

IS DEFAMATION THE 'GALAPAGOS ISLANDS DIVISION' OF THE AUSTRALIAN LAW OF TORTS?

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Abstract

The theme of this article is whether in 2009 the tort of defamation can be accurately described as exhibiting in substantive form a species of tortious exotica in a post-national uniform defamation laws legal environment. The article examines this question through the prism of three recent defamation cases that went to the High Court and through an analysis of the new uniform defamation legislation itself which preserves much of the previous common law. In light of the newly minted legislation and the lack of Australian cases on the important offer of amends procedure, attention is given to the recent case law experience in England under a similar offer of amends procedure. The article concludes that conjuring up images of giant turtles and arcane procedures in relation to defamation is to indulge in hyperbole and gives insufficient credit to the landmark uniform defamation laws.

I INTRODUCTION

The title of this article is taken from the extra-judicial comments made by Justice David Ipp in 2007 in which his Honour suggested that '[t]he tort of defamation has evolved all on its own and has created legal forms and practices unknown anywhere else'.¹ More importantly for the purposes of this article his Honour was writing post the introduction of the uniform defamation laws ('UDL') and his Honour was still of the opinion that '[m]any of these problems are the product of legislation, and improvement will be slow until the legislation is changed'.² This article examines the implication that further legislative changes are required

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1 Justice David Ipp, 'Themes in the Law of Torts' (Speech delivered at the Judges' Review Conference, Sydney, 16 March 2007); See also, Justice David Ipp, 'Themes in the Law of Torts' (2007) 81 *Australian Law Journal* 609.

2 Justice Ipp, above n 1, 8.

in order to overcome the perceived problems of 'massive delays' in bringing cases to trial and that '[d]amages seem out of proportion to damages awards in other categories of cases'.³ This analysis will be conducted by examination of three recent defamation cases that went to the High Court of Australia, namely, *Channel Seven Adelaide Pty Ltd v Manock*,⁴ *John Fairfax Publications Pty Ltd v Gacic*⁵ and *Radio 2UE Sydney Pty Ltd v Chesterton*⁶ and by a review of the UDL. Whilst these cases were concerned with legislation prior to the introduction of the UDL, it is suggested here that they provide a useful guide as to how the High Court will interpret future cases under the UDL. Self evidently, the High Court does not give leave to appeal unless a significant legal principle is open for decision. These three defamation cases which range over fair comment (honest opinion), business defamation and community standards, and the general test for defamation, can be viewed within the new UDL framework that essentially imports the common law, unless specifically excluded by statute.

This article will argue that to conjure up images of 'giant turtles of defamation [which] have evolved their own dialect, arcane customs and overly subtle distinctions'⁷ is to indulge in hyperbole. Perhaps, an analogy closer to the Australian mainland, like Kangaroo Island or Fraser Island, whilst less exotic might have been more apposite. Furthermore, in a recent critique of the UDL, David Rolph concluded that the present system of defamation law in Australia 'bears the hallmarks of historical accident, comparative neglect and piecemeal reform'.⁸ This article will argue that this criticism is too severe and that whilst further reform will be necessary, both the learned judge and the learned author have given too little credit to the landmark uniform defamation legislation that came into force across Australia in 2006.

II UNIFORM DEFAMATION LAWS

It has been observed many times that the essential feature of the tort of defamation is the protection of reputation and that this protection runs counter to freedom of speech. One of the objects of the UDL is to ensure

3 Justice Ipp, above n 1, 7-8; See also, Justice David Ipp, 'Themes in the Law of Torts' (2007) 81 *Australian Law Journal* 609, 615.

4 (2007) 232 CLR 245.

5 (2007) 230 CLR 291.

6 (2009) 254 ALR 606.

7 Justice Ipp, above n 1, 247.

8 David Rolph, 'A Critique of the National Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207, 247.

that freedom of speech is not unreasonably limited.⁹ As Richards, Ludlow and Gibson state in a recent torts textbook, ‘the delicate balance between free speech and protection of reputation is nowhere more apparent than in the defence of fair comment’.¹⁰ Fair comment sits in tandem with the broad public interest defence of qualified privilege which protects a statement that is ‘fairly warranted’ and ‘honestly made’ for ‘the common convenience and welfare of society’.¹¹ Under the UDL the defence of fair comment is recast as the defence of honest opinion.¹² However, the UDL is not a code and the common law defence of fair comment will remain relevant because the common law is maintained, unless the UDL specifically or by necessary implication provides otherwise.¹³ Can it be said that the failure under the UDL to exclude the common law, and in particular allow the defences under the legislation to co-exist with the defences at common law,¹⁴ justify asserting that ‘[a]lthough now uniform, defamation law in Australia remains unnecessarily complex and arcane and, in many respects, inefficacious’?¹⁵ This article answers the above question with an emphatic negative and argues that it is both sensible and pragmatic to import much of the common law,¹⁶ given that some Australian jurisdictions such as the Northern Territory, Victoria and Western Australia relied on the common law prior to the introduction of the UDL, and that only the threat by the then Commonwealth Attorney-General to enact a defamation code galvanised the recalcitrant States and Territories into action that they had been resisting since 1979, with the publication of the Australian Law Reform Commission’s report entitled *Unfair Publication: Defamation and Privacy*.¹⁷

9 See, eg, *Defamation Act 2006* (NT) s 2(b): ‘to ensure the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance’.

10 Richards, Ludlow and Gibson, *Torts Law in Principle* (5th ed, 2009), 469.

11 *Moit v Bristow* [2005] NSWCA 322 (Unreported, Beazley, McColl JA, Campbell AJA, 19 September 2005) [73] (McColl JA).

