

IMPUTATION OR PUBLICATION: THE CAUSE OF ACTION IN DEFAMATION LAW

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I'd always thought [the NSW approach] was a good idea ... [But] in light of the development of the common law over 20 or more years of pleading rules or so on – it seems to me to make our statutory cause of action redundant ... [Y]ou've got to the stage when you'll ask yourself what is the contribution of this statutory cause of action?

I INTRODUCTION

Australia does not have uniform defamation law. Each of the eight states and territories has its own law,² despite decades of reform efforts.³ But, after statements by the Commonwealth Attorney-General late in 2003,⁴ national defamation reform again appears possible. The matter is before the Standing Committee of Attorneys-General, and the federal government appears willing to act if states and territories cannot reach agreement.⁵

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1 Interview with a NSW Senior Counsel. See below Part IVB.

2 For a brief overview of the differing laws see Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed, 2004) 26–7.

3 See, eg, NSW Law Reform Commission, *Defamation*, Working Paper No 1 (1968) [296]. Community Law Reform Committee of the ACT, *Defamation*, Report No 10 (1995) 103 suggests efforts have existed for 'more than 150 years'.

4 Fergus Shiel, 'Time for Unity on Defamation, says Ruddock', *The Age* (Melbourne), 15 November 2003, 11.

5 See, eg, Cth Attorney-General's Department, *Outline of Possible National Defamation Law*, Discussion Paper (2004). For an examination of the constitutional heads of power that could be relied on see Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) [303]–[339].

Most earlier reform proposals have focused on the preferable defamation law for the particular state or territory in question,⁶ with individual jurisdictions suggesting their proposals may provide a basis for national uniformity. For example, the 2002 report of the NSW Attorney-General's Taskforce on Defamation Law Reform stated:

While this report can only have any direct impact on NSW law ... these proposals could form the basis for discussion with the States and Territories, with a view to a further attempt to bring about national reform.⁷

Similar sentiments exist in documents from the Attorneys-General of NSW, Queensland and Victoria,⁸ the NSW Law Reform Commission,⁹ and two Western Australian reports.¹⁰ It is likely that current moves towards uniformity will draw heavily on the laws of particular jurisdictions. There have already been some proposals for uniformity based largely on NSW law.¹¹

The most significant Australian jurisdictions for defamation are the states of NSW and Victoria. They are the two most populous states and experience considerable amounts of defamation litigation. This article examines one difference in their laws that may have been under-appreciated in earlier reform efforts, namely the basis of the cause of action. In Victoria, the cause of action in libel or slander arises at common law and is based on the *publication* – publishing defamatory material gives rise to the cause of action. In contrast, NSW has a statutory cause of action in defamation based on *imputations* – that is, each imputation pleaded by the plaintiff is a separate cause of action under s 9 of the *Defamation Act 1974* (NSW).¹²

This article compares the two bases for the cause of action in defamation – imputation or publication. The basis will be important in any moves toward uniform national law, and it is worth examining in detail because it has been overlooked in many previous reform efforts. Drawing on empirical research into

6 An obvious exception is the Australian Law Reform Commission Report, above n 5, which through its national scope would have brought about uniformity.

7 NSW Attorney-General's Taskforce on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW* (2002) 37; see also Recommendation 18: at 38.

8 Attorneys-General of NSW, Qld and Vic, *Discussion Paper on Reform of Defamation Law* (1990) 4.

9 NSW Law Reform Commission, *Defamation*, Report No 75 (1995).

10 Law Reform Commission of Western Australia, *Report on Defamation*, Project No 8 (1979) [10]; *Western Australian Defamation Law: Committee Report on Reform to the Law of Defamation in Western Australia* (2003) 68. Cf SA Law Reform Committee, *Report Relating to the Reform of Libel and Slander*, Report No 15 (1972) 5, which only mentioned uniformity briefly, in relation to 'foreign' (ie, interstate) publications.

11 See, eg, the Cth Attorney-General's initial discussion paper, above n 5, which draws substantially on NSW law. See also Michael Sexton, 'An Erosion of Freedom of Speech?', *The Australian* (Sydney), 22 March 2004, 7.

12 Section 9(2) of the *Defamation Act 1974* (NSW) provides:

Where a person publishes any matter to any recipient and by means of that publication makes an imputation defamatory of another person, the person defamed has, *in respect of that imputation*, a cause of action against the publisher for the publication of that matter to that recipient:

(a) in addition to any cause of action which the person defamed may have against the publisher ... in respect of any other defamatory imputation made by means of that publication ... (emphasis added).

defamation litigation, the article suggests that what may appear to be a minor legal difference should be recognised as an important element in the complexity of NSW litigation. This paper argues that the *imputation-based* cause of action in NSW has encouraged interlocutory fights about the form of pleaded imputations, as well as encouraging imputations to be considered separately, rather than in the context of the publications in question. While such interlocutory fights are possible under the *publication-based* cause of action in Victoria, they happen far less frequently and cases remain more closely focused on the publications in dispute. The NSW approach also appears to have substantially curtailed the availability of defences, placing publishers in a far weaker position than at common law. All this means that the basis of the cause of action, and the differing litigation practices that have developed in Victoria and NSW, should be seen as significant elements in the comparative freedom of speech enjoyed in different Australian defamation jurisdictions.¹³ The basis of the cause of action should be addressed explicitly in any future reforms – whether national or state-based – and a cause of action based on the publication should be recognised as preferable.

Although the article focuses on NSW and Victorian defamation law and practice, the issues are relevant more widely in Australia and in comparable jurisdictions internationally. After the Queensland Court of Appeal's decision in *Robinson v Laws*,¹⁴ the Code states of Queensland and Tasmania appear to be in a similar position to NSW with the cause of action being based on the pleaded imputations rather than the publication. Thus many of this article's comments extend to the Code jurisdictions. Similar arguments also could be advanced for other jurisdictions with broadly comparable defamation laws. For example, other research into English defamation litigation echoes the findings described here about the cause of action's influence on litigation.¹⁵

After examining how the basis of the cause of action has been overlooked in some earlier reform efforts in Part II, the article addresses three main issues. Part III outlines general matters about pleading. It illustrates technicalities that can arise under the NSW imputation-based cause of action and outlines judicial criticisms of the NSW model. Practices that have developed under the imputation-based cause of action in NSW have encouraged fights about pleaded imputations, most often focussed on the form of words used in the pleading. This

13 This variation within Australia could be compared to the chilling effect which appears to exist under traditional Anglo-Australian defamation law, relative to US law. 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.

14 [2003] 1 Qd R 81.

15 Kenyon, *Meaning in Defamation Law and Practice*, above n*.

tendency has been strengthened by the limited jury role under s 7A of the Act, which was introduced in NSW in the mid-1990s.¹⁶

In Part IV, two empirical projects are drawn on to outline significant differences in NSW and Victorian defamation litigation. The empirical research suggests pleading disputes happen far more frequently in NSW than in Victoria for little, if any, benefit. It seems judicial criticism of the technicality of NSW litigation should be heeded.

The NSW Law Reform Commission, however, has repeatedly supported the imputation-based cause of action. Part V examines this support and argues it should not block moving to a cause of action based on published material. A publication-based cause of action is more likely to support longstanding aims of defamation reform and remove 'unwarranted restrictions on freedom of speech as a result of unnecessary technicality or uncertainty'.¹⁷

Three points need emphasis at the outset. First, the article makes no claim that an imputation-based cause of action *necessarily* has the consequences that are apparent in NSW. But, given the NSW experience and the influence its precedents would have under uniform law based on its model, the publication-based cause of action should be preferred. The publication-based cause of action appears likely to promote fewer pre-trial machinations, less arid technicality and greater protection for speech.

