HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

CHANNEL SEVEN ADELAIDE PTY LTD APPELLANT

AND

DR COLIN MANOCK RESPONDENT

Channel Seven Adelaide Pty Ltd v Manock [2007] HCA 60
13 December 2007
A21/2007

ORDER

1. *Appeal dismissed.*

2. *Special leave to cross-appeal be granted and the cross-appeal be treated as instituted, heard instanter and allowed.*

3. *Set aside orders 2-5 of the Full Court of the Supreme Court of South Australia made on 18 October 2006 and, in their place, order that paragraphs 3.1-3.39, 8.1 and 8.2 of the further amended defence be struck out.*

4. *The appellant pay the respondent's costs of the appeal and the cross-appeal.*

On appeal from the Supreme Court of South Australia

Representation

R J Whitington QC with S J Doyle for the appellant (instructed by Kelly & Co Lawyers)

G O'L Reynolds SC with N J T Swan, R W Potter and A Williamson for the respondent (instructed by Lawson Smith Lawyers)

CATCHWORDS

Channel Seven Adelaide Pty Ltd v Manock

Defamation – Defences – Fair comment – Promotion of a future edition of a television programme alleged to be defamatory – Defendant pleaded fair comment on a matter of public interest – Whether the allegedly defamatory statements constituted fact or comment – Distinction between fact and comment – Whether the facts on which the comments were alleged to be based were sufficiently identified – Construction of the rule from *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 – Relevance of imputations conveyed by the promotion – Whether the alleged comments were fair – Whether reasonableness is a requirement of fairness.

Defamation – Pleading and practice – Whether defence of fair comment should have been struck out – Whether defendant should be given an opportunity to re-plead defence of fair comment.

Words and phrases – "comment", "fact", "fair", "imputation", "substratum of fact", "sufficiently indicated".

1 GLEESON CJ. The facts and issues in the appeal are set out in the reasons of Gummow, Hayne and Heydon JJ ("the joint reasons"). I agree with the orders proposed in those reasons.

2 What the joint reasons describe as issues (c), (d), and (e) come down to a question similar to that which Eady J formulated for decision in *Lowe v Associated Newspapers Ltd*[1]. There a newspaper had described a "manoeuvre" of the claimant as "a repellent piece of financial chicanery." The defamatory meaning alleged was that the claimant had obtained ownership of a football club "by underhand and dishonest means". Eady J said that the plea of fair comment was "to be scrutinised in order to see whether the particulars are such that a person could indeed honestly come to the conclusion, in the light of them, that the claimant had been dishonest."[2] In the present case, the meaning alleged was based on an assertion in the published matter, which related to a murder trial, that there was evidence "they kept to themselves", with a background picture identifying the respondent with "them". The respondent had been an expert witness at the trial. The meaning alleged in the pleadings, and assumed for the purposes of the present argument to have been conveyed, was that the respondent had deliberately concealed evidence. It was in substance the same as what had been said in the publication. To this, the appellant raised a defence of fair comment. The particulars, unlike the published matter, set out the facts on which the "comment" was said to have been based. Those facts included allegations of inadequacy of the respondent's investigation into the death of the victim, inaccuracy and inconsistency in his evidence, failure to act promptly in certain respects, absence of sound scientific grounds for some of his reasoning, and errors of various kinds. Neither individually nor collectively did they raise matters such that a person could honestly have come to the conclusion, in the light of them, that the respondent had deliberately concealed evidence. I agree with what is said in the joint reasons about issues (c), (d), and (e).

3 The issues described in the joint reasons as (a) and (b) are related, although distinct. The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.

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1 [2007] QB 580.

2 [2007] QB 580 at 585 [8].

4 In *Pervan v North Queensland Newspaper Co Ltd*[3], McHugh J described as "the conventional case of fair comment" one where the basis of the comment appears in the publication and the reader (or viewer, or listener) is able to judge whether the facts justify the comments. He said that was very different from what he called "the *Kemsley* situation". It will be necessary to return to consider exactly what such a situation is, but, in one respect, this description of the conventional case may be unduly narrow. The defence is concerned with comment based on facts. The truth of those facts will affect the viability of the defence. The distinction between a comment (such as an expression of an opinion, or inference, or evaluation, or judgment) and the factual basis of the comment, blurred though it may be in many communications, affects the application of the defence in a number of ways. So long as a reader (or viewer, or listener) is able to identify a communication as a comment rather than a statement of fact, and is able sufficiently to identify the facts upon which the comment is based, then such a person is aware that all that he or she has read, viewed or heard is someone else's opinion (or inference, or evaluation, or judgment). The relationship between the two conditions mentioned in the previous sentence is that a statement is more likely to be recognisable as a statement of opinion if the facts on which it is based are identified or identifiable.

