

# Introduction

Fame is a shuttlecock. If it be struck only at one end of the room, it will soon fall to the ground. To keep it up, it must be struck at both ends.

(*Samuel Johnson* in Boswell,  
*The Journal of a Tour of the Hebrides* 1984, 408)

## Why Analyse Reputation?

A reputation may be protected, vindicated, made, acquired, deserved (or undeserved), damaged, injured, diminished or traduced. Each of these ways of affecting a reputation implies something different about the concept of reputation itself and the value to be ascribed to it. There are many competing and often contradictory discourses surrounding the concept of reputation in defamation. Given the rich and sometimes evocative ways in which reputation can be described and acted upon, one might have expected to encounter a substantial body of jurisprudence analysing the concept of reputation in defamation law. However, there has been scant attention given to this crucial concept.

This omission is surprising, given the centrality of reputation to defamation law. It is uncontroversial to state that the tort of defamation protects reputation. Indeed, it is clear that reputation is the sole interest directly protected by the law of defamation (Watterson 1993, 812–13; Barendt 1999, 112–14; Beverley-Smith 2002, 249–50; Rogers 2002, 12.1). It is equally uncontroversial to state that the common law claims to value freedom of speech. Consequently, it is axiomatic that the tort of defamation purports to strike a balance between freedom of speech and the protection of reputation.

What is meant by the concept of freedom of speech generally and what is meant by it specifically in the context of defamation law have been extensively analysed from a variety of legal and critical perspectives (Barendt 2005, 205–26; Peonidis 1998; Cottrell 1999; Stone and Williams 2000; Magnusson 2001). Similarly, the appropriate balance between freedom of expression and the protection of reputation in defamation, and the way in which that balance should be implemented, have also been the subject of detailed, scholarly consideration (Schaffner 1990; Boivin 1997; Tingley 1999).

There are a number of likely reasons for this focus: firstly, the influence of the First Amendment of the United States Constitution, guaranteeing freedom of speech, *inter alia*, the constitutionalisation of American defamation law in *New York Times v Sullivan* 376 US 254; 84 S Ct 710 (1964) and the resulting

jurisprudence;<sup>1</sup> secondly, the recent development of enforceable, rights-based jurisprudence, in their various constitutional and statutory forms, in Canada, New Zealand and the United Kingdom and its subsequent impact on defamation law in those countries;<sup>2</sup> and thirdly, in Australia, the recognition of the implied freedom of political communication, arising from the text and structure of the Commonwealth Constitution, and its subsequent impact on defamation law, coupled with the political resistance to the introduction of constitutional or statutory regimes to protect individual rights (Potter 1998; Stone 1998; Chesterman 2000; Butler 2000a; Meagher 2005).<sup>3</sup>

In stark contrast, the concept of reputation itself remains relatively unexamined. The meaning and importance of reputation is largely assumed. General texts on tort law and specialist texts on defamation law tend not even to address what is meant by reputation, instead commencing their analyses of the law of defamation by examining what is defamatory. (However, see now George 2006, 74–86.) Those textbooks which acknowledge the need to define the central interest of reputation tend to do so perfunctorily. This lack of analysis of the concept of reputation has been noted by judges and academics alike (see, for example, *Hill v Church of Scientology* (1995) 126 DLR (4th) 129 at 160 per Cory J; Levine 2002, 8; Tingley 1999, 632; Walker 1994, 732–3; Kenyon 1998, 76; Barendt 1996, 114; Beverley-Smith 2002, 250).

One consequence of this lack of analysis is that assumptions are implicitly made about the concept of reputation. For example, it is assumed that there is a single, coherent, immutable concept of reputation protected by defamation law. It is assumed that the plaintiff's reputation exists and that the defendant's publication adversely affects it (Gibbons 1996, 587). Yet these assumptions are surely contestable.

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1 See for example *Rosenblatt v Baer* 383 US 75; 86 S Ct 669 (1966); *Curtis Publishing Co v Butts* 388 US 130; 87 S Ct 1975 (1967); *Gertz v Robert Welch Inc* 418 US 323; 94 S Ct 2997 (1974); *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749; 105 S Ct 2939 (1985); *Milkovich v Lorain Journal Co* 497 US 1; 110 S Ct 2695 (1990); *Masson v New Yorker Magazine Inc* 501 US 496; 111 S Ct 2419 (1991); Anderson 2004.

2 See, for example, in relation to Great Britain, *Reynolds v Times Newspapers* [2001] 2 AC 127; [1999] 4 All ER 609; [1999] 3 WLR 1010. See, for example, in relation to New Zealand, *Lange v Atkinson* [2000] 1 NZLR 257; *Lange v Atkinson* [2000] 3 NZLR 385. See, for example, in relation to Canada, *Hill v Church of Scientology* (1995) 126 DLR (4th) 129. See generally Stone and Williams 2000.

