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Abstract
There are many ways to damage a reputation. The most obvious way is by words, written or spoken — libel or slander. Centuries of case law, however, disclose that defamation defendants have been endlessly inventive about the means by which they damage a plaintiff's reputation. In Falkenberg v Nationwide News Pty Ltd, a married couple in the Sydney suburb of Leichhardt complained about a 'Far Side' cartoon published in The Daily Telegraph Mirror, which included their actual home telephone number as the relevant, fictitious one to contact Satan. In Bishop v State of New South Wales, a schoolteacher complained about a theatrical performance by school students suggesting that he was in a sexual relationship with a colleague. In Monson v Tussauds Ltd, the plaintiff, a man against whom a verdict of 'not proven' had been returned in a Scottish murder trial, complained about a waxwork dummy of himself, which was on display in the 'Chamber of Horrors' in the famous London waxworks, Madame Tussauds, alongside convicted murderers. In his judgment, Lopes LJ noted that it was not necessary for defamatory matter to be written or spoken, that even 'a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel'.

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Dirty pictures: Defamation, reputation and nudity

David Rolph

Introduction

There are many ways to damage a reputation. The most obvious way is by words, written or spoken — libel or slander. Centuries of case law, however, disclose that defamation defendants have been endlessly inventive about the means by which they damage a plaintiff's reputation. In *Falkenberg v Nationwide News Pty Ltd*, a married couple in the Sydney suburb of Leichhardt complained about a 'Far Side' cartoon published in *The Daily Telegraph Mirror*, which included their actual home telephone number as the relevant, fictitious one to contact Satan. In *Bishop v State of New South Wales*, a schoolteacher complained about a theatrical performance by school students suggesting that he was in a sexual relationship with a colleague. In *Monson v Tussauds Ltd*, the plaintiff, a man against whom a verdict of 'not proven' had been returned in a Scottish murder trial, complained about a waxwork dummy of himself, which was on display in the 'Chamber of Horrors' in the famous London waxworks, Madame Tussauds, alongside convicted murderers. In his judgment, Lopes LJ noted that it was not necessary for defamatory matter to be written or spoken, that even 'a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel'.

Certainly photographs may constitute defamatory matter, as the case law again demonstrates. This article concerns itself with a case-study of two recent cases, *Ettingshausen v Australian Consolidated Press* and *Shepherd v Walsh*, in which the plaintiffs complained principally about the publication of naked photographs of themselves. In both cases, the exposure of the plaintiffs' bodies was held to expose the plaintiffs to ridicule and thus was deemed defamatory. To be exposed to ridicule has long been held, though not uncontroversially, to be defamatory. The earliest, oft-cited attempt at defining what is defamatory remains the *dictum* of Parke B in *Parmiter v Coupland*, that a publication is defamatory if it is 'calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule'.

The purpose of this case-study is to illuminate the concept of reputation. Despite the centrality of reputation to defamation law, being the principal interest directly protected, it has been subjected to comparatively little academic or judicial analysis. To the extent that reputation is defined and discussed, it is usually done so in contrast to character. Lord Denning famously distinguished these concepts in *Plato Films Ltd v Speidel*, on that basis that a 'man's "character", it is sometimes said, is *what he in fact is*, whereas his "reputation" is *what other people think he is*' (original emphasis).

There is surely, however, at least some interdependence between reputation and character, which makes Lord Denning's definition a working one, raising more questions than it answers. The single, sustained academic exposition of the concept of reputation remains Robert Post's seminal article, 'The Social Foundations of Defamation Law: Reputation and the Constitution'. Post suggests that there are at least three concepts of reputation discernible in defamation law: reputation as property; reputation as honour; and reputation as dignity. Because reputation is inherently social, being at base what other people think about the plaintiff, Post suggests that each conception of reputation reflects a different type of society and therefore a different purpose for the role of reputation. For instance, the 'property' approach conceptualises reputation as an economic construct, the 'honour' and

'dignity' approaches as a social construct. This case-study endeavours to apply and to augment Post's analysis of reputation.

Given the state of the academic literature of the concept of reputation in defamation law, it is neither possible nor desirable to provide a comprehensive exposition of reputation. What this case-study attempts to do is to illuminate the complexities of reputation and to stimulate thinking about this hitherto neglected interest through an examination of these two recent cases. Importantly, it also seeks to gesture towards the possibility of recognising reputation as a media construct, as well as an economic and a social one; that is, reputation as celebrity.

Case study 1: *Ettingshausen v Australian Consolidated Press Ltd*

In 1990, freelance journalist and self-described 'cappuccino-drinking copywriter from Paddington' (Kerr et al 1991a: 95) James Kerr, and photographer, Brett Cochrane, were given permission to accompany the Kangaroos, the Australian representative rugby league team, on their English tour. Kerr and Cochrane were granted 'unqualified access' (Kerr et al 1991a: 96) to the players — at their hotels, at their training sessions, in the locker-rooms, in the showers after matches. The purpose of Kerr and Cochrane accompanying the Kangaroos to England was to obtain material for a photo book (Kerr et al 1991a: 95) which would be sold to raise money for a charity, the Children's Leukaemia and Cancer Foundation (Kerr et al 1991a: 99). The resulting book, *Twenty Eight Heroes: Inside the 1990 Kangaroo Tour*, was published and released in 1991 (Kerr et al 1991b). As part of the promotion of the book, *HQ* magazine published an article, under the title 'Hunks', with text by Kerr and photographs by Cochrane. The text and eight of the nine accompanying photographs were unobjectionable. One photograph, however, the photograph used on the first double-page spread of the article, proved especially controversial and ultimately resulted in one of the largest Australian defamation trials of the early 1990s.

The photograph in question, a grainy black-and-white image captioned 'Shower power', depicted three Kangaroos, Ben Elias, Laurie Daley and Andrew Ettingshausen in the showers. Elias is shown facing Daley and Ettingshausen. He is bent over slightly, soaping himself down. Daley stands side on, facing towards Elias. Ettingshausen, however, is standing, arms folded, with his back against the wall, facing the camera (Kerr et al 1991a: 94–5). Amidst the grainy shadows of the photograph and beneath the superimposed text of the article is, according to Hunt J, 'a shape between the plaintiff's legs which (despite the defendant's submission to the contrary) is certainly capable of being interpreted as a penis'. Because of the lighting and the manner in which the photograph has been cropped, the penises of Elias and Daley are not visible to the naked eye.

