

Is *Polly Peck* at risk of losing its sting?

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The *Polly Peck* defence to a defamatory publication allows a defendant to allege that the publication conveys several imputations which carry a common sting, and to seek to justify that common sting rather than a particular imputation being alleged by the plaintiff. However, this defence has attracted criticism on a number of grounds, including the claim that it may embarrass fair trial of the action.

This article examines these criticisms in light of recent support for the defence in the Victorian Supreme Court. The article then suggests a mechanism for determining the appropriate level of abstraction for application of the defence, which may serve as a means of addressing such criticisms. This mechanism enables the *Polly Peck* defence to serve as a vehicle for flexibility whilst keeping the potential for injustice to a minimum.

The *Polly Peck* defence

There was a time when it was not thought necessary for a plaintiff in a defamation action who was relying on a false or popular innuendo to plead the ordinary and natural meaning of the words complained of. However, in 1964 it was suggested by three members of the House of Lords in *Lewis v Daily Telegraph Ltd*² that it was at least permissible, and certainly desirable, where the words did not speak for themselves, for a plaintiff to set out in his or her pleadings ‘those indirect meanings which go beyond the literal meaning of the words for which the pleader claims to be inherent in them’.³ Since then, courts in both England⁴ and Australia⁵ have moved towards a position where plaintiff is obliged to give specific particulars of the meanings on which he or she is relying, as arising from the relevant part of the publication in issue, other than in cases where the words are capable of only one defamatory meaning.⁶

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2 [1964] AC 234.

3 Ibid, 280 (Lord Devlin); see also 265 (Lord Morris), 273 (Lord Hodson).

4 See, for example, *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 185; *Allsop v Church of England Newspapers Ltd* [1972] 2 QB 161; *DDSA Pharmaceuticals v Times Newspapers Ltd* [1973] QB 21.

5 See, for example, *Kerney v Optimus Holdings Pty Ltd* [1976] VR 399.

6 The position in Australia is complicated by different jurisdictions adopting different approaches to pleaded imputations. Under the *Defamation Act 1974* (NSW) s 9(2)-(4) each imputation conveyed is regarded as a separate cause of action. Consequently in New South Wales a plaintiff is bound by the imputations pleaded — judgment may not be obtained on the basis of a substantially different imputation without an amendment of the statement of claim.

Nevertheless, two important aspects of pleading practice were not addressed by these cases,⁷ namely:

- whether a defendant is similarly obliged to plead the meaning on which he or she relies for his or her plea of justification and fair comment, if that meaning differs from those relied on by the plaintiff; and
- whether if a publication contains two or more separate imputations and the plaintiff complains of one of them, the defendant may rely on the others and plead justification and fair comment.

The first of these issues was resolved by the English Court of Appeal in *Lucas-Box v News Group Newspapers Ltd*,⁸ the Court ruling that a defendant in defamation proceedings who wishes to rely on a plea of justification must make clear in the particulars of justification the case which he or she is seeking to set up and must therefore state clearly and explicitly the meaning which he or she wishes to justify if it differs from that pleaded by the plaintiff.

The second issue was considered in *Polly Peck (Holdings)plc v Trelford*,⁹ where the English Court of Appeal decided that a defendant was entitled to plead that in the context, the words 'complained of' were true in any meaning which was open to the jury to find that they bore, and that where a publication contained several defamatory imputations which in their context have a common sting and the plaintiff complains of one or more but not all of them, the defendant is entitled to justify the common sting.¹⁰

The 'Polly Peck defence', as the second principle has become known, represented a departure from previously settled law that it was not open for a defendant raising the defence of justification to plead that he or she had made some statement other than that complained of by the plaintiff and then seek to show the truth of that statement, nor was a defendant entitled to plead that the words bore some meaning other than the meaning alleged in the statement of claim and then seek to justify that meaning.¹¹ Nevertheless, the defence has been accepted by a number of Australian courts with little discussion.¹²

Criticisms of the defence

Despite this acceptance, the *Polly Peck* defence has not attracted universal support. In *Templeton v Jones*¹³ the plaintiff, a candidate in the 1984 New Zealand general election, brought proceedings alleging that he was defamed in a publication which described him as a man who despised 'bureaucrats, civil servants, politicians, women, Jews and professionals'. The plaintiff alleged that the allegation that he despised Jews was defamatory, ignoring the other allegations in the publication. The defendant sought to plead justification for all of the allegations.

