyes of the community as a whole – the community generally. Let me give an example. In *Loukas* v *Young*[58] the defendant spoke of the plaintiff, in the Greek language, words which in the English language mean: "This Maria, who made my daughter ill by using witchcraft on her." Even though the plaintiff lost many friends in the Greek community in Sydney with which she associated, Taylor J of the Supreme Court of New South Wales held that "these words are not capable of a defamatory meaning, simply because in this day and age the reasonable man, the ordinary man, does not believe in witches or witchcraft." The fact that Mrs Loukas' reputation was undoubtedly lowered in the eyes of the Greek community in Sydney, the only community which mattered to her, did not enable her to succeed because the imputation that she was a witch or practised witchcraft was, according to the judge, not defamatory according to the standards of the community generally, even though it may well have been defamatory in the Greek community. The standard which continues to apply in Australia today is that "the defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes."[59] The standard in England is the same, the courts being concerned

52 See, *Lewis* v *Daily Telegraph Ltd* [1964] 2 AC 234, 260, *per* Lord Reid.
53 See, *Lau Chee Kuan* v *Chow Soon Seong & Ors* [1955] MLJ 21, 22, *per* Murray-Aynsley CJ (S).
54 *Ibid*, at 22 *per* Mathew CJ (FM).
55 See, *JB Jeyaretnam* v *Goh Chok Tong* [1985] 1 MLJ 334.
56 See, *Syed Husin Ali* v *Sharikat Penchetakan Utusan Melayu Berhad & Another* [1973] 2 MLJ 56.
57 [1981] 56 ALJR 214, 216.
58 *Supra*, note 9, at 550.
59 See, *Readers Digest Services Pty Ltd* v *Lamb* [1981] 56 ALJR 214, 217 *per* Brennan J.

only with the effect that the defamatory words have on right-thinking members of society generally and not the effect the words have on a limited class in that society. As Greer LJ said in *Tolley* v *Fry:*[60] "Words are not actionable as defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right-thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community, but will not affect his reputation in the eyes of the average right-thinking man, is not actionable within the law of defamation." In Singapore, too, the standard is that of the community generally and the lowering of the plaintiff's reputation in the estimation of a small but respectable section of the community may not be sufficient for the publication to be regarded as defamatory. As TS Sinnathuray J said in *Chiam See Tong* v *Ling How Doong*[61] in determining the defamatory nature of the publication "the views of the community as a whole must be considered and not just that of a limited class." How then should we regard the suggestion in a book on *The Law of Defamation in Singapore and Malaysia*, where the author writes that in Singapore "an allegation that a person of Muslim origin ate pork might well be held to be defamatory, although such an allegation *vis-à-vis* the majority Chinese population would not be objectionable."[62] This suggestion would only be accurate if the standard applied in Singapore was that a statement which lowered the plaintiff in the estimation of a substantial and respectable minority of the community might lead to liability in defamation. But as I have already indicated, that is not the standard the courts in Singapore have applied and TS Sinnathuray J has indicated clearly in *Chiam See Tong*'s case that the views of the community as a whole should be considered and not just that of a limited class. That is not to say that the question of the standard applied should not be reconsidered. Indeed there is much to be said for the view that, bearing in mind the increasing diversity of the English, Australian and Singaporean communities, the standard which should find favour with the courts in those countries should be the standard adopted by the American courts which generally permit recovery in defamation even though the plaintiff's reputation may be lowered only in the estimation of a particular group, albeit a substantial and respectable one. There is an acknowledgement by the courts in the United States that the plaintiff may suffer real damage if he is lowered

60 [1930] 1 KB 467, 479.

61 *Supra*, note 16, at 661-2.