Second, this paper criticises aspects of NSW law and some of the justifications previously given for it in the literature. This result was not expected when research began several years ago. The State's detailed statutory provisions and its wealth of judgments were expected to offer useful material for other jurisdictions. Undoubtedly this is true, in part. But research suggests the common law's publication-based cause of action may offer valuable lessons for improving defamation law and litigation – especially for reform efforts that remain within a relatively traditional framework, such as one that does not require plaintiffs to prove falsity.¹⁸

Third, another important factor related to the basis of the cause of action is not explored in detail here; namely, how the cause of action relates to defence pleading of meaning. England, like Victoria, has a common law cause of action based on the publication. Other research suggests the English approach to defence pleading of meaning is far preferable to the NSW model, which has only

16 For discussions of the *Defamation Act 1974* (NSW) s 7A process see, eg, David Rolph, 'Perverse Jury Verdicts in New South Wales Defamation Trials' (2003) 11 *Torts Law Journal* 28; Andrew T Kenyon, 'Defamatory Meaning: Pleading and Practice in New South Wales' in Eric M Barendt and Alison Firth (eds), *Yearbook of Copyright and Media Law* (2000) 100. The specificity of imputations has gained even greater importance under s 7A. Under it, the tribunal of fact that determines whether the plaintiff's pleaded imputations are conveyed and are defamatory (the jury) is separate from the tribunal of fact determining defences and remedies (the judge). This means that defendants are *more* concerned about any room for argument about an imputation's meaning. Otherwise, there may be a difference between the meaning the jury finds and, for example, the meaning the judge requires to be proved true.

17 Attorneys-General of NSW, Qld and Vic, *Reform of Defamation Laws* Discussion Paper No 2 (1991) 1.

18 The 1995 Report of the NSW Law Reform Commission remains the most significant Anglo-Australian proposal for more substantial reform: NSW Law Reform Commission (1995), above n 9.

a limited defence for ‘contextual’ imputations.¹⁹ The English practice of defence pleading is practical where the cause of action is based on the publication, but similar defence pleading could not arise under NSW law. Briefly, at common law, defendants can respond to plaintiffs’ imputations by raising different meanings of two types. First, the defendant may deny the other party’s meaning is conveyed in any manner. A different meaning may be conveyed, which the defendant may seek to justify. Almost invariably, this is a meaning of lesser seriousness: for example, that the plaintiff is *suspected* of some criminal activity rather than being *guilty* of it. Second, the defendant may argue that the plaintiff’s meaning is not a distinct meaning, but has a ‘common sting’ with other meanings conveyed by the publication. For example, allegations of separate acts of adultery may have a common sting of adulterous promiscuity.²⁰ Even if the plaintiff does not complain about those other meanings, the defendant can use them in justification. If the meanings have a common sting, proving one of the imputations true justifies all of them. English case law since the mid-1980s has been significant for these two types of defence meaning. The general approach was set out by the English Court of Appeal in *Lucas-Box v News Group Newspapers*²¹ and *Polly Peck Holdings v Trelford*.²² In England, the first type of defence meaning is often known as a Lucas-Box plea, and judgments commonly refer to Lucas-Box meanings.²³ It is distinguished from the second type of defence meaning – the common sting meaning – which can be called a Polly Peck plea. While the term Polly Peck pleading is typically used in Australia for both styles of defence plea, it is useful to distinguish between the two situations by using the labels Lucas-Box and Polly Peck pleas. In part, this is because Lucas-Box pleas are both ubiquitous and widely supported in England,²⁴ while Polly Peck pleas are very rare and treated with minor reservations by London practitioners.²⁵ The publication-based cause of action allows greater scope for defence pleading of meaning, which appears to offer another important area of benefit to litigation practice.

19 *Defamation Act 1974* (NSW) s 16. The English approach also is preferable to the constrained form of defence pleading that now exists in Victoria: see *David Syme v Hore-Lacy* [2000] 1 VR 667. See, generally, Kenyon, *Meaning in Defamation Law and Practice*, above n *.

20 See, eg, *Khashoggi v IPC Magazines* [1986] 1 WLR 1412, in which it was held to be arguable, so an injunction on publication was lifted. As to injunctions and defamation see, eg, Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 319–29.

21 [1986] 1 WLR 147.

22 [1986] QB 1000.

23 See, eg, *Berezovsky v Forbes Inc* [2001] EWCA Civ 1251 (Unreported, Aldous, Sedley, Arden LJJ, 31 July 2001) [4]; *Burstein v Times Newspapers* [2001] 1 WLR 579, 589; *Carlton Communications v News Group Newspapers* [2002] EMLR 16, 302; David Price and Korieh Duodu, *Defamation: Law, Practice and Procedure* (3rd ed, 2004) [28-13]. They are sometimes described as ‘Lucas-Box particulars’, see, eg, *Control Risks Ltd v New English Library Ltd* [1990] 1 WLR 183, 189.

24 See, eg the Lucas-Box pleading is directly supported by the *Civil Procedure Rules 1998* (UK) 53 Practice Direction 2.5.

25 See Kenyon, *Meaning in Defamation Law and Practice*, above n *.

II A HISTORY OF REFORM PROPOSALS AND THE CAUSE OF ACTION

Australian defamation law reform often has not considered the cause of action at all, or has not seen it as significant. The Australian Law Reform Commission's 1979 report, *Unfair Publication: Defamation and Privacy*,²⁶ still offers a 'most comprehensive and persuasive blueprint for the reform of defamation'.²⁷ It followed a 1976 Constitutional Convention in Hobart which recommended referring powers to the Commonwealth in order to achieve uniform defamation law.²⁸ The ALRC Report considered the NSW model, in which each imputation is a cause of action. But it recommended plaintiffs have a single cause of action, based on the defamatory matter that was published, however many imputations were conveyed by that publication.²⁹ The ALRC, however, did not see this as an important issue:

So long as the plaintiff is required to draft his pleadings with sufficient particularity to inform a defendant of the case he has to meet, and all imputations are dealt with simultaneously by the selected remedies, the question whether there should be one cause of action or more is not of great practical significance.³⁰

The Law Reform Commission of Western Australia's 1979 *Report on Defamation* considered the ALRC Report. It recommended deferring the introduction of privacy protection so as not to 'hinder much needed national reform'³¹ of defamation. In relation to defamation it substantially agreed with the ALRC's proposal for a single cause of action.³²

The ALRC Report and subsequent discussion by the Standing Committee of Attorneys-General led to an exposure draft Defamation Bill 1983. Clauses 7 to 9 of that Bill based the cause of action on imputations rather than on the publication:

Where a person publishes a defamatory imputation relating to another person, the other person has a right of action against the first-mentioned person in respect of the publication of the defamatory *imputation*.³³

No reasons for moving away from the ALRC Report are apparent in the Defamation Bill, but it presumably meant to follow the NSW model. In any event, the change does not appear to have been contentious. Quite separate reasons underlay the Defamation Bill's failure to proceed, such as differences

26 Australian Law Reform Commission, above n 5.

27 Sally Walker, 'The New South Wales Law Reform Commission's Discussion Paper on Defamation' (1994) 2 *Torts Law Journal* 69, 71.

28 Australian Law Reform Commission, above n 5, [47].

29 *Ibid* [91]. The Report included a draft Bill in these terms: at Appendix C.

30 *Ibid* [90].

31 WA Law Reform Commission (1979), above n 10, [9].

32 *Ibid* [6.9]–[6.10].

33 Exposure Draft Defamation Bill 1983 (Cth) cl 7 (emphasis added) (copy on file with author). Cls 8 and 9 dealt with defamation of partnerships and deceased persons.

between the jurisdictions over defences and media opposition to court ordered correction statements and related remedies.³⁴

Efforts for uniformity revived after several years, and in 1990 and 1991 the Attorneys-General of NSW, Queensland and Victoria jointly issued two discussion papers on defamation reform.³⁵ It is striking that the basis for the cause of action is almost entirely absent from both papers. They focussed on matters such as: should truth alone be sufficient for a defence of justification, or should a public interest element also be required;³⁶ what should be the scope of privilege defences; how and by what body should damages be determined; and should there be provision for court-ordered or court-recommended correction statements?

