

# But Names Won't *Necessarily* Hurt Me: Considering the Effect of Disparaging Statements on Reputation

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*The author proposes a change in how some courts apply the test for defamatory meaning—a change that in her view would help to protect freedom of expression without compromising the protection of reputation or altering the substantive law of defamation.*

*To be defamatory, a statement must tend to harm reputation. However, Canadian case law shows that disparaging statements are often assumed to be defamatory, even when they may have little potential to harm reputation because a right-thinking audience member is unlikely to believe them. The author argues that this is the result of an overly literal approach to ordinary meaning, a disregard for how right-thinking people interpret statements, and a tradition of not adducing evidence of context to prove meaning. Social science evidence shows that a variety of factors—from pre-publication knowledge and opinions to the form in which the words were expressed—can substantially alter an audience's interpretation of a statement. The approach proposed by the author would require courts to place more emphasis on the entire context of an impugned statement in determining whether the statement would lower a right-thinking person's estimation of the plaintiff. Although leading more evidence of context would add a degree of complexity, it would not place an undue burden on the parties. Any loss of efficiency would be justified, given the importance of freedom of expression and the fact that the aim of defamation law is to protect reputation, not feelings.*

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## Introduction

“[I]t may well be the case that the common law takes a rather generous line on what lowers a person in the estimation of others”.<sup>1</sup>

In *WIC Radio Ltd. v. Simpson*,<sup>2</sup> a 2008 decision of the Supreme Court of Canada, Justice Louis LeBel’s concurring reasons planted a seed that could help protect both reputation and freedom of expression without changing the substantive law of defamation. Justice LeBel was of the view that the test for prima facie defamation had been misapplied, to the detriment of the defendant, in that the trial judge had insufficiently considered contextual factors relevant to whether the defendant’s remarks would have led a “right-thinking person” to have thought less of the plaintiff.

The case centred on the requirement in defamation law that the defendant have an honest belief in the opinion stated in order to succeed in the defence of fair comment. The plaintiff, an activist against positive depictions of homosexuality, alleged that a radio host employed by the defendant had made statements comparing her to Hitler and the Ku Klux Klan, calling her a bigot, and implying that she would condone violence. The trial judge had no difficulty finding the imputation that the plaintiff would condone violence to be prima facie defamatory—in other words that it would cause a right-thinking person to think less of the plaintiff. This finding was not appealed to the British Columbia Court of Appeal<sup>3</sup> or the Supreme Court of Canada. Although defamatory meaning was therefore not at issue, a majority of the Supreme Court noted that the imputation was “clearly” defamatory.<sup>4</sup>

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1. Patrick Milmo et al, eds, *Gatley on Libel and Slander*, 10th ed (London, UK: Sweet & Maxwell, 2004) at 18, n 32, cited in *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 68, [2008] 2 SCR 420, LeBel J [*WIC Radio*].

2. *Ibid*.

3. *Simpson v Mair*, 2006 BCCA 287, [2006] 10 WWR 460.

4. *WIC Radio*, *supra* note 1 at para 45.

In concurring reasons, however, LeBel J. disagreed. In his opinion, although the remarks were disparaging, they would not have caused a right-thinking member of the particular radio show's audience to think less of the plaintiff. The radio host, who had a reputation for being provocative, was merely stating his opinion on a matter that was being publicly debated and on which the audience presumably held its own views. In such a context, according to LeBel J., it was unreasonable to conclude that people would take the host's comments at face value and change their opinions of the plaintiff.

Justice LeBel's conclusion that it was not *prima facie* defamatory to imply that the plaintiff would condone violence in the same manner as Hitler may have come as a surprise to many. After all, it is difficult to imagine a more damning comparison. Certainly LeBel J.'s comments were not convincing to the eight other justices of the Supreme Court who heard the case, none of whom agreed that the issue of defamatory meaning was even debatable.

Whether or not the statements in *WIC Radio* were indeed *prima facie* defamatory, LeBel J. raised important points about the need for a more contextual approach to defamatory meaning. Although the law of defamation, as it now exists, is supposed to be sensitive to context in determining whether a statement<sup>5</sup> is defamatory, judges and even defence counsel are sometimes too quick to assume that a disparaging imputation would tend to harm the plaintiff's reputation. Courts sometimes ignore the fact that the particular audience may have entrenched views or knowledge about the plaintiff, the defendant or the subject matter in question, or may make credibility judgments based on the format of the publication, so that the audience is unlikely to be affected by the defendant's statements. Since the aim of defamation law is to protect reputation (while not unduly limiting expression), courts must be careful to ensure that reputation is actually at stake, and not just ego.

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5. Defamation need not occur through spoken or written words. See e.g. *Vander Zalm v Times Publishers et al* (1980), 109 DLR (3d) 531 at 535, 18 BCLR 210 (CA) [*Vander Zalm*], which involved a cartoon. However, I will usually refer to words or statements, for the sake of simplicity.

This article argues that courts tend to conflate disparaging meaning with defamatory meaning, and calls on them to correctly apply the test for whether a statement is prima facie defamatory. Section I examines the nature of defamatory meaning in law. Section II considers case law illustrating the tendency to find disparaging comments prima facie defamatory without sufficiently considering their potential for harming reputation. Section III addresses factors relevant to how opinions are formed and changed. Section IV discusses the third person effect, the perception that a third person's view of the plaintiff would be negatively affected, even if one's own view is not. Finally, Section V explores some potential obstacles to a more realistic approach to defamatory meaning and concludes that any additional evidentiary burdens are justified.

## I. Defamatory Meaning

The purpose of the law of defamation is to protect reputation without unduly inhibiting freedom of expression.<sup>6</sup> The very first sentence in *Gatley on Libel and Slander* states that defamation (or libel and slander) is concerned with protecting reputation.<sup>7</sup> This proposition is “virtually axiomatic in the cases and literature”.<sup>8</sup> The leading Canadian case on defamation, *Hill v. Church of Scientology of Toronto*, stresses the importance of protecting reputation.<sup>9</sup>

That goal, of course, is not to be achieved at any cost. In the years since the *Canadian Charter of Rights and Freedoms* was enacted, courts in Canada have limited the scope of defamation in order to protect free expression.<sup>10</sup> However, this article does not focus on whether the law of

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6. *WIC Radio*, *supra* note 1 at para 1.

7. Patrick Milmo et al, eds, *Gatley on Libel and Slander*, 11th ed (London, UK: Thomson Reuters, 2008) at 3 [*Gatley*].

8. Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007) at 1.

9. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 116–17, 24 OR (3d) 865 [*Hill*].

10. For example, the Supreme Court of Canada recently created a new defence to defamation: responsible communication on matters of public interest. See *Grant v Torstar*

defamation strikes the correct balance between reputation and expression. Rather, it focuses on whether courts are correctly applying existing law to the question of whether the plaintiff's reputation interest has (potentially) been affected.

An important feature of defamation law is that, despite its focus on reputation, the plaintiff need not prove actual harm to reputation. The law of defamation presumes falsity and damages (that is, harm to reputation) if a statement tends to harm one's reputation in the mind of hypothetical right-thinking members of society.<sup>11</sup> The test for prima facie defamation has been phrased in a number of ways; *Gatley* notes that "[t]here is no wholly satisfactory definition of a defamatory imputation",<sup>12</sup> and that "it is probable that not all the cases are reconcilable with a single principle".<sup>13</sup> The most commonly cited test is whether the words have "a tendency . . . to lower [the plaintiff] in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem".<sup>14</sup>

Although the purpose of defamation law is generally considered to be the protection of reputation, some definitions of defamatory meaning result in liability where there is no potential for harm to the plaintiff's reputation<sup>15</sup>—for example, by asking whether the words tend to make others "shun or avoid" the plaintiff or expose him to ridicule.<sup>16</sup> A cartoon mocking an unpopular politician may cause its subject to be regarded with feelings of ridicule without having any effect on the politician's reputation, which is already poor. It is for this reason that

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*Corp*, 2009 SCC 61, [2009] 3 SCR 640. Note, however, that the *Charter* does not directly apply to the common law of defamation. See *Hill*, *supra* note 9 at para 79.

11. *WIC Radio*, *supra* note 1 at para 1.

12. *Gatley*, *supra* note 7 at 12.

13. *Ibid* at 12, n 64.

14. RFV Heuston, *Salmond on the Law of Torts*, 17th ed (London: Sweet & Maxwell, 1977) at 139–40, citing *Sim v Stretch* (1936), 52 TLR 669 at 671 (UKHL); *Capital and Counties Bank v Henty* (1882), 7 App Cas 741 (EHL). This test was cited with approval in *Vander Zalm*, *supra* note 5.

