

**DEFAMATION, REPUTATION AND THE COMMUNITY:
AN ANALYSIS OF THE DOCTRINE OF PRESUMED HARM IN DEFAMATION LAW**

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ABSTRACT

[53] It is a general principle of tort law that a plaintiff must establish actual damage in order to succeed in a cause of action. In the tort of defamation in Australia and New Zealand, courts presume injury to a plaintiff's reputation as a result of a defamatory imputation. This article explores the operation of the doctrine of presumed harm in the law of defamation. Can the presumption of harm be explained by reference to the tort's historical development? Are there pragmatic justifications for its retention in modern defamation law? Do these explanations satisfactorily account for the irrebuttable nature of the doctrine of presumed harm? The author of this article suggests that the conclusive nature of the presumption of harm is necessary to protect the dignity aspect of an individual's reputation. In doing so, the tort of defamation fulfills its purpose of protecting an individual's interest in his or her reputation.

[54] In Australia and New Zealand, defamation departs from the fundamental principle of tort law that requires a plaintiff to establish proof of actual damage in order to succeed in a cause of action.² So long as the plaintiff in a defamation action proves that the imputation is defamatory, that the imputation is of or concerning the plaintiff and that the imputation was published to a third party, damage to the plaintiff's reputation is presumed to flow from the imputation.³ The presumption of harm to the plaintiff's reputation is also irrebuttable in nature. The fact that a defendant can prove that a defamatory imputation has not affected the plaintiff's reputation does not provide a defence to a defamation action.

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² For other actions such as trespass, damage is not a mandatory ingredient of a cause of action but is necessary to entitle the plaintiff to more than a nominal amount in damages. See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) 45. Defamation stands in contrast to the closely related tort of injurious falsehood, where a plaintiff is required to prove pecuniary loss in order to succeed in a cause of action. See Robert Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 699.

³ Stephen Todd, *The Law of Torts in New Zealand* (3rd ed, 2001) 802; G Palmer, 'Defamation — an overview' (Paper presented at the Legal Research Foundation Inc Seminar, Auckland, 25 February 1988) 9; Australian Law Reform Commission, above n 2, 45.

The primary purpose of this article is to explore the doctrine of presumed harm with reference to its historical origins and determine whether the rule is consistent with the purpose of modern defamation law, which is to protect an individual's interest in his or her reputation. Emphasis is also placed on possible law reform in order to more closely align the law of defamation with this objective.

The article traces the doctrine of presumed harm to the historical origins of defamation law. This is followed by an outline of the doctrine of presumed harm as it operates in modern defamation law. Finally, an attempt is made to rationalise the continued operation of the presumption of harm in a modern legal context.

Since modern defamation law purports to protect an individual's interest in his or her reputation, I have evaluated the doctrine of presumed harm against this background. The section begins with an analysis of the right to a reputation and the way in which reputation has been conceptualised by courts. This is followed by an analysis of reputation in the three forms of property, honour and dignity, and an analysis of the purpose of compensation as it applies to each form of reputation. The issue of whether the particular form of reputation supports the doctrine of presumed harm is also considered. Then some concluding remarks are offered concerning the courts' conceptualisation of reputation, the manifestation of an individual's reputation and the doctrine of presumed harm.

Three proposed options for law reform in Australia and New Zealand are then considered. The section begins by exploring whether the abolition of the doctrine of presumed harm in favour of a requirement to prove actual damage to reputation more closely aligns defamation law with its purpose of providing redress to individuals whose reputation has been injured by a defamatory imputation. The section then explores the rebuttable presumption of harm standard. By this standard, a defamatory imputation is presumed to have injured the plaintiff's reputation from the outset, and the onus shifts to the defendant to establish that no injury was inflicted upon the plaintiff's reputation. Finally, the section examines the viability of the retention of the doctrine of presumed harm and how compensation may be used to more closely align defamation law with its purpose of protecting an individual's interest in his or her reputation.

Finally, some concluding remarks are made that relate to the doctrine of presumed harm and the potential for future development within defamation law. The author suggests that the retention of the doctrine of presumed harm and reform in relation to the way in which courts approach the issue of compensation ensures that the law of defamation adequately protects the dignity aspect of an individual's reputation. In doing so, defamation law fulfills its purpose of protecting an individual's interest in his or her reputation.

[55] The Doctrine of Presumed Harm

The History of the Presumption of Harm in Defamation Law

The operation of the doctrine of presumed harm in modern defamation law can be traced to the historical origins of defamation. In the Middle Ages, defamation could be either a sin, a crime, or a tort and was punished accordingly.⁴ As a consequence, until well into the eighteenth century, defamation served to protect three respective interests: an individual's spiritual well being, the realm's interest in securing peace and order and an individual's interest in his or her reputation.⁵ The tension between these competing objectives and the various bodies that exercised jurisdiction over defamation actions during the Middle Ages accounts for the conclusive presumption of harm in modern defamation law. This section provides a brief account of the development of defamation law with reference to its treatment as a sin, a crime and a tort.⁶

In the early Middle Ages, defamation actions were heard in the local courts before secular and spiritual officials who presided over both ecclesiastical and temporal cases.⁷ The courts' primary purpose was to prevent vulgar abuse, activities of the common scold⁸ and injury to reputation.⁹ Individuals could gain redress for verbal and written matter.¹⁰ Where one of the parties to the cause of action was a royal official or

⁴ W S Holdsworth, 'Defamation in the 16th and 17th Centuries' (1924) 40 *Law Quarterly Review* 302.

⁵ R C Donnelly, 'History of Defamation' (1949) *Wisconsin Law Review* 99, 122.

⁶ For a comprehensive summary of the history of defamation law, see for example *ibid* 99; Holdsworth, above n 4, 302; Van Vechten Veeder, 'The History and Theory of the Law of Defamation' (1903) 3 *Columbia Law Review* 546.

⁷ Donnelly, above n 5, 103.

⁸ Scolds were usually female citizens who caused verbal and physical disturbance in public places: see *ibid* 103, fn 2.

⁹ *Ibid* 126; Donnelly, above n 5, 101.

¹⁰ C H S Fifoot, *History and Sources of the Common Law Tort and Contract* (1949) 126.

belonged to a class of persons over which royal jurisdiction extended, the case was heard before the King's Courts.¹¹

Following the Norman Conquest in 1066, William I separated spiritual and temporal courts by a decree and established ecclesiastical courts administering solely Canon Law.¹² As this development created intense rivalry between the two judicial bodies, a number of rules were established to demarcate the ecclesiastical courts' jurisdiction over defamation actions.¹³ The ecclesiastical courts were restricted to the punishment of sin and prohibited from hearing an action which gave rise to a common law remedy.¹⁴ As this rule effectively barred compensatory damages, the usual remedy was a declaration that the imputation was untrue.¹⁵ If the statement was made in public, the declaration took place during a church service in the victim's parish.¹⁶ The perpetrator would announce that he had defamed the plaintiff and beg forgiveness from God and the victim.¹⁷ The struggle between the Church and State over the administration of justice eventually resulted in the demise of the ecclesiastical courts during the second decade of Queen Victoria's reign.¹⁸

During the Middle Ages, the Star Chamber operated as a separate judicial body alongside the ecclesiastical courts and the common law courts. The Star Chamber comprised the highest dignitaries of [56] Church and State.¹⁹ Originally a court of criminal equity constituted by Henry VII, the Star Chamber's jurisdiction was based upon the theory that certain wrongs could not be effectively remedied by ordinary courts of law. Furthermore, causes of action brought before such judicial bodies did not reflect all classes of wrongs and crimes.²⁰ The Star Chamber was thus empowered to overturn traditional rules of evidence and set aside existing legal doctrines.²¹ The Star Chamber's primary purpose was to preserve peace in the realm and the body thus exercised jurisdiction over the offence of Scandalum Magnatum.²² The advent of the printing press in the fifteenth century had posed a threat to public order. During the

¹¹ Donnelly, above n 5, 106.

¹² Ibid 103–4.

¹³ Veeder, above n 6, 551.

¹⁴ Fifoot, above n 10, 127.

¹⁵ Donnelly, above n 5, 104.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Veeder, above n 6, 552.

¹⁹ Ibid 562.

²⁰ Ibid.

²¹ Ibid 563.

²² Literally 'scandal of magnates'.

reigns of James I and Charles I, the judicial body was used to severely repress individuals who participated in political and religious discussion.²³ The judicial body viewed written defamatory matter as a crime because it primarily threatened order in the realm rather than an individual's reputation. The treatment of defamation as a crime explains why the Star Chamber required that the imputation merely tended to breach order in the realm²⁴ and why plaintiffs could recover compensation without proving damage to their reputation.²⁵

The decline of the local courts and the inability of ecclesiastical courts to administer a monetary remedy for oral defamatory imputations caused the common law courts to adopt an interest in defamation during the sixteenth century.²⁶ Although the common law courts did not initially distinguish between oral and written defamatory material, the Star Chamber's remedy for the offence of *Scandalum Magnatum* caused the common law courts to primarily exercise jurisdiction over oral defamation cases.²⁷ In an attempt to control the number of cases brought before the courts, judges developed a number of rules relating to defamation.²⁸ Initially, the imputation had to be precise as to a common law crime and the plaintiff was required to be imputed to have committed the act.²⁹ The common law courts also focussed on the damage caused to the plaintiff rather than the insult itself.³⁰ As a result, damages were required to be alleged and proven before redress could be awarded.³¹ Yet, after the initial flood of actions had subsided in the first half of the seventeenth century, the common law courts revised the previous doctrines relating to defamation.³² The common law courts removed the general requirement that damage must be proven in order for a plaintiff to succeed in a cause of action by creating the slander per se category exception.³³ If it was falsely alleged that an individual had committed an indictable crime, contracted a loathsome, contagious disease or was unfit in his profession, he or she was not required to prove damage and injury to reputation was presumed to flow from the

²³ Donnelly, above n 5, 117.