62 See, KR Evans, *The Law of Defamation in Singapore and Malaysia*, 2nd ed, Butterworths, 1993 at 10.

in the esteem of any substantial and respectable group even though it may be a small minority.[63] As Holmes J said in the decision of the Supreme Court of the United States in *Peck* v *Tribune Co*[64] "Liability is not a question of a majority vote" and a plaintiff should be able successfully to bring an action in defamation if his reputation is adversely affected in "an important and respectable part of the community." A good example of the operation of this standard in practice is provided by the decision in *Braun* v *Armour & Co,*[65] a decision of Cardozo CJ of the Court of Appeals of New York in 1930. In that case, the plaintiff was a butcher who dealt in kosher meat exclusively. An advertisement published by the defendant (a bacon company) falsely stated "These progressive dealers listed here sell Armour Star Bacon in the new window-top carton." Included in the list was the name and address of the plaintiff. The complaint of the plaintiff stated that he was a dealer in Kosher meat exclusively in accordance with the tenets of the Orthodox Jewish faith; that bacon is a non-kosher meat product; that the statements in the advertisement were false and defamatory of the plaintiff as he did not sell any of defendant's bacon and that he had been injured by the advertisement in his reputation and business. The court held the complaint stated facts sufficient to constitute an action in defamation. The advertisement was therefore defamatory of the plaintiff even though he was injured in his reputation only in the eyes of members of the Orthodox Jewish faith (who were his customers) and not in the eyes of the American community generally which would not think less of a butcher who sold bacon. This decision recognises the cultural and religious diversity in the community in the United States and allows matter to be considered defamatory even if the published matter only lowers the plaintiff in the eyes of any substantial and respectable group even though it may be quite a small minority of the community as a whole. This is not the position in England, Australia and Singapore and a statement that a person of Muslim origin ate pork might not be held to be defamatory unless the Singapore courts are prepared to accept the standard that is accepted in the United States that published matter can be defamatory if it tends to lower the plaintiff in the eyes of a particular section of society even though not in the eyes of the community as a whole. Such a class or section might be a small minority of the community but it must be a substantial and respectable minority of the community. The word 'respectable' is necessary here because it is important that the courts do not recognise published matter as being defamatory even if it lowers

[63] See, *Prosser and Keeton on the Law of Torts* 5th ed 1984 at 777. See also, Brown, *The Law of Defamation in Canada* Vol 1, Carswell, 1987 pp 136-139.

[64] 214 US 185, 190 (1909).

[65] 173 NE 845 (1930).

a person in the eyes of a substantial group in the community if that group is one whose standards are so anti-social that it is not proper for the courts to recognise them.[66] If a group such as the members of the golf club in *Byrne* v *Deane*[67] think less of the plaintiff because he has reported to the police the presence of illegal gambling machines on the club premises, this should not be regarded as defamatory by the courts, because only wrong-thinking persons would think less of the plaintiff for reporting the matter to the police and the law of defamation does not regard as defamatory a loss of esteem in the eyes of such wrong-thinking persons.

IV. Varying Community Standards

I now move to the third part of my lecture. I had indicated earlier that the community standards by which alleged defamatory matter is to be judged may not only vary between the various countries that I have been discussing, *viz*, England, Australia and Singapore, but that this standard itself may vary within each country where the matter is published, according to the time and the circumstances when the alleged defamatory imputation is made. As a judge said recently in the New Zealand decision in *Mount Cook Group* v *Johnstone Motors*:[68] "As the authorities on defamation show, something which may not be thought to be defamatory at one time can well be regarded as defamatory in different social conditions which pertain later."[69] In that case, the plaintiffs who operated the ski area at Coronet Peak near Queenstown in New Zealand and who promoted it extensively in New Zealand and overseas objected to certain posters being sold by the defendants. These posters depicted a bride and groom, with their backs to the camera, walking along a path. The groom was lifting the hem of the bride's dress with his right hand to expose her underpants, his left hand being placed on and under her bottom. The caption on the scene read: "Please darling no children yet – fun first. Let's ski Coronet Peak, Queenstown." The plaintiffs had no connection whatsoever with the posters and when the defendants refused a request by the plaintiff's operation manager to stop selling the posters, the plaintiff sued the defendant for defamation and succeeded in obtaining not only damages but also an injunction to prevent the defendants from henceforth publishing the poster by any means. The posters were held to

[66] See, *eg*, *Mawe* v *Pigott* (1869) IR 4 CL 54; *Byrne* v *Deane, supra*, note 15, at 832; *Berry* v *Irish Times Ltd* [1973] IR 368 and *Connelly* v *McKay* 28 NYS 2d 327 (1941). See also Neill and Rampton, *Duncan & Neill on Defamation,* 2nd ed, Butterworths, 1983 at 31.