The 1990 Discussion Paper made no reference at all to the NSW cause of action. The 1991 Discussion Paper reported that agreement had been reached by the Attorneys on many contentious issues. These included reducing the limitations period, not requiring public interest to be shown for the justification defence (except where a publication invades privacy), and allowing courts to recommend, but not order, that correction statements be made.³⁷ The second Discussion Paper focused on unresolved issues, particularly concerning privilege defences and damages. It did not explicitly address the question of whether the cause of action would be imputation-based but it did briefly canvas the contextual truth defence under *Defamation Act 1974* (NSW) s 16,³⁸ which suggests that the NSW model was envisaged.

This apparent reliance on the NSW approach was confirmed in subsequent Bills. Defamation Bills were introduced into the parliaments of NSW, Queensland and Victoria during 1991 and 1992.³⁹ These Bills were not completely uniform but they all provided that the cause of action would be the pleaded imputation.⁴⁰ The second reading speeches are silent as to reasons for this approach. None of the Bills passed. Elections intervened in Queensland and Victoria, while in NSW, the parliamentary Legislation Committee recommended referring defamation law reform to the NSW Law Reform Commission.⁴¹ That

34 Exposure Draft Defamation Bill 1983 (Cth) cll 18–21. See also Attorneys-General of NSW, Qld and Vic (1990), above n 8, 5.

35 Attorneys-General of NSW, Qld and Vic (1990), above n 8; Attorneys-General of NSW, Qld and Vic (1991), above n 17.

36 *Defamation Act 1974* (NSW) s 15. Public benefit remains a requirement under the *Defamation Act 1889* (Qld) s 15; *Defamation Act 1957* (Tas) s 15; and for the ACT: *Civil Law (Wrongs) Act 2002* (ACT) s 59 which aims to maintain the public benefit requirement, but arguably also allows the common law defence. See Matthew Collins, 'New Defamation Law for the ACT' (2001) 6 *Media & Arts Law Review* 335, 336.

37 Attorneys-General of NSW, Qld and Vic (1991), above n 17, 2.

38 Ibid 52–3.

39 Defamation Bill (NSW) 1991, reintroduced in 1992; Defamation Bill 1991 (Vic); Defamation Bill 1991 (Qld). A Bill also was tabled in the ACT Assembly in November 1991. For a background to the development of the Bills, see: Second Reading Speech, Defamation Bill 1991 (NSW), Legislative Assembly, 14 November 1991 (Peter Collins, Attorney-General of NSW).

40 See, eg, Defamation Bill 1991 (Vic) cll 7 and 8.

41 For a brief overview of the failure of efforts in NSW, Qld and Vic, see Community Law Reform Committee of the ACT, above n 3, 103–105.

reference occurred and led to the Commission's 1995 report, which will be examined in detail below in Part V.

It is noteworthy that more recent reform documents have either not adopted the NSW model without commenting on it,⁴² or have not supported the model after considering it.⁴³ For example, the ACT Community Law Reform Committee's 1995 report examined procedural and substantive reforms in light of early 1990s moves towards uniformity by NSW, Queensland and Victoria. The Committee recommended a statutory cause of action for defamation, but one based on the publication, not the imputations:

The approach in the New South Wales Act tends to encourage barren semantic speculation about the effect of defamatory matter which results in interminable interlocutory skirmishes. The Committee agrees that 'imputations' are properly dealt with by way of particulars and should not give rise to separate causes of action.⁴⁴

The Committee thought defamation cases were prone to 'frivolous or misconceived'⁴⁵ interlocutory fights, with the NSW approach doing nothing to counter that tendency.

Parts III and IV consider how such 'barren semantic speculation' might arise more frequently in NSW than in other jurisdiction: Part III examines defamation pleading and specificity while Part IV examines defamation practice.

III DEFAMATION PLEADING AND SPECIFICITY

A General Matters

In defamation law, the meanings that a publication conveys are called imputations.⁴⁶ Natural and ordinary meanings are one type of imputation. They can be conveyed directly or by inference. The inferences, called popular innuendoes,⁴⁷ depend only on general community knowledge, such as knowing a common slang expression. Legal innuendoes are the second type of imputation.⁴⁸ They depend on facts outside the publication that are not within general community knowledge. These extrinsic facts, combined with the publication, convey a legal innuendo. At common law, a separate cause of action arises for each legal innuendo (but legal innuendoes are very rarely pleaded in practice), while all natural and ordinary meanings form a single cause of action. In NSW, each imputation is a separate cause of action, and must be pleaded.⁴⁹

42 Attorney-General of WA, *Western Australian Defamation Law: Committee Report on Reform to the Law of Defamation in Western Australia* (2003); Cth Attorney-General's Department, above n 5.

43 Community Law Reform Committee of the ACT, above n 3.

44 *Ibid* [57].

45 *Ibid* [167] and its n 111.

46 See, eg, *Mirror Newspapers v Harrison* (1982) 149 CLR 293, 295 (Mason J).

47 They can also be called 'false innuendoes'.

48 They can also be called 'true innuendoes'.

49 *Defamation Act 1974* (NSW) s 9(2); *Petritsis v Hellenic Herald* [1978] 2 NSWLR 174, 190 (Samuels JA); *Supreme Court Rules* (NSW) Pt 67 r 11(2).

The degree of specificity is a major question about pleading meaning. Under general principles, pleading the meanings alleged to arise from a publication is said to serve good procedural aims by clarifying the matters in dispute. And the general trend during the 20th century was toward both parties pleading meaning ‘with as much clarity and openness as possible’.⁵⁰ But encouraging, or requiring, parties to plead alleged meanings raises long-standing concerns about pleading. There is a fear disputes can be diverted into arcane interlocutory arguments, or involve particularly long and elaborate pleadings. In Victoria, natural and ordinary meanings should be identified in the pleadings, unless they are obvious from the face of the publication.⁵¹ Because each imputation is a separate cause of action in NSW, it must be pleaded clearly.

In its proposals that led to the *Defamation Act 1974* (NSW), the NSW Law Reform Commission noted that making each imputation a separate cause of action could harm pleading practice and lead to prolix pleadings.⁵² It suggested introducing court Rules (which now exist) to prevent separate imputations being pleaded unless they differ in substance.⁵³ The NSW *Supreme Court Rules* have detailed provisions relating to imputations, which are said to place ‘a premium on careful and accurate pleading’.⁵⁴ The apparent effect is to achieve greater precision and reduce any confusion as to what meaning the plaintiff contends is conveyed by the publication at issue. If the pleaded imputation is ambiguous, the jury should not be left to determine its meaning.⁵⁵ The imputation must be repleaded so that it is precise. Precision in this area is described as a primary value in litigation.⁵⁶ Suggestions that the approach increases the law’s ‘technicality’ have been noted by the NSW Law Reform Commission,⁵⁷ but it has supported the State’s model as emphasising precision, clarifying issues and saving court time.⁵⁸

B Illustrating Concerns about Specificity with *Drummoyne*

Precision is traditionally seen as the benefit of the NSW approach. But *Drummoyne Municipal Council v Australian Broadcasting Corporation*⁵⁹ (*‘Drummoyne’*) illustrates a possible weakness in the approach: what degree of

50 Patrick Milmo and W V H Rogers (eds), *Gatley on Libel and Slander* (9th ed, 1998) 647 (footnotes omitted). See also (10th ed, 2004) 805.

