

Restrictions on the Freedom of Expression

The law restricts the freedom of expression in two important ways: (i) the laws of obscenity, and (ii) the laws of defamation. Because such restrictions are antithetical to the creative freedom so important to art, they are both matters that should be of great concern to artists. The law of obscenity is not mechanically complex, but it is so vague and uncertain that its restrictive power is enormous. Because of legislative dissimilarities it is necessary to deal separately with each State. Discussion then turns to the role of "artistic merit" and concludes with some comments on the compliance with and enforcement of these laws. In contrast, defamation is an area of enormous legal complexity and few lawyers are expert in its intricacies. The following description discusses the components of defamation and its attendant defences of justification, fair comment and privilege.

THE RIGHT TO CREATE

It is said that "by one's work, so one is known", and it is never truer than when said of artists. By creating, artists communicate, and in doing so expose both themselves and their ideas to the public. Unless they have the freedom, the right to create, they have nothing. Thus the essential questions are: can the law force a person to create, to be an artist; and can the law prevent a person from creating, from being an artist? The answer is the product of fusing fundamental rights and contractual principles.

Everyone in Australia has the right to be an artist. No law permits it and no law forbids it. The law may limit the ideas that one may express (e.g. by the laws of defamation), or restrict the vehicle used to express them (e.g. the laws of obscenity), but otherwise it will not generally interfere with an individual's right of expression. That freedom to express oneself is seen as a fundamental, if limited, right. Thus, for the most part, the law will not interfere with the decision to create or not create.

This general freedom may be limited by contract. For example, persons employed as graphic artists may sign a contract of employment, the terms of which prohibit them from doing work for competitors for the duration of the contract. If such an artist breached that term it might be possible for the employer to enforce it by obtaining an injunction (a court order restraining the activity).

In most cases, however, contract will not restrict the freedom to create. For example, if an artist agrees to paint a canvas on commission but later decides not to go through with the deal, what options does the disappointed party have? He or she may seek:

- monetary damages;
- an order forcing the artist to complete the work; or
- an order prohibiting the artist from painting for anyone else until the work is completed.

But these options are illusory. It is almost certain that the artist would be ordered by the court to pay damages for the breach of the contract. But if the collector wanted the artwork rather than the money and tried to force the artist

to complete the work, the courts would say: "This is a contract for personal services and as a matter of policy, the courts do not enforce such contracts. That would amount to servitude." If the collector adopted the third option the court is likely to say: "To prevent a person from earning a livelihood in this way is a very serious measure. When the parties entered the contract they did not include any clause which forbade the artist from working on other pieces and in the absence of the parties including such an exclusivity clause, the courts are loathe to imply one. Furthermore, to grant such a prohibition would be a backdoor way of enforcing a contract for personal services and this the court will not do. Lastly, the court does not need to contemplate such extreme sanctions because the collector has a perfectly good remedy available, namely, damages."

This approach was exemplified in two famous cases; *Bonheur v. Pourchet* (Cour de Paris, 1865.2.201), and *Whistler v. Eden* (D.P. 1898.2.465, Cours d'appel, Paris). In the first case, Pourchet commissioned Rosa Bonheur to paint a work of specified size and manner. She agreed to do so but later refused to fulfil her bargain. Pourchet sought an order forcing her to complete the work, but the court rejected the application and granted damages instead.

In the second case, Whistler had been commissioned to paint the portrait of Lady Eden, the plaintiff's wife. The work was done, and prior to delivery to his Lordship it was exhibited at the Salon de Champs de Mars. Perhaps because of the favourable reception received by the painting, Whistler demanded that the commission price be raised before delivery would be made. As might have been expected, a dispute ensued. As might not have been expected, Whistler painted out the subject's head. Lord Eden sued. He sought an order that Whistler restore the painting and deliver it. He also sought damages.

The appeal court held that it would not order the irascible Whistler to restore and complete the canvas but instead awarded a sum of damages against him for his breach of contract.

It may be argued that the artist's freedom of expression is a fairly recent phenomenon, perhaps concomitant with the artist's role transition from tradesman to independent genius. Certainly, the restriction of creativity, of ideas, is not new. Moreover, the censors and their motives are extraordinarily diverse. There is the censorship imposed by religious organisations, such as that exemplified by Michaelangelo's troubles with Paul VI, Pius IV and Clement VIII: see Blunt, *Artistic Theory in Italy 1450-1600* (1940), pp. 118-119. The political regulation of artistic freedom is similarly easy to point out. That art can be "ideologically corrupt" is illustrated by the attitudes of Soviet Russia to "bourgeois" art, the Nazi restrictions upon "degenerate" art and the cultural stricture of the American "McCarthy period".

Art institutions, too, play an important role in defining what is acceptable, for their acquisition policies are insidiously influential in determining what art will be seen by the general public and what art must be produced if it is to have a good chance of being hung. The formation of the Salon des Refuses and the fame that hindsight accorded many of its artists, stands testimony to the powerful restrictive influence of the art establishment.

One of the most obvious tools of control is the legal system. Although we in Australia do not have laws which blatantly channel artistic expression, we do have several which can be subtly influential. The two that will be discussed in this chapter are the law of obscenity and the law of defamation. These are not as dramatic as some earlier forms of restriction, but restrictions they most certainly are.

OBSCENITY

“Not only is obscenity an inescapably subjective phenomenon but it represents an adverse judgment on at least three different grounds: aesthetic, moral and utilitarian”: Fox, The Concept of Obscenity (Law Book Co., Sydney, 1967), p.5. The aesthetic which distinguishes the artistic from the pornographic, the moral which provides the societal gauge that transforms the erotic into the obscene, and the utilitarian which suggests that the members of a healthy society enjoy only pure thoughts.

In Australia, two legal mechanisms operate to restrict the exposure of people to obscenity: common law and statute.

1. The Common Law -- Obscene Libel

At common law, it is a misdemeanour to “publish an obscene libel”. This has been described in Stephen, Digest of the Criminal Law (3rd ed., London, 1883), p. 116 in the following terms:

“Everyone commits a misdemeanour who without justification . . . publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition; or any publication recommending sexual immorality, even if the recommendation is made in good faith for what the publisher considers to be the public good.”

In such proceedings, three things must be proved: the thing must have been published, be obscene, and be published with a criminal intention (that is, to corrupt public morals).

(i) Publication

Publication is not to be given its colloquial meaning. It is used in its legal sense, to mean “communication to another person”. For example, an artwork would be published if it were merely shown to a prospective purchaser. Mere possession of the work would not be sufficient, for it is its “publication” not its possession that is subject to sanction: see *Dugdale v. R.* (1853) 1 E. & B. 435; 118 E.R. 499.

(ii) “Obscene”

As to the definition of what is obscene, the starting point of any such discussion must be the old English decision of *R. v. Hicklin* (1868) L.R. 3 Q.B. 360 at 371. Therein, the judge described obscenity in the following way:

“The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.”

From this point, the dual concepts of “obscenity” and “the tendency to deprave and corrupt” were interwoven.