²⁴ *Ibid* 118.

²⁵ Australian Law Reform Commission, above n 2, 45.

²⁶ Fifoot, above n 10, 126, 128; Donnelly, above n 5, 110; Colin Rhys Lovell, 'The 'Reception' of Defamation by the Common Law' (1961–1962) 15 *Vanderbilt Law Review* 1051, 1063.

²⁷ Lovell, above n 26, 1063–4.

²⁸ *Ibid* 1064.

²⁹ *Ibid*.

³⁰ Donnelly, above n 5, 115.

³¹ Lovell, above n 26, 1063–4.

³² *Ibid* 1065.

³³ *Ibid*.

imputation.³⁴ With this exception, a plaintiff was required to allege and prove a precise connection between the defamatory words and the damage caused by the imputation.³⁵

[57] The development of defamation law in these two judicial bodies explains the operation of the doctrine of presumed harm in modern defamation law.³⁶ The presumption of harm is a legacy of the rules established by the Star Chamber, while the common law courts' focus on damage explains why it is injury to reputation rather than an insult that gives rise to a cause of action. In the recent decision *Dow Jones & Co Inc v Gutnick*,³⁷ Gleeson CJ, McHugh, Gummow and Hayne JJ noted that defamation '...is a tort concerned with damage to reputation and it is that damage which founds the cause of action'.³⁸ The following section explores how an individual's reputation may be damaged by a defamatory imputation. This is followed by an outline of the operation of the doctrine of presumed harm in a modern context.

The Doctrine of Presumed Harm in Modern Defamation Law

In order to understand how a defamatory imputation affects an individual's reputation, it is useful to draw from inter-related disciplines such as sociology and psychology, which offer explanations for human behaviour. The law of defamation presupposes an image of how people are tied together, or should be tied together, in a social setting.³⁹ A defamatory imputation disturbs a community's social framework by causing changes in human behaviour on both a conscious and unconscious level.⁴⁰ Probert uses the example of a situation where Person A makes a remark to Person B about Person C.⁴¹ He argues that the statement affects relationships between not only the three persons concerned, but also the structure of groups to which the three persons belong.⁴² Human interaction may be affected in two specific ways. Firstly, there may be a negative attitude and opinion change vis à vis the plaintiff. Secondly, there may

³⁴ Ibid.

³⁵ Ibid 1066.

³⁶ See Holdsworth, above n 4, 305.

³⁷ (2003) 194 Aust LR 433 (HCA).

³⁸ Ibid 440. See also *Little Rock Newspapers Inc v Dodrill* 660 SW 2d 933, 935 (Hays J) (Ark 1983).

³⁹ Post, above n 2, 693.

⁴⁰ Walter Probert, 'Defamation: A Camouflage of Psychic Interests: The Beginning of a Behavioural Analysis' (1962) 15 *Vanderbilt Law Review* 1173, 1176.

⁴¹ Ibid 1177.

⁴² Ibid 1177-8.

be a negative physical or behavioural change vis à vis the plaintiff.⁴³ These two reactions are encapsulated by modern definitions of what constitutes a defamatory imputation.⁴⁴

In Australia and New Zealand, once a plaintiff has determined that an imputation is capable of a defamatory meaning, is of or concerning the plaintiff, and was published to a third party, he or she may be entitled to compensation⁴⁵ without proof of damage to his or her reputation. In other words, the inquiry into whether an imputation is defamatory is not a factual determination requiring an assessment of whether the imputation actually caused others to hold the plaintiff in lower estimation. It is sufficient that the imputation tended to cause others to think less of the plaintiff. In the New Zealand decision *Collerton v Maclean*, McGregor J noted that:

A defamatory statement is a statement which is calculated to lower the plaintiff in the estimation of right thinking men, or cause him to be shunned or avoided or expose him to hatred, contempt or ridicule, or one which is calculated to convey an imputation disparaging to him in his business or office or calling.⁴⁶

⁴³ Clay Calvert, 'Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations' (1995) 26 *Pacific Law Journal* 933, 939.

⁴⁴ See n 46 below and accompanying text.

⁴⁵ Note that the defendant may invoke various defences such as absolute or qualified privilege, fair comment and truth in order to defeat the plaintiff's claim.

⁴⁶ [1962] NZLR 1045, 1046. Australia's position is exemplified by the Australian Law Reform Commission's 1979 Report, where it was said that 'the requirement is tendency not actuality': Australian Law Reform Commission, above n 2, 45. The doctrine of presumed harm also operates in the jurisdiction of England and Wales, as well as some jurisdictions in the United States of America. See, eg, *Yousouppoff v Metro-Goldwyn-Mayer Pictures* (1934) 50 TLR 581, 587 (Slessor J); *Tolley v Fry* [1930] 1 KB 467, 479 (Greer LJ); *Herrmann v Newark Morning Ledger Co* 138 A 2d 61, 72 (NJ Super 1958) (Conford J); *K-Mart Corp v Washington* 866 P 2d 274, 284 (Nev 1993). This article draws upon the differing approaches of American jurisdictions to the issue of harm in defamation law. However, references to related cases should be viewed against the background of underlying principles governing defamation law in the United States of America. American jurisdictions maintain a distinction between libel and slander. Slander is actionable without proof of damage if the imputation concerns a crime, loathsome disease, the plaintiff's business, trade, profession or office or unchastity. Where an imputation does not fall into one of these categories, the plaintiff must establish 'special damage'. Once the plaintiff has proven pecuniary loss, general damages may be recovered for injury which is 'parasitic' to reputational injury, such as hurt feelings and humiliation. By contrast, libel is only actionable upon proof of damage to reputation. Different standards of proof exist for public figures and private plaintiffs. In *New York Times v Sullivan* 376 US 254, 279–80 (1964) ('Sullivan'), Brennan J held that a public official is prohibited from recovering damages for injury to reputation relating to official conduct unless he or she proves that the imputation was made with 'actual malice': with knowledge that the imputation was false or with reckless disregard of whether it was false or not. The decision *Gertz v Robert Welch, Inc* 418 US 323, 349–50 (1974) makes it clear that the burden of proof on private plaintiffs is lower than that in Sullivan. Unless a plaintiff shows actual malice, damages must be 'supported by competent evidence', damages must represent compensation for no more than 'actual injury', damages must not be 'presumed' and damages must not constitute punitive damages in disguise. These limits apply to private plaintiffs suing over matters of public concern. There remains some uncertainty as to whether these limits apply for private plaintiffs where the

[58] The irrebuttable nature of the presumption of harm requires analysis. The fact that a defendant can prove that the plaintiff's reputation has not been affected by the imputation will not defeat a defamation action. This doctrine is upheld even where the defendant can prove that no one believed the imputation. In *Morgan v Odhams Press Ltd*,⁴⁷ Lord Morris stated that:

It was submitted that if defamatory words concerning A are published to B who refuses to believe that the words are true, then A would have no cause of action. I consider that such a contention is completely fallacious. Apart from any question affecting the measure of damages A's rights would be unaffected by the circumstance that B in fact disbelieved the words.⁴⁸

Similarly, in *Hough v London Express Newspaper Ltd*,⁴⁹ Goddard LJ noted that '[i]f words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue'.⁵⁰ A plaintiff can even recover large amounts of damages if the plaintiff specifically withdraws a previous claim that his or her reputation has been damaged during the course of the trial.⁵¹

Understanding the Presumption of Harm in a Modern Context

Although the presumption of harm in the law of defamation may appear an arbitrary rule of tort law,⁵² as previously explained, the rule is the product of historical development and the principles of different [59] judicial institutions. However, judges and legal academics offer various explanations for the operation of the doctrine of presumed harm in a modern legal context. This section examines the validity of these arguments.

Many justifications for the operation of the doctrine of presumed harm focus on evidentiary difficulties arising from a requirement to prove actual damage to

publication in question is not a matter of public concern. The United States Supreme Court left this question open in *Dun & Bradstreet, Inc v Greenmoss Builders, Inc* 105 S Ct 2939 (1985). See generally W Page Keeton, *Prosser and Keeton on the Law of Torts* (5th ed, 1984) 785–97.

⁴⁷ (1971) 2 All ER 1156.

⁴⁸ Ibid 1168–9.

⁴⁹ [1940] 2 KB 507.

⁵⁰ Ibid 515. See also *Melton v Bow* 247 SE 2d 100, 101 (Jordan J) (Ga 1978).

⁵¹ *Time, Inc v Firestone* 424 US 448, 460 (1976). See also *Hough*, above n 51, 515 (Goddard LJ).

