

## I. Introduction

The balance between the right to free speech and the protection of a person's reputation are the fundamental underpinnings on which defamation law is based. The root of this balance ostensibly stems from one person's right to protect their reputation in light of another person's right to publish comment on it. The judicial system has long upheld<sup>1</sup> the notion that if a person deliberately or maliciously publishes material which adversely and unfairly affects another's reputation – a cause of action will exist to the person aggrieved. Such a notion has historically only existed at common law and has been fraught with complexities associated with the interpretation of defences to any defamatory cause of action. The recent the introduction of the *Defamation Act 2005*<sup>2</sup> has attempted to uniform defamation litigation across all Australian jurisdictions and endeavoured to ensure that defamation cases are trialled with greater consistency. Unfortunately, such an enactment has still left countless unresolved questions with respect to the manner in which litigating parties interpret defamatory meanings and how such meanings are pleaded.

Accordingly, the central focus of this paper relates to the *Polly Peck* defence – a defence to a defamatory cause of action which allows a defendant to plead a meaning different from that contended by the plaintiff which the defendant is then able to justify.<sup>3</sup> The *Polly Peck* defence is an abbreviated term introduced into the Australian judicial literature from the United Kingdom case of *Polly Peck (Holdings) plc v Trelford*.<sup>4</sup> The defence provides the proposition that 'the plea of justification must be not only as broad as the literal language of the libel, but as broad as the inferences of fact necessarily flowing from the literal language.'<sup>5</sup> As suggested by O'Connor LJ in *Polly Peck (Holdings) plc v Trelford*<sup>6</sup>

[s]everal defamatory allegations in their context may have a common sting, in which they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting found in the publication'.<sup>7</sup>

The very proposition of allowing a defendant to plead a meaning different from that which the plaintiff contends has contributed to the significant judicial criticism of the defence in Australia – most notably from the High Court in *Chakravarti v Advertiser Newspapers Ltd*<sup>8</sup> where both Brennan CJ and McHugh J were overtly critical of the defence such that they stated 'the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass fair trial actions.'<sup>9</sup>

Consequently, this paper will explore the judicial commentary on the rationale of the *Polly Peck* defence and the degree to which the defence is still relevant under Australian defamation law. It will seek to determine the primary criticisms of the defence in light of the High Court's decision in *Chakravarti v Advertiser Newspapers Ltd*<sup>10</sup> and review how the principle has been applied since this judgement was handed down. It will also endeavour to explore the balance between the purported first and second limbs of the defence and consider

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<sup>1</sup> *Smale v Hammon* (1610) 1 Bulst 40; 80 ER 743.

<sup>2</sup> *Defamation Act 2005 (Vic)* enacted on 1<sup>st</sup> January 2006. Incorporated into each Australian State respectively.

<sup>3</sup> *Control Risks Ltd v New Library Ltd* [1990] 1 WLR 183.

<sup>4</sup> *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000 ('*Polly Peck*').

<sup>5</sup> *Ibid* at 1032 – 33.

<sup>6</sup> *Ibid* 4.

<sup>7</sup> *Ibid* 5.

<sup>8</sup> *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 ('*Chakravarti*').

<sup>9</sup> *Ibid* at 527.

<sup>10</sup> *Ibid* 8.

policy based reasoning with respect to the judicial process. A discussion of the merit of these considerations will then conclude the paper and a determination will be made whether the *Polly Peck* defence is still relevant in modern defamation law.

## II. The two-limbs of *Polly Peck*

Central to the foundation of common law pleadings is the principle that a plaintiff is bound by the particulars which they provide in their cause of action.<sup>11</sup> Plaintiffs cannot depart from such pleadings unless the case is conducted on a different basis or leave is sought to amend the pleadings.<sup>12</sup> In defamation actions, a plaintiff is bound by the meanings in which they plead or which do not substantially differ from those which are pleaded. If leave is sought from the Court to modify those pleadings in the course of a trial, the Court can permit such a request and then consider questions of prejudice to the publisher.<sup>13</sup> In *Herald & Weekly Times Ltd v Popovic*<sup>14</sup> Gillard AJA explained the view that ‘it is still a matter for the jury as to the meanings of the words and the defamatory imputations’.<sup>15</sup> Such a statement implies that any defamatory imputation relied on by the plaintiff can be reinterpreted by the jury – suggesting that neither the Court nor the jury are bound by the meaning pleaded by the plaintiff. His Honour subsequently stated

