SIX YEARS OF AUSTRALIAN UNIFORM DEFAMATION LAW: DAMAGES, OPINION AND DEFENCE MEANINGS

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I INTRODUCTION

Since early 2006, largely uniform defamation legislation has operated in Australia.[1] The very achievement of uniformity in defamation has been seen as a 'watershed',[2] with efforts towards national reform dating back more than 30 years.[3] The uniform legislation was agreed between state and territory Attorneys-General in the shadow of a Commonwealth threat to enact national legislation that would have operated only within the scope of Commonwealth constitutional power.[4] A media commentator observed at the time: 'from the perspective of the media, [the Commonwealth's] original proposal was so appallingly bad that it changed the politics of defamation reform. It motivated all interested parties: the states, the media and media lawyers.'[5] Subsequent academic and professional commentary has noted the haste with which the legislation was finally agreed and has seen a continuing need for more considered and far-reaching reforms to

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1 See *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Amendment Act 2006* (ACT) (amending the *Civil Law (Wrongs) Act 2002* (ACT)); *Defamation Act 2006* (NT) (collectively referred to as the 'uniform *Defamation Acts*'). The state Acts commenced on 1 January 2006; the territory Acts early in 2006 (ACT: 23 February; NT: 26 April).

2 Steven Rares, 'Defamation and Media Law Update 2006: Uniform National Laws and the Federal Court of Australia' (2006) 28 *Australian Bar Review* 1, 1.

3 See, eg, Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report 11 (1979); Attorneys-General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (1991); Attorneys-Geenral of NSW, Queensland and Victoria, *Reform of Defamation Laws: Discussion Paper (No 2)* (1992).

4 The Commonwealth proposal was subject to extensive media criticism; see, eg, Gregory Hywood, 'An Affront to Our Democracy', *The Age* (Melbourne), 25 March 2004, 15; Chris Merritt, 'Ruddock Drove States to Accord on Defamation', *The Australian* (Sydney), 15 December 2005, 14.

5 Merritt, above n 4.

defamation law.[6] As Michael Tilbury suggested well before the reforms, achieving uniformity would only be one element in a larger project of evaluating the substance of defamation law.[7]

The uniform law on paper has already been subject to useful analysis, with David Rolph observing how the changes display a paradoxical quality.[8] They are 'significant' in bringing about uniformity, but 'do not represent a radical departure' from the prior law.[9] The changes are 'incremental'.[10] That conclusion of significant yet incremental change offers the starting point for this article. It draws on research into all available defamation judgments under the uniform law to ask whether that description remains appropriate. While a myriad of issues have been raised in judgments, this article focuses on several of the aspects that have received more substantial attention in the case law.

Although understanding the reforms through analysing judgments is a limited approach, it can help to provide 'the technical, legal face of a broader, and deeper, debate'[11] about defamation. In legal commentary, there are notable examples of systematic analysis of defamation judgments for the purposes of doctrinal inquiry.[12] While not generating the wider understanding gained from interviewing or surveying litigants,[13] journalists,[14] lawyers[15] or the public,[16]

6 See, eg, Richard Ackland, 'Defamation Law Has Its Reputation on the Line', *Sydney Morning Herald* (Sydney), 15 April 2005, 11; Michael Gillooly, 'The Making of the Modern Law of Defamation: Book Review' (2006) 14 *Torts Law Journal* 311; Kim Gould, 'The More Things Change, the More They Stay the Same … or Do They?' (2007) 12 *Media & Arts Law Review* 29; David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207.

7 Michael Tilbury, 'Uniformity, the Constitution and Australian Defamation Law at the Turn of the Century' in Nicholas J Mullany and Allen M Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998) 244, 251–2.

8 Rolph, above n 6, 247.

9 Ibid.

10 Ibid.

11 Roger S Magnusson, 'Media Law: Commentary and Materials: Book Review' (2001) 9 *Torts Law Journal* 223, 226.

12 This can include quite systematic analysis in doctrinal research (such as investigation of the legal role played by different forms of journalistic conduct): see, eg, Brian C Murchison et al, 'Sullivan's Paradox: The Emergence of Judicial Standards of Journalism' (1994) 73 *North Carolina Law Review* 7. It can also derive the kind of information gained through the analysis of court files (such as, classifying plaintiffs and defendants, the steps taken in litigation and so forth). Major early examples, based heavily on appellate decisions, are Marc A Franklin, 'Winners and Losers and Why: A Study of Defamation Litigation' [1980] *American Bar Foundation Research Journal* 455; Marc A Franklin, 'Suing Media for Libel: A Litigation Study' [1981] *American Bar Foundation Research Journal* 795. Among other things, that study found the then high proportion of suits with non-media defendants (approximately 70 per cent of the sample).

13 See, eg, Randall P Bezanson, 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get' (1986) 74 *California Law Review* 789.

14 See, eg, Eric Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford University Press, 1997).

15 See, eg, Ursula Cheer, 'Myths and Realities about the Chilling Effect: The New Zealand Media's Experience of Defamation Law' (2005) 13 *Torts Law Journal* 259; Andrew T Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006).

considering the content of publications,[17] or examining court files,[18] whether in national or comparative terms,[19] case law analysis provides a useful base.[20] Here, three matters from the judgments receive focus. They concern damages, the defence for honest opinion and the impact of pleaded meanings on defences. While 'incremental change' remains a plausible label for the reforms, the alterations to damages appear more significant,[21] the honest opinion defence is problematic, and wider issues about meaning in defamation remain under-examined in Australian decisions.

In considering the treatment of opinion under the uniform law, some points are made relevant to the defence of justification. On justification, Australian cases have maintained a particular approach to defence pleading and have not yet closely analysed English law and practice.[22] Much more could be written about justification and about what in Australia is usually called Polly Peck pleading,[23] but the key points can be made here through consideration of the opinion defence. As Roger Magnusson commented, under Australian common law 'the debate about free speech is all too easily camouflaged by complex rules and

16 See, eg, Roy Baker, 'The Rookie and the Silk: Learning the "Ordinary Reasonable Person" in Defamation Law' (2007) 12 *Media & Arts Law Review* 399; Roy Baker, 'Defamation and the Moral Community' (2008) 13(1) *Deakin Law Review* 1; Roy Baker, 'Defamation and the Culture Wars' (2009) 14 *Media & Arts Law Review* 425; Randall P Bezanson, Gilbert Cranberg and John Soloski, *Libel Law and the Press: Myth and Reality* (Free Press, 1987).

17 See, eg, Chris Dent and Andrew T Kenyon, 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers' (2004) 9 *Media & Arts Law Review* 89; Andrew T Kenyon, 'Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore and Australia' (2010) 4 *International Journal of Communication* 440.

18 See, eg, Brendan Edgeworth and Michael Newcity, 'Politicians, Defamation Law and the "Public Figure" Defence' (1992) 10 *Law in Context* 39; Tania Sourdin, *A Study of Defamation Proceedings Commenced in the New South Wales Supreme Court for the Period 1/1/1987 to 31/12/1988* (University of New South Wales, 1990) (copy on file with author).

19 Cf Bezanson, Cranberg and Soloski, above n 16; Russell L Weaver et al, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006).

20 Wider socio-legal research into defamation law reform remains, in many ways, internal to law and its operation and leaves to one side the more questioning analyses such as those offered by Thomas Gibbons, 'Defamation Reconsidered' (1996) 16 *Oxford Journal of Legal Studies* 587; Chris Dent, 'Compensation and/or Correcting the Record: A Framework for the Regulation of (Defamatory) Speech' (2011) 16 *Media & Arts Law Review* 123.

21 Rolph, above n 6, 239, noted this in his earlier analysis of the reforms.

22 See, eg, *David Syme v Hore-Lacy* (2000) 1 VR 667 ('*Hore-Lacy*'); cf *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147 ('*Lucas-Box*'); Andrew T Kenyon, 'Perfecting Polly Peck: Defences of Truth and Opinion in Australian Defamation Law and Practice' (2007) 29 *Sydney Law Review* 651. Consideration could also be given to the defence of contextual truth, which has generated attention in case law under the uniform law; see particularly *Kermode v Fairfax Media Publications* [2010] NSWSC 852 (Simpson J); *Besser v Kermode* (2011) 282 ALR 314 (Beazley, Giles and McColl JJA).

23 As has been explained elsewhere, it appears preferable to distinguish different types of variation between plaintiff and defence meanings, via the terms Lucas-Box pleading and Polly Peck pleading, after the two English Court of Appeal decisions in *Lucas-Box* [1986] 1 WLR 147; *Polly Peck v Trelford* ('*Polly Peck*') [1986] QB 1000; see Kenyon, above n 22.

doctrinal detail'.[24] This observation has weight for defamation in general and perhaps especially for justification and opinion defences. Most courts have not yet addressed the very real constraints on speech (and good litigation practice) that appear likely to result from the current approach.

All publicly available court decisions were searched for matters litigated under the uniform law and handed down by 30 September 2011, retrieving 297 decisions.[25] From only nine decisions in 2006 and 19 in 2007, the numbers have grown steadily. For the same period from January 2006, a total of more than 550 defamation-related decisions were found, with the number under the former law falling markedly in recent years. More than half the decisions under the current law were delivered in New South Wales (179), followed by Western Australia (37), Queensland (22) and Victoria (20). Several points are notable about these figures. First, it appears likely that not all judgments have been located,[26] and it may be that lower percentages of decisions have been retrieved from jurisdictions such as Western Australia or Victoria and from some intermediate courts. However, it is a large body of case law that has been found and it may well be a substantial proportion of all decisions. Second, the decisions show something about who is being sued for defamation. Defamation law has long been seen as a 'law of the press',[27] and media entities were involved as defendants in 138 of the decisions; that is, in just under half of all decisions. What may be more notable about the result is that so many matters were found *not* involving media defendants. Some of these appear to have raised wider public interest issues, such as public debate over property developments,[28] but many appeared to focus on narrower, personal concerns. Third, the majority of decisions relate to pre-trial hearings about pleaded imputations and the capacity of the publication at issue to give rise to them. Although the uniform law embraces a common law focus on the material published as the cause of action rather than the pleaded imputation, such interlocutory battles remain the mainstay of defamation litigation. Earlier research showed those battles to be important, and especially so in New South Wales under its *Defamation Act 1974* ('the 1974 Act').[29] The sheer weight of New South Wales decisions found in this study gives one pause to think that elements of the former New South Wales approach, focussed closely on

24 Magnusson, above n 11, 226. See also Roger S Magnusson, 'Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges' (2001) 9 *Torts Law Journal* 269, 296: 'In defamation law, freedom of speech … tends to be obscured by doctrinal technicalities'.

25 Judgments were searched to 30 September 2011, via open access and commercial databases. Current Australian court practice suggests this will have provided a very high percentage of all decisions. In addition, the media law news journal, *The Gazette of Law and Journalism*, was reviewed for all years since the uniform law began. In the article itself, it has also been possible to note some later judgments.

26 For example, some judgments refer to earlier hearings; some are appeals from earlier decisions that are not available via the public and commercial databases used here, and so forth.

27 See, eg, Paul Mitchell, 'Nineteenth Century Defamation: Was It a Law of the Press?' (2008) 13 *Media & Arts Law Review* 293.

28 See, eg, Brian Walters, *Slapping on the Writs: Defamation, Developers and Community Activism* (UNSW Press, 2003).

29 See Kenyon, above n 15.

plaintiff's pleaded imputations,[30] might continue under the uniform law. The change in doctrine under the uniform law may in fact be understood through the accumulated habits of litigation practice. This may prove especially significant for how Australian case law deals with issues of meaning and defences.

At the outset it is worth noting that many areas of the uniform law are still to receive substantial attention in cases. These include the statutory qualified privilege defence under section 30 and the offer to make amends procedure under sections 12–19. In relation to the former, the defence appears to maintain many of the weaknesses in application of earlier law on qualified privilege.[31] There is a real question as to 'whether the defence is too qualified to have any practical value',[32] notwithstanding some successful applications.[33] In contrast, litigators have suggested the offer to make amends process is now important in practice. The procedure appears to have been used and succeeded, largely without having raised matters for judgment. Practitioners have commented from experience that 'the offer of amends provisions are working as a mechanism that encourages the speedy and cost-effective resolution of defamation disputes'[34] and that 'media organisations have resolved a majority of complaints received by them by use of the offer of amends procedure'.[35] This could well be called a *revolution* in Australian defamation law in light of earlier, largely unsuccessful attempts to encourage the quick resolution of disputes.[36] It may be the most significant element to date of the uniform law.

Other aspects of the law remain controversial, as they were during the reform process.[37] For example, the role of judge and jury with regard to determining

30 See, eg, Justice David Levine, *The Future of Defamation Law*, (31 August 1999) Supreme Court of New South Wales <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_levine_310899>.

31 See, eg, *Defamation Act 1974* (NSW) s 22 and the defence under general law for some defamatory political communication in light of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Many commentators have been critical of the defences as applied. See, eg, Patrick George, 'Qualified Privilege – A Defence Too Qualified?' (2007) 30 *Australian Bar Review* 46, 68: 'It seems with each advance made in favour of the privilege there is a retreat when it comes to its application'; Rolph, above n 6, 233–5; Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) 142–3; Kenyon, above n 15, 233; Gould, above n 6.

32 George, above n 31, 47.

33 See, especially Kim Gould, 'Statutory Qualified Privilege Succeeds, But Too Early for the Media to Go "Dancing in the Streets"' (2011) 16 *Media & Arts Law Review* 241.

34 Law Council of Australia, Submission to NSW Department of Attorney General and Justice, *Review of the* Defamation Act 2005 *(NSW)*, 1 August 2011, 10 [5.5] <http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.html >. See also Matt Collins, 'Five Years on: A Report Card on Australia's National Scheme Defamation Laws' (2011) 16 *Media & Arts Law Review* 317.

35 Australia's Right to Know, Submission to NSW Department of Attorney General and Justice, *Review of the* Defamation Act 2005 *(NSW)*, (2011) 6 <http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.html>.