5 However, to satisfy the requirements for the defence, it is not necessary that the facts upon which the comment is based be stated in the terms of the communication itself. The rationale is also satisfied if, to use the language of the majority in *Pervan*, the facts are "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"[4]. It is more accurate, therefore, to describe as conventional a case where the facts upon which the comment is based are stated in the terms of the communication, or are sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to identify it as comment on those facts and to assess for themselves whether the facts support the comment. If the purported facts upon which the comment is based are not true, the defence does not lie. Hence, Bingham LJ's summation that "comment may only be defended as fair if it is comment on facts (meaning true facts) stated or sufficiently indicated."[5] (We are not concerned, in this appeal, with questions that arise where there is a privilege that covers the statement of facts.)

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3 (1993) 178 CLR 309 at 341.

4 (1993) 178 CLR 309 at 327.

5 *Brent Walker Group Plc v Time Out Ltd* [1991] 2 QB 33 at 44.

6 There was argument in this case as to whether the majority in *Pervan* went too far in saying that the persons to whom the defamatory matter is published must be able to judge for themselves how far the opinion expressed in the comment is well founded. In *Pryke v Advertiser Newspapers Ltd*[6], King CJ said:

> "A statement can be regarded as comment as distinct from allegation of fact only if 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."

That statement of principle was not in dispute. If the condition stated is satisfied, then in the ordinary case the person to whom the comment is published will be able to assess its foundation.

7 What is "the *Kemsley* situation"? The author of the headnote to the report of the case[7] summarised Lord Porter's opinion thus: "Newspapers, being submitted to the public, are a proper subject-matter of comment in the same way as literary works and the comment on them, in order to be fair, need not be confined to their literary content." That reflects what Lord Porter said at pages 355 and 356 of the report. What Lord Porter said, about matters submitted to the public, was substantially to the same effect as what had appeared in a leading text on the law of tort for some years before *Kemsley v Foot* and that, in turn, reflected the authorities referred to by the author of that text. The eighth edition of *Salmond on the Law of Torts* (for example), published in 1934, described the defence of fair comment in a way that went further than the customary descriptions. The author said[8]: "A fair comment on a matter which is of public interest or is submitted to public criticism is not actionable." The reason for the defence was said to be this[9]:

> "Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's writings or actions. Being therefore a mere matter of opinion, and so incapable of definite proof, he who expresses it is not called upon by the law to justify it as being true, but is allowed to express it, even though others disagree with it, provided that it is fair and honest."

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6 (1984) 37 SASR 175 at 192.

7 *Kemsley v Foot* [1952] AC 345.

8 *Salmond on the Law of Torts*, 8th ed (1934) at 438.

9 *Salmond on the Law of Torts*, 8th ed (1934) at 439.

As to matters submitted to public criticism, which he treated separately from matters of public interest (although obviously the two could overlap), the author said[10]:

> "He who voluntarily gives up his right of privacy by submitting himself or his deeds to public scrutiny and judgment must submit to the exercise of a right of public comment. This right, therefore, extends to books and every form of published literature, works of art publicly exhibited, and public musical or dramatic performances. So also with any form of appeal to the public, such as advertisements, circulars, or public speeches."

8 In the Court of Appeal in *Kemsley v Foot*[11], both Somervell LJ and Birkett LJ (with whom Jenkins LJ agreed) assimilated the conduct of the newspaper proprietor to that of an author, artist, or performer (or, nowadays, a professional sportsman), who submits a work or publication or performance to the public. Obviously, the readers of a commentary on a theatrical performance may not be able to see the performance and judge for themselves whether the commentary is well supported. Yet the defence of fair comment is open. Whether one treats this as a particular aspect of the public interest, or as a different subject of comment, is not presently important. The essence of "the *Kemsley* situation" is that certain forms of conduct are of such a nature as to invite comment. That is the genus of which books, and artistic works, and theatrical performances are species. Where conduct is "submitted to public criticism", then, so long as statements about that conduct are presented as comment and not as facts, it is not necessary that a reader, viewer or hearer of the comment should be in a position to form his or her own opinion. Conduct of that kind stands apart from "the conventional case". It was the conventional case to which Lord Nicholls of Birkenhead was referring in *Reynolds v Times Newspapers Ltd*[12] and *Cheng v Tse Wai Chun*[13], and to which the majority in this Court was referring in *Pervan*[14].