12 See, eg, *Defamation Act 2006* (NT) s 28.

13 See, eg, *Defamation Act 2006* (NT) s 5(2): ‘This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication)’.

14 See, eg, *Defamation Act 2006* (NT) s 21(1): ‘A defence under this Division is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability’.

15 Rolph, above n 8, 248.

16 See, eg, *Defamation Act 2006* (NT) s 21(2) which imports the common law interpretation of malice rather than attempting to define malice in s 3 which deals with definitions: ‘If a defence under this Division to the publication of defamatory matter may be defeated by proof that the publication was actuated by malice, the general law applies in defamation proceedings in which the defence is raised to determine whether a particular publication of matter was actuated by malice’.

17 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979).

One aspect of the tort of defamation that has enjoyed a chequered history is the respective roles of the judge and jury in defamation proceedings. Prior to the introduction of the UDL, a hotchpotch of arrangements existed, with some jurisdictions allowing the jury to determine all issues relating to liability, defences and damages, whilst other jurisdictions where juries had been abolished for all civil litigation ensured judges sitting alone determined defamation claims. The most bizarre arrangement was adopted in New South Wales (naturally the author would add rather unkindly, given that State's claim to being the defamation litigation capital of Australia) where under s 7A of the repealed *Defamation Act 1974* (NSW)¹⁸ 'juries were empanelled to determine whether a matter complained of was defamatory and judges sitting alone then determined all issues relating to defences and damages'.¹⁹ Under the UDL, jurisdictions adopted one of two options: either to remove trial by jury in defamation proceedings, which was the course chosen by the Northern Territory, Australian Capital Territory and South Australia; or to allow either party to elect to have a jury, and where such an election is made, the jury is to determine liability²⁰ and defences²¹ and the judge is to assess damages.²² In *John Fairfax Publications Pty Ltd v Gacic*, Gummow and Hayne JJ made the following telling critique of the previous split trial system in New South Wales under the old s 7A *Defamation Act 1974* (NSW):

The history of the present litigation is an illustration of the false expectations that, by the introduction of s 7A into the 1974 Act, a substantial amount of time and money would be saved and that procedural complexities would be overcome. The 2005 Act contains in s 22 its own regime for division of functions between judge and jury, including determination of damages by judge not jury, but does not replicate the procedures required by s 7A.²³

On the question of damages, a very significant feature of the UDL is that damages are to bear a rational relationship to harm²⁴ and there is an indexed cap of \$250,000 for non-economic loss.²⁵ In the opinion of some commentators the impact of the damages cap is already evidenced by a reduction in defamation litigation under the UDL. Andrew Dodd reported as follows:

18 *Defamation Act 1974* (NSW) which has been replaced by *Defamation Act 2005* (NSW).

19 Rolph, above n 8, 225.

20 See *Defamation Act 2005* (NSW) s 22(2).

21 See *Defamation Act 2005* (NSW) s 21(1).

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

23 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291, 304.

24 See, eg, *Defamation Act 2006* (NT) s 31.

25 See, eg, *Defamation Act 2006* (NT) s 32(1).

Amazing but true. *The Age* newspaper has received just one writ for defamation in the last 18 months. How could this be? In the same period the paper has seen a resurgence in investigative reporting and some gutsy sleuthing on gangland killings and religious cults. The answer, according to the paper's legal advisor, is the new uniform defamation code and especially the cap it puts on damages for plaintiffs. Peter Bartlett of Minter Ellison says the upper limit of \$250,000 for loss of reputation has had 'a sobering effect' on potential plaintiffs because after legal costs they would need to win at least \$100,000 before 'seeing a penny in their pocket'.²⁶

Mark Pearson, in a review of Australia's defamation reforms after a year in operation, reported a similar outcome, stating that Fairfax Media in Sydney had advised that 'statements of claim for defamation against their mastheads halved in the period July 2006 - April 2007 compared with the same period in the previous year (before the reforms)'.²⁷ Pearson also said that the Herald and Weekly Times in Melbourne had indicated that their 'newspaper group had not received a single writ for anything published since January 1, 2006, the day the new laws came into force'.²⁸ Sydney however appears to be the aberration as Fairfax Media still received six statements of claim in the financial year 2006-07, five of which related to material published after 1 January 2006 and will therefore have to be decided under the UDL.²⁹

Thus, far from defamation being a tort that still harbours some exotic species, it may well be that the UDL will succeed in keeping many defamation cases out of the courts completely.³⁰ The damages cap is buttressed by the process of 'offering to make amends',³¹ whereby publishers can print retractions and apologise early without admitting liability. If an offer to make amends is refused by a potential plaintiff it may provide a defence,³² making it a powerful inducement to settle early and for media companies to admit errors. There is a similar

26 Andrew Dodd, *New Uniform Defamation Code Calms Litigants* (2007) <<http://www.crikey.com.au/2007/07/13/new-uniform-defamation-code-calms-litigants/>> at 21 July 2009.

27 Mark Pearson, *A Review of Australia's Defamation Reforms After a Year of Operation* (2007) Bond University <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1253&context=hss_pubs> at 21 July 2009.

28 Pearson, above n 27, 12.

29 Dodd, above n 26, quoting Associate Professor Andrew Kenyon of the Centre of Media and Communications Law: 'My sense is that the number of actions has probably fallen everywhere except Sydney'.