Ettingshausen immediately commenced defamation proceedings against the publisher of *HQ* magazine, Australian Consolidated Press Ltd (ACP). In their final form, Ettingshausen pleaded the following imputations:

> (a) The plaintiff deliberately permitted a photograph to be taken of him with his genitals exposed for the purposes of reproduction in a publication with a widespread readership.
>
> (b) The plaintiff is a person whose genitals have been exposed to the readers of the defendant's magazine 'H.Q.', a publication with a widespread readership.

These imputations were pleaded in the alternative. (Ettingshausen also pleaded, as a true innuendo, the imputation that 'he is unfit to hold [his position as a schools and junior development promotions officer by the New South Wales Rugby League] because of having posed for or allowed a photograph to be taken exposing his genitals for publication in the defendant's magazine'. The proof of this true innuendo required proof of the extrinsic fact, that Ettingshausen was known to have held such a position.)

At a separate trial, ACP challenged the capacity of the matter complained of to convey these two imputations and the capacity of imputation (b) to be defamatory. Examining the article in question,

Hunt J had no difficulty in concluding that the ordinary, reasonable reader could find that imputation (a) was conveyed on the available evidence. Kerr and Cochrane were accompanying the tour with the permission of the Australian Rugby League; the players were made aware of the purpose for which Kerr and Cochrane were accompanying them; Kerr particularly became familiar with the players.

In relation to imputation (b), Hunt J had no difficulty in finding that it was capable of being conveyed by the article. The more complicated question was whether it was capable of defaming the plaintiff. Hunt J acknowledged that the imputation did not purport to ascribe any moral blame to Ettingshausen. Nevertheless, Hunt J found that the imputation could be defamatory of Ettingshausen because, applying *Burton v Crowell Publishing Co*, it was 'capable of subjecting the entirely blameless plaintiff to more than a trivial degree of ridicule'.

Following this interlocutory decision of Hunt J, ACP published a 'qualified and seemingly reluctant' apology to Ettingshausen in the Summer 1991 issue of *HQ*. The apology purported to withdraw imputation (a). Not only was the apology couched in 'qualified and seemingly reluctant' terms, it was unfortunately placed on the same page as a large advertisement for condoms, 'Discrete Objects of Desire'.

At the trial itself, ACP maintained that the photograph in question did not show Ettingshausen's penis. On appeal, Gleeson CJ described this as 'a disingenuous attempt to deny the obvious'. The unusual forensic position adopted by ACP did, however, provide one of the most famous pieces of cross-examination in Australian legal history. Tom Hughes QC, counsel for Ettingshausen, cross-examined the editor of *HQ*, asking her for her opinion about the photograph. He used the opportunity to make a joke at the expense of her New Zealand accent:

> HUGHES: It is a penis isn't it?
>
> MARTYN: I assume if it is in that part of the body, may be it could be or it might not be.
>
> HUGHES: What else could it be … is it a duck?' (Hickie 1993c, Casimir and Squires 1993b, O'Neill 1993, Miller 1995: 111–12)

By contrast, the photographer, Brett Cochrane, readily conceded in cross-examination that Ettingshausen's penis was present and visible in the photograph (Hickie 1993d).

During the trial, Hunt CJ at CL refused to allow the defences of consent and statutory qualified privilege, pursuant to the *Defamation Act* 1974 (NSW) section 22, to be presented to the jury. In relation to the defence of statutory qualified privilege, Hunt CJ at CL was not satisfied that the publication of the plaintiff's penis — the 'lowest common denominator' of Ettingshausen's imputations — was reasonable in the circumstances. In relation to the defence of consent, Hunt CJ at CL found that ACP had failed to adduce evidence to prove that Ettingshausen consented to the photographic exposure of his penis, that he had consented to the use of that particular photograph in that particular magazine. The only defence Hunt CJ at CL allowed ACP to present to the jury therefore was the defence of unlikelihood of harm, pursuant to the *Defamation Act* 1974 (NSW) section 13. Unsurprisingly, given the onerous requirements of this defence and its infrequent success (*Morosi v Mirror Newspapers*, *Singleton v John Fairfax & Sons Ltd [No. 1]*, *Chappell v Mirror Newspapers*, *King and Mergen Holdings Pty Ltd v McKenzie*, *Jones v Sutton*, Gillooly 2004: 216–18), the jury rejected it.

At the first trial before Hunt CJ at CL, conducted over eight days in early February 1993, the jury found that imputation (a) and the true innuendo pleaded by Ettingshausen were conveyed and were defamatory. It was therefore unnecessary for the jury to consider imputation (b). The jury needed to deliberate for only an hour in order to award Ettingshausen $350,000 damages (*The Sydney Morning Herald* 12 February 1993, Ackland 1993).

The media response to the decision was one of incredulity and derision (O'Neill 1993, Strong 1993). Given the media response, Hunt CJ at CL felt compelled, two days after the jury verdict, dealing with an application brought by ACP for a stay pending an appeal, to take the somewhat unusual course of castigating the media for their reporting and analysis of the jury verdict, accusing them of unbalanced reporting of the outcome of the case arising out of their vested interests.

ACP appealed to the New South Wales Court of Appeal, which, by majority, dismissed the appeal as to liability but unanimously agreed that the quantum of jury's award of damages was manifestly excessive. A new trial was ordered, limited to the question of damages.

A retrial was conducted before Badgery-Parker J in early 1995. At the second trial, the jury awarded Ettingshausen only $100,000 damages (Dean 1995b).

Commenting after the second trial, Ettingshausen stated that he was satisfied with the outcome. He felt that the jury's verdict indicated to himself and the world at large that his 'morals', as well as his reputation, were intact. Ettingshausen claimed that the case demonstrated emphatically that he did not and would never pose nude for a magazine. Counsel for Ettingshausen, Tom Hughes QC, opined that '[s]elf-respecting people don't like being seen as a sort of a hunk of human flesh, a plaything'. Counsel for Australian Consolidated Press, Bruce McClintock, understandably expressed a markedly different view. He claimed that the publication of the offending photograph in *HQ* magazine had no effect whatsoever on Ettingshausen's reputation. McClintock also asserted that the article accompanying the photograph was overwhelmingly positive. Finally, McClintock noted that the nature and quality of the photograph meant that many readers may not have noticed the exposure of Ettingshausen's penis in the photograph until the publicity of the proceedings brought it to their attention (Dean 1995b).