[67] *Supra*, note 15.

[68] [1990] 2 NZLR 488.

[69] *Ibid*, at 500-501 *per* Tipping J.

be defamatory of the plaintiff because ordinary people of reasonable intelligence seeing the poster and making the link with the plaintiff would tend to think less of the plaintiff from the point of view of its commercial ethics and standards. The plaintiff produced a letter they received from a member of the public who among other things said: "That this sort of image of women as being passive sex objects should be used to promote skiing in Queenstown is quite inappropriate, apart from the extremely derogatory caricature of the nature of a marriage relationship."[70] Tipping J sitting without a jury, as a judge would in Singapore, held that the poster was defamatory of the plaintiff in 1990 even though it might not have been defamatory at an earlier time. As he put it: "The evidence from the marketing experts makes it clear that public attitudes to this sort of material in question have been the subject of significant change over the past few years. Whereas at the beginning of the 1980's people may have been prepared to tolerate a poster of this kind, the evidence suggests that ordinary sensible people had become distinctly less tolerant by the end of the decade."[71] So a poster which would have been tolerated and even, perhaps, found amusing in 1980 was capable of being defamatory and held to be so in 1990.

Another area which has seen a shift in community attitudes is the area of sexual relationships outside marriage (pre-marital and extra marital relationships) and imputations of lack of chastity especially in relation to women. It is not easy to say with any degree of confidence what the ordinary reasonable reader generally in England, Australia and Singapore would today think of an imputation of a sexual relationship outside marriage and of an imputation of a lack of chastity. In the very recent case of *Costello and Abbott* v *Random House Australia Pty Ltd*,[72] involving two Australian Government Ministers and their wives and decided just three weeks ago, on 5 March 1999, the defendant contended "that in the absence of any special extrinsic facts, such as vows of chastity by a person in religious orders, that it is not, in the modern era, defamatory to say of a woman, that she had sex with more than one person before her marriage to one of them."[73] Higgins J, sitting without a jury in the Supreme Court of the Australian Capital Territory, acknowledged that "to some persons, if would be highly offensive, even outrageous, that a woman would be guilty of a lack of chastity" but that others "might take the view that such conduct, whilst not ideal, is fairly commonplace [and that] there would be some, perhaps,

[70] *Ibid*, at 491.
[71] *Ibid*, at 500-501 *per* Tipping J.
[72] [1999] ACTSC 13.
[73] *Ibid*, at para 62.

who would adopt the slogan, 'if it feels good, do it' and applaud such conduct".[74] His Honour held, however, that he had to abide by *his* view of the attitude, not of persons at either extreme, but of the ordinary reasonable reader generally and that "there is every reason to suppose that such persons would predominantly adhere to what Mr Alfred Doolittle in My Fair Lady described as 'middle class morality.'"[75] He therefore held that the allegation which could be drawn from the published matter that Mrs Abbott and Mrs Costello had been guilty of unchastity was defamatory of each of them.

There is, however, the difficult decision of the Court of Appeal of New South Wales in *Cairns and Morosi* v *John Fairfax & Sons Ltd*[76] where the defendant newspaper published matter which conveyed to the ordinary reasonable reader the imputation that the plaintiff (Dr Cairns, the Treasurer in the Whitlam Government) was improperly involved with his assistant, Junie Morosi, in a romantic or sexual association contrary to the obligations of his marriage and to that of Miss Morosi. It was accepted that the imputation was capable of defaming the plaintiffs but the jury decided that this allegation of adultery between Dr Cairns and Miss Morosi was not defamatory of them. On appeal it was argued that the verdict of the jury was perverse. Mahoney JA expressed the view that it is open to a jury to conclude that "a reasonable or right-thinking member of the community would take the view that religious or ethical principles, as currently understood or propounded, impose too high or too rigid a standard of sexual morality and that the standards by which the community judges sexual associations are, if not lower and more flexible, at least different."[77] Hutley JA expressed himself somewhat more colourfully. He said: "...the fact that so intelligent and glamorous a woman as Miss Morosi.... developed a romantic interest in him may raise his [Dr Cairns's] standing in public eyes, and the fact that so important a figure as the Treasurer of the Commonwealth reciprocated her interest may raise her standing in public eyes."[78] His Honour thought that the imputation of an improper adulterous relationship would be harder to justify as not being defamatory, but he then went on to say that "the reputations of Antony and Cleopatra have not been lowered in the eyes of the public by their romance, and in other days, the title of the King's Mistress was one of honour."[79] Hutley JA concluded that "...the simultaneous finding that there was the allegation of improper adultery between the two

