Language and Law

A resource book for students

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First published 2016

ISBN: 978-1-138-02558-5 (hbk)
ISBN: 978-1-138-02557-8 (pbk)
ISBN: 978-1-315-43625-8 (ebk)

Chapter B8

Disputing 'Ordinary Language'

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DOI: 10.4324/9781315436258-20

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

B8

DISPUTING 'ORDINARY LANGUAGE'

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In this unit, we develop the outline of verbal 'content adjudication' we present in Unit A8. We focus on how the meaning and effect of utterances is decided in fields including media law and the law governing public order, where uses of language may, for example, be alleged to be offensive, threatening, defamatory, an incitement to racial or religious hatred, or a commercial misrepresentation. We examine how courts often rely on a concept of 'ordinary meaning' in these circumstances, and show how this notion offers only an unstable link between two different visions of how language works: one a model of negotiated interaction; the other concerned to regulate communicated effects.

Descriptive and normative accounts of language

To most language users (including lawyers and linguists), it seems self-evident that language use can prompt different interpretations depending on audience and context. Situated inference plays an important part in this process, generating and filtering possible meanings. So does recognition of what speech act is being performed, and what move or transaction an utterance performs in an ongoing interaction. These topics form the subject matter of pragmatics, discourse analysis and conversation analysis. For the purposes of law, by contrast, courts must select among alternative, submitted meanings one single meaning that is found (in the specialised, legal sense of 'found' meaning 'decided', see Thread 7) to be the correct, factual meaning that the relevant law will apply. Sometimes such adjudication is performed in a procedurally detailed manner (e.g. in defamation actions); in some areas, decisions may be arrived at by relying more on the judge's linguistic intuitions (or those of a jury, if there is one).

Similar processes are involved in assessing the effect, rather than the meaning, of a disputed utterance or discourse. Effects in question may range from feeling traumatised through to being deceived into buying or doing something; and those effects may result in further consequences, such as losing money or being injured. In everyday social interaction, it is recognised that discourse can produce very different effects, depending not only on personal beliefs or knowledge, but also on the disposition of the addressee. One person's funny joke may be offensive and demeaning to someone else; an advertising claim may be treated completely seriously by a credulous consumer yet dismissed as an obvious exaggeration by someone more sceptical; and one person's taste in titillation may be another's obscenity. Readers and viewers have different thresholds of tolerance, excitability, suspicion and detachment; and such characteristics are likely to affect how a person views rhetorical exaggeration, irony, intemperate language, invective and potentially manipulative sales discourse.

The 'ordinary' meaning of contested words

Central to the adjudication of meaning and effect by law courts is the concept of **ordinary meaning**: the notion of 'plain' or 'natural' signification rather than strained

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or opportunistic interpretation. Such 'plain' meaning can be linked to effects that an utterance may be presumed to have on the addressee(s) and others. Courts typically identify such plain or ordinary meanings for non-legal discourse by deciding what an **ordinary, reasonable reader** (as characterised in defamation law) would take the utterance in dispute to have meant or what communicative effect it would have (or would have had). The 'ordinary, reasonable reader', and related **average consumer** (in trademark law), are specialised legal constructs: interpretive variants of the common-law standard of the **reasonable man** [*sic*], also referred to in earlier periods as **the man on the Clapham omnibus** (though these various persons are often narrowed as appropriate by context).

For purposes of litigation, judging requires a standard of interpretation beyond the views of the interactants themselves. In adversarial proceedings, a claimant puts forward one meaning (sometimes several, argued as alternatives); each meaning claimed will be stretched in the direction of his or her overall submission (i.e. paraphrased to accentuate the gravity of defamatory imputation, racially derogatory meaning or false commercial representation). The defendant will submit one or more contrary meanings, stretched in the direction of the defence being made out (i.e. a more innocuous proposition or an ironic or humorous purpose). On what basis can a court decide what the contested discourse means, since the words are not technical legal discourse whose meaning is controlled by law but language in general use in a wider social sphere?

If interpretation starts from the idea that communicated meanings are what a speaker or writer intends, then the defendant will always succeed: the subjective effect that triggered the suit will be found to be unwarranted. Interpretation that prioritises the subjective effect of an utterance on an addressee or other recipient, on the other hand, would mean that the claimant or prosecution will always succeed: the subjective perception will be vindicated, whatever it may have been. Viewed in terms of free speech, granting too much to intended meaning favours free speech but at the risk of condoning potentially serious harms. Granting too much to subjective effect, on the other hand, can have a chilling effect on free speech, by being overly claimant-friendly: increased risk of litigation may discourage socially valuable but controversial viewpoints, which freedom of expression principles seek to protect (Barendt 2005).