36 See, eg, New South Wales Law Reform Commission, *Defamation*, Report 75 (1995) ch 6, which recommended a different remedial structure for defamation, better to promote 'the speedy and public vindication of the plaintiff's reputation': at [2.16].

37 See, eg, Submissions to the NSW Department of Attorney General and Justice, *Review of* Defamation Act 2005 *(NSW)*, 25 January 2012, <http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_consultation/

liability and remedies,[38] dispensing with a jury trial,[39] the inability of many corporate entities to sue in defamation over publication within Australia,[40] the utility of a single publication rule (especially for digital communications),[41] and even whether the estate of a deceased plaintiff should be able to sue in defamation.[42] Some of the controversies have been longstanding, such as whether the defence of justification, which requires material to be proven substantially true, should also require publication to have been in the public interest or for the public benefit. Twenty years ago, 'controverted discussions' on the public interest element were noted in relation to earlier efforts to achieve uniform law;[43] 10 years ago, the 'enduring quality' of the 'regional differences' on the issue were seen as central to the 'stalemate of defamation law reform';[44] and in 2011, reaching agreement on it was described as the 'biggest obstacle' to uniform law.[45] While divisions on the issue were clearly strong, a public interest element might have little impact, at least in litigation. For example, Justice David Levine, after many years heading the New South Wales Supreme Court defamation list, doubted its significance: '[i]n my experience that has never been an issue in any event. In the case in which truth was involved, the issue was just truth'.[46] As well as these areas of relative controversy, there are other notable, if discrete, changes

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lpclrd_stat_reviews.html>. Consultation appears to have been almost entirely NSW focused. The Law Council of Australia, for example, submitted comments well after the original deadline, apparently due to lack of earlier communication from the NSW Department of Attorney General and Justice.

38 See, eg, Law Council of Australia, above n 34, [6.1]–[6.6] (concerns about judges awarding damages when juries determine most other matters; recommends juries also determine damages).

39 See, eg, *Channel Seven Sydney v Fierravanti-Wells* (2011) 283 ALR 178 (Giles, McColl JJA and Handley AJA).

40 See, eg, David Rolph, 'Corporations' Right to Sue for Defamation: An Australian Perspective' (2011) 22 *Entertainment Law Review* 195 (among other points noting an unintended consequence of the changes; namely, the possibility of corporations more easily obtaining pre-publication injunctions by using other actions than defamation); Matt Collins, 'Protecting Corporate Reputations in the Era of Uniform National Defamation Laws' (2008) 13 *Media & Arts Law Review* 447; NSW Bar Association, Submission to NSW Department of Attorney General and Justice, *Review of the* Defamation Act 2005 *(NSW)*, 12 April 2011, 6–15 (corporations should be able to sue in defamation as under traditional law; alternatively, they should be able to do so if special damage can be established); Law Council of Australia, above n 34, 6–9 [4.1]–[4.11] (the change has liberalised reporting, it remains controversial, and the current wording of s 9 is anomalous in the way it excludes some corporations); Australia's Right to Know, above n 35, 31–2 (the prohibition should be widened to prevent defamation action by non-profit-seeking corporations and by corporations with fewer than 10 employees).

41 See, eg, Law Council of Australia, above n 34, 27–8 [13.8]–[13.14].

42 This was a matter of notable difference between Commonwealth and state proposals before the uniform law; see, eg, Rolph, above n 6, 220–3. It raised relatively little comment in the 2011 NSW review, although the NSW Bar Association, above n 40, 16–17 submitted that deceased persons should be able to sue.

43 Alex Castles, 'The Transgressions of the "Satirist" and Uniform Defamation Laws in Australia' (1992) 66 *Australian Law Journal* 167, 168. He notes Australian Law Reform Commission, above n 3, 63–6 and Attorneys-General of NSW, Queensland and Victoria, *Discussion Paper (No 2)*, above n 3, 10–16.

44 Magnusson, above n 11, 223 reviewing and quoting from Sally Walker, *Media Law: Commentary and Materials* (2000) 88–92.

45 Law Council of Australia, above n 34, 2 [2.1].

46 Reported in Chris Merritt, 'Complete Picture about a Little Matter of Privacy', *The Australian* (Sydney), 20 April 2006, 16. He noted only one District Court case in which a lack of public interest was argued.

under the uniform law, such as ending the unique split mode of defamation trial that applied in New South Wales under section 7A of the 1974 Act[47] and the move to a nationally consistent limitation period of one year from the date of publication.[48]

II DAMAGES

Some of the more significant changes under the uniform law appear to be those made to damages. While there was little that could be drawn from decided cases in 2008,[49] case law now suggests two matters. They concern the statutory limit on damages and the approach taken to multiple proceedings. Before examining those issues, some general points are made about damages.

A Defamatory Damages in General

Defamation damages are frequently classified into three categories: compensatory, aggravated and exemplary or punitive damages. Aggravated damages are a form of compensatory damages.[50] They address increased harm suffered by the plaintiff due to the defendant's improper conduct.[51] The law requires them to be distinguished from exemplary or punitive damages, which are not available under the uniform law.[52]

Compensatory damages in defamation differ from many forms of damages because they are intended to vindicate the plaintiff's reputation as well as to provide consolation for personal distress and reparation for harm to reputation.[53] The element of vindication is said to be achieved by ensuring the total sum

47 See, eg, David Rolph, 'Perverse Jury Verdicts in New South Wales Defamation Trials' (2003) 11 *Torts Law Journal* 28; Kenyon, above n 15, 344–8.

48 See, eg, *Limitation Act 1969* (NSW) ss 14B, 56A–56D. The period is to be extended to up to three years where it is 'not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication': s 56A; see, eg, *Ahmed v Harbour Radio* [2010] NSWSC 676 (Simpson J); *Carey v ABC* (2010) 77 NSWLR 136 (McCallum J); *Noonan v Maclennan* [2010] 2 Qd R 537 (Keane, Holmes and Chesterman JJA).

49 Rolph, above n 6, 243.

50 See, eg, *Uren v John Fairfax & Sons* (1966) 117 CLR 118 (McTiernan, Taylor, Menzies, Windeyer and Owen JJ); *Waterhouse v Broadcasting Station 2GB* (1985) 1 NSWLR 58, 74–5 (Hunt J); *Attorney-General v Niania* [1994] 3 NZLR 106, 112 (Tipping J).

51 The conduct of the defendant must have been improper, unjustifiable or lacking in bona fides: *Triggell v Pheeney* (1951) 82 CLR 497, 514 (Dixon, Williams, Webb and Kitto JJ).

52 See, eg, *Defamation Act 2005* (NSW) s 37. On distinguishing aggravated and exemplary damages, see Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87 and earlier analyses cited there.

53 See *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 155 (Windeyer J); for an historical analysis see Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 62–70. For an overview see Terence K Tobin and Michael G Sexton, *Australian Defamation Law and Practice* (Butterworths, 1995 updated to 2011) [20,015]–[20,025]. Personal distress may be a major element of the harm to be compensated: at [21,115].

awarded is such as 'to convince a bystander of the baselessness of the charge'.[54] However, 'compensation' is an awkward term to apply to these damages both in terms of vindication and consolation. As John Burrows and Ursula Cheer have commented, vindication is 'far removed from "compensation" in any ordinary sense': [55]

> if what a plaintiff has lost is not something of economic value, it becomes difficult, and even artificial, to talk about "compensation" in money. … The truth is that "compensation" is not really an apt term in this situation. It might be better to say that the plaintiff receives "consolation" or "solatium" in respect of such injuries, the appropriate figure being something settled on by an almost arbitrary process.[56]

Defamation damages are 'at large'. That is, the damages are not limited to actual financial loss and are not capable of precise calculation.[57] Their quantification 'is by no means straightforward'.[58] A damaged reputation really 'has no equivalent in money or money's worth'.[59] Defamation damages are 'a matter of impression and not addition';[60] the standard is necessarily 'qualitative and … imprecise'.[61] Defamation damages are also presumed; they need not be proven.[62]

There have long been case law examples from Australia and other Commonwealth jurisdictions of awards in defamation that appear extremely high. Prior to the uniform *Defamation Acts*, plaintiffs could clearly be awarded substantial sums. A number of examples exist of awards in excess of half a million dollars without any proven economic loss, including New South Wales ($935 000[63] and $2.5 million),[64] Queensland ($750 000)[65] and Victoria

54 *Broome v Cassell and Co* [1972] AC 1027, 1071 (Lord Hailsham LC), which remains commonly cited: see, eg, *Crampton v Nugawela* (1996) 41 NSWLR 176, 193 (Mahoney ACJ); *Ali v Nationwide News* [2008] NSWCA 183 [75] (Tobias and McColl JJA); *Cornes v The Ten Group* [2011] SASC 104 [125] (Peek J).

55 John Burrows and Ursula Cheer, *Media Law in New Zealand* (Oxford University Press, 6th ed, 2010) 79.

56 Ibid 78.

57 See, eg, *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin).

58 Alistair Mullis and Andrew Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (2010) 14 *Communications Law* 72, 76.

59 Geoffrey Robertson and Andrew Nicol, *Media Law* (Penguin, 5th ed, 2007) 180.

60 *Broome v Cassell and Co* [1972] AC 1027, 1072 (Lord Hailsham).

61 *Rogers v Nationwide News* (2003) 216 CLR 327, 349 [67] (Hayne J).

62 See, eg, *Ratcliffe v Evans* [1892] 2 QB 524, 528 (Bowen LJ); *Readers Digest Services v Lamb* (1982) 150 CLR 500, 507 (Brennan J); cf cases of slander not actionable per se at common law: see, eg, *Ratcliffe v Evans* [1892] 2 QB 524, 529–30 (Bowen LJ). The uniform defamation law has abolished the distinction between libel and slander and the need to prove special loss for most slanders: see, eg, *Defamation Act 2005* (NSW) s 7.

63 *Hartley v Nationwide News* (1995) 119 FLR 124.

64 *Erskine v John Fairfax Group* (Unreported, Supreme Court of New South Wales, Levine J and jury, 6 May 1998). This jury award was subject to appeal and ultimately settled for an undisclosed sum: see, eg, Patrick George, *Defamation Law in Australia* (LexisNexis, 2006) 406; see also Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (Federation Press, 1998) 271.

($630 000).[66] Such sums could often be successfully appealed, but their initial award underlines the potentially high figures involved. As David Price and his co-authors have noted about jury awards in England, 'ordinary people who for once in their lives have the opportunity to be bountiful on someone else's behalf, tend to err on the side of generosity.'[67]

Under the uniform *Defamation Acts*, some of the above points have changed. Judges award damages rather than juries.[68] Where juries are used in defamation,[69] exemplary damages cannot be awarded.[70] There must be 'an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded'.[71]

In relation to judges determining damages, a procedural question arises: should juries hear evidence on damages when it is formally irrelevant to their task? Defendants could well fear that evidence on damages would influence jury determinations about liability, while plaintiffs could be concerned about side effects of evidence related to mitigation.[72] However, courts appear unlikely to split hearings due to perceived risks of trial inefficiencies and experiences with split trials in New South Wales under section 7A of the 1974 Act.[73] In *Greig*, for example, McClellan CJ at CL refused to split the trial. He noted that witnesses were expected to give evidence relevant to both liability and damages and their

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65 *Bellino v Australian Broadcasting Corporation* (Unreported, Supreme Court of Queensland, Mackenzie J and jury). At trial, a privilege defence was also found to apply. That was successfully appealed in the High Court and a new trial ordered: (1996) 185 CLR 183. At retrial (and subsequent appeal) the defence succeeded: *Bellino v Australian Broadcasting Corporation* (1998) Aust Torts Reports 81-479. For background on the highly significant current affairs broadcast underlying the litigation, see Chris Masters, *Inside Story* (Angus and Roberton, 1992) 43–83.

66 *Hore-Lacy v Cleary* (Unreported, Supreme Court of Victoria, Nettle J and jury, 22 March 2010), which included $30 000 exemplary damages. There were also notably high awards in the ACT: *Lewincamp v ACP Magazines* [2008] ACTSC 69 (Besanko J) ($375 000); *O'Rourke v Hagan* (2007) Aust Torts Reports 81-906 (Crispin J) (more than $200 000); South Australia: *Simeone v Walker* [2009] SASC 201 (Withers J) (more than $200 000 to each of two plaintiffs in relation to publication of emails). In addition, a NSW award of $525 000 for television broadcasts alleging paedophilia was held to be too low (in part, for not including a sum for aggravation) in *Amalgamated Television Services v Marsden* [2002] NSWCA 419 (Beazley, Giles and Santow JJA).

67 David Price, Korieh Duodu and Nicola Cain, *Defamation: Law, Procedure and Practice* (Sweet and Maxwell, 4th ed, 2009) 220.

68 See, eg, *Defamation Act 2005* (NSW) s 22(3).

69 They are not used in South Australia, the ACT and the Northern Territory; see, eg, Rolph, above n 6, 225. Damages had been assessed by judges in NSW since the mid-1990s, after s 7A(4)(a) was added to the *Defamation Act 1974* (NSW).

70 See, eg, *Defamation Act 2005* (NSW) s 37.

71 See, eg, *Defamation Act 2005* (NSW) s 34.

72 See, eg, *Defamation Act 2005* (NSW) s 38, which provides a non-exhaustive list of factors relevant to mitigation, including the defendant having apologised or published a correction, the plaintiff having already recovered defamation damages or compensation for another publication with the same meaning or effect (or having brought such an action).

