

Contents

<i>Table of Cases</i>	xv
Introduction	1
I. The Inquiry	1
II. Reputation, Defamation, and the Law	2
A. The current legal framework	2
B. Problems with the current legal framework	3
III. Scope and Structure: An Overview of the Study	6
A. The scope of the study	6
B. An overview of the study	8
1. <i>Part I: Theorizing reputation</i>	8
2. <i>Part II: History, law, and reputation</i>	9
3. <i>Part III: Reputation and actionable defamation in the modern common law</i>	10
I. THEORIZING REPUTATION	
1 Reputation and Community: The Centrality of Moral Judgment	15
I. The Choice of Analytical Category: Reputation or Defamation?	15
II. Defining Reputation: The Literature and the Legal Framework	19
A. Analyses of reputation in the literature	19
B. Legal and social constructs of reputation	21
III. The Concept of Community	22
A. Community, modernity, and the individual	23
B. 'Community' in sociology	24
C. 'Community' in political philosophy	26
1. <i>Liberalism and the communitarian critique</i>	27
2. <i>Common ground and disagreement</i>	29
D. The significance of understanding community	30
IV. Reputation, Moral Judgment, and the Constitution of Community	31
A. 'Legal' reputation and moral judgment	31
B. 'Real' reputation and moral judgment	33
C. Contested norms: The visibility of moral judgment	34
Conclusion	35
2 Moral Judgment and Conceptions of Reputation	37
I. Reputation and Property	38
A. Legal foundations	38
B. Philosophical coherence	40
C. The material worth of a good reputation	42

II. Reputation and Personality	42
A. The concept of honour 43	
1. <i>The limits of 'reputation as honour'</i> 43	
2. <i>A richer sense of honour: social worth and self-worth</i> 44	
B. Honour and moral judgment 46	
1. <i>Aristocratic honour</i> 46	
2. <i>Honour outside the aristocracy</i> 48	
C. Ethnographies of honour as moral taxonomies 51	
D. Honour, dignity, and moral taxonomies 54	
1. <i>The substance of criteria for moral judgment</i> 54	
2. <i>The bases or sources of criteria for moral judgment</i> 55	
Conclusion	56

II. HISTORY, LAW, AND REPUTATION

3 Reputation and the History of Defamation	61
I. Law and Reputation	62
A. Relationships between law and reputation 62	
B. Moral taxonomies in early modern England 65	
II. Reputation and Defamation Outside the Common Law	68
A. Defamation in the local courts 68	
B. Defamation in the ecclesiastical courts 71	
C. <i>Scandalum magnatum</i> : defamation and the great men of the realm 75	
Conclusion	79
4 The Development of the Common Law Actions	81
I. Reputation and Defamation Under the Early Common Law	81
A. The rise of the King's justice: the common law to 1648 81	
B. The influence of the Star Chamber on the common law 85	
1. <i>The Case de Libellis Famosis</i> 86	
2. <i>Thorley v Kerry and the legacy of the Star Chamber</i> 89	
II. The Common Law's Claim to Protect Reputation	91
A. A conceptual shift: the intrinsic value of reputation 92	
B. Scientific method and defamation law 94	
1. <i>The rise of scientific method</i> 94	
2. <i>The law as it was stated in the treatises</i> 97	
C. Shaping the modern common law 99	
Conclusion	101

III. REPUTATION AND ACTIONABLE DEFAMATION IN THE MODERN COMMON LAW

5 Protecting Reputation: The Principal Test for What is Defamatory	107
I. The Centrality of Moral Judgment in the Principal Test	108

