



Articles

Refusing defeat: A final call for the revival of the Polly Peck defence

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*Australia is an interesting enclave of defamation jurisprudence. It is particularly interesting in respect of the so-called 'Polly Peck' defence. It can be traced to two landmark English decisions: **Lucas-Box v News Group Newspapers**¹ and **Polly Peck (Holdings) v Trelford**.² Broadly speaking, 'Polly Peck' defends a defamation claim by relying on defamatory meaning that differs from the meaning pleaded by the plaintiff. Australian appellate judges have been quite skeptical about it. Following some critical obiter dicta in **Chakravarti v Adelaide Newspapers Ltd**,³ the defence has been substantially modified. In 2000, the Victorian Court of Appeal replaced it with the more confined 'Hore-Lacy' approach.⁴ This article argues for the full restoration of the Polly Peck methodology. In particular, it argues for Australian courts to once again recognise the now critically endangered 'common sting' plea. It does so by reviving the antipodean debate around the permissibility of alternative meaning pleas. Our fixations on the plaintiff's pleaded imputations, as well as our fears of 'roving inquiry' have not been good reasons for abandoning Polly Peck.*

Introduction

It is often said that defamation actions are to be avoided. One reason is that they are notoriously disputatious — plaintiff and defendant hardly ever agree. Quite often, disagreement centers on what meaning has been conveyed by the defamatory words at issue.⁵ The defendant might deny that the words were defamatory of the plaintiff.⁶ More commonly, the defendant will raise a defence. Although also applicable to 'fair comment',⁷ Polly Peck is most closely linked to the defence of justification.⁸ Justification is made out if the 'defamatory imputations carried by the matter of which the plaintiff complains, are substantially true'.⁹ Windeyer J captured its rationale with elegant brevity: 'the law does not protect the reputation a man has, but only

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1 [1986] 1 WLR 147 ('Lucas-Box').

2 [1986] QB 1000, 1032 ('Polly Peck').

3 [1998] HCA 37 (20 May 1998) [8] ('Chakravarti').

4 See *David Syme & Co Ltd v Hore-Lacy* [2000] VSCA 24 (9 March 2000) ('Hore-Lacy').

5 Andrew T Kenyon, *Defamation: Comparative Law and Practice* (CRC Press, 2013) 81.

6 *Hore-Lacy v Cleary* [2006] VSC 421 (6 November 2006).

7 *Control Risks v New English Library* [1990] 1 WLR 183; *Anderson v Nationwide News* (2001) 3 VR 619; Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010) [917].

8 *Polly Peck* [1986] QB 1000, 1032 (O'Connor LJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150.

9 *Defamation Act* (2005) Vic s 25; *Plato Films Ltd v Speidel* [1961] AC 1090 ('Plato Films');

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the reputation he deserves.’¹⁰ Sometimes, the defendant will seek to justify the imputation that the plaintiff has pleaded. This involves proving true the inferences of fact reasonably arising from the literal language — the imputation. Other times, the defendant might try and justify a different meaning.¹¹ This involves pleading that the imputation — the proverbial ‘sting’ — differs from that pleaded by the plaintiff.

In Australia, alternative meaning pleas have been historically expounded under the umbrella term, ‘Polly Peck’.¹² Properly conceived it encompasses two distinct species: (a) Lucas-Box ‘different’ meanings; and (b) Polly Peck ‘common sting’ meanings.¹³ Although unusual parlance in Australia,¹⁴ Lucas-Box pleas assume the context of when the defendant pleads defamatory meaning that differs from that pleaded by the plaintiff. The defendant’s alternative meaning is typically a less serious one.¹⁵ ‘Common sting’ pleas arise more discretely.

Essentially, they involve a defendant taking a broader ‘look at the whole publication.’¹⁶ If the publication encompasses other defamatory allegations that are not ‘separate and distinct’ from that of which the plaintiff complained, the defendant may argue that — cumulatively — they convey a ‘common sting’.¹⁷ If, on the balance of probabilities, the tribunal of fact accepts the ‘common sting’ meaning — and that in that meaning the words are substantially true — the ‘presumption of falsity’¹⁸ is rebutted. Liability will be defeated. No one has been defamed.

In Australia, both Lucas-Box and Polly Peck ‘common sting’ pleas have been viewed with a cool air of skepticism.¹⁹ After a spate of promising

Reynolds v Times Newspapers Ltd [2001] 2 AC 127; *Lewis v Daily Telegraph Ltd* [1964] AC 234; *Lang v Australian Consolidated Press Ltd* [1970] 2 NSWLR 408, 115; *Sergi v ABC* [1983] 2 NSWLR 669, 676–9. In relation to justification of ‘suspicion of guilt’, see *Sands v Channel Seven Adelaide Pty Ltd* [2010] SASC 202 (1 July 2010) 31.

10 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150 (Windeyer J); *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4, 21–2 (Street ACJ).

11 *Lucas-Box* [1986] 1 WLR 147.

12 *Ibid*; *John Fairfax Publications v Jones* [2004] NSWCA 205 (22 June 2004) 80 (Hodgson JA); *Polly Peck (Holdings) v Trelford* [1986] QB 1000, 1032 (O’Connor LJ, with whom Goff and Nourse LLJ agreed); *Woodger v Federal Capital Press of Australia* (1992) 107 ACTR 1, 24 (Miles CJ); *Sands v Channel Seven Adelaide* (2005) 91 SASR 466, 478 (White J).

13 Andrew T Kenyon, ‘Perfecting Polly Peck: Defences of Truth and Opinion in Australian Defamation Law and Practice’ (2007) 26 *Sydney Law Review* 651, 657; *Herald & Weekly Times v Popovic* (2003) 9 VR 1 (‘Popovic’).

14 *Ibid*.

15 *Lucas-Box* [1986] 1 WLR 147; *Hore-Lacy* [2000] VSCA 24 (9 March 2000); *Nationwide Wide News v Moodie* [2003] WASC 273 (14 November 2003) (‘Moodie’); *John Fairfax Publications v Zunter* [2006] NSWCA 227 (16 August 2006); Kenyon, *Defamation*, above n 5, 81.

16 *Polly Peck* [1986] QB 1000, 1032 (O’Connor LJ).

17 *Ibid*. See also, *Khashoggi v IPC Magazines* [1986] 1 WLR 1412 (‘Khashoggi’); *Templeton v Jones* [1984] 1 NZLR 448, 459 (Cooke J).

18 W V H Rogers, *Winfield and Jolowicz on Tort* (London, Sweet and Maxwell, 2010) 12–25; Paula Giliker, *The Europeanisation of English Tort Law Hart Studies in Private Law* (Bloomsbury Publishing, 2014) 134; *McVicar v United Kingdom* (2002) 35 EHRR 22. Cf *New York Times v Sullivan*, 376 US 254 (1964).

19 *Chakravarti* [1998] HCA 37 (20 May 1998) [8]; *Hore-Lacy* [2000] VSCA 24 (9 March 2000). New Zealand has taken a similar approach: see *Broadcasting Corp of New Zealand*

endorsements,²⁰ Brennan CJ and McHugh J in *Chakravarti v Adelaide Newspapers* leveled the first direct criticisms. ‘A plea of justification in respect of an imputation not pleaded by the plaintiff’, their Honours asserted, ‘contravenes the basic rules of common law pleadings’.²¹ It undermines the wisdom that it is for the plaintiff in a civil action to set the parameters of its claim.²² By allowing such a plea, Lord Morris feared that ‘the limits of roving inquiry would be hard to control’.²³

The implication of the High Court’s criticisms was considered by the Victorian Court of Appeal in *David Syme & Co Ltd v Hore-Lacy*.²⁴ The majority responded by quite radically reconstituting the Polly Peck proposition. The present position is that a case may only go to the tribunal of fact on alternative meanings, which are not more serious than, and not substantially different, from those pleaded by the claimant.²⁵ Dubbed the ‘permissible variant’ approach, many believe it disrupts what Lord Morris termed a defendant’s ‘unseemly use of opportunity to expose a plaintiff’.²⁶ Accordingly, an Australian defendant wishing to plead a Lucas-Box meaning or one founded on a ‘common sting,’ must now negotiate the narrower corridors imposed by *Hore-Lacy*.

Although the Polly Peck debate has been vigorous in Australia, it has gradually run out of steam. In 2014, influential Victorian²⁷ and New South Wales²⁸ decisions have signaled a further retreat from the classical Polly Peck proposition. Far from dispirited, this article re-examines the subject and re-launches the case for Polly Peck’s revival. It argues strongly against the antipodean orthodoxy that has underpinned alternative meaning pleas. Two over-arching themes are explored. First, the belief that Polly Peck affronts proper pleading practices. Second, that it transforms what should be a precise dispute between the parties into some kind of ‘roving inquiry’.²⁹

These two factors have been the primary catalysts of Polly Peck’s distinctively Australian demise. So much so, in fact, that a defendant’s ability to plead alternative meanings is now subject to a highly rigid, even prejudicial,

v Crush [1988] 2 NZLR 234; *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433. Canada has followed the UK: see *Pizza Pizza Ltd v Toronto Star Newspapers Ltd* (2009) 49 OR (3d) 254 (Ontario Court of Appeal).

20 *Kennett v Farmer* [1988] VR 991; *Kelly v Special Broadcasting Service* [1990] VR 69; *Gumina v Williams (No 2)* [1990] 3 WAR 351; *TWT Ltd v Moore* [1991] ACTSC 96 (31 October 1991); *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1; *Grundmann v Georgeson* (1996) Aust Torts Reports 81-396, 513; *Hart v Wrenn* (1995) 5 NTLR 17.

21 *Ibid* [8] (Brennan CJ and McHugh J).

22 Jesse Franklin Brumbaugh, *Legal Reasoning and Briefing: Logic Applied to the Preparation, Trial and Appeal of Cases, With Illustrative Briefs and Forms?* (Bobbs Merrill Company, 1917) 65; David Crump et al, *Cases and Materials on Civil Procedure* (LexisNexis, 2012) 245. See also *Kennett v Farmer* [1988] VicRp 90, 98 (Nathan J).

23 *Plato Films* [1961] AC 1090, 1144 (Lord Morris). Lord Radcliffe dissented vigorously.

24 [2000] VSCA 24 (9 March 2000).

25 *Ibid* [21] (Ormiston JA), [52], [58] (Charles JA).

26 *Plato Films* [1961] AC 1090, 1144 (Lord Morris).

27 *Setka v Abbott* [2014] VSCA 287 (18 November 2014).

28 *Bateman v Fairfax Media Publications (No 2)* [2014] NSWSC 1380 (9 October 2014) (‘Bateman’).

29 *Plato Films* [1961] AC 1090, 1144 (Lord Morris).

imputation-based approach.³⁰ In the tenor of Kenyon and Collins, I view this as a ‘wrong turn’.³¹ Publication — the vessel by which a defamatory charge is actionable in Australia³² — should constitute the wider terrain from which alternative meaning can be harvested and defended. By restoring Polly Peck to its unadulterated condition, defamation claims will be fairer and more efficient. Furthermore, I argue that Polly Peck has a particularly significant role to play within a modern tort that protects ‘as complex a legal interest’³³ as ‘reputation’.

These issues are explored over three parts. In the first part, I trace the historical emergence of the Polly Peck defence in the United Kingdom. Here I also analyse its reception and evolution in Australia. In the second part, I examine afresh the full scope and nature of the High Court’s criticisms in *Chakravarti*. In the third part, I challenge the response of the Victorian Court of Appeal in *Hore-Lacy*. Focusing on the leading authorities since *Hore-Lacy* and emphasising the most recent appellate judgments, I conclude that despite a doctrinal shift away from a classical Polly Peck defence, its revival under Australian defamation law — though improbable — is normatively desirable. It is to the common law development of the Polly Peck doctrine that we now turn.

Polly Peck: Origins and evolution

The historical orthodoxy

The practice of defendants ascribing a different meaning to the defamatory words at issue (and leading evidence in support of it) was considered heterodox.³⁴ Criticism was especially vociferous towards defendants who attempted to show that if the whole publication was taken into account, the defamatory charge could then be justified.³⁵ The 19th century case of *Watkin v Hall*³⁶ is illustrative. There, Blackburn J declared that the defendant’s attempt to set out by his plea the entire article ‘was a matter utterly irrelevant to the question at issue; whether he had published the libel charged in the declaration’.³⁷ Across all common law heritage jurisdictions, Blackburn J’s formalist position held sway for over a century.

The nub of his Honour’s disapproval lay in the defendant’s prejudicial

30 *Lewis v Daily Telegraph Ltd* [1964] AC 234, 272 (Lord Hodson), 282 (Lord Devlin), 359 (Lord Reid).

31 Kenyon, *Defamation*, above n 5, 283–300; Kenyon, ‘Perfecting Polly Peck’, above n 13, 651–82; Matthew Collins, *Collins on Defamation* (Oxford University Press, 1st ed, 2014) 176–9.

32 E Gabriel Perle and John Taylor Williams, *Perle & Williams on Publishing Law* (Aspen Publishers Online, 1999) vol 1, 1.05.

33 David Rolph, ‘Building and Rebuilding Reputations, Reflections on the Role of Defamation Law in the Life of a Celebrity’ in Kathy Bowrey and Michael Handler (eds), *Law and Creativity in the Age of the Entertainment Franchise? Cambridge Intellectual Property and Information Law* (Cambridge University Press, 2014) 103–17.

34 *Scott v Sampson* (1882) 8 QBD 491; *Hobbs v Tinsling* [1929] 2 KB 1, 17–18 (Scrutton LJ); *Plato Films* [1961] AC 1090, 1124–5 (Viscount Simonds).