⁵² See *Gertz v Robert Welch Inc*, 418 US 323 (1974), where Powell J noted that the absence of the requirement to prove damage to reputation is an 'oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss'.

reputation. Yet, from the outset of the trial process, a presumption of harm is favourable for prospective plaintiffs. A requirement on the plaintiff to prove actual damage to his or her reputation would require the plaintiff to establish his or her pre-existing reputation. This may leave genuinely defamed plaintiffs without a remedy, since they may opt against suing the defendant for fear of public inspection into their private affairs.⁵³

The presumption of harm facilitates the trial process due to evidentiary difficulties arising from a requirement of proof of actual damage to reputation. In his dissenting judgment in *Gertz v Robert Welch, Inc.*,⁵⁴ White J observed that ‘...damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for adequate compensation’.⁵⁵ A major evidentiary difficulty is making an assessment of the extent of damage caused by a defamatory imputation. This was acknowledged by the Supreme Court of Canada in *Hill v Church of Scientology*,⁵⁶ where Cory J noted that:⁵⁷

[A] defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime.

The extent of damage is especially difficult to predict in cases where the defamatory matter is in printed form. While an oral remark is transient in nature and may not be correctly recalled at a later time, written defamatory material may remain in print form for an extensive period of time and have a recurring impact on readers who come across the imputation.⁵⁸ Furthermore, the scope of readership of the publication may be unknown.

⁵³ Katherine Roby and Pamela Yeary, ‘Defamation: The Kansas Requirement that Private Plaintiffs Prove Injury to Reputation Before Recovering for Emotional Harm’ [1984] 23 *Washburn Law Journal* 342, 355.

⁵⁴ *Gertz v Robert Welch Inc.*, 418 US 323 (1974), 323.

⁵⁵ *Ibid* 394. See also *Dun & Bradstreet Inc v Greenmoss Builders Inc*, 105 S Ct 2939, 2946 (1985) (Powell J).

⁵⁶ (1995) 126 DLR (4th) 129.

⁵⁷ *Ibid* 176. See also *Ley v Hamilton* (1935) 153 LT 384, 386 (Atkin LJ).

⁵⁸ But refer to the alternative viewpoint presented in Veeder, above n 6, 573, where the author argues that oral defamatory matter has a more devastating impact on its audience as it does not take tangible form and therefore cannot be easily contradicted.

A requirement of proof of actual damage to the plaintiff's reputation would place an undue burden on the plaintiff to locate witnesses who are able to testify on his or her behalf at trial. Even plaintiffs with a good reputation may struggle to prove injury to reputation. In large communities where publications are widely circulated, it may be difficult to locate and identify witnesses who have read the publication and who have since lowered their opinion of the plaintiff. This may even cause problems in small rural communities, where distributions may cover wide areas which include several communities.⁵⁹

The extensive nature of the damage caused by a defamatory imputation is also problematic where a plaintiff's reputation is adversely affected among people who he or she does not personally know.⁶⁰ While close friends or business acquaintances may contact the plaintiff as to the truth of the allegation, casual acquaintances may neglect to make inquiries as to the substance behind the imputation. The imputation may cause such people to change their attitude towards the plaintiff and even affect their actions towards him or her.⁶¹ As the plaintiff does not know these people or their motives for actions in [60] relation to himself or herself, it is not feasible for the plaintiff to call them as witnesses to prove damage to his or her reputation.⁶² The presumption of harm is justified on the basis that to require proof of actual damage to reputation would leave genuinely defamed plaintiffs without a deserved remedy.⁶³

Even if a plaintiff is able to locate witnesses whose attitudes and behaviour changed towards him or her as a result of a defamatory imputation, they may be reluctant to deliver a testimony to this effect.⁶⁴ It is conceded that witnesses may be willing to testify that the plaintiff's reputation in the community had generally suffered as a result of the publication of the defamatory imputation. Roby and Yeary argue that such evidence is hearsay and is insufficient to establish the causal connection between the publication of the defamatory falsehood and the resulting injury to the plaintiff.⁶⁵ Their argument is supported by principles governing the admissibility of evidence of a

⁵⁹ Roby and Yeary, above n 53, 354.

⁶⁰ Australian Law Reform Commission, above n 2, 46.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ J G Miles, 'Defamation — Pleadings and Tactics' (Paper presented at the Legal Research Foundation Inc Seminar, Auckland, 25 September 1988) 59. See also Roby and Yeary, above n 53, 354–5.

⁶⁵ Roby and Yeary, above n 53, 354–5.

plaintiff's reputation in assessing an award of damages. In *Scott v Sampson*,⁶⁶ Cave J held that while general evidence of reputation should be admitted, evidence of rumours and suspicions to the effect of the defamatory imputation is inadmissible. However, in reality, evidence concerning a plaintiff's reputation will often overcome the hearsay rule and be admitted as evidence. In *Plato Films Ltd v Speidel*,⁶⁷ Radcliffe LJ observed that reputation rests on '...nothing more than particular incidents of some general notoriety or else on rumour or suspicion, which may or may not be well founded'.⁶⁸

Barendt argues that a plaintiff may be able to establish proof of damage to reputation by demonstrating that he or she has lost opportunities that were reasonably anticipated prior to publication.⁶⁹ However, such evidence is mere speculation as to the loss of a chance and does not bear a sufficient relationship to the issue of damage to reputation that it may be deemed relevant and therefore admissible evidence.

Legal commentators have also justified the presumption of harm on a deeper sociological level by arguing that the audience of a defamatory statement may not be aware of its impact and the plaintiff would therefore be unable to establish proof of damage to reputation. Riesman argues that members of the audience may not be sufficiently aware of their general reactions to communications and are thus unable to isolate the effect of a defamatory statement on them at the time that the statement was made.⁷⁰ Miles even justifies the retention of a defamation action in circumstances where the audience does not believe the imputation, on the basis that members of the audience typically have little idea of how a defamatory statement has affected them.⁷¹

The doctrine of presumed harm serves to simplify the trial process as a whole. A requirement upon the plaintiff to establish actual damage to his or her reputation would necessarily entail the testimonies of numerous witnesses, which prolongs the trial process and expends the valuable time and resources of courts. The presumption of harm expedites the trial process as a whole.

⁶⁶ (1882) 8 QBD, 491, 503–4.

⁶⁷ [1961] AC 1090 (HL).

⁶⁸ *Ibid* 1130–1.

⁶⁹ Eric Barendt, 'What is the point of Libel Law?' (1999) 52 *Current Legal Problems* 110, 124.

⁷⁰ David Riesman, 'Democracy and Defamation: Fair Game and Fair Comment II' (1942) 42 *Columbia Law Review* 1282, 1303.

⁷¹ Miles, above n 64, 59.

Although the presumption of harm can be traced to the historical development of defamation law, there are persuasive pragmatic reasons for retaining the doctrine of presumed harm in contemporary society. Yet, the irrebuttable nature of the presumption of harm suggests that the doctrine of presumed harm in the law of defamation is more than merely a residual 'product of history'⁷² or a tool to facilitate [61] the evidentiary process in a defamation action.⁷³ The following section examines the doctrine of presumed harm against the background of reputation in order to better understand why the defendant in a defamation action may not adduce evidence at trial to rebut the presumption of harm to the plaintiff's reputation.

Reputation

The Right to a Reputation

The law of defamation protects an individual's interest in his or her reputation by condemning those who make defamatory statements about others.⁷⁴ Thomas Gibbons argues that this right derives from an individual's broader right to control the flow of personal information.⁷⁵ Such control is desirable because the information may be considered private or be used to form the basis of other people's judgments about the person concerned.⁷⁶ The desire to control one's public image is a strong assertion of personal autonomy.⁷⁷ It recognises a transition from a private world where others do not have knowledge about a person to a social world where the attitudes and responses of others may have unpredictable effects.⁷⁸

The willingness of courts to recognise an individual's right to his or her reputation is not a novel concept; it is one that is ancient in its origins. As discussed above, modern defamation law is the result of centuries of legal development. Actions were heard before a range of judicial institutions with differing objectives. The law of defamation gradually became concerned with the protection of reputation.

⁷² Australian Law Reform Commission, above n 2, 45.

⁷³ Post, above n 2, 698.

⁷⁴ See Todd, above n 3, 800; Raymond E Brown, *The Law of Defamation in Canada* (2nd ed, 1994) 1–1; *Crane v New York Zoological Society* 894 F 2d 454, 457 (DC Cir 1990) (Buckley J). See also Lavorato J's statement in *Schlegel v Ottumwa Courier* 585 NW 2d 217, 223 (Iowa, 1998).

⁷⁵ Thomas Gibbons, 'Defamation Reconsidered' (1996) 16 *Oxford Journal of Legal Studies* 587, 589.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid* 589–90.

Courts in various jurisdictions have continued to recognise an individual's right to his or her reputation in contemporary society. In the Canadian decision *Hill v Church of Scientology of Toronto*,⁷⁹ Cory J noted that:

Although much has very properly been said and written about the importance of freedom of expression, little has been said and written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws...Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.⁸⁰

In the American decision *Rosenblatt v Baer*,⁸¹ Brennan J noted that the law of slander and libel is designed to effectuate society's 'pervasive and strong interest in preventing and redressing attacks upon reputation'.⁸²

[62] *The Concept of Reputation as Defined by Courts*

Notwithstanding the importance of the interest that defamation law purports to protect, the meaning and scope of 'reputation' has not received the depth of analysis that one might expect.⁸³ Reputation is an elusive and intangible concept that encompasses the way in which an individual is perceived by others. In *Re T and the Director of Youth and Community Services*,⁸⁴ the Supreme Court of New South Wales defined a person's reputation as the estimate of his or her moral character entertained by a group of people, such as those who live in the same neighbourhood or those with whom he or she associates at work.⁸⁵

⁷⁹ (1995) 126 DLR (4th) 129, 129.