15. *Gatley*, *supra* note 7 at 44.

16. See McNamara, *supra* note 8 at 142 for a discussion of the "shun and avoid" test; see also *Gatley*, *supra* note 7 at 44.

some scholars have called for the elimination of tests of defamation based on shunning and ridiculing.<sup>17</sup> Given defamation law's aim of protecting reputation, the primacy of the right-thinking person test, and the criticisms of the extended tests, this article proceeds on the basis that statements must tend to injure the plaintiff's reputation in the minds of hypothetical right-thinking people if they are to be *prima facie* defamatory.

Moving from the effect of the words to the people whose estimation of the plaintiff must be affected, the concept of right-thinking members of society poses a number of challenges.<sup>18</sup> Suffice it to say that in Canada, the relevant judge of whether something is defamatory in meaning is the ordinary person or member of the community.<sup>19</sup> However, the right-thinking person is not an actual member of the community, such as a juror, but rather a legal fiction—a hypothetical person endowed with certain characteristics, not unlike the reasonable person of negligence law. In particular, the right-thinking person is “ordinary, reasonable, [and] fair-minded”.<sup>20</sup>

The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast—or written statement—should be assessed from the perspective of someone reasonable, that is, a person who is reasonably

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17. See e.g. McNamara, *supra* note 8 (“the supplementary tests of ‘shun and avoid’ and ridicule should not form a part of the legal framework. These tests have developed in a way that means in some instances they go beyond the protection of reputation and instead protect a plaintiff's sense of self-worth” at 230).

18. For a discussion of some of the difficulties with this concept, see Roy Baker, “Defamation and the Moral Community” (2008) 13:1 *Deakin Law Review* 1; McNamara, *supra* note 8; Michael J Tommaney, “Community Standards of Defamation” (1970) 34:3 *Alta L Rev* 634.

19. Raymond E Brown, *Defamation Law: A Primer* (Toronto: Thomson Carswell, 2003) at 24.

20. *Charleston v News Group Newspapers Ltd*, [1995] 2 WLR 250 (UKHL) at 454, cited in *WIC Radio*, *supra* note 1 at para 97, LeBel J.

thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.<sup>21</sup>

Further, the right-thinking person should not be “naïve or unduly suspicious or avid for scandal”.<sup>22</sup>

The right-thinking person is a member of the publication’s audience, or is at least capable of understanding the publication in the way its audience would have understood it.<sup>23</sup> Raymond Brown notes that in Canada, “a publication must be reasonably understood in a defamatory sense by those to whom it is published”.<sup>24</sup> Thus, if a technical publication has a narrow audience, whether statements in that publication are defamatory will depend on whether right-thinking readers of the publication would interpret it as such.<sup>25</sup>

Although a statement may be defamatory whether or not its audience believes it,<sup>26</sup> this is only true in the sense that the audience may not consist of right-thinking people. The right-thinking person is a hypothetical person, not an actual member of the audience. Therefore, a hypothetical right-thinking member of the audience could theoretically think less of the plaintiff, even if no member of the audience *actually* thinks less of the plaintiff, if the audience members do not have the characteristics of right-thinking people.<sup>27</sup> A right-thinking person is a member of the publication’s audience, but a hypothetical member.

Given defamation law’s focus on reputation, it has never been defamatory to simply say something disparaging of the plaintiff unless what was said also tends to lower the plaintiff in the estimation of right-thinking people. In deciding whether a statement tends to diminish the

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21. *Color Your World Corp v Canadian Broadcasting Corp* (1998), 38 OR (3d) 97 at 106, 156 DLR (4th) 27 (CA), leave to appeal to SCC refused, [1998] 2 SCR vii.

22. *Laws v Harper Collins Publishers Ltd*, [2006] OJ No 1651 (QL) at para 6 (Sup Ct J).

23. *Gatley*, *supra* note 7 at 53. See also *Jeynes v News Magazine Ltd*, [2008] EWCA Civ 130 (available on WL Can) (“[t]he hypothetical reader is taken to be representative of those who would read the publication in question” at para 14).

24. Brown, *supra* note 19 at 31.

25. *Gatley*, *supra* note 7 at 53.

26. See *Vulcan Industrial Packaging Ltd v Canadian Broadcasting Corp*, [1983] OJ no 242 (QL) at para 45 (SC); *MacDonald v Poirier* (1991), 120 NBR (2d) 18, 302 APR 18 (QB).

27. See *Gatley*, *supra* note 7 at 39.

plaintiff's reputation, a judge must first determine whether, as a matter of law, it can bear the defamatory meaning alleged. The trier of fact must then determine whether the statement does in fact bear that meaning.<sup>28</sup> This depends on two separate but related questions: what the impugned words mean, and whether people would tend to think less of the plaintiff because of the publication. Where the judge is the trier of fact, all three questions are often merged into a single analysis.<sup>29</sup> In a jury trial, the questions of meaning and whether that meaning is defamatory are often compressed into a single question: whether the words defame the plaintiff.<sup>30</sup>

To determine what the words actually mean, the trier of fact will, by default, rely on the ordinary meaning of the words in context. If the plaintiff wishes to rely on a special meaning of the words that only arises because of facts known to the audience but not known to the general public, that special meaning must be pleaded as innuendo and must be proven.<sup>31</sup> The defendant is, of course, also entitled to adduce evidence of special facts that negate the claim that the statements were *prima facie* defamatory.

Once the trier of fact determines what the words mean, he or she must then determine whether they have a tendency to affect the plaintiff's reputation for the worse. This latter question is often given insufficient consideration if the meaning of the words clearly disparages the plaintiff. The question is, however, an important one, as it helps to ensure that defamation law only condemns expression that tends to affect reputation—not expression that simply offends the plaintiff.

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28. *Best v Weatherall*, 2010 BCCA 202, 3 BCLR (5th) 388 (“[i]t is well established that the question of whether words are capable of being defamatory is a question of law, but whether they are in fact defamatory is a question of fact” at para 34).

29. *Grassi v WIC Radio Ltd*, 2000 BCSC 185 at para 26, [2000] 5 WWR 119.

30. *Gatley*, *supra* note 7 at 37.

31. *Ibid* at 112–13; Brown, *supra* note 19 at 43–45.



## II. Assuming That Disparaging Remarks Tend to Harm Reputation

The following cases exemplify the tendency of courts to assume that disparaging remarks have defamatory meaning, even where reputation may not actually have been at risk. The purpose of reviewing these cases is not to argue that they were wrongly decided, but rather to suggest that not enough consideration was given to the potential effect on reputation.

In *Vander Zalm v. Times Publishers*,<sup>32</sup> the plaintiff, British Columbia's Minister of Human Resources at the time, alleged that a cartoon depicting him was defamatory. The cartoon showed him pulling the wings off flies, and the trial judge found that it depicted him as a cruel man. The defendant publisher argued that the cartoon would not tend to lower the plaintiff in the estimation of right-thinking members of society.<sup>33</sup> The trial judge disagreed:

[T]he cartoon was defamatory because in the natural and ordinary meaning that viewers would attribute to it, it meant and would be understood to mean that the plaintiff is a person of a cruel and sadistic nature who enjoys inflicting suffering on helpless persons, said false pictorial representation adversely affecting and lowering his reputation and standing in the estimation of right-thinking members of society generally by exposing him to hatred, contempt or ridicule, and disparaging him in his office as Minister of Human Resources.<sup>34</sup>

The judge seems to have assumed that imputing cruel and sadistic tendencies to the plaintiff would adversely affect his reputation. However, in the case of a well-known public figure such as Mr. Vander Zalm, it is not obvious that anyone would think less of him because of the cartoon. Cartoons are not meant to be taken at face value, and it is likely that the audience (newspaper readers in Victoria, BC) already held reasonably well-established opinions about Mr. Vander Zalm and his role as Minister of Human Resources. He was a controversial figure

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32. 96 DLR (3d) 172, [1979] 2 WWR 673 (BCSC).

33. *Ibid* at 174.

34. *Ibid* at 175.

whose statements and policies were much discussed in the media.<sup>35</sup> Those who already had a low opinion of him were unlikely to have thought less of him because of the cartoon. Rather, it would likely have reinforced pre-existing opinions about him and have had no effect on his reputation. Similarly, it is unlikely that those who approved of Mr. Vander Zalm and his policies would have been swayed in their opinions by a political cartoon. They may have dismissed the cartoon's imputation of cruelty as being a poor attempt at humour by a left-leaning cartoonist.