35 *Plato Films* [1961] AC 1090, 1144–6 (Lord Morris).

36 (1868) LR 3 QB 396 (‘*Watkin*’).

37 *Ibid* 402 (Blackburn J).

attempt to justify ‘that of which the plaintiff *does not* complain’.³⁸ In *Plato Films v Speidel*³⁹ Lord Morris concretized this orthodoxy. ‘It would seem objectionable’, his Lordship stated, ‘if a damages claim for publishing some false defamatory matter, could be made the occasion for asserting and investigating other allegations against a plaintiff’.⁴⁰ The general tide of judicial opinion, however, slowly shifted.

According to Morris, the beginnings of a groundswell of agitation are traceable to Lord Denning.⁴¹ The skeptical tone of his judgments in *Plato Films*,⁴² *Slim v Daily Telegraph Ltd*,⁴³ and *S & K Holdings Ltd v Throgmorton Publications Ltd*⁴⁴ combined to highlight the conundrum of what a defendant is expected to do when ‘the plaintiff complains not of the whole, but only of part’.⁴⁵ Essentially, Lord Denning’s concern was about the phenomenon ‘selective suing’ — namely, when plaintiffs only take issue with a single defamatory sting among a possible constellation. The facts in *Templeton v Jones*⁴⁶ bear this problem out particularly well.

The defendant had accused the plaintiff of ‘hating bureaucrats, civil servants, politicians, women, Jews and professionals’.⁴⁷ The plaintiff, however, only sued over the imputation that he harboured anti-Semitic thoughts. Duty-bound, Cooke J applied Blackburn J’s reasoning. ‘A defendant’, his Honour stated, ‘may not justify that of which the plaintiff *does not* complain’.⁴⁸ If the defendant wants to show that other damaging imputations have been ignored, she may well do so. Yet this will only mitigate quantum, not defeat liability.⁴⁹ By the 1980s, the ability of a defendant to venture beyond the meaning ascribed initially by the plaintiff was being argued more powerfully. The modern approach was ultimately laid down by the English Court of Appeal in two far-reaching decisions: *Lucas-Box v News Group Newspapers*⁵⁰ and *Polly Peck (Holdings) v Trelford*.⁵¹ It is on the propositions for which these decisions stand that we now hone our attention.

The progressive 80s

Lucas-Box ‘different’ meanings

A newspaper article had been published about a suspected terrorist who had been arrested outside the plaintiff’s residence. The article portrayed a dramatic plot in which well-heeled young women were courting fugitive terrorists. The

38 *Plato Films* [1961] AC 1090, 1142 (Lord Morris).

39 *Ibid.*

40 *Ibid.*

41 Anthony J H Morris, ‘Polly Peck Defence: Its Future in Australia’ (2000) 74 *Australian Law Journal* 760, 768.

42 [1961] AC 1090, 1142 (Lord Denning).

43 [1968] 2 QB 157, 168 (Lord Denning).

44 [1972] 1 WLR 1036, 1040 (Lord Denning).

45 *Ibid.* 1039–40 (Lord Denning).

46 [1984] 1 NZLR 448.

47 *Ibid.*

48 *Ibid.* 451 (Cooke J).

49 David J Brennan, ‘The Defense of Truth and Defamation Law Reform’ (1994) 20 *Monash University Law Review* 151, 166.

50 [1986] 1 WLR 147.

51 [1986] QB 1000.

plaintiff pleaded that the imputation that arises from the words at issue was that she connived with terrorists, or was at least reasonably suspected of doing so. The defendant sought to furnish particulars justifying the alternative — indeed less serious — imputation that the plaintiff was merely consorting with radicalised Italians. The case spawned the so-called ‘Lucas-Box meaning’. What are Lucas-Box pleas and how do they arise?

Lucas-Box pleas allow a defendant to deny the plaintiff’s imputation and, in turn, plead *another* meaning that the words are reasonably capable of bearing.⁵² They can arise in a myriad of ways. A standard example is when the plaintiff has pleaded defamatory meaning at the level of criminal guilt. Employing Lucas-Box will enable a defendant to provide particulars that justify meaning at the less serious level of suspicion. Alternatively, suppose the defendant had written that the plaintiff was a ‘Casanova’. By pleading Lucas-Box, the defendant can say that he was not actually imputing ‘adultery’ (as the plaintiff insisted), but mere ‘popularity with women’. According to George, it affords substantial latitude by allowing defendants to pigeonhole words within the various ‘tiers of gravity’ of defamatory meaning.⁵³

A fundamental requirement, however, is that a defendant relying on an alternative Lucas-Box meaning must actually furnish supporting particulars that could establish its truth.⁵⁴ As Ackner LJ stated, there is ‘no reason why libel litigation should be immune from the ordinary pleading rules’.⁵⁵ In Australia, this position was first endorsed by the Supreme Court of Victoria in *Kennett v Farmer*.⁵⁶ Nathan J held that a defendant is ‘entitled and, probably obliged, to plead the meanings of the defamatory words he seeks to justify’.⁵⁷ What is a ‘common sting’ plea?

Polly Peck ‘common sting’ meanings

In *Polly Peck*, the plaintiff company pursued business activities in Cyprus and Turkey. Its shares soon skyrocketed on the London Stock exchange. The defendant published three articles that criticised the company’s activities. In their statement of claim, the plaintiff pleaded imputations pertaining solely to their mineral water venture. In pleading justification and fair comment, the defendant gave particulars that made reference to other aspects of the defendant’s business. These separate allegations fell beyond the tightly set boundaries of the plaintiff’s initial petition. Via an interlocutory process, the

52 Kenyon, *Defamation*, above n 5, 116–18.

53 Patrick George, *Defamation Law in Australia*, (LexisNexis Butterworths, 2nd ed, 2012) 207; *Bennett v News Group Newspapers* [2002] EMLR 39, 36 (Walker LJ); *Chase v News Group Newspapers* [2003] EMLR 11, 45 (Brooke LJ, with whom Rix and Keene LJ agreed); *Musa King v Telegraph Group* [2004] EMLR 23.

54 *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733, 738 (May LJ), 739 (Parker LJ); *Control Risks Ltd v New Library Ltd* [1990] 1 WLR 183; *Prager v Times Newspapers Ltd* [1988] 1 WLR 77, 92 (Nicholls LJ); *Viscount de L’Isle v Times Newspapers* [1988] 1 WLR 49, 60 (Mustill LJ); *Kennett v Farmer* [1988] VicRp 90, 96–8 (Nathan J). Reflecting on English experiences, Kenyon states that Lucas-Box ‘different’ meanings are now ‘absolutely vital’: Kenyon, *Defamation*, above n 5, 118.

55 [1986] 1 WLR 147, 181 (Ackner LJ); *Polly Peck* [1986] QB 1000, 1033 (O’Connor LJ).

56 [1988] VicRp 90.

57 *Ibid.*

plaintiff applied to strike them out, but failed. The numerous allegations arising from the exposé provided grounds for what Nolan J termed ‘a single composite criticism’.⁵⁸

Ultimately, it was O’Connor LJ’s judgment that gave the most lucid formulation of the Polly Peck methodology. ‘Several defamatory allegations in their context’, his Lordship declared, ‘may have a common sting’. If so, ‘they are not to be regarded as ‘separate and distinct’.⁵⁹ Indeed, the defendant may justify the over-arching ‘sting’ that they compositely convey.⁶⁰ O’Connor LJ then turned to reflect on the multiple allegations that had arisen previously in the controversial case of *Templeton v Jones*.⁶¹ His Lordship thought that, together, they were in fact ‘capable of meaning that the plaintiff was an intolerant bigot, preaching politics of hatred in the hope of political advantage’.⁶² If such was the ‘sting of the passage as a whole’,⁶³ the defendant ought to have been permitted to introduce particulars and lead supporting evidence. *Khashoggi v IPC Magazines*⁶⁴ provides the most compact illustration of the ‘common sting’ principle at work.

In *Khashoggi*, the plaintiff was the subject of a magazine article that in substance alleged she was ‘a lady of considerable sexual enthusiasm’.⁶⁵ More to the point, the article also alleged — entirely falsely — that the plaintiff had committed adultery with the president of another country. The plaintiff sued on the narrow imputation that she pursued an affair with the head of a foreign state. By way of defence, the publisher pleaded justification. In defending the imputation of adulterous scandal, the defendant pointed to other charges within the same publication that portrayed the plaintiff as promiscuous.⁶⁶ Linked with the plaintiff’s own imputation, the defendant argued that they conveyed the aggregate ‘sting’ of ‘adulterous promiscuity’.⁶⁷ On the basis of the prima facie plausibility of this alternative meaning, an injunction against publication was lifted.⁶⁸

As a matter of principle, what the defendant was able to do in *Khashoggi* does not seem objectionable. Australian judges, however, have begged to differ. What, in a nutshell, are the anxieties that surround the ‘common sting’ methodology?

According to Sappideen, it encourages defendants to smuggle into the juridical theatre libellous allegations that are, for all intents and purposes,

58 *Polly Peck* [1986] 1 QB 1000, 1019 (Nolan J). See also *Stonor v Daily Telegraph Ltd* (Unreported, Court of Appeal of England and Wales, Cairns and Bridge LJ, 19 July 1976), quoted in *Polly Peck* [1986] 1 QB 1000, 1028–30.

59 *Polly Peck* [1986] 1 QB 1000, 1032 (O’Connor LJ).

60 Laurence W Maher, ‘Defamatory Meaning and the Defence of Truth: *Polly Peck* in Australia’ (1993) 1 *Torts Law Journal* 215, 217.

61 [1984] 1 NZLR 448.

62 *Polly Peck* [1986] 1 QB 1000, 1031 (O’Connor LJ).

63 *Ibid.*

64 [1986] 1 WLR 1412.

65 *Ibid* 1414.

66 *Ibid* 1412.

67 *Ibid.*

68 *Ibid.* As to injunctions and defamation, see *Greene v Associated Press* [2005] EMLR 10; Paul Mitchell, *The Making of Modern Defamation Law* (Bloomsbury Publishing, 2005) 77–97.

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extraneous to the plaintiff's original complaint.⁶⁹ By a process of what Collins aptly terms 'creative pleading',⁷⁰ the defendant, we are told, is able to duck away from a square-on confrontation with the plaintiff's pleaded imputation. The statement of claim — the procedural vessel by which the subject for adjudication is tentatively set — is effectively 'hijacked'.⁷¹ Indeed, by linking the plaintiff's pleaded meaning with other stings abstracted at the defendant's individual whim, the spotlight of the dispute may be diverted 'onto different issues'.⁷² In fact, had the 'common sting' meaning been accepted in *Templeton v Jones*, Callaway JA reminds us that the aggrieved 'plaintiff could not have obtained redress for being falsely labelled an anti-Semite'.⁷³ This, in a nutshell, is most representative of Australian attitudes.

In England, attitudes are less intractable. Initial qualms about the propriety of 'common stings' very soon mellowed. Debate, judicial and academic, quickly focussed on negotiating the new principle's proper parameters. The abiding concern, even in England, has been the acceptable 'degree of abstraction'⁷⁴ used to elicit a 'common sting' meaning. Everyone acknowledges that the test is attenuated by the decidedly ad hoc criteria of what 'separates' and 'distinguishes' one allegation from another. The enquiry clearly hinges on the arbitrary degree of generality with which a defendant is able to marshal a publication's numerous allegations.⁷⁵ It is much less a scientific enquiry than an invitation to judicial idiosyncrasy. That being said, it is still a normatively desirable aspect of Commonwealth defamation doctrine.

At its heart, Polly Peck purports to remedy the unfairness brought about when a plaintiff seeks a damages award by raising one or more stings to their reputation, whilst ignoring, often conveniently, indistinct others.⁷⁶ From this viewpoint, I suggest that Polly Peck is entirely consonant with the policy rationale that where the truth is substantially spoken, reputations either cannot be injured, or are only brought down to their proper level.⁷⁷ This normativity is further borne in light of the essence of the tort of defamation itself.⁷⁸ Redirecting our basic thoughts about the tort, Brennan has emphasised that defamation 'takes cognisance only of reputation where it is well-founded in

69 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Thomson Reuters, 10th ed, 2011) 400.

70 Collins, *Collins on Defamation*, above n 31, 176.

71 *Kennett v Farmer* [1988] VicRp 90 [97] (Nathan J).

72 Collins, *Collins on Defamation*, above n 31, 177.

73 *Hore-Lacy* [2000] VSCA 24 (9 March 2000). For an historical articulation, see *Scott v Sampson* (1882) 8 QBD 491, 503 (Cave J).

74 Kenyon, *Defamation*, above n 5, 118.

75 For English examples, see *Bookbinder v Tebbit* [1989] 1 WLR 640 (CA) 647 (Ralph Gibson LJ); *Mintoff v Associated Newspapers Group* [1989] EWCA Civ 25 (26 April 1989); *Cruise v Express Newspapers plc* [1999] QB 931 (CA) 950.

76 *Polly Peck* [1986] 1 QB 1000, 1031 (O'Connor LJ); *Khashoggi* [1986] 1 WLR 1412.

77 *Rofo v Smith's Newspapers* (1924) 25 SR (NSW) 4, 21 (Street ACJ); *Lange v Atkinson* [1998] 3 NZLR 424, 425.

78 David Rolph, 'Dirty Pictures: Defamation, Reputation and Nudity' (2006) 10 *Law Text Culture* 101; Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007); David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008); Kenneth H Craik, *Reputation: A Network Interpretation* (Oxford University Press, 2008); David S Ardia, 'Reputation in a Networked World: Revisiting the Social Foundations of Defamation

the plaintiff's character'.⁷⁹ If this sets out the tort's legitimate interest, then Polly Peck serves quite an important imperative — that is, to more accurately calibrate what substantive impact the published words have had on the very vaporous social, economic, and indeed media construct that is 'reputation'.⁸⁰

At least initially, Australian judges seemed set on integrating Polly Peck into domestic law. Its arrival on Australian shores forms our next enquiry.