⁸⁰ *Ibid* 160.

⁸¹ 383 US 75 (1966).

⁸² *Ibid* 86. See also *Gundram v Daily News Pub Co* 156 NW 840, 841 (Gaynor J) (Iowa 1916) and *Rybas v Wapner* 457 A 2d 108, 110 (Beck J) (Pa Super 1983).

⁸³ See also Post, above n 2, 692.

⁸⁴ [1980] 1 NSWLR 392.

⁸⁵ *Ibid* 395, 399. See also *Louisville Times Co v Emrich* 66 SW 2d 73 (Ky 1934).

The concept of 'reputation' should not be confused with the concept of 'character'. While 'reputation' refers to what a person appears to be, 'character' refers to what a person is in fact.⁸⁶ 'Reputation' defines the community's perception of values and traits possessed by a particular person, whereas 'character' identifies the set of values and personality traits a person actually possesses.⁸⁷

An individual's reputation manifests itself in many different forms. The influential article by Post characterises reputation as property, honour and dignity.⁸⁸ Post's discourse has influenced the way in which the author of this article has chosen to examine reputation and the presumption of harm in defamation law.

Reputation as property

Exploring Reputation as a Form of Property

The property approach to reputation envisages a social framework where the market place connects individuals and determines the value of property. Reputation is conceptualised as an intangible asset that is earned by an individual's efforts and labour.⁸⁹ Injury to reputation denotes the destruction of the results of an individual's labour.⁹⁰ The resulting loss caused by a defamatory imputation is capable of pecuniary measurement.⁹¹ Damage to a plaintiff's reputation often manifests itself in the form of economic repercussions, such as third persons refusing to conduct business with the plaintiff, leading to [63] a loss of profit and goodwill. Thus, the

⁸⁶ Miller J in *Gobin v Globe Pub Co* 620 P 2d 1163, 1166 (Kan 1980) identified the difference between these two concepts: 'It is damage to one's reputation in the community for which redress is sought in libel or slander actions. Reputation is what others say or think about a person, one's good or bad name in the community. Character, on the other hand, denotes those moral qualities which a person possesses, one's moral fiber. Reputation is external, character internal'. See also *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392, 395 (Waddell J); *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (HL) (Denning LJ).

⁸⁷ Brown, above n 74, 1–14, 1–15. However, the focus on the 'reputation' rather than the 'character' of an individual effectively means that the law protects an individual's projection of himself or herself to society, even if it is an illusion. Brown goes on to argue that while a person may have a right to project an image of himself or herself that does not exist, a person does not have a right to prevent others from exposing what is merely an illusion. See also Gibbons, above n 75, 596, where the author describes reputation as a flawed value as it comprises a snapshot of the plaintiff's character which is often doctored to portray qualities that may not exist in reality.

⁸⁸ These three concepts are by no means the only possible concepts of reputation, but in the opinion of the author, they have had the most significant impact on the development of the law of defamation. Post also recognises that some cultures may equate reputation with the judgment of history and immortal fame. A unique form of reputation may be acquired by great leaders or recipients of honours such as the Nobel Peace Prize. See Post, above n 2, 720. Reputation may also manifest itself in forms of social advantages, such as friendship, respect and association with a community. See Gibbons, above n 75, 590.

⁸⁹ Post, above n 2, 693.

⁹⁰ *Ibid* 694.

⁹¹ *Ibid*.

purpose of defamation law is to protect individuals by ensuring that their reputation is not wrongfully deprived of its proper market value and provide compensation for damage to property.⁹²

The property analysis accurately acknowledges the existence of a powerful consumer society dictated by market forces. Yet, the theory is inconsistent with many important doctrines underpinning defamation law. For example, an imputation must be deemed as defamatory by courts in order to give rise to a cause of action. Defamation law does not offer redress for untrue communications that are not defamatory, even where they result in financial loss.⁹³ The fundamental requirement that liability attaches to defamatory imputations suggests that defamation protects personal interests other than solely property.⁹⁴

Compensation

As the property approach to reputation conceptualises reputation as an intangible asset, the purpose of compensation is to provide redress for damage to property. Courts have not discussed how violations of different forms of an individual's reputation may warrant different remedies. However, the violation of an individual's personal asset resulting in financial loss suggests that compensatory damages are the most appropriate remedy to specifically redress the injury caused by a defamatory imputation.

However, the property approach to reputation does not explain why courts regularly award compensatory damages for injury to a plaintiff's feelings, where mental and emotional repercussions flow from damage to the plaintiff's reputation.⁹⁵ The property approach to reputation envisages reputation as an intangible asset capable of monetary quantification. A speculative award of damages for hurt feelings and humiliation is inconsistent with the 'paramount goal' of defamation law, which provides compensation for injuries that are 'susceptible of more or less objective

⁹² *Ibid* 695.

⁹³ *Ibid* 697.

⁹⁴ *Ibid*.

⁹⁵ For cases where compensatory damages have been awarded for hurt feelings and humiliation in defamation actions, see, eg, *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86, 104–5 (CA) (Pearson LJ); *Fielding v Variety Inc* [1967] 2 QB 841, 851 (CA) (Lord Denning MR); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 151 (Windeyer J) (HCA); *Cassell & Co v Broome* [1972] AC 1027, 1071 (HL) (Lord Hailsham).

measurement'.⁹⁶ Furthermore, the property analysis suggests that defamation law should not be concerned with purely private injuries that are independent of the market.⁹⁷ Even though individuals may attach importance to the way others regard them, emotional injury should not be the subject of redress through the vehicle of defamation law.⁹⁸

The Doctrine of Presumed Harm

The property analysis supports the presumption of harm in the law of defamation due to evidentiary difficulties arising from a requirement upon a plaintiff to prove actual damage to his or her reputation. As discussed above, plaintiffs would face difficulties in locating witnesses and requiring them to testify that they held the plaintiff in lower estimation and refused to associate with him or her in the course of business. A plaintiff may be able to provide evidence of damage to his or her business, such as financial statements demonstrating loss of revenue. However, the plaintiff would then face the insurmountable task of establishing a causal connection between the imputation and a loss of profit in the course of business. A requirement upon the plaintiff to prove actual damage to his or her reputation may deny a remedy to many deserving plaintiffs. Thus, the presumption of harm serves to properly align defamation law with its purpose of providing redress to individuals whose reputation has been affected by a defamatory imputation.

[64] However, the irrebuttable nature of the presumption of harm cannot be convincingly justified in the property analysis. The doctrine of presumed harm allows individuals to be compensated for injury to their reputation even where it may be proven that they did not in fact sustain such an injury. The award of compensation for non-existent injuries is clearly inconsistent with the primary purpose of defamation law, which is to provide compensation for injury to a plaintiff's personal property.

The property approach to reputation does not serve to completely characterise modern defamation law. The theory does not explain many of its rules. Furthermore, the property analysis does not support the way in which courts have approached the issue of compensation. While the theory is consistent with the doctrine of presumed harm, it does not support the conclusive nature of the presumption of harm. In order to gain

⁹⁶ *Rosenbloom v Metromedia Inc* 403 US 29, 75–6 (1971) (Harlan J).

⁹⁷ Post, above n 2, 695.

⁹⁸ Ibid.

a deeper appreciation of the tort of defamation, it is necessary to turn to other forms of reputation.

Reputation as Honour

Exploring Reputation as a Form of Honour

The association of reputation with an individual's honour can be traced to Anglo-Saxon times, where a defamatory statement violated an individual's honour and gave rise to a duel between the parties.⁹⁹ The feudal principle of honour is less pervasive in the modern democratic era as societies are arguably egalitarian by nature. However, the ancient concept of honour remains relevant in contemporary society, where individuals identify with the normative characteristics of particular social roles. In return, they receive from others the regard and estimation that society accords to that role, which forms an integral part of their reputation. An individual does not earn or create this kind of honour through labour, but rather claims a right to it by virtue of the status that society attributes to his or her social role.¹⁰⁰

Unlike the property approach to reputation, honour may not be bought, sold or exchanged.¹⁰¹ It is not possible for an individual to create honour. Honour arises where an individual either fulfils or fails to fulfil the requirements of his or her social position.¹⁰² Furthermore, unlike in a market society where reputation is a private possession created by individual effort and of importance primarily to those who have created it, the preservation of honour entails more than the protection of merely an individual interest. Since honour is not created by individual labour but instead by shared social perceptions of an individual, honour is a public rather than private possession.¹⁰³

Along with the property approach, the analysis of reputation as honour provides a more complete theoretical framework for defamation law. As previously discussed, the property analysis does not explain why defamation law does not provide redress for untrue non-defamatory communications which result in financial loss.¹⁰⁴ Post argues that this feature serves to distinguish between communications that are

⁹⁹ See Veeder, above n 6, 549; Lovell, above n 26, 1052.

¹⁰⁰ Post, above n 2, 699–700.

¹⁰¹ Ibid.

¹⁰² Ibid 701.

¹⁰³ Ibid 702.