Attempts by the judges to give meaning to the phrase “tendency to deprave and corrupt” cannot be counted as great moments of jurisprudence. Indeed, as Windeyer J. once observed, the Hicklin test “has only survived really because, although constantly mentioned, it and its implications have been ignored. Courts have not in fact asked

first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so its evil tendency and intent is taken to be apparent": *Crowe v. Graham* (1967) 121 C.L.R. 375 at 392.

Many cases have decided what a "tendency to deprave and corrupt" does not mean. For example, the case of *R. v. Martin Secker & Warburg Ltd* [1952] 2 All E.R. 683, held it to mean more than "to shock or disgust", and in *Knuller v. D.D.P.* [1973] A.C. 435, it was held not to correspond with the phrase "to lead morally astray". But considerable difficulty lies in understanding the positive guidelines attempted by the courts. Most cases give the words "tendency to deprave and corrupt" one of three meanings:

"First, they can mean that the tendency of the (work) is to arouse impure thoughts in the mind of the reader or the viewer. Secondly, they can mean that such a person would be encouraged to commit impure actions. Thirdly, they can mean that the reading of a book or looking at the picture would endanger the prevailing standards of public morals": St John-Stevas, Obscenity and the Law (Secker & Warburg, London, 1956).

In Australia, the third of those categories has attained predominant judicial favour. For example, in *Crowe v. Graham* (1967) 121 C.L.R. 375 at 396, it was held that an indecent picture is one that is "an affront to modesty". This is based on the belief that there "does exist in the community at all times however the standard may vary from time to time -- a general instinctive sense of what is decent and what is dirty": *R. v. Close* [1948] V.L.R. 445 at 465.

In the latter case, Fullagar J. stated (at 463) that the "tendency to deprave and corrupt" was not to be taken as "a logical definition of the word 'obscene', but was merely explaining that particular characteristic which was necessary to bring an obscene publication within the law relating to obscene libel. The tendency to deprave is not the characteristic which makes a publication obscene, but is the characteristic which makes an obscene publication criminal." Thus the tendency to deprave and corrupt is not to be taken as the sole test of what constitutes obscene libel. Rather, to prove the offence it will be necessary to show that the work is "both offensive according to current standards of decency and calculated or likely to have the effect described in *R. v. Hicklin* ": *R. v. Close* [1948] V.L.R. 445 at 465.

Both aspects of this two-limbed test may be influenced by the nature of the work (e.g. an artwork or medical text) and the manner and place of its exhibition.

(a) The nature of the work. The cases recognise that works of art enjoy a certain amount of licence. Thus it has been held that the "representation of nudity in what is not a work of art is not to be regarded as protected (merely) because similar realism in a work of art would not be regarded as indecent": *McGavan v. Langmuir* 1931 S.C. (J.) 10 at 15. On the other hand, the issue of indecency cannot be answered by simply asking, "Is it art?" Had this been the relevant test, a photographic representation of Giorgione's "Sleeping Venus" would surely not have been found to be an indecent document: see *Clarkson v. McCarthy* [1917] N.Z.L.R. 624.

(b) The manner and place of exhibition. The manner and place of the work's exhibition is relevant to both limbs of the obscene libel test. As to the first (whether or not it is obscene, at all), suppose that a lithograph of erotic theme is exhibited in an art gallery and an identical image is hung in a school. The hypothetical community standard of what is decent would probably accept the former and condemn the latter. An artwork acceptable in the one place is obscene in the other.

As to the second limb (the tendency to deprave and corrupt), the manner and place of exhibition is directly related to the law's concern with who is likely to see the work and thus be influenced by it. So, in the above example, the patrons of an art gallery are considered less likely to be "depraved and corrupted" by the erotic work than the younger and, presumably, more impressionable school children.

(iii) Criminal intention

It is a matter of considerable legal debate, whether or not the prosecution has to prove that the publisher of the obscene work actually intended to deprave or corrupt the viewers. The better view appears to be that the offence of obscene libel is not one of strict liability, and that the prosecution does have to prove the criminal intention, namely an intention to deprave and corrupt.

Whilst there is still no established causal link between obscenity and the tendency to deprave and corrupt, it must be remembered that the rule was based upon the Victorian rule of thumb that, for women, sex was an evil, that those who enjoyed sex were depraved, and those that might enjoy it were easy subjects of corruption. Such a view is no longer fashionable, but it remains the sole link between "obscenity" and the tendency to deprave and corrupt.

Furthermore, nobody finds in himself or herself an example of a person actually depraved by erotica. "So discussion tends to centre on a hypothetical, unencountered 'them' in contrast to incorruptable 'us'. This perhaps is why in 1962 the courts established that no amount of exposure can deprave a policeman. He is indissolubly one of us": *The Obscenity Laws, A Report of the Working Party of the Arts Council of Great Britain*, Andre Deutsch, 1969.

Given this, it is clearly difficult for the prosecution to prove that an accused person actually intended to "deprave and corrupt". This problem used to be surmounted by reliance on the legal presumption that "one intends the natural consequences of one's act". This had the effect of reversing the burden of proof, so that instead of the prosecution having to establish the accused's criminal intention to deprave and corrupt, it could rely on the presumption, thus forcing the accused to prove that he or she did not have the requisite criminal intention.

This presumption is no longer part of the criminal law in Australia. Thus it would seem that the prosecution must now prove actual intent and, as this is no easy matter, this probably explains why cases of obscene libel are now very rare.

(iv) Conclusions

The offence of criminal libel is rarely alleged these days. Prosecutors prefer to utilise the various pieces of legislation that attempt to limit what society's members can see, if not enjoy. There are many such pieces of legislation and thus obscene libel will be resorted to only in situations in which the legislation is insufficiently flexible to permit prosecution. Given the wide language of the legislation, these occasions will be rare.

Obscene libel was abolished in England in 1959 (Obscene Publications Act 1959, s. 2(4)) and if any certainty is to be attained in the law of obscenity, the procedure should be abolished in Australia, too.

2. The Legislation

Besides certain federal Acts such as the Customs Act 1901 (which, generally, controls the importation of indecent or obscene works) and the Post and Telegraph Act 1901 (which prohibits the transmitting of indecent or obscene

articles by post) and the Broadcasting and Television Act 1942, every State and Territory has legislation restricting the exposure of its people to obscene or indecent material. These latter Acts are historically rooted in an English statute of 1857, which is known as Lord Campbell's Act. This was "intended to apply exclusively to works written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in a well regulated mind". Although the explanation reflects a Victorian attitude, it is one that is still fairly descriptive of the modern position. Whilst it may be strongly argued that society needs some protection from dealers in dirt, the legislative definitions of what is obscene are vague and non-exhaustive. This puts the court in the unenviable position of arbiter of morals and aesthetics. The problem then becomes one of fact and degree.

When the reader peruses the selection of State legislation provided later in this section of the chapter, two things will be apparent: first, the echoing theme of the Hicklin test (the tendency to deprave and corrupt) and secondly, the variety of ways in which each State has moved away from these early roots.