‘It follows, in my opinion, it is just and fair that the defendant should be in a position to be able to plead his version of the defamatory imputations and plead justification in those meanings.’<sup>16</sup>

His Honour then provided that in the interests of fairness it is ‘not open to a defendant to plead an entirely separate and distinct allegation which is in no way relied upon by the plaintiff’.<sup>17</sup> Such an assertion by His Honour primarily addresses only one limb of the *Polly Peck* defence – that is, where a defendant argues a different imputation to that pleaded by the plaintiff and then attempts to justify that different imputation as the primary basis for a justification defence. This so called<sup>18</sup> first limb of the *Polly Peck* defence is derived from *Lucas-Box v News Group Newspapers*<sup>19</sup> case and is significantly different – although still expressed under the same judicial terminology – to the interpretation of the *Polly Peck* defence raised in the *Chakravarti v Advertiser NewsPapers Ltd*.<sup>20</sup>

In *Chakravarti*, Brennan CJ and McHugh J outlined the apparent second limb<sup>21</sup> of the *Polly Peck* defence and expressed deep criticism<sup>22</sup> for in allowing it to be used in the Australian judicial system. Importantly, the joint Justice’s decision does not specify the differences between the differing limbs of a *Polly Peck* defence but rather focuses its attention on the

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<sup>11</sup> *Chakravarti v Advertiser NewsPapers Ltd* (1998) 193 CLR 519 at 527.

<sup>12</sup> *The Water Board v Moustakas* (1980) 180 CLR 491.

<sup>13</sup> *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [308] (*‘Popovic’*)– ‘if the plaintiff seeks a substantial change to the pleaded meanings in the course of the trial, amendment may be necessary and it may be refused if causing prejudice to the publisher.’

<sup>14</sup> *Ibid* 13 at [308] – [309].

<sup>15</sup> *Ibid* 13 at [308] citing *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147 at 152; *Ibid* 11 at 534 and 546.

<sup>16</sup> *Ibid* 13 at [309].

<sup>17</sup> *Ibid* 13 at [309].

<sup>18</sup> Patrick Milmo Q.C. & W V H Rogers, *Gatley on Libel and Slander*, 10<sup>th</sup> Edition, Sweet & Maxwell, London, 2004 at 11.14; *John Fairfax Publications v Jones* [2004] NSWCA 205 at [80].

<sup>19</sup> *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147.

<sup>20</sup> *Ibid* 11 at 519.

<sup>21</sup> *John Fairfax Publications v Jones* [2004] NSWCA 205 at [80].

<sup>22</sup> *Ibid* 11 at 527.

purported second limb of the defence – that is, allowing a defendant to allege that a publication conveys several imputations which carry a common sting and then justify that common sting as a permissible defence.<sup>23</sup> The joint Justices specifically illustrated this second limb of *Polly Peck* in their judgement providing that under the defence a defendant is permitted to

‘take a part of an article that wrongly alleges that the plaintiff has convictions for dishonesty and a part that imputes that the plaintiff has defrauded shareholders, assert that the article means that the plaintiff is dishonest, and then justify that meaning, perhaps by proving that the plaintiff had in fact defrauded the shareholders.’<sup>24</sup>

Their primary criticism of this second limb – or so called *Polly Peck common sting* defence<sup>25</sup> – is the notion that ‘no injustice is done by holding a defendant to the fundamental principles of pleading by requiring a defence to respond to the statement of claim’.<sup>26</sup> The rationale for such an assertion is the belief that in allowing a defendant to depart from a well accepted rule of common law, it requires the Court to interpret a satisfactory level of abstraction of the common sting by considering the validity of the defendant’s contradictory imputations and whether a sufficient nexus exists between them. In their Honours view, this could lead to ‘[o]utrageous findings that are purportedly true in substance and fact when they are plainly not’.<sup>27</sup> It is contended that such an assertion is not baseless – if the level of abstraction considered in the common sting is high, then the defendant would be entitled to rely on this higher abstraction commonality to justify less – although still potentially serious – imputations. Their Honours suggested that determining the appropriate level of abstraction would be extremely onerous as ‘the most damaging meaning or meanings will always be a matter in dispute.’<sup>28</sup>