30 One powerful feature of the UDL is that there is now a one year limitation period. See *Limitation Act 1981* (NT) s 12(2)(b).

31 See, eg, *Defamation Act 2006* (NT) ss 12-17.

32 See, eg, *Defamation Act 2006* (NT) s 17(1) which provides that if an offer to make amends is not accepted it is a defence to an action in defamation against the publisher if the offer was made as soon as practicable, and if at any time before trial the publisher was willing to carry out the terms of the offer, and in all the circumstances the offer was reasonable.

offer of amends procedure in England³³ and two recent cases,³⁴ *Warren v Random House Group Ltd (Nos 1-3)* and *Tesco Stores Ltd v Guardian News & Media Ltd and Rusbridger*, decided under English legislation, may provide a pointer as to how the case law might develop in Australia. An offer of amends, which can be likened to a type of 'get out of jail free' card, enables a defendant who has made an honest mistake or is unable or unwilling to defend a defamation action, to admit liability at an early stage by agreeing to apologise and to pay the plaintiff damages and costs. If the offer of amends is not accepted, it is a complete defence at trial, unless the plaintiff can prove that the defendant published maliciously. If the offer is accepted in principle, then the precise terms of the apology and the amount of costs and damages are negotiated. If agreement cannot be reached, the defendant may publish a unilateral apology and the court be asked to decide the financial issues.

In *Warren v Random House Group Ltd (Nos 1-3)*,³⁵ an offer of amends was made and accepted, and a statement in open court based on an agreed apology was made. Before compensation was agreed, Random House obtained evidence which it alleged was capable of proving the allegation, and accordingly sought to renege on the offer of amends and to substitute a justification defence. The Court of Appeal likened the position to circumstances in which a party voluntarily gives an undertaking to the court on settlement of litigation and then seeks to vary it. The court held that such a variation should only be allowed in exceptional circumstances which were not present in this case. By way of contrast, in *Tesco Stores Ltd v Guardian News & Media Ltd and Rusbridger*,³⁶ the plaintiff sought to argue that it was entitled to suspend its decision on an offer of amends indefinitely until trial. As the *Defamation Act 1996* (UK) does not include any time limit for the acceptance of an offer of amends and here the plaintiff was prevaricating over the offer of amends, the defendant sought clarification from the court. Eady J pointed out that the purpose of the legislation was to achieve speedy and inexpensive disposal of complaints of injury to reputation, where the defendant acknowledged the defamatory allegations were inaccurate. The discipline imposed by the legislation required the plaintiff to accept the offer and be vindicated, or reject the offer and prove malice. Eady J effectively held that Tesco could not sit on the fence and that it was contrary to the underlying policy

33 *Defamation Act 1996* (UK) c 31, ss 2-4.

34 *Warren v Random House Group Ltd (Nos 1-3)* [2008] EWCA Civ 834 (Unreported, Clarke MR, May, Wilson LJ, 16 July 2008); *Tesco Stores Ltd v Guardian News & Media Ltd and Rusbridger* [2008] EWCH (QB) (Unreported, Eady MR, 29 July 2008).

35 [2008] EWCA Civ 834 (Unreported, Clarke MR, May, Wilson LJ, 16 July 2008).

36 [2008] EWCH (QB) (Unreported, Eady MR, 29 July 2008).

of the legislation to keep the offer open, while simultaneously seeking to prove malice. These two English court decisions clearly demonstrate the judiciary's desire to fulfil Parliament's purpose of ensuring that the offer of amends regime allows for speedier resolution of what might otherwise be lengthy and costly defamation actions. To the extent that English case law is followed in Australia, given the similarities in the offer of amends legislation, it is here argued that the strength of Justice Ipp's comment, with its images of continuing arcane legal practices, will be further undermined.

The next section develops the point that it was entirely sensible to allow the common law to be maintained unless expressly excluded by the UDL. The common law defence of fair comment sits side by side with the statutory defence of honest opinion.³⁷ The case of *Channel Seven Adelaide Pty Ltd v Manock*³⁸ had come to the High Court from the Full Court of the Supreme Court of South Australia and was determined on the availability of the common law defence of fair comment. The matters decided by the High Court provide a strong pointer as to how similar issues will be decided in the future under the UDL.

III FAIR COMMENT AND HONEST OPINION

In *Channel Seven Adelaide Pty Ltd v Manock* ('the *Manock* case'),³⁹ the High Court ruled against a defence of fair comment on a matter of public interest which Channel Seven (the defendant) sought to raise in a defamation action. In March 2004, Channel Seven broadcasted a promotion for a forthcoming edition of its *Today Tonight* program. Displayed on the screen was an image of Dr Manock (the plaintiff), while the voiceover recited the following words:

The new Keogh facts. The evidence they kept to themselves. The data, dates and documents that don't add up. The evidence changed from one court to the next.⁴⁰

37 See *Defamation Act 2006* (NT) s 28(1) which provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was an expression of opinion rather than a statement of fact, the opinion related to a matter of public interest, and the opinion is based on proper material. Section 28(5) *inter alia* defines proper material as being substantially true or attracting qualified or absolute privilege. Under s 28(4) the defence can only be defeated if the opinion was not honestly held.

38 (2007) 232 CLR 245.