9 In the present case, the condition stated by King CJ in *Pryke* was not satisfied. To be protected by the defence of fair comment, the defamatory matter had to be recognisable as comment and not as a statement of fact. The facts on

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10 *Salmond on the Law of Torts*, 8th ed (1934) at 441 (reference omitted).

11 [1951] 2 KB 34 at 42, 50-51.

12 [2001] 2 AC 127 at 201.

13 (2000) 3 HKCFAR 339 at 347-348.

14 (1993) 178 CLR 309 at 327.

which the matter was based were neither stated nor indicated with sufficient clarity to make it clear that it was comment on those facts.

10 It is important to bear in mind the nature of the published matter. It was a short, promotional item. Some people who saw it would also watch the later programme which was being promoted. Many would not. The reasons why they would not might be various. For some, it may have been inconvenient. For some, it may have been impossible. Others might simply have had better things to do. There are, no doubt, circumstances where the connection in time, place, or form between that which is being promoted and the promotional material is such that the two can be linked for the purpose of identifying a sufficient indication of facts by the promotional material. The indication, however, must be to the ordinary reader, or viewer, or hearer of the promotional material.

11 The matter published was very brief and was calculated to have a strong impact. It would be naive to think that the broadcaster was conveying to the viewers that what it was saying was only the broadcaster's opinion, and that other opinions might be open. It is artificial to separate the four sentences used by the broadcaster. So far as the respondent's reputation was concerned, the sting was in the use of his image, and the words: "The evidence they kept to themselves." The first sentence, announcing "new Keogh facts", plainly represented to viewers that new facts had emerged that were to be revealed in the programme being promoted. The promise to reveal facts that were not previously known to the general public was at the forefront of the promotional exercise. That promise was followed immediately by a reference to the evidence that "they" (the respondent) "kept to themselves". That would not appear to an ordinary reasonable viewer as an opinion as distinct from a statement of fact. The first, third and fourth sentences gave context and colour to the second sentence, but the substance of what was published was that the broadcaster was in a position to reveal new facts about the Keogh trial, and that the forensic pathologist had kept material evidence to himself. That was clearly capable of conveying the meaning that he deliberately concealed evidence, and it was presented in the form of fact, not comment. No doubt, from a marketing point of view, there was a good reason for that. That may be why, as counsel observed, brief advertisements are sometimes unpromising material for a defence of fair comment. The impact they are designed to achieve may be difficult to reconcile with a requirement that an allegation must be recognisable as comment and not as a statement of fact.

12 In this respect, television promotions are not in some special category. Nor, for that matter, are promotions generally. Publishers and broadcasters may have their own commercial imperatives. The form in which those imperatives manifest themselves changes from time to time with changes in technology. The matter of present importance is that the law of defamation distinguishes between comment and statements of fact, even if publishers and broadcasters do not. The

rationale for that was explained by Bingham LJ in *Brent Walker Group Plc v Time Out Ltd*[15]. The defence on which the appellant seeks to rely applies to allegations that are recognisable as comment rather than as statements of fact. The allegation against the respondent was not of that kind.

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15 [1991] 2 QB 33 at 44.

13 GUMMOW, HAYNE AND HEYDON JJ. This appeal raises a range of issues concerning the common law defence to a defamation action of fair comment on a matter of public interest. The defence was pleaded to an action commenced in the District Court of South Australia in 2004 but which is yet to go to trial. The case comes to this Court from an appeal heard by the Full Court of the Supreme Court against the outcome of a strike-out application.

The factual background

14 In March 1994, Anna-Jane Cheney was found dead in her bath. Her fiancé, Henry Keogh, was charged with her murder. The jury failed to agree at his first trial, but on 23 August 1995 he was convicted at a second trial and sentenced to life imprisonment, with a 25 year non-parole period. He has brought an appeal to the South Australian Court of Criminal Appeal, an application for special leave to appeal to this Court, and two petitions to the Governor of South Australia for mercy, all without success.

15 Dr Colin Manock ("the plaintiff") is a forensic pathologist. He was formerly the Senior Director of Forensic Pathology at the State Forensic Science Centre. He conducted a forensic examination into Anna-Jane Cheney's death, and gave evidence for the prosecution at the criminal trials.