73 See, eg, Rolph, above n 47; Kenyon, above n 15, 159–61, 344–8. However, some trials appear to have been split. In *Greig v WIN Television NSW* [2009] NSWSC 876, [4] ('*Greig*') McClellan CJ at CL noted this happened in *Corby v Channel 7 Sydney* [2008] NSWSC 245 (McCallum J) but that no reasons were provided for the split approach. See also *Fierravanti-Wells v Channel Seven Sydney (No 3)* [2011] NSWDC 201 [45] (Gibson DCJ).

credibility would likely be tested. 'Plainly, if this is the case questions of credit will be relevant to both issues of liability and damages. Accordingly, if … [witnesses] give evidence on two occasions, there is the prospect of different conclusions by the jury and myself as the trial judge on those matters.'[74] The issue could be effectively dealt with by instructing the jury to disregard irrelevant evidence, as occurs in other areas of law.[75] In addition, splitting proceedings could lead to increased costs 'wholly disproportionate to the maximum verdict which a judge can award to a plaintiff'.[76]

The requirement for a 'rational relationship' between harm and damage relates to longstanding debates about defamation awards. The challenges posed by the levels of award for pain and suffering in personal injury cases and for non-economic loss in defamation have been explored at length in case law and commentary.[77] With the requirement of a 'rational relationship' and the capping of damages both for defamation (considered below) and for non-economic loss in personal injury,[78] the law has arrived at a 'pragmatic solution to the seemingly intractable problem of the proper relationship between the level of damages' in the two categories of cases.[79] Practitioners have noted how the overall approach primarily continues the common law position from the 1990s.[80]

B Statutory Cap on Damages and Aggravation

In addition to the above elements, the uniform *Defamation Acts* create a form of statutory cap on damages for non-economic loss.[81] The uniform *Defamation Acts*' figure of $250 000 is indexed and, from 1 July 2011, has reached $324 000.[82] Higher damages for non-economic loss can only be exceeded where a court is satisfied the circumstances of publication warrant an award of aggravated damages.[83]

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74 *Greig* [2009] NSWSC 876 [10] (McClellan CJ at CL).

75 Ibid [11].

76 Ibid [12].

77 See, eg, *Carson v John Fairfax and Sons* (1993) 178 CLR 44; New South Wales Attorney-General's Task Force on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW* (2002) 35–7. Similar debates arose under English law see, eg, *John v Mirror Group Newspapers* [1997] QB 586; UK Law Commission, 'Damages for Personal Injury: Non Pecuniary Loss' (Consultation Paper, 1995) 140; Mitchell, above n 53, 56–62.

78 See, eg, Rolph, above n 6, 241–2.

79 David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Commentary and Materials* (Oxford University Press, 2010) 336.

80 Tobin and Sexton, above n 53, [20,001] note 'it must be doubted whether this is in fact a modification of the common law position'. The leading decision remains *Carson v John Fairfax and Sons* (1993) 178 CLR 44; see also *Rogers v Nationwide News* (2003) 216 CLR 327.

81 See, eg, *Defamation Act 2005* (NSW) s 35(1). The capped amount available in a proceeding is the amount gazetted 'at the time damages are awarded' not at the time of publication: s 35(1).

82 See, eg, NSW, *Government Gazette* No 4588, 24 June 2011; from 1 July 2010 it was $311 000: No 2452, 18 June 2010; from 1 July 2009 it was $294 500: No 3137, 19 June 2009; from 1 July 2008 it was $280 500: No 5482, 20 June 2008; from 1 July 2007 it was $267 500: No 3793, 15 June 2007; from 1 July 2006 it was $259 500: No 5042, 30 June 2006.

83 See, eg, *Defamation Act 2005* (NSW) s 35(2).

The cap could affect the calculation of damages in various ways. For example, the quantum of damages might be assessed as under the common law (even if by a judge) with the cap playing a role only if the sum would otherwise exceed the cap. Alternatively, there could be a different scale of awards under the uniform law, with the cap setting the 'outer limit'[84] of awards and only particularly serious defamations being capable of receiving damages for non-economic loss of $324 000. This is the approach that has gained support in judgments. While the purposes of defamation damages have been noted in terms consistent with the common law,[85] on quantum an analogy has been drawn between 'the maximum damages amount under section 35 and the maximum penalty in a criminal case'.[86]

In the New South Wales decision of *Attrill*, Bell J reviewed the two approaches to the cap outlined above, before stating:

> I approach the matter on the basis that the maximum damages amount provided by section 35 is to be understood as fixing the outer limit of damages for non-economic loss (in cases which do not warrant an award of aggravated damages) and … awards for non economic loss are to find a place within a range marked out in this way.[87]

While Bell J noted this does not mean the maximum sum can only be awarded in relation to 'the worst defamation imaginable',[88] it must follow that the cap could only be reached for very serious defamations. In that particular case, the imputations were serious. A national television current affairs program alleged the plaintiff was a criminal or confidence trickster who 'by occult practices … devastated families by causing them to lose their children' and, having 'conned thousands of people, he deserves to be behind bars'.[89] Justice Bell held the 'harm done to the plaintiff … justifies a substantial award of damages' and that 'it is necessary that the award clearly signify that the allegations are without foundation'.[90] However, the award was far below the cap, at $110 000.[91]

Similar approaches have been taken in other decisions. For example, Gibson DCJ has noted the cap 'must mean that awards of damages at the lower end of the scale' are 'appropriate' for most publications of limited reach,[92] and McCallum J has stated: 'the maximum damages amount is to be regarded as being reserved for the worst category of case, such as the publication of an imputation of paedophilia on the front page of a major newspaper or in the prime

84 See, eg, *Attrill v Christie* [2007] NSWSC 1386 [43]–[44] (Bell J) ('*Attrill*').
85 Through reference to *Carson v John Fairfax & Sons* (1993) 178 CLR 44; as in *Attrill* [2007] NSWSC 1386 [38]–[39] (Bell J); *Manefield v Child Care NSW* [2010] NSWSC 1420 [176] (Kirby J).
86 *Papaconstuntinos v Holmes A Court* [2009] NSWSC 903 [114] (McCallum J) ('*Papaconstuntinos*').
87 *Attrill* [2007] NSWSC 1386, [44] (Bell J).
88 Ibid.
89 These imputations were held to be conveyed: ibid [3], [6].
90 Ibid [47].
91 Ibid.
92 *Moumoutzakis v Carpino* [2008] NSWDC 168, [148] (Gibson DCJ).

time broadcast of the television news.'[93] Similarly, in Queensland, an award has been scaled in relation to the capped maximum, 'by comparison between the harm sustained by the plaintiff in a particular case and harm of the most serious kind, disregarding extraordinary cases'.[94] The alternative approach of assessing damages 'as usual' and reducing them if they would otherwise exceed the cap was specifically rejected; it was thought that approach would produce a 'capricious result' in light of the legislative approach.[95]

Decisions under the uniform *Defamation Acts* suggest that awards far below the cap are now routine.[96] Practitioners have noted a 'significant trend downwards in the quantum of damages'[97] and even described the level of awards as 'derisory'.[98] At the least, the intention to reduce awards and make them more predictable has been achieved.[99] A few awards near to the cap exist, but they appear to be unusual. The experience to date differs from some suggestions before the reforms that the cap could *inflate* damages in jurisdictions where awards were previously low; for example, in Western Australia it was observed that the 'general level of awards and damages … is low, relative to other jurisdictions … [A] cap or limit on damages … might have the inadvertent effect of lifting the current level of awards by suggesting that the awards should be towards the upper level of that limit'.[100]

Here, three examples are noted before a larger group of awards is summarised. First, available decisions suggest the highest award under the uniform law has been $240 000 made in 2010 for non-economic loss, with a further $15 000 for economic loss. The total award, including interest, of $267 919 was made for a national television broadcast alleging medical misconduct and surgical incompetence, among other things, against a surgeon.[101] Second, in 2009 an award of $200 000 was made for a television program suggesting reasonable grounds for suspecting corrupt behaviour by a former deputy mayor that should be investigated.[102] This sum included aggravation due to publication without the plaintiff's stated denial, the defendant's chief of staff having admitted to publishing a lie and the plaintiff being called a liar several times during cross-examination at trial. Third, $140 000 was awarded in 2008 to actress Judy Davis in her claim against two newspaper publications accusing her

93 *Papaconstuntinos* [2009] NSWSC 903, [114] (McCallum J).

94 *Anderson v Gregory* [2008] QDC 135 [91] (McGill DCJ), appeal dismissed: *Anderson v Gregory* [2008] QCA 419 (23 December 2008) (McMurdo P, Holmes JA and McMeekin J).

95 *Anderson v Gregory* [2008] QDC 135 [91] n 57. The overall award was $37 500, which related to some publications prior to the uniform law and also aggravation of damages.

96 See generally Matthew Lewis, 'A Closer Look at Damages', *Gazette of Law and Journalism* (26 April 2011).

97 ABC Radio National, 'Law Report', *Uniform Defamation Laws*, 9 June 2009, (Peter Bartlett) <http://www.abc.net.au/radionational/programs/lawreport/uniform-defamation-laws/3131624 >.

98 NSW Bar Association, above n 40, 40 [9.12].

99 Law Council of Australia, above n 34, 23 [12.3].

100 West Australian Defamation Law Committee, *Committee Report on Reform to the Law of Defamation in Western Australia* (September 2003) [62].

101 *Haertsch v Channel Nine* [2010] NSWSC 182 (Nicholas J).

102 *Greig* [2009] NSWSC 876.

of being unreasonable, selfish and heartless with respect to risks for young children playing in a public recreation area. The matter was considered a 'serious defamation',[103] particularly as the plaintiff had kept her private life largely out of public view:

> [The plaintiff] is a private person who has shunned publicity. Many actors seek out personal publicity. Ms Davis said that she had never pursued this course and, although recognising and accepting that her work would be viewed by many people, she said that she had always endeavoured to protect her own privacy and that of her family. The defendant was aware of her desire to maintain her privacy.[104]

This aspect of privacy being relevant to quantum is worth noting. McClellan CJ at CL noted the public would have little other 'knowledge of her personal qualities' and the publications in question 'would be one of the few sources of information by which the public could gain an impression as to her reputation'.[105] That is, the publications would have a greater impact on reputation because of the paucity of other information. The decision suggests that elements of privacy – at least for a high profile individual who has consciously avoided publicity about her private life – can be relevant to the quantum of defamation damages.

Other decisions under the uniform *Defamation Acts* illustrate that awards often appear to be below the cap:

- A letter of limited publication alleged, among other things, a reasonable suspicion of the plaintiff corruptly using and channelling funds (from a commercial venture associated with a sporting club) for inappropriate purposes and spreading misleading information: $25 000.[106]
- The defendant called the plaintiff a paedophile in a bitter dispute about access over the grandson of the plaintiff and defendant, with publication to only four people: $30 000.[107]
- Seven online or email publications, generally discrediting the plaintiff's naturopathic practice and competency, were made in circumstances including the defendant's failure to apologise, malice and failure to defend the action: $50 000 general damages and $50 000 aggravated damages.[108]

103 *Davis v Nationwide News* [2008] NSWSC 693, [40] (McClellan CJ at CL) ('*Davis*').
104 Ibid [12].
105 Ibid [41].
106 *Papaconstuntinos* [2009] NSWSC 903. These imputations were held to be 'serious' and, while evidence of an apology would be relevant to mitigation under *Defamation Act 2005* (NSW) s 38, there was strength in the plaintiff's argument that the apology came too late. An appeal against liability was successful: *Holmes a Court v Papaconstuntinos* [2011] NSWCA 59 (Allsop P, Beazley, Giles, Tobias and McColl JJA).
107 *RJ v JC* [2008] NSWDC 217 (Gibson DCJ).
108 *Woolcott v Seeger* [2010] WASC 19 (Le Miere J).

- An email was sent to parents of other students within a school, alleging a school principal was dishonest, untrustworthy and incompetent: $80 000 (including an unspecified sum of aggravated damages).[109]
- Allegations the plaintiff was untrustworthy, a liar and had stolen money from the defendant were made to a limited audience: $50 000 to each of two plaintiffs (including an unspecified sum of aggravated damages with the court noting the 'impact upon the plaintiff's family, and in particular upon the plaintiff's children, has been particularly strong' and the factors of aggravation were very high).[110]
- A statement was made to one person that the plaintiff had stolen from the defendant: $2500 (there was no evidence that the publication had circulated beyond that recipient and a late application to amend the defence to add the statutory defence of triviality was refused).[111]
- A circular was published to four property owners and displayed on common property in a strata plan of suburban retail shops, alleging the plaintiff was a gangster, criminal and planned illegally to dispossess the other strata owners of their rights: $50 000 (including an unspecified sum of aggravated damages).[112]
- Two newspaper publications implied a politician was in public office for the 'shallow pursuit of perks' and unworthy motives, with no apology being made: $40 000.[113]
- An anonymous 'broadsheet' that defamed a local bowling club chief executive officer (allegations included dishonesty, falsification of qualifications and mental illness) was published to four people including the club's chair and another director: $25 000 (including an unspecified sum of aggravated damages).[114]
- Three publications appeared in an Australian-based Italian-language internet newspaper defaming two plaintiffs by imputing they 'had bribed an official of a political party in order to become endorsed candidates' in an Italian parliamentary election: $40 000 to each plaintiff (including an unspecified sum of aggravated damages).[115]

Of course, this survey of decisions does not establish that average awards are lower than under the former law. However, the reduced level of the highest

109 *Ryan v Premachandran* [2009] NSWSC 1186, [134] (Nicholas J). The allegations were held to be 'grave' and to strike directly at 'her established reputation for integrity as a senior public school teacher for many years'.

110 *PK v BV (No 2)* [2008] NSWDC 297, [27] (Gibson DCJ).

111 *Beaven v Fink* [2009] NSWDC 218, [162]–[165] (Sidis DCJ); see *Defamation Act 2005* (2005) s 33.

112 *Moumoutzakis v Carpino* [2008] NSWDC 168, [148]–[152] (Gibson DCJ).

113 *Conlon v Advertiser News Weekend Publishing* [2008] SADC 91, [12], [19], [20] (Boylan J).

114 *Martin v Bruce* (2007) 6 DCLR (NSW) 157, [111]–[114].

