

# THE “POLLY PECK DEFENCE”: ITS FUTURE IN AUSTRALIA

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***Since the High Court’s decision in Chakravarti<sup>1</sup> there is considerable doubt whether - and to what extent - the defence commonly identified with the decision of the English Court of Appeal in Polly Peck<sup>2</sup> is available in Australian defamation actions. In this article, it is contended that, except in very narrowly confined circumstances, the defence should no longer be recognised.***

In the history of the common law, certain case-names have become synonymous with the principle of law for which the case stands as the first or leading authority<sup>3</sup>. Few have had names as apposite as “*Polly Peck*”<sup>4</sup>, which has become the byword for the practice of permitting defendants, in defamation cases, to plead that the publication of defamatory words is defensible - usually, although not invariably<sup>5</sup>, on the grounds that the words are true and (where this is an element of the relevant defence) were published for the public good<sup>6</sup> - on the basis that the words convey a different meaning from that alleged by the plaintiff.

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<sup>1</sup> *Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37

<sup>2</sup> *Polly Peck PLC v. Trelford* [1986] QB 1000

<sup>3</sup> For example, *Rylands v. Fletcher* (1868) LR 3 HL 330, *Browne v. Dunn* (1893) 6 TR (HL) 67, *Mareva* [*Mareva Compania Naviera SA v. International Bulk Carriers Ltd*] [1975] 2 Lloyd’s Rep 509, and *Anton Piller* [*Anton Piller KG v. Manufacturing Processes Ltd*] [1976] Ch 55

<sup>4</sup> *Polly Peck PLC v. Trelford* [1986] QB 1000

<sup>5</sup> As discussed below, a “*Polly Peck* defence” may also be advanced alleging fair comment or, perhaps, qualified privilege.

<sup>6</sup> The law varies amongst Australian jurisdictions as to whether publication in the public interest, or for the public benefit, is an element of the defence commonly known as “justification”. In Victoria, Western Australia, South Australia and the Northern Territory, truth of itself is a complete defence. In Queensland, Tasmania and the Australian Capital Territory, truth alone is not a defence unless the publication was also made for the public benefit. In New South Wales, the common law defence of justification has been replaced with a defence of “substantial truth” under s.15 of the *Defamation Act 1974*, provided that the imputation either relates to a matter of public interest or is published under qualified privilege. S.16 creates a cognate defence of “contextual truth”.

The validity of this principle has been called in question by remarks of Brennan CJ and McHugh J in *Chakravarti v. Adelaide Newspapers Limited*<sup>7</sup>, an appeal from the Full Court of the Supreme Court of South Australia<sup>8</sup> in which the central issue concerned the respondent newspaper's defence that the reports on which it was sued constituted fair and accurate reports of proceedings at a Royal Commission. In relation to this issue<sup>9</sup>, and also in relation to issues concerning the assessment of damages<sup>10</sup>, the unanimous conclusion of the High Court was largely in favour of the appellant (who had been the plaintiff at first instance). Although questions regarding the validity of a *Polly Peck* defence had been argued in the course of the appeal<sup>11</sup>, and although the remarks of Brennan CJ and McHugh J on this subject were plainly reasoned and deliberate<sup>12</sup>, it may be strictly correct to characterize such remarks as "*obiter*". Nonetheless, such a powerful and authoritative refutation of a principle which has gained wide acceptance in both England<sup>13</sup> and Australia<sup>14</sup> warrants a reconsideration of the principle's continuing validity.

### **The *Polly Peck* Defence**

Generally, a *Polly Peck* defence arises where the plaintiff pleads a "false innuendo" - that is to say, where the plaintiff's pleading attributes to the defamatory words a

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<sup>7</sup> [1998] HCA 37, paras [7] to [13]

<sup>8</sup> *Chakravarti v. Adelaide Newspapers Limited* (1996) 65 SASR 527

<sup>9</sup> [1998] HCA 37, para [1] (Brennan CJ and McHugh J); paras [46] and [70] (Gaudron and Gummow JJ); para [158] (Kirby J)

<sup>10</sup> *ibid.*, para [1] (Brennan CJ and McHugh J); para [101] (Gaudron and Gummow JJ); para [185] (Kirby J)

<sup>11</sup> High Court of Australia transcript A41/1996, 1 September, 2 September and 3 September 1997

<sup>12</sup> [1998] HCA 37, paras [7] to [13]

<sup>13</sup> fnn 32 to 36, below

<sup>14</sup> fnn 30, 31 and 41, below

particular meaning, which is said to be their natural and ordinary meaning<sup>15</sup> - and the defendant ascribes a different meaning to the words themselves, either alone or in the context in which they appear. Different considerations arise where the plaintiff pleads a “true innuendo” - that is to say, where the plaintiff contends that a defamatory meaning is conveyed by the words complained of, having regard to some extraneous knowledge held by persons (or some of them) to whom the defamatory words were published<sup>16</sup>.

A *Polly Peck* defence is usually a defence of justification - that the words published, by themselves or in their context, are true in substance and fact. A similar defence may be raised by way of fair comment, or (perhaps<sup>17</sup>) qualified privilege. What distinguishes a *Polly Peck* defence from an “ordinary” defence of justification, fair comment or qualified privilege is that the defence is premised on an allegation that the publication

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<sup>15</sup> In defamation law, a “natural and ordinary” meaning is not necessarily a literal meaning; it may be conveyed either literally by the words of the publication, or by “any implication or inference which a reasonable reader guided not by any special but only by general knowledge ... would draw from the words”: *Jones v. Skelton* [1963] 1 WLR 1362, 1371.

<sup>16</sup> A common example of a “true innuendo” is the publication of a photograph, showing a man and a woman, with a caption describing them as affianced. Neither the photograph nor the caption can be regarded as defamatory in its natural and ordinary meaning. But if either of the persons depicted in the photograph is already lawfully married, the publication may convey to people who are aware of this fact the implication that one or both of them is an intending bigamist. Moreover, to a reader who is acquainted with the lawful spouse of one of the persons depicted in the photograph, the publication may convey a meaning which is defamatory of that spouse - even though the spouse is not depicted or mentioned in the publication - that he or she has falsely claimed to be wedded to a person depicted in the photograph. See *Cassidy v. Daily Mirror Newspapers Ltd* [1929] 2 KB 331.