¹⁰⁴ See above n 93 and accompanying text.

relevant to an individual's honour and communications that are irrelevant to an individual's honour.¹⁰⁵ The analysis of reputation as honour also intersects with the property analysis as roles and individuals are interdependent. In fields such as medicine, it is questionable whether a doctor's reputation stems solely from his or her achievements, or whether it inheres in the status of the profession.¹⁰⁶ The importance of the fluid nature of reputation will become evident later in this section, where it is argued that no single form of reputation accurately conceptualises the nature of the interest protected by defamation law.

[65] *Compensation*

In the analysis of reputation as honour, injury to reputation arises where a defamatory imputation causes a loss of respect for an individual. Violation of an individual's honour also disrupts the framework governing society by changing the way in which citizens view social roles. Since damage does not entail financial loss, the purpose of defamation law cannot be to compensate for loss in a pecuniary sense, but must be seen as the restoration of the plaintiff's honour.¹⁰⁷ Against this background, the award of damages is not the most appropriate form of compensation. By contrast to the property analysis, the honour approach to reputation demands a non-pecuniary remedy such as a retraction and reply, apology or declaration which seeks to specifically redress the injury caused by the imputation. A plaintiff may also find the self-help remedy of denial of the false allegation useful in mitigating the damage to his or her reputation.¹⁰⁸ This remedy received express legal recognition in the case *Gertz v Robert Welch, Inc*¹⁰⁹ where Powell J stated that '[t]he first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation'.¹¹⁰

The Doctrine of Presumed Harm

The presumption of harm in defamation law is justified in the theory of reputation as honour. Similar to the property approach, the imposition of a requirement on a plaintiff to prove injury to his or her honour raises insurmountable evidentiary difficulties. The presumption of harm serves to facilitate the trial process and ensure

¹⁰⁵ Post, above n 2, 706.

¹⁰⁶ Ibid 707.

¹⁰⁷ Ibid 703.

¹⁰⁸ See Calvert, above n 43, 938.

¹⁰⁹ *Gertz v Robert Welch Inc*, 418 US 323 (1974).

¹¹⁰ Ibid 344.

that individuals whose reputation has been damaged by a false imputation gain redress through the vehicle of defamation law. In doing so, the tort of defamation successfully fulfils its purpose of protecting an individual's interest in his or her reputation.

However, the irrebuttable nature of the presumption of harm is inconsistent with the honour approach to reputation. The fact that a defendant is unable to adduce evidence to prove that the plaintiff's reputation was not in fact damaged by an imputation means that defamation law may provide redress for non-existent injuries. This is inconsistent with the tort's purpose of providing compensation to individuals whose reputation has been injured by a defamatory imputation. Even in conjunction with the theory of reputation as property, the concept of reputation as honour does not completely conceptualise modern defamation law. I will now explore reputation as a form of dignity in an attempt to better understand the tort of defamation.

Reputation as Dignity

Exploring Reputation as a Form of Dignity

The recognition of reputation as a form of dignity can be traced to early German and Anglo-Saxon law, when compensation was awarded for battery in order to redress insult to an individual's dignity. An open bruise gave rise to a higher sum of damages than a bruise concealed by clothing.¹¹¹

The relationship between reputation and dignity was recognised in the American case *Rosenblatt v Baer*:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.¹¹²

[66] Barendt downplays the significance of dignity by arguing that the purpose of defamation law is to protect reputation rather than the underlying value of dignity. He

¹¹¹ John Wade, 'Tort Liability for Abusive and Insulting Language' (1950–1951) 4 *Vanderbilt Law Review* 63, 64.

¹¹² *Rosenblatt v Baer*, 383 US 75 (1966), 92 (Stewart J); upheld by Powell J in *Dun & Bradstreet, Inc v Greenmoss Builders Inc*, 105 S Ct 2939 (1985) 2945. See also the Canadian decisions of *R v Stevens* [1993] 7 WWR 38, 63 (Man Prov Ct) (Griesbrecht J); *Hill v Church of Scientology*, (1995) 126 DLR (4th) 129, 163 (Cory J). For an English decision to this effect, see *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, 622 (HL) (Lord Nicholls of Birkenhead).

considers that such a value only serves to explain and justify the importance that the law attributes to the right to reputation.¹¹³ As outlined above, there is open judicial recognition of the relationship between an individual's reputation and dignity. While reputation is the starting point in the process of determining whether an imputation is defamatory, dignity is relevant to understanding the interest that the tort of defamation attempts to protect. Rather than merely justifying the importance of reputation as a value protected by the law, dignity forms an integral component of the definition of reputation and is therefore protected through the vehicle of defamation law.

Barendt goes on to argue that the value of dignity is unworthy of legal protection through the vehicle of defamation law as it is 'far too vague and amorphous to provide a basis for a legal cause of action' and rather should be protected in a constitution.¹¹⁴ His reasoning rests upon the basis that the law of torts is designed to provide redress for clear and demonstrable injuries. However, Barendt's thesis is problematic in several respects. The starting point in modern tort law is not to provide redress for clear and demonstrable injuries, but rather to protect public interests by sanctioning certain conduct. While the right to reputation and dignity may be protected by constitutional law, these rights represent social interests that fall within the taxonomy of tort law. Barendt appears to view reputation through the lens of property, where reputation is an asset that is capable of monetary quantification and, where violated, is capable of precise compensation. However, as has been demonstrated, the property analysis does not completely conceptualise the interest protected by modern defamation law.

The dignity approach to reputation is similar to the honour approach as it is presupposed that an individual's identity is in some sense constituted by reputation.¹¹⁵ However, while honour is concerned with the attributes of personal identity that stem from the characteristics of particular social roles, dignity is concerned with the aspects of personal identity that stem from membership in the general community. Thus, under a regime of honour defamation law protects the status of specific social roles, whereas under a regime of dignity defamation law safeguards the identity of the entire community.¹¹⁶ The concept of reputation as dignity stands in direct contrast to the

¹¹³ Barendt, above n 69, 117.

¹¹⁴ Ibid.

¹¹⁵ Post, above n 2, 715.

¹¹⁶ Ibid.

property approach to reputation. While in a market society reputation is a form of property whose value is determined by the marketplace, in a communitarian society reputation is constitutive of social and individual identity and its worth cannot be reduced to a monetary amount.¹¹⁷

As Post indicates, the concept of reputation as dignity is somewhat paradoxical — it is puzzling how a social and public concept such as reputation can possibly affect the ‘essential dignity’ of an individual.¹¹⁸ Post bridges the gap by asserting that defamation contains an implicit theory of the relationship between the private and public aspects of the self.¹¹⁹ An individual’s identity and sense of dignity is shaped by membership of the community which he or she inhabits.¹²⁰ Acceptance within the community is dependent upon shared attitudes and the disapproval of anti-social conduct.¹²¹ Thus, defamation law functions to protect individuals whose reputation has been injured in the eyes of the general community and affirm their status in society.¹²² Defamation does not extend protection to those who are defamed [67] in the eyes of ‘wrong thinking’ citizens or socially deviant community segments. The denial of redress to socially deviant citizens presumes that they lack the social dignity that ‘right thinking’ citizens exhibit and are therefore unworthy of full membership of society and the protection of the law.¹²³ Defamation law thus protects the subsidiary interest of community identity through the maintenance of a cohesive social order.¹²⁴

It is arguable that the subsidiary purpose of protecting community identity threatens to undermine the primary purposes of the law of defamation, which are to protect an individual’s interest in his or her reputation and provide compensation for damage

¹¹⁷ Ibid 717.

¹¹⁸ Ibid 708.

¹¹⁹ Ibid.

¹²⁰ Ibid 712.

¹²¹ Ibid 711.

¹²² Ibid 712.

¹²³ Ibid 711. The common law takes its function of maintaining community identity so seriously that it refuses to protect individual dignity if it determines that a particular community is not worthy of legal support. These communities include socially deviant community segments that approve of anti-social conduct or the nonfeasance of judicially approved acts such as the reporting of illegal activity to the authorities. See *Byrne v Deane* (1937) 1 KB 818, 840, where the court had to decide whether the suggestion that a member of a golf club had reported the existence of gambling machines to the police was defamatory. In rejecting the allegation as defamatory, Greene LJ noted that ‘to say of a man that he has put in motion the proper machinery for suppressing crime is a thing which cannot on the face of it be defamatory’. This stance has also been adopted by American courts. See, eg, *Saunders v Board of Directors, WHYY-TV* 382 A (2d) 257 (Del Super Ct 1978); *Connelly v McKay* 28 NYS 2d 327 (Mis Sup Ct 1941).

¹²⁴ Post, above n 2, 713, 715.

flowing from a defamatory imputation. However, the dignity approach to reputation depends on the maintenance and protection of a stable social order, as an individual's identity and sense of dignity is shaped by membership of the community which he or she inhabits.¹²⁵ It is therefore inevitable that the law of defamation upholds the protection of community identity.

The notion that defamation law aims to promote social cohesion is problematic, given different judicial approaches to the concept of community in tests for determining whether an imputation is defamatory. New Zealand courts have upheld the English decision *Sim v Stretch*¹²⁶ and refer to the attitudes of the 'right-thinking members of society generally'.¹²⁷ Yet, in Australian and American jurisdictions, courts consider the views of minority groups in society in determining whether an imputation is defamatory. In Australia, an imputation will be held as defamatory if it lowers the plaintiff 'in the estimation of an appreciable and reputable section of the community'.¹²⁸ In America, courts will refer to the attitudes of a 'considerable and respectable class in the community'.¹²⁹ The willingness of Australian and American jurisdictions to consider the views of community segments in determining whether an imputation is defamatory reflects the fact that society is not cohesive on a number of issues.