[74] *Ibid*, at para 103.
[75] *Ibid*, at para 104.
[76] *Supra*, note 4.
[77] *Ibid*, at 720.
[78] *Ibid*, at 710.
[79] *Ibid*.

appellants and the finding that this is not defamatory is unusual, but not perverse in these days."[80]

However, if publishers of matter alleging sexual misconduct assumed that the decision in the *Cairns and Morosi* case gave them some sort of licence to make allegations of extra-marital sex free from the fears of a libel action, they are sadly mistaken. Higgins J in *Costello and Another* v *Random House* in 1999 was plainly of the view that even today allegations of sexual misconduct are clearly defamatory. This was not only so because such an allegation might lower the reputation of a person or because the alleged conduct might be discreditable but also because the effect might be to render the person liable to derision or the subject of scandal. His Honour said he was fortified in this view, that such an allegation may be defamatory, by the decision of Hunt J in *Chappell* v *TCN Channel Nine Pty Ltd*[81] where allegations of sexual misconduct had been made against Greg Chappell, former Australian Test Cricket Captain. Chappell sought an injunction to restrain further publication which was opposed on the basis that the matter complained of *merely* made allegations of sexual misconduct. The defendant said that the decision in the case of *Cairns and Morosi* implied that the plaintiff had no reasonable prospects for success but Hunt J rejected that submission and the injunction was issued. There is also the recent unreported decision in *Makim* v *Nationwide News Pty Ltd*[82] where articles in the Sydney *Sunday Telegraph* and the *Daily Telegraph* carried imputations that Mrs Makim, (the Duchess of York's sister) was having an adulterous affair with an Argentinian polo player contrary to the obligations of her marriage. The imputations were held to be defamatory and the jury awarded her a sum of $300,000 in damages. One might well ask if the jury in the *Cairns and Morosi* case was applying a different community standard to the jury in the *Makim* case and whether in Australia, as a result of the *Makim* and *Costello* cases, we are back to "middle class morality" after experimenting with a permissive attitude to sexual morality in the 70's and 80's.

If allegations of sexual misconduct and extra-marital sex are still defamatory, what about allegations of homosexuality? Is it defamatory to say today, in England, Australia and Singapore, that someone is a homosexual or to publish matter which carries an imputation of homosexuality? In *Liberace* v *Daily Mirror Newspaper*[83] a journalist described Liberace, a

80 *Ibid*.
81 (1988) 14 NSWLR 153.
82 See, *Sydney Morning Herald*, 25 November 1990. The decision does not appear to be reported.
83 *The Times*, 17 and 18 June 1959.

well-known entertainer, as the "the summit of sex – the pinnacle of masculine, feminine and neuter. Everything that he, she or it can ever want to be ... a deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, ice-covered heap of motherly love." The English judge held that these words, taken together, were capable of the imputation that Liberace was a homosexual and the jury agreed that in that sense they were defamatory. More recently, in the *Jason Donovan* case,[84] also in England, where matter published by the defendants carried the imputation that the actor and singer was a homosexual, the trial judge, Drake J, said it was very debatable whether it was defamatory to call a man a homosexual today. But the English jury decided that it was in fact defamatory and awarded Jason Donovan $460,000. If Madame Edith Cresson, (a former Prime Minister of France and a European Union Commissioner for Education and Research) is to be believed, (and I should add that her research credibility has been questioned recently) one in every four Englishmen is a homosexual and in Australia, the Gay and Lesbian Mardi Gras is, I believe, the biggest international festival held in Australia each year. How long, then, will it be before judges and juries decide that it is no longer defamatory to describe a man as a homosexual? And what of lesbianism? In *Kerr* v *Kennedy,*[85] Asquith J said "Whatever value high or low is ascribed to chastity today, it does seem to me to be nothing less than fantastic to say of a woman 'she is a notorious lesbian, but she is perfectly chaste.' ...In my view, the imputation of lesbianism is an imputation of unchastity..." In 1981 in a South African decision,[86] the plaintiff succeeded in an action in defamation when the defendant in a telephone conversation with a third party described the plaintiff as a "lesbian". This was despite the fact that the third party did not know what the word "lesbian" meant and only discovered its meaning when she put the phone down and asked her husband. I have not discovered any Singapore cases which have considered whether an imputation of homosexuality or lesbianism is defamatory.