In Victoria, South Australia, Western Australia and the Territories, by contrast, only one cause of action arises regardless of the number of imputations pleaded. Under this regime, a plaintiff may be able to depart from a pleaded imputation if the defendant will not be prejudiced, embarrassed or unfairly disadvantaged. The same approach has traditionally applied in Queensland and Tasmania, but recent dicta in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 may indicate a shift to the New South Wales position: see generally M Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 53-6.

7 *Cruise v Express Newspapers Pty Ltd* [1999] QB 931, 947-8.

8 [1986] 1 WLR 147.

9 [1986] 1 QB 1000.

10 *Ibid*, 1032. See also *Khashoggi v IPC Magazines Ltd* [1996] 1 WLR 1412.

11 *Howden v Truth & Sportsmen* (1937) 58 CLR 416, 425; *David Syme & Co v Hore-Lacy* [2000] VSCA 24 (Unreported, Ormiston, Charles and Callaway JJA, 9 March 2000) [43] (Charles JA).

12 See, for example, *Gumina v Williams (No 2)* [1990] 3 WAR 351 (FC); *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440; *Kennett v Farmer* [1998] VR 991; *Kelly v Special Broadcasting Service* [1990] VR 69; *Woodger v Federal Capital Press* (1992) 107 ACTR 1 (Miles CJ). The defence was raised before the Queensland Court of Appeal in *Grundmann v Georgeson* (1996) Aust Torts Reps 81-396 without a final view being expressed by the Court.

13 [1984] 1 NZLR 448.

Cooke J for the Court of Appeal said that:

In the present case ... the allegation that the plaintiff despises Jews is not reasonably capable of being treated as other than a distinct charge. It is obviously different, for instance, from the allegation that he despises women. It is true that many of the allegations [in the publication] are variations on or illustrations of a theme: namely that the plaintiff indulges in the politics of hatred. They are specific and severable allegations nonetheless.

It is important to note that the plaintiff is not suing on all the words set out in [the publication] ... In [the statement of claim] it is made clear that only the allegations about Jews is sued on. The defendant on the other hand ... wishes to prove that all the words set out in [the publication] are true. That is not permissible, because of the limited nature of the plaintiff's complaint.¹⁴

His Honour's statement highlights a difficulty inherent in the *Polly Peck* defence: that its efficacy depends on the level of abstraction with which the several imputations contained in a publication are regarded, with a view to identifying the relevant common sting. As his Honour pointed out, at one wide level of abstraction the words contained in the publication could be interpreted as but instances or emanations of a single proclivity. However, at a narrower level of abstraction each allegation was seen as distinct and separate from the others. This raises a question of how the appropriate level of abstraction is determined in a given case.¹⁵

Cooke J's comments were approved by Brennan CJ and McHugh J in the course of their criticism of *Polly Peck* in their joint judgment in *Chakravarti v Advertiser Newspapers Limited*.¹⁶ Their Honours observed:

This passage highlights what we regard as the fundamental defect in the reasoning in *Polly Peck*. Cooke J rejected the notion that the defendant can take severable parts of a publication each containing defamatory imputations, link them together, and give the publication a meaning at a sufficiently high level of abstraction to subsume the meanings of the severable parts. That is, the defendant cannot take a part of an article that wrongly alleges that the plaintiff has convictions for dishonesty and a part that imputes that the plaintiff has defrauded shareholders, assert that the article means that the plaintiff is dishonest, and then justify that meaning, perhaps by proving that the plaintiff had in fact defrauded the shareholders. On that hypothesis, it would be outrageous if the defendant could obtain a finding that the article is true in substance and, in fact when it plainly was not. Yet that is the sort of finding that must result from applying the central proposition of *Polly Peck*.¹⁷

Accordingly, their Honours were of the view that a central problem with the *Polly Peck* defence is that it prima facie applies regardless of how high a level of abstraction is necessary to discern a common sting among several imputations and that there is a stage at which the identified common sting cannot be accepted as legitimate because it leads to a result which is 'outrageous' in the circumstances. To perhaps flesh out their Honours' example a little further, suppose a publication alleged that the plaintiff lied to his wife, was convicted of shoplifting and defrauded his shareholders. If the appropriate level of abstraction is one that identifies the common sting as being that the plaintiff is dishonest, the defendant would be entitled to justify that common sting by showing that the plaintiff lied to his wife and was convicted of shoplifting, while being relieved of justifying the more serious allegation that he defrauded

¹⁴ Ibid, 452.