16 On 5 March 2004 at approximately 7.00pm Channel Seven Adelaide Pty Ltd ("the defendant") broadcast what the parties have called a "promotion" on television as part of a programme known as *Today Tonight*. The item was promoting a future edition of *Today Tonight*. The presenter said:

> "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."

While these words were being said, a picture of the plaintiff was displayed in the background, slightly above the presenter. The presenter then said, according to the further amended defence:

> "They're so smug and complacent about how fantastic our court system is, that we need an urgent wakeup call."

And:

> "Unless the investigation is thorough then the court proceedings aren't going to be complete because they're only getting part of the story."

The issues in outline

17 In *Pervan v North Queensland Newspaper Co Ltd*[16] this Court gave some consideration to the common law defence of fair comment. No application to reopen *Pervan's* case was made by either party to the present appeal, but they disagree as to the meaning and significance of what was said in *Pervan's* case.

18 The "promotion" broadcast by the defendant was designed to catch the attention of viewers and to retain their interest in watching the future programme. What was held out to viewers was the revelation of "new" facts. These would not be facts already known. Hence a submission by the defendant the effect of which would be to change the defence from one of fair comment on facts accurately and truly stated to one of fair comment on indicated topics of public interest. For the reasons which follow this submission should be rejected.

19 The issues on the appeal also concern the distinction between fact and comment; the consequences of the intermingling of fact and comment; the sufficiency of identification of the factual basis for the comment; and the requirement that the defence address the meaning of the defamatory matter pleaded by the plaintiff.

The procedural background

20 *The pleadings.* On 22 March 2004 the plaintiff instituted proceedings in defamation against the defendant. The statement of claim alleged that the promotion "in its ordinary and natural meaning meant and was understood to mean that the plaintiff had deliberately concealed evidence from the trials of Mr Keogh when he was tried for murder". Obviously if that meaning is found, the promotion made a very grave allegation of misconduct by the plaintiff – a serious crime[17], a most serious breach of duty on the part of a professional assisting the authorities in a murder prosecution, and a wicked act which could have caused a grave injustice to the accused.

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16 (1993) 178 CLR 309.

17 The *Criminal Law Consolidation Act* 1935 (SA), s 243, provides that it is an offence to conceal anything that may be required in evidence at judicial proceedings with the intention of influencing the outcome of judicial proceedings. Section 242(1) creates the offence of making a false statement under oath. For each offence the penalty is imprisonment for 7 years.

21 On 16 June 2004 the defendant filed a brief defence denying all allegations. On 2 March 2005 that defence was replaced by an amended defence denying that the promotion bore the meaning alleged by the plaintiff, denying that it referred solely or primarily to the plaintiff, and pleading numerous positive defences including fair comment on a matter of public interest, justification, absence of reputation and qualified privilege. On 12 July 2005 a further amended defence was filed.

22 The defendant's plea of fair comment took the following form:

"Further, or in the alternative, the defendant says that the following words:

3.1 the new Keogh facts;

3.2 the evidence they kept to themselves;

3.3 the data, dates and documents that don't add up; and

3.4 the evidence changed from one Court to the next,

constitute fair comment on a matter of public interest."

There followed 10 pages of particulars[18]. The first of those pages, under the heading "Particulars of Public Interest", pars 3.5-3.17, made various allegations on that subject. The last nine of those pages, under the heading "Particulars of facts upon which comment is based", in pars 3.18-3.39, alleged that the plaintiff had conducted an inadequate investigation and given inaccurate evidence[19].

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18 They are set out in *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462 at 464-470 [9]-[11].

19 The District Court Rules 1992 (SA) (Civil), r 46A.02(b), provided:

"All pleadings are to:

...

(b) plead only the material facts relied upon and not the evidence or arguments by which they are to be proved".

Rule 46A.05(2)(b) and (c) provided:

"The Defence must plead, but plead only:

...

(Footnote continues on next page)

23 The defendant's plea of justification appeared in pars 4 and 5 of the further amended defence. They alleged that the promotion meant that the plaintiff's evidence at the criminal trials was "unsatisfactory to the knowledge of the plaintiff" and that, on that meaning, the promotion was true; the particulars of justification offered were pars 3.18-3.39. Paragraphs 6 and 7 alleged that the plaintiff's reputation as a forensic pathologist had been so impaired by various events before the promotion was broadcast that it was incapable of damaging his reputation. Paragraph 8 alleged that:

> "[T]he promotion was published on an occasion of qualified privilege in that the broadcast constituted the discussion of government and political matters and the defendant's conduct in publishing the promotion was reasonable in the circumstances."