The cartoon would only defame Mr. Vander Zalm if the hypothetical right-thinking readers of the *Victoria Times* had no prior opinions of him, or opinions so tenuously held that the political cartoon could cause them to think less of him. This is, of course, a possibility, but not one addressed at either the trial level or by the British Columbia Court of Appeal, which overturned the trial judge's finding of liability on the basis of fair comment. The Court of Appeal did cite case law for the proposition that an imputation of cruelty is necessarily defamatory.<sup>36</sup> However, a finding of defamatory meaning in a particular case is so context-dependent that it has no precedential value.<sup>37</sup> The fact that one court holds an imputation of cruelty to be defamatory is not determinative of whether such an imputation is defamatory in other contexts.

In numerous other cases, it appears to have been assumed that a statement was defamatory because it disparaged the plaintiff, without sufficient attention to its potential to harm his or her reputation.

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35. *Vander Zalm*, *supra* note 5 at 536–37.

36. *Ibid.* Hinkson JA cautiously cites *Le Fanu v Malcomson* (1848), [1843–60] All ER Rep 152 at 155, 9 ER 910 (HL), itself cited in Heuston, *supra* note 14, at 543 for the proposition that allegations of cruelty are necessarily prima facie defamatory, at 543. However, Seaton JA questions whether that can be true “in a general sense”. See *Vander Zalm*, *supra* note 5 at 540.

37. See *Gatley*, *supra* note 7 (“whether or not any imputation is defamatory is not a matter of law, but a matter of fact for the jury, and no other jury will be bound to reach the same decision” at 58; and although some words appear on their face to be defamatory, “the context in which the statement is made may show that words like ‘thief’ and ‘killer’ are not defamatory” at 101, n 123).

Consider, for example, defamation actions brought by abortion providers against protesters. In *Assad v. Cambridge Right to Life*, the plaintiff doctors claimed that signs saying: “Dr. Assad stop killing unborn babies” and “Dr. Chan stop killing unborn babies” were defamatory.<sup>38</sup> They sought an injunction to prevent the defendants from, among other things, carrying these signs outside their clinic.

The trial judge held that the average passer-by would understand the word “killing” in a pejorative sense. Since providing abortions is a legal activity, to suggest otherwise was prima facie defamatory. “It is, to put it bluntly, an accusation of murder, and, in the circumstances here there can be no legal justification for that”.<sup>39</sup>

But if the purpose of defamation law is to protect reputation, it is not at all clear that such accusations implicate defamation’s purpose. Those audience members who are pro-choice would presumably not think less of the plaintiffs if they were to see the signs. They would dismiss the phrase “killing unborn babies” as anti-choice propaganda. Those audience members who were anti-abortion would think no less of the plaintiffs, assuming they already knew the plaintiffs were abortion providers. That is, they would already equate abortions with killing unborn babies and would already believe the plaintiffs kill unborn babies. If, however, the audience members were anti-abortion and did not know the plaintiffs performed abortions, the signs would arguably be prima facie defamatory—but no more so than signs informing the public that the plaintiffs were abortion providers. It is the message that the plaintiffs provided abortions that would cause those audience members to think less of them, not the use of the words “killing unborn babies”. If a member of the audience were unfamiliar with the abortion debate or had no opinion on it, the signs in *Assad* might change his or her opinion of the plaintiffs. Such a person might not, however, fall within the definition of a right-thinking person, who, as noted above, is taken to be well-informed and not naïve.<sup>40</sup>

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38. (1989), 69 OR (2d) 598 (available on WL Can) (SC) [*Assad*].

39. *Ibid* at 603.

40. See “Canadians Decisively Pro-Choice on Abortion” (1 April 2010), online: Ekos Politics <[http://www.ekospolitics.com/wp-content/uploads/full\\_report\\_april\\_11.pdf](http://www.ekospolitics.com/wp-content/uploads/full_report_april_11.pdf)> (10% of Canadian respondents considered themselves neither pro-choice nor pro-life,

It therefore seems that, contrary to the trial judge's conclusion in *Assad*, it is quite difficult to defame abortion providers by saying that they kill unborn babies.<sup>41</sup> Such allegations are unlikely to affect the plaintiff's reputation among informed and reasonable people, whatever views they may have on abortion.

To take another example, in *Vaquero Energy v. Weir*,<sup>42</sup> the defendant had posted comments about the plaintiff corporation and its CEO, Mr. Waldner, in an online chat room called Stockhouse. The trial judge's reasons do not set the comments out in detail, but do indicate that the defendant referred to Mr. Waldner as "insane, retarded, managing the company for his own benefit" and being comparable to Osama bin Laden.<sup>43</sup> Justice Kent dealt very briefly with whether the statements were prima facie defamatory: "there is no doubt in my mind that statements like that used are defamatory. They are statements which 'tend to lower [Mr. Waldner and Vaquero] in the estimation of right-thinking members of society'".<sup>44</sup>

If the real issue were the threat to the reputations of Vaquero and Mr. Waldner, the court should have considered whether anyone would actually believe the defendant's comments. The chat room in question was dedicated to information about companies' stocks. It may be (and evidence to this effect could have been adduced) that its participants—the audience for the allegedly defamatory statements—were

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while another 11% did not respond or answered "do not know". This indicates that a strong majority of Canadians has an opinion about abortion. Although the right-thinking person cannot necessarily be equated with the majority, it is not unreasonable to conclude that a right-thinking person has an opinion on the morality of abortion).

41. It should also be noted that *Assad*, *supra* note 38 is not an isolated case. It relies in part on *Planned Parenthood Regina Inc v Whatcott*, 2002 SKQB 312 at para 17, 222 Sask R 163, which held that allegations of criminality (in that case, calling Planned Parenthood a murderer) are prima facie defamatory. As discussed in *Gatley*, *supra* note 7 at 58, 101, n 123, defamatory meaning is context-dependent, so that even calling someone a killer is not necessarily prima facie defamatory.

42. *Vaquero Energy Ltd v Weir*, 2004 ABQB 68, [2006] 5 WWR 176 [*Vaquero*].

43. *Ibid* at para 2.

44. *Ibid* at para 11. Defence counsel effectively agreed, since Kent J noted regarding defamatory meaning, "there was not much argument from [the defendant] on that point" (*ibid*).

knowledgeable about stocks and were reasonably well-educated. The right-thinking person is in any event known to possess common sense, to be informed and not to be naïve. Given that almost everyone can publish on the internet, it is at least worth considering whether a right-thinking person reading postings in the Stockhouse chat room would give any credence to the online ramblings of someone who compared the CEO of a major corporation to Osama bin Laden and called him insane and retarded. Although the claims would not have to be taken literally in order to tend to affect the plaintiff's reputation, in this case it is not obvious on what basis a right-thinking person could think less of the plaintiff; rather, the claims seem to say more about the defendant. Courts must give right-thinking people the credit they are due.

The trial judge in *Vaquero* did consider the likelihood that the defendant's comments would be believed, but only in relation to the amount of damages. Justice Kent concluded that anonymous online posts were more likely to be believed than attributed ones, because if the author were named, the audience could take any known political bias into account.<sup>45</sup> This is unconvincing. Depending on the nature of the known bias, the audience would be either more or less likely to believe the statement—not necessarily less likely. Also, readers may be more likely to dismiss an anonymously posted comment than an attributed one even if they know nothing about the author. Since there are no repercussions for anonymous posts (unless, as in this case, someone tracks down an ISP number), anonymous commenters may be less measured and reasonable.<sup>46</sup>

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45. *Vaquero*, *supra* note 42 at para 17.

46. See Jacob M Rose & James E Hunton, "Effects of Anonymous Whistle-Blowing and Perceived Reputation Threats on Investigations of Whistle-Blowing Allegations by Audit Committee Members" (2011) 48:1 *Journal of Management Studies* 75 at 95, where reports of anonymous whistleblowers were treated as less credible than the reports of identified whistleblowers. This study only assesses credibility of anonymous posting in one narrow context and cannot be considered determinative of the credibility of anonymous internet posts generally, but its results nevertheless contradict the assumption that an anonymous remark should be *more* credible than an identifiable one. See also Elizabeth F Judge, "Cybertorts in Canada: Trends and Themes in Cyber-Libel and Other Online Torts" in Todd Archibald & Michael G Cochrane, eds, *Annual Review of Civil Litigation* (Toronto: Carswell, 2005) 149 at 154–55.