<sup>17</sup> In those jurisdictions where the cause of action is the publication of defamatory matter rather than the publication of a defamatory imputation, a defence of qualified privilege (or its statutory equivalent) may be available regardless of the imputations pleaded by the plaintiff - or, for that matter, by the defendant - as the relevant privilege attaches to the publication of the matter rather than the publication of particular meanings conveyed by the matter: *Gratton v. Queensland Newspapers Pty Ltd* [1989] 1 Qd R 381. Thus, in such jurisdictions, there may be no need to advance a *Polly Peck* type defence. It is beyond the scope of this paper to consider whether a *Polly Peck* defence of qualified privilege may be available in jurisdictions like New South Wales where the cause of action is constituted by the publication of defamatory imputations rather than defamatory matter (*Defamation Act 1974*, s.9(2)). Nor is it necessary, for present purposes, to consider whether in Queensland (and possibly other Australian jurisdictions, apart from New South Wales) it is the publication of defamatory imputations, rather than the publication of defamatory matter, which gives rise to a cause of action: see *Pervan v. North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 333 (per McHugh J); *Bellino v. Australian Broadcasting Corporation* (1996) 184 CLR 183, 230 (per Dawson, McHugh and Gummow JJ), 237 (per Gaudron J).

sued upon conveys a meaning different from that for which the plaintiff contends.

How this happens may best be illustrated by an example. Take the case<sup>18</sup> of an entertainer, who happens to be a married man. In a newspaper review of the entertainer's performance, the description "camp" is used. He alleges that, in its natural and ordinary meaning, this expression implies that he is homosexual, which (he being a married man<sup>19</sup>) is defamatory. The publisher denies that the word complained of conveys this meaning, and asserts that it implies merely that the entertainer's style of performance is highly exaggerated, extravagant and ostentatious. In support of this interpretation, the defendant may rely on other passages forming part of the same review, focussing on the entertainer's style of performance rather than the entertainer's sexual orientation. Based on the meaning for which it contends, the publisher may seek to argue either that the use of the word "camp" is an accurate description of the plaintiff's performance (i.e., a defence of truth), or - more pertinently - that it constitutes fair comment in respect of the plaintiff's performance.

If the defendant is permitted to advance such a plea, it will significantly affect the course of the trial, and may also affect the outcome. If there is no *Polly Peck* defence, and assuming that any imputation of homosexuality is indefenceable, the only question for the tribunal of fact will be to consider whether the word "camp" conveys this meaning and, if so, to assess damages. If a defence of truth or fair comment may be introduced,

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<sup>18</sup> The facts of this (entirely hypothetical) illustration are based loosely on those of *Liberace v. Daily Mirror Newspapers*, The Times, June 17, 18, 1959, where the plaintiff - an American pianist and entertainer - was described (*inter alia*) as "this deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother-love". The plaintiff alleged that these words conveyed (amongst other things) an imputation of homosexuality. The jury agreed, and awarded substantial damages. The defendant did not seek to justify the truth of this imputation, and argued (unsuccessfully) that the words complained of constituted fair comment on the plaintiff's performance as an entertainer. A detailed (and highly entertaining) account of the case may be found in H. Montgomery Hyde, *Their Good Names - A Collection of Libel and Slander Cases* (London: Hamish Hamilton, 1970) Chapter 12.

<sup>19</sup> For the purposes of this hypothetical example, the facts of *Liberace v. Daily Mirror Newspapers* have been altered to make the plaintiff a married man, as in modern times it may be doubted whether an imputation of homosexuality is defamatory, unless the plaintiff is married (so as to imply that his marriage is a sham), or the plaintiff professes to be heterosexual (so as to imply that he is a liar).

on the basis that the word “camp” is taken to refer to the plaintiff’s style of performance, the evidence on these issues may be wide-ranging, contributing substantially to the length and cost of the trial.

If the tribunal of fact is a jury, there may be genuine grounds for concern that an improper use may be made of evidence introduced in support of the *Polly Peck* defence. Evidence suggesting that the plaintiff’s performance is in execrable taste may (for instance) influence the jury’s assessment of damages; and this may happen despite any judicial direction that, if the jury accepts the meaning which the plaintiff places on the defamatory word, the jury should disregard all evidence adduced with reference to any alternative meaning for which the defendant contends.

What makes this branch of the law particularly complex is that ordinary words of the English language, and especially informal and slang words, are “imprecise instruments for communicating the thoughts of one man to another”<sup>20</sup>. Moreover, “[t]here are no words so plain that they may not be published with reference to such circumstances and to persons knowing the circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances”<sup>21</sup>. The plaintiff will naturally contend for the most harmful meaning attributable to the words complained of. The defendant will seek to attribute to the same words a more innocent meaning - one which is capable of being justified, or regarded as fair comment. The jury may, however, think that the natural and ordinary meaning lies somewhere between these extremes.

Suppose that the jury is satisfied that the word “camp” implies a lack of manliness, but not necessarily homosexuality. On the one hand, the plaintiff has not based his claim on such an imputation; and on the other hand, the defendant has not sought to defend that imputation. Is the court entitled to find in the plaintiff’s favour on the basis that the word complained of conveys a defamatory meaning, albeit a different and (arguably)

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<sup>20</sup> *Slim v. Daily Telegraph Ltd* [1968] 2 QB 157, 171, per Diplock LJ; see also *Charleston v. News Group Newspapers Ltd* [1995] 2 AC 65, 71-2, per Lord Bridge of Harwich

<sup>21</sup> *Capital and Counties Bank v. Henty* (1882) 7 App Cas 741, 771, per Lord Blackburn

less serious meaning than that asserted by the plaintiff ? And if so, should the jury consider whether a charge of effeminacy is defenceable - either because it is true, or because it amounts to fair comment - where the case advanced by the defendant seeks only to support an imputation that the plaintiff's performance was exaggerated, extravagant and ostentatious ?

### **The Law Before *Chakravarti***

In *Watkin v. Hall*<sup>22</sup>, Blackburn J. - commenting on the earlier case of *Brambridge v. Latimer*<sup>23</sup> - said:

“I think the decision [is] correct, because in that case a portion of a newspaper article being set forth in the declaration, with an innuendo, the defendant endeavoured to shew that if the whole article was taken, the plaintiff would have had a different cause of action, and he sought, by his plea, to set out the whole article, and, so, to justify it as true in fact. This was a matter utterly irrelevant to the question at issue, whether he had published the libel charged in the declaration.”