51 *Kerney v Optimus Holdings* [1976] VR 399 applying *Allsop v Church of England Newspaper* [1972] 2 QB 161. Legal innuendo meanings also must be pleaded, and the plaintiff must particularise and prove the relevant extrinsic facts: *Turner v The Bulletin Newspaper Co* (1974) 131 CLR 69, 80 (Barwick CJ).

52 NSW Law Reform Commission, *Report of the Law Reform Commission on Defamation*, Report No 11 (1971) [51]–[54].

53 *Ibid* Appendix C. The lack of such a rule in the Code States is likely to be exploited since *Robinson v Laws* [2003] 1 Qd R 81.

54 NSW Law Reform Commission (1995), above n 9, [1.19].

55 *Singleton v French* (1986) 5 NSWLR 425, 427–30 (Mahoney JA), 435. (McHugh JA, Samuels JA agreed).

56 See, eg, *Monte v Mirror Newspapers Ltd* [1979] 2 NSWLR 663, 676 (Hunt J).

57 NSW Law Reform Commission (1995), above n 9, [4.5], citing the Young Lawyers *Submission to the NSW Law Reform Commission* (1993) 13.

58 NSW Law Reform Commission (1995), above n 9, [4.5].

59 (1990) 21 NSWLR 135.

specificity is appropriate when lack of clarity follows from the defendant's publication rather than the plaintiff's pleading? *Drummoyne* is both a useful example of the general issue and an important case to consider closely because it remains a leading decision on defamation pleading. For example, at least 30 Australian cases referred to *Drummoyne* between January 2002 and June 2004.⁶⁰

In *Drummoyne*, the plaintiff council pleaded an imputation that it was corrupt without giving a particular meaning of corruption.⁶¹ This imputation was alleged to lack specificity, and the first instance judge struck out the pleading. Justice Hunt said the adjective 'corrupt' can convey at least three distinct meanings; namely, being open to bribery, being dishonest or lacking integrity.⁶² The plaintiff argued it should not need to go beyond pleading 'corruption', a word the defendant actually used. The plaintiff sought to rely on all reasonable meanings of corruption as being within its general pleading. This was rejected: 'It is for the plaintiff to state its imputations with precision notwithstanding any imprecision of the matter complained of.'⁶³ The plaintiff, however, could replead and specify the sense of corruption being argued for. Or the plaintiff could argue that all three senses of corruption arose from the publication, if each was separately pleaded.

The order to replead was supported on appeal, but through different reasoning. Justice Priestley held that corruption could have the three meanings mentioned by Hunt J, but that it also could have a general defamatory meaning.⁶⁴ Justice Priestley agreed a defendant is entitled to know the 'precise' meaning alleged by the plaintiff *if* precise means that it is 'sufficiently clear' to inform the defendant of the case it must meet since '[p]recision must always be a relative matter.'⁶⁵ This approach seems much closer to traditional common law pleading principles. It means that the plaintiff can replead and contend for any meaning of corruption, including corruption's general meaning, if it is clear which meaning is alleged by each pleaded imputation.

The order to replead was also supported by Gleeson CJ, who emphasised that specificity was a practical question and suggested that: '[i]f a problem arises, the

60 The cases involved the High Court (on appeal from NSW), the Supreme Courts in the ACT, NSW, Queensland, SA and WA, and the Federal Court in its NSW Registry. See, eg, *Askew v Morris* [2004] WASC 43 (Unreported, Master Newnes, 23 March 2004); *South Australian Water Corporation v Sullivan* [2004] SASC 42 (Unreported, Bleby J, 26 February 2004); *Griffith v John Fairfax Publications* [2004] NSWSC 66 (Unreported, Levine J, 19 February 2004); *Magub v Hinchliffe* [2004] QSC 4 (Unreported, McMurdo J, 5 February 2004); *John Fairfax Publications v Rivkin* (2003) 201 ALR 77; *Reading v ABC* [2003] NSWSC 716 (Unreported, Shaw J, 7 August 2003); *Obeid v John Fairfax Publications* [2003] NSWSC 563 (Unreported, Levine J, 25 June 2003); *Byrnes v John Fairfax Publications* [2003] NSWSC 575 (Unreported, Levine J, 23 June 2003); *NRMA v Nine Network Australia* [2002] ACTSC 37 (Unreported, Master Connolly, 17 May 2002); *Moir v Flint* [2002] WASC 48 (Unreported, McLure J, 20 March 2002); *Stalyce Holdings (Aust) v Cetec* [2002] FCA 278 (Unreported, Tamberlin J, 19 March 2002); *Greek Herald v Nikolopoulos* (2002) 54 NSWLR 165. The vast majority of case law references to *Drummoyne* concern the issues of pleading and specificity explored in this article.

61 Note *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 now prevents a council suing in defamation; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 could provide an extended form of common law qualified privilege defence for comments about a council.

62 The judgment of Hunt J is detailed on appeal: *Drummoyne* (1990) 21 NSWLR 135, 153–5.

63 Justice Hunt cited on appeal: *ibid* 154.

64 *Ibid* 155.

65 *Ibid*.

solution will usually be found in considerations of practical justice rather than philology.⁶⁶ The degree of specificity should be decided in light of the published material with reference to the appropriate test: whether confusion is likely about the meaning of the imputation pleaded by the plaintiff.⁶⁷ Ambiguity may flow from the published material or the defendant's own words or actions, rather than from the plaintiff's pleading. For example, a placard labelled 'Corrupt Judges' could convey an allegation in those very terms, which would be specified enough for trial.⁶⁸ In such an instance, it would be inappropriate to require the plaintiff to specify further the meaning of 'corrupt'. This approach seems equivalent to the 'general meaning of corruption' argument allowed by Priestley JA. The plaintiff must specify the meanings to be argued for, which may include quite general meanings. Thus, the *Drummoyne* majority did not require any extreme degree of specificity. This is noteworthy because the '*Drummoyne* point' has entered the lexicon of NSW cases when pleaded imputations are challenged on grounds of specificity or ambiguity.⁶⁹ Those challenges appear to be far more common than in jurisdictions like Victoria, which base the cause of action on the publication.

In the *Drummoyne* appeal, Kirby P dissented and would not have required any repleading. He held that 'corrupt' was not ambiguous in the context of this publication, and criticised the artificialities of defamation pleading.⁷⁰ A less strict approach to specificity was favoured by Kirby P, even though imputations ground the NSW cause of action. Justice Kirby believed the approach of NSW trial courts creates an unduly complex procedure with unwarranted delays and costs, wrongly places the burden of pleading on the plaintiff (at least where published words' ordinary meaning is capable of being defamatory), and may mean that a plaintiff loses if its precisely pleaded imputation is found not to have been conveyed.⁷¹ An additional effect is suggested by the empirical research considered in Part IV below. Requiring a high degree of specificity appears to substantially limit the availability of the defences most connected to a publication's meaning; namely, those of justification and comment. It means the only viable 'defence' for a publisher may be to challenge the plaintiff's pleaded imputations pre-trial.

Justice Kirby has returned to the issue, notably in the High Court decision in *Chakravarti v Advertiser Newspapers*.⁷² There, Kirby J said that the need for 'exact precision' in each imputation – clearly a matter of precedent in NSW after *Drummoyne*⁷³ – may have disadvantages:

66 Ibid 137 (Gleeson CJ).

67 Ibid 138 (Gleeson CJ) citing *Whelan v John Fairfax & Sons* (1988) 12 NSWLR 148, 155 (Hunt J).

68 *Drummoyne* (1990) 21 NSWLR 135, 137 (Gleeson CJ) citing *John Fairfax & Sons v Foord* (1988) 12 NSWLR 706, 726.

69 See, eg, *Marsden v Amalgamated Television Services* (1998) 43 NSWLR 158.

70 *Drummoyne* (1990) 21 NSWLR 135, 149 (Kirby P in dissent).