115 *Restifa v Pallotta* [2009] NSWSC 958, [71], [74] (McCallum J). There was no evidence of the extent to which the publications had been downloaded and comprehended, but it was accepted not to be of 'limited circulation': at [65].

damages awarded, the 'scaled' nature of the awards, and the case examples all suggest the level has become lower.[116] An important caveat remains, which is considered below. It concerns plaintiffs' capacity to seek an amount of damages up to the cap for each of multiple publications, which means publishers may face several payouts for multiple publications.

Under the uniform law there appears to have been a significant reduction in the level of awards. If that tendency is established in the longer term, it could reduce the frequency or longevity of defamation litigation as the costs and risks of litigating will tend to outweigh by a substantial margin any potential monetary award. If the maximum level of a possible award is relatively predictable, compared to the 'lottery' long offered by defamation law and particularly defamation damages,[117] there will be a clearer calculus for parties. There is historical evidence suggesting that most US plaintiffs' initial interests are not financial.[118] They are concerned to correct the record. Even if the same general disposition applied in Australia, the very different rules for the payment of costs in litigation suggests the purely financial aspects of a dispute could not be ignored by many plaintiffs.

A second issue about damages concerns aggravated awards. The statutory cap can only be exceeded if 'the court is satisfied that the *circumstances of the publication* of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages'.[119] At common law, aggravated damages respond to increased harm to the plaintiff resulting from a much wider range of defence conduct that is improper, unjustifiable or lacking in bona fides. The conduct is not limited to the circumstances of publication. It may include, for example, the later publication of an inadequate apology, other defamatory publications, the defendant's malice or the conduct of the litigation. In *Davis*, McClellan CJ at CL found the uniform *Defamation Acts* do not limit the general approach to aggravated damages: 'provided the award, including any component for aggravated damages by reason of the conduct of the defence or other relevant reasons, does not exceed the statutory maximum.'[120] Thus, where non-economic awards are lower than the cap, courts can consider the usual broad range of factors for aggravated damages; only when the cap is exceeded do courts appear to be limited to the circumstances of publication in considering aggravated damages.[121] An equivalent approach has been taken in other cases,[122] as well as being explicitly noted in the Western Australian Supreme Court.[123]

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116 See also Lewis, above n 96.

117 See, eg, Barendt et al, above n 14, 24; the term has also been used in addresses to juries about the quantum of damages being sought: *El Azzi v Nationwide News* [2005] NSWSC 247, [80] (Levine J).

118 See generally Bezanson, Cranberg and Soloski, above n 16.

119 See, eg, *Defamation Act 2005* (NSW) s 35(2) (emphasis added).

120 *Davis* [2008] NSWSC 693, [20] (McClellan CJ at CL).

121 As Terence Tobin QC has pointed out, the statutory wording literally requires only that the circumstances of publication be *the* factor warranting an award of aggravated damages in excess of the cap. Once that is the case, it may be open to a court to consider all the usual factors relevant to aggravated damages. See discussion of his 24 June 2008 address to NSW Bar Association in *Moumoutzakis v Carpino* [2008] NSWDC 168, [121]–[123] (Gibson DCJ).

C Multiple Proceedings and Consolidation

As well as the statutory limit on damages and the assessment of aggravated damages, courts have dealt with questions involving multiple publications and multiple proceedings. There is a simple point to make initially: the cap has been applied as a comprehensive provision for each proceeding. It has not made a difference if multiple publications have been sued on within the same action.[124]

The approach to consolidated (or separated) *proceedings* has been more complex. The uniform law provides that, where defamation proceedings have been brought against a defendant, leave of the court must be obtained before the plaintiff can commence further proceedings seeking defamation damages against the same defendant 'in relation to the same or any other publication of the same or like matter'.[125] Victorian cases suggest courts will allow plaintiffs some room as to what constitutes 'the same or like matter' when deciding if a plaintiff can bring separate proceedings against the same defendant. For plaintiffs, this creates the possibility of multiple awards for non-economic loss up to the statutory cap, one for each of the separate proceedings.

The plaintiff in *Buckley v Herald & Weekly Times (No 2)*[126] had already commenced defamation proceedings against two defendants over four articles published in December 2006.[127] He then brought separate proceedings against the same defendants over an article published in August 2008. The defendants applied to stay the later proceedings because the plaintiff had not sought leave under section 23 of the *Defamation Act 2005* (Vic). In the alternative, they sought an order for the two actions to be consolidated.

Justice Kaye found the later publication contained some similar allegations to the earlier publications, with the plaintiff pleading similar imputations in relation to them. However, the later publication had a 'different central theme', or 'different principal topic and focus'.[128] There was not the 'substantial resemblance or similarity' between the publications that is required under section 23.[129] In general terms, the earlier articles focussed on 'an alleged illicit or nefarious commercial and financial relationship' between the plaintiff and a

122 See, eg, *Restifa v Pallotta* [2009] NSWSC 958, [71], [74] (McCallum J); *Greig v WIN Television NSW* [2009] NSWSC 876 [141]–[159] (McClellan CJ at CL); *Larach v Urriola* [2009] NSWDC 97, [278]–[317] (Gibson DCJ); *Moumoutzakis v Carpino* [20008] NSWDC 168, [111]–[152] (Gibson DCJ).

123 *Forest v Askew* [2007] WASC 161 (Newnes J).

124 See, eg, *Davis* [2008] NSWSC 693, [8]–[9] (McClellan CJ at CL); *Buckley v Herald & Weekly Times* (2009) 24 VR 129 (Nettle, Ashley and Weinberg JJA). However, multiple plaintiffs were each said to have the statutory cap available to them in *Restifa v Pallotta* [2009] NSWSC 958, [64] (McCallum J); the comment was obiter with the award to each plaintiff being $40 000 in that case. It has been suggested that s 35 should be clarified so that the cap is the maximum available to each plaintiff in defamation proceedings: Law Council of Australia, above n 34, 26 [12.20].

125 See, eg, *Defamation Act 2005* (NSW) s 23. The legislation defines 'matter' to include 'an article, report, advertisement or other thing communicated by means of a newspaper': at s 4.

126 [2008] VSC 475.

127 The earlier suit gave rise to an interlocutory decision on fair comment and justification: *Buckley v Herald & Weekly Times* [2008] VSC 459 (Kaye J).

128 *Buckley v Herald & Weekly Times (No 2)* [2008] VSC 475, [19]–[20] (Kaye J).

129 Ibid [12].

'drug czar' (whose identity was suppressed for a considerable time after the publications).[130] The later article repeated some of the same matters, but principally concerned the alleged supply by the plaintiff of a wig to the 'drug czar' in order 'to disguise his appearance from authorities'.[131] The order to stay the later proceedings was therefore refused. Justice Kaye held that the similarity of the pleaded imputations was not determinative, with the statute requiring 'a comparison of, and contrast between, the publications relied on in the two sets of proceedings'.[132] In doing so, Kaye J expressed a narrow view of when leave would be required:

> in order that there be a relevant 'likeness' for the purposes of section 23, the similarities … must, in a real sense, be significant and substantial. It is not sufficient that there be some similarity, or common features, between the two sets of publications … there must be a real and substantial similarity between the two sets of publications.[133]

However, the matter did not end there. The defendants' application for consolidation of the two proceedings succeeded before Kaye J.[134] He noted that 'a number of factors … militate in favour of an order for consolidation',[135] such as the similarity of material relevant to discovery and interrogatories in each action, and some common factual and legal issues. Justice Kaye noted that counsel for the plaintiff:

> correctly accepted that, if the two proceedings are not consolidated, they should be tried together. Consolidation of the two proceedings would save duplication of procedural steps, and lead to a more efficient, and less costly, disposition of the matters. The question, then, is whether an order for consolidation might cause unfair prejudice to the plaintiff.[136]

The possible unfair prejudice at issue was the statutory limitation on damages, a limit which has been held to apply to any single proceeding even if it includes multiple actions.[137] Justice Kaye held the risk of prejudice in relation to the cap faced each side: 'whatever decision I make in relation to the defendants' application for consolidation, one party's potential detriment will be the other party's potential advantage.'[138]

The decision to consolidate was overturned on appeal.[139] Consolidation would 'cut across' the intention of the uniform *Defamation Acts* made clear in section 23. As Nettle JA commented in the Victorian Court of Appeal, 'the Act provides in itself for the circumstances in which proceedings will and will not be brought as one'.[140] Ashley JA added that the defendants' argument of unfair

130 Ibid [17]. Each of the four earlier articles is considered separately; see also [22]–[24].
131 Ibid [18].
132 Ibid [20].
133 Ibid [15].
134 Consolidation was sought under the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 9.12.
135 *Buckley v Herald & Weekly Times (No 3)* [2009] VSC 59, [16] (Kaye J).
136 Ibid.
137 *Davis v Nationwide News* [2008] NSWSC 693.
138 *Buckley v Herald & Weekly Times (No 3)* [2009] VSC 59, [18].
139 *Buckley v Herald & Weekly Times* (2009) 24 VR 129 (Nettle, Ashley and Weinberg JJA).
140 Ibid 131 [8] (Nettle JA, Ashley and Weinberg JJA agreed).

prejudice if consolidation was not ordered was unpersuasive. Even without the legislation, 'consolidation at common law could not be ordered … if there was risk of real prejudice to the plaintiff'.[141] Because the plaintiff did not need to obtain leave under section 23 for the second action, he could maintain the separate proceedings and seek to recover damages up to the statutory cap in respect of each proceeding.[142]

The frequency with which such situations arise and the approach taken by courts will be significant for this important element in the uniform law. Overall, case law suggests damages have fallen since the introduction of the cap, but the limit might increasingly be sidestepped through the bringing of multiple proceedings. This suggests section 23 is ripe for further reform. If the cap was aimed at providing relative certainty to parties, the circumstances in which it can be avoided need to be determined more clearly. Even those who would call for the removal of the cap have suggested the cases show how the cap could be avoided and its aims abused.[143] Others have called for the cap to be strengthened by limiting the opportunity to avoid consolidation. For example, consolidation could be required whenever 'proceedings concern publications of the same or substantially same matter, irrespective of whether the matter is published by the same or different publishers, and irrespective of whether the matter is published in or via the same or different media' such as print, broadcast and online.[144] This may be closer to the aim of the 2005 reforms themselves and deserves consideration.

III HONEST OPINION

The uniform *Defamation Acts* have introduced a statutory defence of honest opinion.[145] As with other defences under the Acts, honest opinion does not itself replace defences at general law such as fair comment.[146] Defendants may plead both the common law and statutory defences for comment or opinion.[147]

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141 Ibid 132 [15] (Ashley JA).

142 A similar approach has been described in relation to *Fierravanti-Wells v Nationwide News* and *Fierravanti-Wells v News Digital Media* in Australia's Right to Know, above n 35, 14–15. Those decisions do not appear to be publicly available, although other aspects of the first matter are: *Fierravanti-Wells v Nationwide News* [2010] NSWSC 648 (Simpson J). For litigation against another media publisher, apparently related to the same general allegations, see *Fierravanti-Wells v Channel Seven Sydney* [2010] NSWDC 77 (Gibson DCJ); *Fierravanti-Wells v Channel Seven Sydney* [2010] NSWDC 143 (Levy DCJ); *Channel Seven Sydney v Fierravanti-Wells* (2011) 283 ALR 178 (Giles, McColl JJA and Handley AJA).

143 See, eg, NSW Bar Association, above n 40, 41 [9.15].

144 Law Council of Australia, above n 34, 24 [12.17].

145 See, eg, *Defamation Act 2005* (NSW) s 30.

146 See, eg, *Defamation Act 2005* (NSW) s 24(1).

147 See, eg, *Holmes v Fraser* [2008] NSWSC 570 (Simpson J). This is so, even though it has been suggested that 'for most practical purposes' the statutory defence 'has superseded' the common law one: Law Council of Australia, above n 34, 20 [9.10].

Comment or opinion defences are typically said to have great importance for free speech,[148] with analysis considering, for example, the importance of the defences within international instruments, constitutional provisions, and the traditions of protecting speech under the common law.[149] English law can be seen to have enjoyed a gradual widening of the defence now known as honest comment, primarily because of the greater scope given to free speech in the public interest.[150] As noted by Kirby J in *Channel Seven Adelaide v Manock* ('*Manock*'), fair comment 'has been rightly described as "the bulwark of free speech in the law of defamation"'.[151] For this 'bulwark' defence, there are six points to note. The first five concern matters of: comment or fact; comment or opinion; the speech of others; reasonableness; and factual basis. Then there is the question of the defence's relationship to pleaded imputations or published matter, which raises larger matters about meaning, and is addressed in Part IV.

A Comment or Fact

The first point is something that the uniform law does not directly address, but it remains a key underlying issue for the protection of speech. Separating comment and fact is 'a difficult and, occasionally, an impossible thing to do'.[152] Factual statements cannot be defended by fair comment or honest opinion; instead, justification or other defences must be used. While fair comment generally requires the truth of certain facts to be shown,[153] fair comment can be seen as a more appealing defence than justification for the way it allows free speech arguments to be utilised.

As to the scope of fair comment, a standard reference is to the historical statement in *Clarke v Norton* that comment is a deduction, inference, conclusion, criticism, judgment, remark or observation.[154] That reference suggests one of the key difficulties found in applying the defence: 'a statement which may be regarded as one of *fact* but which is *inference* from other facts stated or referred to may be a comment for the purposes of the defence'.[155] The treatment in litigation of what could be called 'inferential comments' or perhaps 'inferential

148 See, eg, NSW Bar Association, above n 40, 33 [8.1]: the defence is 'of profound significance'.

149 See, eg, Steven Rares, 'No Comment: The Lost Defence' (2002) 76 *Australian Law Journal* 761, 761–2, which notes the Universal Declaration of Human Rights, the First Amendment to the US Constitution, and the celebrated, if apocryphal, words of Voltaire; *Kemsley v Foot* [1951] 2 KB 34, 46 (Birkett LJ): fair comment is 'an essential part of the greater right of free speech'.

150 See the detailed review of key fair comment decisions in *Joseph v Spiller* [2011] 1 AC 852 (Lord Phillips PSC, with whom Lord Roger, Lord Walker, Lord Brown and Dyson JJSC agreed).