This view held sway, both in England and in Australia, for over a century. In New Zealand it was affirmed as recently as 1984, when the Court of Appeal concluded it was “... elementary that a defendant may not justify - that is to say, prove the truth of - that of which the plaintiff does not complain”<sup>24</sup>. In *Kennett v. Farmer*<sup>25</sup>, Nathan J. described as the “conventional view” that expressed in the 8<sup>th</sup> edition of *Gatley on Libel and Slander*<sup>26</sup>; viz. -

“Where however the plaintiff relies on more than one false ‘innuendos’ he is stating how he is going to present his case, and the defendant cannot allege that the words have some other natural and ordinary meaning and then justify that.”

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<sup>22</sup> (1868) LR 3 QB 396, 402

<sup>23</sup> (1864) 12 WR 878; 10 LT 816; 4 NR 285

<sup>24</sup> *Templeton v. Jones* [1984] 1 NZLR 448, 451

<sup>25</sup> [1988] VR 991, 996

<sup>26</sup> Published in 1981; para.1108

As with so many other attempts to “modernise” the law, the beginnings of a groundswell of agitation to overrule this traditional approach can be traced to Lord Denning, and specifically to his speech (as a member of the House of Lords) in *Plato Films Ltd v. Spidee*<sup>27</sup>, and his judgments (as Master of the Rolls) in *Slim v. Daily Telegraph Ltd*<sup>28</sup> and *SK Holdings Ltd v. Throgmorton Publications Ltd*<sup>29</sup>. But the question did not arise squarely for consideration until two cases came before the English Court of Appeal in 1985. *Lucas-Box v. News Group Newspapers Ltd*<sup>30</sup> was argued some months after the *Polly Peck* case, but the decision was handed down a few weeks earlier, and was approved and followed by the Court in *Polly Peck*. In the result, there was unanimous support from five members of the Court of Appeal - Lord Justices Ackner, O’Connor, Robert Goff, Mustill and Nourse - supporting the proposition that<sup>31</sup>:

“In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him, and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different from that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and to give particulars of the facts and matters upon which he relies in support of his plea ... .”

In the ensuing decade, this proposition was readily embraced in Australia, by the Full Court of the Supreme Court of Western Australia<sup>32</sup>; by three judges sitting at first instance in the Supreme Court of Victoria<sup>33</sup>; by two judges sitting at first instance in the

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<sup>27</sup> [1961] AC 1090, 1142

<sup>28</sup> [1968] 2 QB 157, 168

<sup>29</sup> [1972] 1 WLR 1036, 1040

<sup>30</sup> [1986] 1 WLR 147

<sup>31</sup> [1986] QB at 1032, per O’Connor LJ

<sup>32</sup> *Gumina v. Williams (No.2)* [1990] 3 WAR 351

<sup>33</sup> Nathan J. in *Kennett v. Farmer* [1988] VR 991; Murphy J. in *Kelly v. Special Broadcasting Service* [1990] VR 69; and Gobbo J. in *Curran v. The Herald and Weekly Times* Butterworths Unreported Judgments BC 9300747

Supreme Court of the Australian Capital Territory<sup>34</sup>; by one member of the Queensland Court of Appeal<sup>35</sup>; and by a judge sitting at first instance in the Supreme Court of the Northern Territory<sup>36</sup>.

In the writer's experience, *Polly Peck* defences have been commonly pleaded, both prior to and since the decision in *Chakravarti*<sup>37</sup>, although not to the same extent in New South Wales as in other jurisdictions. This may be explained by the fact that, in cases where a *Polly Peck* defence of justification might be available, the statutory defence of "contextual truth" may be a more attractive option to New South Wales pleaders<sup>38</sup>. In *Woodger*<sup>39</sup>, Miles C.J. was "unable to see where the difference lies ultimately between the defence of contextual imputation in New South Wales and the principles that lie behind the *Polly Peck* judgment"<sup>40</sup>. Meanwhile, in the United Kingdom, the *Polly Peck*

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<sup>34</sup> Higgins J. in *TWT Ltd v. Moore* (1991) A Def Rep 51,030; and Miles C.J. in *Woodger v. Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1

<sup>35</sup> Dowsett J. in *Grundmann v. Georgeson* (1996) Aust Torts Rep ¶81-396 at 63,513. It may be more accurate to say that his Honour assumed, without deciding, that such a defence is available under Queensland law; the *Polly Peck* defence had failed at first instance, and was only relevant on appeal in respect of the costs of maintaining that unsuccessful defence.

<sup>36</sup> Mildren J. in *Hart v. Wrenn* (1995) 5 NTLR 17

<sup>37</sup> *Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37

<sup>38</sup> Another explanation sometimes advanced for the fact that *Polly Peck* defences are not often pleaded in New South Wales is the argument that, in a jurisdiction where the cause of action is the publication of a defamatory imputation rather than the publication of defamatory matter (*Defamation Act 1974*, s.9(2)) - and where, consequently, a plaintiff must plead the imputation or imputations sued on, and is held to that pleading - no occasion arises to advance a *Polly Peck* defence: Gillooly, *The Law of Defamation in Australia and New Zealand* (Sydney: Federation Press, 1998) pp114, 115. If this argument is correct - and it has much to commend it - the same conclusion arguably applies in Queensland, to the extent that under Queensland law it is the publication of a defamatory imputation, rather than the publication of defamatory matter, which gives rise to a cause of action: see *Pervan v. North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 333 (per McHugh J); *Bellino v. Australian Broadcasting Corporation* (1996) 184 CLR 183, 230 (per Dawson, McHugh and Gummow JJ), 237 (per Gaudron J).

<sup>39</sup> (1992) 107 ACTR 1, 23

<sup>40</sup> A different view has, however, been taken by Mildren J. in *Hart v. Wrenn* (1995) 5 NTLR 17, 25; also per Crispin J., *Steiner Wilson & Webster Pty Ltd trading as Abbey Bridal v. Amalgamated Television Services Pty Limited* [1999] ACTSC 123, para.197



principle has become firmly entrenched<sup>41</sup>.

It should be noted, in passing, that the *Polly Peck* defence is quite different in principle from, although in some ways related to, other particular forms of the defence of justification. One is the so-called defence of “partial justification” - where the defendant, although unable to contend that the defamatory words are wholly true, may be permitted to prove the truth of a part of them<sup>42</sup>. So, if the defamatory imputation is that the plaintiff, a solicitor, has been the subject of professional disciplinary proceedings on three occasions, the defendant may plead and prove a partial justification that this is true as to one occasion<sup>43</sup>. This is not a *Polly Peck* defence, as the defendant is seeking to justify a part of the defamatory imputation sued upon by the plaintiff, rather than an entirely different defamatory imputation.