71 Ibid 149–51.

72 (1998) 193 CLR 519, 578. See, also, *Rigby v John Fairfax Group* (Unreported, New South Wales Court of Appeal, Kirby P, Priestley and Meagher JJA, 1 February 1996) 4–5 (Kirby P in dissent).

73 It is 'well settled': *Rigby v John Fairfax Group* (Unreported, NSW CA, Kirby P, Priestley and Meagher JJA, 1 February 1996), 12 (Priestley JA, Meagher JA agreed). See also *Marsden v Amalgamated Television Services* (1998) 43 NSWLR 158, 162 (Hunt CJ at CL; Mason P and Handley JA agreed).

It has led to *many pre-trial applications, complex interlocutory proceedings and a potential for injustice*, depending upon the ingenuity and skill of the pleader of the imputations. ... Because readers and viewers are not favoured with pleaded imputations when they receive the matter complained of, there is a *risk that the attention at the trial will be deflected from the item actually said to have harmed the plaintiff's reputation to an evaluation of pleaded imputations and a debate about whether they truly arise.*⁷⁴

The judge who headed the NSW Supreme Court's Defamation List for many years since the early 1990s, Levine J, has also criticised the pleading battles that appear common in NSW:

it must be borne in mind that the conduct of defamation litigation in this State is straight-jacketed by the undue technicality that attends the formulation of imputations.⁷⁵

Justice Levine has also commented extrajudicially that

The tort of defamation ... boils down to determining what the publication means. Or it should. The amount of the Court's time, let alone litigants' resources, expended profligately in the determination of what words, sentences and phrases mean is positively scandalous.⁷⁶

Research into litigation practice, considered in the next part of this article, supports these criticisms. The degree of specificity that is required in a particular jurisdiction appears to have a significant influence on the complexity of litigation and the relative positions of each party. Requiring greater specificity appears to restrict the scope of allowable speech, which is a previously unrecognised element in debates about specificity.

IV DEFAMATION LITIGATION FIELDWORK

A Background

Case law examples like *Drummoyne* suggest how technicality might arise under the NSW model. But in what ways does such complexity exist in practice? To address the issue, this article draws on two substantial empirical projects examining various aspects of Australian, English and US defamation law and practice.⁷⁷ The primary materials used here are files from NSW and Victorian courts for defamation cases issued in 1998, which were examined several years later. The court files offered information such as what sorts of meanings were pleaded, what interlocutory applications were made and with what result. Interviews with lawyers involved in defamation litigation provided further information about what happened at different stages of the process.⁷⁸ The first set

74 *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 578 (emphasis added).

75 *Hughes v Seven Network* (Unreported, Supreme Court of New South, Levine J, 13 November 1998).

76 Justice David Levine, *The Future of Defamation Law* (1999) Lawlink [12] < http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_310899 > at 19 July 2004.

77 See Kenyon, above n*.

78 All interviews were conducted in person, with each one lasting approximately one hour. The interviews were semi-structured, allowing interviewees to offer general comments. Almost all interviews were audio-tape recorded, transcribed and coded according to the legal issues addressed in the interviews.

of interviews, conducted in 2000 and 2001, focused on issues concerning a publication's meaning in defamation litigation. Broader interviews were conducted with defamation experts in 2003 and are also drawn on in this article. All those who assisted in relation to the two data sources of court files and interviews are sincerely thanked.⁷⁹ The recent interviews updated the earlier fieldwork and confirmed the impression that changes under s 7A of the *Defamation Act 1974* (NSW) have not reduced the complexity of litigation.⁸⁰ If anything, the s 7A process has exacerbated the drawbacks of NSW's imputation-based cause of action.

B NSW Fieldwork

The NSW Supreme Court Registry is not open to the public.⁸¹ Permission to access files was obtained from the Court's Chief Executive Officer. Registry court diaries and computerised records show 68 defamation cases were issued in the NSW Supreme Court during 1998. Another six cases had been identified through court diaries for the Defamation List, but their files showed they contained no defamation claims.⁸² Practitioners reported that relatively few defamation cases were run in the NSW intermediate court – the District Court – in 1998⁸³ so the District Court Registry was consulted only in relation to six cases issued in the Supreme Court during 1998 and transferred to the District Court. Information was taken from the files for the period ending 31 December 2000, two to three years after the cases had been issued and when they had been through commonplace interlocutory activity. Overall, the sample of 68 Supreme Court files is taken to illustrate NSW practice from that period. To supplement these records, 10 interviews were conducted in Sydney with specialist defamation lawyers during November 2000. Defamation was a sizable part of

79 Individuals are listed here who assisted with the organisation or provision of interviews, or the provision of access to transcripts or court files (each is identified according to any title held when first contacted): Maureen Ahearne, Ian Angus, Peter Bartlett, John Bennett, Mal Brooks, Bruce Burke, David Caspersonn, Cindy Christian, Richard Coleman, Dr Matthew Collins, Stephen Collins, Christopher Dale, Sophie Dawson, Mark Dreyfus QC, Anne Flahvin, Tim Hale SC, Alister Henskens, Will Houghton QC, Christopher Hutchings, Nerida Johnston, Stephen Jupp, Richard Leder, the Honourable Justice David Levine RFD, Bruce McClintock, Ruth McColl SC, Findlay McCrae, Laurence Maher, Ann Matheson, Tom Molomby, Justine Munsie, Leanne Norman, Peter O'Donahoo, Stephen O'Meara, Richard Potter, Stav Psonis, Nicholas Pullen, Steven Rares SC, Guy Reynolds, Jeremy Ruskin QC, Joseph Saltalamacchia, Georgina Schoff, the Honourable Judge Stott, Terence Tobin QC, Robert Todd, Belinda Thompson, Laura Tyler, Michael Wheelahan, Scott Wheelhouse, Simon Wilson QC.

80 See above n 16.

81 For the treatment of access to court files in various Australian jurisdictions see Sally Walker, *Media Law: Commentary and Materials* (2000) 463–479.

82 These figures correspond with those supplied by the Supreme Court in a statistical summary of defamation filings during the years 1990–2000, which listed 74 files for 1998 (unpublished correspondence, copy on file with author). The total number of files identified during fieldwork through the court diaries was 74, 6 of which did not prove to concern defamation law.

83 This has subsequently changed, with the Supreme Court transferring more cases and the District Court's jurisdictional limit having become \$750,000. The reliance here on Supreme Court files is similar to the conduct of the ACT's Community Law Reform Committee, which concentrated its 1990s defamation work on the ACT Supreme Court where most claims were issued: Community Law Reform Committee of the ACT, above n 3, [180].

every interviewee's practice, but for most it formed approximately half their work. The majority of interviewees had between 10 and 20 years defamation experience. A majority reported acting equally for plaintiffs and defendants, with the remainder mainly acting for defendant media companies. Another 16 interviews were conducted with a similar group of lawyers in 2003, which updated the issues addressed in 2000 as well as considering other aspects of defamation law and practice.

C Victorian Fieldwork

Victorian defamation litigation is common in both the Supreme Court and the County Court, Victoria's intermediate court. Both Court Registries are open to the public, but Registry managers greatly assisted the fieldwork by granting access to the files without cost. Lawyers interviewed raised little difference between the two Victorian courts – except for suggesting a greater variety of judges heard County Court matters, some of whom had little defamation experience. Registry records show 22 defamation cases and one injurious falsehood claim were issued in the Victorian Supreme Court during 1998. Four defamation files, plus the injurious falsehood file, contained generally endorsed writs; that is, they had no statement of claim. In every instance those claims later settled, or were dismissed due to inactivity, with no pleading of imputations taking place. Those five files did not offer useful information for this research and are not commented on further, which means that 18 Supreme Court files were examined in detail. To them were added the 46 defamation cases issued in the County Court's Melbourne Registry during 1998.⁸⁴ In a similar style to NSW, the 64 Victorian court files were consulted at length in relation to the period ending 31 December 2000. These records were supplemented by eight interviews with specialist defamation lawyers conducted in 2000. For most interviewees, defamation formed approximately half their work, with the majority having between 10 and 20 years defamation experience. Most interviewees worked mainly for media defendants, while others worked equally for plaintiffs and defendants. As in NSW, broader interviews were conducted in 2003 with 11 similar lawyers.