In relevant areas of law, these contrasting difficulties are generally overcome by the court acting as a kind of meaning umpire (Durant 2010a). Meaning is typically determined not on the basis of intention or effect, but according to an objective reading of the words constructed by appealing to the (presumed) interpretive judgment of an ordinary, reasonable reader. Description of this interpretive standard as objective can seem strange from an ethnographic point of view (which is likely to emphasise the specificity of and variation in language use, including interpretation); but such description forms part of a framework in law of tests defined as subjective (where they consist of reported experience) and objective (when viewed from an external point of judgment). As regards the public credibility, and ultimately legitimacy, of how law arrives at fixed meaning for everyday discourse, describing a meaning as 'objective' brings an advantage, however: that the word not only carries the meaning 'viewed from outside, as an object', but also the connotation 'unbiased, scientific'.

The adjudicated meaning that is simultaneously ordinary and objective becomes the legal meaning of the contested utterance for the purpose of the litigation. It is then a small step for that meaning to underpin where required a legal standard of **strict liability**, for example in defamation, which holds the communicator liable for the meaning decided by the court with no reference to whether he or she may have intended to communicate that meaning (or whether that was the meaning the addressee or recipient claims to have derived).

Interpreting contested utterances in two areas of law

Now consider briefly how these approaches to identifying meaning take shape in two important but very different areas of law: the civil law of defamation, which we have mentioned already, and criminal prosecution of Internet trolls in English law under s. 127(1) of the Communications Act 2003.

The 'ordinary reader' in defamation

Defamation law protects people (and, slightly less, companies) against untrue statements whose publication has caused or is likely to cause serious harm to their reputation. The effect of 'damage to reputation' has been defined in various ways over the centuries, and has changed substantially along with social values (e.g. in relation to sexuality and sexual behaviour). Centrally, however, reputational damage occurs where the hearer or reader of something published (whether spoken, printed, broadcast or online) will think less well of the individual referred to. (For a detailed account of English libel (defamation) law, with comparative discussion of other jurisdictions, see Barendt *et al.* (2014: 361–453).)

Whether a particular statement produces such an effect, however, depends on what it means. That is established, following a 'judicial filter' in which a judge may throw out claims based on extravagant or implausible meanings, to the strict liability standard described above using the 'ordinary reader' test. Except for a class of exceptions (which we describe briefly below), the legally adopted meaning of the disputed words will be their natural and ordinary meaning, or meaning the words convey to ordinary people. An ordinary person for this purpose has been judicially characterised as 'a person of fair, average intelligence; who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal'. This reader 'does not live in an ivory tower, and is a layman, not a lawyer'; his or her capacity for implication is acknowledged to be possibly greater than that of a lawyer.

The ordinary meaning of 'the words', then, is context-specific **utterance meaning** rather than a literal 'dictionary meaning' of the particular words: it is the meaning of words as tokens (i.e. in a specific use), not types (i.e. in terms of their potential for meaning if used). The ordinary meaning is that of the words as used in a given publication, targeted at a particular type of reader (who is acknowledged to read different kinds of material with different standards of care and attention: newspapers, text messages, headlines, scientific papers, etc.). The meaning arrived at also takes account of inferences prompted by typical use of the words in other contexts, as well as inferences ('indirect meanings') shaped by general knowledge. In some defamation actions, 'ordinary meaning' is extended by a specialised kind of so-called **true innuendo**

meaning (Barendt *et al.* 2014: 374–8). Such a meaning is triggered where an interpretation significantly different from face-value meaning, with potentially defamatory implications, is implied if the reader of the publication is aware of certain extrinsic facts.

Two key features stand out about the approach to deciding the meaning of an alleged defamatory statement in this way. One is that the resulting meaning is singular: there is one correct meaning. UK defamation law observes an often criticised **single meaning rule**, acknowledged by lawyers as being highly artificial, which requires that from the multiple, different shades of meaning likely to be derived by actual readers, one definitive meaning must be determined. It is on the basis of that one meaning that the gravity of defamatory effect, if any, will be assessed, judgment given, and (potentially) damages awarded. The other feature is that the meaning of a defamatory statement is 'ordinary' only in a highly specialised sense of *ordinary*: 'ordinary' located in a complex network of previous analyses in the relevant case law.