Obscenity and indecency

It will be noticed that some States have now opted to use the term "indecency" rather than "obscenity" (and indeed some States use both). The definitional distinction has attracted considerable attention in the courts. Generally speaking, both terms contemplate the contravention of accepted societal standards of decency, with obscenity at the higher end of the scale and indecency at the lower end. What is indecent is not necessarily obscene, but what is obscene will always be indecent: see *R. v. Stanley* [1965] 2 Q.B. 327; *Crowe v. Graham* (1967) 121 C.L.R. 375 at 390-394. Thus, presumably, the law is stricter in those States which prohibit indecency than those which prohibit obscenity. But the distinction and its importance is always only one of degree and fact and thus, in practice, the personal view of society's standards held by the judge will have more impact on the outcome of any particular case than this matter of sliding definition.

(i) New South Wales

The Indecent Articles and Publications Act 1975 makes it an offence to publish an indecent article: s. 6. "Publish" is statutorily defined in s. 5 as including:

"(a) distribute, disseminate, circulate, deliver, send, display, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire and offer to let on hire;

(b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a);

(c) print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing an act so referred to or to enable such an act to be done."

It is phrased in extraordinarily wide terms.

The police have the power to search premises that they believe contain indecent articles. They must have a warrant to do this, but that warrant gives them the power to use force in entry, to search, and to seize any article that may be reasonably suspected of being indecent: s. 7. At this point, a range of alternatives are open to the authorities; they may issue a summons requiring the owner of the premises from which the article was seized to show cause why the article should not be destroyed; they may charge the maker, owner, or the person in whose

possession the article was found; or they may choose not to proceed any further with the matter. In any event, unless the formal proceedings are commenced within a month of the seizure, the items must be returned: s. 8.

The difficulty posed by the legislation is that it contains no definition of "indecenty". That is a matter for the court to determine. As already mentioned, the case of *Crowe v. Graham* (1967) 121 C.L.R. 375, held that an indecent picture was one that was an affront to modesty, taking into account the current community standards. But clearly this is of little practical assistance to artists who wish to challenge those standards without falling foul of the law.

As had already been suggested, in determining whether or not a work "offends modesty" the court will take into account the manner and place in which the article was displayed. For example, *In The Appeal of Marsh* (1973) 3 D.C.R. (N.S.W.) 115 concerned four sketches by Tane which were seized from the "Nth Degree" gallery in Paddington. They could be plainly seen through the window from the street.

In dismissing the charge his Honour said (at 123-124) that the distinction between the decent and indecent in works of art depends on the honesty and integrity of the work in its use of the sexual or erotic theme. Such a work - if it is dealt with frankly and artistically -- is not indecent. He went on to say that the place and manner of display is a relevant factor. Thus, something that might be indecent if exhibited in a church or outside a school, might not be indecent if exhibited in a Paddington art gallery, for the community has different expectations and imposes different standards on such a place.

That such ex post facto criteria vary with time as well as place is illustrated by comparing the above case with *Potter v. Smith* (1902) 2 S.R. (N.S.W.) 220, in which a pamphlet about birth control was held to be indecent! That was 1902 and the community standard has clearly progressed from those days.

This, however, may not be the view of Juan Davila, whose work entitled "Stupid as a Painter" was seized by the Vice Squad from its place of exhibition in the Biennale of Sydney 1982. The complainants on that occasion were an evening newspaper and a member of the Festival of Light who was a candidate in a then approaching by-election. The issue was fought, almost entirely, in the media. The work never came before the courts.

After timely comment by the Premier to the effect that the Vice Squad had no place in art galleries, the Minister of Police ordered the Vice Squad to return the work, and at the same time promised a review of the Act so that such incidents might not occur in the future. The gallery that had originally exhibited the work refused to rehang it, but it was eventually shown to the public again at the Power Gallery, shielded by an alluring red screen and a sign which read:

"Viewers are advised that they may find some parts of the work in this bay offensive and disturbing. Since the work is classified with an R-rating it may not be viewed by those under the age of 18.

Should any question be raised as to the legal age of a viewer, he or she will be required to complete a form stating name, address and date of birth."

Presumably, this protected the young from depravity and corruption.

It must be emphasised that the resolution of this incident was political, not legal. Indeed there is considerable weight to the argument that the Minister of Police was acting beyond his powers when he ordered the Vice Squad

to return the work. Nevertheless, the fact that the work was seized at all, together with the improvisational nature of its return, emphasises the urgency of the promised review of the legislation.

Davila again became the centre of controversy in 1984. He, along with several other artists were commissioned by the Lake Macquarie Regional Gallery to create works for an exhibition on the theme of "Romance". The show had been previewed by the mayor and local government members and had been seen by large numbers of viewers.

The Vice Squad went to the gallery after receiving a complaint from a member of the public (who was also a member of the Call to Australia Party, the political wing of the so-called Festival of Light). A week later, only a few days before the closure of the show, they returned with a warrant and seized three of the works by Davila.

The council was charged and convicted. It did not appeal because it did not wish to prolong the considerable publicity that the Call to Australia Party was receiving over the affair.

(ii) Queensland

In Queensland, the problem of dirt versus aesthetics is tackled by two Acts: the Criminal Code and the Vagrants, Gaming and Other Offences Act 1931-1978.

Section 228 of the Criminal Code states that it is an offence to, knowingly and without lawful justification or excuse,

- publicly sell or expose for sale "any obscene picture, photograph, drawing, or model or any other object tending to corrupt morals";
- expose such items to view in any place to which the public has access.

This is principally a provision aimed at the sellers and exhibitors of obscene material, rather than the creators of it. However this section has been enlarged by the Vagrants, Gaming and Other Offences Act. Section 12 of that Act makes it an offence to make, sell, exhibit, publish, distribute, and possess for the purposes of sale or distribution, any indecent or obscene publication.

"Obscene publication" is defined as including any obscene writing, print, picture, photograph, photographic negative, plate, slide or films, transparency, lithograph, drawing, record or representation.

Although most jurisdictions have shied away from propounding statutory definitions of indecency or obscenity, Queensland has had no such qualms. Section 2 of the Vagrants, Gaming and Other Offences Act defines an indecent picture or printed matter as including:

"any picture relating directly or indirectly, to pregnancy of women or to sexual intercourse in a lewd, purient or obscene manner, or which may be reasonably construed as in a lewd, purient, or obscene manner, or sexual abuse or to any complaint or infirmity arising therefrom, or to impotency, or to nervous debility or female irregularities, or which may reasonably be construed as relating to any illegal medical treatment or illegal operation.

What is more, 'obscene' includes, without limiting the generality of its meaning, emphasizing matters of sex or crime or calculated to encourage depravity."

It should be noted that the Queensland section uses the phrase "emphasis on sex", unlike the Victorian section which uses the phrase "undue emphasis on sex". This makes the Queensland clause much stricter than its counterparts in other jurisdictions. Furthermore, the use of "or" in the last sentence of the definition makes it clear that a work can be obscene without encouraging depravity.