While it is clear that both Brennan CJ and McHugh J rejected the notion of the *Polly Peck common sting* defence, it is seemingly apparent that their outright rejection of the defence is overarching. It is contended that the *Polly Peck common sting* is acceptable if framed appropriately within the common law jurisprudence. Instead of an outright rejection of the defence – a definitive test is required for determining the appropriate level of abstraction permissible to the pleaded imputations. In the absence of such a test, this determination will always be a polarised argument – as Brennan CJ and McHugh commented<sup>29</sup> – with the defendant attempting to achieve the highest level of abstraction while the plaintiff contends for the lowest. The degree to which a plaintiff can diverge from a pleaded meaning was addressed by all five judges in *Chakravarti v Advertiser Newspapers Ltd*<sup>30</sup> with differing views being afforded. Both Brennan CJ and McHugh J adopted a narrowly constructed view such that when ‘the plaintiff seeks to rely on a different nuance of meaning, or oftentimes, merely a less serious defamation – the different defamatory meaning may be found by the jury’.<sup>31</sup> Both Gaudron and Gummow JJ adopted an entirely broader view in suggesting that there was no disadvantage in allowing a plaintiff to rely on meanings ‘which are comprehended in, or are less injurious than the meaning pleaded in the Statement of Claim.’<sup>32</sup>

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<sup>23</sup> *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 530.

<sup>24</sup> *Ibid* 23 at 530.

<sup>25</sup> *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000 at 1032 – 33.

<sup>26</sup> *Ibid* 23 at 532.

<sup>27</sup> *Ibid* 23 at 530.

<sup>28</sup> *Ibid* 23 at 535.

<sup>29</sup> *Ibid* 23 at 535.

<sup>30</sup> *Ibid* 23 at 519.

<sup>31</sup> *Ibid* 23 at 534.

<sup>32</sup> *Ibid* 23 at 546.

Their Honours additionally commented that there was also no ‘disadvantage in committing reliance on a meaning which was simply a variant of the meaning pleaded.’<sup>33</sup> Kirby J suggested that ‘no complaint can arise where an additional imputation is found to represent nothing more than nuances or shades of meanings of those pleaded.’<sup>34</sup> Consequently, while it is apparent that each judgement is markedly different in overall context, each of the decisions support the notion that a judge and jury should be only permitted to depart from a plaintiffs pleaded imputations when an alternative meaning is a nuance or variant and is no more serious than that proposed by the plaintiff.<sup>35</sup>

This was the view adopted by Ormiston JA in the subsequent case of *David Syme & Co Ltd v Hore-Lacy*<sup>36</sup> where His Honour questioned the degree to which a judge or jury should be permitted to ‘go beyond the meanings relied upon during the trial’.<sup>37</sup> His Honour stated that

‘the jury may properly be instructed that they can go beyond the meanings alleged, but only so long as the meaning they fix upon is comprehended by or is simply a variant of one of the meanings pleaded or otherwise relied upon.’<sup>38</sup>

Ormiston JA agreed with the primary decision of Charles JA who commented in light of the *Chakravarti* decision that a plaintiff could succeed on meanings other than those pleaded provided they were not ‘substantially different from and no more injurious than the meanings pleaded’.<sup>39</sup> His Honour provides that the meaning of ‘substantially different’ raised by Gaudron and Gummow JJ could be tested by questioning whether the defendant would have been entitled to ‘plead a different issue, adduce different evidence or conduct the case on a different basis or whether the justification would be substantially different’.<sup>40</sup> In this regard, His Honour concludes that neither a plaintiff nor a defendant should be permitted to raise a meaning substantially different than that alleged by the plaintiff.<sup>41</sup> It is apparent that this test places an arbitrary ceiling limit on the level of abstraction that can be ascertained from the plaintiff’s pleadings and ensures that only a less injurious meaning can be derived by either party. This seemingly strikes an appropriate balance between the restrictive approach adopted by Brennan CJ and McHugh J in *Chakravarti* while at the same time ensuring that neither litigating party is subjected to prejudice through the introduction of unspecified meanings.