Also distinguishable from the *Polly Peck* defence is that form of defence which seeks to justify the “common sting” of the pleaded imputations, although unable to prove the literal truth of the entire publication. Although discussed in the *Polly Peck* case, authority for this species of justification has a far more venerable history<sup>44</sup>. Such a justification properly addresses the “common sting” of the imputations pleaded by the plaintiff, rather than the “common sting” of imputations pleaded by the defendant which are different from those pleaded by the plaintiff.

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<sup>41</sup> See, for example, *Viscount de L'Isle v. Times Newspapers Ltd* [1988] 1 WLR 49; *Prager v. Times Newspapers Ltd* [1988] 1 WLR 77; *Morell v. International Thomson Publishing Ltd* [1989] 3 All ER 733; *Control Risks Ltd v. New Library Ltd* [1990] 1 WLR 183

<sup>42</sup> I have described this as a “so-called defence” because, if successfully invoked, it does not relieve the defendant of liability. Like the so-called defence of contributory negligence in negligence actions, it goes only to the assessment or quantification of damages.

<sup>43</sup> *Clarkson v. Lawson* (1829) 6 Bing 266 [130 ER 1283]; and see *Plato Films Ltd v. Speidel* [1961] AC 1090, 1141-2, per Lord Denning. It is beyond the scope of the present paper to consider whether the criticism of *Polly Peck* in *Chakravarti* also calls into question the so-called defence of “partial justification”: see *Kelson v David Syme & Co Limited* [1998] ACTSC 87, para 17, per Crispin J

<sup>44</sup> See, for example, *Morrison v. Harmer* (1837) 3 Bing (NC) 759 [132 ER 603]; *Alexander v. North Eastern Railway Co.* (1865) 6 B&S 340 [122 ER 1221]; *Southerland v. Stopes* [1925] AC 47, 78-79; *Potts v. Moran* (1976) 16 SASR 284, 305-6. Again, it is beyond the scope of the present paper to consider whether a “common sting” defence of justification can survive the decision in *Chakravarti*; but see, in particular, per Brennan CJ and McHugh J, [1998] HCA 37 at [11].

## A Matter of Pleading

Before turning to *Chakravarti*<sup>45</sup> itself, it is pertinent to consider the rules of pleadings and practice which form the backdrop against which the validity of a *Polly Peck* defence falls to be considered.

It is axiomatic that a plaintiff must plead the “material facts” relied on as giving rise to a cause of action. The defendant may admit or traverse the plaintiff’s allegations and, depending on the rules of the court in which proceedings are brought and the nature of the claim, may be required to set out grounds for any non-admissions or denials, or even to verify these matters by oath or affirmation. But if the allegations in the plaintiff’s pleading have been properly placed in issue, the success or failure of the plaintiff’s case depends - at least in the first instance - on the plaintiff’s satisfying the tribunal of fact, to the requisite standard, that the facts alleged in the pleading are true.

No doubt there are situations in which a judgment may be given for the plaintiff, even though the plaintiff’s proof falls short of establishing all of the “material facts” pleaded. In a debt action, the plaintiff may recover judgment for a smaller amount than the amount sued for, if the evidence does not support a judgment for the total claim. In a negligence action, the plaintiff may succeed although the evidence falls short of proving all of the particulars of negligence averred in the statement of claim, or on the basis of evidence substantiating negligence less egregious than that which has been pleaded, at least if the negligence found to have occurred is of the same general character as that sued upon. Depending on the degree of variance between the pleaded allegations and the evidence at trial, the plaintiff may be required to amend; but it is unlikely that any discretionary basis will exist to refuse an amendment, unless some demonstrable and irreparable prejudice has been occasioned to the defendant.

The plaintiff cannot, however, succeed on the footing that the evidence adduced at trial establishes a basis upon which the plaintiff might have, but has not, sued the defendant. Thus, subject always to the court’s power to permit amendment where appropriate, a

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*Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37

plaintiff whose pleading alleges a negligent mis-statement to a certain effect is not entitled to judgment where the evidence establishes that a different representation was negligently made, and that the plaintiff was injured by relying on it.

Apart from traversing the plaintiff's allegations, a defendant may raise positive grounds of defence, by way of what is traditionally called "confession and avoidance", such as a plea of licence or consent in the case of a property tort. But any such positive defence must answer the plaintiff's case. A pleading which takes the form of denying that the defendant committed the conduct alleged by the plaintiff, alleging that the defendant committed quite different conduct, and asserting a lawful defence in respect of the conduct which the defendant claims to have committed, is obviously objectionable.

Yet this is, in substance, the nature of a *Polly Peck* defence. The plaintiff claims to have been wronged by the defendant's publication of matter containing certain imputations which reflect adversely on the plaintiff. The defendant denies having done so, but claims to have injured the plaintiff's reputation in a different way, and asserts a lawful excuse for having so injured the plaintiff. In order to appreciate how this singular approach to pleading came to be regarded as permissible - let alone received endorsement from judges of the greatest eminence - it is necessary to consider some features of the historical development of the law of defamation.

The modern causes of action for libel and slander, or (in those jurisdictions where the distinction between written or permanent defamations and spoken or evanescent defamations has been abolished) for defamation, is traceable to the criminal jurisdiction of the infamous Court of Star Chamber. Thus defamation was at first regarded as an odious and oppressive branch of the law, and an impediment to free speech and other civil liberties. The stigma historically attaching to the law of defamation drew added emphasis from the practice, until the late 18<sup>th</sup> Century, of removing from the jury all questions other than the fact of publication. Public sentiment against the then prevailing practice was heightened by the case of *The King v. Shipley (The Dean of St. Asaph's Case)*<sup>46</sup>, which was a prosecution for a seditious libel, in the form of a parodied dialogue

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<sup>46</sup> (1784) 4 Dougl 74 [1998 ER 774]

calling for an enlarged electoral franchise and other democratic reforms. The great Lord Erskine appeared for the defendant, and some of the heat generated at trial may be gleaned from the report of the trial judge (Buller J.)<sup>47</sup>:

“As to the verdict, there was much interruption on the part of the counsel for the defendant, in my opinion improper. I will state what I did. They brought in a verdict of guilty of publishing only, which I refused to take; in which, I conceive, I did right. The jury were asked if they found it a libel: they said, no. An improper use was made of that: the counsel for the defendant said, they find it no libel. The jury said they found no such thing: they did not mean to find whether it was a libel or not, one way or the other. As to the observations made by the counsel upon the course pursued by me on this occasion, if thrown out ad captandum, they might as well have been spared. If it was meant to insinuate that I had any wish against the defendant, it is as false as it is scandalous.”