Reception in Australia

In Australia, *Lucas-Box* and *Polly Peck* were first considered by Nathan J in *Kennett v Farmer*.⁸¹ In that case, the defendant alleged that the plaintiff, Jeff Kennett, had conspired with government officials 'to block Supply to the Government so as to oust [it] from office'.⁸² In essence, the case concerned the procedural requirements of *Lucas-Box* meanings. When pleading justification, should a defendant have to furnish particulars clearly stating the ordinary and natural meanings of the words it purports to justify?⁸³ In giving his response, Nathan J was the first Australian judge to offer Polly Peck safe asylum. Before doing so, however, Nathan J heard a barrage of arguments imploring Australia to turn back the Polly Peck vessel headed from Britain. The plaintiff's strongest argument — and in Australia the most unremitting — was what his Honour dubbed the 'deflection' thesis.⁸⁴ It requires some unpacking.

The thesis takes quite targeted aim at the 'common sting' methodology. 'A plaintiff could, nor should', the plaintiff stated, 'be obliged to fight the case upon meanings which the defendant may select'.⁸⁵ By pleading an alternative *Lucas-Box* or 'common sting' meaning, the defence effectively 'casts back upon the plaintiff an obligation to displace the defendant's selected meanings'.⁸⁶ In this sense, it 'deflects' from the real issue by shifting the spotlight away from the defamatory imputation set out by the plaintiff. The field of dispute is inappropriately expanded to encompass matters peripheral to the plaintiff's complaint.⁸⁷ 'The litigation itself', the plaintiff added, 'would become more complex than it now is'.⁸⁸ So much so, we were told, that 'control of the litigation could be lost'.⁸⁹ Lord Morris's 'roving inquiry'⁹⁰ mantra was the argument's guiding thread.

Nathan J was intent on unstitching it. To deny the defendant the ability to plead and lead evidence in justification of either a '*Lucas-Box*' or 'common

Law' (2010) 45 *Harvard Civil Rights-Civil Liberties Law Review* 261; Laura A Heymann 'The Law of Reputation and the Interest of the Audience' (2011) 52 *Boston College Law Review* 1341.

79 Brennan, 'The Defense of Truth and Defamation Law Reform', above n 49, 152–3.

80 Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 702.

81 [1988] VicRp 90.

82 Ibid [92] (Nathan J).

83 *Lucas-Box* [1986] 1 WLR 147 (Ackner LJ).

84 *Kennett v Farmer* [1988] VicRp 90, [98] (Nathan J).

85 Ibid.

86 Ibid [97].

87 Ibid [96].

88 Ibid.

89 Ibid. See also *Chakravarti* [1998] HCA 37 (20 May 1998) 58 (Gaudron and Gummow JJ).

90 *Plato Films* [1961] AC 1090, 1144 (Lord Morris).

sting' meaning amounts to a denial of 'equal fairness'.⁹¹ That the fact-finder, jury or judge, will have to consider the alternative imputations in light of the tendered evidence is part and parcel of the juridical function.⁹² His Honour also reminded that a determination of the 'true meaning amongst such possible meanings as are capable of being conveyed'⁹³ is a task belonging to the tribunal of fact. The suggestion, therefore, that fact-finders will be somehow 'hijacked into a given meaning simply because that is the pleading of either the plaintiff or defendant'⁹⁴ was more fanciful than realistic. If the defendant's alternative meaning is 'fairly open'⁹⁵ to being conveyed to the 'ordinary reader',⁹⁶ what good reason is there to censure it?⁹⁷

Ultimately, Nathan J found the thrust for reform that had swayed their Lordships on the English Court of Appeal 'equally as compelling in Victoria'.⁹⁸ Leave was duly granted for the defendant to amend the defence by adding Lucas-Box pleas of justification. Nathan J's approval of Polly Peck inspired a swathe of subsequent endorsements across Australian jurisdictions.

Polly Peck down-under

The Full Court of the Supreme Court of Victoria was first to acquiesce in *National Mutual Life Association of Australasia v GTV*.⁹⁹ Deliberating the line of English authority upon which Nathan J had relied, Fullagar, Hampel and McDonald JJ all accepted that they 'could not be expected to decline to follow it'.¹⁰⁰ The facts arose from a current affairs television program. The program was allegedly defamatory of the plaintiff's sickness and disability policies and the manner in which they were being sold. When the defendants proposed to broadcast a second segment on the same topic, the plaintiff objected. It applied to the Supreme Court of Victoria for an interlocutory injunction. Factually, Polly Peck arose in respect of the plaintiff's second pleaded imputation.¹⁰¹ In response to this imputation, the defendant sought to plead an alternative meaning at a less serious level. The conundrum, however, was that none of the defendant's less serious imputations bore a direct nexus to the content of the plaintiff's second imputation.

91 *Kennett v Farmer* [1988] VicRp 90, [98] (Nathan J).

92 *Ibid*. See also *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747, 768 (Fullagar, Hampel and McDonald JJ).

93 George, above n 53, 206.

94 *Kennett v Farmer* [1988] VicRp 90 [98] (Nathan J).

95 *Ibid*.

96 *Jones v Skelton* [1963] 1 WLR 1362, 1371; *Sim v Stretch* (1936) 52 TLR 669, 671 (Lord Atkin); *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505; *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (Lord Reid); *Slatyer v Daily Telegraph Newspaper Co* (1907) 7 SR (NSW) 488, 504 (Street J); *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293, 301; *Parmiter v Coupland* (1840) 6 M&W; 105, 108.

97 *Kennett v Farmer* [1988] VicRp 90, [98] (Nathan J); *Popovic* (2003) 9 VR 1.

98 *Ibid* [100] (Nathan J).

99 [1989] VicRp 66 (Ormiston JA) ('*National Mutual*').

100 *Ibid*. See also *Gumina v Williams (No 2)* [1990] 3 WAR 351, 364 (Seaman J).

101 *National Mutual's* second imputation was framed thus:

That the management of National Mutual had devised and put into operation a training scheme for their salesmen of disability policies which had failed to give sufficient or clear emphasis to the definition of average weekly earnings in those policies which required the deduction of business expenses.

The plaintiff argued that these alternative meanings should not be allowed because they were 'separate' and 'distinct' from the imputation as originally formulated in the statement of claim. The Court rejected the defendant's alternative imputation on elementary Polly Peck criteria.¹⁰² It stated that proof of the truth of the defendant's alternative meaning 'would not answer the plaintiff's separate imputations relating to its training programmes'.¹⁰³ As far as their Honours were concerned, the defendant was alleging 'the truth of two separate imputations, to answer a third'.¹⁰⁴

*Kelly v Special Broadcasting Service*¹⁰⁵ is also illustrative. The action arose out of publications on the television programs *Dateline* and *Four Corners*. By numerous imputations, the plaintiff pleaded that the defendant meant the plaintiff was a fraudster and a criminal. Relying on allegations arising from the entire television program, the defendant attempted to plead that the allegedly defamatory charges conveyed a less serious 'common sting'. Specifically, that the plaintiff was a 'mysterious political activist'.¹⁰⁶ Murphy J rejected the plea. The composite criticism of 'mysterious political activism' was, at least on his analysis, purporting to fix meaning at too high a level of abstraction.

Interestingly, as Polly Peck gradually settled into our Australian defamation landscape, local conditions saw it take on a rather different hue. A strong example is the decision of the Supreme Court of the Australian Capital Territory in *TWT Ltd v Moore*.¹⁰⁷ According to Higgins J, Polly Peck will arise if, 'apart from the imputations alleged by the plaintiff from the matter complained of, another substantially different but at least equally damaging imputation arises therefrom'.¹⁰⁸ This formulation diverges markedly from the terms in which O'Connor LJ had first expressed it in *Polly Peck*.¹⁰⁹ Though it is not altogether clear what motivated Higgins J's aberration, the former s 16 of the *Defamation Act 1974* (NSW) probably bore some influence.¹¹⁰

According to Morris, the repealed s 16 statutory defence of 'contextual truth' had long been an 'attractive option'¹¹¹ for New South Wales pleaders. Essentially, s 16 allowed the substantial truth of a contextual imputation to be established, provided it was 'a matter of public interest or is published under qualified privilege'.¹¹² In light of this statutory counterpart, we can conjecture that Higgins J might have been attempting to reconcile the nascent Polly Peck principle with what looked like a comparable statutory truth defence already

102 *Polly Peck* [1986] 1 QB 1000, 1031 (O'Connor LJ); *Khashoggi* [1986] 1 WLR 1412.

103 *National Mutual Life Association of Australasia v GTV Corporation* [1989] VR 747, 756 (Ormiston JA).

104 *Ibid* 750 (Ormiston JA).

105 [1990] VR 69.

106 *Ibid* (Murphy J).

107 [1991] ACTSC 96 (31 October 1991).

108 *Ibid* [33] (Murphy J).

109 *Polly Peck* [1986] 1 QB 1000, 1032 (O'Connor LJ).

110 Morris, above n 41, 768.

111 *Ibid*. For the imputation-based action in NSW see *Defamation Act 1974* (NSW) s 9(2); Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (Federation Press, 1998) 114–15; *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 333 (McHugh J); *Bellino v Australian Broadcasting Corporation* (1996) 184 CLR 183, 230 (Dawson, McHugh and Gummow JJ), 237 (Gaudron J).

112 *Defamation Act 1974* (NSW) s 16.

existent in New South Wales. Whatever the cause, the confusion was perpetuated in *Woodger v Federal Capital Press of Australia Pty Ltd*.¹¹³ There, Miles CJ was 'unable to see where the difference lies, ultimately, between the defence of contextual imputation in NSW, and the principles that lie behind the Polly Peck judgment'.¹¹⁴

Subsequent decisions nonetheless quickly restored the Polly Peck 'common sting' plea to its classical appearance. In *Hart v Wrenn*,¹¹⁵ for example, Mildren CJ's articulation of the Polly Peck principle strongly echoed O'Connor LJ's original formulation. In *Hart v Wrenn*, the plaintiff had pleaded that the relevant broadcast contained 15 imputations that were defamatory of him. Among them were imputations that the plaintiff was corrupt, dishonest, lacking in integrity and hypocritical. The defendants pleaded justification in relation to nine of the plaintiff's imputations. The matters before Mildren CJ included an amendment to para 11 of the statement of defence. The amendment purported to raise 'a further common meaning which, at least arguably, could meet the "sting" of the plaintiff's allegations'.¹¹⁶ Polly Peck was re-embraced: 'if there are several defamatory allegations in the broadcast, which in context have a "common sting" to them', Mildren CJ confirmed that they 'are not to be treated as separate and distinct, and the defendants are entitled to justify the "common sting"'.¹¹⁷

Through this introductory discussion, my intention has been to give a very clear portrayal of the historical course Polly Peck had travelled down before entering the High Court. We now shift our focus to the *Chakravarti* decision.

The High Court: Revived orthodoxies

Background

In *Chakravarti*,¹¹⁸ the plaintiff, Mr Chakravarti, sued *The Advertiser* for defamation in the Supreme Court of South Australia. He sued on two separate articles. The articles were based on evidence given to the Royal Commission established in 1991 to investigate the near collapse of the State Bank. In respect of the first article, the plaintiff pleaded that it imputed to him criminal or civil wrongdoing, as well as reprehensible conduct in connection with a loan. Similarly, the second article suggested criminal conduct as well as conspiracy amounting to civil misconduct.

The Advertiser argued, in part,¹¹⁹ that the articles did not bear the meanings pleaded by the plaintiff. On the alternative, the plaintiff pleaded that the two articles bore a different meaning. In light of this alternative meaning, it was alleged that they were true, both in substance and fact.¹²⁰ Furthermore, it was

¹¹³ *Woodger v Federal Capital Press of Australia* (1992) 107 ACTR 1, 24 (Miles CJ).

¹¹⁴ *Ibid* [23] (Miles CJ).

¹¹⁵ (1995) 5 NTLR 17, [25] (*Hart v Wrenn*).

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* 25 (Mildren J).

¹¹⁸ [1998] HCA 37 (20 May 1998).

¹¹⁹ *Ibid*. It was also argued that they did not bear any other meaning defamatory of Mr Chakravarti.

¹²⁰ *Ibid* [30].

also pleaded that each article was a fair and accurate report of the proceedings of the Royal Commission.¹²¹

Gummow and Gaudron JJ delivered the leading judgment. In respect of both articles, the imputations pleaded by the plaintiff had been borne out and the report did not fairly and accurately render the proceedings 'in so far as the report gave rise to the imputations pleaded and proved'.¹²² On this point, all five members of the High Court were of one mind.

Accurately understood, the High Court's eight separate references to the Polly Peck proposition were obiter dicta.¹²³ At the trial and first appellate level, Polly Peck had been a non-issue.¹²⁴ Indeed, Breit has stated that the doctrinal implication of the *Chakravarti* decision owes far less to its substantive outcome than to the miscellaneous 'non-binding observations made by the various judges'.¹²⁵

In re-examining the High Court's criticism of Polly Peck, I shall begin by critiquing the particular pleading rules germane to defamation actions. It must be emphasised that this preliminary, often unexplored, theme supplied the backdrop upon which the legitimacy of Polly Peck fell for scrutiny.

The plaintiff's 'original petition'

Brennan CJ and McHugh J's disendorsement of Polly Peck has to be situated in context. It followed an analysis about the extent to which a plaintiff could permissibly deviate from the pleaded imputation, and still be awarded substantial damages. In what follows, I elaborate on this routinely ignored issue of the plaintiff's 'original petition'. What is its scope? How have understandings around it evolved? How has it influenced Polly Peck's position in Australia?