In *Herbert v. Guthrie* [1970] Qd R. 16, which concerned 15 Beardsley prints entitled "Lysistrata and the Three Ladies", the judge held that "neither nakedness nor repulsiveness without more amounts to obscenity" (at 30). Their pose may make them obscene, as may a gesture of a homosexual nature or a facial expression that suggests homosexuality. It was also a matter of concern to Justice Hart (at 28-30), that Beardsley was wrong in depicting pubic hair in the way he did. He found that there is internal evidence in the play, and a note in the 1943 translation to the effect, that Greek women in Aristophanes' day practised depilation! The prints were found to be obscene.

In *Sancoff v. Holford; Ex parte Holford* [1973] Qd R. 25, the judge described the proper approach for a magistrate to take. It was held that the magistrate should: (i) look at the article; (ii) adopt what he or she reasonably thinks are proper standards of decency now commonly accepted by the average person in the community; and (iii) find whether such a person taking up the publications and reading them would regard them as publications offensive to his or her modesty in regard to matters of sex.

(iii) Victoria

In Victoria, s. 166 of the Police Offences Act 1958 makes it an offence to print, photograph, lithograph, draw or make any obscene article. It is also an offence to exhibit such articles in a place to which the public has access, or to sell or distribute such articles. (See too, the Summary Offences Act 1966, s. 17(1)(b).) It should be noted that the key word used is "obscene", not "indecent" as in New South Wales. Here, s. 164 of the statute gives some guidance as to the meaning of "obscenity":

"(1) 'Obscene' (without limiting the generality of the meaning thereof) includes --

(a) tending to deprave and corrupt persons whose minds are open to immoral influences; and

(b) unduly emphasising matters of sex, crimes of violence, gross cruelty or horror.

(2) In determining . . . whether an article is obscene the court shall have regard to --

(a) the nature of the article; and

(b) the persons, classes of persons and age groups to or among whom it was or was intended or was likely to be published, distributed, sold, exhibited, given or delivered; and

(c) the tendency of the article to deprave or corrupt any such persons, class of persons or age group . . ."

(a) Undue emphasis on sex. In determining whether the emphasis on sex is “undue” the court will consider whether the work “transgresses the generally accepted bounds of decency”: *Crowe v. Graham* (1967) 121 C.L.R. 375 at 395. In determining this, the court must use as its yardstick the standards of the community in which the article is published: *Wavish v. Associated Newspapers Ltd* [1959] V.R. 57. Thus, an artwork may be acceptable in, say, Germany, but be unfit for publication in Victoria. But what those community standards are, and whether they have been transgressed, is a matter for the court to determine: *Mackay v. Gordon & Gotch (Australia) Ltd* [1959] V.R. 420.

(b) Tendency to deprave and corrupt. There need be no evidence given that the work actually depraved or corrupted anyone. Indeed it would be difficult to do so! A finding of obscenity is enough: *Buckley v. Szadurski* [1973] V.R. 28. Thus, the defendant cannot call opinion evidence to show that the work would be unlikely to have any detrimental effect on those who might be likely to see it: *Wavish v. Associated Newspapers Ltd* [1959] V.R. 57. Further, it is not necessary for the prosecution to prove that the artist had any intention to exhibit or display the work: *Buckley v. Szadurski* [1973] V.R. 28. The fact of its creation and its “objectively” determined effect, is sufficient. (It would be kind of the reader not to notice that in determining “the tendency to deprave and corrupt”, the legislation suggests that one of the factors that must be considered is the article's “tendency to deprave and corrupt”. When legislation is as unhelpful as this, it is not surprising that judges as well as artists express difficulty with the provision.)

(iv) Tasmania

This State has adopted a different approach to those taken in the other jurisdictions. Two provisions may be relevant: the Classification of Publications Act 1984 and the Criminal Code 1924.

The former is arguably relevant because it includes a very wide definition of “publication”:

“ ‘publication’ means any book, paper, magazine, film, slide, or written or pictorial matter that is available, or intended to be made available for exhibition, display, sale, or distribution to members of the public . . . ”

However, the machinery of the Act appears quite inappropriate to the censorship of individual works of visual art.

In contrast, the Criminal Code inarguably applies to artworks. Section 138 states that it is a crime for a person to publicly exhibit any “disgusting object or indecent show”.

It should be noted that it is not an offence to create or sell such work. It is its public exhibition that is prohibited; “publicly exhibits” is not, however, defined in the Criminal Code.

(v) South Australia

If legislators have generally shied away from the definitional problems posed by this area, those of South Australia are made of sterner stuff.

The Police Offences Act 1953-1983 deals with both “indecent” material and “offensive” material. Section 33(1) of the Act defines “indecent material” as “material of which the subject-matter is, in whole or in part, of an indecent, immoral or obscene nature”.

“Offensive material” means material

“(a) of which the subject matter is or includes --

- (i) violence or cruelty;
- (ii) the manufacture, acquisition, supply or use of instruments of violence or cruelty;
- (iii) the manufacture, acquisition, supply, administration or use of drugs;
- (iv) instruction in crime; or
- (v) revolting or abhorrent phenomena; and

(b) which, generally disseminated, would cause serious and general offence among reasonable adult members of the community.”

“Material” is also given a wide definition. It includes

“(a) any written or printed material;

(b) any picture, painting or drawing;

(c) any carving, sculpture, statue or figure;

(d) any photograph, film, videotape or other object from which an image may be reproduced; or

(e) any other material or object on which an image or representation is recorded or from which an image or representation may be reproduced.”

The last provision is a catch-all clause and would clearly cover computer programs and other electronic storage mechanisms.

The offence is committed by any person who

“(a) produces or takes any step in the production of indecent or offensive material for the purpose of sale;

(b) sells indecent or offensive material;

(c) exhibits such material in a public place or so as to be visible from a public place;

(d) deposits such material in a public place or, except with the permission of the occupier, in or on private premises;

(e) exhibits indecent material to a person so as to offend or insult that person;

(f) delivers or exhibits indecent or offensive material to a minor (other than a minor of whom the person is a parent or guardian);

(g) being a parent or guardian of a minor, causes or permits the minor to deliver or exhibit indecent or offensive material to another person;

(h) causes or permits a person to do an act referred to above.”

In other words, it covers everybody who is involved in the production, sale, exhibition or delivery of indecent or offensive material.

Section 33(v)(b) of the Act provides a defence of artistic merit. It states that “no offence is committed by reason of the production, sale, exhibition or delivery of material that constitutes, or forms part of, a work of artistic merit if, having regard to the artistic nature and purposes of the work as a whole, there is no undue emphasis on its indecent or offensive aspects”.

No assistance is given in the Act as to what would constitute “undue emphasis” and it is assumed that this would be a matter for judicial discretion.

Perhaps the most important defence of all is found in s. 33(vi) which specifies that no prosecution for this offence shall be commenced without the written consent of the Minister. Certainly, had such a provision existed in New South Wales in 1982, the Vice Squad would never have raided the Biennale of Sydney.