On appeal, the majority - Lord Mansfield CJ and Ashurst J - approved the course taken by the trial judge, of withdrawing from the jury all issues other than that of publication. But in a courageous and powerful dissent, Willes J. urged that juries in defamation cases “have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publication”<sup>48</sup>, adopting Blackstone’s characterisation of this right as a protection against “the violence and partiality of Judges appointed by the Crown”<sup>49</sup>. Though neither Erskine’s advocacy nor the reasoning of Willes J. held sway in court, they carried the day in another forum, and resulted in the passing of *Fox’s Libel Act*<sup>50</sup> in 1792.

Thenceforth, the function of judges in defamation trials was limited to deciding whether or not, as a matter of law, the alleged publication is capable of bearing a defamatory meaning. It became the sole province of the jury “to say whether a libellous construction should be put upon it”<sup>51</sup>.

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<sup>47</sup> 4 Dougl, at 82 [99 ER at 779]

<sup>48</sup> 4 Dougl at 170 [99 ER 824]

<sup>49</sup> 4 Dougl at 172 [99 ER 825], citing 4 BI Comm 349

<sup>50</sup> 23 G III c60, entitled “An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel”

<sup>51</sup> *Capital & Counties Bank v. Henty* (1882) 7 App Cas 741, 762, per Lord Penzance

For these historical reasons, the doctrine developed that “neither the judge nor the jury were ... confined to the meanings asserted by the parties”<sup>52</sup>. Thus has arisen the vexed question whether a plaintiff, who does not rely on a “true innuendo”, is obliged to plead or particularise the precise meanings said to be conveyed by the defamatory matter and, if so, whether the tribunal of fact is bound merely to accept or reject the plaintiff’s pleaded case. Traditionally, where the plaintiff relied on a “natural and ordinary meaning” it was held that the plaintiff need not identify the specific meaning relied on, and may succeed if the tribunal of fact finds that any defamatory imputation arises from the words complained of<sup>53</sup>.

In more modern times, however, courts have increasingly come to insist upon the plaintiff’s pleading, or furnishing particulars of, the specific meanings which will be contended for at trial. In New South Wales, because the statutory cause of action arises from the publication of defamatory imputations rather than defamatory matter<sup>54</sup>, this practice is now regarded as mandatory. Elsewhere, whilst there is no absolute requirement in this regard, it has become the accepted practice to plead “false innuendos”, and a failure to do so is likely to attract judicial disapproval<sup>55</sup>. Where this has not happened, the plaintiff may be ordered to furnish particulars, in keeping with the well-settled principle that the function of particulars is to apprise the opposing party of

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<sup>52</sup> *National Mutual Life Association of Australasia Ltd. v. GTV Corporation Pty Ltd*, [1989] VR 747, 768

<sup>53</sup> *Cassidy v. Daily Mirror Newspapers Ltd* [1929] 2 KB 331; *National Mutual Life Association of Australasia Ltd. v. GTV Corporation Pty Ltd*, [1989] VR 747; *Charleston v. News Group Newspapers Ltd* [1995] 2 AC 65

<sup>54</sup> *Defamation Act 1974*, s.9(2); and see *NRMA Insurance Ltd v Amalgamated Television Services Pty Ltd* [1989] A Def R 40,741. The same result should follow in Queensland, if it is the case that the publication of a defamatory imputation, rather than the publication of defamatory matter, gives rise to a cause of action: see *Pervan v. North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 333 (per McHugh J); *Bellino v. Australian Broadcasting Corporation* (1996) 184 CLR 183, 230 (per Dawson, McHugh and Gummow JJ), 237 (per Gaudron J).

<sup>55</sup> See *Lewis v. Daily Telegraph Ltd* [1964] AC 234, 265, 279-80; *Hadzel v. De Waldorf* (1970) 16 FLR 174, 179; *Australian Consolidated Press Ltd v. Rogers* [1971] 1 NSWLR 682, 684; *DDSA Pharmaceuticals Ltd v. Times Newspapers Ltd* [1973] 1 QB 21, 26; *National Mutual Life Association of Australasia Ltd. v. GTV Corporation Pty Ltd*, [1989] VR 747, 768; *Chakravarti v. Adelaide Newspapers Ltd* [1998] HCA 37, [15] (Brennan C.J. and McHugh J.), [52] (Gaudron and Gummow JJ.), [139] (Kirby J.)

the case which it will have to meet at trial<sup>56</sup>.

Where a plaintiff has pleaded false innuendos - either voluntarily or under compulsion - what are the consequences ? On this issue, at least, the members of the High Court in *Chakravarti* spoke with a single voice. Brennan C.J. and McHugh J. said that<sup>57</sup>:

“If the meaning pleaded goes to the jury and is not found by the jury, the plaintiff fails. If there be no unfair disadvantage to the defendant by allowing another defamatory meaning to be relied on and to go to and be considered by the jury - as where the plaintiff seeks to rely on a different nuance of meaning or, oftentimes, merely a less serious defamation - the different defamatory meaning may be found by the jury.”

Gaudron and Gummow JJ. held that<sup>58</sup>:

“As a general rule, there will be no disadvantage in allowing a plaintiff to rely on meanings which are comprehended in, or are less injurious than the meaning pleaded in his or her statement of claim. So, too, there will generally be no disadvantage in permitting reliance on a meaning which is simply a variant of the meaning pleaded. On the other hand, there may be disadvantage if a plaintiff is allowed to rely on a substantially different meaning or, even, a meaning which focuses on some different factual basis. Particularly is that so if the defendant has pleaded justification or, as in this case, justification of an alternative meaning. However, the question whether disadvantage will or may result is one to be answered having regard to all the circumstances of the case, including the material which is said to be defamatory and the issues in the trial, and not simply by reference to the pleadings.”