¹⁵ See also A Kenyon, 'Pleading Defamatory Meaning, Fair Report Defences and Damages' (1999) 7 *Torts Law Journal* 9, 21.

¹⁶ (1998) 193 CLR 519.

¹⁷ Ibid, 529.

his shareholders. If the *Polly Peck* defence is to be a valid and reliable proposition that does not depend on mere intuition, it requires a means for determining whether the level of abstraction utilised is legitimate. Certainly it would be expected that this would be an issue on which the parties would have diametrically opposed views, the defendant arguing for a higher level of abstraction than the plaintiff.

This was not the only ground on which Brennan CJ and McHugh J found fault in the defence. In their Honours' view the defence was apt to embarrass and lead to unfair trials:

Leaving aside technical pleas such as pleas in abatement, defences are either by way of denial or confession and avoidance. A defence which alleges a meaning different from that of the plaintiff is in the old pleading terminology an argumentative plea of Not Guilty. Under the principles of pleading at common law, it could tender no issue and would be struck out as embarrassing. Under the modern system, articulating an alternative meaning could conceivably make explicit the ground for denying a pleaded imputation. But it would be only in such a case that a defendant's plea of a new defamatory meaning might be supportable as a plea which prevents the plaintiff being taken by surprise. A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the action.¹⁸

Nevertheless, the other members of the court did not share these concerns.¹⁹

Some judges have expressed additional policy reasons for refusing to support the *Polly Peck* defence, including the following.

- Since the defence allows a defendant to prove the truth of an assertion not raised by the plaintiff, it may result in a longer trial with a consequent increase in cost. Miles CJ of the ACT Supreme Court once admitted in the course of accepting the defence that it is '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.'²⁰
- It effectively gives the defendant a opportunity to further damage the plaintiff's reputation by leading evidence concerning matters about which the plaintiff does not complain. This concern was summarily dismissed by Hedigan J in *Carrey v ACP Publishing Pty Ltd* as a 'vice' of the defence which 'courts and parties have to live with'.²¹
- There may be a question whether the common law should allow a form of contextual truth in jurisdictions where the relevant parliament has chosen not to legislate to achieve such a defence.²²

Despite the earlier approval of the *Polly Peck* defence by judges of the Australian Capital Territory,²³ opposition to the defence is now being expressed in that jurisdiction. In *Kelly v Nationwide News Pty Ltd*²⁴ Gallop ACJ considered the comments in *Chakravarti v Advertiser Newspapers* at some length. His Honour suggested that the comments of the judges had to be read in the context of the issues that arose in that case, which was whether a plaintiff was entitled to damages for imputations which he did not specifically plead. This therefore did not specifically raise the *Polly Peck* issue, but did address some common issues.

¹⁸ Ibid, 527-8.

¹⁹ See, for example, Gaudron and Gummow JJ, 543.

²⁰ *Woodger v Federal Capital Press* (1992) 107 ACTR 1, 21.

²¹ [1999] VR 875.

²² *Hart v Wrenn* (1995) 124 FLR 135, 152.

²³ See, for example, *Woodger v Federal Capital Press* (1992) 107 ACTR 1 (Miles CJ); *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 (Higgins J).

²⁴ (1998) 147 FLR 410 (ACT SC).

His Honour repeated the words of one of the authorities cited by Brennan CJ and McHugh J, namely *Hadzel v De Waldorf* where it was pointed out that:

A judge can find for the plaintiff on a nuance of meaning not put by him, but it would be a strange reversal of ordinary practice, and possibly very unfair to one or both parties, for the judge to find that the plaintiff was defamed in some way not averred by the plaintiff.²⁵

A compromise approach?