However, the departure of Australian and American courts from the general community standard for determining whether an imputation is defamatory does not detract from the law of defamation's role in promoting social cohesion. The two different tests for determining whether an imputation is defamatory instead raise a variety of theoretical issues that operate on a number of levels. On a sociological level, the law of defamation raises the issue of what constitutes a community. In essence, a community is an [68] artificial social construct that is central to the law of defamation. The law of torts is inextricably linked to community standards, for its

¹²⁵ Ibid 712.

¹²⁶ [1936] 2 All ER 1237.

¹²⁷ Ibid 1240 (Atkin J). Refer to the New Zealand decisions *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488, 496 (Tipping J); *Bowles v Truth* (NZ) Ltd [1965] NZLR 768, 773 (Woodhouse J); *Collerton*, above n 47, 1046 (McGregor J) for an affirmation of this principle.

¹²⁸ *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 694 (Glass JA). See also *Grundman v Georgeson* [1996] Aust Torts R 63,500, 63,503, where Davies JA referred to an acceptable audience as a 'substantial, intelligent and reasonable section of the community'.

¹²⁹ *Peck v Tribune Co* 214 US 185, 190 (1909) (Holmes J). This decision was upheld in *Braun v Armour & Co* 173 NE 845 (1930); *Sharratt v Housing Innovations, Inc* 310 NE 2d 343, 346 (Mass 1974).

purpose is to proscribe anti-social conduct. Therefore, it is inevitable to refer to community values in the law of defamation. The sociological issue of what constitutes a community becomes a legal issue of whether the community should be protected by the law. This entails a judicial evaluation of the community and an assessment of whether the views of its members warrant the protection of the law. The adoption of the minority segment approach by American and Australian courts represents judicial recognition of the heterogeneous nature of contemporary society. Courts in these jurisdictions have acknowledged that society is in fact composed of a variety of community segments where individuals value their personal reputation. In instances where their reputation is damaged by a defamatory imputation, individuals are able to gain redress through the vehicle of defamation law. The refusal of courts to extend redress to 'wrong thinking' citizens on both the general community standard and the community segment tests reflects how policy considerations influence which communities are protected by the law of defamation. The policy element in the test for determining whether an imputation is defamatory is problematic. For example, the law of defamation purports to protect an individual's reputation, yet refuses to extend protection to individuals who are deemed 'wrong thinking' citizens. The tension between principle and policy in defamation law is a theme that permeates the law of torts. While this article raises jurisprudential issues concerning the content of law, it does not attempt to resolve them. It is desirable that such issues are explored through further academic research.

Compensation

Damage to a plaintiff's reputation occurs when a defamatory imputation erodes the plaintiff's dignity and when he or she is shunned by the general community. Therefore, the purpose of compensation is the rehabilitation of an individual's dignity.¹³⁰ Since a false imputation may have affected the esteem of the plaintiff in the eyes of members of the community he or she inhabits, the award of a remedy also serves to re-integrate the plaintiff into the community.

The non-pecuniary nature of the injury to an individual's dignity suggests that compensatory damages would be an inappropriate form of redress. Where the very core of an individual's integrity has been violated, compensation in the form of a retraction and reply, declaration or apology would more specifically redress the injury

¹³⁰ Post, above n 2, 715.

caused to the plaintiff's reputation. In particular, a declaration as to the falsity of the imputation would enable the plaintiff to effectively gain reacceptance into the community that he or she inhabits.

In the analysis of reputation as property and honour, it is evident that the award of compensation for emotional injuries to a plaintiff such as hurt feelings and humiliation lie outside the scope of compensation in defamation law because they are inconsistent with the primary purpose of the tort, which is to compensate an individual for injury to his or her reputation rather than to protect his or her feelings.¹³¹ The refusal of defamation law to protect a plaintiff's feelings in absence of damage to reputation is illustrated by the fact that publication to a third party is essential to a cause of action.¹³² Upon this analysis, while hurt feelings and injury to emotional well being may warrant a remedy at law, defamation is not the proper basis upon which to found such a cause of action.¹³³

However, support for the extension of the tort to encompass an individual's interest in his or her [69] emotional well being can be found in Probert's analysis of defamation law.¹³⁴ His thesis is applicable to the three forms of reputation discussed in this article. Probert argues that a plaintiff brings a defamation action not only because his or her esteem has been lowered in the eyes of members of the community.¹³⁵ A plaintiff may have suffered hurt feelings, anxieties of a psychiatric nature and bodily harms of a medical nature.¹³⁶ A plaintiff may have also suffered economic repercussions, as well as a loss of power and influence over other people.¹³⁷ In the plaintiff's personal sphere, there may have been implications regarding his or her self-respect, social

¹³¹ Both David Riesman and Sally Walker express concerns about the extension of the action of defamation to situations where only a plaintiff's personal feelings have been injured. See Sally Walker, 'Regulating the Media: Reputation, Truth and Privacy' (1994) 19 *Melbourne University Law Review* 729, 739 and Riesman, above n 70, 1302. See also *Rybas v Wapner* 457 A 2d 108, 110 (Beck J) (Pa Super 1983) for a statement to this effect.

¹³² See *Pullman v Walter Hill and Co Limited* [1891] 1 QB 524, 527 (Lord Esher MR), 529 (Lopes LJ) and 530 (Kay LJ).

¹³³ See Roby and Yeary, above n 53, 357. In Calvert Magruder, 'Mental Disturbance in Torts' (1936) 49 *Harvard Law Review* 1033, 1055, the author proposed a new tort to protect an individual's interest in his or her mental and emotional tranquillity and framed such a tort as thus: 'one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue'. John Wade also noted the emergence of general support among legal commentators for granting relief for mental injury where the defendant's conduct does not fall within one of the traditional tort classifications. See Wade, above n 111, 81.

¹³⁴ See Probert, above n 40, 1173.

¹³⁵ *Ibid* 1174.

¹³⁶ *Ibid* 1174, 1177.

¹³⁷ *Ibid*.

affiliations and freedom to migrate within social circles.¹³⁸ Probert asserts that damage to reputation is merely the starting point into the relational damage endured by the imputation and must be viewed in a broader context.¹³⁹ Therefore, defamation law necessarily entails the protection of not only the plaintiff's reputation but also his or her emotional well being.

More specifically, the extension of defamation law to protecting an individual's interest in his or her self-esteem is consistent with the view of reputation as dignity. Unlike reputation as forms of property and honour, reputation as dignity is both internal and external in nature. While the concepts of reputation as property and honour focus exclusively on the individual's public image as perceived by others, the dignity approach focuses on the relationship between the individual and the community which he or she inhabits. By protecting an individual's self-image, defamation law recognises an individual's interest in his or her self-worth.

The Doctrine of Presumed Harm

The theory of reputation as dignity supports the presumption of harm in defamation law. The violation of an individual's dignity causes a loss of public image and personal self-worth. These losses are non-pecuniary in nature and establishing proof of actual damage would present an insurmountable challenge for the plaintiff, threatening to deny redress to deserving plaintiffs who are unable to meet the evidential threshold. The presumption of harm thus functions to more closely align defamation law with its purpose of protecting an individual's interest in his or her reputation.

The analysis of reputation as property and honour has demonstrated that one of the inherent dangers associated with the doctrine of presumed harm is the award of compensation to plaintiffs who have suffered no real injury to reputation.¹⁴⁰ This may occur where it can be proven that the persons to whom the defamatory statement was communicated rejected the validity of the imputation and continued to maintain the plaintiff in high esteem.¹⁴¹ Yet, unlike reputation as forms of property and honour, the

¹³⁸ Ibid.

¹³⁹ Ibid 1177.

¹⁴⁰ Post, above n 2, 697.

¹⁴¹ See *Richardson v Barker* 7 Ind 567 (1856); *Howe v Perry* 32 Pick 506 (Mass 1834). See also Magruder, above n 133, 1055.

concept of reputation as dignity is consistent with the anomalous irrebuttable presumption of harm. Post's theory of reputation as dignity asserts that the protection of public good functions as an independent objective of defamation law in addition to the protection of an individual's dignity and [70] providing compensation for injury to his or her reputation.¹⁴² The presumption of damage serves to maintain community identity since it creates a licence for juries to sanction defendants who trespass beyond the bounds of propriety.¹⁴³ The utterance of a defamatory statement is thus sufficient to give rise to compensation, irrespective of whether harm accrued to the plaintiff as a result of the imputation.

Reconceptualising Reputation

While courts have recognised an individual's right to his or her reputation, they have neglected to succinctly define the nature and scope of this personal interest. Post proposes three different views of reputation in order to explain the protection of this interest through the vehicle of defamation law. However, these views of reputation are also fundamentally inconsistent with one another. The tort of defamation seeks to protect competing interests that depend upon the existence of very different social frameworks.¹⁴⁴ As a result, each form of reputation supports only some of the rules pertaining to defamation law; no single theory is completely consistent with the modern tort of defamation. What is clear is that defamation law encompasses not only an individual's interest in his or her reputation, but also the interest of community identity. This has been illustrated by the analysis of reputation as a form of dignity, which depends upon the protection of this subsidiary interest. Against this background, I will now consider various proposals for legal reform which strive to align the tort of defamation with its objectives.