In any event, whether or not anonymous online posts are *generally* less credible than attributed ones, the particular comments at issue in the *Vaquero* case were so far-fetched that a right-thinking person may well have dismissed them as the ramblings of a crank and not thought less of Vaquero or Mr. Waldner.

Instead, *Vaquero* suggests that whether the comments were believed relates only to damages. After reaching the doubtful conclusion that anonymous online posts are more credible than attributed ones, Kent J. said that “[the] greater risk that the defamatory remarks are believed . . . aggravates the defamation”.<sup>47</sup> If he meant that the more people who believe the remarks, the greater the harm to reputation, he might have been correct. However, if he meant that creating a risk that the remarks will be believed aggravates the defamation, he was incorrect. If a right-thinking person would not believe the remarks, they are quite simply not defamatory, since he or she would not think less of the plaintiff because of them. Justice Kent should have given more consideration to whether a right-thinking person (specifically, a right-thinking person who read the Stockhouse chat room postings) would have actually thought less of the plaintiff because of them.

A similar case involved a set of rambling online complaints against the Barrick Gold corporation, including allegations of genocide, fraud bigger than Enron, and tax evasion. The motions judge said the published comments were “emotional, often incoherent, rambling and highly critical of Barrick”.<sup>48</sup> She held that the statements were “clearly” defamatory, since they alleged improper acts.<sup>49</sup> Strangely, however, she went on to award only a relatively small amount in damages, on the basis that Barrick Gold’s reputation had not been harmed. She seemed not to rely on the distinction between the tendency to harm reputation and proof of actual harm. Rather, she found that the comments were not credible:

Much of what Mr. Lopehandia says comes across as a diatribe or a rant. His messages are generally difficult to follow and often incoherent. They do not leave a reader with the

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47. *Vaquero*, *supra* note 42 at para 17.

48. *Barrick Gold v Lopehandia*, [2003] OJ no 5837 (QL) at para 8 (Sup Ct) [*Barrick Gold*].

49. *Ibid* at para 20.

impression that the writer has a credible case against Barrick. Rather, they leave the impression of someone with a grievance, who is emotional and highly intemperate in expressing his views . . .

In my view, a reasonable reader is unlikely to take what he says seriously—especially those who are said to have read the material, such as stock analysts or individuals working for the [Toronto Stock Exchange]. In assessing damages, one must consider the impact of the messages on the estimation of the plaintiff among right-thinking members of society. While Mr. Lopehandia's words are defamatory, I do not believe that they have caused any serious damage to Barrick's business reputation.<sup>50</sup>

Whether or not the comments were actually defamatory, the motions judge misapplied the law of defamation. Logically, she could not have concluded both that the statements were “clearly” defamatory and that a reasonable person would not have found them credible. If a right-thinking person would not find the statements credible, he or she would not think less of the plaintiff because of them, and they would simply not be defamatory. As in *Vaquero*, the court in *Barrick Gold* reduced a central component of the test of defamatory meaning to a mere matter of quantifying damages. The judge appears to have equated defamatory meaning with disparaging meaning.

In an interesting conclusion to the *Barrick Gold* case, the Ontario Court of Appeal increased the award of damages, in part on the basis that the motions judge had erred in considering the statements not to be credible.<sup>51</sup> The Court of Appeal found that the plaintiff's reputation had suffered significant damage and emphasized the ability of the internet to disseminate material widely, as well as the fact that several people had raised concerns about the postings (without indicating whether any of them had believed what was said).

The trial judge's conclusions in *Barrick Gold* can be compared with those of Quijano J. in *Home Equity Development Inc. v. Crow*, who seemed more alive to how the language and the context of the debate would affect the understanding of a reasonable audience member. Justice Quijano said:

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50. *Ibid* at paras 38–39.

51. *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 at para 43, 239 DLR (4th) 577 (CA).

The description of the entire shore of Possession Point as having been ‘hacked down, and bulldozed and . . . devoid of all life’ was, as I have found, at best a gross exaggeration. . . . Considering the language complained of in the context of the letter as a whole and the context of the knowledge of the ordinary reader by this time in the ‘debate’, I have concluded that the ordinary reader would have understood this to be gross exaggeration for effect and would not have ascribed to it the meanings complained of. I am not persuaded that it is defamatory.<sup>52</sup>

The survival of the honest belief test as part of the defence of fair comment provides a final example of the tendency to pay too little attention to the potential for harm to reputation. In *WIC Radio*, the Supreme Court of Canada modified the test of honest belief so that defendants need no longer subjectively believe what their words impute. Instead, the test is now whether anyone could believe those imputations.<sup>53</sup> However, as LeBel J argued in *WIC Radio*, the requirement that anyone could believe the imputations is redundant in light of the requirement that they be defamatory.<sup>54</sup> If no one could believe them, they could not influence a right-thinking person. If the plaintiff makes out a prima facie case, it follows as a matter of logic that someone could believe the imputations. Justice Binnie argued in favour of keeping the honest belief test, in part on the basis that removing it would amount to more than an incremental change to the law of fair comment.<sup>55</sup> However, if the test serves no purpose it should be abandoned. The fact that seven of the nine judges who heard *WIC Radio* opted for a test of objective honest belief means either that they chose to create a useless test to avoid non-incremental change or that they considered it possible for a statement to be prima facie defamatory and yet not believable by anyone (reasonable, well-informed or otherwise).

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52. *Home Equity Development v Crow*, 2004 BCSC 124 at para 106 (available on CanLII). There are other cases in which the courts are alive to whether the right-thinking person would have been swayed by disparaging words. See *Roth v Aubichon* (1998), 171 Sask R 271 at para 6 (available on CanLII) (QB) and *Best v Weatherall*, 2008 BCSC 608 (available on CanLII); *Best*, *supra* note 28.

53. *WIC Radio*, *supra* note 1 at paras 49–51.

54. *Ibid* at para 97.

55. *Ibid* at para 36.



The cases discussed above involve findings of prima facie defamation in circumstances where the plaintiff's reputation was arguably not at risk. They generally state the law of defamation correctly, but do not give enough consideration to facts that are relevant to whether right-thinking people would actually change their opinion of the plaintiff because of the statements in question. There are several reasons why this is so.

First, the emphasis on ordinary meaning de-contextualizes the statements. Ordinary meaning is what an ordinary person would understand without any special knowledge,<sup>56</sup> and no evidence is admissible as to that meaning.<sup>57</sup> Although ordinary meaning is supposed to be contextual,<sup>58</sup> only certain aspects of context, such as whether a statement was meant to be taken literally or in a satirical or hyperbolic sense, are generally considered relevant to ordinary meaning.<sup>59</sup> Further, in practice, ordinary meaning tends to be conflated with dictionary or literal meaning<sup>60</sup>—especially where the statement was not meant

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56. *Leenen v Canadian Broadcasting Corp* (2001), 54 OR (3d) 612 at para 8, 6 CCLT (3d) 97 (CA).

57. *Gatley*, *supra* note 7 at 1174.

58. *Brown*, *supra* note 19 at 31–32.

59. See e.g. *Milkovich v Lorain Journal Co*, 497 US 1 (1990), 110 S Ct 2695 (a majority of the US Supreme Court recognized the relevance of hyperbole, but otherwise took a fairly literal approach to ordinary meaning. Justice Brennan, on the other hand, would have preferred a much broader contextual approach to meaning). See generally David McCraw, “How Do Readers Read? Social Science and the Law of Libel” (1991) 41 *Cath U L Rev* 8 at 98–100 (discussing the different approaches). Justice Binnie, writing in *WIC Radio*, *supra* note 1, seems to take the same approach to context as the majority in *Milkovich*. Justice Binnie is careful to note that satire should be protected and that there is a “democratic right” to “poke fun” (*ibid* at para 48). However, in assessing the “sting” of the words at issue in *WIC Radio*, Binnie J did not explicitly consider whether right-thinking members of the radio host’s audience would actually have thought less of the plaintiff as a result of the disparaging comments. Given his conclusion that the factual foundation for the disparaging comments was well known to the audience (*ibid* at para 34), it is not obvious that the comments had a tendency to harm reputation.

60. Although courts usually note that ordinary meaning is not the same as dictionary meaning, they nevertheless often rely on the dictionary meaning. See e.g. *Rupic v Toronto Star Newspapers Ltd* (2009), 307 DLR (4th) 233 at para 36 (available on QL) (Ont Sup Ct J); *Thomas v McMullan*, 2002 BCSC 22 at para 59 (available on QL); *Doyle v International*

satirically or hyperbolically. For example, in an American case the defendant called the governor a murderer because the governor did not prevent the execution of two criminals.<sup>61</sup> The defendant was found liable in defamation. One scholar noted the court's emphasis on the disparaging meaning of "murderer", notwithstanding the context of the defendant's protest, and argued that the defendant had been "convicted more by the dictionary than by the law".<sup>62</sup> The purpose of the default reliance on ordinary meaning is to promote efficiency and limit the evidence that must be called, on the assumption that the audience consists of members of the general public.<sup>63</sup> However, it encourages counsel and courts to take a literal and simplistic view of meaning—one which ignores the broader context of publication.