3 The leading cases in relation to the implied freedom of political communication are *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; 108 ALR 681; 66 ALJR 658; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; 108 ALR 577; 66 ALJR 695; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; 124 ALR 1; 68 ALJR 713; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 145 ALR 96; 71 ALJR 818; *Levy v State of Victoria* (1997) 189 CLR 579; 146 ALR 248; 71 ALJR 837; *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182; 78 ALJR 1166.

More importantly, another consequence is that it is difficult to assess the validity of central claims made about defamation law. The question of how effective the existing principles of defamation law are in providing protection for a plaintiff's reputation cannot be adequately assessed without an understanding of what reputation actually is. Likewise, the issue of how appropriate the existing balance between freedom of expression and protection of reputation struck in defamation law is, and whether any recalibration is required, can only be properly evaluated if there is an understanding of what is in fact meant by reputation (Post 1986, 692; Walker 1994, 733).

### **The Meaning of Reputation**

It is important to start by attempting to define the term, 'reputation'. Those scholars who engage with the problem of defining reputation readily admit the difficulty of the task. According to Post, reputation is 'a mysterious thing' (Post 1986, 692). Balkin and Davis characterise reputation as 'highly prized but intangible' (Balkin and Davis 2004, [17.3]). Explaining why they chose not to include defamation in their textbook on torts, Luntz and Hambly describe reputation as 'nebulous, yet much cherished' (Luntz and Hambly 2002, [1.4.6]). Perhaps, as Watterson suggests, it is misguided to view reputation as 'one of the few safe harbours in the law of defamation' (Watterson 1993, 812). As another scholar has observed, 'pinning down a definition of reputation is a difficult task' (Calvert 1995, 939; cf. Levine 2002, 5).

A useful starting-point is to examine how the term 'reputation' is ordinarily defined for non-legal purposes. Indeed, Prosser and Keeton have stated that reputation, for the purposes of defamation law, is understood 'in the popular sense' (Keeton et al. 1984, 773; Spencer Bower 1990, 243).

The *Oxford English Dictionary* (1989, 678) defines 'reputation', thus:

1. Opinion, supposition; also the opinion or view *of* one about something ...
2. The common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person or thing is held.
3. The condition, quality, or fact of being highly regarded or esteemed; credit, note, or distinction; also respectability, good report.
4. The honour or credit *of* a particular person or thing; one's good name, good report, or fame in general.
5. The estimation, credit, or ascription *of* being or possessing something.

The unifying feature of all these definitions of 'reputation' is the dependence of an individual's reputation on the recognition of others (Post 1986, 692).

Beyond certain, incidental judicial assertions about the nature of reputation, the common law has generally eschewed engagement with the problem of defining reputation. For instance, recently, in *Rogers v Nationwide News Pty Ltd* (2003)

216 CLR 327; (2003) 201 ALR 184; 77 ALJR 1739; Aust Torts Reports ¶81-713, Hayne J (at 349; 199) has stated that ‘reputation is not a commodity having a market value’. However, in *Dixon v Holden* (1869) 7 LR Eq 488, Malins V-C stated (at 492) that ‘[o]ne man has property in lands, another in goods, another in business, another in skill, another in reputation’ and further observed that ‘his reputation ... is his property’. It is difficult to reconcile these apparently conflicting statements about reputation. Is it a proprietary or a purely personal interest (Boivin 1997, 290–91)? Is reputation an economic or a dignitary interest (Beverley-Smith 2002, 251)? Is it possible for it to be both (Linden 2001, 683)? If so, why do judges disagree about the nature of reputation? These incidental assertions about reputation do not help define the concept of reputation so much as highlight its underdevelopment in defamation jurisprudence.

To the extent that the law of defamation has engaged with the problem of defining the term, ‘reputation’, it has contented itself with generalities. The classic statement of what constitutes reputation for the purposes of defamation law is taken from Lord Denning’s judgment in *Plato Films Ltd v Speidel* [1961] AC 1090:

A man’s ‘character’, it is sometimes said, is *what he in fact is*, whereas his ‘reputation’ is *what other people think he is*. If this be the sense in which you are using the words, then a libel action is concerned only with a man’s reputation, that is, with what people think of him: and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition. ([1961] AC 1090at 1138 (original emphasis))<sup>4</sup>

Lord Denning’s definition of ‘reputation’ is problematic for several reasons. Firstly, the case law, old and new, is replete with references wherein the terms, ‘character’ and ‘reputation’, are used interchangeably.<sup>5</sup> Indeed, Lord Denning himself recognises this precise problem (at 1138).

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4 Lord Denning’s distinction between reputation and character has been subsequently endorsed. See, for example, *Re T and Director of Youth & Community Services* [1980] 1 NSWLR 392 at 395 per Waddell J; *Melbourne v R* (1999) 198 CLR 1 at 15–16; 164 ALR 465; 73 ALJR 1097 per McHugh J; *O’Hagan v Nationwide News Pty Ltd* (2001) 53 NSWLR 89 at 91 per Meagher JA; Levine 2002, 5; Veeder 1904, 33; Pound 1915, 447.