Case study 2: *Shepherd v Walsh*

The decision of the Supreme Court of Queensland in *Shepherd v Walsh* provides a neat contrast to *Ettingshausen* in a number of respects. In *Shepherd v Walsh*, the plaintiff, Sonia Shepherd, sued over the publication of a naked photograph of her, accompanied by some lewd commentary, in the 'Home Girls' section of the 1 November 1995 edition of the *Picture* magazine. *Picture* was characterised by the trial judge in *Shepherd v Walsh* as 'a picture magazine of a salacious bent', comprised 'mainly of photographs of naked women and crass, and

essentially inane, stories relating to the photographs'. More succinctly, in similar proceedings, another judge described *Picture* as 'soft-core pornography' (*Obermann v ACP Publishing Pty Ltd*). The 'Home Girls' section publishes naked photographs of ordinary women who send them in for that purpose. It is the most popular segment of this magazine (Albury 1997: 19, 25 n 1). For their efforts, women who submit photographs can elect to have their faces obscured, in which case they are dubbed 'Bag Girls' and paid $75, or they can have their faces displayed, in which case they qualify as 'Home Girls' and are paid $150. Shepherd appeared as a 'Home Girl' with her face clearly visible.

The corresponding 'Home Blokes' section in the same magazine is less popular and less lucrative. It also has stricter identification requirements for its participants. Men who submit naked photographs of themselves must send a copy of some form of photographic identification, such as a driver's licence. Women simply clip and sign a coupon, indicating their consent, with no additional proof required. Jones J described the risk of misrepresentation as 'obvious'.

Such a misrepresentation occurred in this case — and it occurred deliberately. As an act of revenge, Shepherd's disgruntled ex-boyfriend, Anthony Patterson, encouraged his current girlfriend, Sonja de Vries, to submit the photograph with a coupon. De Vries then conducted a telephone interview with the editor to confirm her details.

Accompanying the photograph of Sonia Shepherd was the following text, which in no way reflected the *persona* of the plaintiff but instead substantially reflected the *persona* of Sonja de Vries:

> SONJA: Hervey Bay, Qld
>
> Age 22 and single with one girl ruggie, Sonja rates her favourite things as Pet Shop Boys, tenpin bowling, *Chicago Hope*, spaghetti and getting smashed on tequila slammers at the Pie every weekend. '*Where did you score your weirdest root, Son?*' 'At the end of the jetty at high tide.' '*Who would you like to get naked with?*' 'My next door neighbour.'

Shepherd did not consent to the original taking of the photograph. In fact, she claimed she was unaware of its existence. In the early 1990s her boyfriend at the time, Anthony Patterson, surprised Shepherd in

their bedroom and took the photograph in spite of her protestations. He assured Shepherd that there was no film in the camera when in fact there was. Shepherd believed him and did not check the camera for herself because Patterson quickly packed the camera away in their holiday luggage. Clearly, Shepherd did not consent to the publication of the photograph, nor did she give the brief interview which was attributed to her in *Picture*.

The publication of the offending photograph was exposed in this way. Mark Douglas, a friend of Shepherd's brother-in-law, first saw the photograph of Shepherd when he purchased the magazine prior to a fishing trip in November 1995. He telephoned the Jeppesens to alert them to the contents of the magazine. Shepherd first became aware of the existence of the photograph when she was informed by a letter from her sister, Helen Jeppesen, in December 1995 in the following terms: 'We saw that photo of you in that girlie magazine, and you call yourself a Christian. I don't believe anything you say.'

Shepherd commenced defamation proceedings in the Supreme Court of Queensland against the publisher, printer and distributor of *Picture*, as well as her ex-boyfriend, the fifth defendant. The publishing defendants admitted that they published the photograph and that the photograph was 'of and concerning the plaintiff'. All the defendants denied, however, that the publication of the photograph with the accompanying text was capable of being defamatory and that it was in fact defamatory of Shepherd. Otherwise, the defendants raised no defence. Given the nature of publication, Jones J unsurprisingly found in favour of Shepherd.

His Honour awarded Shepherd $50,000 compensatory damages against all five defendants but found that there were no grounds for an award of aggravated damages. However, Jones J did find that the fifth defendant, Shepherd's ex-boyfriend, had acted in contemptuous disregard of Shepherd's rights and, as such, deserved to have an award of exemplary damages imposed upon him, assessing the appropriate level of exemplary damages at $20,000. Shepherd may experience difficulty recovering these damages from Patterson as he did not file an appearance at the hearing.

The application of Post's conceptions of reputation to imputations of exposure to ridicule

Both *Ettingshausen* and *Shepherd v Walsh* centrally involve the concept of reputation as dignity. Both Andrew Ettingshausen and Sonia Shepherd felt that they had been portrayed in a ridiculous light by having naked photographs of themselves published without their consent and reacted adversely to it. At his first trial, Ettingshausen gave evidence that he found the photograph 'very offensive' and 'pornographic' (Hickie 1993a). At his second trial, he gave evidence that, almost four years after the photograph was originally published, he was still experiencing the repercussions. He was subjected to comments from team-mates, opponents and spectators; he was the subject of graffiti; he had been dubbed 'The Nudist' by radio sports commentators, 'Rampaging' Roy Slaven and H.G. Nelson. Ettingshausen gave evidence that he felt that he was compelled to overachieve on the sportsfield in order to obliterate the public memory of the photograph. He did, however, admit in the course of cross-examination that the publication had not harmed his football, television or radio career (Dean 1995a). Similarly, in her defamation proceedings, Sonia Shepherd gave evidence that she was 'shocked', 'upset', 'totally disgusted', almost suicidal, when she learned of the publication. She claimed, and it was accepted by Jones J, that the publication was a significant stressor on her already fragile marriage and it hastened the decline of that relationship. Her distress was revived first when she had to disclose the publication to her fiancée in order to explain her conduct of the defamation proceedings and again when she had to give evidence in her defamation proceedings. Thus, both Ettingshausen and Shepherd were complaining that the respective defendants' publications exposed them to ridicule and that this diminished their sense of self. In this way, both cases directly engage the concept of reputation as dignity.