151 (2007) 232 CLR 245, 297 [115] (Kirby J); citing P J Sutherland, 'Fair Comment by the House of Lords?' (1992) 55 *Modern Law Review* 278, 278. See also United Kingdom, *Report of the Committee on Defamation*, Cmnd 5909 (1975) 151.

152 Raymond E Brown, *The Law of Defamation in Canada* (Carswell, 2nd ed, 1994) 964.

153 See, eg, *Meckiff v Simpson* [1968] VR 62, 66 (Winneke CJ, Adam and Gowans JJ); but facts within a protected report on parliamentary or court proceedings can suffice: *Sims v Wran* [1984] 1 NSWLR 317, 323.

154 [1910] VLR 494, 499 (Cussen J).

155 Patrick Milmo and W V H Rogers (eds), *Gatley on Libel and Slander* (Sweet and Maxwell, 11th ed, 2008) 339 (emphasis added).

facts' has been challenging to say the least. (A compelling recent example under English law is provided by *British Chiropractic Association v Singh*.)[156] The difficulty is one of interpretation. The question of fact or comment remains part of the challenge of *application* of comment and opinion defences and it is important to note the uniform *Defamation Acts* do nothing explicit in relation to that challenge.

B The Change from 'Comment' to 'Opinion'

It may be that a difference exists between the common law defence, which protects 'comment', and the statutory protection for 'opinion'. Often the two terms are used interchangeably in commentary, with 'opinion' describing how a comment is non-factual. For example, '[a] comment is a statement of opinion based on facts';[157] '[c]omment defences may defend defamatory opinion';[158] the law provides 'special defences for the makers of defamatory statements of opinion';[159] '[t]he essence of [the common law defence] is that everyone is entitled to express an opinion, provided those hearing or seeing the publication can identify it as an opinion'.[160] However, it has been suggested that opinion may be a narrower concept than comment. In *Gatley on Libel and Slander*, for example, it is noted that equating 'comment' and 'opinion' is 'an over-simplification'.[161] That is, comment in the common law defence extends to matters of deduction, inference, conclusion and so forth, as noted above in *Clarke v Norton*. The concept of opinion may not be seen to extend as widely as this. However, there appears to have been no intention to narrow the statutory defence through using the term 'opinion'. It appears preferable to maintain the position that the defence is as broad as fair comment, such that the terms can be used interchangeably for this aspect of the uniform law.[162]

C The Speech of Others

Since the 1970s, there had been some uncertainty about how speech by others than the defendant was treated under fair comment. For example, if comment was made by an employee, agent or third party, what would a media publisher need to

156 [2011] EMLR 1; see, eg, Paul Mitchell, 'The Scope of Fair Comment' (2010) 126 *Law Quarterly Review* 525; Eric Barendt, 'Science Commentary and the Defence of Fair Comment to Libel Proceedings' (2010) 2 *Journal of Media Law* 43 who also notes the Court of Appeal emphasised the overall quality of the publication as comment more than the usual focus on the meaning conveyed by the publication. In the Australian context, for examples of the difficulty in distinguishing fact and comment, one could consider *Manock* (2007) 232 CLR 245, 261–7 [33]–[44] (Gummow, Hayne and Heydon JJ), 296–301 [112]–[132] (Kirby J); see also *Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661.

157 George, above n 64, 339.

158 Kenyon, above n 15, 89.

159 Gillooly, above n 64, 124.

160 Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook Co, 3rd ed, 2007) 85.

161 Milmo and Rogers, above n 155, 339.

162 This approach could be supported by adding a definition of 'opinion' to the uniform *Defamation Acts* in the same terms as used in *Clarke v Norton* [1910] VLR 494, 499 (Cussen J): Law Council of Australia, above n 34, 20 [9.7].

establish for the defence to succeed? Need the comment be proven to be subjectively the honest view of the speaker or need it just be one that was objectively possible for a speaker to have made? Final appellate decisions in the UK and Australia, but not Canada, supported the objective approach.[163] The issue had been dealt with under the 1974 Act in NSW,[164] and a broadly similar approach was taken in the uniform *Defamation Acts* but with slightly different statutory wording.

Under the uniform law, the defendant must establish the matter was an expression of opinion of the defendant, an employee or agent, or another commentator.[165] Then, to defeat honest opinion, the plaintiff must prove the defendant did not honestly hold the opinion, the defendant did not believe the opinion was honestly held by the employee or agent, or the defendant had reasonable grounds to believe the opinion was not held by the other commentator.[166]

In an attempt to avoid the protection offered to speech of employees by the honest opinion defence, it appears more journalists are being sued alongside media publishers.[167] A source for this change is a view apparently expressed by McClellan CJ at CL during a defamation trial, which was subsequently noted in other judgments. District Court Judge Gibson explained in *Rodgers v Nine Network Australia (No 2)* that the transcript of trial submissions in *Davis*[168] suggests McClellan CJ at CL 'expressed the view that it was necessary for the journalists to be joined as parties (a step rarely taken in the past by plaintiffs …) for the plaintiffs to be able to succeed in defeating the defence of comment'.[169] However, it is not clear why this step would be needed under the statutory defence. As Simpson J has stated, '[j]ust why that should be so is a mystery to me. No decision of this or any other court was cited to support this proposition'.[170] Similarly, Gibson DCJ observed that 'any judicial view that the journalist should be joined for the defence of comment to be defeated is clearly or plainly wrong'.[171]

Instead, the suing of journalists may follow from a different aspect of the statutory defence (at which the comments of McLennan CJ at CL may also have been aimed). The uniform *Defamation Acts* provide what appears to be a stronger defence in this situation than the former New South Wales statute. Under the

163 *Telnikoff v Matusevich* [1992] 2 AC 343, 354–5 (Lord Keith; Lords Brandon and Oliver agreed); *Pervan v North Queensland Newspaper Co* (1993) 178 CLR 309 approved the objective approach in relation to the former Queensland defamation code; cf *Cherneskey v Armadale Publishers* [1979] 1 SCR 1067, 1079–81 (Ritchie J; Laskin CJC, Pigeon and Pratte JJ agreed) and note dissent: 1096–7 (Dickson J; Spence and Estey JJ agreed).

164 *Defamation Act 1974* (NSW) ss 32–4.

165 See, eg, *Defamation Act 2005* (NSW) ss 31(1)–(3).

166 See, eg, *Defamation Act 2005* (NSW) s 31(4).

167 See, eg, Law Council of Australia, above n 34, 20 [9.9]; NSW Bar Association, above n 40, 34 [8.8].

168 See, eg, Transcript of Proceedings, *Davis v Nationwide News Pty Ltd* (Supreme Court of New South Wales, 20146/06, McClellan CJ at CL, 11 July 2008) 1121, although there is no judgment on this issue.

169 *Rodgers v Nine Network Australia (No 2)* [2008] NSWDC 275, [3] (Gibson DCJ).

170 *Ahmed v Harbour Radio* [2010] NSWSC 676, [20] (Simpson J).

171 *Creighton v Nationwide News (No 2)* [2010] NSWDC 192, [94] (Gibson DCJ).

1974 Act, the defence for comment of an employee was defeated only if it was shown the employee did not hold the opinion when it was published.[172] The plaintiff faced substantially the same burden to defeat a comment defence whether it sued a media publisher or a journalist; namely, showing there was not honest belief.[173] However, the uniform laws give employers a defence for employee opinion unless it is shown the employer did not believe the employee honestly held the opinion. That is, on paper, a stronger protection than the former law,[174] and is consistent with understanding the reforms as having a generally liberalising intent.[175] However, if the aim was to give such stronger protection the provision may not have succeeded. Principles of vicarious liability could suggest the employer would be liable if the journalist was sued directly and was shown not to have believed the opinion. There would be a question of statutory interpretation as to whether the statutory defence overruled wider common law principles, but it may be that the stronger uniform defence for employee opinion could be avoided by suing the employee directly.

The apparent change in practice increases the complexity of litigation through prompting action against multiple defendants, each with slightly different responsibility for the publication. It appears to be an unintended consequence of the slightly different statutory wording. Explanatory material for the uniform laws says merely that the section 'clarifies the position at general law in relation to the publication of opinion of employees, agents and third parties'.[176] Parliamentary debates add nothing relevant on the issue.[177]

Suing journalists personally also raises wider free speech concerns. As Gibson DCJ has noted, if journalists are routinely joined as parties there 'will be a significant chilling on freedom of journalistic expression' due to the impacts of being sued (even where any damages would be paid by the employer).[178] This would be an ironic result of a defence that has been called 'a boon' to defendants.[179] Reform could clarify whether the honest opinion defence is to be defeated if it is shown the defendant did not believe the employee honestly held the opinion, or if it is shown that it was actually not the employee's honest opinion.[180] The present wording may require corporate defendants to overcome

172 *Defamation Act 1974* (NSW) s 33. There were also very substantial, general difficulties about using the former NSW defence: see below nn 204–09 and accompanying text.

173 *Defamation Act 1974* (NSW) s 32.

174 This aspect of the honest opinion defence appears to be the aspect described as 'a boon to the defendants' and 'more than a boon' during submissions in *Davis*: see *Rodgers v Nine Network Australia (No 2)* [2008] NSWDC 275, [50]–[51] (Gibson DCJ).

175 See, eg, Law Council of Australia, above n 34, 19 [9.3].

176 See, eg, Explanatory Memorandum, Defamation Bill 2005 (Vic) 19.

177 Other aspects of the honest opinion defence did receive attention in parliamentary debates: see below nn 219–23 and accompanying text.

178 *Creighton v Nationwide News (No 2)* [2010] NSWDC 192, [93] (Gibson DCJ); quoting *Hanrahan v Ainsworth* (1985) 1 NSWLR 370, 377–8 (Hunt J).

179 See above n 174 and accompanying text.

180 NSW Bar Association, above n 40, 35 calls for the second approach. That would be weaker than the apparent intention of the uniform laws. Law Council of Australia, above n 34, 20 [9.9] has emphasised that the effectiveness of the new provisions is significantly reduced by journalists being sued directly.

both tests, where an employee is sued alongside them. That does not appear to have been the aim of the reform.

D Comment and Opinion Being 'Reasonable'?

Rather than any intended change in the scope of what is protected as comment or opinion, the change in terminology from '*fair* comment' to '*honest* opinion' may be intended to highlight how 'fair' is somewhat of a misnomer in the common law defence.[181] That is, the importance in the statutory wording lies in the use of 'honest', which underscores how the defence concerns comment or opinion that would be possible for an honest speaker to make. This has long been the accepted common law position.[182]

However, in *Manock* the joint judgment of Gummow, Hayne and Heydon JJ appears to take a different approach to this aspect of fair comment. It suggests that 'classic statements of the law' require the comment to be one which could 'reasonably' be formed on the basis of the facts in question.[183] The joint judgment appears to mean something close to 'appropriate' or 'sound' by this usage of reasonable, rather than 'pertaining to reason' or 'not lacking in sanity'. However, a meaning of 'appropriate' would be contrary to all accepted commentary,[184] and the particular quotations provided in the joint judgment should be understood as relating to the second above meaning of reasonable. There is overwhelming authority that fair comment can protect obstinate, exaggerated and unreasonable opinions.[185] Fair comment can include 'a substantial "quantum leap" of logic'.[186] As Gleeson CJ stated in *Manock*:

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181 Butler and Rodrick, above n 160, 85. In the UK the defence is now known as 'honest comment': *Joseph v Spiller* [2011] 1 AC 852, 889 [117] (Lord Phillips PSC, with whom Lord Roger, Lord Walker, Lord Brown and Dyson JJSC agreed).

182 See, eg, *Merivale v Carson* (1887) 20 QBD 275, 281 (Lord Esher MR), 283–4 (Bowen LJ); *McQuire v Western Morning News* [1903] 2 KB 100, 110 (Collins MR); *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 174 (Jordan CJ); *Turner (otherwise Robertson) v Metro-Goldwyn-Mayer Pictures* [1950] 1 All ER 449, 461 (Lord Porter); *Slim v Daily Telegraph* [1968] 2 QB 157, 170 (Lord Denning MR).

183 *Manock* (2007) 232 CLR 245, 290 [90] (Gummow, Hayne and Heydon JJ); quoting *Goldsbrough v John Fairfax & Sons* (1934) 34 SR (NSW) 524, 532 (Jordan CJ).

184 See, eg, Milmo and Rogers, above n 155, 357–9; Sir Brian Neill et al, *Duncan and Neill on Defamation* (Butterworths Tolley, 3rd ed, 2009) 131–2; Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010) 172–3; Price, Duodu and Cain, above n 67, 73, 81–2; Alistair Mullis and Cameron Doley (eds), *Carter-Ruck on Libel and Privacy* (Butterworths, 6th ed, 2010) 236–38; Tobin and Sexton, above n 53, [13,075]–[13,080]; George, above n 64, 345–6; Gillooly, above n 64, 131–2.

185 See, eg, *Merivale v Carson* (1887) 20 QBD 275, 280 (Lord Esher); *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 173 (Jordan CJ); *Silkin v Beaverbrook Newspapers* [1958] 2 All ER 516 (direction to jury by Lord Diplock); *Rocca v Manhire* (1992) 57 SASR 224, 229–30 (King CJ); *Branson v Bower (No 2)* [2002] 2 WLR 452; *Tse Wai Chun v Cheng* [2001] EMLR 31.

186 *Hore-Lacy v Cleary* [2008] VSC 215, [69] (Kaye J).