5 For examples of older authorities, see, for example, *De Crespigny v Wellesley* (1829) 5 Bing 392 at 405–6; 130 ER 1112 at 117–18 per Best CJ; *Toogood v Spyring* (1834) 1 CM & R 181 at 193; (1834) 149 ER 1044 at 1049 per Parke B; *Smith v McQuiggan* (1863) 2 SCR(NSW) (L) 268 at 270 per Stephen CJ; *Bryce v Rusden* (1886) 2 TLR 435 at 439 per Huddleston B; *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 527 per Lord Esher MR. For examples of more recent authorities, see, for example, *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171–2 per Diplock LJ; *Delaney v News Media Ownership Ltd* [1976] 1 NZLR 322 at 326–8; *Gorman v Barber* (2004) 61 NSWLR 543 at 550 per Mason P. See further Spencer Bower 1990, 242.

Moreover, it is perhaps important not to overstate the distinction between reputation and character so as to posit a false dichotomy between the two. Reputation and character are different, but not absolutely distinct, concepts. There is surely a necessary interdependence between what an individual in fact is and what other people think an individual is. What other people think of an individual is intimately connected with what other people know about the individual. Other people know about an individual through that individual's interaction with them. In that interaction, the individual has control over what aspects of his or her character are or are not disclosed. Ideally, perhaps, reputation and character would be identical but, because reputation is socially mediated, whereas character is innate, there is invariably some discrepancy between the two. In turn, what an individual thinks about himself or herself is, to varying degrees, informed and affirmed by what others think about that individual. Reputation and character cannot, or perhaps should not, be so neatly divided.

The common law of defamation is ambivalent about whether reputation and character can, or ought, be co-extensive (Spencer Bower 1990, 243). On the one hand, the rationale stated for the defence of truth, which, at common law, is a complete defence to a claim for defamation, is that:

[A]s the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it. (*Rofe v Smith's Newspaper Ltd* (1924) 25 SR(NSW) 4 at 21–22; (1924) 42 WN(NSW) 3 per Street ACJ; Spencer Bower 1990, 242)

According to Windeyer J, 'the law does not protect the reputation that a man has, but only the reputation that he deserves' (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150; see also *M'Pherson v Daniels* (1829) 10 B & C 263 at 272; 109 ER 448 at 451 per Littledale J). In theory, perhaps, reputation and character should be co-extensive and defamation law assists in calibrating them.

Yet, this is not necessarily borne out in practice. It is well-known that the case law is replete with undeserving plaintiffs receiving compensation for injured reputations, reinforcing the notion that, in reality, reputation and character are not co-extensive. George describes defamation law as 'controversial' precisely because 'it has provided protection to criminals and the corrupt, to rogues and villains, preventing exposure of their true characters and maintaining their undeserved reputations' (George 2006, 3). Like George, Barendt names few names but journalist Evan Whitton demonstrates no such reticence, identifying Liberace and Australian political figures, Junie Morosi and Jim Cairns, *inter alia*, as examples of such plaintiffs (Barendt 1999, 115; Whitton 2004. See Chapters 5 and 6).

Nonetheless, what Lord Denning's definition makes tolerably clear is that reputation is not simply the plaintiff's subjective sense of self (Keeton et al. 1984, 773). Defamation is a social tort and the interest it protects, reputation, has been described as analogous to a relational interest (Skolnick 1986, 677; Bellah 1986,

744; Keeton et al. 1984, 773). For good or ill, the common law of defamation has made damage to the plaintiff's reputation, not the insult experienced by the plaintiff, the gist of the action (Pollock 1929, 249; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 per Gleeson CJ, McHugh, Gummow and Hayne JJ; 194 ALR 433; 77 ALJR 255; Aust Torts Reports ¶81-682). Watterson has argued that reputation tends to be associated with personal characteristics, such as honesty and integrity, not with physical characteristics, such as gender or ethnicity (Watterson 1993, 812). Thus, reputation is derived from the exhibition of these personal characteristics in interactions with others, reinforcing its social nature. There is therefore an indelibly social aspect to reputation. However, whilst reputation has this indelibly social aspect to it, the personal aspect of reputation, the plaintiff's subjective response to a defamatory publication and its impact on his or her sense of self, is not wholly irrelevant. Reputation is a complex concept, difficult to define, because it is an interest that is at once both purely personal to the plaintiff and inherently social. The implications of this recognition require exposition.