Second, courts largely ignore the way right-thinking people interpret statements. They tend implicitly to adopt a "hypodermic needle" or "direct effects" model of language processing, which assumes that the linguistic stimulus (the impugned statement) leads directly to a response and effect.<sup>64</sup> However, empirical research shows that this is not how information is processed: "Communication science no longer accepts a simple cause/effect model in which a reputation is damaged in the instant of a televised news bulletin".<sup>65</sup>

Third, there are evidentiary challenges to proving a tendency to harm reputation. Not only does adducing additional evidence increase the burden on the parties, but as things currently stand, some relevant evidence may not even be admissible. For example, another article in the same newspaper in which the impugned statements appeared may be

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*Association of Machinists and Aerospace Workers, Local 1681 and Eaton* (1991), 110 AR 222 at para 30 (available on QL) (QB); *Daisbowa Inc v Friends of the Lubicon* (1998), 39 OR (3d) 620 at 661, 158 DLR (4th) 699 (Ct J (Gen Div)).

61. *Commonwealth v Canter* (1929), 269 Mass 359, 168 NE 790.

62. Frederick F Schauer, "Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter" (1978) 64:2 Va L Rev 263 at 265.

63. Jason Harkess, "A Linguistic Inspection of the Law Of Defamation" (1998) 8:3 Auckland UL Rev 653 at 666.

64. See McCraw, *supra* note 59 at 89–90; Jeremy Cohen & Albert C Gunther, "Libel as Communication Phenomena" (1987) 9:5 Comm & L 9 at 17–18.

65. *Ibid* at 9–10.

inadmissible if it does not specifically refer to the impugned article,<sup>66</sup> despite the fact that the types of articles that generally appear in a particular publication may be very relevant to what the right-thinking reader of that publication knows. Although it may at some point become impractical to adduce such evidence, the law should not automatically exclude evidence on the basis of a narrow view of what is relevant to the meaning and the effect of a published statement.

Thus, although the way in which a right-thinking person would be influenced by particular statements is central to whether they are defamatory, in practice that is often ignored in favour of debates over what the words mean. And what they mean tends to be considered narrowly, unless special facts about meaning in the particular context of publication are pleaded and proven. As a result, even when evidence of the audience's knowledge and opinions is admissible to prove what a right-thinking person would have thought, the law does not facilitate its use. Nor is there a significant tradition of adducing such evidence.<sup>67</sup>

This section has argued that the law has been misapplied, and has suggested some reasons why. However, it has not yet considered why this deviation from the law is problematic. Why not embrace an approach that determines first whether a plaintiff disparaged a defendant, and leave contextual matters that might affect how the statement would be understood by its audience to be taken into account in quantifying damages? Since damages should reflect actual harm to reputation, doing the analysis twice might seem redundant.

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66. *Gatley*, *supra* note 7 at 1206.

67. Thomas Gibbons, "Defamation Reconsidered" (1996) 16:4 *Oxford J Legal Stud* 587 ("the law only rarely solicits the opinions of real audiences" at 601). However, social science evidence is sometimes used in the US to prove what the actual effect on the relevant audience would have been. For example, in Wayne Newton's defamation action against National Broadcasting Corp, a public opinion survey was admitted into evidence. See Jeremy Cohen et al, "Perceived Impact of Defamation: An Experiment on Third Person Effects" (1988) 52:2 *The Public Opinion Quarterly* 161 at 165 (discussing *Newton v National Broadcasting Co* (1991), 930 F.2d 923 (9th Cir)). Psycholinguists are also sometimes called as witnesses. Both parties relied on psycholinguists' evidence in *Rudin v Dow Jones & Co Inc*, 557 F Supp 535, 536 (DCNY 1983) as referenced in McCraw, *supra* note 59 at 103.

Such an approach would not only constitute an enormous change to the law of defamation, but a change for the worse. Considering the potential effect on reputation only at the damages stage would shift the emphasis of defamation law away from the effect on reputation and toward the meaning of the impugned words. Finding the defendant to be prima facie liable based only on the meaning of the words uttered, rather than on their effect on the audience, would raise serious freedom of expression issues. Defendants could be held liable for saying things even where there was no actual or potential effect on reputation. The Supreme Court's pronouncements to date suggest that defamation law's restrictive effect on expression is justified only because of the importance of the competing reputation interest.<sup>68</sup> This is not to say that the actual effect on reputation should not be relevant to damages: it should be, and is. But at a minimum, potential harm to reputation must be a prerequisite to liability.

At the other end of the spectrum, one might suggest a move away from the right-thinking person's view entirely and simply require the plaintiff to prove actual harm to reputation in order to establish liability or at least in order to recover anything more than nominal damages. Some scholars have argued against presumed damages (that is, in favour of plaintiffs recovering damages only where they can prove actual rather than potential harm to reputation).<sup>69</sup> This would bring defamation law in line with other torts, most of which require proof of harm for anything more than nominal damages, but it would also significantly increase the burden of proof on plaintiffs. Evaluating the merits of abolishing presumed damages is beyond the scope of this article. I therefore assume that damages will continue to be presumed where the plaintiff proves defamatory meaning.

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68. See e.g. *WIC Radio*, *supra* note 1 at para 2.

69. See e.g. David A Anderson, "Reputation, Compensation and Proof" (1984) 25:5 *Wm & Mary L Rev* 747.

### III. Factors Relevant to Whether a Reasonable Person Would Think Less of the Plaintiff

To help ensure that liability for defamation is only imposed where a statement has a tendency to injure reputation, I will canvass several factors that are relevant to whether a person's reputation is affected by disparaging statements: pre-publication knowledge and opinions about the plaintiff; pre-publication knowledge and opinions about the defendant; the subject matter of the impugned statement; characteristics of the audience; form of the publication; and whether the impugned words are a statement of fact or opinion. These are not the only factors that are relevant to forming opinion, but they are particularly relevant to assessing impact on reputation.<sup>70</sup>

#### *A. Pre-Publication Knowledge and Opinions About the Plaintiff*

The nature of the plaintiff's pre-existing reputation is clearly relevant to whether disparaging remarks are defamatory, as LeBel J. noted in *WIC Radio*.<sup>71</sup> If I tell Canadians that Paul Bernardo is a murderer, I have done nothing to harm his reputation. That he is a murderer is so well-known that my stating the fact will not change right-thinking persons' opinions. It is true that I would also have a strong defence of justification if he sued me for defamation, but my statement is not even prima facie defamatory.

Similarly, if certain facts about the plaintiff are widely known, factual statements that *contradict* them, even in a disparaging way, may have no effect on reputation. If I state that Prime Minister Stephen Harper is a bachelor or is twenty-years-old (both of which could conceivably disparage a politician), I would not convince reasonable and

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70. See e.g. Stuart Oskamp & P Wesley Schultz, *Attitudes and Opinions*, 3d ed (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2005) at 209.

71. *WIC Radio*, *supra* note 1 at para 69.

well-informed people of either “fact”.<sup>72</sup> Hypothetical reasonable people will be taken to know certain things in order to qualify as reasonable and well-informed. In this sort of example, statements contradicting what reasonable people know to be true may have no effect on their beliefs about what is true.

This is true not only of statements of fact but also of comment. Where people hold opinions about a person, the fact that a contrary opinion is stated in no way ensures that people’s opinions will change. The likelihood of a changed opinion depends on a range of factors. The more strongly an opinion is held, or the more that it is based on what is known about a person, the less likely it is to be changed on the basis of someone else’s stated opinion. For example, Mr. Vander Zalm was sufficiently well-known to readers of the *Victoria Times*, and his policies sufficiently controversial, that reasonable people were likely to already have formed opinions about him.

This is not to say that public figures can never be defamed. If the *Victoria Times* had run an editorial claiming Mr. Vander Zalm had stolen money, or that in its opinion he was incapable of carrying out the duties of Human Resources Minister, such statements might well have been prima facie defamatory.<sup>73</sup> However, as argued before, it is unlikely, given his notoriety, that the cartoon imputing cruel tendencies to him would have any effect on a right-thinking person’s opinion of him.