(vi) Western Australia

Under the Indecent Publications and Articles Act 1902-1983 it is an offence to make, sell, possess, deliver or exhibit a work that is indecent or obscene: s. 2. Section 4 of the Act contains a definition of what will be deemed indecent that is very similar to the Queensland. The Act contains no definition of “obscene”. Thus, the High Court’s test of “the transgression of accepted community standards” will be applied: see *Mackinlay v. Wiley* [1971] W.A.R. 3.

Hennessy v. Lee [1973] W.A.R. 127 at 129, described the judicial approach to determinations of obscenity:

“Aided by any relevant evidence and equipped with a measure of knowledge of the attitudes and beliefs which are widely held in the community, he makes a judgment . . . But the fact that he knows that different people in the community have diverse attitudes and standards does not prevent him from having recourse to the touchstone of the broad standard or consensus of attitude which (in his judgment) exists within the community.”

It is of little assistance to artists who may wish to deal with erotic subject matter and yet ensure their obedience to the law.

Section 204 of the Criminal Code is one of the most Dickensian of all Australian statutes in relation to obscenity. It still actually refers to the notorious and unhelpful test of “tending to corrupt morals”. Thus, liability falls on:

“Any person who knowingly, and without lawful justification or excuse --

(1) Publicly sells or exposes for sale any obscene book or other obscene printed or written matter, or any obscene picture, photograph, drawing, or model or any other object tending to corrupt morals; or

(2) Exposes to view in any place to which the public are permitted to have access, whether on payment of a charge for admission or not, any obscene picture, photograph, drawing or model, or any other object tending to corrupt morals; or

(3) Publicly exhibits any indecent show or performance, whether on payment of a charge for admission to see the show or performance or not . . .”

(vii) Artistic merit as a defence

All States have some species of artistic merit defence, but they vary enormously. For example, in New South Wales the Act states that where indecency is in issue “the opinion of an expert as to whether or not an article has any merit in the field of literature or art, medicine or science and, if so, the nature and extent thereof, is admissible

evidence". But even if the work is of proven merit, the defence is not absolute. Rather, it is a statutory method of ensuring that the artistic merit is considered by the court when it looks to the nature of the work. The defence is not a licence for talented obscenity.

Some States have spelt out limitations. For example, in Victoria the "merit" defence applies unless the work was "not justified in the circumstances of the particular case having regard, in particular, to the persons, class of persons or age groups into whose hands it was intended or likely to come". In South Australia, the defence will not apply where the work describes "with undue detail, or emphasise(s) coition, unnatural vice, or other sexual, immoral or lascivious behaviour, or the organs of generation or excretion".

The charming aspect of the Queensland, Western Australian and Tasmanian legislation is the defence provided to such charges, namely, that the act complained of was done for the public benefit. That should give defence lawyers some scope for creativity for the question of whether or not the act was done for the public benefit is one of fact and is therefore a matter for the jury to determine.

Unfortunately, to describe the "artistic merit" issue as a defence at all is misleading. All such statutory provisions do is make the artistic merit of the work one of the factors that the court will take into account. It is for the defendant to raise the issue of merit and to call experts who will testify as to the artistic merit of the work.* But it is still open to the court to hold that even though the work has artistic merit, the obscenity is such that the prevailing community standards must be enforced.

* In *Hennessy v. Lee* [1973] W.A.R. 127 at 129-130, the expert witness said of the artwork: "it was pretty, of good design, well balanced and rhythmical. The colour was pleasing, very skilfully executed. It was," she said, "a good piece of commercial art." This was not sufficient to establish that it was of artistic merit.

(viii) Penalties

The sanctions provided in all States are similar. They include the fining or imprisonment of the convicted person and the forfeiture or destruction of the artwork.

(ix) Enforcement and compliance

Enforcement of the obscenity laws is the responsibility of the police. They usually act only when a complaint is made but they have the power to proceed on their own volition. Usually, members of the vice squad will enter the gallery and informally look at the suspect works. Then, if some of the works give offence, they will approach the manager of the gallery and suggest that if the offensive works are not removed, they will be seized and legal proceedings may be commenced. Almost always, this informal enforcement procedure sees the work sent off to the stockroom and society's sensibilities protected. It is hardly surprising that galleries should be prepared to accede to this mode of censorship, for they may consider that their commercial survival is dependent upon their good reputation, and because the cost of an obscenity trial would be considerable. However, the artist may feel rightfully angry. The work may be in itself an important one, or it may be important to the balance or theme of the exhibition. Or the work may gain an importance by the very fact of its censorship and become a symbol of artistic freedom denied. In any event, the work is now unlikely to sell, so the artist will at least be again financially disadvantaged.

With the informal system of enforcement at least the gallery, and to a lesser extent the artist, has an option: concede quietly or fight loudly. But it is absurd that adults are still subjected to the paternalism of such legislation. One of the most sensible provisions is that of the South Australian Act which forbids the commencement of any action without the prior consent of the Minister. This is good so far as it takes the final decision out of the hands of the vice squad and into an elected representative of the people, but as many of the complaints which have triggered the most publicised “art-porn” raids have been laid for political purposes, the value of that provision will depend largely upon the incumbent.

There is no doubt that any sophisticated society will demand that there be some laws against “offensive”, “indecent” or “obscene” material and it is totally impracticable to suggest that such laws should be repealed or that works of art in general should be excluded from their ambit or even that there should be an absolute defence for works of art. To argue the social desirability of such suggestions is a waste of time. They are politically impossible.

Rather, a simple (and politically acceptable) reform would be to enact a statutory presumption whereby a work of art exhibited in a bona fide art gallery would be presumed to be not “indecent”, “offensive” or “obscene” for the purposes of the Act. The suggestion that this would allow every porn vendor to open an “art gallery” and sell disgusting material without appropriate public control would surely be met by the ability of any court to determine whether the gallery was bona fide. In addition, a suitably drafted defence of “artistic merit” would also ensure that the material (as well as the venue of exhibition) was put into its proper perspective.

As matters stand, the customer of a newsagency is subjected to material that is far more sexually explicit, confronting and lacking in artistic merit than that which adorns any gallery wall.

For the artist the message is clear -- if not simple. If the artwork is erotic or brutish to such an extent that it breaches the community's standards of “decency” one can expect trouble. The heinous feature of the law of obscenity is that one cannot possibly know whether one has breached that nebulous standard until it is too late.

(x) Responsibility of public galleries

In 1985 a Tasmanian artist, Anne McDonald, was invited to exhibit in *Perspecta '85* at the Art Gallery of New South Wales. After complaints, reportedly from some attendants, the gallery refused to exhibit the works. After certain pressure it agreed to their exhibition if the photographs were “edited”. This consisted of attaching large and obvious black shapes over the sexually explicit portions of the work. After only a few days, the covers were well dog-eared from being continually lifted by members of the public who wished to see what was being so obviously censored.