39 (2007) 232 CLR 245. Dr Manock is a forensic pathologist who gave evidence for the prosecution in the 1995 trial of Henry Keogh for the murder of Anna-Jane Cheney. At the time Dr Manock was the Senior Director of Forensic Pathology at the State Forensic Science Centre.

40 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 257.

Dr Manock brought defamation proceedings against Channel Seven, alleging that the promotion conveyed the meaning that he had deliberately concealed evidence. Channel Seven sought to defend the action on the basis of fair comment, but the Full Court of the Supreme Court of South Australia ordered that the defence of fair comment be struck out.⁴¹ Channel Seven appealed to the High Court. In a majority of 4:1 the court dismissed the appeal⁴² and held that:

[S]tatements in the promotion, taken separately or together, were presented as fact and not recognisable as comment. The alleged comment was also not based on facts which were either expressly stated, sufficiently referred to or notorious.

The *Manock* case provides an opportunity to review the latest High Court authority on the common law defence to a defamation action of fair comment on a matter of public interest, and further provides a strong indication as to how the statutory defence of honest opinion under the UDL will operate as regards 'an expression of opinion of the defendant rather than a statement of fact'.⁴³ Of particular interest are the obiter remarks of Gleeson CJ, that brief advertisements are sometimes unpromising material for the defence of fair comment and that television promotions are not in some special category.⁴⁴ His Honour acidly observed that 'the law of defamation distinguishes between comment and statements of fact, even if publishers and broadcasters do not'.⁴⁵ In a similar vein, the joint judgment of Gummow, Hayne and Heydon JJ noted that Channel Seven faced two particular difficulties in resisting the conclusion that the material was fact, not comment. Firstly, it is harder for a television viewer to distinguish fact and comment than it is for the reader of printed material, and secondly, the 'ordinary' recipient is to be identified in the context of a commercial television channel broadcasting a brief promotion in prime time for a programme to be shown at prime time.⁴⁶ Finally, attention will be given to the judgment of Kirby J, who whilst agreeing with the orders proposed in the joint judgment, proposed that the appellant, Channel Seven, have leave to re-plead particulars to support a defence of fair comment consistent with the reasons of the court.⁴⁷ His Honour considered that it was a basic mistake to divorce

⁴¹ *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462, 479-480.

⁴² In *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 296 Kirby J categorises his opinion as 'a minority one', although the High Court's media release categorised the decision as 'unanimous'- see, High Court of Australia, Public Information Officer, 'Channel Seven Adelaide Pty Ltd v Dr Colin Manock' (Press Release, 13 December 2007).

⁴³ See, eg, *Defamation Act 2006* (NT) s 28(1)(a).

⁴⁴ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 256.

⁴⁵ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 256.

⁴⁶ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 264.

⁴⁷ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 313.

the impugned words from the context in which they appear, and that it was arguable that a jury could conclude that the ordinary reasonable viewer watching the promotion would conclude that the statements of the broadcaster were nothing more than comments support for which was promised in the advertised programme.⁴⁸

A *Distinguishing Fact and Comment*

The focus of analysis of the *Manock* case is on the joint judgment of Gummow, Hayne and Heydon JJ ('the joint judgment') and the significant points of difference between the joint judgment and Kirby J's judgment. Some consideration will also be given to Gleeson CJ's observations as to when a comment is to be regarded as 'fair'.

The starting point of the analysis is the authority upon which the joint judgment relied. The joint judgment examined a series of cases,⁴⁹ commencing with an extract from the judgment of Bingham LJ in *Brent Walker Group Plc v Time Out Ltd*⁵⁰ that 'the law has developed the rule ... that comment may only be defended as fair if it is comment on *facts* (meaning true facts) *stated or sufficiently indicated*'. The second authority considered was a passage from the judgment of Jordan CJ in *Goldsbrough v John Fairfax & Sons Ltd* where his Honour said that for the defence of fair comment to succeed, 'it is essential that the whole of the words in respect of which it is relied on should be comment'.⁵¹ The joint judgment continued with a discussion of the test of an ordinary reasonable recipient of a communication:⁵²

The question of construction or characterisation turns on whether the ordinary reasonable⁵³ 'recipient of a communication would understand that a statement of fact was being made, or that an opinion was being offered'⁵⁴ - not 'an exceptionally subtle' recipient,⁵⁵ or one bringing to the task of 'interpretation a subtlety and perspicacity well beyond that reasonably to be expected of the ordinary reader whom the defendant was obviously aiming at'.⁵⁶

Applying this test to the present circumstances, the joint judgment noted that the 'ordinary' recipient is to be identified in the context

48 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 299.

49 See, *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 262-264, under the heading, 'Distinguishing fact and comment'.

50 [1991] 2 QB 33, 44.

51 *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524, 531-532.

52 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 264.

53 *Crawford v Albu* (1917) App D 102, 105 (Bristowe J), 125 (Solomon JA). See also, *Rocca v Manbire* (1992) 57 SASR 224, 235; *Kerr v Conlogue* (1992) 65 BCLR (2d) 70, 84.

54 *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174, 182 (Reynolds JA).

55 *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279, 302 (Evatt J).