Communications research confirms that pre-publication knowledge and opinions about a person will influence whether disparaging statements about that person are likely to influence the audience’s attitudes. For example, a study of the effect of attack campaign ads concluded that the audience’s pre-publication attitudes toward the

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72. I am assuming for the sake of argument that a “right-thinking” Canadian would know that Stephen Harper is married and has left his twenties far behind, but this is a question of mixed fact and law that would have to be decided in a particular case.

73. A court would still have to examine the editorial in context. If the statement were made sarcastically or otherwise in such a way that the audience would not believe it, it should not be prima facie defamatory.

candidate were relevant to the effect the attack ads had on their opinion of the candidate.<sup>74</sup>

### *B. Pre-Publication Knowledge and Opinions about the Defendant*

What the audience knows and thinks about the defendant (and about the speaker to whom the words are attributed, where the speaker and defendant are not the same) is also important in determining whether comments tend to injure the plaintiff's reputation. If a disparaging statement appears in a reputable newspaper, which is thought to be committed to responsible journalism and fact-checking, a right-thinking person might well lend more credence to it than to a statement in the *National Enquirer*, or one written by a known crank, by someone with no relevant expertise or by an anonymous online commenter. If a newspaper has known political leanings that are not shared by right-thinking persons, what it publishes may more readily be discounted.

An example discussed above helps make this point. What the audience understands by "Dr. Assad kills unborn babies" is influenced by the fact that the speaker is an anti-abortion activist. That fact helps the audience to understand that "kills unborn babies" means something like "provides abortions—which the speaker considers immoral". However, a similar statement by the College of Physicians and Surgeons or by the police would take on a very different character. It might well suggest to a right-thinking person that Dr. Assad was doing something unprofessional or criminal.

Similarly, statements by public figures are coloured by what is known and believed about those figures. If Stephen Harper comments negatively on someone, whether the audience thinks less of that person will very likely depend on what it knows and thinks about Stephen Harper. To take a real life example, consider the so-called McLibel case,<sup>75</sup> in which members of London Greenpeace stated that McDonald's was guilty of a number of misdeeds, including complicity in third world

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74. See Lynda Lee Kaid & John Boydston, "An Experimental Study of the Effectiveness of Negative Political Advertisements" 35:2 *Communication Quarterly* 193 at 194.

75. *McDonald's Corp v Steel & Morris*, [1997] EWHC 366 (BAILII) (QB).

starvation, torturing animals and exploiting workers. The extent to which right-thinking people would have thought less of McDonald's would depend not only on their pre-existing opinions of McDonald's, but also on what they might know of London Greenpeace, a relatively radical environmental group not affiliated with Greenpeace International.<sup>76</sup>

There is social science evidence demonstrating that certain known qualities of the speaker are relevant to whether opinions are changed. These attributes are known as source variables. They include the speaker's credibility, which is itself based on expertise and trustworthiness, attractiveness and likeability, power, etc.<sup>77</sup> In an experiment, people were presented with statements to the effect that young adults only needed a certain amount of sleep each night. The degree to which the audience was convinced depended on whether the statement was attributed to a Nobel Prize-winning physiologist or to the director of the Fort Worth YMCA. However, even the eminent physiologist's statements were not taken at face value: the degree to which they changed people's opinions depended on how many hours of sleep he said were needed, as well as on how many hours of sleep the respondent had previously thought were needed.<sup>78</sup>

### C. *Subject Matter to which the Impugned Words Relate*

Prior knowledge and opinions about the subject matter also influence whether a statement is prima facie defamatory. As discussed above in relation to *Assad*, if the subject matter of the impugned comments is one on which people hold strong opinions or about which much is known, identifying someone with one side of the debate is less likely to be defamatory—even if harsh or unreasonable words are used. This is because a person with greater knowledge or stronger opinions is less likely to change his or her opinion of the plaintiff.

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76. Harkess, *supra* note 62 at 665.

77. Oskamp & Shultz, *supra* note 69 at 209.

78. Stephen Bochner & Chester A Insko, "Communicator Discrepancy, Source Credibility and Opinion Change" (1966) 4:6 *Journal of Personality and Social Psychology* 614 at 614, 617.



The facts of *WIC Radio* provide another example. The trial court held that the radio host's comments implied that the plaintiff would condone violence. However, the statements were made in the context of a widely publicized debate about the portrayal of homosexuality in schools. The plaintiff was opposed to the positive portrayal of homosexuality in schools, while the radio host was in favour of it. The fact that the show's audience was probably familiar with the debate and probably had its own opinions on the matter made it less likely that the host's comments would lower the plaintiff's reputation in the eyes of a right-thinking member of that audience. A listener who agrees with the plaintiff's position might quickly dismiss the radio host's comments as biased and ridiculous, and not think less of the plaintiff. However, if one disagreed with the plaintiff, comments implying that she would condone violence might simply accord with one's existing negative image of her without adding to it.

*WIC Radio* is perhaps a less obvious example than some. It is plausible that right-thinking people, especially if they favour inclusion of positive depictions of homosexuality in schools, would think less of the plaintiff as a result of the comments. They may be inclined to agree with the radio host, and they may previously have thought only that she was homophobic, not that she would condone violence.

Social science evidence also links prior knowledge and opinions of the subject matter to whether opinions will change. The study of the impact of attack ads, discussed above, also found that the respondents' political leanings were relevant to the effect of the ads on opinions about the candidate.<sup>79</sup> The study of perceptions of how many hours sleep young adults need also revealed the relevance of the respondents' previous knowledge and opinions on the topic.<sup>80</sup> The number of hours of sleep respondents said young adults needed depended not only on what experts said, but on how many hours a respondent had previously believed were needed.

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79. Kaid & Boydston, *supra* note 73.

80. Bochner & Insko, *supra* note 77.

#### *D. Other Relevant Information about the Audience*

In addition to what the right-thinking person knows and thinks about the plaintiff, the defendant, and the subject matter, it is important to consider such factors as education level and resources. The right-thinking person is, by definition, well-informed and possesses common sense, but in specific contexts he or she may also be especially well-educated and well-informed. For example, in *Vaquero*, the hypothetical reasonable Stockhouse chat room participant is arguably even less likely than right-thinking people generally to take the defendant's critical statements about *Vaquero* at face value. If there were evidence that Stockhouse readers were educated and had money invested in the stock market, a trier of fact might be more likely to conclude that a right-thinking member of that group would simply dismiss the defendant's ramblings. If members believed everything that was said in the chat room, they presumably would not last long as stock market investors. This is separate from the issue of the format of the impugned statements or the anonymity of the defendant. One might be able to prove that right-thinking readers of Stockhouse chat room posts would generally be sceptical of claims made in that forum.

Again, the relevance of characteristics of the audience members to whether opinions change is supported by empirical research. These characteristics are referred to as recipient variables.<sup>81</sup> They include the recipient's gender, intelligence, mood and self-esteem. For example, one study found that audience members' moods could influence their attitudes toward a product.<sup>82</sup>

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81. See Oskamp & Schultz, *supra* note 69 at 209; Richard E Petty & Duane T Wegener, "Attitude Change: Multiple Roles for Persuasion Variables" in Daniel T Gilbert, Susan T Fiske & Gardner Lindzey, eds, *The Handbook of Social Psychology*, vol 1 (New York: McGraw Hill, 1998) 323 at 323.

82. Richard E Petty et al, "Positive Mood and Persuasion: Different Roles for Affect Under High- and Low-Elaboration Conditions" (1993) 64:1 *Journal of Personality and Social Psychology* 5. For additional examples of the effect of recipient variables, see Richard E Petty, Duane T Wegener & Leandre R Fabrigar, "Attitudes and Attitude Change" (1997) *Annual Review Psychology* 609. See also William J McGuire, "Personality and Attitude Change: An Information-Processing Theory" in Anthony G Greenwald, Timothy C Brock & Thomas M Ostrom, eds, *Psychological Foundations of Attitudes* (New York: Academic Press, 1968).