Less public was the incident which occurred when certain persons from the Art Gallery of New South Wales disapproved of the drug references in the painting “Henri's Armchair” by Brett Whiteley and asked the artist to paint them out. This was similar to the incident in which the Art Gallery of Western Australia ordered the painting-out of the sexually explicit portions of Whiteley's major work, “American Dream”. (At least the former institution had the grace to inform the artist and did not simply order a conservator to perform the cover-up.)

Incidents such as this, and the removal of Nigel Thompson's painting from the 1984-1985 Sulman Prize exhibition after complaints from some members of the Art Gallery Society are part of a sad tradition in Australian public galleries. It is a tradition that reaches past the removal of the Arthur Boyd “Lysistrata” etchings from the Bathurst

Gallery years ago and probably even past 1907 and the hanging of Norman Lindsay's pen and ink drawing "Pollice Verso", face to the wall at the National Gallery in Victoria.

Whilst one may complain about the machineries of censorship legislation, the galleries themselves perform considerable informal censorship. This is even more insidiously restrictive for their boundaries are completely informal, ill-defined and there is little opportunity to argue the merits of any individual case, let alone for public scrutiny.

If a major public gallery were to stand up for the freedom of expression by publicly defending a work and its artist and by providing for a reasoned and intelligent public discourse, it may not only prompt government to reflect upon and reconsider its legislation. It may also improve the public appreciation, understanding or at least tolerance of artistic expression.

However, while public galleries bow to the pressures of small but vocal pressure groups, political masters scared of electoral backlash and corporate sponsors scared of client disapproval, the public gallery will itself remain an essentially conservative force in art practice.

DEFAMATION

The laws of defamation provide our society with an expensive, highly complex, unsatisfactory apparatus by which some of its individuals can defend their reputation after others have exercised their freedom of speech. It is a balancing mechanism. By it, artists are restricted in their commentary on others and indeed, others are restricted in their commentary on artists.

There are two species of defamation: libel, which is a defamation in concrete form (such as a letter, book, painting, photograph, sculpture, film or video tape); and slander, which is impermanent (such as speech or gestures). The distinction is rooted in history. Whilst slander has its origins in the early jurisdictional battle between the common law courts and the ecclesiastical courts, the origins of libel go back to the Star Chamber where the laws were developed to restrict the political influence of the newly invented printing press and to provide an alternative to (newly outlawed) duelling. (Some might say that its purpose is not markedly different today.)

From these beginnings the law of defamation has grown in substantive bulk and procedural complexity, and only four jurisdictions have wholly or partly codified these laws in legislative form. These are Queensland, New South Wales, Tasmania and the Australian Capital Territory. The other States and Territories enjoy a pastiche of piecemeal legislation which is subject to the historical vagaries of the common law. The whole is a canvas that might have been created by jurisprudential cubists.

This diversity of law creates considerable problems for many litigants. As much media is now nationally networked, a defamatory statement made in one jurisdiction will frequently also be published in several others. In such cases the defamed person has a right of action in each of those States but this is one instance where abundance does not add to one's quality of life or justice. To do this would be extraordinarily expensive; what may be defamatory in one State may not be defamatory in another; a defence that exists in one may apply quite differently in another.

The litigant's likelihood of success is something of a lottery.

Although it has been much discussed, it appears unlikely that the States will introduce a uniform defamation law. It is a matter of politics rather than logic. For the meantime, litigants in such cases usually consolidate the proceedings in one case and then the one judge will hear all of the matters and apply say, Victorian law to the Victorian publications of the defamatory statement and New South Wales law to the New South Wales publications: see e.g. *Cawley v. Australian Consolidated Press* [1981] 1 N.S.W.L.R. 225.

Despite these jurisdictional problems, three basic elements must always be established in any successful defamation action. The statement must

- be defamatory;
- concern the plaintiff; and
- have been communicated to a person other than the plaintiff.

1. What is Defamatory?

In his classic textbook The Law of Torts (7th ed., The Law Book Co., 1987), pp. 501-502 Fleming states:

“A defamatory statement may be defined as one which tends to lower a person in the estimation of his fellow men by making them think less of him. Frequently, it takes the form of an imputation calculated to bring the plaintiff ‘into hatred, contempt or ridicule’ (*Parmiter v. Coupland* (1840) 6 M. & W. 105 at 108; 151 E.R. 340 at 342) whether by direct statement, irony, caricature or any other means.”

In the code States “defamatory matter” is defined as

“any imputation concerning any person, or any member of his family, whether alive or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him”: e.g. Qld, s. 366; W.A., s. 346; Tas., s. 5.

The manner in which such aspersions may be made are as numerous as invective may be disparate. For example, as Fleming states in The Law of Torts (7th ed., The Law Book Co., 1987), pp. 501-502, it may be defamatory to publish a photograph of the plaintiff either juxtaposed with that of an ape (*Zbyszko v. New York American* 239 N.Y.S. 411 (1930)) or in an apparently obscene posture (*Burton v. Crowell Publishing Co.* 82 F. 2d 154 (2d Cir. 1936)), to wrongly ascribe an inferior work to a celebrated painter (see *Ridge v. English Illustrated Magazine* (1913) 29 T.L.R. 592), or even to publish a work that has been deleteriously altered: see *Lee v. Gibbings* (1892) 67 L.T. 263.

The defamatory nature of the statement may not be readily apparent. A seemingly innocent phrase or photograph may be obviously actionable when put in context. For example, if a photographer snaps a man and a woman sitting on a riverbank, entitles the work “The Lovers” and enters it in a competition, a lawsuit may result should one of the subjects in fact be married to another. The seemingly innocent artistic statement, put in context, is defamatory.

On the other hand, the context of the statement may show an apparently defamatory statement to be harmless.

Lord Justice Sankey illustrated the point thus:

“One recalls the instance of the lady who in a West End drawing room accused a noble lord of being a thief, but when one is told that she said, with a smile, ‘Lord X you are a thief, you have stolen my heart’ one recognises that to call someone a thief is not necessarily actionable”: *Broome v. Agar* (1928) 138 L.T. 698 at 702.

The context that is important, however, is not that in which the statement was made but rather that in which it was communicated. For defamation is not concerned with the making of harmful statements, but rather the communication of them.

Similarly, in determining whether a statement is capable of being defamatory one looks not to the intention of the author but the effect of it upon the person by whom it is heard or seen. One asks not, “What was the artist saying?”, but rather, “What does the ordinary sensible observer understand the artist to have said?” One looks to effect, not intention.

2. Reference to the Plaintiff

In an action for defamation it is essential to show that the plaintiff is the identifiable subject of the offending statement. Often this is simple: the critic's vitriol will name the artist; the portrait or photograph is readily identifiable. But such explicitness is not necessary. All that need be proved is that a reasonable person inferred from the work that it concerned the plaintiff. (For this reason, it has been held that the old line, “the characters and incidents in this book are fictional and have no reference to any person living or dead”, provides no protection if in spite of the camouflage the person is identifiable: *Corrigan v. Bobbs- Merrill Co.* 126 N.E. 260 (N.Y. 1920). One simply asks, “Would a reasonable person infer that the words (or painting) referred to the plaintiff?” The test is not an onerous one.