For a long time, the common law orthodoxy was that 'a plaintiff sued on an allegedly defamatory publication and could succeed on *any* defamatory meaning which the publication could bear'.¹²⁶ In effect, plaintiffs were not required to particularise the specific defamatory imputation upon which they complained. English and Australian judges began to impose strictures on this unrestrained freedom.¹²⁷ As a result, plaintiffs were gradually required to plead the particular factual details of their case.¹²⁸ In *Advertiser News Weekend Publishing Co Ltd v Manock*,¹²⁹ Doyle CJ encapsulated the modern preeminence of the plaintiff's 'original petition':

Once the plaintiff pleads a meaning on which the plaintiff relies, that pleading will identify the meaning of which the plaintiff complains . . . although it is the

121 Ibid [31].

122 Ibid [33].

123 This view is supported in Kenyon, *Defamation*, above n 5, 120; Morris, above n 41, 768.

124 *Manonbendro Chakravarti v Advertiser Newspapers Ltd* [1996] SASC 5431 (29 January 1996).

125 Rhonda Breit, 'Chakravarti v Advertiser Newspapers: Lessons for Journalists' (1999) 8 *Australian Studies in Journalism* 37, 38.

126 *Setka v Abbott* [2014] VSCA 287 (18 November 2014) [48].

127 Ibid [49].

128 Reasons are given in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 185 (Salmon LJ), 177 (Diplock LJ); *Prager v Times Newspapers Ltd* [1988] 1 WLR 77, 93 (Russell LJ); *Polly Peck* [1986] QB 1000, 1033 (O'Connor LJ).

129 (2005) 91 SASR 206, 219.

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publication of the defamatory material that is the tort, the function of the pleading is to identify *the field of inquiry* at the trial.¹³⁰

There was a problem however. Notwithstanding particularisation, plaintiffs could still obtain damages upon a meaning entirely absent from their statement of claim.¹³¹ It was this dilemma of plaintiffs departing from their pleaded imputations that lay at the very root of the High Court's criticism of Polly Peck. As we shall see, each of the three *Chakravarti* judgments expressed a different view on how closely plaintiffs should be bound by their own particulars. Importantly, this plaintiff-oriented discourse formed the analytical basis upon which a determination could be made about the scope and methodology of a defendant's alternative meaning plea.

The High Court agreed that plaintiffs can legitimately stray from what they provisionally set in stone in their statement of claim.¹³² Departure, however, is not unbounded. It is attenuated by an important consideration. According to Brennan CJ and McHugh J, departure will only be allowed if the defendant 'is not, or might reasonably be thought to be, prejudiced, embarrassed or unfairly disadvantaged'.¹³³ Thus as Kenyon has observed, the *Chakravarti* judgments all converge on the following point: 'allowing plaintiffs to succeed on non-pleaded meanings could prejudice defendants'.¹³⁴ Upon what yardstick is prejudice against the defendant measured?

According to Brennan CJ and McHugh J, prejudice is best determined under a 'nuance of meaning'¹³⁵ approach. 'A different nuance of meaning from the meaning pleaded', their Honours stated, 'could go to the jury if it is not unfair to the defendant'.¹³⁶ In effect, this means that a plaintiff will not be allowed to succeed on a meaning that 'so alters the substance of the meaning pleaded that the defendant would have been entitled to plead a different issue, to adduce different evidence, or to conduct the case on a different basis'.¹³⁷ To bear out their Honours' point, consider the following analogy with the tort of negligent misstatement.

Suppose a plaintiff alleges that a negligent statement caused her pure economic loss.¹³⁸ The plaintiff will not be entitled to judgment where the evidence led at trial establishes that a *different* representation was negligently made. Success will depend on establishing that the suffered loss came about by relying on the plaintiff's pleaded misstatement. As Morris puts it, the plaintiff will not 'succeed on the footing that the evidence adduced at trial

130 Ibid 219 (Doyle CJ) (emphasis added).

131 *Prichard v Krantz* (1984) 37 SASR 379, 386 (King CJ, with whom Millhouse and Prior JJ agreed); *Taylor v Jecks* (1993) 10 WAR 309, 317–18.

132 *Chakravarti* [1998] HCA 37 (20 May 1998) 19 (Brennan CJ and McHugh J), 52 (Gummow and Gaudron JJ), 139 (Kirby J).

133 Ibid 24 (Brennan CJ and McHugh J).

134 Kenyon, *Defamation*, above n 5, 281.

135 *Chakravarti* [1998] HCA 37 (20 May 1998) 22 (Brennan CJ and McHugh J); *Hadzel v Waldorf* (1970) 16 FLR 174, 182 (Fox J); *Prichard v Krantz* (1984) 37 SASR 379, 386 (King CJ, with whom Millhouse and Prior JJ agreed); *Crompton v Nugawela* (1996) 41 NSWLR 176, 183 (Mahoney ACJ).

136 *Chakravarti* [1998] HCA 37 (20 May 1998) 21 (Brennan CJ and McHugh J).

137 Ibid 19.

138 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

establishes a basis upon which the plaintiff might have, but has not, sued the defendant'.¹³⁹

Accordingly, the 'shade or nuance' of meaning approach is the method Brennan CJ and McHugh J rely on in order to avert prejudice being done to the defendant. It is also clear that their Honours are particularly preoccupied with the plaintiff's pleaded particulars. The statement of claim, in other words, is the main reference point for deciding whether the meaning of a defamatory statement is properly borne out. How did Gaudron and Gummow JJ approach the issue?

Plaintiffs could legitimately succeed, their Honours stated, on meanings 'comprehended in the statement of claim, less injurious meanings, or simply variants of pleaded meanings'.¹⁴⁰ Citing Stephen J's comments in *Sungrature Pty Ltd v Middle East Airlines Airliban*,¹⁴¹ Gaudron and Gummow JJ noted that, having pleaded an innuendo, 'the plaintiff was not free thereafter to rely upon some *quite different* meaning'.¹⁴² Of course, prejudice to the defendant will ultimately limit the degree of departure. Nonetheless, when considering if prejudice has been caused, Gaudron and Gummow JJ made a rather salient point. Regard must be had to 'all the circumstances of the case, including the material which is said to be defamatory and the issues in the trial, and not just simply by reference to the pleadings'.¹⁴³ Therefore, unlike Brennan CJ and McHugh J, Gaudron and Gummow JJ's approach appears to be less pleadings-focused. Their Honours' inclination to arbitrate 'prejudice' in light of a 'wider context'¹⁴⁴ suggests a 'less stringent'¹⁴⁵ approach to that advanced by Brennan CJ and McHugh J. What approach did Kirby J take?

Like Gaudron and Gummow JJ, Kirby J agreed that the plaintiff should still be able to succeed on meanings, supported by evidence, that are not 'substantially different in kind'¹⁴⁶ from those pleaded. His Honour took no issue with the 'nuance' or 'shade' of meaning approach.¹⁴⁷ Yet Kirby J seemed to express a more over-arching — essentially policy-based — concern for 'facilitat[ing] the *fair* determination of the dispute which the parties bring to court'.¹⁴⁸ As long as 'fairness' towards the defendant is not threatened, movement from pleaded meanings can be tolerated.

What implication does this have for defendants? How does a concern for how much departure should be granted to plaintiffs, have any bearing on a defendant's ability to plead alternative meanings? In what follows, we explore this link.

According to George, the formulation of the rule in *Polly Peck* formed a

139 Morris, above n 41, 78.

140 *Chakravarti* [1998] HCA 37 (20 May 1998) [60] (Gaudron and Gummow JJ).

141 (1975) 134 CLR 1.

142 *Ibid* [14] (Stephens J) (emphasis added).

143 *Chakravarti* [1998] HCA 37 (20 May 1998) 60 (Gaudron and Gummow JJ). Issues in respect of meaning are dealt with pre-trial. Having regard to 'all the circumstances of the trial' is difficult to achieve if attention focuses heavily on the imputations pleaded by the plaintiff.

144 Kenyon, *Defamation*, above n 5, 285.

145 *Ibid*.

146 *Ibid*.

147 *Chakravarti* [1998] HCA 37 (20 May 1998) [139] (Kirby J).

148 *Ibid* (emphasis added).

conscious judicial response to the increased ‘flexibility towards interpretation’ that had been gradually afforded to plaintiffs.¹⁴⁹ If plaintiffs are able to depart from the meanings they plead and still succeed (subject to the proviso that the defendant suffers no prejudice), then why should defendants be denied comparable flexibility? This argument is only strengthened by the procedural reality that fact-finders are never bound by either of the parties’ pleaded meanings.¹⁵⁰ It follows, therefore, that the defendant should also be given the opportunity to ‘establish defences based upon meanings different from that pleaded by the plaintiff’.¹⁵¹ In *Kennett v Farmer*, Nathan J thought this was simply a matter of ‘equal fairness’.¹⁵² What was the High Court’s position?

There is no evidence to suggest that the *Chakravarti* judgments take issue with ‘Lucas-Box’ pleas. In fact, Gaudron and Gummow JJ fully endorse Ackner LJ’s requirement that plaintiffs and defendants furnish particulars of their respective meaning.¹⁵³ They also level no criticisms against the historical endorsement of Polly Peck in Australia.¹⁵⁴ Methodologically, however, the *Chakravarti* opinions are fixed (although to varying degrees) on the idea that the meanings pleaded in defamation actions ‘be centered on the plaintiff’s pleaded meanings’.¹⁵⁵ The statement of claim is the gauntlet of the defamation action. Anyone’s meaning must not stray too far from it.

At a fundamental level, therefore, *Chakravarti* advocates a kind of ‘symmetrical congruence’ between what meaning plaintiffs can succeed upon on the one hand, and what meaning defendants can advance in defence on the other.¹⁵⁶ If mere ‘shades’ or ‘nuances’ of meaning are permitted for plaintiffs, then room for defendants to move must also be subject to comparable strictures and controls.

Having investigated the underlying methodological assumptions of the High Court’s discussion, we now turn to survey the contours of Brennan CJ and McHugh J’s criticism of the Polly Peck defence.

Polly Peck’s defect

Brennan CJ and McHugh J’s attack on Polly Peck arrives on the scene early. By para 6 of their judgment, the Polly Peck proposition is laid out for analysis. The full scope of their Honours’ criticism, however, is rather difficult to determine. At least initially, their qualm seems to be that Polly Peck allows defendants ‘to plead a meaning *different* from that contended for by the plaintiff, and then justifying that different meaning’.¹⁵⁷ But this casts quite a wide net. In effect, it suggests that both Lucas-Box and ‘common sting’ meaning pleas might be facing the scalpel. Ultimately, however, it is

149 George, above n 53, 207.

150 *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747, 768 (Fullagar, Hampel and McDonald JJ); *Kennett v Farmer* [1988] VicRp 90 [98] (Nathan J).

151 George, above n 53, 207.

152 *Kennett v Farmer* [1988] VicRp 90 [98] (Nathan J).

153 *Lucas-Box* [1986] 1 WLR 147, 181 (Ackner LJ).

154 *Chakravarti* [1998] HCA 37 (20 May 1998) [52] (Gaudron and Gummow JJ).

155 Kenyon, *Defamation*, above n 5, 283.

156 *Ibid* 283–4.

157 *Chakravarti* [1998] HCA 37 (20 May 1998) [6] (Brennan CJ and McHugh J) (emphasis added).

para 1022 of O'Connor LJ's judgment in *Polly Peck* — the credo of the 'common sting' jurisprudence — that is quarantined.¹⁵⁸ In light of O'Connor LJ's proposition, Brennan CJ and McHugh J outline what they consider to be the principle's 'fundamental defect'.¹⁵⁹ In what follows, we critique it.

On orthodox understandings, Brennan CJ and McHugh J declare that defence pleas are 'either by way of denial, or confession and avoidance'.¹⁶⁰ O'Connor LJ's formulation, they believe, overturns this orthodoxy. *Polly Peck* neither denies the averments in the plaintiff's declaration, nor admits them to be true and alleges new facts that obviate their legal effects.¹⁶¹ Rather uniquely, *Polly Peck* strives to defeat liability by raising meanings that are '*not part of the plaintiff's case*'.¹⁶² As even the most avid of *Polly Peck*'s devotees acknowledge, '*Polly Peck* pleas are unusual in terms of civil litigation'.¹⁶³ 'And yes', Kenyon confesses, 'they do appear to contravene usual pleading practice'.¹⁶⁴

Consider, by way of analogy, the defence of 'consent' in the tort of trespass to land. Apart from denying the plaintiff's allegation of trespass, the defendant might raise a plea in 'confession and avoidance'. By this, I mean that the plaintiff voluntarily agreed to the defendant's entry onto the property.¹⁶⁵ Like in a *Polly Peck* context, the trespassing party is trying 'to destroy the effect of the allegations admitted'.¹⁶⁶ In doing so, certain fundamentals cannot be ignored. In civil claims, it is trite that defences 'must answer the plaintiff's case'.¹⁶⁷ They may not, as Callaway JA put it, 'sidestep the real issue'.¹⁶⁸

Polly Peck, we have been told, is a blatant 'sidestepping' manoeuvre. It allows the defendant to claim having injured the plaintiff's reputation in a different way than what has been alleged by the plaintiff. The defendant is effectively defending its 'own version' of the plaintiff's complaint. Consider again, for example, the facts in *Templeton v Jones*.¹⁶⁹ There, the defendant was not responding to the plaintiff's particular imputation of anti-Semitism. It was defending a more general 'composite' criticism — 'the politics of hatred'.¹⁷⁰ The defendant was asserting a lawful excuse for having injured the plaintiff in a way *it saw fit*.¹⁷¹ As Morris insists, to deny the alleged conduct, and to assert a defence in respect of some other conduct, is improper.¹⁷² Yet, 'this is in

158 Ibid [7].

159 Ibid [11].

160 Ibid [8]–[9].

161 John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union: With References to the Civil and Other Systems of Foreign Law* (The Lawbook Exchange Ltd, 2004) 300.