56 *London Artists Ltd v Littler* [1969] 2 QB 375, 398 (Edmund Davies LJ).

of a brief promotion in prime time commercial television, and cited Blackburn CJ in *Comalco Ltd v Australian Broadcasting Corporation*:

It is obvious that a television viewer receives a succession of spoken words and visual images, which he is unable to have repeated for the purpose of reflection or clarification; whereas a reader of printed material normally has it all before him at will, and has unlimited facilities for re-reading.⁵⁷

The joint judgment then analysed the first four sentences of the promotion (see above) and concluded they were either statements of fact⁵⁸ or 'impermissibly mixed up and intermingled with factual material'.⁵⁹ The joint judgment stated that the same conclusion would follow if all the four sentences were taken together.⁶⁰

The joint judgment then turned its attention to the question: 'Are the facts on which the supposed comment is alleged to be based sufficiently identified?'⁶¹ It endorsed the rule enunciated by King CJ in *Pryke v Advertiser Newspapers Ltd* that material cannot be fair comment unless 'the facts on which it is based are stated or indicated with sufficient clarity to make it clear that it is comment on those facts'.⁶² Furthermore, the High Court in *Pervan v North Queensland Newspaper Co Ltd*⁶³ had noted that 'the facts on which the comment is based [must be] *sufficiently indicated or notorious* to enable persons to whom the defamatory matter is published to judge for themselves how far the opinion expressed in the comment is well founded'. The joint judgment in expressly approving the above passage elaborated on its meaning as follows:

[A] sufficient linkage between the comment alleged and the factual material relied on can appear in three ways: the factual material can be expressly stated in the same publication as that in which the comment appears (i.e. by 'setting it out'); the factual material commented on, while not set out in the material, can be referred to (ie by being identified 'by a clear reference'); and the factual material can be 'notorious'.⁶⁴

57 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 264 (Gummow, Hayne and Heydon JJ) citing Blackburn J in *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1, 40.

58 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 264-267.

59 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 267.

60 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 267.

61 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 268.

62 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 268 citing *Pryke v Advertiser Newspapers Ltd* (1984) 37 SASR 175, 192 (King CJ). This rule or condition was also approved by Gleeson CJ (at 253) who stated that this 'statement of principle was not in dispute' and if satisfied 'then in the ordinary case the person to whom the comment is published will be able to assess its foundation'.

63 (1993) 178 CLR 309, 327 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

64 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 272.

This statement of the law was cited and followed by Adams J in the recent case of *Coates v Harbour Radio Pty Ltd*⁶⁵ which involved radio broadcasts by Mr Alan Jones on Radio 2GB concerning Mr John Coates the Australian Chef de Mission, at the 2004 Athens Olympics in relation to the rowing final of the Women's Eights. While this case also predates the UDL, there can be little doubt that the courts will apply similar authority to 'an expression of opinion of the defendant rather than a statement of fact' used in the defence of honest opinion under the UDL.⁶⁶

B *Pervan v North Queensland Newspaper Co Ltd*

The precedent established in *Pervan v North Queensland Newspaper Co Ltd* ('*Pervan*')⁶⁷ played a significant role in the arguments put in the *Manock* case⁶⁸ which makes the former case worthy of some attention. The facts in *Pervan* were set out in the case as follows:

In 1986, when the appellant, George Anthony Pervan, was a councillor of the Johnstone Shire Council and Chairman of its Works Committee, a member of the Parliament of Queensland made allegations in Parliament that the appellant had misapplied the Council's cyclone relief funds and that he had been 'feathering his own nest'. On two occasions, the *Innisfail Advocate* ('the Advocate'), a newspaper published by the first respondent, published a fair report of these allegations. It also published replies to the allegations. It then published on behalf of the second respondent, Herbert William Layt, in its public notices an advertisement in these terms: 'Councillors feathering their own nests? Funds being misappropriated? This is doing irreparable damage to the image of our shire. It is now more important than ever to attend the ratepayers and residents meeting at the Grand Central Hotel Tuesday, 12th August at 8pm'.⁶⁹

The High Court in *Pervan* held 6:1, with McHugh J dissenting, that the publication was based on a clear substratum of fact consisting of the statements made in Parliament. In the High Court's view, 'the two questions may be characterized as comment' and 'the next sentence may also be regarded as an expression of opinion as to the effect of the allegations'.⁷⁰ McHugh J in dissent held that 'the defence fail[ed] in this case because the whole of the defamatory matter consisted of comment'⁷¹ and went on to find that a defendant cannot use extrinsic evidence (here the allegations made in Parliament) to show what was the subject matter of the comment.⁷²

65 [2008] NSWSC 292 (Unreported, Adams J, 4 April 2008) [166].

66 See, eg, *Defamation Act 2006* (NT) s 28(1)(a).

67 (1993) 178 CLR 309.

68 (2007) 232 CLR 245.

69 *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 314.

70 *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 318.

71 *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 347.

72 *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 349-350.

In the *Manock* case, when Channel Seven sought to use McHugh J's dissenting judgment in *Pervan*, the joint judgment of Gummow, Hayne and Heydon JJ observed that 'the defendant was not seeking to have *Pervan's* case overruled; rather it contended that on its proper construction it supported the defendant's submission'.⁷³ In its submission, Channel Seven argued that the common law defence of fair comment could be relied on notwithstanding that the facts upon which the comment was based were not set out in the matter complained of by the plaintiff. This was consistent with the background facts being 'notorious' as held in *Pervan*. However, as the joint judgment pointed out, there were no notorious facts in Channel Seven's promotional material because it referred to the 'new' Keogh facts which were to be revealed in the actual programme.⁷⁴ Thus, Channel Seven needed an additional attack and claimed to have discovered it in a passage from the dissenting judgment of McHugh J in *Pervan*. Under the heading 'The defamatory comment may be based on facts which are not published in the article' McHugh J considered that this principle was not limited to plays or spectacles:

The defence is available even though the publication does not state or indicate the facts which form the basis of the comment. As long as the subject-matter of the comment is identified, the defendant is entitled to the benefit of the defence of fair comment if he or she is able to prove one or more facts which will justify the comment.⁷⁵

Gummow, Hayne and Heydon JJ gave short shrift to the use of this argument put by Channel Seven. The joint judgment dealt with the possible extension of the principle:

It may also be true that that principle extends beyond reviews of plays or sporting spectacles. Perhaps the somewhat special facts of *Kemsley v Foot*⁷⁶ fall fairly within the principle so extended; or the outcome may be justified on the ground that the facts about the Kemsley newspapers underlying the comment "lower than Kemsley" were notorious.⁷⁷

However, as the joint judgment trenchantly observed 'the present circumstances are very remote from the problems arising with plays, sporting spectacles, newspapers or anything like them'.⁷⁸ Thus,

73 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 273.

74 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 284.

75 *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 340-341 where McHugh J quoted *Kemsley v Foot* (1952) AC 345, 358, 362 as authority for this statement.

76 In *Kemsley v Foot* (1952) AC 345, Kemsley newspapers were widely read and known and, therefore, the facts about Kemsley underlying the comment 'lower than Kemsley' were notorious.

77 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 280.

78 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 280.

Gummow, Hayne and Heydon JJ (as well as Gleeson CJ) were not prepared to extend the principle adopted in *Pervan* to the situation such as the one their Honours had before them in the *Manock* case, where the factual substratum of the comment was neither sufficiently identified nor notorious.

There is another significance of *Pervan* that needs to be discussed. Earlier it was mentioned that Channel Seven was not seeking to have *Pervan*'s case overruled. Their Honours made this telling observation:

If the defendant were contending that the majority approach in *Pervan*'s case should be overruled, it would be necessary to give detailed attention to that submission. ... But since the defendant's argument is presented only as a question of working out what the majority in *Pervan*'s case meant, it is not necessary to deal with these policy-based and potentially radical submissions.⁷⁹

This observation was attacked by Kirby J in his own judgment. His Honour noted that 'factual circumstances [in *Pervan*] more different from the present case would be difficult to imagine'⁸⁰ and lamented such a narrow approach:

The joint reasons approach the resolution of this question as if it can be decided entirely divorced from what those reasons disparagingly describe as 'policy-based and potentially radical submissions'.⁸¹

Kirby J argued that the *ratio decidendi* of *Pervan* was 'far removed from the legal question in issue in this appeal'.⁸² According to Kirby J the relevant question was whether the words and images in a promotional broadcast were sufficiently 'indicated'⁸³ and that 'to draw from the judicial *dicta* in *Pervan* a legal rule binding in the present case is to fall into error'.⁸⁴

C *Pleadings and Reasonableness*

Kirby J has not been alone in criticising the majority view in the *Manock* case.⁸⁵ Media commentators have seen the High Court's decision in the *Manock* case as 'narrow[ing] the scope of the fair comment

79 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 280.

80 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 304. Kirby J observed: '*Pervan* addressed a statute not the common law. It related to a defence of fair comment expressed in distinctive terms in a particular setting. It concerned a publication in a regional newspaper, not a broadcast on a commercial television station. And the publication appeared in a notice in permanent printed form, not a brief broadcast of a promotional advertisement'.

81 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 302.

82 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 304.

83 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 304.

84 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 304.

85 (2007) 232 CLR 245.

defence' or having added an 'additional hurdle to be overcome'.⁸⁶ The *Manock* case has also been 'widely lamented by media lawyers for its potential to erode freedom of speech by reducing the availability of the comment defence to the media' and it has also been lamented 'that the Court chose to side-step a close examination of the likely impact of its decision on freedom of speech' and that this is a 'matter for regret'.⁸⁷

In fairness to the majority in the *Manock* case, the pleadings⁸⁸ determined the manner in which the appeal was considered. Dr Manock contended that the promotion inferred that he had deliberately concealed evidence as alleged by the second sentence of the promotion: '*The evidence they kept to themselves*'.⁸⁹ Channel Seven sought to have the 'matter complained of' (the promotion) viewed as a whole. Channel Seven argued that the true meaning of the promotion was that Dr Manock had conducted an inadequate investigation in the trials of Mr Keogh combined with his giving inaccurate evidence.⁹⁰ The majority in the *Manock* case upheld the decision of the lower court (the Full Court of the Supreme Court of South Australia) to strike out Channel Seven's defence of fair comment because it did not specifically address Dr Manock's pleading that the promotion carried the imputation that he had deliberately concealed evidence. The joint judgment put the mismatch between the plaintiff's and defendant's pleadings as follows:

The plaintiff pleaded that the meaning of the promotion was that he "had deliberately concealed evidence from the trials of Mr Keogh". None of paras ..., pleaded in support of the defendant's plea of fair comment, squarely state that the plaintiff "deliberately concealed" (that is, consciously suppressed) evidence. Many of them were either about the shortcomings of persons other than the plaintiff or inadequacies in the plaintiff's investigation of the crime. The balance alleged inaccuracies, inconsistencies and unreliabilities in the plaintiff's evidence, but ... not deliberate concealment.⁹¹

Justice Ipp referred to defamation pleadings as being 'complex, pedantic and technical as anything known to Dickens'⁹² and observed

86 Inez Ryan, 'Developments in the Defence of Fair Comment: Case Note: The Manock Case' (2008) *Australian Press Council News* <<http://www.presscouncil.org.au/pcsite/apcnews/feb08/manock.html>> at 2 March 2009.