Has there been a shift in community attitudes over the last twenty or thirty years on the issue of abortion so that it can be said that it is no longer defamatory to call someone an abortionist or to say of a woman that she has had an abortion? This question arose in the Australian decision in *Hepburn* v *TCN Channel Nine Pty Ltd*.[87] In that case, the Court of Appeal of New South Wales had to consider the question whether an imputation that a person "is an abortionist" could be treated as defamatory. While

[84] I have misplaced the newspaper report of this case. It does not appear to be reported.
[85] [1942] 1 KB 409, 412-3.
[86] *Vermaak* v *Van Der Merwe* [1981] 3 SALR 78.
[87] [1983] 2 NSWLR 682.

recognising that the term "abortionist" as applied to a medical practitioner can carry the imputation that she terminates pregnancies with or without lawful authority, Glass J expressed the opinion that "the jury could, acting reasonably, treat as defamatory the imputation that pregnancies were lawfully terminated by the plaintiff"[88] who was in fact a medical practitioner. And Hutley J said that "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."[89] In a later passage His Honour said "it may carry the defamatory imputation even to those uncommitted to the particular moral code."[90] The decision in *Hepburn*'s case was in 1983. I cannot say with any degree of confidence whether to say of someone that they have had an abortion or to say of a medical practitioner that he or she is an abortionist will be defamatory in England or Australia in 1999. If, as the Court of Appeal said in *Hepburn*'s case in 1983, the objection to abortion is, for a substantial part of the community, on moral grounds, that is very unlikely to have changed over the last twenty years. But what is likely to be the position in Singapore where the Judaeo-Christian moral ethic which informs the attitudes of a substantial part of the population in England and Australia is, for historical and cultural reasons, not so pervasive? The fact that abortions are legal and countenanced by the government at least for the last two or three decades may influence the decisions of the courts in Singapore on the question whether the word "abortionist" is defamatory and whether it is defamatory to say of a woman that she has had an abortion when she has not.

And finally to the word "communist". Is it defamatory today to call a person a communist? Less than fifty years ago, a Canadian judge said: "Labour unions, universities and other public bodies have publicly sought and are still seeking to rid themselves of men and women professing Communist beliefs. It has come to be universally accepted in the Western nations that it is dangerous to our way of life to allow a known Communist or Communist sympathiser to remain in a position of trust or influence."[91] And another judge in the same case said "I think that neither the Government of Canada, nor that of the United States, nor that of England knowingly would employ

88 *Ibid*, at 693.
89 *Ibid*, at 686.
90 *Ibid*.
91 See, *Martin* v *Law Society of British Columbia* [1950] 3 DLR 177, 178-9 *per* O'Halloran JA.

a Communist."[92] These two statements were made in a case where the British Columbia Court of Appeal held that it was open to the Benchers of the Law Society of British Columbia to determine that a person who was admittedly a Communist was not a person of good repute and was not a fit person to be called to the Bar or admitted as a solicitor. Certainly there are decisions from England[93] and Australia,[94] Canada[95] and New Zealand[96] where it has specifically been held that it was defamatory of the plaintiff to publish an accusation of being a communist or a member of a Communist Party. Although there is no specific decision of a Singapore court on this question that I have discovered, Chua J in *Workers' Party* v *Tay Boon Too* and *Workers' Party* v *The Attorney General*[97] appeared to approve of the English decision in *Braddock* v *Bevins*[98] that an imputation that a person or a party is communist would be actionable as a defamatory imputation even though in the *Workers' Party* cases the plaintiff was not in fact being accused of being communist but only of receiving funds from an external power. Despite this array of authority I doubt if it would be defamatory today in England or Australia to call someone a Communist or Communist sympathiser. I am not familiar enough with the position in Singapore to speculate on whether it would be defamatory to call a person a Communist. Singaporeans will be in a better position to make this judgment than I.