In *Li v The Herald & Weekly Times Pty Ltd*<sup>42</sup> Gillard J upheld his original judgement from *Herald & Weekly Times Ltd v Popovic*<sup>43</sup> commenting<sup>44</sup> that the *Polly Peck* defence is only appropriate where the plaintiff does not plead the proper imputations arising from the words complained of, and where the defamatory imputations form the basis of the plaintiff pleadings – the first limb of *Polly Peck*. His Honour then provided that where there is a common sting which is not ‘separate and distinct’ from the manner in which the plaintiff has pleaded his case, then the defendant is allowed to rely on this common sting as a justifiable

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<sup>33</sup> *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 546.

<sup>34</sup> *Ibid* at 580-81.

<sup>35</sup> *David Syme & Co v Hore-Lacy* [2000] VSCA 24 at [21]; [52].

<sup>36</sup> *Ibid* at [24].

<sup>37</sup> *Ibid* at [13].

<sup>38</sup> *Ibid* at [17].

<sup>39</sup> *Ibid* at [52].

<sup>40</sup> *Ibid* at [52].

<sup>41</sup> *Ibid* at [63].

<sup>42</sup> *Li & Anor v The Herald & weekly Times Pty Ltd & Anor* [2007] VSC 109.

<sup>43</sup> *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161.

<sup>44</sup> *Ibid* 42 at [91].

defence – the second limb of *Polly Peck*.<sup>45</sup> This seemingly reflects the current common law position in Victoria evinced from *David Syme & Co Ltd v Hore-Lacy*<sup>46</sup> as the most recent decision applying the *Polly Peck* principle. While most other Jurisdictions have accepted the *Polly Peck* defence as valid law<sup>47</sup> – New South Wales has not adopted the same approach and have expressly prohibited the principle. This was confirmed in the most recently of *Mahommed v Channel Seven Sydney Pty Ltd*<sup>48</sup> which upheld the decision from *Fairfax Publications v Zunter*<sup>49</sup> where the NSW Court of Appeal refuted that the *Polly Peck* defence was permissible at common law in Australia.

In *Zunter*,<sup>50</sup> both the NSW Supreme Court and Court of Appeal refused to accept the *Polly Peck* defence pleading which attempted to contend that two permissible imputations alleged by the plaintiff had a common sting meaning.<sup>51</sup> The defendant did not frame this specifically as a *Polly Peck* defence but rather as a ‘single additional imputation’<sup>52</sup> which Simpson J rejected without any significant judicial analysis – rather simply stating that the defendant could only succeed if ‘I declined to follow (as I decline to do) the decisions of appellate courts in other States of Australia.’<sup>53</sup> It is poignant to note that Simpson J did not consider, in any manner, the differences between the first and second limbs of a *Polly Peck* defence and nor did Her Honour provide any commentary on ‘decisions of appellate courts in other States of Australia.’<sup>54</sup> Similarly, Handley JA of the NSW Court of Appeal provided little commentary on the basis for rejecting the *Polly Peck* defence only stating that

‘[i]t was rejected in *Chakravarti* ... by Brennan CJ and McHugh J, in dicta ... which has been followed by intermediate appellate courts in Victoria, Queensland, Western Australia and South Australia ... and it would be inappropriate for us to re-examine the question.’<sup>55</sup>

Importantly, many of the decisions listed most notably in Victoria – but also in South Australia and Western Australia<sup>56</sup> – do support a limited form of the *Polly Peck* first and second limb approaches. The most notable of these decisions being *David Syme & Co Ltd v Hore-Lacy*<sup>57</sup> which seemingly allows a defendant to defend a meaning which is not substantially different or more injurious than that of the plaintiff’s imputation.<sup>58</sup>

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<sup>45</sup> *Li & Anor v The Herald & weekly Times Pty Ltd & Anor* [2007] VSC 109 at [91].

<sup>46</sup> *David Syme & Co v Hore-Lacy* [2000] VSCA 24.