A. The early application of the 'hatred, contempt, or ridicule' test	108
B. Articulating the standards of judgment: 'The right-thinking person'	110
C. Moral taxonomies and the principal test	112
1. <i>Moral taxonomies in the 19th century</i>	113
2. <i>Traditional values and the legal framework</i>	115
II. Competing Moral Taxonomies in a Jurisdiction	117
A. The general standards approach	117
B. The sectional standards approach	120
C. Adopting a sectional standards test	122
D. The qualitative question	124
III. The Ethical Recognition of Criteria for Moral Judgment	124
A. The limiting function of ethical recognition	125
B. The refusal of recognition in the informing cases	128
1. <i>The positive ethical status of informing</i>	129
2. <i>The place of public policy considerations</i>	132
C. Recognition in the informing cases	134
1. <i>The negative ethical status of informing</i>	134
2. <i>The character of the publication: informing, disloyalty, and treachery</i>	136
Conclusion	138
6 The 'Shun and Avoid' Test as the Basis for Actionability	141
I. Distinguishing Between the Principal and Supplementary Tests	141
A. The statements of law	141
B. The moral fault distinction and lines of authority	142
II. A Critique of the Moral Fault Distinction	144
A. <i>Youssoupoff</i> : Chastity and 'moral discredit'	144
B. Moral discredit, moral fault, and moral worth	146
C. Ethical recognition in the 'shun and avoid' test	148
III. Lines of Authority: Disease and Insanity	150
A. Disease: The influence of slander on libel	150
1. <i>Written allegations of disease in the 18th century</i>	150
2. <i>Disease imputations after Villers v Monsley</i>	152
B. The uncertain moral status of insanity	154
1. <i>The insanity cases</i>	154
2. <i>The place of the insanity cases in the legal framework</i>	155
Conclusion	158
7. The Ridicule Test as the Basis for Actionability	161
I. Formation: The Origins and Early Application of the Test	162
A. The earliest decisions: <i>Mason, Cropp</i> , and <i>Villers</i>	162
B. From the 19th to the 20th century	164
C. The legal position by the 1930s	166

II. Expansion: from Social Worth to Self-Worth	169
III. Settlement: the Focus on Form, the Protection of Self-Worth, and the Failure to Explain the Connection Between Ridicule and Reputation	172
A. Decline and revival	172
B. Ridicule in the absence of moral fault or immoral association	173
1. <i>The photograph cases</i>	173
2. <i>The written cases</i>	176
IV. Satire and Actionability Under the Ridicule Test	180
A. The <i>Hanson</i> case	180
B. Applying the ridicule test to the <i>Hanson</i> facts	182
C. The argument for a higher threshold	183
D. When should satire be actionable?	185
Conclusion	188
 8. Ethical Recognition, Moral Diversity, and ‘The Right-thinking Person’	 191
I. Ethical Recognition and Moral Diversity	192
A. Moral diversity, contested criteria, and inclusive communities	192
B. The defamatory capacity of imputations regarding blackness	193
1. <i>The cases</i>	193
2. <i>Explaining the shift: the refusal of ethical recognition</i>	195
II. Ethical Recognition in the Sexuality Cases	197
A. Imputations of homosexuality in England	197
B. Imputations of homosexuality in the United States	199
C. Imputations of homosexuality in Australia	201
III. The Refusal of Ethical Recognition in the Sexuality Cases	204
A. <i>Rivkin v Amalgamated Television Services</i>	204
B. The basis for the shift to the refusal of recognition	206
1. <i>The use of precedent in Rivkin</i>	207
2. <i>The use of legislation in Rivkin</i>	208
IV. The Presumptive Content of ‘The Right-Thinking Person’	210
A. Determining the ethical good	210
B. Ethical presumptions and inclusive communities	212
C. Ethical recognition of exclusionary criteria for moral judgment	215
D. Resolving difficult imputations	218
1. <i>Ascriptive criteria: sexuality, blackness, and mental illness</i>	219
2. <i>Objectionable or unpopular political beliefs</i>	220
3. <i>Informing</i>	221
4. <i>Abortion</i>	223
5. <i>Displacing inclusive presumptions</i>	225
Conclusion	226

Conclusion: Re-thinking the Tests for What is Defamatory	229
<i>Appendix: Notes on Historical Sources</i>	233
<i>References</i>	237
<i>Index</i>	249