Law Reform

This part of the paper considers the doctrinal and pragmatic advantages and disadvantages associated with three different proposals for legal reform in relation to the doctrine of presumed harm. In assessing the option that Australia and New Zealand should adopt, primacy is given to defamation law's two purposes of protecting an individual's interest in his or her reputation and maintaining community

¹⁴² Post, above n 2, 713.

¹⁴³ Ibid 713–14.

¹⁴⁴ Ibid 721.

identity. However, consideration is also given to pragmatic factors, such as the implications for the trial process in defamation actions.

The Abolition of the Doctrine of Presumed Harm

Unlike Australia and New Zealand where the doctrine of presumed harm operates as a conclusive presumption of damage to a plaintiff's reputation, some jurisdictions require proof of injury to reputation in order to succeed in a defamation action.¹⁴⁵ This section will analyse the advantages and disadvantages of abolishing the doctrine of presumed harm in favour of a requirement to prove injury to reputation at both a practical and theoretical level.

On a doctrinal level, the imposition of a burden on the plaintiff in a defamation action to establish actual damage to his or her reputation as a result of a defamatory imputation promises to rectify an existing imbalance between the plaintiff and the defendant in a defamation action. Defamation law may be perceived as favouring the interests of the plaintiff, who need only establish the three requirements outlined earlier in order to succeed in a cause of action. In the absence of a successful defence to the cause of action, a plaintiff may gain substantial redress from courts for damage to his or her reputation. The requirement to prove actual damage to reputation increases the burden placed on the plaintiff in a defamation action and appears to more fairly balance the interests of justice between the two parties.

Another doctrinal advantage is that the imposition of a burden upon the plaintiff to prove actual damage to his or her reputation ensures that compensation awarded to plaintiffs in defamation actions [71] is strictly limited to actual injuries suffered as a result of a defamatory imputation. One of the inherent dangers associated with the doctrine of presumed harm is that plaintiffs may receive compensation for non-existent injuries. By restricting compensation to individuals who have suffered actual

¹⁴⁵ The jurisdiction of Kansas in the United States of America has abolished the doctrine of presumed harm in favour of a requirement to prove actual damage to reputation in order to succeed in a defamation action. Prior to *Gobin v Globe Publishing Co*, a series of cases heard by the Kansas Supreme Court on three separate occasions, a private plaintiff was not required to show negligence or fault of any kind by a media defendant in order to succeed in a defamation action. General damages were presumed as a result of the defamatory imputation. Read together, the three decisions abolish the doctrine of presumed harm, requiring a plaintiff to establish actual damage to reputation. Refer to *Gobin v Globe Publishing Co* 531 P 2d 75 (Kan 1975); *Gobin*, above n 86, 1163; *Gobin v Globe Publishing Co* 649 P 2d 1239 (Kan 1982). See also Roby and Yearly, above n 53, 349. The jurisdictions of Iowa and Arkansas have also adopted a similar stance. See respectively *Schlegel v Ottomwa Courier*, 585 NW 2d 217, 224; *Little Rock Newspapers Inc v Dodrill*, 660 SW 2d 933, 935 (Hays J) (Ark 1983), 933.

damage to reputation, the abolition of the doctrine of presumed harm promises to more closely align defamation law with its primary purposes of protecting the interest that individuals have in their reputation and where that interest is violated, providing adequate compensation.

However, this option for legal reform carries substantial doctrinal and pragmatic disadvantages which outweigh the doctrinal advantages associated with introducing a requirement to prove actual damage to reputation in a defamation action. On a doctrinal level, while the onus on the plaintiff to prove damage to his or her reputation appears to more fairly balance the interests of justice between the plaintiff and the defendant in a defamation action, the introduction of a requirement upon a plaintiff to establish actual damage to his or her reputation is inconsistent with the fundamental purpose of defamation law, which is to provide redress to individuals whose reputation has been affected by a defamatory imputation. As discussed above, insurmountable evidentiary difficulties involved with proving actual damage to reputation threatens to render defamation actions less accessible to many deserving plaintiffs. From its inception defamation law has attempted to protect an individual's interest in his or her reputation. Thus, the abolition of the doctrine of presumed harm and introduction of a requirement to prove actual damage to the plaintiff's reputation in a defamation action effectively circumvents the ability of the tort of defamation from fulfilling its proper purpose.

Although the abolition of the doctrine of presumed harm strictly confines compensation to actual damage to reputation, I have demonstrated how the tailoring of compensation to specifically redress the type of injury suffered by a plaintiff in a defamation action to some extent avoids awarding an undeserved financial windfall to the plaintiff. By this measure, pecuniary remedies such as damages are awarded for financial loss and non-pecuniary remedies such as a retraction and reply, apology or declaration are awarded for injury to a plaintiff's honour and dignity. This ensures that deserving plaintiffs are awarded an appropriate form of compensation that specifically redresses the injury to their reputation caused by a defamatory imputation.

Finally, as the concept of reputation as dignity demonstrates, defamation law is not exclusively concerned with damage to a plaintiff's reputation. The maintenance of a cohesive social order falls outside the interest of reputation in a strict sense and

functions as a subsidiary objective in defamation law. The protection of this additional social interest may be justified on the basis that the protection of community identity is inextricably linked to the protection of an individual's dignity. On this analysis, the abolition of the doctrine of presumed harm in favour of a requirement upon plaintiffs to establish actual damage to their reputation effectively inhibits the ability of defamation law to perform its primary function of protecting an individual's interest in his or her reputation.

On a pragmatic level, the significance of the departure of the states of Kansas, Iowa and Arkansas from the doctrine of presumed harm must not be overstated. The majority of American jurisdictions have adhered to the traditional rule and presume damage to the plaintiff's reputation as a result of a defamatory imputation.¹⁴⁶ The fact that only three minor American jurisdictions have chosen to abolish [72] the doctrine of presumed harm does not indicate overwhelming judicial support for the introduction of a requirement to prove actual damage to reputation in a defamation action.

The Rebuttable Presumption of Harm Standard

This option for legal reform is based on a hybrid approach that seeks to attain a compromise between the retention of the doctrine of presumed harm and the abolition of the doctrine of presumed harm. This standard shall be referred to hereafter as the 'rebuttable presumption of harm standard'. This proposal for law reform retains an element of the doctrine of presumed harm while introducing the requirement of proving actual damage to reputation. By the rebuttable presumption standard, harm to the plaintiff's reputation is presumed from the outset. The onus then shifts to the defendant to establish that no harm was inflicted upon the plaintiff's reputation as a result of the defamatory imputation.

On a doctrinal level, the onus on the defendant to establish on the balance of probabilities that no harm accrued to the plaintiff ensures that compensation is limited

¹⁴⁶ For example, the states of Florida, Louisiana, Maryland, Massachusetts and Virginia have upheld the doctrine of presumed harm and do not require a plaintiff to establish actual damage to reputation in order to succeed in a defamation action. For affirmation of this principle, see respectively *Miami Herald Publishing Co v Ane* 458 So 2d 239 (Fla 1984); *Freeman v Cooper* 390 So 2d 1355 (La Ct App 1980); *Hearst Corp v Hughes* 466 A 2d 486 (Md 1983); *Kelly v Loew's Inc* 76 F Supp 473 (D Mass 1948); *Poulston v Rock* 467 SE 2d 479 (Va 1996). See n 46 for a discussion of the different treatment of public and private plaintiffs in defamation litigation since the *Sullivan* decision in 1964.

to actual injury suffered by the plaintiff. If the defendant manages to establish that the imputation did not in fact affect the plaintiff's estimation in the eyes of members of the community, then the plaintiff is unable to gain redress through the vehicle of defamation law. This option for legal reform appears to ensure that defamation law is closely aligned with its purpose of protecting an individual's interest in his or her reputation and providing compensation for injury to reputation. Thus, the rebuttable presumption of harm standard ensures that conceptual clarity within the law of defamation and the taxonomy of tort law are dually protected.

On a pragmatic level, the rebuttable presumption of harm standard facilitates the trial process. Unlike the previous option for legal reform, the rebuttable presumption of harm standard retains the presumption of harm in defamation law. This effectively circumvents placing an undue evidentiary burden upon the plaintiff in a defamation action, where he or she is required to establish actual damage to his or her reputation as a result of the defamatory imputation. As previously mentioned, the presumption of harm to the plaintiff's reputation also serves to expedite the trial process, as the plaintiff is not required to call upon numerous witnesses to testify that their estimation of the plaintiff was affected as a result of the imputation. The presumption of harm thus conserves the valuable time and resources of judicial bodies.

However, the disadvantages associated with the rebuttable presumption of harm standard must be acknowledged. On a doctrinal level, some plaintiffs may not be afforded redress notwithstanding having suffered damage to their reputation. Even though the defendant may be able to prove that enough people disbelieved the defamatory imputation to displace the presumption of harm to the plaintiff's reputation, there may still be other people in obscure sectors of the community whose estimation of the plaintiff was severely affected by the defamatory imputation.¹⁴⁷ Here, the plaintiff may not be afforded redress through the vehicle of defamation law, even though he or she has suffered damage to his or her reputation. In this situation, defamation law is deprived of its ability to perform its primary function of compensating a plaintiff for loss of his or her reputation in the community.