The concept of reputation as dignity also arises in both *Ettingshausen* and *Shepherd v Walsh* by virtue of the fact that both publications may be construed as an invasion of privacy. Ettingshausen particularly viewed the publication of the photograph as 'a gross

invasion of [his] privacy' and brought his defamation proceedings in part to seek redress for it. This is problematic for a number of reasons, both at the level of principle and according to the particular facts of the case. At the level of principle, it is perhaps inappropriate to use defamation proceedings to vindicate a right to privacy, given that the sole interest directly protected by defamation law is the right to reputation (Watterson 1993: 812–13, Barendt 1999: 112–14, Beverley-Smith 2002: 249–50, Rogers 2002: [12.1]). The current contested status of an independent, enforceable right to privacy in Australian law tends to reinforce this (*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, *Grosse v Purvis*, *Kalaba v Commonwealth*, *Giller v Procopets*). Defamation proceedings may, however, provide an incidental measure of protection for the plaintiff's privacy, but this is premised upon damage to the plaintiff's reputation being at issue (*Chappell v TCN Channel Nine Pty Ltd*). In *Ettingshausen*, the plaintiff's interest in his reputation and his 'right' to privacy were unhelpfully confused.

On the facts of the case, Ettingshausen's claim that his 'privacy' had been invaded is also problematic. In cross-examination, Ettingshausen gave evidence that he objected to the photograph because 'it shows my genitals which I believe to be a very personal part of my body which I do not want to be shown to anybody' (Hickie 1993a).

He subsequently qualified that statement, acknowledging that he did not object to his wife seeing him naked. Likewise, he did not object to his team-mates seeing him naked. He also accepted that he knew of Cochrane's role as official team photographer and that Cochrane was taking photographs of the Kangaroos in the locker-rooms and the showers. Nor did Ettingshausen object to all displays and representations of the penis. For instance, he accepted in cross-examination such displays and representations of the penis may be appropriate or inoffensive, depending on the context, citing a medical encyclopaedia as an example (Hickie 1993a). What Ettingshausen essentially objected to was the selection of the particular photograph for use in *HQ* magazine. It was this act, not the other acts which entailed

the exposure of his penis, that seemed to have constituted the invasion of privacy.

This starkly reveals two interrelated features of *Ettingshausen*. Firstly, it demonstrates the problematic nature of discourses surrounding privacy. Like dignity, notions of privacy are highly subjective. Moreover, the boundaries of what is private (and, by implication, what is public) are not rigidly defined. For Ettingshausen, his body was not entirely private — some could look, some could not. The activity he was engaging in, showering after a game, was private but this did not occur in an entirely private space — it was a communal shower to which team officials, including photographers, were allowed access (cf *Vernonia School Dist. v Acton*). Ettingshausen wanted to control for himself what personal aspects of his body, his activities, his spaces were private and public (McKee 2001: 286). ACP's conduct was an interference with his autonomy as well as his reputation, his dignity and his privacy.

Secondly, as Miller argues (1995: 132–7), *Ettingshausen* demonstrates a fundamental cultural anxiety surrounding the exposure of the penis. This 'cultural anxiety' does not extend to female nudity. It is largely absent from *Shepherd v Walsh*. Whilst judges and advocates strongly condemned the invasion of privacy Ettingshausen was subjected to by having a grainy, black-and-white photograph of his body, including his indistinct penis, published in a magazine, particularly ACP's conduct, the same censure was not evident in *Shepherd v Walsh*, where a more revealing colour photograph of the plaintiff had been reproduced and circulated again by ACP. Yet the defendants' conduct in *Shepherd v Walsh* equally amounted to an invasion of Shepherd's privacy with adverse consequences for Shepherd's dignity.

Both Ettingshausen and Shepherd were also complaining about an intrusion on their dignity and autonomy in another related sense. Neither Ettingshausen nor Shepherd apparently objected to nudity *per se*. The gist of their complaints was that a naked photograph of them had been published without their consent. They were fundamentally objecting

to the way in which they had been portrayed. By publishing the naked photographs of the plaintiffs, the defendants had interfered with the plaintiffs' dignity and autonomy, their right or desire to control the manner in which they are portrayed. Whilst Ettingshausen, with his higher public profile, clearly had more at stake, Shepherd, through her defamation proceedings, also manifested this desire.

Yet the concept of reputation as dignity only provides a partial explanation for the reputation and the damage done to it involved in these two cases. By a judge or jury, as relevant, finding that the physical exposure of the plaintiff's body by the defendant was defamatory, the judge or jury is reflecting and at the same time imposing a value judgment about the morality of publicly mediated nudity. This explains, in part, the nature and the vehemence of Ettingshausen's subjective reaction to the photograph in *HQ* magazine — he would not have willingly participated in a photograph he characterised as 'very offensive' and 'pornographic' (Hickie 1993a). Indeed, Ettingshausen himself stated that he felt that his 'morals' had been vindicated by the jury verdict (Dean 1995b), suggesting that he generally viewed such photographs as immoral. Likewise, Shepherd would not have consented to the taking and the publication of the photograph. Indeed, in addition to the imputations based on portrayal in a ridiculous light, Shepherd also pleaded that the publication conveyed the imputation that she would expose herself for financial gain and that she was promiscuous.

Yet both of these value judgments are contestable in contemporary Australian society. For example, Ettingshausen's claim that the publication of the naked photograph adversely affected his reputation seems inconsistent with the increasing use of the physical attractiveness of sportsmen to market professional sport — including the liberal use of male nudity. Differing opinions arose at the time of *Ettingshausen* itself. Former Balmain Tigers captain, Wayne Pearce, gave evidence at the first trial in *Ettingshausen* that he was 'repulsed' by the sight of Ettingshausen's penis in *HQ* magazine. Asked to explain his reaction, Pearce responded: 'I wouldn't want my pecker in the paper' (Hickie 1993b, O'Neill 1993).

Responding to Ettingshausen's claim and Pearce's evidence, former Western Suburbs stalwart, Tommy Raudonikis, made the following offer: 'I'll drop my ol' fella out anytime anywhere for that kind of money' (O'Neill 1993).

Yet the professionalisation and commercialisation of sport has led, since the mid-1980s, to the commodification and exploitation of the bodies of sportspeople, both men and women. Importantly, this process of commodifying and exploiting the bodies of sportspeople explicitly involves the sexualisation of their bodies. The logic is clear enough — sex sells, as the advertising adage goes, so use sex to sell sport. Fortunately, with sportspeople, there is generally the advantage of having healthy and attractive bodies to exploit.