<sup>47</sup> For example, South Australia in *Advertiser-News Weekend Publishing Co Ltd v Manock* [2005] SASC 82 and Western Australia in *Nationwide News Pty v Moodie* (2003) 28 WAR 314.

<sup>48</sup> *Mahommed v Channel Seven Sydney Pty Ltd* [2009] NSWSC 631 at [239].

<sup>49</sup> *Fairfax Publications v Zunter* [2006] NSWCA 227 (*‘Zunter’*).

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* at [42].

<sup>52</sup> *Fairfax Publications v Zunter* [2005] NSWSC 759 at [61].

<sup>53</sup> *Ibid* at [62].

<sup>54</sup> *Ibid* at [62].

<sup>55</sup> *Ibid* 49 at [42].

<sup>56</sup> For example, South Australia in *Advertiser-News Weekend Publishing Co Ltd v Manock* [2005] SASC 82 and Western Australia in *Nationwide News Pty v Moodie* (2003) 28 WAR 314.

<sup>57</sup> *Ibid* 46.

<sup>58</sup> Dr Des Butler, *Is Polly Peck at risk of losing its sting?*, *Media & Arts Law Review*, 2000, Vol 5, Pg. 259 at 265.

### III. A Modern Approach

In light of Part II of this paper, it is contended that the most appropriate balance struck in respect of the first and second limbs of the *Polly Peck* defence is outlined in the decision of Charles JA in *David Syme & Co Ltd v Hore-Lacy*<sup>59</sup> where His Honour provides an arbitrary ceiling limit on the degree to which defamatory imputations can differ from those initially pleaded. This ostensibly addresses the primary concerns outlined in Brennan CJ's and McHugh J's decision in *Chakravarti* where their Honours expressed 'outrage' that a defendant could be permitted to link differing imputations together to present a common sting potentially more injurious than that pleaded by the plaintiff.<sup>60</sup> It is evident that the underlying theme evinced in their Honours' decision is one which attempts to preserve judicial objectiveness and fairness such that each party is fully equipped to deal with the imputations pleaded and neither party is armed to abstractly vary from them. Such a notion strikes at the heart of the legitimacy of the pleading and it is argued that such a concern is quickly dismissed if the ceiling principle conveyed by Charles JA in *Hore-Lacy*<sup>61</sup> is adopted.

A large body of the High Court's judgements in *Chakravarti* related to policy considerations – reflected largely in the decisions of Gaudron and Gummow JJ<sup>62</sup> and Kirby J<sup>63</sup> – in the concern that the defence could operate oppressively. It was Brennan CJ and McHugh's view that in allowing a defendant to raise imputations different to that pleaded by the plaintiff, it would raise false issues which would 'embarrass the fair trial action.'<sup>64</sup> Gaudron and Gummow JJ also highlighted concern in this regard suggesting that a plethora of pressures already existed on court time and litigation and if the parties were not held largely to their pleadings then it would lead to 'delay or disadvantage to the other side.'<sup>65</sup> Importantly, Gaudron and Gummow JJ do not discount the *Polly Peck* defence entirely on this basis stating that it would be highly unlikely that litigating parties would not be able to 'hit upon, at least approximately, all the reasonably open meanings.'<sup>66</sup> Their Honours referred<sup>67</sup> to the case of *Woodger v Federal Capital Press of Australia Pty Ltd*<sup>68</sup> where Miles CJ stated that the defence is

'open to abuse because they are capable of converting a modest and narrow claim by a plaintiff into a wide-ranging expansive and expensive inquiry, the limits of which are set by the defendant's capacity to pay for it.'<sup>69</sup>

In this regard, it is arguable that without the adoption of a restriction such as that imposed in *Hore-Lacy*<sup>70</sup> a defendant would be able to expand the defamatory meaning which a plaintiff has not pleaded in order to further harm the plaintiff's reputation. This would undoubtedly lead to extended trial lengths which would definitively increase the litigation cost and, at least in the defendant's mind, seek to confuse the jury as to the validity of the imputation

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<sup>59</sup> *David Syme & Co v Hore-Lacy* [2000] VSCA 24.

<sup>60</sup> *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 530.