Without a mechanism for determining the appropriate level of abstraction and a means of avoiding embarrassment of a fair trial, the *Polly Peck* defence might rightly be criticised as 'controversial',²⁶ and as placing 'an unfair weapon in the hands of defendants in "common sting" cases'²⁷ which allows a defendant to 'side-step the real issue'.²⁸

There may, however, be a means by which it is possible to transcend the criticisms that have been levelled at the defence. According to the majority in the recent Victorian Court of Appeal case *David Syme & Co v Hore-Lacy*, whether, and the extent to which, a defendant may justify meanings different from those alleged by the plaintiff is 'necessarily bound up with the extent to which a plaintiff may be allowed to depart a trial from specific meanings pleaded in the Statement of Claim'.²⁹

The key lies in the special character of defamation actions and the notion that, in common law cases at least, the publication is the basis of the cause of action rather than the interpretation of the words alleged by the plaintiff.³⁰ This notion has an important ramification: that the judge and jury are entitled to depart from the interpretation proposed by the plaintiff and adopt an interpretation of the publication of their own. As the Victorian Full Court remarked in *National Mutual Life Association of Australia Ltd v GTV Corporation Pty Ltd*:

The judge [is] to decide what meanings [are] fairly open and [is] to lead to the jury all such meanings, and only such meanings of the words as [are] fairly open ... Neither the judge nor the jury [are] thereby confined to the meanings asserted by the parties.³¹

However, this statement does not address the degree of departure from a pleaded meaning which is permitted before the fairness of the trial is called into question. This question has attracted a variety of responses. For example, King CJ in *Pritchard v Kranz* said:

In many cases ... the more serious allegation can be regarded as including the less serious. In that sense, the Court is free to attribute to the words a less injurious meaning than that attributed to them in a pleading.³²

His Honour drew a contrast with a meaning which instead 'amounted to an imputation of a substantially different kind'. Similarly, in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*,³³ Stephen J said that the

25 (1970) 16 FLR 174, 182 (Fox J).

26 Kenyon, above n 15, 21.

27 *David Syme & Co v Hore-Lacy* [2000] VSCA 24 (Unreported, Ormiston, Charles and Callaway JJA, 9 March 2000) [73] (Callaway JA).

28 *Ibid*, [72].

29 *Ibid*, [46] (Charles JA).

30 *Ibid*, [1] (Ormiston JA).

31 [1989] VR 747, 768.

32 (1984) 37 SASR 379, 386.

33 (1975) 134 CLR 1, 14.

plaintiff was not free at trial to rely upon some ‘different meaning which he might seek to read into the words complained of ... at least not one more injurious’.

The ability of the judge and jury to give the publication a meaning not pleaded by the parties was a matter addressed by all five judges of the High Court in *Chakravarti*, although their Honours differed in the terms in which they cast the extent of departure they considered permissible.

The narrowest approach to the question might be discerned from the judgment of Brennan CJ and McHugh J:

If there be no unfair disadvantage to the defendant by allowing another defamatory meaning to be relied on and to go and be considered by the jury — as where the plaintiff seeks to rely on a *different nuance of meaning* or, oftentimes, merely a *less serious* defamation — the different defamatory meaning may be found by the jury [emphasis added].³⁴

Gaudron and Gummow JJ would appear to have adopted a broader view:

As a general rule, there will be no disadvantage in allowing a plaintiff to rely on meanings *which are comprehended in, or are less injurious than* the meaning pleaded in his or her Statement of Claim. So, to, there will generally be no disadvantage in committing reliance on a meaning which is simply a *variant of the meaning* pleaded. On the other hand, there may be disadvantage if a plaintiff is allowed to rely on a *substantially different meaning*, or, even, a meaning which focuses on some different factual basis. ... the question where the disadvantage will or may result is one to be answered having regard to all the circumstances of the case, including the material which is said to be defamatory in the issues in the trial, and not simply by reference to the pleadings [emphasis added].³⁵

Kirby J emphasised the discretion of the trial judge:

In an attempt to reconcile the desirable encouragement of a particularisation of claims, the avoidance of ‘trial by ambush’ and the consideration of the entirety of the publication in question, courts will uphold the discretion of the trial judge, *including discretion to confine parties to the imputations pleaded where that is required by considerations of fairness*. However, a more serious allegation will generally be taken to include a less serious one unless the latter is of a substantially different kind ... the better view is that the rules of pleading must, in those jurisdictions governed by the common law, adapt to the fair evaluation by the tribunal of fact of the matter complained of. If the publisher claims surprise, prejudice or other disadvantage, the trial judge may protect it. *No complaint can arise where additional imputation is found to represent nothing more than nuances or shades of meanings of those pleaded* [emphasis added].³⁶