The trend towards marketing professional sport based on the physical attractiveness of its participants has been particularly noticeable in relation to male-dominated sports, such as rugby league. The impetus for this development was the need to expand the sport's market share by appealing to women, a group which generally felt excluded from the working man's game, rugby league, thereby aiming to secure rugby league as a family-friendly sport (Yeates 1995: 39, Turner et al 2000: 57–9). In order to attract female spectators, the public relations officer for rugby league, Brian Walsh, selected the photogenic Pearce to become the public face of rugby league. When Pearce retired, Ettingshausen, described by Walsh as 'young, great looking, articulate, clean image', replaced Pearce (Turner et al 2000: 58). His task was 'giving a sexy image to the blokey sport' (Will 1997). Brian Walsh also handled Ettingshausen's personal public relations (Walsh 1992). With the assistance of his personal management and the management of the rugby league administration, Ettingshausen consciously exploited his physical attractiveness.

Thus, Ettingshausen was at the forefront of this trend. In 1991, Ettingshausen was on the front cover of the inaugural 'Men of League' calendar (Walsh 1992). He also acknowledged in cross-examination that he had modelled extensively, often shirtless (Hickie 1993a). Since its inception, the 'Men of League' calendars have been regularly

produced, helping to raise the public profiles of the individual players and the sport generally.

The list of sportsmen who have posed nude is long and growing longer. It is now seemingly *de rigueur* for professional sportsmen to produce 'beefcake' calendars. Another football code, Australian Rules, has produced an annual 'Men for All Seasons' calendar, for over a decade. Male and female Australian Olympians now line up to pose nude for 'coffee table' books which precede each summer Olympic Games (Studio Magazines 1996, 2000, 2004). Australian Rules footballer Warwick Capper, cyclist Martin Vinnicombe and rugby league player Chris Caruana were all centrefolds for women's magazine, *Australian Women's Forum* (*Australian Women's Forum* March 1993, May 1993, June 1996, Casimir & Squires 1993a, 1993c, 1993d, Borham 1993b, Smith 1996, Koch 1996). The attempt to attract women as an audience for traditionally male sports has had the incidental effect of attracting another audience normally excluded, gay men. When high-profile rugby league player, Ian Roberts, 'came out', he did so by posing nude for a gay magazine (James 1995, Freeman 1997: 259ff, cf Miller 2001: 72–3). The Australian Rugby League realised it could raise its profile (and its revenue stream) by specifically targeting gay men as a potential audience (Cunningham et al 1994: 69, McKee 2001: 284–5). Now even heterosexual footballers like the former Canterbury-Bankstown Bulldogs captain, Steve Price, married with children, will voluntarily pose nude for an Australian gay magazine with minimal public reaction (Lord 1999). As Kirby P, as His Honour then was, noted: '[c]ommon experience demonstrates that male nudity is now much more frequently seen in books, magazines, television, video and film than was formerly the case'.

Against this background, it is difficult to accept that the publication of a naked photograph of a sportsman is necessarily immoral. There is no uniform moral or social standard on the acceptability of publicly mediated nudity by sportsmen.

Equally, there is arguably no uniform moral or social standard in relation to publicly mediated nudity of ordinary people — or non-

celebrities. Just as celebrities, in particular sportspeople, are more willing to pose nude (Barcan 2004: 241–8), there is also a trend towards ordinary people participating in this phenomenon. As Barcan argues (2004: 262–8), *fora* such as the 'Home Girls' pages where the photograph of Sonia Shepherd appeared are designed to allow ordinary people to pose nude, just like celebrities increasingly do. For Barcan (2000: 145–6), the 'Home Girls' pages and its equivalents attest to the democratisation of celebrity that has occurred in a post-modern society — a celebration of celebrity, an emulation of celebrity, a participation in the production of celebrity and yet, in its ordinariness, an ambivalent rejection of celebrity. The 'Home Girls' section of *Picture* is nominated by readers as their favourite part of the magazine and it attracts approximately 50 entries per week (Barcan 2000: 148), suggesting that there are a not insubstantial number of people within the community who have no particular moral problem with this activity. Thus, whilst both *Ettingshausen* and *Shepherd v Walsh* partly involve reputation as honour, the liberalisation and fragmentation of social attitudes towards publicly mediated nudity, by both celebrities and 'non-celebrities' alike, mean that it is difficult to posit a uniform moral or social standard by which to assess such conduct.

These cases also manifest in part a notion of reputation as property. Post suggests that the concept of reputation as property can be applied to the reputations acquired by individuals in non-professional contexts. He argues that social interactions with others is a form of labour requiring skill and effort and consequently the product of that labour, reputation, can be construed as an asset (Post 1986: 694–5). In this way, it could be suggested that Shepherd's reputation amongst her family, friends and work colleagues was an asset she possessed and could protect by means of defamation proceedings. Ettingshausen's reputation is more readily identifiable as a form of property. As journalists have noted, Ettingshausen has assiduously cultivated and vigilantly protected his public profile over a number of years (Kent 2000). Through his professional career in rugby league, Ettingshausen has obviously created a reputation as an elite sportsman. However, in

addition to this profile, and as a consequence of it, Ettingshausen has been offered a range of other opportunities, often unrelated to sport, to enhance and diversify his reputation. Supported by professional personal management and the professional management of the rugby league administration, as well as by his own endeavours, Ettingshausen has clearly developed a valuable reputation. In this sense, Ettingshausen's reputation is also a form of property. The difference in value between Shepherd's and Ettingshausen's reputations, however, indicates a fundamental difference in their respective reputations, a difference, it is submitted, that is best explained by recourse to the concept of reputation as celebrity.

The concept of reputation as celebrity and imputations of exposure to ridicule

Superficially, *Ettingshausen* and *Shepherd v Walsh* bear many similarities. Yet there is clearly a qualitative difference between the cases and, more fundamentally, the reputations of the respective plaintiffs. It is submitted that, whilst Post's reputational schema might adequately explain the reputational interests of Sonia Shepherd involved in her defamation proceedings, it does not adequately explain those of Andrew Ettingshausen. Consequently, it cannot explain why their reputations are qualitatively different. It is further suggested that the answer lies in the fact that Ettingshausen is a celebrity — and Shepherd is not.

The concept of celebrity has been the subject of considerable analysis from a variety of academic perspectives — cultural studies (Marshall 1997, Turner 2004); film studies (Schickel 1986); economics (Cowen 2000); history (Braudy 1997, Ponce de Leon 2002); media studies (Turner et al 2000); psychology (Giles 2000); and sociology (Gamson 1994, Rojek 2001). These critical perspectives have not yet been brought to bear on defamation law generally and the concept of reputation specifically. This article seeks to illuminate the possibilities of applying these understandings of celebrity to defamation law.