> *(b)* the material facts relied upon to constitute any ground of defence on which the defendant bears an evidentiary or a legal onus of proof;
>
> *(c)* such further material facts as are necessary to give other parties fair notice of the defendant's case which they will have to meet".

Rule 46A.09(1) and (2) provided:

> "(1) No order is to be made that any further material facts are to be pleaded other than where the material facts pleaded do not disclose facts sufficient to give the other parties fair notice of the case which they will have to meet and the party seeking them would be significantly prejudiced in the conduct of its case by not having them. (The intent of Rule 46A is that parties should include all material facts in their pleadings as initially filed so that there is no unfairness to another party by any lack of particularity and if they have not done so the trial Judge may refuse to allow that party to present a case which is outside the terms of its pleading.)
>
> (2) No pleading is embarrassing for want of particularity unless the missing particulars would be ordered under (1)."

Paragraph 3 of the further amended defence is structured on the theory that pars 3.1-3.4 are material facts which are not particulars, and pars 3.5-3.39, inter alia, are material facts which are, in the language of r 46A.09(1) and (2), designed to give "particularity" under r 46A.05(2)(c) to the material facts in pars 3.1-3.4 pleaded pursuant to r 46A.05(2)(b) by giving the plaintiff fair notice of the case he has to meet.

Under the heading "Particulars of the Discussion of Government and Political Matters" there appeared, among other allegations, the following two paragraphs:

> "8.1 The defendant repeats paragraphs 3.5-3.39 inclusive of this Amended Defence;
>
> 8.2 The defendant repeats paragraphs 6.1-6.3 inclusive of this Amended Defence".

24 *The District Court proceedings at first instance.* On 27 September 2005 the District Court of South Australia (Master Rice) struck out pars 3.17-3.18, 3.26-3.28 and 3.33-3.34 of the further amended defence. The Master also struck out the justification defence in pars 4 and 5 on the ground, inter alia, that proof that the plaintiff knew the evidence called to be unsatisfactory did not establish the truth of the imputation pleaded by the plaintiff. And the Master struck out the impaired reputation defence in par 6[20].

25 *The District Court appeal.* The plaintiff appealed to a judge of the District Court (Judge Muecke) against the Master's failure to strike out pars 3.13-3.16, 3.19-3.25 and 3.29-3.39. The defendant cross-appealed against the Master's order striking out pars 3.17-3.18, 3.26-3.28 and 3.33-3.34. The defendant did not cross-appeal against the Master's order striking out pars 4-6. Judge Muecke noted that the plaintiff had not sought before the Master, and did not seek before him, to strike out pars 3.1-3.4 – the paragraphs alleging as material facts that the words of the promotion constituted fair comment on a matter of public interest. He therefore approached the controversy on the basis that the words in the promotion which the defendant alleged were fair comment were capable of being construed as a comment[21]. Judge Muecke held that pars 3.13-3.17, 3.18 (in part), 3.26.1, 3.26.3 and 3.35.11.3.2 be struck out[22].

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20 *Manock v Channel Seven Adelaide Pty Ltd* unreported, District Court of South Australia, 27 September 2005. The Master's order does not refer to par 7, but his reasons for judgment, at [48]-[52], suggest that he intended to strike it out.

21 *Manock v Channel Seven Adelaide Pty Ltd* [2005] SADC 168 at [16]-[17].

22 The last two paragraphs were struck out on the basis that certain affidavit evidence was given to the Medical Board Tribunal after 5 March 2004, which it was: *Manock v Channel Seven Adelaide Pty Ltd* [2005] SADC 168 at [33]-[40]. It was conceded on the appeal that the particulars to pars 3.26.1, 3.26.2 and 3.26.3 had to be abandoned for the same reason, and it follows that those paragraphs must be treated as abandoned.

26 *The Supreme Court appeal.* The plaintiff then appealed to a single judge of the Supreme Court of South Australia (Bleby J), who referred the appeal to the Full Court. The appeal was against "that portion of the judgment which did not strike out ... the balance of paragraph 3.18 to 3.39". The plaintiff thus continued not to object to pars 3.1-3.4. The plaintiff's position was that even if pars 3.18-3.39 were struck out, the defendant "ought to be given one final opportunity to plead particulars to support its defence of fair comment ... [and] in the event that Channel Seven was unable to do so, para 3 should be struck out"[23].