162 Kenyon, *Defamation*, above n 5, 286.

163 Ibid.

164 Ibid.

165 *Bocado SA v Star Energy UK Onshore Ltd* [2010] 3 All ER 975 (Hope LJ).

166 Sheldon Douglass Elliott and Delmar Karlen, *Cases and Materials on Pleading and Procedure Before Trial* (West Publishing Company, 1961) 162.

167 Morris, above n 41, 701.

168 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [72] (Callaway JA).

169 *Templeton v Jones* [1984] 1 NZLR 448.

170 Ibid 459 (Cooke J).

171 Morris, above n 41, 701.

172 Ibid.

substance,' he argues, 'the nature of a Polly Peck defence'.¹⁷³ Though widely supported, this 'pleadings thesis' is too simplistic.

The 'pleadings thesis' is predicated on a dubious assumption. It believes there is a meaningful equivalency between defending tortious conduct (a battery, for example) other than that causing injury to the plaintiff, and asserting that words carry a meaning different to that alleged by the original petitioner. Unlike other interests recognised by the law of torts, the concept of 'reputation' is surely the most elusive. As Post has stated, one's right to an unblemished reputation 'entails more than the preservation of merely individual interests'.¹⁷⁴ Our reputations are built — and indeed torn down — not by the individual tortfeasor one selects to sue, but by 'shared social perceptions that transcend the behaviour of particular persons'.¹⁷⁵

This has been a wholly unnoticed and very important dimension of Polly Peck's normativity. The defence invites one to treat 'reputation' as something more than a mere 'private possession'.¹⁷⁶ By allowing a defendant to rely on the whole publication in establishing a truth-based defence, regard is had to whether the 'consensus of society'¹⁷⁷ has been truly impaired. Thus, while Polly Peck admittedly stretches the 'strict and logical rules constituting the common law system of pleadings',¹⁷⁸ it also makes for a far more sophisticated treatment of the contemporary tort of defamation. It helps redirect the preoccupation of the tort away from property-based conceptions of reputation, and closer towards a construct composed of the impressions and thoughts of society at large. In light, therefore, of the protection that defamation affords the unique concept of 'reputation', there is an appreciable distinction between disputes about ordinary tortious acts, and debates about what defamatory meaning is accurately conveyed by an expression of language. If there is a doctrine calling for the tort of defamation to be treated sensitively, as well as viewed slightly differently from other torts, it is surely Polly Peck.

In what follows, we continue our critical analysis of the High Court's criticism of Polly Peck. Our next focus is on the nature of its reasoning, particularly Brennan CJ and McHugh J's engagement with the leading common law authorities.

Analysis and reasoning — a cause for rethinking

Brennan CJ and McHugh J's interpretation of the leading line of authorities requires particular analysis. Three seminal cases are cited in support of Polly Peck's criticism: (a) *Bremridge v Latimer*,¹⁷⁹ (b) *Watkin v Hall*,¹⁸⁰ and (c)

173 Ibid.

174 Post, above n 80, 702.

175 Ibid.

176 Ibid.

177 Ibid.

178 Robert Henley, Eden Henley and Thomas Whitney Waterman, *A Compendium of The Law and Practice of Injunctions: And of Interlocutory Orders in the Nature of Injunctions* (Banks, Gould & Co, 1952) vol 1, 167.

179 *Bremridge v Latimer* (1864) 12 WR 878, 879–80 (Byles J) ('*Bremridge*').

180 (1868) LR 3 QB 396.

Templeton v Jones.¹⁸¹ We begin by focusing on the former two. As stated earlier, *Bremridge* and *Watkin* were the leading authorities that ostensibly stood against the practice of defendants defending a defamatory charge in light of an entire publication. As we shall see, however, their Honours' analysis of their respective propositions was conspicuously thin. A closer examination of these cases will give us further cause to rethink Polly Peck's abandonment in our jurisdiction.

19th century case law

Bremridge was the first case cited in support of Polly Peck's disapproval.¹⁸² However, Brennan CJ and McHugh J only cited the bare rule for which the case has become widely known. 'The issue raised by these (defence) pleas', Byles J had remarked, 'is plainly calculated to prejudice the plaintiff, who has a right to have the charge of "treachery" tried and not to be compelled to take part in an irrelevant inquiry'.¹⁸³ The finer details of the case were unexplored. Such an oversight was not inconsequential.

Bremridge concerned a political candidate who previously acted as an election agent for a British parliamentarian named Hodgson. A written article accused the plaintiff of being expelled from the House of Commons for bribery. It also accused him with the desertion of his client and benefactor, Hodgson. The defendant sued on the imputation that he was treacherous. Importantly, however, the words about him having been charged with bribery were omitted. Thus, in pleading his innuendo meaning, the plaintiff tactfully confined his complaint to the imputation that he had 'basely deserted Hodgson and refused to act as his agent'.¹⁸⁴

In his statement of defence, the defendant reproduced the entire passage. Now, the previously severed words referring to the plaintiff as a 'briber' were included. By omitting them from reproduction, the defendant argued that the defamatory meaning of the impugned passage had been altered.¹⁸⁵ The Court of Common Pleas rejected this argument. It ruled that the charges of 'bribery' and 'treachery' were distinct.¹⁸⁶ This meant that the defendant was unable to prove the truth of a distinct charge that did not form the basis of the plaintiff's complaint. In Byles J's words, 'the charge of 'treachery' could only be 'separately tried'.¹⁸⁷ There is more to this case though.

Initially, whether the charges of 'treachery' and 'bribery' were distinguishable had been doubted. 'The libel', according to Willes J, 'might not, perhaps, involve two separate charges of misconduct'.¹⁸⁸ 'Bribery' and 'desertion', he maintained, 'might be so connected together to form one'.¹⁸⁹ This has seen Kenyon suggest that *Bremridge* may not stand as the unshakeable orthodoxy that Brennan CJ and McHugh J supposed. According

181 [1984] 1 NZLR 448.

182 *Chakravarti* [1998] HCA 37 (20 May 1998) [8].

183 *Bremridge* (1864) 12 WR 878, 879–80 (Byles J).

184 *Bremridge v Latimer* (1864) 4 NR 285, 286.

185 Kenyon, *Defamation*, above n 5, 288.

186 *Bremridge* (1864) 12 WR 878, 879–80 (Byles J).

187 *Ibid.*

188 *Bremridge* (1864) 4 NR 285, 287 (Willes J).

189 *Ibid.*

to Kenyon, 'it says nothing unusual in relation to contemporary Lucas-Box or Polly Peck practice'.¹⁹⁰

Kenyon's argument is supported by the High Court's reference to Blackburn J's decision in *Watkin*. In the passage Brennan CJ and McHugh J quote, Blackburn J states that had the defendant been allowed access to the whole article, 'the plaintiff would have had a different cause of action'.¹⁹¹ This would have been impermissible because the plaintiff would not have been able to succeed on the defendant's alternative meaning. Accordingly, Blackburn J's reflection on *Bremridge* only reinforces the position that defendants may not plead alternative meanings that are 'separate and distinct' from those pleaded by the plaintiff. Even under O'Connor LJ's classic 'common sting' criteria,¹⁹² such marked departures from the plaintiff's complaint never gain authorisation.

This leads us to a second issue thrown into relief by *Bremridge*. The issue is of more pragmatic concern — namely, plaintiffs who try to 'limit, artificially, the field of dispute about meaning'.¹⁹³ Brennan CJ and McHugh J appear not to be aware of it in the slightest. Evidence of this consists in the High Court's failure to engage with O'Connor LJ's own evaluation of the *Bremridge* and *Watkin* authorities in his own *Polly Peck* judgment.¹⁹⁴ According to O'Connor LJ, it is paradigmatic of savvy plaintiffs using a 'blue pencil upon words published'.¹⁹⁵ This selectivity, he argued, is characteristically used to modify the meaning of words. This prevents the defendant from justifying them 'in their unexpurgated form'.¹⁹⁶ 'It seems to me', O'Connor LJ emphasised, 'that this is exactly what the plaintiff in *Bremridge* succeeded in doing'.¹⁹⁷

In *Bremridge*, the plaintiff had omitted the words 'the convicted briber' when reproducing the passage.¹⁹⁸ Agreeing with Willes J, O'Connor LJ agreed that to have removed those words from the publication was to have modified the passage's meaning. As such, an alternative imputation that relied on the separate charge of 'bribery' should have been allowed. His Lordship even said he might have decided the matter differently. 'The passage as published', he asserted, reasonably seemed to support 'that *Bremridge* was a corrupt, unreliable, heartless man unfit to be a member of parliament',¹⁹⁹ as opposed to the plaintiff's narrower imputation of 'desertion'. By deeming the charges distinct, however, the Court of Common Pleas annulled the defendant's opportunity to plea and justify a 'common sting'.

In drawing the boundaries of the 'common sting' methodology, O'Connor LJ has also spoken approvingly of a test set forth by Bridge LJ in

190 Kenyon, *Defamation*, above n 5, 288.

191 *Watkin* (1868) LR 3 QB 396, 402 (Blackburn J).

192 *Polly Peck* [1986] QB 1000, 1032.

193 Kenyon, *Defamation*, above n 5, 290.

194 *Chakravarti* [1998] HCA 37 (20 May 1998) [6]–[13] (Brennan CJ and McHugh J).

195 *Polly Peck* [1986] QB 1000, 1023 (O'Connor LJ, with whom Goff and Nourse LJ agreed).

196 *Ibid.*

197 *Ibid.*

198 *Ibid.* 1022.

199 *Ibid.* 1023.

Stonor v Daily Telegraph.²⁰⁰ In permitting access to the whole publication, Bridge LJ's test directs the spotlight on the 'artificiality' of the plaintiff's complaint. It asks the following question: is the plaintiff 'limiting the area of debate by choosing a part only of that total libel as the battleground'?²⁰¹ Accordingly, a helpful way of thinking about 'common sting' pleas is not as a sword but as a shield. They *protect* defendants whose defensive efforts are being outmaneuvered by exceedingly narrow imputations.

This pragmatic concern bore no influence upon the High Court's analysis. To conclude, therefore, as Brennan CJ and McHugh J did, that a plea of 'confession and avoidance' in respect of a meaning not complained of by the plaintiff is an 'irrelevant enquiry'²⁰² is too reductionist. It overlooks a number of salient themes supported by the leading line of cases. Upon finer inspection, therefore, both *Bremridge* and *Watkin* display no drastic inconsistencies with the law after *Polly Peck*. They only underscore the principle that defendants are not permitted to raise meanings that draw upon 'separate' and 'distinct' allegations. As path-breaking as it is often portrayed, O'Connor LJ's judgment in *Polly Peck* does not threaten this.

Of course, 19th century defamation practices were not Brennan CJ and McHugh J's only footing. *Templeton v Jones* formed the third pillar of their criticism.²⁰³ I will now turn to explore how Brennan CJ and McHugh J interpreted the issues arising in that case.

***Templeton v Jones* and severable 'stings'**

Cooke J's judgment in *Templeton v Jones*²⁰⁴ was extolled by the High Court as a sound application of the *Bremridge* orthodoxy.²⁰⁵ It was in this passage that the High Court clearly honed its criticism towards the 'common sting'²⁰⁶ proposition.

We will recall that in *Templeton v Jones* it was held that the attitude expressed by the 'politics of hatred'²⁰⁷ was incapable of defending the distinct 'sting' of anti-Semitism. This meant that evidence of general hatred could not be adduced. Importantly, however, Cooke J had described the anti-Semitic charge 'as not reasonably being capable of being treated as other than a distinct charge'.²⁰⁸ Although often disregarded, his Honour went on to state that this will not apply 'if the words are not severable in that they are not distinct charges, and in substance only one'.²⁰⁹

Accurately understood, therefore, the basic methodology supported by *Polly Peck* 'common sting' pleas was never repudiated by the New Zealand Court of Appeal. Rather, the multiple charges in *Templeton v Jones* — unlike those in *Khashoggi* — simply raised a more tenuously arranged set of

200 (Unreported, Court of Appeal of England and Wales, Cairns and Bridge LJJ, 19 July 1976).

201 *Ibid* (Bridge LJ).

202 *Chakravarti* [1998] HCA 37 (20 May 1998) [6]–[13] (Brennan CJ and McHugh J).

203 *Ibid*.

204 [1984] 1 NZLR 448.

205 *Chakravarti* [1998] HCA 37 (20 May 1998) [10].

206 *Ibid*; *Popovic* (2003) 9 VR 1, 319. Gillard AJA opined that *Chakravarti* inveighs solely on 'common sting' pleas.

207 *Templeton v Jones* [1984] 1 NZLR 448, 459 (Cooke J).

208 *Ibid*.