Post suggests that reputation as honour and dignity presuppose that people are related through the mechanism of society and that reputation as property presupposes that people are related through the mechanism of the marketplace. In a similar way, theorists of celebrity contend that celebrities are connected to their audiences through the mechanism of the media (Gamson 1994: 5, Rojek 2001: 9). As Rojek observes, 'media representation is the basis of celebrity' (Rojek 2001: 16).

Daniel Boorstin's highly influential definition of a celebrity as 'a person who is known for his well-knownness' remains apposite (1992: 57). It gestures towards a fundamental feature of celebrity: its generation and sustenance by the media. Whereas reputation as honour is generated and sustained by pre-ordained social status and roles, whereas reputation as property is generated and sustained by personal exertions in the marketplace, celebrity is generated and sustained by and in the media. Moreover, according to Marshall, celebrity confers a 'discursive power' on its subject — a power to shape, generate and participate in public discourses (Marshall 1997: x). This 'discursive power' confers on celebrities, in the context of defamation, the capacity to create, cultivate and defend their reputations more openly and more effectively than non-celebrities.

There are a number of ways in which Ettingshausen's celebrity distinguishes his defamation proceedings from those of Shepherd. For instance, there is a clear difference in the level of damages awarded. It is often stated that awards of damages vary widely, reflecting the highly subjective, and radically different, nature of each individual reputation. Ettingshausen was originally awarded $350,000 damages, which was subsequently reduced to $100,000 damages, comprising compensatory and aggravated damages; Shepherd received $50,000 compensatory damages and $20,000 exemplary damages. Given that exemplary damages for defamation are no longer available in Australia (see, eg, *Defamation Act* 2005 (NSW) section 37), the proper basis for comparison of these two awards requires the component of exemplary damages from Shepherd's award to be excluded. On the basis of the ultimate verdict (and not taking into account inflation), Ettingshausen's

award was twice that of Shepherd; on the basis of the original verdict, it was seven times that of Shepherd.

Even taking Ettingshausen's favourable verdicts alone, there is a real issue of whether the damage to any man's reputation as a consequence of a photograph of his penis was worth $100,000, let alone the original verdict of $350,000. The original verdict sparked criticism from the media, the public and members of the legal fraternity (Dixon 1993, O'Neill 1993, Strong 1993, Jurman 1993a, 1993b). On appeal, Kirby P noted that plaintiffs claiming permanent, physical disfigurement and disability would have received substantially less damages than Ettingshausen did for his comparatively ephemeral injury. Indeed, the verdict was cited as an impetus for defamation law reform, particularly in relation to the removal of the function of assessing damages from the jury (*Defamation Act* 1974 (NSW) section 7A(4)(b) (repealed); see now *Defamation Act* 2005 (NSW) section 22(3)) and the introduction of the requirement for judges assessing defamation damages to take into consideration the level of personal injury damages (*Defamation Act* 1974 (NSW) section 46A(2) (repealed); see now *Defamation Act* 2005 (NSW) section 35). No such concern attended the quantum of damages awarded to Shepherd.

The difference between the damages awarded to Ettingshausen and Shepherd — whether they be distinguished by a multiple of two or seven — indicates the difference in reputation between the plaintiffs. As counsel for Ettingshausen, Tom Hughes QC, observed to the jury at the first trial, '[t]he bigger they are, the harder they fall' (O'Neill 1993). In other words, plaintiffs with high public profiles are likely to have greater damage done to their reputations than plaintiffs without high public profiles. The logic of defamation law on this point is not incontrovertible. It is equally plausible to argue that plaintiffs with high public profiles have greater access to *fora*, such as the media, by which they can rebuild their reputations or at least overwhelm any actual damage done to their reputations by the publication of defamatory matter.

Indeed, Raudonikis' observation about Ettingshausen's defamation proceedings, that Ettingshausen's celebrity status had allowed him greater access to justice than the average person, tends to support this:

> If [Ettingshausen] can get that much then good luck to him. But really the average person, a battler, can't go and sue a big company like that because he hasn't got the money to do it in the first place (O'Neill 1993).

Raudonikis' point might be extended beyond the simple observation that 'the average person' confronts barriers to access to justice to the further point that he or she also confronts barriers to *fora*, not only the courts but also the media, wherein he or she might attempt to rebuild their reputations.

The sharp difference between the reputations of Ettingshausen and Shepherd — and the importance of Ettingshausen's celebrity — becomes noticeable in relation to the identification of the plaintiff in the respective cases. Named in the article, Ettingshausen was regarded by the judges, both at first instance and on appeal, as famous. The trial judge, Hunt J, described him as 'a well-known Rugby League footballer' who represented Australia in international competitions and the presiding appellate court judge, Gleeson CJ, described him as 'a prominent rugby league footballer'. Ettingshausen was not only identifiable and identified but his reputation was also known. There was no such recognition for Shepherd. Shepherd was not sufficiently identified by the matter in question — only her given name was used and the accompanying description of her corresponded to the personality of Sonja de Vries. She was required to provide particulars of identification. Even when Shepherd had established the defendants' liability, including identification, the scope of identification became crucial to the assessment of damages. Whereas in *Ettingshausen*, there was simply reference made to the extent of publication through the citation of circulation figures for *HQ* magazine, in *Shepherd v Walsh*, Jones J undertook an extensive review of the evidence in an attempt to establish the number and classes of persons who, actually or inferentially, identified Shepherd. Jones J also geographically confined the areas in which damage to Shepherd's reputation may have occurred

to those three locations where Shepherd had recently lived — Adelaide, Cairns and Hervey Bay — but ultimately finding that the greatest harm to Shepherd's reputation had occurred in Hervey Bay. Unlike Ettingshausen, Shepherd's reputation was not known and recognised as such by the court and it was certainly not considered to be nationwide. The fact that Ettingshausen was immediately recognisable (and that Shepherd was not) further explains the difference in media attention the two litigants received.

There was a large amount of publicity surrounding the trial (Hickie 1993a-e, Casimir et al 1993b, Dixon 1993, *The Sydney Morning Herald* 12 February 1993, Borham 1993a), the appeal (Hickie 1993f-g, Curtin 1993) and the retrial (Dean 1995a-b) of Ettingshausen's case. It even attracted international media attention (Milliken 1993). As *The Sydney Morning Herald* observed in its editorial:

> All court proceedings are part-theatre. But, as the daily reports of the Ettingshausen case vividly show, none is more theatrical than a defamation proceeding (12 February 1993).

However, contrary to the editorialist's view, not all defamation proceedings are 'theatrical'. *Shepherd v Walsh* does not meet this description. In contrast to *Ettingshausen*, there was apparently no publicity surrounding Shepherd's case and thus no 'media circus' similar to the one that attended Ettingshausen's proceedings.