87 Anne Flahvin, 'Defamation: Comment Defence Rendered Less Media Friendly' (2008) Issue 2 *Media and Content Headlines*, Baker and McKenzie <<http://www.bakernet.com/NR/rdonlyres/5AD026DE-CF8C-4D08-9651-16A86A276930/43394/HeadlinesNewsletter.pdf>> at 2 March 2009.

88 Channel Seven pleaded numerous positive defences including fair comment on a matter of public interest, justification, absence of reputation and qualified privilege.

89 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 265.

90 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 258, 285.

91 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 285.

92 Ipp, above n 1. For the reference to Charles Dickens, see *Burrows v Knightley* (1987) 10 NSWLR 651, 654.

further that '[i]nterlocutory disputes continue to beset plaintiffs and there are often massive delays in getting defamation cases to trial'.⁹³ Kirby J (who prior to his appointment to the High Court was the President of the New South Wales Court of Appeal) quoted the above observations of Ipp J with approval in the *Manock* case, noting his Honour's 'sharpest comments [in relation to complexity and delay] were reserved for the subject matter of this appeal'.⁹⁴ However, Ipp J of the New South Wales Supreme Court would have had the now repealed *Defamation Act 1974* (NSW) partly in mind when making his 'Galapagos' observations. At common law, the publication of defamatory matter constitutes the cause of action⁹⁵ whereas the now repealed s 9(2)⁹⁶ replaced defamatory matter with each pleaded imputation. The UDL enacts the common law position, which may well reduce the tediously wordy pleadings in future in Sydney, a city (adopting the artistic licence of Ipp J) which as the defamation capital of Australia might be likened to the legendary island of Atlantis.⁹⁷

Rolph has neatly summed up Channel Seven's interlocutory application in the *Manock* case as demonstrating 'a gross disproportion between the substance of the dispute and the way this dispute was pleaded'.⁹⁸ The learned author rightly scathingly referred to Channel Seven's detailed particularising of the defence of fair comment, contesting the strike out application all the way to the High Court, and delaying a hearing on its merits as 'hardly amounting to conduct designed to give effect to the right to comment'.⁹⁹ Rolph characterised the case as being an 'extreme example of common problems with the defence of fair comment: unnecessary prolixity of pleadings and frequent interlocutory skimishes'.¹⁰⁰

Notwithstanding accuracy of the above observations, the critical point for the purposes of this article is whether such criticisms will be as readily forthcoming under the UDL. Channel Seven, in the *Manock* case, will have every incentive to make an offer of amends¹⁰¹ and will also be cognisant that aggravated damages are available above and

93 Justice Ipp, above n 1.

94 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 294.

95 If the plaintiff relies on the natural and ordinary meaning, then particularisation of meanings is not required.

96 Repealed *Defamation Act 1974* (NSW) s 9(2).

97 Atlantis is a legendary island first mentioned in Plato's dialogues *Timaeus* and *Critias* and has become a byword for any and all supposed advanced prehistoric lost civilizations.

98 Rolph, above n 8, 236.

99 Rolph, above n 8, 237.

100 Rolph, above n 8, 237.

101 See, eg, *Defamation Act 2006* (NT) ss 12-17.

beyond the indexed \$250,000 damages cap under the UDL,¹⁰² which a court may well feel is justified where a large corporation seeks to unnecessarily delay proceedings against an individual. Also, the *Manock* case¹⁰³ makes it abundantly clear to broadcasters that there will be no whittling down of the bright line between fact and comment as reflected by the UDL's use of the words that 'the matter was an expression of opinion of the defendant rather than a statement of fact'¹⁰⁴ in the defence of honest opinion.

The statutory defence of honest opinion largely reflects the common law principles of fair comment. However, there are some differences that arguably give the statutory defence a wider scope. For example, the definition of 'proper material'¹⁰⁵ allows the statutory defence if the material is 'substantially true' whereas at common law it is unclear whether the defendant must justify every fact upon which the comment is based.¹⁰⁶ However, both defences are lost if based on facts that are distorted or misrepresented.¹⁰⁷ At common law, the defendant publisher loses the defence if it acted with malice. Under statute, knowledge by the publisher that the third party (commentator) did not honestly hold the opinion is presumptive evidence of malice¹⁰⁸ whereas 'a lack of reasonable grounds [by the publisher] for believing the opinion was held by the commentator would not generally constitute malice'.¹⁰⁹

In the *Manock* case, Gummow, Hayne and Heydon JJ also rejected Channel Seven's submission that an honest person who might be prejudiced and hold exaggerated views could, given the number of inconsistencies and inadequacies in the investigation, hold the opinion that there had been some deliberate concealment on the part of Dr Manock.¹¹⁰ The reason for this rejection was that it does not accord with the law on the reasonableness of opinion or comment, and the joint judgment cited two cases, *Goldsborough v John Fairfax*¹¹¹ and *O'Shaughnessy v Mirror Newspapers Ltd*,¹¹² for the proposition that to be fair, comment must express an opinion that might reasonably be drawn from facts by an honest or fair-minded person:

102 See *Defamation Act 2006* (NT) s 32(2).

103 (2007) 232 CLR 245.

104 See *Defamation Act 2006* (NT) s 28(1)(a).

105 See *Defamation Act 2006* (NT) s 28(5)(a).

106 *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510.