This article can only offer a snapshot based on one year's case files, trial transcripts and interviews with practitioners, supplemented by wider, more recent interviews. While the interview samples are small, they should be understood within the context of a concentrated field of legal practice. The interviewees comprised a good cross-section of key informants about defamation practice in Melbourne and Sydney. Further research *may* suggest greater values within the NSW imputation-based cause of action, but there is no reason to think the data considered here is atypical. It should not be overlooked in future reforms.

⁸⁴ An additional three defamation files were issued in Melbourne, but transferred to regional courts, and are not considered in this sample. The County Court files included only one generally endorsed writ, for which a statement of claim was served promptly, and it is included in this discussion.

D Summarising the Empirical Data

The material from court files and interviews strongly supports criticisms of NSW practice and suggests that its imputation-based cause of action is unhelpful.⁸⁵ In relation to NSW, the research suggests plaintiffs usually plead multiple meanings at varied levels of seriousness. The form of pleaded imputations is often an issue pre-trial, and challenges to the specificity of imputations are common. As plaintiffs are bound to their pleaded imputations, there is no room for defendants to respond with Lucas-Box or Polly Peck meanings,⁸⁶ and there are only limited circumstances in which contextual imputations can arise. Thus defendants' attention is directed towards more interlocutory hearings to challenge plaintiffs' imputations. The research suggests this pre-trial battleground has been intensified by the operation of defences in NSW. Defences of truth and comment appear to have become tightly focused on plaintiffs' imputations and made less accessible as a result. Thus, defendants' disagreements with plaintiffs' meanings can be dealt with realistically only pre-trial. Interlocutory battles attacking plaintiffs' pleaded imputations can be seen to operate as a major form of 'defence'. The jury's confined role under the s 7A procedure has accentuated these peculiarities of NSW practice. For all these reasons, the whole approach is well described as imputation-centred.

Victorian research suggests that the common law cause of action, based on the publication, is an important element in a preferable style of litigation. In Victoria, plaintiffs appear to plead more meanings than in NSW, with repetitive pleadings often not being challenged. The form of pleaded imputations is rarely an issue pre-trial, parties are not held particularly close to their pleaded meanings, and juries are not asked specific questions about each pleaded imputation. Defendants virtually never agree with plaintiffs' imputations, and Lucas-Box pleas are fairly common. The *combination* of plaintiff and defence pleadings means differences between the parties about meaning are usually set out fairly clearly without pre-trial hearings related to the issue. And justification and fair comment are far more common pleadings than corresponding NSW defences. It seems defendants are not unreasonably precluded from raising them, which may be the NSW situation. All these factors result in issues about the imputations predominantly being left until trial, left for the jury, and focused upon the publication.

Figures from NSW and Victorian court files are notable. They suggest how amendments to pleaded meanings are far more common in NSW, defence pleadings relevant to meaning are far less common, and that rates of trial and settlement differ. First, with regard to amending pleadings, in NSW there were challenges or negotiated changes to imputations in almost every second case. In Victoria, changes occurred in just under one in ten cases. Second, with regard to defences, in NSW truth was pleaded in less than one in six defences, contextual truth in one in eight defences,⁸⁷ and comment in one in five defences. Victoria

85 The material is examined at length, in relation to many other aspects of defamation law in Kenyon, *Meaning in Defamation Law and Practice*, above n *.

86 See above nn 21–24 and accompanying text.

87 This rate can be expected to have increased as s 7A practice has developed.

saw approximately double these rates of pleading: justification of the plaintiff's meanings was pleaded in one in four defences, Lucas-Box meanings in one in three defences, and fair comment in more than two in five defences. These two areas of difference reinforce the idea that NSW defendants are prompted to focus on pre-trial challenges to pleaded imputations, while Victorian defendants can respond to plaintiffs' pleadings with defences related to alternative meanings that are capable of arising from the publication in question. Third, and importantly in light of the other two differences, Victoria saw a greater percentage of cases settle more quickly or be disposed of at trial than in NSW.⁸⁸ While figures on the length of hearings related to only a small number of files, the Victorian trials did not run for any significantly longer time than NSW matters. On the available information, the public costs of the Victorian approach do not appear to exceed those of NSW.⁸⁹ They appear to be less; given the lower number of interlocutory challenges and quicker disposal of claims in Victoria.

V RE-EXAMINING THE CASE FOR THE IMPUTATION-BASED CAUSE OF ACTION

Doctrinal analysis and empirical research suggests that the imputation-based cause of action may be an important source of complexity in NSW defamation litigation. Interviews with NSW lawyers suggested some openness to returning to a publication-based approach, as at common law. Similar sentiments appear in the 2002 Report of the NSW Attorney-General's Taskforce on Defamation Law Reform,⁹⁰ and in a 2001 submission to the NSW Attorney-General from the NSW Bar Association.⁹¹ The most recent, brief Discussion Paper from the federal Attorney-General suggests uniform national law should have a cause of action based on the published material, not on the pleaded imputations.⁹² But as discussed in Part I, notable previous reform efforts have begun by suggesting a publication-based cause of action, before ending with one based on the pleaded imputations.⁹³

In this situation, the NSW Law Reform Commission's comments about the cause of action could be thought to hamper reform. The NSW cause of action, with its basis in the pleaded imputations, has been repeatedly supported by that

88 In Victoria, 87 per cent of files had been disposed of by the end of 2000, while in NSW only 56 per cent had been completed.

89 Chesterman has raised the important matter of the costs to public resources of defamation litigation, as well as the costs to the parties: Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 170.

90 It suggested future amendment to *Defamation Act 1974* (NSW) s 9 (in the interests of national uniformity) so that the NSW cause of action was not imputation-based: Attorney-General of NSW Task Force, above n 7, 37.

91 NSW Bar Association, *Annual Report* (2001) 46–7. The NSW Bar Association's defamation working party also recommended abolishing s 7A of the *Defamation Act 1974* (NSW) and supported full jury trials.

92 Cth Attorney-General's Department, above n 5, 2.

93 See above nn 26–45 and accompanying text.

Commission. Examining its comments, however, suggests the issue should be seen as open for reconsideration. This Part examines the NSW approach and argues that it was not originally concerned with the matters of specificity which now appear as important reasons for s 9 of the *Defamation Act 1974* (NSW). In addition, the 1990s NSW literature does not appear to have appreciated the considerable development in common law defamation pleading since the early 1970s.