Where the statement concerns a group (be it ethnic, religious, political, geographical, commercial or aesthetic), the plaintiff must show that he or she is specifically identified: *Knupffer v. London Express* [1944] A.C. 116 at 122; *Dowding v. Ockerby* [1962] W.A.R. 110. Thus, if a work were to deride say “curators”, “men”, or “abstract painters”, a person of that description would have insuperable difficulty establishing that the imputation was personal. If, however, the group was small, such as a board of directors, or a partnership of lawyers, it might be shown that the imputation could reasonably refer to all members of the group. In such a case an individual member of the group may be able to assert that he or she has been personally implicated.

Thus, whether the statement concerns an individual or a group, the question remains the same: “Does this implication reasonably refer to the plaintiff?”

3. Publication

For a statement to be actionable it must be communicated to a person other than the subject of the imputation; for it is the communication, not the making, of the statement that is proscribed. This is the sense in which the term “publication” is used -- it is a legal synonym for “communication”.

Thus if A writes a letter to B accusing her of some gross impropriety and only B reads the letter, there has been no publication to a third party and therefore no defamation has been suffered. However if A had dictated that letter to her secretary, that would amount to sufficient publication: *Osborne v. Butler* [1930] 2 K.B. 226.

The form in which the defamation is communicated is irrelevant. It may be in a painting (*Du Bost v. Beresford* (1810) 2 Camp. 511; 170 E.R. 1235), a photograph, a cartoon (Russell v. Pressdram, The Times, 4 February 1966; Harry Seidler & Associates and *Harry Seidler v. John Fairfax & Sons Ltd* (unreported, Supreme Court of New South Wales, CL 15860 of 1982; CA 292 of 1984), (which involved a Patrick Cook cartoon); *Massey v. New Zealand Times* (1911) 30 N.Z.L.R. 929), a movie or video (*Youssopoff v. M.G.M.* (1934) 50 T.L.R. 581), or a sculpture (*Monson v. Madame Tussauds* [1894] 1 Q.B. 671). See, too, *Gregory v. Duke of Brunswick* (1843) 6 M. & G. 953; 134 E.R. 1178 (burning a man in effigy), and *Eyre v. Garlick* (1878) 42 J.P. 68 (hanging a man in effigy.)

The important thing is that the defendant is actually responsible for the publication. This involves a finding of fault in relation to the act of publication (Luntz, Hambly, Hayes, Torts: Cases and Commentary (Butterworths, Sydney, 1980), para. 15.6.05). Thus if a trespasser enters an artist's studio and there sees a defamatory sketch, no publication has taken place. Similarly, if the artist posted the sketch to his or her subject and the packet was wrongfully opened by the mailman or a reporter, no publication has occurred. However, the decided cases provide many examples of letters being unexpectedly opened by husbands, wives, secretaries, clerks, butlers and business partners, and many of these untimely interventions have been held to be "publications". In such situations it appears that the "answer to the question of publication of a libel contained in a letter will depend on the state of the defendant's knowledge, either proved or inferred, of the condition likely to prevail in the place to which the libel is destined": *Theaker v. Richardson* [1962] 1 All E.R. 229; [1962] 1 W.L.R. 151.

It is of importance for gallery owners to note that by exhibiting a defamatory work, after they have been made aware of the work's defamatory nature, they are a participant in the publication and therefore liable. This is consistent with the underlying tenet of the area that it is the publication not the creation of defamatory material that is prohibited. Strictly speaking, it is a restriction not on the freedom of creation but on the freedom of dissemination.

Consistent with this idea of fault and involvement, there is no liability for defamatory material published accidentally, but there is liability for accidentally defamatory material published intentionally: Fleming, The Law of Torts (7th ed., The Law Book Co., Sydney, 1987), pp. 511-513.

4. Innuendo

In most defamatory statements there is a grain of truth, but often, that truth has been exaggerated or distorted in some way. Moreover, the manner in which that truth is presented may permit the viewer or reader to make an inference from the facts that is not true. For example, if it were reported that a police officer had been seen accepting a package from a prominent underworld identity, the statement would give rise to the imputation that the policeman was "on the take". The matter would clearly be of the "public interest", but whilst the statement itself may be demonstrably true, the inference that is to be drawn from the statement may not. The criminal may have been acting as an informant and it would be for the defendant to prove corrupt motive, not for the policeman to prove his innocence.

Because of the difficulty of proving the truth of innuendo, this defence is rarely used. Furthermore the defence is unattractive because if it is pleaded unsuccessfully, the court may increase the quantum of damages awarded: *Cassell & Co. Ltd v. Broome* [1972] A.C. 1027 at 1071.

5. Justification as a Defence

Justification is the "truth defence". At common law, if a defendant in a defamation case can say, "What I have said or imputed is true", he or she may have a defence because the law will not "permit a man to recover damages in respect of an injury to character which he either does not, or ought not, to possess": *McPherson v. Daniels* (1829) 10 B.C. 263 at 272; 109 E.R. 448 at 451. He will have to prove that the facts relied on, and the imputation drawn therefrom, are indeed true. It is not sufficient to prove that he merely believed them to be true: *Sutherland v. Stopes* [1925] A.C. 47; [1924] All E.R. Rep. 19.

In most jurisdictions the common law has been statutorily amended. Thus, in Queensland, Tasmania and the Australian Capital Territory, it must be shown that the statement is not only true but that it is in the public benefit that the publication complained of should be made: Qld, s. 376; Tas., s. 15; A.C.T., s. 6. Similarly, in New South Wales it must be proved that the statement was true and that the imputation relates to a matter of public interest: N.S.W., s. 15.

6. Fair Comment as a Defence

In the visual arts the defence of fair comment is of particular importance in two situations: cartoons and other works of political or social comment (particularly where satire is used); and art criticism and review.

(a) Cartoonists, commentators, satirists

It is perhaps surprising that such practitioners are not more often subjected to legal actions. Cartoonists in particular hold the work, ideas, actions and looks of public figures up to ridicule, not only by what they have their characters do but even in their manner of depiction.

An action was brought by architect Harry Seidler against John Fairfax & Sons, being the publishers of the National Times and employer of cartoonist Patrick Cook. The paper had published a cartoon which depicted a barren landscape on which had been erected ten box-like structures without tops. In two of these in the foreground could be seen just the top of some heads and through the slot in the front of the box some of the occupants' faces were visible. One of these occupants was being fed through the slot by an attendant. At the rear of the box another attendant was removing his excreta. The caption read "Harry Seidler Retirement Park".

Was this defamatory? The statement of claim alleged that the cartoon conveyed three imputations, each of which were defamatory: that he was brutal and anti-social; that he lacked aesthetic sensibilities; and that he was incompetent as an architect.