The fifth member of the Court, Kirby J., concluded that<sup>59</sup>:

“In an attempt to reconcile the desirable encouragement of particularisation of claims, the avoidance of ‘trial by ambush’ and the consideration of the entirety of the publication in question, courts will uphold the discretion of the trial judge, including a discretion to confine parties to the imputations pleaded where that is required by considerations of fairness. However, a more serious allegation will

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<sup>56</sup> *Australian Consolidated Press Ltd v. Rogers* [1971] 1 NSWLR 682, 684

<sup>57</sup> *Chakravarti v. Adelaide Newspapers Limited* [1988] HCA 37, [24]

<sup>58</sup> *ibid.*, [60]

<sup>59</sup> *ibid.*, [139]

generally be taken to include a less serious one unless the latter is of a substantially different kind.”

In a system of jurisprudence where a plaintiff is not required, before trial, to identify the precise case which it intends to advance at trial - and where the tribunal of fact is at liberty to find in the plaintiff's favour on any defamatory meaning discernable from the words complained of, regardless of the way that the case has been pleaded and particularised - there is some logical attraction to the proposition that a defendant should be permitted to advance positive grounds of defence in respect of meanings which might otherwise support a judgment for the plaintiff, even though the plaintiff has not expressly relied on such meanings. If the defendant faces a risk that the court may adopt a meaning different from that advanced by the plaintiff, and find in the plaintiff's favour in respect of such a meaning, the defendant should have the opportunity to justify, or to advance a defence of fair comment or (perhaps) qualified privilege, in respect of any meaning which the words complained of are reasonably capable of bearing.

But in a system of jurisprudence which requires the plaintiff to state the case which will be advanced at trial, and which confines the plaintiff to that case unless a departure from it will occasion no prejudice to the defendant, there is no obvious attraction to the notion that the defendant should be permitted to raise positive defences in respect of a case which the plaintiff has not sought to advance, and is precluded from adopting at trial. As McHugh J remarked in the course of argument in *Chakravati*<sup>60</sup>, “[I]f the defendant's plea of justification does not meet the plaintiff's case, what is it doing? It is just clouding up the record.” If at trial the plaintiff seeks to embrace a different meaning from that advanced in its statement of claim, and the meaning is one which (had it been pleaded) might have attracted a defence of justification, fair comment or qualified protection, it is difficult to imagine a clearer case for the exercise of the judicial discretion to confine the plaintiff to the pleaded case.

This is not to deny that it is entirely proper for a defendant to plead that the words

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<sup>60</sup>

High Court of Australia transcript A41/1996, 2 September 1997

complained of bear a different meaning from that alleged by the plaintiff, as particulars of the defendant's denial of the false innuendos advanced by the plaintiff. In jurisdictions where a bare traverse is permissible, this practice is acceptable, though it may not be mandatory<sup>61</sup>; in Queensland, at least, a denial or non-admission of an allegation of fact is required to be "accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted"<sup>62</sup>. But this is no warrant for the defendant to go further, and to plead justification of, or some other positive defence in relation to, the alternative meaning for which the defendant contends.

### ***Chakravarti* and its Aftermath**

Of the five Justices constituting the High Court in *Chakravarti*<sup>63</sup>, only one - Kirby J. - made no observations relevant to the question whether a *Polly Peck* defence is available under Australian common law. Gaudron and Gummow JJ. discussed such defences, in terms indicating an assumption - rather than a considered conclusion - that such defences are available in Australia. Most pertinently, their Honours observed<sup>64</sup>:

"... it has been said that, if a defendant seeks to justify a meaning which is different from that asserted by the plaintiff, it should plead that alternative meaning because '[I]ibel law ought not to be an exception to the modern rules of pleading which are directed to precisely defining the issues between the parties, providing the benchmarks against which the relevance of evidence is to be assessed and deciding those issues on their merits'."

However, Brennan C.J. and McHugh J., with reference to the judgment of O'Connor L.J. in *Polly Peck*<sup>65</sup>, made the following unequivocal pronouncement<sup>66</sup>:

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<sup>61</sup> In *Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37, Gaudron and Gummow JJ. said at para.[56], "the alternative meaning pleaded by the defendant may make plain the ground upon which the defendant denies the imputation pleaded by the plaintiff."

<sup>62</sup> *Uniform Civil Procedure Rules 1999* (Queensland), r.166(4)

<sup>63</sup> Brennan C.J., Gaudron, McHugh, Gummow and Kirby JJ

<sup>64</sup> *Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37 [56]

<sup>65</sup> [1986] QB 1000, 1032

<sup>66</sup> *Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37 [8]



“With great respect to his Lordship, such an approach is contrary to the basic rules of common law pleadings and in many contexts will raise issues which can only embarrass the fair trial of the action. Leaving aside technical pleas such as pleas in abatement, defences are either by way of denial or confession and avoidance. A defence which alleges a meaning different from that of the plaintiff is in the old pleading terminology an argumentative plea of Not Guilty. Under the principles of pleading at common law, it would tender no issue and would be struck out as embarrassing. Under the modern system, articulating an alternative meaning could conceivably make explicit the ground for denying a pleaded imputation. But it would be only in such a case that a defendant’s plea of a new defamatory meaning might be supportable as a plea which prevents the plaintiff being taken by surprise. A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the actions.”

It is perhaps worth noting that these remarks were amongst the very last judicial pronouncements made by Sir Gerard Brennan, on the eve of His Honour’s retirement.<sup>67</sup> But the reaction to these remarks has been remarkably subdued. The issue has since received consideration by judges at first instance in two Australian jurisdictions, with differing results.

In the Supreme Court of Victoria, Hedigan J has adopted the position that<sup>68</sup>:

“There is no doubt that the *Polly Peck* plea has become firmly entrenched in virtually all jurisdictions in Australia and has been recognised and acted on as part of the common law. ... For a judge sitting at first instance, the judgments of the members of the High Court in *Chakravarti* generate uncertainty, not guidance nor binding authority on this aspect. The Victorian cases ... all proceed on the basis that the *Polly Peck* defence may be pleaded and raised. Until the Court of Appeal, or the majority of the High Court, declare that it is not the law, I regard myself bound to treat it as the law of Victoria.”

On a subsequent occasion, his Honour said<sup>69</sup>:

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<sup>67</sup> See High Court of Australia transcript C00/1998, 20 May 1998

<sup>68</sup> *Carrey v. ACP Publishing Pty Ltd* [1998] VSC 78, para.28

<sup>69</sup> *Hore-Lacy v. David Syme & Co. Ltd* [1998] VSC 96, para.18

“If the views of Brennan C.J. and McHugh J. were applied to this case, the position would be that the defendant would not be permitted to plead a meaning different from that contended for by the plaintiff. The defendant would be in the position of either simply denying the plaintiff’s meanings or alternatively justifying them if they were established. The views as expressed by Brennan C.J. and McHugh J. did not command any articulated support by the other members of the Court who sat in *Chakravarti*. No views have been expressed in other cases by the balance of the members of the High Court of Australia. Although the Full Court in *National Mutual*<sup>70</sup>, having regard to the circumstances in which the appeal came to it, stopped short of approving the application of the *Polly Peck* principles in Victoria, they did not disapprove them. It can hardly be denied that in Victoria and all States in Australia the *Polly Peck* form of pleading has been permitted over the last decade.”