> In this context, 'fair' does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word 'fair' refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.[187]

Similarly, Kirby J stated in *Manock*: 'I accept that a price has to be paid for the defence of fair comment. Some comment is intensely hurtful, unreasonable and unjust.'[188] The joint judgment in referring to reasonableness may confuse matters. Preferable is the focus evident in comments such as these of Gleeson CJ: 'fair' in no sense means 'objectively reasonable' for the defence of fair comment at common law. In any event, there is no suggestion that the uniform law requires reasonableness. Indeed, the matter was considered in the reform process and was not adopted.[189]

E Underlying Facts and Honest Opinion

The joint reasons in *Manock* clarified the law on using facts external to a publication to support a fair comment defence. A narrow approach was taken by requiring, in most instances, the facts on which comment is based to be stated, referred to or notorious. It is not good enough merely to identify the 'subject-matter or sub-stratum of fact of the comment'.[190] It would only be for 'conventional' cases (for example, those involving public plays and spectacles) that a publisher could merely identify the work involved rather than presenting any facts on which comment is based. However, the honest opinion defence does not specifically exclude using external facts as the basis for an opinion,[191] so uncertainty existed as to whether the *Manock* approach would also apply to the statutory defence.

Case law concerning external facts for the honest opinion defence is equivocal but weighed towards the common law approach. One first instance decision in New South Wales suggested the statutory defence under section 31 'may' differ from the common law by not requiring the opinion to be based upon 'proper material' as set out in the matter complained of.[192] A Victorian Court of Appeal decision, however, rejected that approach and required the proper material (on which honest opinion is based) to be known to the recipient or to be contained in the matter complained of; an approach in line with the joint reasons in *Manock*.[193] It was held that there was no 'difference between the common law

187 *Manock* (2007) 232 CLR 245, 252 [3] (Gleeson CJ).
188 Ibid 298 [118] (Kirby J).
189 Reasonableness was to have been a requirement of an early version of the Commonwealth proposal for uniform defamation law; see Attorney-General's Department (Cth), *Outline of a Possible National Defamation Law* (2004) 3; cf Attorney-General's Department (Cth), *Revised Outline of a Possible National Defamation Law* (2004) 44–5.
190 *Pervan v North Queensland Newspaper* (1992) 178 CLR 309, 340 (McHugh J); cf Kirby J (dissent) who took a broader approach to how facts might be identified: [141]–[147], [162]–[163].
191 See, eg, *Defamation Act 2005* (NSW) s 31.
192 *Holmes v Fraser* [2008] NSWSC 570 (Simpson J).
193 *Herald & Weekly Times v Buckley* (2009) 21 VR 661.

and the statute as to the need for facts on which a comment or opinion is based to appear in the publication or otherwise be apparent to the reader'.[194] The Court of Appeal noted that:

> The idea of expanding the defence of comment or opinion to cases where the facts are unspecified and unknown was rejected by the Law Reform Commission (on whose report the legislation is largely based), and there is nothing in the Proposal for uniform defamation laws released by the States and Territories in July 2004 or in the proposed bill which they released in November 2004, or in the Explanatory Memorandum or Second Reading Speech which suggests any difference in that respect. To the contrary, all the indications are that the two were meant to be the same.[195]

While the Court of Appeal did not refer directly to *Manock*, it would seem that the requirements from the joint reasons in *Manock* regarding external facts supporting the opinion will be imported into the statutory defence.[196] This could be so, even though the very wording of the statutory defence suggests it should now protect opinions beyond the 'factual-basis' required by *Manock*.[197] Such a liberalised approach would have similarities to case law developments in England, as well further reforms being proposed there.[198] In *Spiller*,[199] the United Kingdom Supreme Court held comment need only 'explicitly or implicitly indicate, at least in general terms, the facts on which it is based'.[200] This is a substantial, liberalising change from the traditionally understood position. The decision is also notable for its awareness of changing communications, the 'creation of a common base of information shared by those who watch television

194 Ibid 680 [84] (Nettle, Ashley and Nettleberg JJA). Michael Gillooly, writing before the decision in *Manock*, shares the orthodox view in stating that a 'failure to state or indicate the factual basis for the alleged comment normally leads to the conclusion that the statement of opinion actually contains a concealed assertion of fact … Hence the statement is not opinion, pure and unadulterated, and so cannot be excused as fair "comment"': Gillooly, above n 64, 126–7.

195 *Herald & Weekly Times v Buckley* (2009) 21 VR 661 680 [84], referring to Australian Law Reform Commission, above n 3; Standing Committee of Attorneys-General, Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws* (2004).

196 See also Richard Potter, 'Fair Comment – Back from the Wilderness?' (2009) 14 *Media & Arts Law Review* 82, who comments that Parliament could not have intended such a substantial reform as the literal words of the defence could suggest.

197 Law Council of Australia, above n 34, 19 [9.3]–[9.5].

198 Law Council of Australia, above n 34, 19 [9.5]. See Ministry of Justice, *Draft Defamation Bill, Consultation Paper CP3/11*, Cm 8020 (March 2011) [43]–[45]; Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, Report, House of Lords Paper No 203, House of Commons Paper No 930–1 Session 2010–12 (2011) [69](b) which suggests a position slightly more demanding than the Draft Bill but much less restrained than the traditional law; namely, 'the subject area of the facts on which the opinion is based [should] be sufficiently indicated either in the statement or by context'. The Joint Committee, however, does not argue that the commentator should need know the facts relied on to support the opinion: [69](c).

199 [2011] 1 AC 852, 884–6 [94]–[105] (Lord Phillips PSC, with whom Lord Roger, Lord Walker, Lord Brown and Dyson JJSC agreed).

200 Ibid 886 [105].

and use the [i]nternet', and the public engagement with celebrity information.[201] An Australian parallel can be found in the dissenting judgment of Kirby J in *Manock*.[202]

IV DEFENDING IMPUTATIONS OR DEFAMATORY MATTER?

A Comment at Common Law and under the *Defamation Act 1974* (NSW)

While the uniform law does not appear to change issues considered above such as the requirements for underlying facts, it *may* address another problematic aspect of the former situation in New South Wales. Under the 1974 Act, common law fair comment was not available as a defence. It was replaced by a codified comment defence. The common law did still determine some issues such as what constituted 'comment' and what was 'proper material for comment' for the statutory defence.[203] However, the statutory defence was well described as a 'dead letter'.[204] The death occurred because of the overwhelming focus on the plaintiff's pleaded imputations under the 1974 Act. Pleaded imputations were the cause of action under the statute and defences of justification and comment had to answer them precisely.

As Steven Rares has observed, this approach to comment does not appear to have been intended in the 1974 Act's introduction nor in the earlier report of the New South Wales Law Reform Commission.[205] The 1974 Act provided 'it is a defence *as to comment* that the comment is the comment of the defendant'.[206] Case law held the provision to read as if it said 'it is a defence *as to the plaintiff's pleaded imputations* that the *imputation* is a comment of the defendant'.[207] The result was that the comment defence 'substantially require[d] the defendant to hold the opinion expressed by, not what he or she actually wrote or said, but the meaning distilled by a plaintiff's lawyer'.[208] It is not surprising that plaintiff lawyers could almost always frame imputations that would be practically impossible to defend. The then head of the New South Wales Supreme Court defamation list, Levine J stated:

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201 Ibid 890 [131] (Lord Walker SCJ); see also 886 [99] (Lord Phillips PSC). Even so, the relationship between contemporary cultural and economic roles of celebrity and legal understandings of reputation is uneasy; see, eg, Patricia Loughlan, Barbara McDonald and Robert van Krieken, *Celebrity and the Law* (2010) 86–7.

202 *Manock* (2007) 232 CLR 245.

203 *Defamation Act 1974* (NSW) ss 29–35.

204 Rares, above n 149, 774.

205 Ibid 761, citing New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation*, Report 11 (1971).

206 *Defamation Act 1974* (NSW) s 32(1). Sections 33 and 34 provided similar defences for comment of servants or agents of the publisher or strangers to the publisher.

207 See, eg, *NSW Aboriginal Land Council v Perkins* [1998] NSWSC 630 (Priestley JA, Meagher JA and Sheppard AJA).

208 Rares, above n 149, 766.

> The proposition … that the defence of comment can only relate to the [pleaded] imputation and nothing else … would render [the defence] *of no utility at all* … Whilst it is clear that the law of justification under the 1974 Act requires this, I am not persuaded as a matter of construction let alone as a matter of common sense and reality that the legislation in relation to the defence of comment has the same requirement.[209]

Before considering the response of the uniform *Defamation Acts* to this situation, it is worth noting that developments in Australian common law have to a large degree mirrored these aspects of the former New South Wales regime. A high degree of focus on the plaintiff's imputations has emerged through a series of judgments primarily concerning the defence of justification. Those decisions are explored below, with attention given to divergences in different Australian decisions and the value of fuller examination of the position under English law and practice.[210] Of significance here is the approach taken to imputations, although without the benefit of developed argument on the issue, in the High Court decision of *Manock*. That interlocutory appeal addressed common law fair comment.

In *Manock*, it was held that imputations pleaded by the plaintiff constrained fair comment. They limited what could be offered as defence particulars of comment. The plaintiff forensic pathologist in *Manock* pleaded the publication meant he 'had deliberately concealed evidence' from a murder trial and retrial.[211] The defence particulars sought to defend the words published in another meaning, arguing the publication meant the plaintiff had conducted a 'questionable' forensic investigation, had failed to meet professional standards and practices, and had provided inconsistent expert evidence.[212] The majority of Gummow, Hayne and Heydon JJ held there was 'no disparity or difference between the "precise nature of the defamatory meaning" on the one hand and the "matter" or "the raw material of the actual words employed" on the other'.[213] That statement may not be so surprising given the arguments raised on appeal, which did not directly address decisions like *David Syme v Hore-Lacy*,[214] and because of South Australia's judge-alone mode of trial. In particular, the joint judgment approached the question chronologically: the trial judge would have

209 *Sutherland v ACP Publishing* [2000] NSWSC 1139, [19] (emphasis added).

210 This 'call' to consider English law is for an understanding of judgments and litigation practice *in context* and for what they suggest might be valuable approaches in Australia. As Kirby J has observed, it is a mistake to treat overseas (and often historical) judicial statements as if they were direct statements of Australian common law: *Manock* (2007) 232 CLR 245, 302–3 [138]–[141].

211 *Manock v Channel Seven Adelaide* (2006) 95 SASR 462, 464 (Gray and Layton JJ).

212 Ibid 481 (Gray and Layton JJ).

213 *Manock* (2007) 232 CLR 245, 288 [83].

214 [2000] 1 VR 667. The media defendant chose not to raise the points directly; other media outlets considered seeking leave to intervene but did not do so; personal correspondence (on file).

found the plaintiff's imputation to have been conveyed or not to have been conveyed prior to any consideration of fair comment.[215]

B Honest Opinion under the Uniform Laws

In light of the New South Wales comment defence under the 1974 Act and statements in *Manock* relevant to fair comment at common law, what changes may have been effected by the uniform defamation law? First, the approach of the former New South Wales comment defence was not followed in the wording of the uniform law. The uniform *Defamation Acts* provide a defence of honest opinion as 'a defence to the publication of defamatory matter'.[216] The legislation inclusively defines 'matter' in terms of any 'thing by means of which something may be communicated'.[217] Through this, the honest opinion defence appears to avoid the focus on imputations of the former New South Wales law. Richard Potter, for example, has noted: 'Section 31 makes clear that it is the matter published which must contain the opinion and not the imputation pleaded by the plaintiff'.[218]

Second, it is notable that the legislative history also suggests an intention to end the focus on imputations of the 1974 Act. South Australia was the jurisdiction in which the Defamation Bill 2005 was first introduced to the legislature. The second reading speech said the Bill would provide 'a number of defences *relating to the publication of matter that expresses an opinion* that is honestly held by its maker'.[219] However, the Bill's initial wording was:

> It is a defence to the publication of defamatory matter if the defendant proves –
>
> (a) the defamatory imputations carried by the matter of which the plaintiff complains were an expression of opinion of the defendant rather than a statement of fact.[220]

While the opening words stated the defence was to the publication of defamatory *matter*, the subsequent paragraph focused on the *imputations* carried by the matter of which the plaintiff complains. That wording could have been held to implement the approach of New South Wales courts under the 1974 Act. However, the statutory wording changed and the Bill as passed in all Australian jurisdictions contained the defence in these terms:

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215 *Manock* (2007) 232 CLR 245, [83] (Gummow, Hayne and Heydon JJ). Kirby J also took a chronological approach: 311 [172]. Gleeson CJ agreed in general with the joint judgment on these issues, but notably did not agree on the issue of reasonableness and fair comment: 252, [3]; see *Manock* (2007) 232 CLR 245, [3] (Gleeson CJ), see, above n 187 and accompanying text.

216 See, eg, *Defamation Act 2005* (NSW) s 31.

217 See, eg, *Defamation Act 2005* (NSW) s 4.

218 Potter, above n 196, 166.

219 South Australia, *Parliamentary Debates*, House of Assembly, 2 March 2005, 1839 (Michael Atkinson) (emphasis added).

220 Defamation Bill 2005 (SA) as introduced in House of Assembly, 2 March 2005, Bill 84, cl 29(1). The Bill contained similar provisions related to the opinion of employees or agents, and the opinion of other commentators: cls 29(2), 29(3).