## The Importance of Reputation

### *Judges and Academics on Reputation*

Whilst the meaning of reputation is somewhat elusive, the importance ascribed to it is not. The importance of reputation is often glibly and grandly stated by judges and academics alike. The examples are innumerable; a selection will suffice. For instance, in *De Libellis Famosis* (1605) 5 Co Rep 125a at 125b; 77 ER 250 at 251, Sir Edward Coke opined that a man's 'good name ... ought to be more precious to him than his life'. In the mid-nineteenth century, in *De Crespigny v Wellesley* (1829) 5 Bing 392 at 406; 130 ER 1112 at 1118, Best CJ boldly claimed that 'if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter.' More recently, in *Hill v Church of Scientology* (1995) 126 DLR (4th) 129 at 160, a decision of the Supreme Court of Canada, Cory J stated that, 'to most people, their good reputation is to be cherished above all.' (See also *R v Lucas* (1998) 157 DLR (4th) 423 at 456 per Cory J: 'This is the attribute which is most highly sought after, prized and cherished by most individuals. The enjoyment of a good reputation in the community is to be valued beyond riches.')

Judges are not alone in their endorsement of the importance of reputation; academics have been similarly effusive. The eminent torts scholar, Sir Frederick Pollock, opined that '[r]eputation and honour are no less precious to good men than bodily safety and freedom. In some cases they may be dearer than life itself' (Pollock 1929, 242). To similar effect, the late John Fleming described reputation as 'perhaps the most dearly prized attribute of civilised man' (Fleming 1998, 580). The legal historian, J.H. Baker, opined that '[w]ords can be more harmful

than deeds, and in some circumstances honour may be more tender than personal safety' (Baker 2002, 437).

### *Shakespeare on Reputation*

The importance and value of reputation is often asserted shorthand through the deployment of an evocative Shakespearean quote (Post 1986, 692; Walker 1994, 733). One of the most popular quotes from the Shakespearean corpus is taken from *Othello*:

Good name in man and woman, my dear lord,  
Is the immediate jewel of their souls.  
Who steals my purse steals trash; 'tis something, nothing;  
'Twas mine, 'tis his, and has been slave to thousands.  
But he that filches from me my good name  
Robs me of that which not enriches him  
And makes me poor indeed. (III.iii.160–66)

Writing extra-curially, Heerey J of the Federal Court of Australia observed that it was routine practice for counsel for the plaintiff in defamation cases to rely on this passage from *Othello* in support of the importance of reputation (Heerey 2000, 8). In a number of cases, judges too have uncritically cited this passage in their reasoning and some scholars too.<sup>6</sup> It is important, however, not to rely too heavily on this Shakespearean quotation to establish the importance of reputation, particularly by emphasising the sentiment out of context (Spencer Bower 1990, 241–2; Brown 1994, 8; Barendt 1999, 114). It is certainly an elegant statement of the importance of reputation and demonstrates the erudition of the advocate, judge or academic citing it. However, it forecloses debate on a worthwhile point.

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6 See Post 1986, 692 (and cases cited therein); *Thomas v Canadian Broadcasting Corporation* [1981] 4 WWR 289 at 339 per Disbery J; *Milkovich v Lorain Journal Co* 497 US 1; 110 S Ct 2695, 2702 (1990) (Rehnquist CJ); *National Life Insurance Co v Phillips Publishing Inc* 793 F Supp 627, 642 n 28 (1992) (Northrop J); *Lewis v McGraw-Hill Broadcasting Co Inc* 832 P 2d 1118, 1125 (1992) (Dubofsky J); *Bernson v Browning-Ferris Industries of California Inc* 873 P 2d 613; 30 Cal Rptr 2d 440, 447 (1994) (Arabian J); *Newman v Delahunty* 681 A 2d 671, 687 (1994) (Piscal J); *Mucci v Dayton Newspapers Inc* 654 NE 2d 1068, 1074–1075 (1995) (Froelich J); *Pressler v Lethbridge* (1997) 153 DLR (4th) 537 at 554 per Owen-Flood J; *R v Lucas* (1998) 157 DLR (4th) 423 at 456–7 per Cory J; *Howlett v Sagers* (unreported, SC(NSW), 20783/95, Donovan AJ, 24 April 1998) at 59–60; *Guildford Transportation Industries Inc v Wilner* 760 A 2d 580, 595 (2000) (Schwelb AJ); *Nassa v Hook-Superx Inc.* 790 A 2d 368, 374 n 12 (2002) (Flanders J); *W.J.L.A.-TV v Levin* 264 Va 140; 564 SE 2d 383, 396 n 8 (2002) (Koontz J); *Knievel v ESPN* 393 F 3d 1068, 1079 (2005) (Bea J (dissenting)); *Ramsey v Fox News Network LLC* 351 F Supp 2d 1145, 1153 (2005) (Figa J); Carter-Ruck and Starte 1997, 1; Linden 2001, 683; Levine 2002, 4; George 2006, 11.