In the Supreme Court of the Australian Capital Territory, however, Gallop J - whilst accepting that there is “some force in the defendant’s contention that *Polly Peck* has not been fully argued and considered in the *Chakravarti* case”<sup>71</sup> - considered that “it would be courageous for any trial judge to ignore the dicta”<sup>72</sup> of Brennan CJ and McHugh J. In the same Court, Crispin J has had occasion to observe<sup>73</sup>:

“[W]hilst I acknowledge that the remarks of Brennan C.J. and McHugh J. in *Chakravarti* ... were obiter I must say, with great respect, that I share the misgivings which their Honours expressed. Fortunately, having regard to the view which I take of the evidence in this case, it is unnecessary to finally determine whether *Polly Peck* ... should now be followed.”

Elsewhere, the Queensland Court of Appeal has declined an opportunity to consider the relevant impact of the decision in *Chakravarti*<sup>74</sup>. In Western Australia - the only Australian jurisdiction where *Polly Peck* has received the express endorsement of an

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<sup>70</sup> *National Mutual Life Association of Australasia v. General Television Corporation Pty Ltd* [1989] VR 747

<sup>71</sup> *Kelly v. Nationwide News Pty Ltd* [1998] SCACT 117, para 21. In fact, it appears from reference to the transcripts in *Chakravarti* that the issue was thoroughly ventilated in argument: High Court of Australia transcript A41/1996, 1 September, 2 September and 3 September 1997.

<sup>72</sup> *Kelly v. Nationwide News Pty Ltd* [1998] SCACT 117, para 33

<sup>73</sup> *Steiner Wilson & Webster Pty Limited trading as Abbey Bridal v. Amalgamated Television Services Pty Limited* [1999] ACTSC 123, para.199

<sup>74</sup> *Dorfler v. Dwyer* [1998] QCA 221

intermediate appellate court<sup>75</sup> - Steytler J has been content to accept the invitation of counsel “to assume that the position in this State remains as enunciated by the Full Court in *Gumina*<sup>76</sup> notwithstanding the recent criticism of the approach adopted in that case (and others applying the so-called ‘Polly Peck’ principle) by Brennan CJ and McHugh J in *Chakravarti* ...”<sup>77</sup>. And in South Australia, Lann DCJ has found it “not necessary ... to go into the question of whether a ‘Polly Peck’ type of defence has survived the decision of the High Court *Chakravarti*”<sup>78</sup>. Finally, Drummond J, sitting as a member of the Full Federal Court, has provided these observations<sup>79</sup>:

“The appellant could also, if it wished, have pleaded that the text conveyed only the narrow imputation it relied on at trial and then sought to justify it<sup>80</sup>. In *Chakravarti*, Brennan CJ and McHugh J ... held that such a course is not open to a defendant. But Gaudron and Gummow JJ ... accepted it as a permissible one. The other member of the Court, Kirby J, did not consider the point. In this state of authority, the appellant could, if it wished, have raised by way of defence and persuaded the trial judge to entertain a plea of ‘Polly Peck’ justification ... . It did not attempt to do that.”

## The Future

It is submitted that four fundamental principles should guide future consideration of whether or not a *Polly Peck* defence should be permitted as part of the common law of Australia:

- I. It is for the plaintiff in a defamation action, as in any other action, to set the parameters of the plaintiff’s claim. If the plaintiff complains of injury caused by the publication of matter conveying a particular imputation, the plaintiff cannot be

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<sup>75</sup> *Gumina v Williams* (No 2) (1990) 3 WAR 351

<sup>76</sup> *ibid.*

<sup>77</sup> *Brown v. Marron* [1998] WASC 364

<sup>78</sup> *Clarke v. The Adelaide Review*, [1998] SADC 3938, para 15

<sup>79</sup> *Random House Australia Pty Ltd v Abbott* [1999] FCA 1538, para 178

<sup>80</sup> *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1

compelled to litigate a different imputation arguably arising from the same matter. That the words complained of are capable of bearing a different imputation is relevant only to the question whether those words convey the imputation alleged by the plaintiff. If the plaintiff fails to sustain the case pleaded, because the tribunal of fact is not satisfied that the imputation alleged by the plaintiff is made out, the plaintiff's case fails. There is, then, no scope for a defendant to justify, or advance any other positive defence in relation to, any different imputation.

- II. Nonetheless, a defendant has a clear right to justify, or advance other positive grounds of defence in relation to, any imputation upon which the plaintiff can succeed at trial - whether or not it be an imputation in the precise terms pleaded by the plaintiff. If a plaintiff may succeed at trial by reference to an imputation somewhat different from that pleaded, whether it be a less serious imputation or a different shade of meaning, the defendant is entitled to plead justification, fair comment or qualified privilege in respect of such an imputation.
- III. There can be no prejudice to a defendant who is precluded from advancing a *Polly Peck* defence, if the plaintiff is compelled to plead the imputations which will be relied upon at trial, and is confined at trial to the case pleaded, subject only to the possibility that a less serious imputation of the same character, or a different shade of meaning, may be permitted to be advanced at trial. If, at trial, an entirely different imputation is advanced, to which the defendant might have had an arguable defence of justification, fair comment or qualified privilege, the risk of prejudice to the defendant by being denied the opportunity to meet such an imputation ought generally to inform the court's discretion against allowing such an imputation to be advanced.
- IV. Just as the plaintiff should plead the imputations relied on to prevent the defendant's being surprised at trial, so to the defendant may be required to plead any alternative imputations upon which it relies. But this may only be done for permissible purposes. One permissible purpose is to identify the grounds for the defendant's denial that the imputations advanced by the plaintiff are conveyed

by the words complained of: this is not to advance a positive ground of defence, but merely to furnish particulars of the grounds for denying a component of the plaintiff's case. The only circumstance in which it ought be permissible for a defendant to advance positive grounds of defence in respect of alternative imputations is if those alternative imputations are ones upon which the plaintiff can succeed in trial, having regard to the way that the plaintiff's case is pleaded. Thus, a defendant may contend for a less serious imputation of the same character, or a different shade of meaning, as the basis for a positive defence of justification, fair comment or (perhaps) qualified privilege; but may not advance a positive defence in respect of an entirely different imputation.