27 The Full Court (Gray, White and Layton JJ) allowed the appeal and ordered that pars 3.18-3.39 be struck out. It gave leave to the defendant to amend the further amended defence within 28 days. The ground of the Full Court's decision, shortly put, is that "the substance of the comment cannot have a substantially different ... meaning than the imputation alleged by the plaintiff" and that a defence of fair comment must address the imputation pleaded by the plaintiff[24]. This, the Full Court held, pars 3.18-3.39 failed to do.

The appeal to this Court

28 *The notice of appeal.* By special leave, the defendant appealed to this Court. It seeks orders having the effect of reinstating pars 3.18-3.39. The notice of appeal took issue with the central part of the Full Court's reasoning. The defendant maintained its position of not challenging the Master's striking out of pars 4-6.

29 *The notice of contention.* The plaintiff filed a notice of contention. The contention in question was that pars 3.18-3.39 should have been struck out on 15 grounds which could be described as conventional pleading objections.

30 *The notice of cross-appeal.* The plaintiff also sought special leave to cross-appeal. The notice of cross-appeal sought an order that not only pars 3.18-3.39 of the particulars be struck out (as the Full Court had), but that pars 3.1-3.17 be struck out as well. The attack on pars 3.1-3.17, and in particular on pars 3.1-3.4, had not been made before the Master, Judge Muecke or the Full Court. Of the 18 grounds of cross-appeal, the first 15 repeated the grounds in the notice of contention. The last three of the 18 grounds, appearing as par 2(p)-(r), were:

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23 *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462 at 472 [21].

24 *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462 at 479-480 [40] and [43].

"(p) paragraphs 3.1-3.4 constitute statements of fact not opinion;

(q) paragraphs 3.1-3.4 cannot constitute comments on the facts pleaded at paragraphs 3.5-3.39;

(r) alternatively, paragraphs 3.1-3.4 constitute comments inextricably intermingled in the publication with factual matter."

31 *The issues.* It is convenient to deal with the issues in the following order, which is different from the order in which they are presented by the notices of appeal, cross-appeal and contention.

(a) Do pars 3.1-3.4 of the further amended defence plead comment?

(b) Are the facts on which the supposed comment is alleged to be based sufficiently identified?

(c) Is the meaning pleaded by the plaintiff relevant to the defence of fair comment pleaded by the defendant?

(d) Even if the answer to (c) is "Yes", would the number and nature of the criticisms made in pars 3.19-3.39 lead an honest person to agree that the plaintiff had deliberately concealed evidence?

(e) Did the Full Court address the wrong question by asking whether the defendant's particulars of fact were capable of proving the truth of the meaning pleaded by the plaintiff?

(f) Should the defendant's defence of fair comment have been struck out in any event by reason of pleading deficiencies?

32 For the reasons stated below, the answers given to questions (a)-(e) are (a) No[25]; (b) No[26]; (c) Yes[27]; (d) No[28]; and (e) No[29]. Question (f) need not be answered. The answer to each of the first four questions constitutes an

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25 See [33]-[44].

26 See [45]-[75].

27 See [76]-[78].

28 See [88]-[92].

29 See [93]-[94].

independent reason for the conclusion that the appeal must be dismissed and the cross-appeal allowed.

Do the allegations in pars 3.1-3.4 plead comment?

33 *Relevant approach.* In *Favell v Queensland Newspapers Pty Ltd*[30] this Court approved the following statement of McPherson JA as a correct approach where application is made to strike out defamation pleadings as disclosing no cause of action:

> "Whether or not [the pleading] ought to and will be struck out [as disclosing no cause of action] is ultimately a matter for the discretion of the judge who hears the application. Such a step is not to be undertaken lightly but only, it has been said, with great caution. In the end, however, it depends on the degree of assurance with which the requisite conclusion is or can be arrived at. The fact that reasonable minds may possibly differ about whether or not the material is capable of a defamatory meaning is a strong, perhaps an insuperable, reason for not exercising the discretion to strike out. But once the conclusion is firmly reached, there is no justification for delaying or avoiding that step [at] whatever stage it falls to be taken."

The same applies to the striking out of defences. Thus the fact, for example, that reasonable minds might possibly differ about whether the pleaded material is fact or comment is a strong reason for not striking out the allegations, but once the conclusion is firmly reached that it is fact, there is no justification for not giving effect to that conclusion.