As Donovan AJ observed in *Howlett v Saggors* (unreported, SC(NSW), 20783/95, Donovan AJ, 24 April 1998) (at 60), Shakespeare ‘puts these lines into the mouth of the most mendacious man in the panoply of people in his plays’, Iago (see also Barendt 1996, 114). In the previous act (II, iii), in response to Cassio’s declaration: ‘Reputation, reputation, reputation – O, I ha’ lost my reputation, I ha’ lost the immortal part of myself, and what remains is bestial! My reputation, Iago, my reputation.’ Iago counters with the following statements: ‘As I am an honest man, I thought you had received some bodily wound. There is more sense in that than in reputation.’ Iago then observes to Cassio that ‘[r]eputation is an idle and most false imposition, oft got without merit and lost without deserving.’

Another passage from Shakespeare, which is also relied upon by judges, advocates and academics, is the sentiments expressed by Thomas Mowbray, Duke of Norfolk, in the opening scene of *Richard II*:

The purest treasure mortal times afford  
Is spotless reputation; that away,  
Men are but gilded loam, or painted clay ...  
Mine honour is my life. Both grow in one.  
Take honour from me, and my life is done. (I.i.177–9, 182–3)<sup>7</sup>

Whilst Shakespeare allows that the concept of reputation is complex and its value is controvertible, judges, advocates and academics have been less willing to engage with the vexed problem of defining reputation and the related issue of the importance to be ascribed to it.

### *The Continuing Historical Importance of Reputation*

Another justification for ascribing importance to the concept of reputation is that it is a value universally recognised. There is certainly a venerable literary tradition lauding the importance of reputation. For instance, the wisdom literature of the Old Testament emphatically endorses the importance of a good reputation, stating in one place that ‘[a] good name is to be chosen rather than great riches’<sup>8</sup> and, in another place, that ‘[a] good name is better than precious ointment’ (Ecclesiastes 7:1). There is an equally well-established legal tradition protecting reputation against attack. For example, in Roman law, an individual’s reputation was protected by the

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<sup>7</sup> See, for example, *Australian Consolidated Press Ltd v Ettingshausen* (unreported, CA40079/93, CA(NSW), Gleeson CJ, Kirby P, Clarke JA, 13 October 1993) at 41 per Kirby P; *Barella v Exchange Bank* 101 Cal Rptr 2d 167, 169 (2001) (Rivera J); *Nassa v Hook-Superx Inc* 790 A 2d 368, 372 (Flanders J); Kux 2004a; Post 1986, 701; Carter-Ruck and Starte 1997, 2; Levine 2002, 4; George 2006, 11–12.

<sup>8</sup> Proverbs 22:1; as cited in *Pullum v Johnson* 647 So 2d 254, 256 n 4 (1994) (Van Nortwick J); *Mucci v Dayton Newspapers Inc* 654 NE 2d 1068, 1074 (1995) (Froelich J); *Barella v Exchange Bank* 101 Cal Rptr 2d 167, 169 (2001) (Rivera J).

delict of *iniuria*,<sup>9</sup> with the gist of the action being the insult or affront to the dignity of the individual. Several commentators have observed that all major civilisations and cultures, and their legal systems, appear to have afforded some protection to the reputations of individuals (Brown 1994, 4; Carter-Ruck and Starte 1997, 1–2; Pound 1915, 448–50; see also *Hill v Church of Scientology* (1995) 126 DLR (4th) 129 at 160–62 per Cory J).

It would appear that an individual's reputation continues to be important and that the protection of reputation remains a legitimate goal of the legal system. For example, in *Hill v Church of Scientology* (1995) 126 DLR (4th) 129 at 162, Cory J observes that, whilst the original purpose of defamation law was to provide 'a bulwark against the duel and blood feud', defamation law remains relevant, protecting the reputations of individuals. According to his Honour (at 160, 162), a good reputation is part of the innate dignity of the individual, which, in turn, is the constituent element of a democratic society. In *Reynolds v Times Newspapers* [2001] 2 AC 127 at 201; [1999] 4 All ER 609; [1999] 3 WLR 1010, Lord Nicholls of Birkenhead agrees with Cory J's identification of a connection between reputation and dignity, but differs slightly from Cory J's assessment of the role of reputation in a democratic society. His Lordship (at 201) views reputation not only as part of the inherent dignity of the individual but also as a public good, informing everyday decisions about community life.

There is, however, no real explanation in the judgments of Cory J and Lord Nicholls of Birkenhead as to the historical processes by which a body of law which developed in the ecclesiastical courts of medieval England and the royal courts and the Star Chamber of Tudor and Stuart England, a body of law designed to protect rank, status and the public perception of Christian virtue, transformed itself into an integral part of the rights of the individual in a modern, Western liberal democracy. This reflects the fundamentally ahistorical approach to the concept of reputation that is evident in defamation law.