A rigorous application of these principles will, it is submitted, bring logical coherence to this branch of the law. They are consistent with the "basic rules of common law pleadings" mentioned by Brennan CJ and McHugh J in *Chakravarti*<sup>81</sup>. They are consistent, too, with the object of enhancing fairness and efficiency in the conduct of litigation, as each party is required to formulate its case with a degree of precision, and neither party may depart from its pleaded case if this may occasion prejudice to the opposing party. Both parties are spared the expense, and the community is spared the drain on judicial resources, which may arise where a defendant seeks to justify an imputation which the plaintiff does not rely on. The defendant is not prejudiced, since the defendant remains entitled to advance positive defences in respect of all imputations asserted by the plaintiff, and any other imputations in respect of which the plaintiff might otherwise succeed at trial, and the plaintiff is not permitted to advance alternative imputations to which the defendant may have been able to advance a positive ground of defence. Above all, the adoption of these principles will avoid the rational incongruity which arises where a defendant is permitted to defend a case which the plaintiff has not advanced.

The adoption of these principles will impose restrictions on both parties. The plaintiff will be compelled to plead false innuendos with great care, knowing that, at most, only minor departures from the pleaded case are likely to be permitted. Yet this requirement

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<sup>81</sup> *Chakravarti v. Adelaide Newspapers Limited* [1998] HCA 37 [8]

is no more onerous than that which falls on litigants in any other branch of the law. For its part, the defendant will be prevented from advancing positive grounds of defence in respect of imputations other than those pleaded by the plaintiff, or minor variances thereto. But there can be no legitimate objection to this, if the defendant faces no risk of an adverse result at trial based on imputations - materially different from those pleaded by the plaintiff - to which the defendant may have had valid grounds of defence if they had been pleaded.

The real concern is that the *Polly Peck* defence, as it has evolved in England and Australia, can be an instrument of oppression. As Miles C.J. observed in *Woodger*<sup>82</sup>, such defences are “open to abuse because they are capable of converting a modest and narrow claim by a plaintiff into a wide-ranging expansive and expensive inquiry, the limits of which are set by the defendant’s capacity to pay for it”. For over a century, it has been settled that a defendant in defamation proceedings may not adduce evidence of the plaintiff’s bad character, or specific acts of misconduct (other than those which are admissible in support of a defence of justification) to mitigate damages<sup>83</sup>. For defendants with deep pockets, the *Polly Peck* defence encourages attempts to adduce evidence harmful to the plaintiff’s reputation, under colour of justifying a supposed defamatory meaning which the plaintiff has not sued upon<sup>84</sup>. In *Kennett v. Farmer*<sup>85</sup>, Nathan J. spoke of the propensity of a *Polly Peck* defence to allow the “highjacking [of] the plaintiff’s claim” by the defendant. This possibility, which carries with it the risk of a substantially longer and more expensive trial, and the possibility of juries becoming confused and delivering perverse verdicts, operates as a substantial discouragement to potential plaintiffs with meritorious claims, and as a substantial disincentive to reasonable negotiated settlements.

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<sup>82</sup> (1992) 107 ACTR 1, 21

<sup>83</sup> *Scott v. Sampson* (1882) 8 QBD 491, 504; *Plato Films Ltd v. Spiedel* [1961] AC 1090; *Chappell v. Mirror Newspapers Ltd* (1984) Aust Torts Rep ¶80-691

<sup>84</sup> Even if a *Polly Peck* defence is unsuccessful, “... the evidence led by the defendant ... (which may relate to specific allegations of which the plaintiff did not complain) may have ... [a] significant effect in depressing the level of damages: Gillooly, *The Law of Defamation in Australia and New Zealand* (Sydney: Federation Press, 1998) p 115.

<sup>85</sup> [1988] VR 991, 996

There can be no legitimate basis for defendants to complain if *Polly Peck* defences are restricted to those cases where the alternative imputations asserted by the defendant are within the range of imputations on which the plaintiff might otherwise succeed at trial. A defendant can have no legitimate reason for wishing to litigate the truth of an imputation in respect of which the defendant has not been sued, and upon which judgment cannot be given for the plaintiff. If there is any objection from defendants to the recognition of such a limitation, it can only be because defendants are deprived of the opportunity to adopt a tactical manoeuvre which has no bearing on the real issues to be litigated, and is intended only as an obstacle to the inexpensive, expeditious and just determination of plaintiffs' claims.

Yet, if there were any scope for defendants to be prejudiced by the recognition of such a limitation, there is a simple prophylactic which defendants may adopt in cases where a *Polly Peck* defence has hitherto been available. Where the plaintiff sues in respect of a specific imputation or imputations, and the defendant's advisers are of the opinion that the words complained of convey an entirely different meaning, there is nothing to prevent the defendant's advisers writing to those who represent the plaintiff, seeking confirmation that the plaintiff will not attempt to rely on any such alternative meaning at trial. If the plaintiff explicitly abandons reliance on such an alternative meaning, the defendant's position is fully protected - the defendant need not attempt to justify, or raise any other positive ground of defence in relation to, possible imputations which the plaintiff has unequivocally renounced. If, on the other hand, the plaintiff is unwilling to abjure reliance on a possible alternative meaning, the defendant may well plead a *Polly Peck* defence, in the confident knowledge that it is unlikely to be struck out whilst the plaintiff reserves the option of advancing that alternative imputation at trial. And by the same token, where a defendant has pleaded a *Polly Peck* defence, there is no reason why a plaintiff may not give written notice explicitly disclaiming reliance on the alternative meanings advanced by the defendant, inviting the defendant to accordingly withdraw that aspect of the defence, and foreshadowing the appropriate application if the defendant persists with a plea for which there can be no legal foundation.

It is perhaps excessively optimistic to expect that the so-called "*Polly Peck* defence" will

disappear from Australian jurisprudence, so as to close off at least one of the dead-end paths presented to litigants in their attempts to negotiate the labyrinth of defamation law. Yet the observations of Brennan CJ and McHugh J in *Chakravarti*, if acted upon, can certainly function as a sign-post, directing plaintiffs and defendants alike to a more direct route out of this byzantine maze.