> It is a defence to the publication of defamatory matter if the defendant proves that –
>
> (a) the matter was an expression of opinion of the defendant rather than a statement of fact.[221]

There is no longer any reference to imputations and the wording matches more accurately the intention suggested by the second reading speech. The change followed consultation on the Bill and responded to concerns about the statutory defence potentially being tied to the plaintiff's pleaded imputations.[222] In the New South Wales Legislative Assembly, the Attorney-General noted the word 'imputation' was used in early drafts of the model provisions but was changed. He continued:

> concern has been expressed in some quarters that the use of the term 'imputation' might lead to the importation of the arcane system of pleading that prevails in New South Wales … [where] it is necessary for each imputation to be identified and pleaded with great particularity. That is not the position at common law, where the focus is the matter published rather than the … defamatory imputations it carries. It should be noted that this common law position has been reaffirmed in clause 8 of the bill.[223]

Third, as well as the statutory wording and the legislative history underlying it, at least some cases on the honest opinion defence suggest a move away from the *Manock* common law approach.[224] In *Holmes v Fraser*,[225] fair comment and honest opinion defences failed at trial largely on the basis the publication conveyed factual matters rather than comment or opinion. Characterisation of the

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221 Defamation Bill 2005 (SA) as reported with amendments, House of Assembly, 13 September 2005, Bill 84A, cl 29(1). Debates in the South Australian upper house did not add anything of substance to this issue; see, eg, South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2005, 2750. See also the Introduction Print of the Defamation Bill 2005 (Vic) which contains the same wording. The Victorian second reading speech makes no mention of the defence of honest opinion: Victoria, *Parliamentary Debates*, Legislative Assembly, 7 September 2005, 633–5 (Rob Hulls). The issue was not dealt with in the Victorian Upper House: see, eg, Victoria, *Parliamentary Debates*, Legislative Council, 20 October 2005, 1525–38. In Western Australia, when the Bill was considered in detail in the Legislative Assembly, no reference was made to the defence of honest opinion: Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 5178–519, especially 5198–9. (The same is true of the upper house in Western Australia, *Parliamentary Debates*, Legislative Council, 1 December 2005, 7992–9, 8008.) Similarly, no substantive reference was made in Queensland: *Parliamentary Debates*, Legislative Assembly, 25 October 2005, 3425–7; 9 November 2005, 3864–80, 3889–97. Nor was there substantive discussion in Tasmania: see, eg, Tasmania, *Parliamentary Debates*, House of Assembly, 22 November 2005, 83–95.

222 Personal correspondence between Attorney-General's Department of South Australia and author, April and May 2005. It appears changes to the model provisions were settled by the joint state and territory Parliamentary Counsel's Committee: South Australia, *Parliamentary Debates*, House of Assembly, 13 September 2005, 3319 (Michael Atkinson) see also: at 3322.

223 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2005, 18528 (Bob Debus). There was no relevant discussion of honest opinion in the NSW Upper House: see New South Wales, *Parliamentary Debates,* Legislative Council, 18 October 2005, 18681–695; 19 October 2005, 18801–4.

224 As noted by Kim Gould, 'The Proper Focus of Defamation Defences and the Challenge of Inconsistency' (2010) 33 *Australian Bar Review* 258, 270: 'The question that arises is what constitutes "matter" for the purposes of [s 31], and whether, and if so to what extent, this is influenced by *Manock*. The cases appear divided on these questions.'

225 *Holmes v Fraser* [2008] NSWSC 570 (Simpson J); *Fraser v Holmes* (2009) 253 ALR 538 (Tobias, McColl and Basten JJA).

plaintiff's conduct as 'appalling' could not 'convert' something that was 'essentially a publication of statements of (purported) fact into the expression of opinion'.[226] That interpretation was supported on appeal.[227] While the focus lay on the question of fact or non-fact, at trial Simpson J noted the shift away from imputations under the 1974 Act to published matter under section 31. On its face, the wording of section 31 suggested 'little, if any, room' for interpreting *matter* as being the plaintiff's pleaded *imputations*.[228] The defence would appear to be addressed to the published matter. However, the position on appeal was less definitive, with obiter comments equating the common law position to both section 31 and *Manock*.[229]

In *Herald & Weekly Times Pty Ltd v Buckley*, the Victorian Court of Appeal also noted honest opinion may 'not need to meet the imputation in answer to which it is pleaded'. Instead, it could be enough to show only that the 'defamatory matter' was an expression of honest opinion.[230] The interlocutory appeal in *Herald & Weekly Times Pty Ltd v Buckley* focused primarily on common law fair comment. It did not need to resolve that question about honest opinion.[231]

C The Example of *Soultanov*

While not arising for decision in *Herald & Weekly Times Pty Ltd v Buckley*, the later Victorian Supreme Court decision of *Soultanov v The Age* ('*Soultanov*') did address that question about honest opinion.[232] Justice Kaye substantially equated the common law and statutory defences and, synthesising earlier Victorian and High Court decisions, held that the defence must address the plaintiff's pleaded imputation or address a meaning that is not substantially different from, and not more injurious than, the plaintiff's imputation.[233] That is, the approach for honest opinion was equated to that taken to justification in most contemporary Australian judgments.

In *Soultanov*, it was argued a newspaper publication alleged that biotechnology company directors had, for more than a year, increased their shareholdings in the company before publicly disclosing details of a successful clinical drug trial. The plaintiff was a director of the company in question, Solagran. The plaintiff pleaded the article meant 'he had breached the continuous disclosure rules of the Australian Stock Exchange' by failing to disclose

226 *Holmes v Fraser* [2008] NSWSC 570, [63] (Simpson J).
227 *Fraser v Holmes* (2009) 253 ALR 538, 558 [90] (Tobias JA, McColl and Basten JJA agreed).
228 *Holmes v Fraser* [2008] NSWSC 570, [59] (Simpson J).
229 Links between the common law and s 31 were made on the issue of whether the statement was fact or comment, but drew on statements in *Manock* that there was no difference between the precise meaning held to be conveyed and the matter published: *Fraser v Holmes* (2009) 253 ALR 538, 557–8 [84]–[90] (Tobias JA, McColl and Basten JJA agreed).
230 (2009) 21 VR 661, 680 [81]–[82] (Nettle, Ashley and Weinberg JJA).
231 Ibid 680 [82].
232 (2009) 23 VR 182.
233 See, eg, *Manock* (2007) 232 CLR 245; *Hore-Lacy* [2000] 1 VR 667; *Nationwide News v Moodie* (2003) 28 WAR 314; *Anderson v Nationwide News* (2001) 3 VR 619.

information 'that would have a potentially significant impact' on the company's share price.[234] A defence of honest opinion was raised in terms that the 'plaintiff had unethically traded in Solagran shares when privy to the details of trial results which had not been released to the market'.[235] Thus, there was a difference between the plaintiff's focus on breaching stock exchange rules and the defendant's focus on unethical trading while withholding information from the market.

As to the publication's meaning, Kaye J held:

> The article contains two fundamental threads, namely, the non-disclosure by Solagran of the results of the trials of Ropren, and the trading by the directors in the company's shares during that period of non-disclosure. The article, in structure and substance, closely interweaves those two threads in the manner contended by [the defendant].[236]

The only explicit holding required was whether the plaintiff's imputation was capable of arising from the publication. Justice Kaye held that it was. However, his analysis accords entirely with the defendant's interpretation of the article. The judgment is clear that each of the meanings contended for by the plaintiff and defendant was capable of arising. Indeed, it appears Kaye J found the defence meaning more plausible as the *single* meaning that would be found under the legal test for defamatory meaning.[237] Justice Kaye explicitly noted his 'reservations' about the plaintiff's meaning, which was 'somewhat strained' and 'artificial' but not beyond the limit of what a jury might find to be the publication's meaning.[238] In understanding the result in *Soultanov* with regard to defence meanings, this point deserves emphasis: *both* meanings were capable of arising from the publication and they did not concern separate and distinct allegations.

With regard whether a defence of honest opinion could respond to something other than the plaintiff's pleaded imputation, Kaye J observed that the 'question is necessarily interrelated with … the extent, if any, to which a jury may find a publication to be defamatory … in a sense which is different to the imputation pleaded and relied upon by the plaintiff'.[239] As does so much in defamation law, the issue comes back to meaning. Meaning is 'probably the most important single factor in a defamation case'[240] and almost always 'a question of central importance'.[241] In analysing the issue, Kaye J set out an analysis which is worth quoting at some length:

> two principal considerations have underscored the decisions of [Australian] courts in recent cases, and in particular the High Court [in *Manock*], in circumscribing

234 *Soultanov* (2009) 23 VR 182, 185.
235 Ibid 186.
236 Ibid 187–8.
237 See, eg, Collins, above n 184, 134–5, 137 for succinct summaries of the tests for meaning and the single meaning rule.
238 *Soultanov* (2009) 23 VR 182, 189.
239 Ibid 191.
240 United Kingdom, above n 151, 22.
241 Neill et al, above n 184, 33.

> the extent to which a jury, or a plaintiff or defendant, may depart from the defamatory imputations relied on by the plaintiff. First, the courts have been concerned to ensure that … such departure does not operate unfairly to the disadvantage of the defendant. Secondly, the courts have been concerned to ensure that a defendant, by seeking to defend an imputation which differs from the imputation relied on by the plaintiff, does not thereby hijack the trial of the case, by pleading and relying on 'false issues', which do not meet the sting of the imputations relied on by the plaintiff.
>
> It is for those reasons that the courts have, in a number of cases, evolved a solution which … requires that a defendant (and jury) are bound by the meanings put forward by the plaintiff, or meanings which are either a 'variant' of the plaintiff's meanings, a 'nuance' of the plaintiff's meanings, or, at most, are not substantially different from those meanings. Those tests have been developed to address issues of fairness to the parties, and to ensure that the defendant does not raise false issues which distract the jury from the real questions in the case. It is important that the formulations of the principle by the authorities be applied in a manner which serves its underlying purposes. In particular, those purposes assist in determining whether the imputation, pleaded by the defendant, is a 'variant of', or 'not substantially different from', the imputation pleaded by the plaintiff.[242]

This is an understandable interpretation of earlier Australian case law, although not necessarily the only one available. Here, three points deserve comment. First, this extract correctly notes the concern evident in judgments about avoiding *unfairness to the defendant*. That concern, however, might be thought ironic because the effect of the decisions has been to limit the availability of fair comment and justification in a manner which defendants would likely see as substantially unfair. In this, it offers a curious echo of the introduction of the statutory, imputation-based cause of action under section 9 of the 1974 Act. That change followed the 1971 report of the New South Wales Law Reform Commission which suggested the common law cause of action could be unfair to defendants.[243] Experience under the 1974 Act underscores the error in that concern about potential unfairness to the defendant.[244] The current Australian approach can prevent defendants arguing honest opinion or truth defences for a meaning that is capable of arising from the publication, does not concern a separate and distinct allegation to that complained of by the plaintiff, and is supported by pleaded particulars of fact.[245] While defendants could be expected to feel the burdens of this approach keenly, it is worth noting that comparative evidence from practice suggests wider detriments; in short, it becomes difficult if not impossible to run litigation equitably, efficiently or effectively without allowing defence meanings in the *Lucas-Box* style.[246]

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242 *Soultanov* (2009) 23 VR 182, 192, see also: at 198. A parallel analysis is provided in *Fierravanti-Wells v Channel Seven Sydney (No 3)* [2011] NSWDC 201, where Gibson DCJ follows through similar steps in relation to the availability of, and approach towards, a defence of truth.

243 New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation*, Report 11 (1971), Appendix D, [45]–[54].

244 See, eg, Kenyon, above n 15, 329–48.

245 Kenyon, above n 22, 664–5, 668.

246 Named after *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147; see generally Kenyon, above n 15, 117–19 (*Lucas-Box* is 'very common', 'works well', 'absolutely vital', and an 'obvious' improvement to practice).

Second, there has been a concern to see that 'false issues' are not raised to the *detriment of the plaintiff*. However, here particular care is needed. Justice Kaye suggests that seeking to defend a different *imputation* can amount to raising a false issue. Rather, the question should be whether the defendant is seeking to introduce material concerning a separate and distinct *allegation* about which the plaintiff does not complain. To use the label 'imputation' is to prejudge the issue to the detriment of the defendant.

Third, if the Australian approach limits defendants to imputations pleaded by plaintiffs or not substantially different variants of them, achieving the limited degree of fairness to defendants that is possible depends on the scope of the terms 'nuance', 'variant' and 'not substantially different'. On this point, the analysis in *Soultanov* offers a useful example. Of particular importance is how Kaye J considered the meanings of each party *in the context of the publication* and in light of the basic purpose of *fairness to both parties* to determine whether the meanings were substantially different:

> If the plaintiff's imputation were to be contrasted with the defendant's imputation, in isolation from the article from which they are derived, there may be some force in [the] submission that the defendants' imputation is more than a variant of the imputation relied on by the plaintiff. …
>
> However, in my view, such an approach would be artificial, and as such, erroneous. … As I have already stated … there were two intertwined threads, joined together in the article. … The plaintiff has chosen to extract one of the two threads – the non-disclosure of the information – and restrict his innuendo to one aspect of that allegation. On the other hand, the defendants have pleaded their innuendo to the two intertwined threads. In that way … there is a necessary and close connection between the subject matter of the defendants' imputation and the subject matter of the plaintiff's imputation. … [T]he imputation sought to be defended on the basis of honest opinion does not set up a 'false issue' at trial.
>
> On the other hand, if the defendants were shut out from pleading [that] defence … they would be placed at an unfair disadvantage. If a jury does accept the imputation put forward by the plaintiff, the jury might well conclude that the real sting of that imputation lay, not just in the breach of rules concerning disclosure of information to the market, but, rather, in the trading of shares by the directors during the period of non-disclosure. In that way … the two imputations are not 'substantially different', when they are considered in the context of the article from which they are derived.[247]

There are four particularly notable aspects arising from this passage. First, the approach has the great strength of not losing sight of the publication at issue. That danger was emphasised repeatedly in relation to New South Wales practice under the 1974 Act where the plaintiff's pleaded imputation was the cause of action.[248]

Second, it differs from the obiter comments of Brennan CJ and McHugh J in the High Court decision in *Chakravarti v Advertiser Newspapers*.[249] Justice Kaye

247 *Soultanov* (2009) 23 VR 182, 198–9 [43]–[45].

248 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 578 (Kirby J); *Hughes v Seven Network* (Unreported, Supreme Court of New South Wales, Levine J, 13 November 1998); *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 578–81 [139] (Kirby J); Levine, above n 30.

249 (1998) 193 CLR 519, [6]–[24].

does not simply ask the restrictive question of whether the defendant would be able 'to adduce different evidence or to conduct the case on a different basis'[250] as a shorthand for deciding what defence meanings exceed the terms 'nuance', 'variant' and 'not substantially different'. That question could suggest, for example, that meanings at the levels of guilt and suspicion are substantially different. However, in *Hore-Lacy* itself, Ormiston JA noted:

> many articles in the press … are devised on the 'no smoke without fire' premise, so that many allegations take a form which might be construed … as alleging highly improper activity though on detailed analysis … the allegation would appear less serious. It is this sort of case which might go to the jury with the plaintiff pleading imputations of high impropriety and the defendant asserting … less serious peccadillos which it wished to justify. The 'smoke' could therefore be justified but it would remain for the jury … to decide whether the imputation was still one of 'fire'.[251]

The approach of Kaye J offers a better method than the questions of Brennan CJ and McHugh J for determining what meanings are 'not substantially different'.