Like the use of a Shakespearean quote, the assertion of the continuing historical importance of reputation forecloses debate and investigation of the meaning and the value that should be ascribed to reputation. Moreover, it suggests that the meaning and the importance of reputation is immutable, transcending time and culture – a position that seems highly debatable, if not untenable. This book contends that placing reputation in its historical context will illuminate what meaning, and, more significantly, what value should be ascribed to reputation in contemporary defamation law.

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9 Justinian, *The Digest of Justinian* (rev. edn) (ed. Alan Watson), Vol. 2, University of Pennsylvania Press, Philadelphia (PA), 1998, 47.10; Justinian, *Institutes* (transl. Peter Birks and Grant McLeod), Duckworth, London, 1994, 4.4; Nicholas 1962, 215–17.

*Dissenting Views on the Importance of Reputation*

Yet this view of the importance of reputation and the need for a high level of protection through defamation law is not incontrovertible. For example, an American lawyer, writing in the early twentieth century, sought to challenge the importance both judges and lawyers place upon the protection of reputation:

Those who resort to such suits nowadays are not persons of distinction or high standing, but are generally adventurers, having more cupidity than good character, and who, vulgarly speaking, are down in the heel and wish to make a raise without labor. The ancient presumption that every plaintiff bringing suit for slander or libel has a good character is far from the truth under present conditions. Nowadays seldom do persons of high standing resort to these actions to vindicate a good name. (Courtney 1902, 554)

Likewise, an American scholar, David A. Anderson, writing more recently, encouraged scepticism about the claims made about the meaning and value of reputation:

Many of our ideas about reputation are products of a simpler era. When most people spent their entire lives in one community, and the community value system was narrowly drawn and widely shared, good reputation was painstakingly earned, easily lost, and not readily rebuilt. Today most of us move from one community to another, not only geographically, but also socially and professionally. Whatever reputation we have in each of those communities may be recently acquired and shallowly based.

In today's pluralistic society, much is tolerated and little is universally condemned. A congressman can be the subject of a sex scandal one year and win an election the next. An entertainer can pursue drug abuse to the brink of death and return more popular than ever. Behavior (sic) that outrages adults can make a musician the idol of millions of teenagers. Even if one's reputation is harmed, the victim is not condemned automatically to live out his life in disgrace. The mobility and anonymity of modern society make rehabilitation much easier. (Anderson 1984, 777–8)

In part, these assessments might be explicable on the basis that the authors are writing from an American perspective. With its First Amendment, US defamation jurisprudence is more sceptical than Anglo-Australian defamation jurisprudence about intrusions on freedom of speech and consequently about claims made about the importance of reputation (Barendt 2005, 198).

However, commentators outside the United States have also challenged the importance placed upon reputation by defamation law. For example, the Canadian defamation scholar, Raymond E. Brown, criticised the right to reputation in the following terms:

Reputation is a flawed value. It is only a snapshot of the plaintiff's character, quite often doctored to portray something that has little or no basis in reality. A person may have

a right to project an image of himself that does not exist; he does not have a right to prevent others from exposing what is merely an illusion. (Brown 1994, 8)

More recently, Australian author, John Birmingham, has lambasted defamation laws, writing that '[d]efamation laws were framed to protect the reputations of 19th-century gentlemen hypocrites. It does very well at protecting the reputations of new-millennium hypocrites as well' (Knox 2003a; 2003b; Rimmer 2004, 48–50).

Even more recently, in *Saffron v John Fairfax Publications Pty Ltd* [2004] NSWCA 254, the New South Wales Court of Appeal has found that it was not perverse or unreasonable of a jury to find that an imputation that the plaintiff had an unsavoury reputation was not defamatory.<sup>10</sup> The Court justified its decision on the basis that the ordinary, reasonable reader might suspend his or her judgment on the plaintiff's reputation, rather than deferring to the opinion proffered that the plaintiff had an unsavoury reputation (*Saffron v John Fairfax Publications Pty Ltd* [2004] NSWCA 254 at [17]). Alternatively, the Court reasoned that the imputation was 'an historical commentary' – that a plaintiff may have had an unsavoury reputation in the past but has since been rehabilitated and now enjoys a more savoury reputation (at [19]). Ultimately, Sheller JA held (at [17]) that 'to describe a person's reputation as unsavoury may not be regarded as something that, in itself, harms that reputation.'

There is therefore a countervailing view about the importance of reputation, albeit a minority one. Perhaps a good reputation is not as important as it once was. Perhaps defamation law is an inadequate vehicle for protecting a good reputation. These concerns can only be adequately addressed when it becomes clear what is meant by reputation for the purposes of defamation law.