The fact that Ettingshausen's defamation proceedings were conducted in the full glare of the media spotlight, whilst Shepherd's case was not, necessarily has an impact on the purposes served by the defamation proceedings and the effectiveness of the defamation trial in serving those purposes (*Uren v John Fairfax & Sons Pty Ltd*; *Carson v John Fairfax & Sons Ltd*; *Rogers v Nationwide News Pty Ltd*). Shepherd's defamation proceedings presumably achieved the vindication and consolation she desired. Indeed, Jones J awarded damages at the lower end of the scale because the passage of time had negatived, to some extent, the damage wrought to her family and social relationships by the publication of the photograph in *Picture*. Ettingshausen's defamation proceedings have not had such finality.

This suggests that Ettingshausen's reputation is fundamentally different. Not only is it larger, enjoyed on a wider scale, it is in part beyond Ettingshausen's control. It has a cultural significance in popular culture. It was created and cultivated in, by and through the media; it now belongs in part to that realm.

The media attention itself was the result of Ettingshausen's creation and cultivation of a public profile. Ettingshausen was not merely a footballer. He and his management had constructed a complex public profile — footballer, representing Australia and New South Wales (Heads 2000: 52–75), fiercely loyal to his Cronulla-Sutherland Sharks club team (Heads 2000: 20–43, Will 1997); family man (Heads 2000: 106–11, O'Neill 1993, Will 1997); sex symbol; model (Heads 2000: 76–7, 80–1); radio commentator (Walsh 1992); television presenter (Walsh 1992, Kent 2000); actor (Heads 2000: 84–5); businessman; gym owner (Borham 1993c); a role model and a paragon of 'clean living' (Kent 2000). The blurb of the authorised video produced to commemorate his retirement from professional rugby league, *The E.T. Story: The Life and Career of Andrew Ettingshausen*, reinforces the complexity of Ettingshausen's reputation as part of his own design, promising as it does an exploration of 'the amazing career of Andrew Ettingshausen the player, the role model, *the sex symbol*, the family man' (emphasis added).

Ettingshausen's reputation is complex because he has had so many opportunities over almost two decades which have allowed him to expand, diversify and exploit his reputation. In August 1992, readers of *Cleo* magazine, also owned by ACP, voted Ettingshausen the sexiest man alive. He was thus described: '[t]he hair is by Sampson [sic], the face by Rubens, the smile by Colgate and the body by Michelangelo' (*Cleo* 1992). Over the years, Ettingshausen has endorsed a wide range of products, including Jeans West, Nissan, Shimano, Grace Bros, Aussiesoft Computers, Asics/Tiger, Hero Cologne, instant lotteries and Cebe (Heads 2000: 82). He has modelled extensively (Heads 2000: 82–3) and acted occasionally (Gambotto 1991: 108, Heads 2000: 82). As a result of his widely-publicised interest in fishing, Ettingshausen has been a spokesperson for the state government body, New South

Wales Fisheries. He has also been a spokesman for the Road Safety Council (Gambotto 1991). Upon his retirement from professional rugby league, there were bipartisan congratulations in the New South Wales Legislative Assembly. Ettingshausen is currently the presenter and executive producer of the long-running television program devoted to fishing, *Escape with ET*, formerly on Channel Nine, currently on Network Ten.

Ettingshausen possesses a complex reputation, largely because he has constructed a complex reputation. Part of Ettingshausen's strategy for constructing and preserving his reputation was the defamation trial itself. It was unfortunately not entirely successful. Nevertheless, Ettingshausen's public profile — his reputation — is not simply a piece of property, a piece of goodwill — it is more than that. Ettingshausen has acquired celebrity — something beyond property. He has cultivated a reputation, which he exploits for gain, but that reputation is also public 'property' beyond his control.

A clear demonstration that his reputation is largely beyond his own control is provided by the fact that Ettingshausen's defamation proceedings have had a lasting impact, whereas Shepherd's case has not. For example, Ettingshausen's defamation proceedings have a continuing cultural resonance that Shepherd's defamation proceedings lack. In 1993, prolific Australian playwright, David Williamson, included a reference in his play, *Brilliant Lies*, alluding to the Ettingshausen case. One of the characters, Susy, has brought a sexual harassment claim against her employer, Gary, for fondling her breasts. During the mediation, she is asked how much she would settle the case for and responds by nominating $40,000 as the figure. When those present express their surprise, Susy responds thus:

> High figure? Why is it a high figure? Some football hero got three hundred and fifty thousand 'cause a magazine photographed his dick! (Williamson 1993: 35)

The fact that Williamson could include an allusion, rather than a direct reference, indicates that the incident had already achieved some cultural currency.

Over 10 years after the publication of the original photograph, the left-leaning columnist, Tony Moore, writing about a perceived explosion in litigation, branded Australia 'a nation of sooks', citing as one of his examples Ettingshausen. In relation to *Ettingshausen*, he observed that:

> Defo remains a profitable way for the rich and famous to remain, well, rich and famous. Remember Andrew Ettingshausen earning a cool $100,000 on appeal when he took offence at a shower shot in *HQ* magazine? Would a factory worker's severed finger be worth as much as this photo-shy member? (Moore 2002: 6)

Ettingshausen's defamation proceedings have also been influential in legal terms. They encouraged others to sue and his imputations formed the precedent for prospective litigants' pleadings. Indeed, the central imputation in *Shepherd v Walsh* was explicitly based on the imputation of exposure to ridicule originally approved by Hunt J. In addition to Sonia Shepherd, a number of other plaintiffs were influenced by Ettingshausen's precedent and thus commenced their own defamation proceedings. An accountant who had posed nude for prominent Australian artist, Donald Friend, sued the Australian Broadcasting Corporation over a documentary in which this event was portrayed (*Haines v Australian Broadcasting Corporation*). Another rugby league player sued a local newspaper for publishing photographs in which part of his penis was exposed during a tackle (*McDonald v The North Queensland Newspaper Co Ltd*). An Australian representative water polo player sued the *Picture* magazine over a photograph in which her breasts were accidentally exposed during the course of a match (*Obermann v ACP Publishing Pty Ltd*). All of these cases relied explicitly upon what was described as 'the *Ettingshausen* imputation'.