A Original Goals of the Reform Process in NSW: 1971 Report of the NSW Law Reform Commission

The current NSW approach can be seen first in the NSW Law Reform Commission's 1971 Report.⁹⁴ The Commission suggested there were 'difficult' and 'unserviceable' distinctions between whether one or multiple causes of action arose in relation to a particular publication. It said that the 'purpose of section 9 is to put the matter on a rational basis and to meet the difficulties which inhere in the multiplicity of causes of action.'⁹⁵ In part, these difficulties arose when material was published to many people, or in several jurisdictions. But the Commission also considered there was a 'related problem of a multiplicity of causes of action by reason of a multiplicity of defamatory imputations conveyed by means of a single report, article, speech or other matter.'⁹⁶ The Commission said a legal innuendo meaning – which depends on facts outside the publication that are not within general community knowledge – certainly creates a separate cause of action. But it suggested doubts existed as to whether popular innuendo meanings – which depend only on matters of general knowledge – create separate causes of action.⁹⁷ The Commission said complexities and uncertainties exist,⁹⁸ but it appears to be a problem of little practical significance.⁹⁹ A plaintiff could simply plead a meaning as both a legal and popular innuendo in the alternative. This can be seen in the Commission's own example: is it common knowledge or not that Casanova can mean 'libertine'? That would affect whether the meaning could arise as a popular or legal innuendo. A plaintiff could simply plead both forms of innuendo, if there was doubt. Instead, the Commission said:

We think that the solution most likely to promote an analysis which will lead to just results, is to provide that a person defamed has a separate cause of action for each defamatory imputation published of him and for each person to whom the publication is made.¹⁰⁰

Whether this is true or not, it is notable that no concern about *specificity* was connected with introducing s 9. The Commission was discussing multiple causes of action, not the clarity with which a case is made. And the Commission considered the defects of existing NSW law to centre on conflicts of law,

94 NSW Law Reform Commission (1971), above n 52.

95 Ibid Appendix D, [36].

96 Ibid [41].

97 Ibid [42]–[46]. See, also, above Part IIIA.

98 Ibid [47].

99 As noted in Australian Law Reform Commission, above n 5, [90].

100 NSW Law Reform Commission (1971), above n 52, 'Appendix D' [49].

prolixity of pleadings in relation to multiple imputations, reaching verdicts on multiple causes of action, and assessing damages.¹⁰¹ Nothing was mentioned about specificity as such.

A further point is important. The proposed Court Rules required that each imputation should be specified:

At present, in the common case of defamation by words, the plaintiff must, as a rule, specify in his declaration the words complained of ... If he relies on a [popular] innuendo he may, but need not, specify the ... innuendo in his declaration. ... [In] the proposed [Defamation] Bill ... each defamatory imputation would support a separate cause of action. It is therefore appropriate that each defamatory imputation should be specified in the statement of claim.¹⁰²

There is nothing in this explanation suggesting that the requirements for each pleaded imputation would differ from the common law – ‘specify’ appears to be used equivalently for both regimes. Although at that time a common law plaintiff *may* have pleaded popular innuendoes, that now *must* be done in all but the exceptional case.¹⁰³ So while the 1971 report led to NSW’s imputation-based cause of action, the report should not be seen as providing the basis for any particular requirement of specificity that differs from the common law. Subsequent Commission publications do not make this clear.

B The NSW Law Reform Commission’s View of the Common Law: 1993 Discussion Paper and 1995 Report

The Law Reform Commission’s 1990s publications may dismiss the common law too quickly, especially given the above analysis of the 1971 report, the existing judicial criticisms of NSW’s technicality,¹⁰⁴ and the empirical research drawn on in this article.¹⁰⁵ Two aspects of the 1990s publications can be criticised. First, the original reasons for recommending s 9 of the *Defamation Act* have not been addressed clearly. Second, the publications’ description of the common law may be misleading. These criticisms suggest the Commission’s justifications for the NSW cause of action are weak.

The Commission’s 1993 Discussion Paper contains the following about s 9:

This provision was designed to overcome the ‘difficult’ and ‘unserviceable’ distinctions, and ‘areas of doubt’, arising at common law regarding the cause of action in defamation. Given that the pleaded imputations constitute the case which the defendant must answer, they must be pleaded with sufficient precision to define the issues...

There has been an ‘unfortunate furore’ in the case law over the level of precision required when pleading imputations, although this now appears to have been resolved.¹⁰⁶

101 Ibid [51]–[56].

102 Ibid [319].

103 See, eg, *Kerney v Optimus Holdings* [1976] VR 399, applying *Allsop v Church of England Newspaper* [1972] 2 QB 161.

104 Eg, above nn 70–76 and accompanying text.

105 See above Part IV.

106 NSW Law Reform Commission, *Defamation*, Discussion Paper No 32 (1993) [4.33]–[4.35].

An extrajudicial paper by Justice David Hunt was cited to support the apparent resolution of that ‘furore’,¹⁰⁷ although the matter has not disappeared from cases.¹⁰⁸ What this passage also fails to make clear is that the initial recommendation for s 9 apparently had nothing to do with precision and specificity as those terms have been subsequently used in NSW. In addition, the passage is incorrect if it is taken to suggest that the Commission in 1971 was concerned about the parties’ meanings being clear and specific. Those were not at all the ‘difficult’ and ‘unserviceable’ distinctions raised in 1971.

In relation to the common law, the Commission said:

In jurisdictions such as Victoria and England, in circumstances in which the meaning of the words is not clear, the plaintiff *may* plead the meanings which they are alleged to convey. ... The defendant may allege that the words convey a different set of meanings, which again may or may not be accepted by the jury. This means that the defendant may establish defences based on an *entirely different set of meanings* to that pleaded by the plaintiff.¹⁰⁹

This passage may be misleading in suggesting common law plaintiffs *may* plead imputations, when in almost every case they *must* plead them. And this has been the situation for as long as the *Defamation Act 1974* (NSW) has existed.¹¹⁰ It also appears misleading in suggesting common law defendants can pursue ‘an entirely different set of meanings’, when only meanings capable of arising from a publication (and meanings that are not separate and distinct from the plaintiff’s meanings) can be argued for under Lucas-Box or Polly Peck pleas.¹¹¹

The Commission further described the common law:

A defendant is able to lead evidence that a less serious meaning to that pleaded by the plaintiff was conveyed, and ... was true. This allows defendants to use the unfair tactic of leading evidence that they ‘almost got it right’, which may influence the jury to reduce the damages.

Additionally, the common law approach leads to the waste of much expensive court time. At the conclusion of evidence, a bargaining process often takes place between opposing counsel and the judge to decide which meanings can be left to the jury.¹¹²

The defence response described in the first paragraph is not necessarily unfair.

107 Justice David A Hunt, ‘Defamation – Pre-trial Practice’ in J C Gibson (ed), *Aspects of the Law of Defamation in New South Wales* (1991) 1, 11–12.

108 See, eg, *Marsden v Amalgamated Television Services* [2001] NSWSC 510 (Unreported, Levine J, 27 June 2001) [5030]; and above n 60.

109 NSW Law Reform Commission (1993), above n 106, [4.37]–[4.38] (emphasis added).

110 See, eg, *Kerney v Optimus Holdings* [1976] VR 399.

111 See above nn 21–24 and accompanying text.

112 NSW Law Reform Commission (1993), above n 106, [4.40]–[4.41] (footnote omitted). On the deficiencies of the common law, the NSW Law Reform Commission cites Patrick T George, ‘Congruency: Unravelling the Defamation Action’ (1990) 6 *Australian Bar Review* 124, [4.40]. George explains that, at common law, evidence of an unsuccessful Lucas-Box or Polly Peck plea can be used to mitigate damages. He suggests that this allows defendants to argue that they almost got matters right, and continues: ‘This unfair tactic was identified in New South Wales prior to the passing of the *Defamation Act 1974*’ and cites *NRMA Insurance v Amalgamated Television Services* (1989) A Def R 50-055. Although that case may support his general criticisms of the common law, it does not say that the NSW Law Reform Commission identified such an ‘unfair tactic’ before the *Defamation Act 1974* (NSW) was enacted.

It is a complex question, considered at length elsewhere.¹¹³ In any event, the above conclusion of the Commission is less plausible if the operation of the common law is understood. Without an ability to respond with alternate meanings, defendants and free speech more generally appear to be severely hampered. And, contrary to the Commission's suggestion, common law litigation appears to be less consuming of court time.