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10 As to the jury verdict, see *Saffron v John Fairfax Publications Pty Ltd* [2004] NSWCA 254 at [11]–[12] per Sheller JA. Described by *The Sydney Morning Herald* as 'the legendary Mr Sin', the late Abe Saffron, a 'colourful Sydney identity', was vigorous in defending his reputation, such as it was. Saffron sued the publisher of *The Gold Coast Bulletin* over a clue to a crossword puzzle printed in the 2 January 2004 edition of the newspaper. The answer to the clue – 'Sydney underworld figure, nicknamed Mr Sin (3, 7)' – was revealed the following day as 'Abe Saffron'. Counsel for Saffron, Clive Evatt, observed to *The Sydney Morning Herald* that the case 'reads like a law school exam paper'. See Pelly 2004; Kux 2005a. He also sued two Melbourne journalists and their book publishers over his inclusion in a book entitled *TOUGH: 101 Australian Gangsters*. See Kux 2005b. Saffron also threatened defamation proceedings against the City of Sydney Council, having taken exception to a proposed footpath plaque commemorating his role in Kings Cross history. The plaque was in the following terms: 'Abe Saffron. Publican and nightclub owner from 1946. Convictions and court appearances from 1938. Friends in high places.' See Cornford 2004. As to Saffron's history and reputation generally, see McNab 2005; Reeves 2007.

## **The Outline of the Book**

This book seeks to identify how the concept of reputation is embedded in the history, principles and practice of Anglo-Australian defamation law. It seeks to explore how the concept or, perhaps more correctly, concepts, of reputation, central to the law of defamation, manifest themselves. This book contends that the meaning of reputation is not immutable. It argues, rather, that the concept of reputation changes historically, reflecting social, political, economic, cultural and, most importantly, technological changes. As a consequence, this book also suggests that the value of a good reputation is not immutable.

This book is divided into three parts. The first part provides the framework for the subsequent analysis. In this part, an historical and a doctrinal approach to the concept of reputation is adopted. The starting-point for this book is necessarily Robert Post's seminal article, 'The Social Foundations of Reputation and the Constitution' (Post 1986). Over two decades after its publication, it remains the most important, and indeed the only sustained, analysis of the concept of reputation in defamation law. Adopting a sociological approach, Post identified three concepts of reputation in United States defamation law – reputation as property; reputation as honour; and reputation as dignity. Chapter 1 seeks to introduce Post's typology of reputational interests and, more importantly, to provide a critique of it.

Chapter 2 then analyses the history of English defamation law – which is the formative part of the defamation law of many common law countries – through the prism of reputation. It argues that the reason there is no unitary concept of reputation at the centre of defamation law is explained by the fact that defamation law itself has heterogeneous origins. Defamation law is derived from a number of sources, each jurisdiction providing protection for different reputational interests in different ways. Importantly, this chapter highlights the arrested historical development of defamation law.

Chapter 3 then analyses the basic principles of liability for defamation – defamatory capacity and meaning; identification; and publication – as well as the available heads of damages and the principles and purposes which govern their application, again through the prism of reputation.

The cumulative effect of this analysis of the history and doctrines of defamation law then informs the second part of the book. This part seeks to illuminate the various concepts of reputation through a series of case studies drawn from recent Australian defamation law. Although drawn from Australian defamation law, it is to be hoped that the insights gained as to the nature of reputation are applicable more generally, as well as the cases being intrinsically interesting. Each chapter in this part seeks to highlight a particular concept of reputation. Chapter 4 examines reputation as property by analysing cases relating to allegations of professional dishonesty and incompetence and cases involving corporate reputation. Chapters 5 and 6 examine reputation as honour, the former by exploring cases involving cases of 'unchastity', including imputations of

adultery and pre-marital sex, the latter by exploring cases involving imputations of homosexuality. Chapter 7 examines reputation as dignity by dealing with cases where the plaintiff has been exposed to ridicule by having naked photographs published without his or her permission. Whilst each chapter takes a particular concept of reputation as the starting-point of its analysis, the discussion is not confined to that concept alone. What becomes apparent through these case studies is that frequently a single case, and a single plaintiff's reputation, will manifest multiple concepts of reputation.

An important feature of the analysis adopted in the case studies is the desire to locate the cases and, more importantly, the plaintiff's reputation, in their broader, non-legal context. In particular, these case studies seek to identify how the plaintiff's reputation existed in the media, if at all, before, during and after the defamation litigation and to assess what impact, adverse or positive, such litigation had upon the reputation sought to be protected or vindicated. This book suggests that reputation, as it is sought to be protected in the courtroom, is not always the same as reputation outside the courtroom. What a number of these case studies suggest is that defamation litigation as a means of protecting or vindicating a plaintiff's reputation can be an effective or equally ineffective means of achieving these goals. Moreover, the defamation litigation itself can become part of the plaintiff's reputation, for good or ill.