209 *Ibid*.

defamatory charges. Even among supporters of the Polly Peck defence, the anterior question must still be answered: are we speaking about a 'self-contained'²¹⁰ sting, or are we speaking about a 'common' one?²¹¹ O'Connor LJ was of the view that a 'common sting' was legitimately extractable from the *Templeton v Jones* publication. Yet as referred to above, a determination about what exactly 'separates' and 'distinguishes' one allegation from another is incapable of demonstrably correct results. As O'Connor LJ quite aptly put it, it remains a question of 'fact and degree in each case'.²¹²

What is noteworthy, however, is the example by which their Honours chose to bear out Polly Peck's 'fundamental defect' in *Chakravarti*.²¹³ At para 11, they furnish the following hypothetical:

A defendant cannot take a part of an article that wrongly alleges that the plaintiff has convictions for dishonesty, and a part that imputes that the plaintiff has defrauded shareholders, assert that the article means that the plaintiff is 'dishonest', and then justify *that* meaning, perhaps by proving that the plaintiff had in fact defrauded the shareholders.²¹⁴

Nonetheless, it is contestable whether Brennan CJ and McHugh J's example 'is the sort of finding that must result from applying the central proposition in Polly Peck'.²¹⁵ Put simply, we do not have enough facts to tell. Suppose, for example, the false allegation regarded a criminal conviction of dishonest interference with merchandise in an Australian retail store.²¹⁶ Whether this charge is 'separate and distinct' from the defensible imputation of 'shareholder fraud', is open to argument. These two charges may not be subject to a traditional Polly Peck 'common sting' plea at all. Even if raised in England and Wales, Polly Peck might be considered impermissible.²¹⁷

At this point, it is important for us to consider *Haslam v Times Newspapers*.²¹⁸ There, Gray J suggested that the permissibility of a 'common sting' meaning should have regard to the following:

- (a) aspects of the plaintiff's reputation upon which the imputations bear;
- (b) whether there is a *nexus* between the two sides' imputations;
- (c) whether they have *shared features*; and

210 Ibid.

211 *Polly Peck* [1986] QB 1000, 1032; *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747, 768 (Fullagar, Hampel and McDonald JJ); *Kelly v Special Broadcasting Service* [1990] VR 69; *Gumina v Williams (No 2)* [1990] 3 WAR 351.

212 *Polly Peck* [1986] QB 1000, 1033 (O'Connor LJ).

213 *Chakravarti* [1998] HCA 37 (20 May 1998) [11] (Brennan CJ and McHugh J).

214 Ibid (emphasis added).

215 Ibid.

216 *Criminal Law Consolidation Act 1935* (SA); *R v Morris* [1984] AC 320.

217 *Polly Peck* [1986] QB 1000, 1033 (O'Connor LJ); *Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49; *Prager v Times Newspapers Ltd* [1988] 1 WLR 77; *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733; *Control Risks Ltd v New Library Ltd* [1990] 1 WLR 183; *Stonor v Daily Telegraph Ltd* (Unreported, Court of Appeal of England and Wales, Cairns and Bridge LJ, 19 July 1976).

218 *Haslam v Times Newspapers* (Unreported, Queen's Bench Division, Gray J, 15 November 2001).

(d) whether the common sting meaning is *probative* of the plaintiff's complaint.²¹⁹

Building on O'Connor LJ's bare formulation, the English methodology underpinning 'common stings' has taken a rather sophisticated turn. In light of Gray J's efforts, it is evident that 'common sting' pleas can operate within closed limits. Despite the fears propagated by the High Court, Polly Peck is a beast that can be tamed.

Ultimately, the *Chakravarti* judgments have raised a number of important themes. First and foremost, the judgment situates the plaintiff's pleaded imputation front and centre of the juridical contest. By doing so, plaintiffs will be far more inclined to artificially limit the field of enquiry and, as a result, unfairly shut off a defendant's access to the whole publication. Ultimately, the availability of a valid truth-based defence to a defamation claim will be difficult to sustain. Overall, the High Court's criticism of Polly Peck did not sufficiently engage with the subtleties thrown into relief by this fraught area of defamation law. Furthermore, we saw that the normative case for Polly Peck's revival was only strengthened when viewed in light of the unique interest that the tort of defamation avowedly protects.

We now shift our attention to *Chakarvarti's* aftermath. What methodological approach now underpins pleas of alternative meaning? Where does it leave the Polly Peck principle in Australia? We begin by examining the decision of the Victorian Court of Appeal in *Hore-Lacy*.

Aftermath: The tidal shift

The decision in *Hore-Lacy*

In *Hore-Lacy*,²²⁰ Dyson Hore-Lacy, the plaintiff, sued in relation to an article published by David Syme & Co Ltd in *The Age* newspaper in 1996. The article concerned activities relating to the possible merger or takeover of the Fitzroy Football Club. The plaintiff contended that the article imputed that he lied about the club's finances and conducted himself questionably in relation to voting by members in respect of a possible merger. By para 6 of their defence, the defendant denied these imputations. It raised the defence of truth, arguing that they were 'true in substance and in fact'.²²¹ In doing so, the defendant pleaded 'at least one meaning different from those stated by the plaintiff'.²²² The case raised the permissible scope of alternative meaning pleas. As we shall explore, Brennan CJ and McHugh J's unfavourable view of Polly Peck strongly influenced the Court of Appeal's reasoning.

Redolent of the High Court's methodological preoccupation with the plaintiff's 'original petition', Ormiston JA commenced his judgment in the following tone:

²¹⁹ Ibid.

²²⁰ [2000] VSCA 24 (9 March 2000).

²²¹ Ibid [28] (Ormiston JA).

²²² Ibid; *National Mutual Life Association of Australasia v GTV Corporation* [1989] VR 747.

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It would seem that the solution to these appeals depends upon the extent to which the plaintiff should be allowed to travel *beyond the strict confines* of his pleadings.²²³

In turn, his Honour also acknowledged the ‘disadvantage that a defendant may be obliged to answer a case not relied on in terms by the plaintiff’.²²⁴ The circumstances where a plaintiff could succeed on non-pleaded meanings, and the correlative prejudice that a defendant might suffer, was the primary prism through which alternative meaning pleas once again fell for analysis. Furthermore, as in *Chakravarti*, the Court of Appeal paid its dues to the rule in *Lewis v Daily Telegraph*.²²⁵ There, it was affirmed that the plain and ordinary meaning of words is expounded by pleading the specific imputations they convey.²²⁶ Accordingly, the Court of Appeal’s analytical approach strongly reflected the centrality of the plaintiff’s pleaded imputations.

Having said that, Ormiston JA did make a rather notable concession. At the beginning of his judgment, his Honour emphasised that there ‘is ordinarily but one article or publication . . . relied upon which, read as a whole, is the basis of the claim’.²²⁷ Unfortunately, however, this propitious reference to the wider pasture of ‘publication’ was only short-lived. Collectively, the *Hore-Lacy* judgments were unable to deflect enough of the spotlight away from what Kirby J very felicitously termed ‘the lawyer’s pleading of the alleged imputations’.²²⁸ The defamatory publication — ‘the livewire of an action for defamation’²²⁹ — was slowly faded into the analytical background.

Ormiston JA’s judgment bears particular interest. It is very cautious not to stray too far from the High Court’s position in *Chakravarti*. The influence of Brennan CJ and McHugh J’s analysis on the Court of Appeal is perhaps strongest in respect of how the basic question of the permissibility of a defendant’s alternative meaning should be approached. Like the High Court, Ormiston JA views this question as representing only one side of a coin. The other equally important side asks what defamatory meaning a plaintiff can seek verdict on without causing prejudice to the defendant.²³⁰ In the tone of Brennan CJ and McHugh J, Ormiston JA noted that the fact-finder may only attach meaning to words that are a ‘variant of one of the meanings pleaded or otherwise relied upon’.²³¹ His Honour framed his position in the following terms:

The jury will have to be told that they cannot find for the plaintiff unless they agree with the meaning or one of the meanings put forward on behalf of the plaintiff, or

223 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [1] (Ormiston J) (emphasis added).

224 *Ibid* [3].

225 *Chakravarti* [1998] HCA 37 (20 May 1998); *Lewis v Daily Telegraph Ltd* [1964] AC 234.

226 *Lewis v Daily Telegraph Ltd* [1964] AC 234, 258–60 (Lord Reid, with whom Lord Jenkins agreed); *Mirror Newspapers v Harrison* (1982) 149 CLR 293, 301 (Mason J).

227 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [1] (Ormiston J).

228 *John Fairfax Publications v Rivkin* (2003) 201 ALR 77, 96 (Kirby J).

229 ‘Iai Oshitokunbo Oshisanya, *An Almanac of Contemporary Judicial Restatements (Civil Law)* (Almanac Foundation, 2015) 237.

230 *Ibid*; *National Mutual Life Association of Australasia v GTV Corporation* [1989] VR 747, 750 (Ormiston J); *Kennett v Farmer* [1988] VicRp 90, 98 (Nathan J); *Gumina v Williams (No 2)* (1990) 3 WAR 351, 355, 364 (Seaman J); *Chakravarti* [1998] HCA 37 (20 May 1998) 139 (Kirby J).

231 *Ibid* 17; *Chakravarti* [1998] HCA 37 (20 May 1998) 60 (Gaudron and Gummow JJ).

unless the meaning they would give the publication was only a nuance or variant, not substantially different or more serious from that proposed by the plaintiff.²³²

Why should defendants be subject to different strictures when pleading alternative meaning pleas? The license to succeed on alternative meanings should be identical, whether it is the plaintiff or the defendant taking advantage of alternative meanings. As such, Ormiston JA concluded that a defendant should *also* not ‘be permitted to . . . plead or rely on a meaning other than one which *is not more serious* and otherwise is *not substantially different*’ from the plaintiff’s.²³³ Charles JA agreed on this point. Like the High Court, their Honours endorse what I call the ‘correlative principle’. Although often overlooked, it lies at the basis of Polly Peck’s abandonment in Australia. It is also the animating force behind the ‘permissible variance’ approach.

In practical operation, the ‘permissible variance’ approach imposes a ‘ceiling limit’ on the degree of a defendant’s deviation from the imputation pleaded in the statement claim. Also, it ensures that only a less injurious meaning can be extracted by either party. On formalist pleadings wisdom, the rule is entirely agreeable. It makes every attempt to ensure that neither party is prejudiced or embarrassed by the introduction of ‘false issues’.²³⁴

There is a problem, however. Aren’t ‘false issues’ and ‘common stings’ merely different sides of the same coin? What if someone’s ‘false issue’ is another’s ‘common sting’? As in *Templeton v Jones*,²³⁵ the politics of hatred and intolerant bigotry were — at least in the judgment of one Law Lord — not ‘false’ issues at all. They were complimentary to the ‘sting’ of anti-Semitism. Accordingly, the fundamental flaw with the so-called ‘permissible variance’ approach is the unduly premature end it puts to such vital disagreements about meaning.

In the paragraphs that follow, we will examine the ‘permissible variance’ doctrine. Our concentration will be on what has become its most salient feature — the ‘not substantially different’ criterion.

‘Permissible variance’ — nature and scope

On the whole, the *Hore-Lacy* judgments are unreliable guides in respect of how a ‘substantial difference’ between conflicting imputations should be decided. In *Hore-Lacy*,²³⁶ the defendant did not plead the alternative meaning it wanted to justify at trial. Echoing Ackner LJ’s remarks in *Lucas-Box*,²³⁷ Ormiston JA stated that it is desirable that defendants plead the alleged ‘natural and ordinary meanings of the words that they would place on them’.²³⁸ His Honour went on to state that ‘whatever criticisms the minority [in *Chakravarti*] leveled at the practice, it seems fortunately restricted to

232 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [21] (Ormiston JA).

233 *Ibid* [22].

234 *Ibid* [10], [36], [45], [53], [54] (Ormiston JA).

235 [1984] 1 NZLR 448.

236 [2000] VSCA 24 (9 March 2000).

237 [1986] 1 WLR 147.

238 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [20].

defamation actions'.²³⁹ Accordingly, the defendant pleaded the following alternative imputations: (a) the plaintiff had lied in certain statements made on radio and television, and (b) the plaintiff had misled members of the football club.²⁴⁰ The imputations pleaded both by the plaintiff and defendant were 'nuances or shades' of each other. Because of only a slight variance in the defendant's alternative meaning, the defendant's Lucas-Box plea could proceed to the tribunal of fact. But *Hore-Lacy* was a relatively uncomplicated case. What about factual instances that push the outer limits of the 'not substantially different' threshold?

As Kenyon has indicated, at least one fringe scenario will be where the defendant presents a more concise alternative meaning, and perhaps even alleges that far fewer discreditable matters arise from the publication.²⁴¹ Suppose, for argument's sake, the defendant merely alleged that the plaintiff had shown a 'lack of respect' for Fitzroy's members. Being a far more compact, even benign imputation, it may be rejected as an '*im*-permissible' variant.

In a more reassuring passage, Ormiston JA suggests that the 'not substantially different' standard would not affect alternative meaning pleas that propose a different 'tier of gravity'²⁴² to that imputed by the plaintiff.²⁴³ It seems, therefore, that Lucas-Box imputations — at least ones directly pertaining to guilt or suspicion — appear to have been left intact. At para 22, for example, his Honour supported cases moving to the jury 'with the plaintiff pleading imputations of high impropriety, and the defendant asserting that its meaning referred to less serious peccadillos which it wished to justify'.²⁴⁴ Thus, while the fact-finder determines whether the plaintiff's imputation was one of 'fire', the defendant is still entitled to plead and justify that only 'smoke' was bellowing. Are 'common sting' pleas handled with the same gentle touch?

The short answer is no. They have felt the full brunt of the 'not substantially different' criterion. For Callaway JA, 'common sting' pleas are most empowering for defendants who contrive to 'escape the imputation of which the plaintiff relies'.²⁴⁵ 'Permissible variance' corrects this. It shifts the compass away from the fact-driven enquiry, and towards what Bridge LJ termed the stings that lie 'in the totality of the allegations of the defendant's article'.²⁴⁶ All that matters is the 'apparent symmetry'²⁴⁷ of the imputations pleaded by the plaintiff on the one hand, and the defendant on the other. 'The question of a defendant justifying meanings different from those asserted by the plaintiff', Charles JA declared, 'is necessarily bound up with the extent to

239 Ibid [21]. See also *West Australian Newspapers Ltd v Elliott* (2008) 250 ALR 363 [10] (Steytler P).

240 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) (Ormiston JA).