Although the judgments differed in the degree of departure they would allow, it is possible to identify some common ground. It would seem that all would support the judge and jury being restricted to departing from the plaintiff’s pleaded meaning only to the extent that the alternative meaning is only a nuance or variant and is not substantially different from or more serious than that proposed by the plaintiff.³⁷ In *David Syme & Co Ltd v Hore-Lacy* Charles JA suggested that whether a meaning is ‘substantially different’ may be tested by asking whether the defendant would have been entitled to

³⁴ Ibid, 534; see also *Hadzel v De Waldorf* (1970) 16 FLR 174, 182 (Fox J).

³⁵ Ibid, 546.

³⁶ Ibid, 580-81.

³⁷ *David Syme & Co v Hore-Lacy* [2000] VSCA 24 (Unreported, Ormiston, Charles and Callaway JJA, 9 March 2000) [21] (Ormiston JA), [52] (Charles JA).

plead a different issue, adduce different evidence or conduct the case on a different basis,³⁸ or possibly where the justification would be substantially different.³⁹

It may be that the formula of an alternative meaning which is only a nuance or variant and is not substantially different from or more serious than that proposed is capable of being adapted to provide a mechanism for the degree of abstraction with which several imputations contained in a publication may be regarded with a view to identifying a relevant common sting. For example, in *Templeton v Jones* the plaintiff complained that a news report published extracts from a speech by a defendant in which he described the plaintiff as a man who despised 'bureaucrats, civil servants, politicians, women, Jews and professionals,' which the defendant referred to as 'the politics of hatred' was defamatory to the extent that it alleged that he despised Jews. At a high level of abstraction, the defendant could claim the imputations bore a common sting that the plaintiff was involved in the politics of hatred, which it could then justify by proving that the plaintiff hated 'bureaucrats, civil servants, politicians, women, and professionals' without needing to prove that he hated Jews. However, it was held that a *Polly Peck* defence was inappropriate because there was no relevant common sting.⁴⁰ This might be explained on the basis that the claimed level of abstraction was inappropriate because such a high level was required to discern a common sting that it would have enabled the defendant to justify by proof of meanings which were substantially different or less serious than the meaning pleaded by the plaintiff.⁴¹

This approach may also be illustrated by the variation of the Brennan CJ/McHugh J example posed above, of a publication alleging that the plaintiff lied to his wife, was convicted for shoplifting and defrauded his shareholders. If the plaintiff were to only complain about the last allegation, at a high level of abstraction the defendant could claim that the imputations had a common sting of dishonesty. However, resort to such a high level would enable the defendant to justify by showing that the plaintiff lied to his wife and was convicted of shoplifting, allegations which are substantially different or far less serious than the allegation made by the plaintiff. Accordingly, the level of abstraction required to identify the common sting would not be legitimate and it would not be an appropriate case for a *Polly Peck* defence.

Such cases might be contrasted with a case where, for example, the plaintiff complains about an imputation that she was unfaithful to her spouse in January and the defendant pleads that several imputations carry the common sting that the plaintiff was promiscuous, which the defendant intends to justify by proving that the plaintiff was unfaithful to her spouse in February and in March.⁴² The level of abstraction needed to derive a common sting in such a case does not mean that the defendant is seeking to justify by proving allegations which are substantially different from or more serious than that pleaded by the plaintiff.

It may also be possible to answer the concern that *Polly Peck* defence allows a defendant to raise false issues which may embarrass the fair trial of the action (as suggested by Brennan CJ and McHugh J in *Chakravarti*). This may also lead to the policy concern that the defence could lead to the admissibility of a substantial body of evidence that would otherwise be irrelevant and a consequent increase in the length and cost of trials. In *David Syme & Co Ltd v Hore-Lacy* Charles JA suggested that these concerns may be allayed if the defendant were limited to justifying a meaning which was one upon which the

38 Referring to the words of Brennan CJ and McHugh J in *Chakravarti* (1997) 193 CLR 519, 532.

39 Referring to the words of Gaudron and Gummow JJ in *Chakravarti* (1997) 193 CLR 519, 543.

40 This was notwithstanding the defendant's own summing up of his description of the plaintiff's behaviour as the 'politics of hatred'.