The comments of Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers* could also be contrasted with different formulations used in other judgments in the decision. The joint judgment of Gaudron and Gummow JJ noted that, while 'substantially different' meanings or those focussing on 'some different factual basis' could cause problems, the question of potential disadvantage to defendants should 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'.[252] That judgment does not support defence meanings being excluded before trial because of their similarity or difference from plaintiff meanings and, notably, *Lucas-Box* was cited without any criticism.[253] Indeed, in *Chakravarti* the plaintiff was not precluded from advancing a meaning at the level of 'suspicion' after having pleaded a meaning at the level of 'guilt'. There could be no prejudice to the defendant because parties had raised questions about both guilt and suspicion of financial misconduct.[254] As Kelly J has noted in the Northern Territory Supreme Court:

> The remarks of Brennan CJ and McHugh J … were not just 'not adopted' by the other members of the Court, they are not supported by the judgment of Gaudron and Gummow JJ or that of Kirby J.
>
> …
>
> Once it is accepted that the tribunal of fact is entitled 'to consider the meaning of the entire matter complained of, notwithstanding the pleaded imputations', then the rationale for a strict pleading approach, which the selected portion of the

250 The questions were posed by Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 532 [19].

251 *David Syme v Hore-Lacy* [2000] 1 VR 667, 675–6.

252 *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 546 [60] (Gaudron and Gummow JJ).

253 Ibid 543 [52], 544 [56] (Gaudron and Gummow JJ).

254 Ibid 534 [25] (Brennan CJ and McHugh J), 546 [61] (Gaudron and Gummow JJ), 578–83 [139]–[145] (Kirby J).

> judgment of Brennan CJ and McHugh J in *Chakravarti* seems to endorse, disappears.[255]

Third, the passage from Kaye J displays awareness of a key aspect of the English approach: there can be unfairness to defendants from plaintiffs 'constraining' the field of battle. In too many Australian judgments, this is not explicitly addressed. However, it is one of the central concerns underlying decisions like *Polly Peck*,[256] namely circumscribing the ability of plaintiffs unreasonably to reshape and constrain disputes through pleading. This point was also noted in the earlier Victorian Court of Appeal decision in *Herald & Weekly Times v Popovic* where Gillard AJA (with whom Warren AJA agreed) observed that plaintiffs may plead:

> imputations which are inadequate or in some way do not properly or fully convey the true defamatory meaning of the words complained of. Common sense and justice demands that the defendant be permitted to plead the true imputation conveyed by the words complained of and in that meaning prove that they are true and correct.[257]

Fourth, in effect the approach of Kaye J comes very close to that taken under English law and to what defence counsel in *Soultanov* appears to have argued for, namely that honest opinion can be directed towards 'a meaning which is not "separate and distinct" from a meaning relied on by the plaintiff'.[258] If Kaye J had asked the following three questions, the analysis would have proceeded to the same conclusion, in what appears to be a more useful and generally applicable fashion: Is the publication capable of conveying the meaning the publisher seeks to defend? Does the defence meaning *not* arise from a separate and distinct allegation to the plaintiff's complaint? Are there defence particulars that could go to establishing the defence?[259] If the questions are answered 'yes' the defence should be allowed to go forward, subject only to questions of case management and the need to control the scope given to each party to present its case.[260] Equally, those three criteria should be the reasons if defence imputations are ruled out. That is, the meaning being incapable of arising, concerning a separate and distinct allegation, or not being supported by particulars. Separate and distinct allegations should be the point of concern;[261] the concepts of nuance and variation are a poor proxy for that.

It is also worth noting that Kaye J, in recounting some relevant history of defamation pleading and practice, suggests *Polly Peck* only gave 'qualified

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255 *Forrest v Chlanda* [2011] NTSC 67, [8], [15], quoting *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 578–9 [139] (Kirby J).

256 [1986] QB 1000.

257 *Herald & Weekly Times v Popovic* (2003) 9 VR 1, 62.

258 *Soultanov* (2009) 23 VR 182, 190 [21].

259 See Kenyon, above n 22, 673–4.

260 See, eg, *Polly Peck* [1986] QB 1000, 1021 (O'Connor LJ, Robert Goff and Nourse LJJ agreeing); *Fierravanti-Wells v Channel Seven Sydney (No 3)* [2011] NSWDC 201, [32], [44] (Gibson DCJ).

261 Where imputations are separate and distinct, a contextual truth defence may be arguable under, for example, *Defamation Act 2005* (NSW) s 26; see, eg, *Newnham v Davis (No 2)* [2010] VSC 94 (Kaye J); *Larach v Urriola* [2009] NSWDC 97 (Gibson DCJ); but see *Besser v Kermode* (2011) 282 ALR 314 (Beazley, Giles and McColl JJA).

acceptance' to the practice of defence pleading of alterative meanings because it held that when meanings are distinct, the defendant cannot defend one by pleading the truth of the other.[262] However, the idea of distinct meanings should be understood as much older than *Polly Peck*. The treatment of defence pleading of alternative meanings in that judgment, and in subsequent English case law, does not suggest a 'qualified acceptance' of the general practice. The acceptance is complete in law and in litigation practice. Empirical evidence suggests all parties understand the English approach on meaning to work as well as might be expected on this question, and certainly far better than the sort of approach currently applied in most Australian decisions.[263]

Of course, there is nothing inherently preferable about the approach of a comparative jurisdiction like England and Wales, and it is right to be alert to an almost automatic adoption of foreign judicial statements that can sometimes be seen.[264] That merely underlines to need for careful and nuanced comparisons. In this instance, English defamation law lies clearly within the same legal tradition, with a history of extensive cross-referencing of judgments in leading texts and decisions. And the very volume of defamation litigation in England means its experience of what works and does not work should be carefully considered and translated to the Australian context. (Earlier studies suggest approximately twice or more per capita defamation claims in England than Australia.)[265] Australian cases, and perhaps the legal arguments presented to the judges, have failed to consider the experience sufficiently. And this means, leaving to one side questions of legal costs and funding litigation, Australian defamation law appears to place defendants in far more difficult positions than the English law.

V CONCLUSION

What do judgments to date suggest about Australia's uniform defamation law? As suggested soon after the laws commenced operation,[266] the uniform law is an evolutionary change. That is an understandable product of its formation and the long history in Australia of seeking uniformity. But larger questions remain about the law's substance and, equally, litigation practices.[267] These suggest a key test for the uniform scheme will be upcoming reforms, if any, arising out of the uniform law's review by the New South Wales Attorney-General's Department.[268] As Michael Gillooly has commented, the 'major advance' in the

262 *Soultanov* (2009) 23 VR 182, 193.
263 See above n 246 and accompanying text.
264 See above n 210.
265 See Roy Baker, 'Defining the Moral Community: The "Ordinary Reasonable Person" in Defamation Law', (Paper delivered at Communications Research Forum, Canberra, 2 October 2003); Kenyon, above n 15, 257.
266 See above nn 8–10 and accompanying text.
267 It may be a change is warranted, as noted by Rolph, above n 6, 247: 'there needs to be something of a cultural change in defamation practice in relation to pleading practices and interlocutory skirmishes.'
268 See above n 37 and accompanying text.

reforms was 'the achievement of uniformity' itself 'and it is this which, one hopes, has laid the foundation for substantial and principled reform to take place in the future'.[269] Some areas for reform emerge from the cases.

This article has considered three areas in particular. The first was damages. The statutory cap on damages for non-economic loss, which reached $324 000 in mid-2011, appears to have prompted a significant reduction in the level of awards. The highest awards have been below the limit, the quantum of damages has been 'scaled' in proportion to the limit, and a host of case examples suggest comparatively modest sums are now common. The ability to exceed the cap through aggravated damages does not appear to have weakened the cap's effectiveness.[270] But the ability of plaintiffs to seek damages up to the cap for each of multiple publications, and the courts' approach to consolidation of defamation actions, suggest the caps' apparent success may not be sustained. If the cap aims to increase certainty for parties and ensure limited awards for non-economic loss, the ability to multiply actions needs to be constrained.[271]

The second area considered was honest opinion and its common law version, fair comment. While a challenge of application remains in distinguishing fact and comment, it appears the change in the defence's terminology – from 'comment' to 'opinion' – should not narrow its scope.[272] A narrower scope could substantially limit the statutory defence and increase reliance on the still available common law protections of fair comment. In addition, the uniform laws sought to clarify the treatment of opinions of different speakers, whether the defendant, an employee or agent, or another commentator. However, this reform appears to have prompted journalists to be joined to defamation actions against their employers. Case law suggests this change may have arisen from a view that journalists *had* to be joined for it to be possible to defeat an honest opinion defence. However, no clear reason has been offered as to why that would be so. Instead, it may be that journalists are sued alongside employers, so the journalist can be argued to be directly liable for a defamatory opinion (where the journalist did not hold the opinion when published) even if the employer could have a defence itself against direct liability (because it believed the journalist held the opinion).[273] The simplest solution may be to revert to the position under the former New South Wales law, so the same test for defeasance applies for employers, employees and agents. However, that would leave to one side the apparent aim of the reforms to strengthen this aspect of the defence.

Some statements about the common law defence in *Manock* suggested fair comment had to be 'reasonable'.[274] This is an unusual analysis given the

269 Gillooly, above n 6, 311.

270 Equally, the potential to plead and prove economic loss does not appear to have been widely used, although the material available for this article may not have revealed the extent of any such practice.

271 See Law Council of Australia, above n 34.

272 See above nn 157–62 and accompanying text.

273 See above nn 167–80 and accompanying text.

274 *Manock* (2007) 232 CLR 245; see above n 183 and accompanying text.

defence's traditions and it seems unlikely to be followed for honest opinion.[275] *Manock* also addressed requirement for facts underlying a comment to be stated or indicated in the publication, or to be notorious. Initial case law under the uniform law suggests this requirement will be imported into the statutory defence, even though the statutory wording omits any reference to it.[276] As recent developments in England suggest, importing this requirement may not be warranted. After an exhaustive consideration of traditional fair comment authorities as recognised in English law, the United Kingdom Supreme Court has set out a more relaxed test.[277]

The third main area considered above was the way in which honest opinion is a defence against the plaintiff's pleaded imputations, or the defamatory matter about which the plaintiff complains. While the Australian common law of defamation has moved towards a greater focus on pleaded imputations – adopting without explicit discussion some of the most criticised aspects of the former New South Wales law – it is not clear the same approach need follow for the uniform law. In relation to honest opinion, the statutory defence's wording differs from the former New South Wales law. It is set out as a defence to the publication of defamatory matter. In addition, the legislative history suggests moving away from the concept of imputations was deliberate. It was observed in New South Wales parliamentary debates that honest opinion did not use the word 'imputation' at all because it aimed to avoid 'the arcane system of pleading' then applying in New South Wales.[278] There is also some case law support for the statutory defence having a 'non-New South Wales' form. This issue, however, raises larger questions about the impact of pleaded meanings on defences. These were considered above through the example of the Victorian Supreme Court decision in *Soultanov*.[279] That careful judgment explains the current Australian approach, while also displaying its limitations. With awareness of the potential for unfairness to each party and the need to tether the analysis of meaning to the publication in context, it also suggests how asking the following three questions would be a better approach for opinion or justification defences. Is the meaning the publisher seeks to defend capable of arising from the publication? Does the defence meaning *not* arise from a separate and distinct allegation to that of the plaintiff's complaint? Are there defence particulars that could establish the defence? Whether, and how, to move to that sort of approach remains for future cases.

Reform might also help address the issue. The Law Council of Australia has suggested what might be an elegant statutory reform, which could achieve the substance of this approach for truth defences. The proposal is slightly wider than the above three questions, although it would focus only on truth not opinion

275 See above nn 181–7 and accompanying text.
276 See above nn 190–7 and accompanying text.
277 *Joseph v Spiller* [2011] 1 AC 852; see above nn 198–9.
278 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2005, 18528 (Bob Debus).
279 (2009) 23 VR 182.

defences. Its aim is to overcome limitations in the current drafting of the contextual truth defence.[280] The suggestion is that defendants should be able defend as true any imputation conveyed by a publication, whether it is an imputation complained of by the plaintiff, an additional imputation, or one having a common sting with an imputation complained of by the plaintiff.[281] A defence would exist where any imputations of which the plaintiff complains (that are not proven substantially true) do not further harm the plaintiff's reputation because of the substantial truth of the 'contextual imputations'. It is argued this would 'reduce the potential for tactical pleading of imputations by all parties … be likely to lead to a concomitant reduction in interlocutory disputation, and ensure that neither party could prevent the "real" meaning of a publication from being put before the trier of fact'.[282] These are highly laudable aims. If the concept of 'common sting' in the proposed statutory wording encompassed the case law deriving from *Lucas-Box* as well as *Polly Peck*, it could be a very sensible reform. This offers a parallel avenue to further consideration of the issue in case law. However, unless equivalent steps were taken through statutory reform of honest opinion, the opinion defence would be left more constrained than for truth, contrary to the logic and practice under English law of dealing with defence meanings in an equivalent manner for justification and honest comment. The history of reform in Australia and the tortuous path towards uniformity does give pause to the idea of purely statutory reform for defamation law.

280 See, eg, *Defamation Act 2005* (NSW) s 26; see also above n 22 and accompanying text.

281 Law Council of Australia, above n 34, [8.23]. This approach would also overcome the limitations to contextual truth confirmed in *Besser v Kermode* (2011) 282 ALR 314 (Beazley, Giles and McColl JJA).

282 Law Council of Australia, above n 34, 18 [8.24].