107 *Herald & Weekly Times v Popovic* [2003] VSCA 161 (Unreported, Winneke ACJ, Gillard, Warren AJA, 21 November 2003).

108 See *Defamation Act 2006* (NT) s 28(4)(c).

109 Danuta Mendelson, *The New Law of Torts*, (1st ed, 2007) 623.

110 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 290.

111 (1934) 34 SR (NSW) 524.

112 (1970) 72 SR (NSW) 347.

[I]n *Goldsbrough v John Fairfax & Sons Ltd*¹¹³ Jordan CJ said comment could not be fair “if the opinion is one that a fair-minded man might not reasonably form upon the facts on which it is put forward as being based”. And in *O’Sbaughnessy v Mirror Newspapers Ltd*¹¹⁴ Jacobs and Mason JJA said: “[D]efamatory matter which appears to be a comment on facts stated or known but is not an inference or conclusion which an honest man, however biased or prejudiced, might reasonably draw from the facts so stated or known will not be treated as comment”.¹¹⁵

Gleeson CJ in the *Manock* case considered that a comment is objectively fair if it is a comment that an honest albeit prejudiced person might make in the circumstances:

‘[F]air’ does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word ‘fair’ refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.¹¹⁶

Some media commentators have detected a difference between the statements of the joint judgment of Gummow, Hayne and Heydon JJ and Gleeson CJ in the *Manock* case on the question of reasonableness. For example, Inez Ryan has contended that for Gleeson CJ ‘fairness’ in fair comment does not refer to the reasonableness or otherwise of the opinions expressed in the published comment, but ‘rather the fairness derives from the comment being presented in a context in which the reader or audience is in a position to agree or disagree with the comment’.¹¹⁷ This is said to be because the relevant facts are notorious, or because the facts are referred to in the published material. Ryan goes on to suggest that the alleged distinction in the views of the joint judgment and Gleeson CJ can be reconciled if the joint judgment’s intent was not to require a rational or reasoned basis for an opinion, but to reinforce that malice is inconsistent with the fair comment defence.¹¹⁸ With respect, there appears to be no justification either for the alleged difference in approach to reasonableness or the strained meaning to reconcile the alleged differences of view. The author contends that both the joint judgment and Gleeson CJ were making reasonableness a

113 (1934) 34 SR (NSW) 524, 532.

114 (1970) 72 SR (NSW) 347, 361.

115 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 290. This statement of the law was cited and followed by Adams J in *Coates v Harbour Radio Pty Ltd* [2008] NSWSC 292 (Unreported, Adams J, 4 April 2008) [151]: ‘The comment must also be an inference or conclusion which an honest person, however biased or prejudiced, might reasonably draw from the facts so stated or known’. Adams J continued by noting that the High Court had rejected the submission that ‘reasonableness’ was not a necessary element of the justification.

116 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 252.

117 Ryan, above n 86.

118 Ryan, above n 86.

component of fair comment because each judgment places an objective boundary around the 'crank' by virtue of references to an honest person however biased or prejudiced, perhaps best characterised as an extreme version of the person on the Clapham bus or Bondi tram. As Trindade, Cane and Lunney observe in their torts text,¹¹⁹ there are two tests for determining fairness, one subjective and the other objective. The learned authors state that the subjective test of fairness requires that 'the comment must represent the honest expression of the defendant's own view' while by contrast the objective test requires that 'the comment must be an inference open to a fair-minded person'.¹²⁰ The authors contend that 'the objective test of fairness formulated in *Merivale v Carson*¹²¹ was approved of by the High Court in *Pervan*'.¹²²

Thus, in the *Manock* case¹²³ the High Court was following previous authority in *Pervan* on the objective test of fairness. However, Richard Ackland, another media commentator is more scathing:

In its own quiet way the highest court has contributed to the shrinkage of our freedoms. In particular, freedom of speech has taken a battering in the recent *Channel Seven Adelaide v Manock* decision, which deals with the defence of comment in defamation cases. Contrary to longstanding authority, the majority reasoning suggests that for any published comment to be defensible it must be 'reasonable'. The right of the crank or ratbag to rail in favour of unpopular causes has been severely curtailed, if not abolished.¹²⁴

It is scarcely balanced reporting to describe the decision in the *Manock* case¹²⁵ as giving freedom of speech a 'battering' or 'being contrary to longstanding authority'. Richard Ackland appears to have misunderstood the law in that the crank still has to pass the test first enunciated in 1887 by Lord Esher in *Merivale v Carson*: 'Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?'¹²⁶ As to the 'ratbag', this could take on the cloak of malice. Thus, the author rejects any suggestion that

119 Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2007) 379.

120 Trindade, Cane and Lunney, above n 119, 379.

121 (1887) 20 QBD 275, 281 (Lord Esher MR).

122 Trindade, Cane and Lunney, above n 119, 379; See also *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 329: 'It is sufficient if the publication is objectively fair and the plaintiff does not prove that the defendant publisher was actuated by malice'.

123 (2007) 232 CLR 245.

124 Richard Ackland, 'Another Bundle of Intrusions', *Sydney Morning Herald* (Sydney), 4 January 2008 <www.smh.com.au/news/opinion/another-bundle-of-intrusions/2008/01/03/1198949984164.html> at 1 March 2009.

125 (2007) 232 CLR 245.

126 *Merivale v Carson* (1887) 20 QBD 275, 281.