Another doctrinal problem is that similar to the abolition of the presumption of harm option for legal reform, the standard refuses to recognise the dual purpose of

¹⁴⁷ See n 57 above and accompanying text.

defamation law as protecting not only an individual's interest in his or her reputation, but also the maintenance of a cohesive social order. Even where the presumption of harm may be rebutted by evidence such as public disbelief of the defamatory [73] imputation, the imposition of liability upon the defendant may be justified by the need to discipline a defendant for transgressing the boundaries of acceptable behaviour by virtue of making a defamatory imputation. The denial of the concept of reputation as dignity threatens to subsume the law of defamation within the framework of reputation as property and honour, thus denying an individual's interest in his or her inherent sense of dignity and self-worth.

On a pragmatic level, a defendant will most likely attempt to displace the presumption of harm to the plaintiff's reputation in order to defeat the cause of action. This may give rise to practical difficulties during the trial process. A defendant may encounter similar difficulties to a plaintiff who is required to adduce evidence of actual damage to reputation, as outlined in the previous option for legal reform.

Given the substantial doctrinal and pragmatic disadvantages of implementing the above two options for legal reform, the retention of the doctrine of presumed harm shall now be considered.

Accommodating the Presumption of Harm

While the retention of the presumption of harm in defamation law has been justified on the basis of various pragmatic considerations, the irrebuttable nature of the presumption of harm is closely linked to the complex nature of the interest that defamation law purports to protect and is justifiable on a doctrinal level. As I have demonstrated, reputation is closely entwined with an individual's sense of dignity, which arises from belonging to the community which he or she inhabits. The conclusive presumption of harm in defamation law serves to protect community identity by sanctioning defendants who transgress the boundaries of acceptable behaviour by making a defamatory communication about a third party, irrespective of whether the imputation caused damage to the plaintiff's reputation.

Defamation law should continue to retain a presumption of harm to the plaintiff's reputation in order to uphold the concept of reputation as dignity and protect all facets of an individual's reputation. As previously noted, the doctrine of presumed harm is

problematic as it appears to provide redress to plaintiffs who have in fact suffered no damage to their reputation, which is inconsistent with the tort's purpose of providing compensation for injury to reputation. However, it is possible to reform the presumption of harm in defamation law in a way that enables the tort of defamation to effectively perform its function of protecting an individual's interest in his or her reputation and providing compensation for injury to reputation. Courts could tailor the remedy awarded to a plaintiff to specifically redress the harm caused to the plaintiff's reputation by the defamatory imputation. Such law reform ensures that plaintiffs deserve the compensation that they have been awarded and counteracts the impact of a defamatory imputation.

As discussed above, the pecuniary nature of the damage caused to a plaintiff's reputation in instances where reputation manifests itself as a form of property suggests that compensatory damages would be the most suitable form of compensation to redress the financial loss flowing from a defamatory imputation. A defamatory imputation may affect the goodwill of a plaintiff's business by deterring third persons from associating with him or her. Generally speaking, the purpose of an award of compensatory damages is to restore a plaintiff to the position he or she would have been in had the defamatory imputation not been communicated.¹⁴⁸ The award of a sum of money to plaintiffs in actions where their property has been violated provides compensation for the financial consequences flowing from a defamatory imputation. This form of compensation specifically redresses the damage caused by a defamatory imputation.

As also noted in above, while a remedy in the form of compensatory damages specifically redresses financial loss flowing from a violation of reputation as property, the award of compensatory damages is inappropriate in actions where a plaintiff's honour and dignity have been infringed. The main problem associated with the award of compensatory damages in such circumstances is that the remedy does not specifically redress the harm suffered by the plaintiff. As David Barrett argues, damage to the plaintiff's [74] reputation in defamation arises mainly by injury with words.¹⁴⁹ It is somewhat paradoxical that the common law should advance compensatory damages as the primary remedy in defamation actions. Remedy in the

¹⁴⁸ Todd, above n 3, 831.

¹⁴⁹ David Barrett, 'Declaratory Judgments for Libel: A Better Alternative' (1986) 74 *California Law Review* 847, 853.

form of a retraction and reply, declaration or apology would more specifically redress the injury caused by a defamatory imputation.¹⁵⁰ A plaintiff may also find the self-help remedy of denial of the false allegation useful in mitigating the damage to his or her reputation.¹⁵¹

The difficulties associated with this option for legal reform are duly acknowledged. A scenario where all three forms of the plaintiff's reputation are violated poses obvious problems for courts. In this situation, courts may be forced to make a decision between various different remedies on the basis of the extent of damage to the differing forms of reputation that were violated. Alternatively, courts may opt to award a combination of remedies to the plaintiff in recognition of the different injuries suffered as a result of the defamatory imputation. Since the form of the plaintiff's remedy is entirely a matter of judicial discretion, courts may differ substantially in their preferred option for redress, creating legal uncertainty regarding compensation in defamation actions.

Furthermore, the retention of the doctrine of presumed harm and the tailoring of a remedy to compensate for damage caused to the plaintiff rests upon the notion that an individual's reputation exists in the discrete forms of property, honour and dignity. Although Post's theory has informed the ideas expressed in this article, it remains questionable whether an individual's reputation may be compartmentalised in this manner. The three forms of reputation analysed in this article are by no means the only forms of reputation.¹⁵² Furthermore, these three forms of reputation are by no means mutually exclusive of one another.¹⁵³ For instance, Post's property analysis encompasses reputation in the forms of honour and dignity, as an individual's honour and dignity may be viewed as his or her personal property. In order to confidently implement this option for legal reform, the viability of Post's theory of reputation warrants further legal and sociological research.

¹⁵⁰ Ibid. This is reflected in *Rosenblatt v Baer* 383 US 75 (1966), 93 (Stewart J).

¹⁵¹ See also John G Fleming, 'Retraction and Reply: Alternative Remedies for Defamation' (1978) 12 *University of British Columbia Law Review* 15, 31; Probert, above n 40, 1186. But see *Cassell & Co v Broome* [1972] AC 1027, 1071, where Hailsham LJ cautioned that 'in case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge'.

¹⁵² See Calvert, above n 43, 938.

¹⁵³ See Post, above n 2, 693, where the author acknowledges that these three forms of reputation may overlap with one another.

The community element in Post's theory of reputation as dignity is also problematic. There is tension between the law of defamation's role in maintaining community identity and the reality that society is heterogeneous in nature, reflected in Australian and American minority segment tests for determining whether an imputation is defamatory. Yet, this tension does not detract from the law of defamation's role in promoting social cohesion. Rather, it reveals the further tension between principle and policy that underpins the law of defamation and permeates the law of torts. This issue lies beyond the scope of this article and warrants further legal research.

Notwithstanding its theoretical and practical difficulties, the retention of the doctrine of presumed harm represents the best option for legal reform in Australia and New Zealand. Unlike the two other options for legal reform, the retention of the presumption of harm serves to maintain community identity and thus protects an individual's dignity. If the primary purpose of defamation law is to protect an individual's interest in his or her reputation, the irrebuttable presumption of harm must be maintained in order to adequately protect the different facets of an individual's reputation.

[75] Conclusion

The doctrine of presumed harm in defamation law appears at odds with the basic principle of tort law that a plaintiff must establish actual damage in order to succeed in a cause of action. This article has attempted to explore the doctrine of presumed harm with reference to its historical origins and explain why the presumption of harm operates as a feature of modern defamation law.

The presumption of harm in defamation law originates from the historical development of the cause of action and has survived to the present day in order to facilitate the trial process. Yet neither of these explanations satisfactorily account for the operation of a conclusive presumption of harm, which prevents a defendant from adducing evidence at trial to prove that the plaintiff's reputation was not in fact damaged by the imputation.

This article has analysed defamation law through the lens of reputation, which functions as the interest protected by the tort. The concept of reputation has been subjected to further analysis in its constituent forms of property, honour and dignity.

These three forms of reputation conceptualise the interest of reputation in accordance with different portraits of society. Notwithstanding the tension between these competing concepts, they together capture the complex nature of the interest protected by defamation law. In turn, the rules related to defamation law attempt to encompass these different views of reputation. It is the theory of reputation as a form of dignity that explains the irrebuttable presumption of harm. By this analysis, defamation law functions to protect not only an individual's interest in his or her reputation, but also the subsidiary interest of maintaining a cohesive social order. Damage is conclusively presumed to a plaintiff's reputation as defamation law seeks to uphold certain community standards by punishing individuals who transgress the boundaries of acceptable social behaviour.

Having examined three different options for law reform in relation to the doctrine of presumed harm, it must be concluded that, notwithstanding its theoretical problems, the retention of the doctrine of presumed harm and reform in relation to the way in which courts approach the issue of compensation best aligns defamation law with its purpose of protecting an individual's interest in his or her reputation. The abolition of the doctrine of presumed harm and the rebuttable presumption of harm standard would frustrate the ability of courts to provide redress for damage to reputation by creating insurmountable evidentiary hurdles for the parties during the trial process. Furthermore, by uplifting the conclusive presumption of harm and disregarding its role in maintaining community identity, these options for legal reform deny recognition of the dignity approach to reputation. These options subsume defamation law within the framework of reputation as forms of property and honour, effectively denying individuals of the valid right to their dignity through the vehicle of defamation law.

Although Post's discourse has influenced the author's conclusions, an analysis of his theory of reputation lies beyond the scope of this article. It is also evident that there is a general underlying tension between principle and policy in the law of defamation that permeates the law on a more general level. Both issues warrant further legal research in order to more closely align the law of defamation with its objectives of protecting an individual's interest in his or her reputation and providing redress for injury to reputation.