V. Summary and Conclusions

The purpose of this lecture has been to attempt to show how the meanings which can arise from published matter are held to be defamatory by the courts. I have discussed the five tests which the courts generally use in coming to the conclusion that the imputation in published matter is defamatory. These tests are not used exclusively in the sense that the defamatory quality of published matter is judged only by one of these tests. Sometimes the matter might be adjudged to be defamatory by the application of several of these tests. Thus in *JB Jeyaratnam* v *Lee Kuan Yew*[99] the Court of Appeal of Singapore came to the conclusion that the words complained of were

92 *Ibid*, at 192 *per* Robertson JA.
93 See, *Braddock* v *Bevins* [1948] 1 All ER 450 and *Burns* v *Associated Newspapers Ltd* (1925) 42 TLR 37.
94 See, *Cross* v *Denley* (1952) 52 SR NSW 112.
95 See, *Brannigan* v *Seafarer's Union* (1963) 42 DLR (2d) 249.
96 See, *Delaney* v *News Media Ownership* [1976] 1 NZLR 322.
97 [1975] 1 MLJ 47.
98 *Supra*, note 93.
99 [1992] 2 SLR 310.

undoubtedly defamatory of the plaintiff, the then Prime Minister of Singapore, as they imputed "dishonourable and discreditable conduct and disparaged him in his office as Prime Minister and tend to bring him into public odium and contempt and lower him as such in the estimation of right-thinking people in Singapore."[100] The matter was therefore held to be defamatory under at least three of the tests that I have discussed. I spent some more time on the fifth test which is that matter is held to be defamatory of a person when it displays that person in a ridiculous light, a relatively new test which, as far as I am aware, has not been used in Singapore. I pointed out the possibilities of that test in protecting privacy under the guise of defamation but suggested also that the test has the potential to stifle caricature and parody and satirical and comical writing.

I then considered the question of the standard applied by the courts in determining the defamatory quality of published matter in England, Australia and Singapore. In determining whether an imputation has a tendency to injure the plaintiff's reputation I asked the question on whom do the defamatory words have to have this effect? Must the words have this effect on right-thinking members of society *generally*, that is the community as a whole, or is it sufficient that the imputation damages a person's reputation in the eyes of a limited class or section of the community? I indicated that the received view in these three countries is that an imputation is not considered defamatory unless it tends to lower the plaintiff in the eyes of right-thinking members of the community *generally* and the standard which continues to apply is that the defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes. I questioned whether this standard is appropriate in increasingly culturally diverse countries like England, Australia and Singapore and whether the time has now come to adopt the standard adopted by the American courts, which generally permit recovery in defamation even though the plaintiff's reputation may be lowered only in the estimation of a particular group, class or section of society, albeit a substantial and respectable one. Finally I adverted to the requirement imposed by the courts that the defamatory nature or quality of the published matter is to be judged according to the general community standards of the society *where*, and at the time *when* the alleged defamatory imputation is made. I pointed out the difficulty for the defamation lawyer because what is defamatory may not only vary according to the place where the alleged defamatory imputation was published, but the judgment as to its defamatory nature and quality may also vary according to the time at which the alleged defamatory words were published.

[100] *Ibid*, at 323 *per* LP Thean J.

Through some of the decided cases from various jurisdictions I considered the possible shift in community attitudes towards sexist advertising, sexual relationships outside marriage, homosexuality and lesbianism, abortion and communism. I was more confident in detecting these shifts in community attitudes in England and Australia where I have lived a considerable period of my life. I am less confident in gauging these shifts in community attitudes in Singapore but fortunately for me, that is a task which is left entirely in the hands of the judges in Singapore. I shall follow their decisions with interest.

FA TRINDADE**

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