241 Kenyon, *Defamation*, above n 5, 298.

242 George, above n 53, 207.

243 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [22] (Ormiston JA).

244 Ibid [22] (Ormiston JA).

245 Ibid [72] (Callaway JA).

246 *Stonor v Daily Telegraph Ltd* (Unreported, Court of Appeal of England and Wales, Cairns and Bridge LJJ, 19 July 1976).

247 *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [71] (Callaway JA).

which a plaintiff may be allowed to depart at trial from specific meanings pleaded in the statement of claim'.²⁴⁸

This unyielding desire for absolute congruence between the parties' respective imputations attacks 'common stings' at their core. Indeed, the attack mounted by the Court of Appeal in *Hore-Lacy* goes decidedly further than that of Brennan CJ and McHugh J. In *Chakravarti*, Brennan CJ and McHugh J only appeared to take issue with those attempts that link 'separate' and 'distinct' allegations and fix upon them a composite meaning at too high a level of abstraction.²⁴⁹ *Templeton v Jones*,²⁵⁰ their Honours showed, was paradigmatic of this impropriety. Having said that, both decisions shy away from a consideration of the pragmatic dilemmas that arise when plaintiffs formulate their imputations too rigidly.

The prevailing wisdom in Australia has been that by focusing on the defamatory imputations each party can 'formulate its case with a degree of precision'.²⁵¹ McHugh J remarked that by making the various stings the analytical centerpiece, issues can be 'defined with precision'.²⁵² It is this precision encouraged by an imputation-based approach that is understood to 'relieve the pressures on court time and the cost of litigation'.²⁵³ Polly Peck openly challenges this. As Gaudron and Gummow JJ hinted at in *Chakravarti*, Polly Peck enables the words to mean 'what the parties choose them to mean'.²⁵⁴ It is this liberality that Polly Peck brings to the canvassing of 'all the reasonably open meanings',²⁵⁵ which indicates irreconcilability with the confined nature of defamation disputes.²⁵⁶ Yet, despite its prevalence, this 'roving inquiry' argumentation is often found standing on shaky ground.

The workings of the former NSW jurisdiction should have taught us some lessons by now. In New South Wales, the defamatory imputation — not the publication — was front and centre of the statutory cause of action.²⁵⁷ Where imputations bathe in the spotlight, Kirby J acknowledges that issues can be framed in a more precise way.²⁵⁸ Having said that, Kirby J did not take a dogmatic view. 'It has led', his Honour added, 'to many pre-trial applications, complex interlocutory proceedings and a potential for injustice, depending

248 Ibid [46].

249 *Chakravarti* [1998] HCA 37 (20 May 1998) [8]–[11] (Brennan CJ and McHugh). See also Anne Flahvin, 'First Impressions — Lessons From *Chakravarti*' (1998) 17 *Communications Law Bulletin* 8.

250 [1984] 1 NZLR 448.

251 Morris, above n 41, 781; *Monte v Mirror Newspapers Ltd* [1979] 2 NSWLR 663, 676 (Hunt J). See also *Drummoynne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135, 137–8 (Gleeson CJ).

252 Justice Michael McHugh, 'Dancing in the Streets — The Defamation Tango' (Paper presented at Australian Bar Association Conference, Dublin, 2 July 2005) 6.

253 *Chakravarti* [1998] HCA 37 (20 May 1998) [58] (Gaudron and Gummow JJ).

254 Ibid.

255 *National Mutual Life Association of Australasia v GTV Corporation* [1989] VR 747, 768.

256 *Chakravarti* [1998] HCA 37 (20 May 1998) [58] (Gaudron and Gummow JJ).

257 *Defamation Act 1974* (NSW) s 9(2). For a complete discussion, see Andrew T Kenyon, 'Imputation of Publication: The Cause of Action in Defamation Law' (2004) 27 *University of New South Wales Law Journal* 100, 111; *Greek Herald v Nikolopoulos* (2002) 54 NSWLR 165.

258 *Chakravarti* [1998] HCA 37 (20 May 1998) [139] (Kirby J).

upon the ingenuity and skill of the pleader of the imputations'.²⁵⁹ Indeed, Kirby J stated that this inflexible approach 'should not be extended to jurisdictions that have not so far embraced it'.²⁶⁰ Moreover, reflecting on the processes of pleading in defamation actions, O'Connor LJ compared them to an 'artificial minuet'.²⁶¹ Like a slow and stately ballroom dance, they force each party to choreograph their every move.²⁶² Defamation actions become a game of strategy. In spite of the 'precision' it is believed to bring, an imputation-based approach only fuels interlocutory hearing about the form of pleaded imputations.²⁶³ The neglected concept of 'publication' must re-enter our defamation consciousness.

According to Rolph, a 'common law cause of action based on the publication'²⁶⁴ was a major impetus for unified defamation laws in Australia. This uniformity has been with us for 10 years now. Pleas about what words mean should be moving further away — not closer towards — the artificiality that highly particularised imputations encourage. The conclusion, therefore, that Polly Peck hinders the efficient administration of defamation claims is at best illusory.

In the final section of this article, we re-engage with the *Hore-Lacy* test. We chart its more recent evolution and adaptation, and determine where exactly Polly Peck fits within the current landscape.

Hore-Lacy and Polly Peck's future

The 'permissible variant' approach and the status of Polly Peck in Australia have been widely considered since *Hore-Lacy*. Not every decision can be examined. A few important appellate decisions should, nonetheless, be analysed. In doing so, we stand to gain a more stable view of developments until the present. Decided by the WA Full Court, *Nationwide Wide News v Moodie*²⁶⁵ merits particularly close analysis.

The matter was appealed after the first instance judge, Hasluck J, struck out the defendant's Lucas-box pleas on 'permissible variance' grounds. Where the plaintiff pleaded that the words attributed to him a 'mafioso' personality, the defendant pleaded the less serious meaning that the plaintiff was 'dictatorial and secretive'.²⁶⁶ On appeal, the Supreme Court of Western Australia unanimously held that the defendant's alternative imputations fell short of the 'permissible variance' threshold.

Despite its conclusion, the judgment showed signs of tidying up the outer

259 Ibid.

260 Ibid.

261 *Polly Peck* [1986] QB 1000, 1020 (O'Connor LJ). See also *Singh v Gillard* (1988) 138 NLJ 144, 144; Mark Lunney and Ken Oliphant, *Tort Law: Text & Materials* (Oxford University Press, 2013) 704.

262 Rosalie P Balkin and J L R Davis, *The Law of Torts* (Buttleworths, 1991) 554; Kenyon, 'Imputation of Publication', above n 245, 101.

263 *Fierravanti-Wells v Nationwide News Pty Ltd* [2010] NSWSC 648 (21 June 2010).

264 David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207, 207.

265 [2003] WASCA 273 (14 November 2003).

266 Ibid [18] (Anderson J).

boundaries of *Hore-Lacy*.²⁶⁷ In discussing the permissibility of the defendant's imputations, Steytler J made a key observation. 'Given ordinary people might understand the pleaded imputations in different ways', his Honour remarked, 'it should remain open to the appellant to plead and lead evidence in support of justifying imputations that the plaintiff was dictatorial and secretive in his management style'.²⁶⁸ Such a meaning may well be 'comprehended within the meanings pleaded by the plaintiff, particularly given *the context* in which the references to mafia style conduct are made *in the two articles*'.²⁶⁹ Is publication entering the foreground again? It seems that the 'not substantially different' criterion could be informed by some reference to whether the defendant's imputations are comprehensible in light of the broader publication. This certainly suggests a more liberal interpretation of *Hore-Lacy* than has been seen elsewhere.

In *Herald Weekly Times v Popovic*,²⁷⁰ the defendant (along with defences about *Lange* privilege²⁷¹ and fair report) pleaded Lucas-Box imputations. The defendant advanced less serious meanings to those of 'subversion' and 'bullying' advanced by the plaintiff. Gillard AJA, with whom Warren AJA agreed, thoroughly canvassed pleading practices relevant to defamation actions. A few important points stand to be made.

Firstly, their Honours reiterated the banality that the tribunal of fact is not 'tied to either party's pleaded meanings'.²⁷² 'In a *Polly Peck* defence case', his Honour added, 'it would be open to the jury to conclude that the article is defamatory of and concerning the plaintiff in the meanings put forward by the publisher or the plaintiff, or a combination of both'.²⁷³ Unfortunately, this adjudicative feature of defamation actions has had, at best, a secondary influence on our thinking around alternative meaning pleas. Whatever formalism dictates pleading practices, *Popovic* reminds us that the fact-finder is far better placed to determine the 'true' imputation arising from the contested language. Thus, to persist with the *Hore-Lacy* test only amplifies 'judicial control over the consideration of the matter complained of by the tribunal of fact'.²⁷⁴ Across states where juries are still empanelled, this only dampens the democratic conviction that questions of defamation are best answered by ordinary jurors who reflect the values and perceptions of the community.

This point is further borne out by Gillard AJA's engagement with the *Hore-Lacy* proposition. His Honour stated that the task of deciding whether the parties' imputations should go to the jury should be approached by 'stepping into the shoes of the average reader, and not to subject the article to a strict legal interpretation'.²⁷⁵ This position shares important similarities with Steytler J's comments in *Moodie*. The publication in question must play at

267 The way the plaintiff pleads his case might also be relevant: see *ibid* [63] (Steytler J).

268 *Ibid*.

269 *Ibid* [64] (emphasis added).

270 (2003) 9 VR 1.

271 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

272 *Popovic* (2003) 9 VR 1 [284].

273 *Ibid*.

274 *Chakravarti* [1998] HCA 37 (20 May 1998) [139] (Kirby J).

275 *Popovic* (2003) 9 VR 1, 333 (Gillard AJA).

least some role in deriving meaning from an allegedly defamatory statement.

Notwithstanding these refinements upon the ‘permissible variance’ approach, the classic Polly Peck method of defending a publication in Australia is quickly eroding. A host of appellate authorities attest to this.²⁷⁶ Detailing them will be covering already well-travelled ground. Kenyon has closely examined the leading cases and reports on the depressing state in which Polly Peck — classically understood — now finds itself. Recent judicial decisions, however, have not yet been discussed. Of them, *Bateman v Fairfax Media Publications (No 2)*²⁷⁷ is perhaps the most controversial.

The plaintiff’s claim arose out of the publication of numerous articles in *The Sydney Morning Herald*. By their amended defence, the defendants pleaded defences of justification, contextual truth, honest opinion, comment and fair report. The plaintiff applied to have parts of those defences struck out. McCallum J’s judgment concerned the defendant’s reliance upon so-called ‘Hore-Lacy meanings’²⁷⁸ in making out the defence of justification. The plaintiff argued that the form of pleading approved in Victoria by virtue of *Hore-Lacy* ‘has no place in New South Wales’.²⁷⁹ Indeed, as her Honour stated, the question before her was whether the Hore-Lacy test is ‘a discrete species of the common law defence of justification, or whether it is properly confined in its application to matters of pleading and practice in the State of Victoria’.²⁸⁰

The plaintiff’s aversion to *Hore-Lacy* is very clearly a symptom of the pre-2005 New South Wales statutory regime. Because the imputation used comprised the cause of action in New South Wales, ‘the law required a plaintiff to specify, in the pleading of the claim, the defamatory meanings contended for, and to do so with precision’.²⁸¹ This led her Honour to reiterate the ‘unexceptionable proposition’²⁸² that the case to be defended is the one pleaded by the plaintiff.

As such, *Bateman* entertained the following question: ‘should the approach approved in *Hore-Lacy* have any operation in New South Wales’?²⁸³ Is it, in other words, a mere ‘pleadings parochialism’ pertinent only to Victoria and another counterpart jurisdictions? Or is it a matter of nationwide uniform defamation principle?

As far as the defendant was concerned, authorities across the entire country had entirely resolved this question. The plaintiff’s argument was a non-starter. Directing McCallum J to her own decision in *Hyndes v Nationwide News Pty Ltd*,²⁸⁴ the defendant considered it trite that Hore-Lacy is available

276 See, eg, *John Fairfax Publications v Zunter* [2006] NSWCA 227 (16 August 2006); *John Fairfax Publication v Hitchcock* [2007] NSWCA 364 (14 December 2007); *Fawcett v John Fairfax Publications* [2008] NSWSC 139 (27 February 2008); *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 (2 September 2011).

277 [2014] NSWSC 1380.

278 *Bateman* [2014] NSWSC 1380 (9 October 2014) [28]–[31] (McCallum J).

279 *Ibid* [25].

280 *Ibid*.

281 *Ibid* [9].

282 *Ibid* [42].

283 *Ibid* [32].

284 [2011] NSWSC 633 (24 June 2011).

'independently of a pure defence of justification at common law'.²⁸⁵ Matters, we shall see, took a rather surprising turn.