<sup>61</sup> *Ibid* 59.

<sup>62</sup> *Ibid* 60 at 579.

<sup>63</sup> *Ibid* 60 at 658.

<sup>64</sup> *Ibid* 60 at 527.

<sup>65</sup> *Ibid* 60 at 577.

<sup>66</sup> *Ibid* 60 at 577.

<sup>67</sup> *Ibid* 60 at 571.

<sup>68</sup> *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1; referenced from Patrick George, *Defamation Law in Australia*, LexisNexis Butterworths, Australia, 2006 at pg 252.

<sup>69</sup> *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1 at 21.

<sup>70</sup> *Ibid* 59.

alleged. The consequential effect would be an adverse course of justice in respect to plaintiffs who have real and meritorious claims.

However, the majority of these concerns are largely dispelled if a defendant is prohibited from pleading alternative imputations which the plaintiff would otherwise be able to succeed upon themselves at trial. There is no reasonable basis for a defendant to justify the truth of imputation which the plaintiff has not sued upon and for which a judgement cannot be given to the plaintiff. It is antithetical to suggest that any legitimacy would exist in a defendant complaining of such a restriction because it would be clearly apparent to the Court that the defendant is attempting to raise 'false issues'<sup>71</sup> in order to extend and increase the economic trial cost to the plaintiff.<sup>72</sup> This is perhaps why the author agrees with the principles outlined in *Hore-Lacy* and *Popovic* such that a plaintiff must make its case clearly to the defendant so they are able to consider the imputations claimed and have an opportunity to plead opposing meanings. The notion of fairness raised with a high degree of conviction by Brennan CJ and McHugh J in the High Court decision of *Chakravarti* seems indifferent to the notion that a defendant could be equally prejudiced if they were not entitled to contend that the words complained of by the plaintiff convey an entirely different meaning. The apparent logical solution is to restrict the degree to which a defendant can plead a meaning so abstractly different from those pleaded by the plaintiff that its sole function is to operate with an undercoating of tactical malice.

Accordingly and as highlighted in *Herald & Weekly Times v Popovic*<sup>73</sup> by Gillard AJA in upholding the decision from *Hore-Lacy*, a defendant should not be restricted from capitalising on a plaintiff's poorly structured pleading. Most critically in the modern usage of the *Polly Peck* limbs are Gillard AJA comments that

'a plaintiff's legal practitioner may through ignorance, a misunderstanding of the language, carelessness, or seeking to confine the plaintiff's case within narrow limits or for some other reason, plead false 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'<sup>74</sup>

Such comments by Gillard AJA truly reflect the manner in which defamatory pleadings should be conveyed – assuming that the imputations pleaded by the defendant meet the abstract ceiling test proposed in *Hore-Lacy* and that the imputations are no more injurious or substantial than what the plaintiff has pleaded. When framed in this light, it is difficult to imagine – give the rarity of the *Polly Peck* defence being successfully applied in modern defamation law cases – that the defence should be removed from modern defamation law. The rejection of the defence in *Zunter*<sup>75</sup> seems to primarily stem from a lack of judicial consideration of the defence and a clear understanding of the two differing *Polly Peck* limbs. It is asserted that with greater judicial consideration of the defence in NSW in future cases, the defence should be introduced as a viable one for defendants.

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<sup>71</sup> *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 527

<sup>72</sup> Anthony J H Morris, *Polly Peck Defence: Its Future in Australia*, Australian Law Journal, 2000, Vol 74 at Pg. 769.

<sup>73</sup> *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161 at [303]

<sup>74</sup> *Ibid* at [303]