41 In *David Syme & Co v Hore-Lacy*[2000] VSCA 24 (Unreported, Ormiston, Charles and Callaway JJA, 9 March 2000) [72] Callaway JA thought it 'outrageous' if the plaintiff could not obtain redress for being falsely branded as an anti-Semite, which had he been in business might have led to him losing his claim, paid costs and lost his Jewish customers, simply because in the words of his Honour 'the defendant was able to side-step the real issue'.

42 Contrast *Khashoggi v IPC Magazines Ltd* [1996] 1 WLR 1412.

plaintiff might him or herself succeed on the pleadings as they stand.⁴³

Conclusion

The legitimacy of the pleading practice known as the *Polly Peck* defence has been called in to question in recent times, most notably by Brennan CJ and McHugh JA in *Chakravarti v Advertiser Newspapers Limited*. Indeed, if the practice is expressed in broad terms — for example, that a defendant is entitled to allege meanings different from those alleged by the plaintiff and seek to justify those meanings — then there may be great force in concerns such as the appropriateness of a purported common sting, the risk of a fair trial being embarrassed and the risk of unnecessarily prolonging court proceedings with an attendant increase in costs.

However, it would seem that if the practice is properly placed in its context and a number of limitations are applied to the defence, these concerns may be dispelled. This context and suggested limitations might usefully be summarised in a series of propositions.

First, a defendant is entitled to suggest that the words complained of bear a different meaning from that alleged by the plaintiff. However, if the defendant elects to do so, he or she should plead the meaning being suggested in the defence. Authority for this proposition may be found in *Lucas-Box v News Group Newspapers*.⁴⁴ This case was not expressly questioned by Brennan CJ and McHugh J in *Chakravarti*. Although their criticism of *Polly Peck* would appear capable of extending to *Lucas-Box* as well, there may be good reason for treating the cases separately.⁴⁵ If a defendant is seeking to rely on justification, it would seem desirable that he or she sets out what he or she claims to be the natural and ordinary meaning of the words to which that defence is directed.⁴⁶

Secondly, the judge and jury are not confined by the meanings asserted by the parties. However, the better view would seem to be that any meaning they give the publication must only be a nuance or variation, and not substantially different or more serious from that proposed by the plaintiff.

Thirdly, the second proposition applies equally to any meaning proposed by the defendant. It is capable of providing a guide for the appropriate level of abstraction used to identify a common sting among several imputations for the purposes of the *Polly Peck* defence. The threshold question for this defence is whether the publication contains a number of imputations which are capable of being interpreted as carrying a common sting. However, even where a common sting is identified, it is suggested that the defence should not apply where the common sting can only be derived by adopting such a high level of abstraction that the defendant would be permitted to justify the common sting by proving allegations which are substantially different or less serious than, rather than merely variations or nuances of, the meaning or meanings alleged by the plaintiff.

Fourthly, the risk of the defendant setting up false issues which may embarrass a fair trial and increase the length and cost of proceedings may be minimised by limiting the defendant to a meaning or meanings upon which the plaintiff him or herself might have obtained a verdict, on the pleadings as they stand.

Placed in this context, and subjected to these limits, the *Polly Peck* defence may be seen as being a vehicle for flexibility whilst keeping the potential for injustice to a minimum. ●

⁴³ Ibid, [53].

⁴⁴ Strictly speaking, the Victorian Court of Appeal in *David Syme & Co v Hore-Lacy* [2000] VSCA 24 (Unreported, Ormiston, Charles and Callaway JJA, 9 March 2000) was only called upon to decide whether a defendant seeking to justify a meaning different from that alleged by the plaintiff is obliged to provide particulars of the alternative meaning being relied upon.

⁴⁵ In *David Syme & Co v Hore-Lacy* [2000] VSCA 24, [20]-[21] Ormiston JA thought that the failure by Brennan CJ and McHugh J to deal explicitly with *Lucas-Box* could not be regarded as ‘a mere oversight’ when viewed in light of the references to the case by both counsel and Gaudron and Gummow JJ.

⁴⁶ See also *ibid*, [21].