The Commission's 1995 Report contains a similar analysis of the common law:¹¹⁴

The inefficiencies of the common law system include ... letting the defendant establish defences which are only relevant to the imputations for which it contends and which are never going to be accepted. ... [T]he Commission also regards as unacceptable the fact that the defendant is able to put before the jury material which is *wholly irrelevant* to the plaintiff's complaint.¹¹⁵

The Commission then cited *Polly Peck* as 'an eloquent indictment of the common law system'.¹¹⁶ In giving a further reference to *Woodger v Federal Capital Press of Australia*,¹¹⁷ the Commission is clearly referring to both types of defence plea, which can be more properly called Lucas-Box and Polly Peck pleas.¹¹⁸ But other empirical research shows that English lawyers would be very surprised to hear that the common law allows defendants 'to put before the jury material which is *wholly irrelevant* to the plaintiff's complaint'.¹¹⁹ That is not the intention, nor the apparent effect, of common law defence pleading. Lucas-Box pleading is very strongly endorsed by English lawyers, whether they act primarily for claimants or defendants. The lawyers can hardly imagine running litigation *without* the availability of Lucas-Box pleading. As noted above¹²⁰ this style of defence pleading is only possible under a publication-based cause of action. While it may appear plausible that greater uncertainty about a publication's meaning exists under the common law approach and that this increases the cost of litigation, the research counters that position. NSW defamation actions appear to occupy more court time pre-trial than in Victoria, without being disposed of any more quickly at trial – and much of the NSW court time is concerned with issues of meaning.

The Commission concluded its consideration of the basis of the cause of action in these terms:

113 See Kenyon, *Meaning in Defamation Law and Practice*, above n *.

114 See, eg, NSW Law Reform Commission (1995), above n 9, [4.2]–[4.3].

115 *Ibid* [4.4] (emphasis added).

116 *Ibid* and its n 6; *Polly Peck* [1986] QB 1000.

117 *Ibid*; (1992) 107 ACTR 1, 23–24 (Miles CJ) which describes defence pleas as two forms of Polly Peck pleading.

118 See above nn 21–24 and accompanying text.

119 See Kenyon, *Meaning in Defamation Law and Practice*, above n *.

120 See above nn 21–24 and accompanying text.

Although one submission ... expressed concern about a trend towards 'increased technicality concerning imputations', there was general support for retaining imputations as the basis of the cause of action. The ... savings in costs and delay achieved by the precision ... far outweigh any appearance of technicality ... The procedure also has the practical effect that, once the plaintiff's imputation has been accepted, there is usually no real defence to it (the plaintiff having selected the imputation for that purpose).¹²¹

Two further points can be made about these conclusions. First, the support for s 9 noted by the Commission may have been weaker than at the time of the interviews drawn on in this article. At the least, concerns with technicality were evident in some interviews, as they had been in the 'one submission' to the Commission acknowledged above.¹²² Second, the Commission itself suggests a potential unfairness to defendants under the NSW approach: plaintiffs will select imputations to plead that offer 'no real defence', yet cannot be ruled out as incapable of arising by a judge pre-trial. This only increases the pressure for defamation disputes to become focused on interlocutory pleading battles, which is difficult to see as beneficial to the interests of plaintiffs, defendants or the recipients of publications.

Reviewing the origins of s 9, and the justifications offered for it, suggests the Commission's preference for an imputation-based cause of action deserves re-examination. Comments by the Commission in the 1990s should not be thought to forestall such a change, whether for NSW, the Code states, or uniform Australian law. Comparative empirical research calls into question the Commission's position. The statutory cause of action may not just be 'redundant', as the article's opening quotation suggests, it appears to be one element significantly complicating NSW defamation litigation, an element which should not be followed in any Australian defamation law.

VI CONCLUSION

The above analysis suggests that an important element in the complexity of NSW practice is the imputation-based statutory cause of action and the concern with specificity that has developed under it. NSW judges, however, do appear to be modifying *some* of the strictness of the law on specificity. A notable example from the Court of Appeal is the decision in *Greek Herald v Nikolopoulos*.¹²³ In a split decision about the degree of specificity required in the case, Mason P, with Wood CJ at CL agreeing, stated:

121 NSW Law Reform Commission (1995), above n 9, [4.5]–[4.6] (footnotes omitted).

122 It was the Young Lawyer's submission, and Judith Gibson is listed as its author: *ibid* Appendix 2. She was appointed a District Court judge from 21 May 2001 and supervises defamation litigation in that court.

123 (2002) 54 NSWLR 165.

The pleader's task is to capture the essence of the specific matters imputed in relation to the plaintiff. Necessarily there will be questions of degree and 'if a problem arises, the solution will usually be found in considerations of practical justice rather than philology' (per Gleeson CJ in *Drummoyne*...). In this as in other areas, pleadings serve the ends of justice: they must not be permitted to assume an independent self-referential function.¹²⁴

This differed greatly to the approach of Young CJ in Eq, who took a more typical NSW approach. He said the State's imputation-based cause of action required imputations to be pleaded with precision and, unlike the common law, an imputation's defamatory quality had to be assessed on its own terms, divorced from the context of the publication in question.¹²⁵ But the majority decision shows at least some of the apparent weaknesses of s 9 can be reduced without legislative reform. This suggests that a change of emphasis can occur in NSW litigation – a change which this research suggests is highly desirable.

While empirical research suggests NSW courts may have paid too much attention to pleaded imputations separated from their publications, judgments following *Greek Herald v Nikolopoulos* appear to be taking a broader approach.¹²⁶ In particular, where publications use words that may be ambiguous, it appears that challenges to imputations will be more difficult. Pleadings probably will be held to have been as specific as warranted in the circumstances of the publication in question.¹²⁷ There is an apparent desire to connect imputations more closely with publications, and partially answer criticisms of NSW's technicality.¹²⁸ The *Drummoyne* imputation about corruption, for example, could well be read in the context of the publication in question, and not require repleading.¹²⁹

Overall, however, the battleground under the *Defamation Act 1974* (NSW) appears to be quite different from the position at common law. It appears to have moved from a focus on the full trial at common law to being centred on pre-trial hearings and the s 7A process in NSW, and also to have moved from the publication and its meaning at common law to the pleaded imputations, which remain at least somewhat divorced from the publication, in NSW. Recent NSW attempts to partially address these problems through case law should be supported. Instead of an imputation-centred approach and extensive pre-trial manoeuvring, it may be preferable to reach trial as quickly as possible. Fieldwork

124 Ibid [18]; see also above n 66 and accompanying text.

125 Ibid [44]–[46], [52].

126 For applications of the approach of Mason P, see, eg, *Justelius v Michael Southern and Associates* [2002] NSWSC 348 (Unreported, Levine J, 26 April 2002) 21, 42, 48; *Hall v Gould* [2002] NSWSC 359 (Unreported, Levine J, 1 May 2002) 3, 8–9.

127 See, eg, *Strasberg v Westfield Ltd* [2002] NSWSC 340 (Unreported, Levine J, 26 April 2002) 20, in relation to the words 'provocative manner'; *Haklane v John Fairfax Publications* [2002] NSWSC 341 (Unreported, Levine J, 26 April 2002) 17, in relation to the plaintiff being 'connected to the underworld'.

128 There has also been a different Practice Note introduced for defamation, while amendments to the Supreme Court Rules have formalised attempts to lessen the number of interlocutory hearings in defamation. See generally Justice David Levine, 'Defamation Practice: Change and Reform: Plus a Change...?', (Speech delivered at the University of New South Wales Law School Continuing Legal Education Conference, Sydney, 16 March 2001) <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index> at 5 June 2004.

129 See above Part IIIB.

suggests that trial or settlement may be reached more quickly at common law, and with fewer interlocutory hearings, than in NSW. And the fieldwork's limited information about common law trials does not suggest they suffer from particular difficulties of length or complexity compared to NSW. These lessons are significant for all Australian jurisdictions that do not base defamation actions on the publication. They are especially important for NSW. The findings are also significant if present efforts for uniform law succeed and Australian defamation law finally loses its 'outstanding characteristic' of lacking uniformity.¹³⁰ Any uniform law should not be based on the pleaded imputations: the cause of action in defamation should lie in the publication.

130 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* (1998) 244, 244.