<sup>75</sup> *Fairfax Publications v Zunter* [2006] NSWCA 227

#### IV. Conclusion

It is evident that the central theme of concern evinced in the majority of cases considered in this paper is one which primarily relates to ensuring that both parties have equal and fair access to the imputations conveyed in each party's respective pleadings. However, as highlighted by the extended commentary of Gillard AJA in *Herald & Weekly Times v Popovic*<sup>76</sup> detailed in Part III of this paper, it is illogical to suggest that a plaintiff's poorly structured pleadings should consequently restrict the ability for a defendant to correctly convey the true defamatory imputation of a publication alleged to damage the plaintiff's reputation. The correct approach in modern defamation actions should be a blending of the ceiling imputation limit evinced in *Hore-Lacy* and a refocus on actual publication in question. The Court must be capable of deriving the defendant's pleaded imputation from the disputed publication and must ensure that this alternate imputation is not in any manner more injurious or substantially different from that which the plaintiff has pleaded. In this manner, it is argued that the onus rests fairly on the plaintiff – the party alleged to have suffered the reputational damage – to carefully structure their pleading to ensure that they do not waste judicial time in pleading imputations which are frivolous or ill conceived. The Court must then turn its mind to the question of whether the defendant has properly justified their respective alternative imputation such that a justifiable element of truth exists.

Furthermore, a realistic practical onus does exist on behalf of a plaintiff's counsel to turn their mind to the possibility of a defendant using a *Polly Peck* defence against their pleaded imputations. Arguably, correct and well structured imputations will remove the possibility of a defendant being able to rely on the defence in a judicial setting or will at least remove the degree to which varying imputations can be pleaded. In this regard, it is contended that the correct approach in Australia should be a blending of the decisions outlined in *Hore-Lacy* and *Popovic*. Perhaps more importantly, there is an obvious need for the judicature to correctly define the first and second limbs of *Polly Peck* instead of referring to the umbrella term which facilitates additional confusion in respect of the defence. The introduction of the *Defamation Act 2005*<sup>77</sup> should in no way adversely affect the operation of *Polly Peck* which it preserves through s24 of the Act. Rather, the more challenging future for the *Polly Peck* defence is an appropriate clarification of its use so that it is possible to achieve 'speedy and efficient and fair resolution of disputes'.<sup>78</sup>

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<sup>76</sup> *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161 at [303]

<sup>77</sup> *Defamation Act 2005 (Vic)* enacted on 1<sup>st</sup> January 2006. Incorporated into each Australian State respectively.

<sup>78</sup> Justice David Levine, *The Future of Defamation Law*,

[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_levine\\_310899](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_levine_310899), Viewed 20<sup>th</sup> October 2009 at 13



## **Bibliography**

### ***Text Books***

George, Patrick, *Defamation Law in Australia*, LexisNexis Butterworths, Australia, 2006

Milmo, Patrick Q.C. & W V H Rogers, *Gatley on Libel and Slander*, 10<sup>th</sup> Edition, Sweet & Maxwell, London, 2004

### ***Journals***

Butler, Dr Des, *Is Polly Peck at risk of losing its sting?*, *Media & Arts Law Review*, 2000, Vol 5, Pg. 259

Morris, Anthony J H, *Polly Peck Defence: Its Future in Australia*, *Australian Law Journal*, 2000, Vol 74

### ***Speeches***

Justice David Levine, *The Future of Defamation Law*,  
[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_levine\\_310899](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_levine_310899), Viewed 20<sup>th</sup> October 2009 at 13

### ***Statute***

*Defamation Act 2005 (Vic)*

### ***Cases***

*Advertiser-News Weekend Publishing Co Ltd v Manock* [2005] SASC 82

*Chakravarti v Advertiser NewsPapers Ltd* (1998) 193 CLR 519

*Control Risks Ltd v New Library Ltd*[1990] 1 WLR 183

*David Syme & Co v Hore-Lacy* [2000] VSCA 24

*Fairfax Publications v Zunter* [2005] NSWSC 759

*Fairfax Publications v Zunter* [2006] NSWCA 227

*Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1

*Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161

*John Fairfax Publications v Jones* [2004] NSWCA 205

*Li & Anor v The Herald & weekly Times Pty Ltd & Anor* [2007] VSC 109

*Lucas-Box v News Group Newspapers* [1986] 1 WLR 147

*Mahommed v Channel Seven Sydney Pty Ltd* [2009] NSWSC 631

*Nationawide News Pty v Moodie* (2003) 28 WAR 314.

*Polly Peck (Holdings) plc v Trelford* [1986] QB 1000

*Smale v Hammon* (1610) 1 Bulst 40; 80 ER 743

*The Water Board v Moustakas* (1980) 180 CLR 491

*Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1