### *E. The Form in which the Statements Were Expressed*

The form in which a message is expressed is relevant to whether its meaning is defamatory. This is because the form of a communication can affect the credibility of its message. Poorly written text with spelling, grammatical or typographical errors may give the impression that the writer is uneducated and therefore less credible. Similarly, if the style of the message is exaggerated, self-contradictory, petty, rambling or emotional, the message may be more likely to be discounted by a right-thinking person. These factors are known as message variables, which also include such factors as the quality and quantity of argument and whether it appeals to reason or emotion.<sup>83</sup> Social science research has demonstrated the relevance of message variables in attitude change. For example, one survey demonstrated that even a single typographical error can affect the credibility of web sites.<sup>84</sup>

In *Barrick Gold*, message variables seem to have played a role in convincing the trial judge that the impugned comments were not credible (although she nevertheless found them defamatory). The judge described them as “emotional, often incoherent, rambling and highly critical of Barrick”, and as coming across as a rant. As a result, she concluded that the messages “do not leave a reader with the impression that the writer has a credible case against Barrick”.<sup>85</sup>

### *F. Comment Versus Fact*

In *WIC Radio*, LeBel J. said that “[i]t should go without saying that people evaluate statements of opinion differently than statements of fact”.<sup>86</sup> He then quoted from *Davis & Sons v. Shepstone*:

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83. Oskamp & Schultz, *supra* note 69 at 209.

84. BJ Fogg et al, “What Makes Web Sites Credible?: A Report on a Large Quantitative Study” in *Proceedings of ACM CHI 2001 Conference on Human Factors in Computing Systems* (New York: ACM Press, 2001) vol 3:1 61.

85. *Barrick Gold*, *supra* note 48 at para 38.

86. *WIC Radio*, *supra* note 1 at para 70.

[T]he distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.<sup>87</sup>

*Davis & Sons v. Shepstone* seemed to imply that there is a difference in moral blameworthiness between commenting harshly and making false statements, but LeBel J. appeared to be more concerned with the actual effect of statements of fact and opinion on reputation. (It may be that the greater moral blameworthiness of alleging misconduct arises from its greater effect on reputation.)

It is a matter of common sense that statements of fact have more of an effect on reputation than statements of opinion—all things being equal. One may believe that someone holds certain opinions without this affecting one's own opinions. However, if someone says that something is true, it is more likely to affect one's own view of what is true (notwithstanding the research findings on correcting misperceptions discussed below). Facts are objective, and comment is subjective. Two contradictory statements of fact cannot both be true, but people often hold opposing opinions. Thus, according to Brown:

[I]f the expression of opinion by the defendant on facts which are true are reasonably understood by those to whom they are published as opinions, and nothing else, they say nothing derogatory about the plaintiff which does not already inhere in the facts that have been recited. It is those facts that are damning, either to the plaintiff because the opinion expressed is so consistent with the true facts which are recited and approximate the subjective opinion of those to whom they are published, or to the defendant because they are so inconsistent with the recited facts and with the subjective opinion of those to whom they are published. In the former case, the reputation of the plaintiff is not adversely affected by the publication of the opinion; in the latter case, it is the defendant who is defamed by his or her own foolish words rather than the plaintiff.<sup>88</sup>

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87. *Ibid*, citing *Davis & Sons v Shepstone* (1886), 11 App Cas 187 at 190 (PC).

88. Brown, *supra* note 19 at 185.

It may seem self-evident that comment is less able than statements of fact to affect reputation. However, triers of fact<sup>89</sup> often find disparaging statements of opinion to be defamatory without giving the right-thinking people enough credit for being able to think for themselves, without automatically adopting the opinions expressed by the defendant.

This is not to imply that statements of fact will easily displace an audience's own understanding of what is true. Recent research has examined the effect of factual corrections in newspapers on misperceptions.<sup>90</sup> When respondents were presented with an article containing a misperception and a correction, "the corrections fail[ed] to reduce misperceptions for the most committed participants. [Indeed], they strengthen[ed] misperceptions among ideological subgroups in several cases".<sup>91</sup> In other words, where people's beliefs in certain types of facts are strong, even contradictory statements of fact may not diminish the strength of those beliefs. In fact, contradictory information may actually reinforce such beliefs, even when the correction is made by a reputable fact-gathering organization such as a newspaper.

Thus, just because a defendant states something to be a fact does not mean that the statement will be believed, even if the defendant is a reputable source. People's knowledge and opinions affect whether they accept certain statements of fact to be true. If an allegedly defamatory statement—whether of opinion or fact—relates to a topic on which hypothetical reasonable members of its audience have firm beliefs, it may not make them think less of the plaintiff.

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89. Although we know this to be true of judges, whose opinions are written, there is no reason to think it is not also true of juries.

90. In particular, a study examined the belief that Iraq had weapons of mass destruction before the US invaded, that the Bush government's tax breaks actually increased tax revenue by stimulating the economy and that the Bush government had banned stem cell research. Of these, the last is demonstrably false, as the Bush government only banned new federally-funded stem cell research. The other claims are not supported by clear evidence and expert opinion, and the article refers to all three as "misperceptions". See Brendan Nyhan & Jason Reifler, "When Corrections Fail: The Persistence of Political Misperceptions" (2010) 32:2 *Political Behavior* 303 at 305, 310–11.

91. *Ibid* at 323.

Considering the factors discussed above would not amount to a change in the law. Rather, it would amount to applying the law in a manner that more accurately reflects defamation law's goal of protecting reputation while not unduly stifling expression. There is considerable case law in which such factors are considered, although not necessarily for the purpose of establishing (or refuting) defamatory meaning. Plaintiffs are presumed to have good reputations, but evidence to the contrary may be led.<sup>92</sup> Although such evidence is usually led in mitigation of damages rather than to prove whether the statement was prima facie defamatory, there is no reason why a defendant could not adduce evidence that the plaintiff was so poorly regarded by right-thinking people that it would have been impossible for them to think less of the plaintiff. Courts have certainly considered knowledge about the plaintiff in determining whether something is defamatory:

If a person is a public character whose public life or great position is calculated to excite interest, it would be unreasonable to suppose that his portrayal in exaggerated form would tend to injure his reputation.<sup>93</sup>

Although this passage refers specifically to ridicule, it reinforces the point that the nature of the public's knowledge and opinions about the plaintiff can affect whether a right-thinking person would think less of him or her.

Further, there are cases where what would not, in its ordinary meaning, be considered defamatory is in fact defamatory because of specific attributes of the plaintiff. For example, it is not defamatory to suggest that a golfer advertises chocolate, unless the right-thinking person knows that the golfer is an amateur who is not permitted to endorse products.<sup>94</sup> Knowledge about the plaintiff should be equally relevant to establishing that statements are *not* defamatory.

The relevance of the defendant's characteristics has been acknowledged in leading cases such as *Hill v. Church of Scientology of Toronto*, which mentions three times that the speaker of the impugned

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92. Brown, *supra* note 19 at 220–21.

93. Gatley, *supra* note 7 at 43.

94. *Tolley v JS Fry and Sons Ltd*, [1931] AC 333, All ER 131 (HL).

statements was wearing his barrister's gown, implying that this lent credibility to his statements.<sup>95</sup> Ultimately, defamation law questions whether the right-thinking person would think less of the plaintiff because of the impugned publication. Nothing in the law precludes recourse to other obviously relevant factors, such as what knowledge and opinions the right-thinking person already has of the defendant, and whether the subject matter of the statement is one on which most people hold strong opinions.<sup>96</sup>

## IV. A Further Note of Caution: The Third-Person Effect

Since people do not necessarily take statements of fact or opinion at face value, it is wrong simply to assume that disparaging statements have a tendency to harm a plaintiff's reputation. Research has also shown that people regularly overestimate the detrimental effect statements will have on *others'* opinions. In other words, we tend to think that others will be negatively influenced by disparaging statements even if we are not affected by them. This is known as the third-person effect.

The third-person effect has been well-documented in the defamation context and elsewhere.<sup>97</sup> One researcher has claimed that "harm to reputation is consistently overestimated, to the unjust advantage of the plaintiff" in a defamation action.<sup>98</sup> The risk is that triers of fact will find that something tends to lower the right thinking person's estimation of the plaintiff, even if the plaintiff is not lowered in the estimation of the trier of fact. Of course the trier of fact should not equate herself with the right-thinking person, but assuming for the moment that a right-thinking person were an average person, research on the third-person

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95. *Hill*, *supra* note 9 at paras 1, 23, 181.

96. Although courts have sometimes held relevant evidence to be inadmissible. See e.g. *Gatley*, *supra* note 7 at 1206.

97. The term was first coined by W Phillips Davison in W Phillips Davison, "The Third-Person Effect in Communication" (1983) 47:1 Public Opinion Quarterly 1. See also Cohen et al, *supra* note 66.

98. Baker, *supra* note 18 at 3.

effect demonstrates that people are not very good at judging what will lower a person's estimation in the opinion of the average person.