The jury found for the defendant. They held that although the cartoon was defamatory, the defence of fair comment applied. They were satisfied that the cartoon was merely an expression of opinion and that the opinion expressed in the cartoon was one which an honest man might have held on the material for comment. (The material for comment was a selection of the plaintiff's well known public buildings.)

One interesting aspect of the case concerned the argument that the defence of fair comment was only available when the comment was based on base facts that were true and as the defendant had never designed a retirement home, there was a misstatement of base facts which made the defence unavailable. To its credit the jury and, predictably the later appeal court, made short work of that argument. The reference to the Seidler Retirement Park was to be considered a fictitious part of the comment rather than a factual assertion about the defendant's architecture. "A cartoon on a matter of public interest . . . is bound by its nature to traffic in exaggeration, caricature, allegory and fiction": *Harry Seidler & Associates and Harry Seidler v. John Fairfax & Sons Ltd* (unreported, Supreme Court of New South Wales, CL 15860 of 1982; CA 292 of 1984), transcript at 5 per Glass J. citing *Vander Zalm v. Times Publishers* (1908) 109 D.L.R. 531 at 558.

Public figures who are would-be plaintiffs would do well to read *The Preses and Society of Solicitors before the Commissary, Sheriff and City Courts of Edinburgh v. Robertson* (1781) 9 Fac. Col. 4. James Boswell, counsel for the defendant used an argument constructed by Dr Johnson which concluded: "Whether there was, or was not, an animus injuriandi, is not worth inquiring, if no injuria can be proved. But the truth is, there was no animus injuriandi. It was only an animus irritandi, which, happening to be exercised upon a genus irritabile, produced unexpected violence of resentment."

(b) Art criticism and review

Whenever an artist reveals work to the public, he or she invites criticism -- and this is not always favourable. However, there are limits to this vulnerability. On the one hand it can be said that in "the case of criticism in matters of art, whether music, painting, literature or drama, where the private character of a person criticised is not involved, the freer the criticism is, the better it will be for the aesthetic welfare of the public": *Lyon v. Daily Telegraph* [1943] K.B. 746 at 752. On the other, as *Whistler v. Ruskin* (unreported, Court of Exchequer, 1878), illustrates, one must draw a line at comment that ventures beyond artistic criticism. In that case, Ruskin had written of Whistler,

"I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face."

The critic had the right to lambast the work and style of the artist, but in calling him a "coxcomb", he attacked the character of the artist rather than his work and this he was not permitted to do. (It is interesting to note that although Whistler won the case, the jury awarded him only one farthing in compensation for the injury done to his reputation!)

(c) The essentials of the defence

(1) The defendant must show that the disparaging remarks were in the nature of "comment" rather than a "statement of fact". Although "comment" may be characterised as "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation", it is frequently difficult to distinguish between comment and statement of fact. However, if the statement purports to be artistic criticism, it is prima facie comment: *Whitford v. Clarke* [1939] S.A.S.R. 434; Fleming, *The Law of Torts* (7th ed., The Law Book Co., 1987), pp. 557-558.

(2)The comment must be based on facts that are true and have not been distorted: *Thompson v. Truth* (1932) 34 S.R. (N.S.W.) 21; *Antonovich v. West Australian Newspaper* [1960] W.A.R. 176. Unless the base facts are true it is impossible to contend that the comment based on those facts is “fair”. (In New South Wales the position has been statutorily amended so that the facts need only be substantially correct.) With true artistic criticism this requirement is easily satisfied, for usually the fact on which the comments are based is the fact that a named artist produced the works that are on exhibition.

(3)Although the defendant does not have to prove that the comment or criticism was correct, it must be shown that the view expressed could be honestly held. It is an objective test, and it is not for the jury to agree or disagree with the comment, nor for it to condemn or approve of the degree of vitriol exhibited.

(4)Finally, it must be shown that the comment was on a matter of public interest or concern. This is usually easy to establish because since “the persons concerned have invited the public to interest itself in their work, they cannot be heard to say that its quality is not a matter of public interest”: *Gardiner v. John Fairfax & Sons Ltd* (1942) 42 S.R. (N.S.W.) 171; see too, *London Artists Ltd v. Littler* [1969] 2 Q.B. 375. Five jurisdictions, Queensland (s. 375), Tasmania (s. 14), New South Wales(s. 31), Western Australia (s. 355) and Northern Territory (s. 6A) specify that artistic and literary works, public entertainments and sports are matters of public interest.

However, by showing work in public, an artist does not thereby make his or her character a matter of public interest: *Campbell v. Spottiswoode* (1863) 3 B.S. 769; 122 E.R. 288; *Merrivale v. Carson* (1887) 20 Q.B.D. 280; *Joynt v. Cycle Trade Co.* [1904] 2 K.B. 297; *Wilson v. Manuwatu Daily Times* [1957] N.Z.L.R. 735. Although a critic can deride the artwork, the character of the artist must not be impugned. Thus, Ruskin could abuse Whistler’s work but should not have referred to him as a “coxcorn”, because at law the character of the artist was not a matter of public interest.

7. Difference between Justification and Fair Comment

Although the previous paragraphs have set out the basics of “fair comment” and “justification”, it is worthwhile emphasising that when “justification” is pleaded the defendant must prove not only that the basic facts are true, but that the imputation or innuendo that may be drawn from these facts is true, too. On the other hand, with “fair comment”, the defendant only has to show that the basic facts are true, not that the comments made on those facts are true.

8. The Defence of Privilege

It is inherent in our legal system that where rights are in conflict, they should be weighed against one another on a hypothetical scale of societal importance. Thus we have seen that the right to create must be balanced against the right to enjoy one’s good character. With the defence of “privilege”, the law performs a similar balancing act and demands that certain situations are so important that the need for freedom of speech should take precedence over the protection of personal character.

There are two types of privilege: absolute and qualified. Absolute privilege attaches to statements made in the parliament, in court proceedings, between high ranking members of the Executive (including Ministers and Heads of Department), in the course of a solicitor-client relationship, and those made between the partners of a marriage.

All of these are situations in which for various reasons, it is crucial that persons have complete freedom of expression. It is the situation that attracts the protection, not the contents of the statement.

In contrast, qualified privilege is a flexible nebulous defence that operates to protect the maker of a defamatory statement "where the person who makes (the) communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it": *Andreyevich v. Kosovich* (1947) 47 S.R. (N.S.W.) 357 at 362; *Telegraph Newspaper v. Bedford* (1934) 50 C.L.R. 632 at 655-658. This definition has been amended and extended in the code States, but it is not intended to explore the complexities of definition or application of this defence because it has little or no application to the professional life of an artist. It is sufficient for our purposes to be aware that the privilege defence exists.

9. Summary

In an action for defamation the plaintiff must prove that the statement was defamatory; concerned the plaintiff; and was communicated to a person other than the plaintiff. For its part, the defendant may try to avoid liability by arguing that one or more of those factors cannot be established.

Should the plaintiff manage to establish the elements of liability, the defendant will still have the opportunity of raising certain defences, such as justification, fair comment and privilege.