34 *Significance of issue.* If pars 3.1-3.4 do not plead comment at all, but only facts, the plaintiff's cross-appeal must succeed. That is because, as facts, they might be material to a defence of justification, but that defence was struck out by the Master, without later complaint by the defendant. As facts, they might also be material to a defence of qualified privilege. But, as facts, they cannot constitute fair *comment* on a matter of public interest, and should be struck out together with the particulars pleaded in pars 3.5-3.39. If some, but not all, of pars 3.1-3.4 plead comment, those that do not cannot constitute fair comment on a matter of public interest, and pars 3.5-3.39 would have to be scrutinised to see whether they were capable of supporting the allegations which did plead comment.

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30 (2005) 79 ALJR 1716 at 1719 [6] per Gleeson CJ, McHugh, Gummow and Heydon JJ; 221 ALR 186 at 189.

35 *Distinguishing fact and comment.* In *Brent Walker Group Plc v Time Out Ltd* Bingham LJ said[31]:

> "The law is not primarily concerned to provide redress for those who are the subject of disparaging expressions of opinion, and freedom of opinion is (subject to necessary restrictions) a basic democratic right. It is, however, plain that certain statements which might on their face appear to be expressions of opinion (as where, for example, a person is described as untrustworthy, unprincipled, lascivious or cruel) contain within themselves defamatory suggestions of a factual nature. Thus 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*." (emphasis added)

In *Goldsbrough v John Fairfax & Sons Ltd*[32] Jordan CJ 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". He continued[33]:

> "It must be indicated with reasonable clearness by the words themselves, taking them in the context and the circumstances in which they were published, that they purport to be comment and not statements of fact; because statements of fact, however fair, are not protected by this defence. In other words, it must appear that they are opinions stated by the writer or speaker about facts, *which are at the same time presented to, or are in fact present to*, the minds of the readers or listeners, as things distinct from the opinions, so that it can be seen whether the opinions are such that they can fairly be formed upon the facts." (emphasis added)

A "discussion or comment" is to be distinguished from "the statement of a fact"[34]. "It is not the mere form of words used that determines whether it is comment or not; a most explicit allegation of fact may be treated as comment if it would be understood by the readers or hearers, not as an independent imputation, but as an

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31 [1991] 2 QB 33 at 44.

32 (1934) 34 SR (NSW) 524 at 531-532.

33 He cited *Myerson v Smith's Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20 at 26-27; *Cole v The Operative Plasterers Federation of Australia (NSW Branch)* (1927) 28 SR (NSW) 62 at 67-68.

34 *Popham v Pickburn* (1862) 7 H & N 891 at 898 [158 ER 730 at 733] per Wilde B.

inference from other facts stated."[35] As the passages quoted from Bingham LJ and Jordan CJ above illustrate, the distinction between fact and comment is commonly expressed as equivalent to that between fact and opinion[36]. Cussen J described the primary meaning of "comment" as "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, observation, etc"[37]. It follows that a comment can be made by stating a value judgment, and can also be made by stating a fact if it is a deduction from other facts. Thus, in the words of Field J[38]:

> "[C]omment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts *stated* or *referred to* by him, or in *the common knowledge of the person speaking and those to whom the words are addressed* and from which his conclusion may be reasonably inferred. If a statement in words of a fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact". (emphasis added)

36 The question of construction or characterisation turns on whether the ordinary reasonable[39] "recipient of a communication would understand that a statement of fact was being made, or that an opinion was being offered"[40] – not

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35 *Cole v The Operative Plasterers Federation of Australia (NSW Branch)* (1927) 28 SR (NSW) 62 at 67 per Ferguson J (Street CJ and Gordon J concurring).

36 For example, *Mackay v Bacon* (1910) 11 CLR 530 at 535-536 per Griffith CJ; *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 302 per Evatt J; *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166 at 173 per Barwick CJ, McTiernan, Menzies and Owen JJ; *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 196 per Mahoney JA.

37 *Clarke v Norton* [1910] VLR 494 at 499.

38 *O'Brien v Marquis of Salisbury* (1889) 6 TLR 133 at 137.

39 *Crawford v Albu* 1917 AD 102 at 105 per Bristowe J, approved at 125 by Solomon JA. See also *Rocca v Manhire* (1992) 57 SASR 224 at 235; *Kerr v Conlogue* (1992) 65 BCLR (2d) 70 at 84.

40 *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 182 per Reynolds JA.

"an exceptionally subtle" recipient[41], 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"[42].