Ettingshausen hoped that *that* photograph would fade from the public memory and that he would be remembered for other things. In this regard, Ettingshausen has been particularly fortunate. As a celebrity, he has had a wide range of opportunities available to him whereby he can attempt to promote an image of himself which can overwhelm the memory of *that* photograph. Yet media commentary about Ettingshausen still routinely refer to his defamation proceedings, almost

a decade after their resolution (Will 1997, Kent 2000, Moore 2002). Interestingly, in the authorised photo book celebrating Ettingshausen's 18-year first-grade rugby league career, the author, Ian Heads, makes no mention of the defamation trial (Heads 2000). However, in the accompanying video, the defamation trial is mentioned, albeit only briefly. Thus, even Ettingshausen, reviewing his public profile over 18 years, is compelled to acknowledge that his defamation proceedings not only occurred but now form part of his reputation.

After *Ettingshausen*: Paul Hasleby

The *Ettingshausen* imputation and the popular memory of Ettingshausen's defamation litigation were recently revived yet again when, in mid-May 2003, a photograph of an Australian Rules footballer, Paul Hasleby, from the Fremantle Dockers, was published in the early edition of *The West Australian* newspaper. The photograph, taken of Hasleby during play in a game against the North Melbourne Kangaroos and published as part of a preview of an upcoming fixture against the Western Bulldogs, showed the head of Hasleby's penis protruding slightly from his football shorts (O'Donoghue 2003, Coghlan 2003a, Timms 2003a, *The Mercury* 14 May 2003). *The West Australian* realised its mistake and airbrushed the photograph for its late edition but not before it was noticed by other media outlets. The circulation of the early edition of *The West Australian* was estimated to be approximately 175,000 copies (Coghlan 2003a). In the days following, the incident was the subject of intense discussion on Perth talkback radio (Timms 2003b). Then Channel Ten's nationwide light entertainment television program, *The Panel*, showed the photograph, uncut as it were, and used it as the fodder for banter (Beacham 2003). Hasleby threatened defamation proceedings against West Australian Newspapers Ltd based on the *Ettingshausen* precedent, but settled out of court, allegedly for the sum of $30,000 (Beacham 2003), which Hasleby promptly donated to an unnamed Perth children's medical charity. *The West Australian* also published an apology to Hasleby and any offended readers (*The*

West Australian 14 May 2003). Less impressed by *The Panel*'s conduct, Hasleby considered launching defamation proceedings against the show's producers, Working Dog Productions, presumably for substantially more money (Beacham 2003). Hasleby's embarrassing incident even reached the British, American and German press (*The Daily Star* 18 May 2003, Hoffmann 2003, *Deutsche Presse-Agentur* 14 May 2003). Hasleby's threat of defamation proceedings attracted some supportive editorial comments (Price 2003) but also received some savage ones (*The Sunday Tasmanian* 18 May 2003, Salusinszky 2003).

Significantly, in Australia, the reporting of Hasleby's unfortunate slip referred extensively to Ettingshausen's defamation proceedings (*Courier-Mail* 13 May 2003, Williams & Hurt 2003, *The Sunday Tasmanian* 18 May 2003, Salusinszky 2003). This is understandable, given that Hasleby was another footballer, albeit from a different code, complaining that a publisher had printed a photograph of (at least part of) his penis. However, the approach to this situation adopted by Hasleby and his management was clearly influenced by Ettingshausen's case. Having witnessed the adverse public reaction to Ettingshausen's defamation proceedings, Hasleby's manager, Wayne Loxley, adopted the prudent course of negotiating a speedy settlement rather than embarking on the fraught course of lengthy, contested litigation, which would only have provided fodder for the media. As such, it seems unlikely that this incident will occupy as central a place in Hasleby's reputation — in Hasleby's celebrity — as Ettingshausen's defamation proceedings occupy in his.

The occasion of Hasleby's threatened defamation proceedings caused the media to ask how Ettingshausen himself felt about his own litigation after the passage of almost a decade. Speaking after the second jury verdict in early February 1995, Ettingshausen was emphatic that he had adopted the correct course, further stating '… if it ever happened again, I definitely would do exactly the same' (Dean 1995b).

Although Ettingshausen himself refused to comment at the time of the Hasleby incident, a close friend of Ettingshausen, John Dunphy,

told a newspaper that 'although Ettinghausen believed he made the right choice at the time, justice had come at a significant price' (Coghlan 2003b). Dunphy continued, 'With hindsight, I'm not sure he would do it again …. But he wanted to make a point. He felt his privacy had been invaded' (Coghlan 2003b).

It appears that Ettingshausen and sporting penises have become inextricably linked. His defamation proceedings — the photograph, the first trial, the excessive jury verdict, the retrial — have now become part of his reputation. Yet the use of the defamation trial in part to police the presentation of one's image is paradoxical. Ettingshausen succeeded, so the verdict vindicated his position. Yet the defamation trial itself and the extensive publicity which attended it necessarily becomes part of Ettingshausen's reputation, such that any balanced, complete account of his career cannot avoid reference to it. The trial itself, as well as the publicity, as public events, therefore become part of the public domain, to be debated and discussed. Ettingshausen cannot control this debate — and thus cannot control his reputation.

Overview

It is perhaps paradoxical that plaintiffs who complain that a publication of a naked photograph exposed them to more than a trivial degree of ridicule seek to assuage the insult to their dignity by agitating the issue, and thereby re-agitating the insult, in the very public forum of the courtroom. This observation was first made almost 70 years ago in *Burton v Crowell Publishing Co*, when Learned Hand J concluded his judgment, cynically or realistically, depending on one's point of view, by presciently noting that '[p]ossibly any one who chooses to stir such a controversy in a court cannot have been very sensitive originally, but that is a consideration for the jury'.

For a plaintiff like Sonia Shepherd, defamation proceedings are presumably effective. Even if they are not, Shepherd has few other alternatives. For a plaintiff like Andrew Ettingshausen, defamation proceedings are less effective as a means of 'vindicating' and

'protecting' his reputation. He may have been awarded substantial damages for what he perceived as a photograph that damaged his reputation, yet the real damage to his reputation seems not to have arisen from the publication of the photograph but from his decision to pursue the matter through the courts. However, whilst defamation proceedings may prove to be an ineffective means of restoring reputation for celebrities like Ettingshausen, they can seek solace in the fact that they have other *fora*, such as the media, in which to begin the process of rebuilding their own reputations.

Ettingshausen appears to be an example of winning the defamation battle but losing the reputational war. As Gleeson (2003) has observed: 'ET simply made too much fuss. He wasn't a good sport.'

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