Citing precedent in *John Fairfax Publication v Hitchcock* and *Fairfax Media Publications Pty Ltd v Kermode*,²⁸⁶ the plaintiff noted that neither decision addressed the antecedent question of whether the *Hore-Lacy* practice 'could apply consistently with the New South Wales practice that a plaintiff is confined to his pleaded imputations'.²⁸⁷ That *Hore-Lacy* is a distinct species of the defense of justification available across all jurisdictions suddenly appeared less obvious. Ultimately, McCallum J was persuaded by the judgment of McColl JA in *Kermode* (with whom the President and Giles JA agreed). In *Kermode*, McColl JA conceded that a defendant could succeed on the defence of justification by pleading 'nuance imputations'.²⁸⁸ In McCallum J's view, however, McColl JA's remarks do not apply universally. They 'were not specific', her Honour stated, 'to the practice in New South Wales, were not part of the ratio of the decision, and were made in circumstances where the point now argued had not been raised for the assistance of the Court'.²⁸⁹ The conclusion, therefore, is that the new methodology that *Hore-Lacy* coined 'makes no sense'²⁹⁰ in the context of the NSW jurisdiction. The 'permissible variance' approach is a foreign 'pleading technique'²⁹¹ manufactured by, and suited to conditions in, Victoria and its counterpart jurisdictions.

McCallum J's judgment will raise eyebrows. Perhaps its biggest flaw is its apparent indifference to important passages in *Chakravarti*.²⁹² We will recall that the High Court took no issue with *Lucas-Box*;²⁹³ a case whose basic proposition is the entitlement of a defendant to justify a different meaning to that pleaded by the plaintiff. Similarly, Brennan CJ and McHugh J also made very explicit reference to a 'modern system'²⁹⁴ of pleadings — a system surely inclusive of her Honour's own jurisdiction. Under that system, their Honours asserted that a defendant's plea of 'a new defamatory meaning might be supportable as a plea which prevents the plaintiff being taken by surprise'.²⁹⁵ The 'permissible variance' doctrine is latent in the High Court authority. It is a matter of Australian common law principle. It should apply everywhere.

That rr 14.28 and 14.30 of the *Uniform Civil Procedure Rules 2005* (NSW) could be, in substantial part, relied on to immunise New South Wales from

285 *Bateman* [2014] NSWSC 1380 (9 October 2014) [53] (McCallum J).

286 *John Fairfax Publication v Hitchcock* [2007] NSWCA 364 (14 December 2007); *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174 (30 June 2011) ('*Kermode*').

287 *Bateman* [2014] NSWSC 1380 (9 October 2014) [54].

288 *Kermode* [2011] NSWCA 174 (30 June 2011) cited in *ibid* [55].

289 *Bateman* [2014] NSWSC 1380 (9 October 2014) [55].

290 *Ibid* [56].

291 *Ibid* [53].

292 *Chakravarti* [1998] HCA 37 (20 May 1998).

293 [1986] 1 WLR 147.

294 *Chakravarti* [1998] HCA 37 (20 May 1998) [8] (Brennan CJ and McHugh J). This observation is only reinforced by the existence of statutory uniform defamation laws across Australia since 2005.

295 *Ibid*.

Hore-Lacy, is a problem.²⁹⁶ Indeed in *Setka v Abbott*, Warren CJ and Ashley JA described her Honour's conclusion in the following (unflattering) terms:

If the position in New South Wales is as her Honour held it to be, and if the conclusions which we have expressed are sound, then any prospect of uniformity of defamation law in Australia, in an important aspect, will be gone.²⁹⁷

Whether Hore-Lacy is merely a 'style' of pleading that 'makes no sense in the context of NSW practice'²⁹⁸ is a pressing issue for appellate reconsideration. Until the matter re-engages our judges, New South Wales, we now must conclude, is retreating further towards an imputation-centered approach under which even the narrower constraints brought about in *Hore-Lacy* seem unpalatable. *Bateman*, however, is not where matters end. In Victoria — the heartland of the 'permissible variance' doctrine — Polly Peck's future has suffered another major setback. In what forms our final discussion, I probe the most recent pronouncement of the Victorian Court of Appeal on the issue of Polly Peck.

Is there any sting left?

To Butler's now nostalgic question 'has Polly Peck lost its "sting"?'²⁹⁹ *Setka v Abbott*³⁰⁰ has surely administered the vasectomy. Like the plaintiff in *Bateman*, Mr Abbott argued that Polly Peck — as confined by *Hore-Lacy* — 'should not be followed'.³⁰¹ The judgment of Brennan CJ and McHugh J in *Chakravarti* was the basis of the argument — namely, that 'defences are either by way of denial or confession and avoidance'.³⁰² That this hoary orthodoxy is still considered a cogent legal thesis in current-day defamation actions provides further cause for alarm.

The plaintiff argued that *Hore-Lacy* should not be applied for a lack of authority. The plaintiff was right that *Hore-Lacy* has not yet been considered by the High Court. The plaintiff also argued that despite the apparent affirmation of *Hore-Lacy* in *Kermode*,³⁰³ what the NSW Court of Appeal said was 'very wide obiter and [had] absolutely nothing to do with the issue for decision'.³⁰⁴ Despite acknowledging that McColl JA's remarks in *Kermode* were only in passing, Warren CJ and Ashley JA reiterated that judges may only depart from decisions of other intermediate appellate courts if they are

296 Crucially, McCallum's J reasoning rests on the strong weight she places on rr 14.28 and 14.30 of the *Uniform Civil Procedure Rules 2005* (NSW). The former refers to circumstances in which a court may strike out pleadings. The latter refers to allegations in statements of claim, generally. Together we are told, these procedural rules militate in favour of disallowing *Hore-Lacy* in NSW, at least if it is conceived in reductionist fashion as a form of pleading, rather than a statement of jurisprudential principle.

297 *Setka v Abbott* [2014] VSCA 287 (18 November 2014) [132] (Warren CJ and Ashley JA).

298 *Bateman* [2014] NSWSC 1380 (9 October 2014) [56] (McCallum J).

299 Des Butler, 'Is Polly Peck at Risk of Losing its Sting?' (2000) 5 *Media & Arts Law Review* 259, 259.

300 [2014] VSCA 287 (18 November 2014).

301 *Ibid* [35].

302 *Chakravarti* [1998] HCA 37 (20 May 1998) [8] (Brennan CJ and McHugh J).

303 [2011] NSWCA 174 (30 June 2011).

304 *Setka v Abbott* [2014] VSCA 287 (18 November 2014) [36]–[37]. 'Counsel', according to

considered to be ‘plainly wrong’.³⁰⁵ They were not so persuaded. The plaintiff’s submission that *Hore-Lacy* ‘is unavailable in law’³⁰⁶ — before or after the commencement of uniformity in 2005 — was correctly rejected.

Ultimately, much of *Setka v Abbott* was aimed at vindicating the ‘middle ground’ that the ‘permissible variance’ methodology has struck. The Court of Appeal reminds us that it has ‘substantially confined the ability of a defendant to plead meanings other than those pleaded by the plaintiff’.³⁰⁷ Its ‘beauty’ is bound up in its response to that peculiarity of defamation claims that allows a ‘plaintiff to go outside his pleaded case, and yet succeed’.³⁰⁸ Within boundaries fixed by the ‘permissible variance’ approach, the defendant is fairly afforded an equivalent latitude (while of course ensuring no ‘false issues’ are raised). *Setka v Abbott*, therefore, dispels any lingering doubts as to whether our system of common law pleadings is undermined by a defendant trying to plead a meaning that differs from the plaintiff’s. But where, more importantly, has it left the proposition that this article has tried to defend? Where has *Setka v Abbott* left Polly Peck in its classical appearance?

Regrettably, the Court of Appeal views the Hore-Lacy approach as a mark of major progress, with very little nostalgia felt for the dilapidated Polly Peck proposition. Interestingly, however, the plaintiff in *Setka v Abbott* seemed to believe that Collins’ description of *Hore-Lacy* as a ‘wrong turn’³⁰⁹ supported his argument. The plaintiff’s belief was mistaken. Collins does not think that the Hore-Lacy methodology is ‘bad in law’³¹⁰ for the same reason the plaintiff did. By ‘wrong turn’, Collins is not advocating — as the plaintiff imputed to him — a return to the old days where the defence of truth needed to ‘meet the entirety of the allegedly defamatory matter and that the plea is one of confession and avoidance’.³¹¹ Warren CJ and Ashley JA have a better eye for what Collins is driving at. As their Honours properly identify, Collins’ misgivings regard *Hore-Lacy* leading to a plaintiff ‘over-reaching’.³¹² Despite its widespread portrayal as middle ground commonsense, *Hore-Lacy* harbours potential for serious misuse.³¹³ Through carefully formulated imputations, plaintiffs can cripple a defendant in establishing a valid defence. This is where Polly Peck — classically understood — can offer an effective intervention. Regrettably, Warren CJ and Ashley JA brush aside Collins’ argument as ‘interesting’.³¹⁴ Despite the insight he fleshes out, their Honours take the firm stance that it is insufficient to overcome ‘the wisdom of requiring pleadings

Warren CJ and Ashley, ‘was principally attacking, as we understand it, her Honour’s conclusion [in *Kernode*] that the Hore-Lacy defence has operation in the context of the Defamation Act 2005’.

305 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); see also *CAL No 14 Pty Ltd v Motor Accidents Board* (2009) 234 CLR 390, [49]–[50] (Gummow, Heydon and Crennan JJ).

306 *Setka v Abbott* [2014] VSCA 287 (18 November 2014) [48].

307 *Ibid* [58].

308 *Ibid* [62]; *Hore-Lacy* [2000] VSCA 24 (9 March 2000) [23] (Ormiston JA).

309 Collins, *Collins on Defamation*, above n 31, 176–9.

310 *Setka v Abbott* [2014] VSCA 287 (18 November 2014) [37].

311 *Ibid*.

312 *Ibid* [67].

313 Collins, *Collins on Defamation*, above n 31, 176–9.

314 *Setka v Abbott* [2014] VSCA 287 (18 November 2014) [67].

and particularisation which should illuminate the issues for determination'.³¹⁵

Over that unwise proposition for which Polly Peck stood, we are called to gather and mourn.

Conclusion

This article has argued for the restoration of the Polly Peck defence in Australia. It has examined the manifold arguments levelled against it. In Australia, alternative meaning pleas are closely linked to the plaintiff's pleaded imputations. What is seen to matter is a very close 'symmetry' between the imputations pleaded by the plaintiff and the defendant. By daring to raise an eye to the whole publication, Polly Peck distracts from real issues. It even encourages roving inquiries. In the wake of *Hore-Lacy*,³¹⁶ it is this sceptical strand of thinking that now dominates across all Australian jurisdictions — with New South Wales possibly excepted.

Nonetheless, when one trusts too much in a vein of skepticism, one lies at risk of adopting a new misleading faith. The decrepit state in which Polly Peck now finds itself bears out this adage. Imputation-focussed thinking towards alternative meaning pleas neglects a serious pragmatic dilemma — namely, plaintiffs gaining an unfair advantage by pleading an imputation in a highly prolix, artificial way. The ingenuity and tact of the pleader of defamatory imputations will, in turn, paralyse defendants who wish to base their defence upon alternative meanings. Defamation actions will be bound up in excessive strategy and game tactics. This is no win for the efficacious administration of defamation disputes. It is no win for substantive justice either.

A much better approach will be to bring the relevant publication to the fore of defamation disputes. This way, the technicalities and inequities of the imputation-centred approach will be minimised. Furthermore, Polly Peck will only further entrust the tribunal of fact with the ultimate task of determining the accurate substratum of fact contained in the defamatory statement, and whether it has been effectively defended.

We also discovered that our appellate authorities have struggled to locate the parameters of the 'common sting' methodology with any precision. 'Common stings' can operate within closed limits. Not only does the composite criticism have to be extracted from the publication at issue, but it must satisfy the 'not separate and distinct' threshold. Our English counterparts have been working towards a sensible calculus.³¹⁷ Indeed, our own judges have already contributed — albeit less consciously — to the setting of the outer boundaries. As Mildren CJ very intuitively put it, 'the common meanings must *meet* the sting'.³¹⁸

We also discussed the entirely unexplored exceptionality of the supposed 'private' interest at the heart of the tort of defamation. The idea of reputation is elusive. Polly Peck gets this. In its unadulterated form, it was shown that Polly Peck takes a forthright approach to a determination of the real impact

³¹⁵ Ibid.

³¹⁶ *Hore-Lacy* [2000] VSCA 24 (9 March 2000).

³¹⁷ *Haslam v Times Newspapers* (Unreported, Queen's Bench Division, Gray J, 15 November 2001).

³¹⁸ *Hart v Wrenn* (1995) 5 NTLR 17 (Mildren CJ).

that a publication has had on those who digest it. As Rosenfeld argues, reputation is 'not an individual attribute or attainment'.³¹⁹ It flows 'from an ascribed social status'.³²⁰ 'Since it involves a shared social perception, it is not so much a private interest'.³²¹ 'It is a public good'.³²² A judgment on the reputation of a plaintiff, therefore, is only enhanced by a broader inquiry into the vessel by which the defamatory matter is transmitted to the world.

Levine J toiled in the 'excruciating and sterile technicalities'³²³ of the imputation-based cause of action in New South Wales. Writing extra-judicially, his Honour identified that defamation gives remedies for 'the publication of something disparaging'.³²⁴ If this is the elementary building block of defamation law, then it should 'boil down to determining what the publication means'.³²⁵ A classic Polly Peck defence is the antidote to his Honour's frustration. By bringing the relevant publication within both parties' reach, the scholasticism that has clouded the ascertainment of defamatory meaning will be diminished.

Polly Peck is probably dead. What has been a case for its revival may turn out to be a eulogy. The common law, however, is man-made. Where there is man, there is hope. Polly Peck brings much good sense to the establishment of defamation defences. Its methods should be endorsed again in Australia.

319 Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 145.

320 Ibid.

321 Ibid.

322 Ibid.

323 Justice David Levine, 'The Future of Defamation Law' (Speech delivered at the occasion of the publication of the first issue of the UTS Law School Law Review, Sydney, 31 August 1999) 9.

324 Ibid.

325 Ibid.