In a survey of Australians conducted by Roy Baker, 56 percent of respondents claimed they themselves would think less of a married man in public office who had an affair with a married woman.<sup>99</sup> However, 83 percent said they thought the "ordinary reasonable person living in Australia" would think less of that same man.<sup>100</sup> When the same questions were asked about a man's HIV positive status, only 16 percent of Australians surveyed said they would think less of him, but 77 percent said that the ordinary reasonable person would think less of him.<sup>101</sup> In each of ten scenarios, the percentage of respondents who thought less of the hypothetical plaintiff was significantly lower than the percentage of ordinary reasonable people that respondents said would think less of the plaintiff. In seven of ten scenarios, there was less than 0.5 percent chance that a majority of Australian residents would actually think less of the plaintiff, but in eight of the ten, there was a greater than 50 percent likelihood of a jury finding *prima facie* defamation, based on the survey responses.<sup>102</sup>

Studies of the third-person effect indicate that it is due largely to an overestimation of the effect on others, rather than to an underestimation of the effect on oneself.<sup>103</sup> Forty-four percent of Baker's respondents displayed the third-person effect, a proportion which is consistent with other studies.<sup>104</sup>

Baker acknowledges that right-thinking people are not necessarily average people or a majority of the population, but the more that right-thinking people differ from average people (that is, average members of the publication's audience), the less defamation law protects the plaintiff's actual reputation. After all, plaintiffs are presumably less concerned with what hypothetical people think of them than what real

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99. *Ibid* at 18.

100. *Ibid* at 19.

101. *Ibid* at 24.

102. *Ibid* at 25.

103. *Ibid* at 27.

104. *Ibid* at 28.



people think of them. The Baker survey results should therefore give one pause.

The third-person effect and its ability to lead to findings of prima facie defamation where most people would not think less of the plaintiff is problematic if defamation law is truly concerned with protecting reputation. The research just discussed indicates that the distinction between what triers of fact think and the attitudes they attribute to right-thinking people already works in favour of plaintiffs. There is reason to think that relying on the factors discussed in Section III could mitigate the third-person effect.

## **V. A More Realistic Approach to Defamatory Meaning**

Given what is known about how opinions are formed and changed, and given that potential harm to reputation is required for defamation law to justifiably limit expression, parties, judges and juries should be encouraged to take a more realistic approach to potential harm to reputation. Counsel should be encouraged to make arguments that rely on a broader understanding of how the context of the publication affects reputation. Judges should be presented with the social science evidence on how communication affects knowledge and opinion. So too should they be made aware of the third-person effect, so that they can attempt to mitigate it in instructing juries. Specifically, juries should be told that they may consider a wide range of contextual facts in assessing whether a right-thinking person would think less of the plaintiff.

Presumably, few would argue against the need to consider the potential for harm to reputation in deciding whether a statement is defamatory, but some might fear the consequences of changing the status quo. Not only would new arguments and evidence need to be considered, but the evidence on how people actually form and change opinions can be complex and counterintuitive.

The risk of greatly increasing the complexity of defamation actions is real, and indeed may not be justified by the ends. One might also ask whether introducing additional evidence negates the efficiencies created by not requiring proof of harm to reputation: In some situations it

might be easier to prove actual harm to reputation than to establish how a hypothetical group of people would have interpreted certain statements.

If, however, the alternative is to continue to take the direct effects or “hypodermic needle” approach to communication, then the ends of a more realistic approach do justify the means. In the *Charter* era, there can be little justification for stifling expression where there is no potential threat to the plaintiff’s reputation. Communications research shows us that the direct effects model is grossly inaccurate,<sup>105</sup> with the result that the potential to harm reputation is assumed where none may in fact exist (and perhaps that such potential is not found where it does exist). Further, encouraging the use of a more realistic model, including the calling of evidence on whether the right-thinking person’s opinion is likely to change, would not necessarily result in drastic and unmanageable changes to the defamation action. Thus, a possible loss of efficiency is justified in light of the aims of defamation law and the importance of freedom of expression.

Before considering the effect of a more realistic model on defamation actions, we should recall that focusing on reputation in the manner proposed would not change the substantive law of defamation. It would simply help to ensure that the law is appropriately applied. The law has always required the plaintiff to prove the potential for harm to his or her reputation, and has always allowed the defendant to adduce evidence of surrounding circumstances to show that the words were innocuous to reputation.<sup>106</sup>

It may be more expedient for the plaintiff simply to prove ordinary meaning or innuendo, without proving (other) facts relevant to the effect of the words (facts such as the state of public opinion on the matter). It may also be more expedient for the parties to assume a direct-effects model of communication. Focusing on the potential for harm to reputation may require leading more evidence about people’s

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105. See Section III, above.

106. *Herrington v McBay* (1888), 29 NBR 670 (available on WL Can) (SC) (“the defendant . . . is allowed to give evidence of all the surrounding circumstances, in order to place the jury, so far as possible, in the position of by-standers, that they may judge how the words would be understood on the particular occasion” at 671).

knowledge, beliefs and capacity to be swayed. However, there are several reasons why rejecting the direct-effects model would likely not lead to drastic and unmanageable changes to defamation actions. First, rejecting the model would only have an effect in cases where the impact of the impugned statement on reputation is at issue. In many cases, the potential for harm to reputation is evident but a defendant claims to have a defence. Even in cases where the potential for harm to reputation is unclear, defendants might choose to rely on defences if one is available to them, rather than to expend resources in proving defamatory meaning. For example, if Paul Bernardo brought an action against someone who called him a murderer, the defendant might prefer to focus on a defence of justification than to prove that the statement did not tend to harm Bernardo's reputation (although a prudent defendant might want to argue both).

Second, the need for evidence will depend on the circumstances of the case. If the audience is a broad one—a network television viewership, for example—there may be little point in adducing evidence of recipient variables. Where plaintiffs are not well known, there may be no point in adducing evidence of their previous reputations. Where defendants are obscure and no information is provided about them in the publications, there may be no point in trying to prove source variables and their likely effect, since these must be known to the audience in order to affect its assessment of the plaintiff.

Third, some of the evidence relevant to the potential harm to reputation would likely be adduced in any event to prove the meaning of the words. This is especially true in the case of innuendo, where the ordinary meaning of the words is not relied on. For example, the makeup of the audience, its education and its knowledge of the subject matter may be essential to proving what the words mean in context. Other evidence about the plaintiff, the defendant and the audience may in any event be adduced in relation to damages. The plaintiff's pre-existing reputation and the number and type of people to whom the words were published, for example, are relevant to damages.<sup>107</sup>

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107. Brown, *supra* note 19 at 213–14.

Fourth, where triers of fact are judges, they can take judicial notice of certain well-known facts, without any need for evidence. In *Gifford v. National Enquirer Inc.*, the judge took judicial notice that the *National Enquirer* largely contained rhetorical hyperbole.<sup>108</sup> Thus, for example, judges based in Victoria, B.C. could take judicial notice that readers of the *Victoria Times* would have been familiar with Mr. Vander Zalm and many of his policies. They could perhaps take judicial notice of the fact that those policies were sometimes controversial and led to public debate. They could presumably take judicial notice that large newspapers have editorial staff and fact checkers, lending them credibility when it comes to published facts.

None of this should be understood as suggesting that evidence of what specific individuals actually thought when confronted with the impugned words will be determinative: the right-thinking person remains a legal construct. Evidence of what specific people thought is only relevant to defamatory meaning to the extent that those people share the characteristics of right-thinking people to whom the words were published.

## Conclusion

In recent years, scholars and organizations have been calling for changes to defamation law in order to better reflect Canada's constitutional protection of freedom of expression.<sup>109</sup> This article has demonstrated that in many cases, expression is restricted even where no harm to reputation may exist. I take no position on whether the current balance between reputation and free expression is appropriate, but I do argue that the right to expression could be better protected without affecting the law's protection of reputation. This would happen if lawyers and triers of fact were to take a more realistic approach to what

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108. (1993), 23 Media L Rep (BNA) 1016 at para 17 (available on QL) (CD Cal).

109. See Denis W Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22:2 Queen's LJ 229; the Canadian Civil Liberties Association's proposals for defamation law reform, cited in *WIC Radio*, *supra* note 1 at para 29.

tends to harm a person's reputation in the estimation of right-thinking members of society. The old adage "sticks and stones may break my bones but names will never hurt me" overlooks the fact that names can indeed do harm, both to feelings and reputation. However, only harm to reputation is—or at least should be—actionable in defamation. Focusing more on whether the words would actually tend to make reasonable people think less of the plaintiff will less often stifle expression, while still ensuring that individuals' reputations continue to be protected.