Internet trolls

The approach to determining meaning and effect adopted in defamation law can be usefully contrasted with an approach followed, controversially in some recent cases, to prosecuting Internet trolls for threats, flaming and harassment using s. 127 of the UK Communications Act 2003. Some of the difference between the approach to trolling and to defamation follows from the fact that defamation is a civil matter, whereas prosecutions under s. 127 relate to alleged criminal offences. Another difference concerns the degree of procedural clarity in arriving at meaning. Concerns over the application of s. 127 during a period showing a rapid rise in the number of prosecutions resulted in the then Director of Public Prosecutions (DPP) releasing new guidelines in 2013 in order to establish clearer procedures and a higher threshold triggering prosecution.

s. 127 consists of three subsections. The third states the penalty for being found guilty of an offence: if convicted of 'improper use of a public electronic communications network', someone may be imprisoned for up to six months, or fined. The offence itself is defined in sections 1 and 2. A person is guilty of an offence under s. 127(1a) if he [*sic*] 'sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'; and guilty under s. 127(2a) if 'for the purpose of causing annoyance, inconvenience or needless anxiety to another, he sends by means of a public electronic communications network a message that he knows to be false'.

As regards interpretation, notice that s. 127(2) specifies an effect that needs to be proved: 'causing annoyance, inconvenience or needless anxiety'. It also specifies a mental state in relation to the falsity of the message: 'knows to be false'. No equivalent purpose or mental state is specified under s. 127(1). In both sections, the scope of the offence can appear problematic because of the challenge in applying the broad terms in which the sections are expressed. 'False', as applied to a message, may have a range of dimensions (which have been examined in detail in other areas of law). More problematic are terms in s. 127(1) including 'grossly offensive' and 'indecent, obscene

or menacing character'. The meaning of these terms has also been explored in other legal fields (including in the law of obscenity), but depends significantly on rapidly changing and socially unstable standards in an open and diverse online society.

More immediately problematic, however, is what any particular utterance – a tweet, Web post, blog, etc. – will be judged to convey. Interpreting online messaging, for example, can lead to major challenges created by the rapid evolution of online communication styles and expectations. Interpretation is not difficult in all cases. In some recent trolling cases, a barrage of messages directed towards women who feature either continuously or even briefly in news coverage has contained explicit threats of sexual violence mixed with misogynistic and vituperative comment, traumatising the recipient. It is difficult to see how directly stated threats, including vaginal penetration 'with a 3 foot pole', could not be taken as 'menacing', whatever the channel, manner or context of their expression. But messages in some other cases are not so easily interpreted or judged. In the case *Chambers v. DPP* [2012], one of a number of cases that prompted the new guidelines by the then DPP, the defendant successfully appealed his conviction under s. 127(1) for publishing a message of a 'menacing character': namely, a tweet to his followers after he found that the (Robin Hood) airport he hoped to use to visit a new girlfriend he had met on Twitter was closed by bad weather. The message read: 'Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together, otherwise I'm blowing the airport sky-high'. No online complaints were made but a security manager routinely monitoring online references to the airport drew attention to the message as a 'non-credible threat'. This resulted in prosecution. Despite the message having been tweeted to the defendant's own contact list rather than the airport (complicating the reference of the pronoun 'you'), his tweet does contain a direct threat, 'If not X, then Y', and that threat is at face value a serious one: to blow up an airport. The interpretive challenge, despite the first instance outcome leading to widespread public ridicule, was hardly negligible: the court was obliged to weigh stylistic markers of an abrasive but ironic online discourse against a directly stated threat that it would have appeared grossly negligent to ignore if anything happened. Interpreting Chambers' tweet raised questions similar to those identified by Greenawalt (which we describe in Unit A7) in his analysis of borderline 'situation-altering' utterances: with respect to indirect expression, at what point does a performative utterance cease to be performative?

In the guidance issued on prosecuting Internet trolls, and with hindsight available following Chambers' successful appeal against conviction, the DPP drew attention to the freedom of expression implications of over-prosecuting the kind of messaging involved in *Chambers*: that a chilling effect might follow from prominent Internet troll prosecutions if they were not evidently 'necessary and proportionate' in accordance with Article 10 of the European Convention on Human Rights. Nevertheless, it was concluded, in some circumstances prosecutions should still be brought. Reflecting the need to weigh up when prosecution would be in the public interest, the DPP's guidance stated that in deciding whether to prosecute, account should be taken of a message's relevant context, including the age of the communicator, the possibility of joking and pastiche, and whether the behaviour was one-off or repeated.