The insights provided by these case studies then furnish the basis for the third and final part of the book. In Chapter 8, it is suggested that, in addition to the recognition of reputation as an economic construct – reputation as property – and reputation as a social construct – reputation as honour and dignity – reputation can also be conceptualised as a media construct – reputation as celebrity. It is submitted that such a concept specifically accounts for the mediated nature of reputation and the damage done to it characteristic of an era of mass communications. Drawing particularly upon the approaches to celebrity in media and cultural studies scholarship, this chapter expounds the concept of reputation as celebrity. Just as the concepts of reputation identified by Post do not manifest themselves in relation to each and every reputation, so celebrity is not raised in each and every case. However, as the case studies amply demonstrate, certain cases, and certain reputations, are explicable only by an acknowledgement of the element of celebrity. It is a truism that we live in a celebrity-obsessed age. This book will seek to demonstrate that reputation as celebrity is of great contemporary relevance at this point in the history of defamation law.

### **The Scope of the Book**

Given the comparative lack of analysis of this topic, as well as the constraints of space, this book does not purport to provide a comprehensive analysis of the concept of reputation in defamation law. It will not deal in detail with how

the concept or concepts of reputation inhere in the defences to defamation (see, for example, Slaughter 1992, 362ff; Gillooly 2004). Some defences to defamation clearly raise the question of the plaintiff's reputation. The defence of unlikelihood of harm or triviality is one example.<sup>11</sup> However, other defences raise the question of the appropriate balance between freedom of expression and the protection of reputation. To avoid entering into this debate, a debate that has been well-served by the academic literature, this book concentrates on meaning and liability for defamation and the basic principles relevant to the assessment of damages for defamation. Nor will it be possible, again due to constraints of space, to undertake an extensive analysis of the ways in which competing concepts of reputation inhere in the complex principles and procedural rules pertaining to the assessment of defamation damages.

In addition, this book, whilst drawing many of its examples from Australian law, focuses on the principles of defamation law which are, in significant respects, common to jurisdictions based on English law. Certain legal doctrines, such as the 'public figure' doctrine, which are unique to the United States and to its First Amendment jurisprudence, will therefore not be considered here.

Defamation law is, of course, not the only area of law which affords protection to reputation. Clearly, other areas of law, such as the tort of passing off and injurious falsehood, provide direct protection of a plaintiff's interest in its reputation. Other areas of law, such as false imprisonment, negligence and breach of contract may provide a measure of indirect protection for a plaintiff's reputation.<sup>12</sup> This book will also not analyse the manner in which reputation

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11 See, for example, *Civil Law (Wrongs) Act 2002* (ACT) s 139D; *Defamation Act 2006* (NT) s 30; *Defamation Act 2005* (NSW) s 33; *Defamation Act 2005* (Qld) s 33; *Defamation Act 2005* (SA) s 33; *Defamation Act 2005* (Tas) s 33; *Defamation Act 2005* (Vic) s 33; *Defamation Act 2005* (WA) s 33; *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749; *Singleton v John Fairfax & Sons Ltd [No 1]* [1983] 2 NSWLR 722; *Chappell v Mirror Newspapers* (1984) Aust Torts Reports ¶80-691; *King and Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305; *Jones v Sutton* [2004] NSWCA 439; (2004) 61 NSWLR 614.

12 See, for example, *Walter v Alltools Ltd* (1944) 171 LT 371; 61 TLR 39; [1944] WN 214 at 214 per Lawrence LJ; *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 603-4; (1991) Aust Torts Reports ¶81-077 at 68,624 per Murphy J; *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32 at 34ff per Levine J; *Wade v State of Victoria* [1999] 1 VR 121; *Sullivan v Moody* (2001) 207 CLR 562 at 580-81; 183 ALR 404; 75 ALJR 1570; Aust Torts Reports ¶81-622 *per curiam*; *Tame v New South Wales* (2002) 211 CLR 317 at 335 per Gleeson CJ, at 342 per Gaudron J, at 361 per McHugh J, at 425 per Callinan J; 191 ALR 449; 76 ALJR 1348; Aust Torts Reports ¶81-672; *Cornwall v Rowan* [2004] SASC 384 at [684]-[696]; *Spring v Guardian Assurance plc* [1995] 2 AC 296; [1994] 3 All ER 129; [1994] 3 WLR 354; *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148; *Balfour v Attorney-General* [1991] 1 NZLR 519; *Midland Metals Overseas Pty Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289; *Fulton v Globe & Mail Ltd* (1997) 152 DLR (4th) 377; *Butler* 2000b; *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 399

is protected by other areas of law. It proceeds on the basis that the concept of reputation has been insufficiently analysed in the context of defamation law such that an exclusive focus on this area of law is justified.

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per Hallett J; *Malik v Bank of Credit & Commerce International SA (in liq)* [1998] AC 20; [1997] 3 All ER 1; [1997] 3 WLR 95; *Gambotto v John Fairfax Publications Pty Ltd* (2001) 104 IR 303 at 312 per Peterson J; Enonchong 1996.