37 The present circumstances create two particular difficulties for the defendant in resisting the conclusion that the material was fact, not comment. First, it is harder for a viewer of television to distinguish fact and comment than it is for a person reading printed material, as Blackburn CJ noted[43]:

> "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. In my opinion it is important in the case before me, when considering whether there is material which can be perceived to be comment, as distinct from fact, but *based upon stated fact*, to remember that the viewer sees and hears the material simultaneously, and only once." (emphasis added)

Secondly, the "ordinary" recipient at whom the defendant here was aiming is to be identified remembering that the defendant was using a commercial television channel to broadcast in prime time a brief promotion of a television programme to be viewed at prime time.

38 *"The new Keogh facts"*. This statement is a statement that new facts had emerged in the Keogh case. Whether or not new facts had emerged in the Keogh case is a question of fact, not opinion: either they had or they had not. And the proposition that new facts had emerged is not put as a deduction or conclusion from other facts: for the statement that there were new facts in the Keogh case is a statement that there were facts which the public did not already know and which would be described to them for the first time if they watched the programme being promoted by the promotion. Like the second and third statements, this statement is not said to be a matter of "opinion", "comment", "conclusion", "deduction" or "observation" from which a reader might infer that it was a matter of comment, not fact.

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41 *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 302 per Evatt J.

42 *London Artists Ltd v Littler* [1969] 2 QB 375 at 398 per Edmund Davies LJ.

43 *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1 at 40.

39 *"The evidence they kept to themselves".* Although it is not clear to whom the word "they" referred, the simultaneous showing of the plaintiff's picture suggests that it must have referred to a class which included the plaintiff. To say that the plaintiff kept evidence to himself is to say that he deliberately concealed it. Whether he did is a question of fact. Fletcher Moulton LJ said that in an imputation that certain plaintiffs had "dishonestly" and "corruptly" supplied a newspaper with information, the words "dishonestly" and "corruptly" were[44]:

> "not comment, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that, in alleging that the defendant 'fraudulently represented', he was indulging in comment. By the use of the word 'fraudulently' he was probably making the most important allegation of fact in the whole case."

Similarly, to allege that the plaintiff did not give certain evidence because he deliberately concealed it is to state a fact. And in *Davis v Shepstone*[45] Lord Herschell LC said:

> "[T]he distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

To say of an expert witness called by the prosecution in a murder trial that he concealed evidence in the circumstances pleaded is not to criticise his acknowledged or proved acts; it is to assert that he has been guilty of a particular act of misconduct. And the "evidence they kept to themselves" is in the same category as "the new Keogh facts" – that is, the statement is not a deduction from other facts, but a reference to evidence which the public did not already know and which would be described to them if they watched the programme being promoted.

40 *"The evidence changed from one Court to the next".* This too is a statement of fact. Its merits are tested by comparing what testimony was given or what documents were tendered in one case with the testimony and documents in another. The statement, preceded as it is by reference to the "new Keogh facts", suggests that the changes in question would be described in the

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44 *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 320.

45 (1886) 11 App Cas 187 at 190.

programme when viewed, would come as a revelation to viewers, and would be inferred from other already known facts.

41 *"The data, dates and documents that don't add up"*. Unlike the other three allegations, this may be more than a statement of fact. Attempting to "add up" the "data, dates and documents" suggests a process of evaluation and judgment. However, in par 2(r) of the notice of cross-appeal the plaintiff contended that "paragraphs 3.1-3.4 constitute comments inextricably intermingled in the publication with factual matter". The plaintiff is here relying on Fletcher Moulton LJ's injunction in *Hunt v Star Newspaper Co Ltd*[46]:

> "[C]omment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment ... The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion

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46 [1908] 2 KB 309 at 319-320. The second to fourth sentences quoted were approved soon after, in 1911, in the "Libel and Slander" title of *Halsbury's Laws of England*, 1st ed, vol 18, par 1285, n (e); the authors were Sir Rowland Vaughan Williams and A Romer Macklin. The passage was also given speedy approval by Veeder, "Freedom of Public Discussion", (1910) 23 *Harvard Law Review* 413 at 419-420. The passage was later approved in *Myerson v Smith's Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20 at 27 per Ferguson J (Cullen CJ and Gordon J concurring); *Thompson v Truth and Sportsman Ltd (No 4)* (1930) 31 SR (NSW) 292 at 299 per Ferguson J; *Thompson v Truth and Sportsman Ltd (No 4)* (1932) 34 SR (NSW) 21 at 24-25 per Lords Tomlin, Thankerton and Macmillan and Sir Lancelot Sanderson; *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 178 per Davidson J; and *London Artists Ltd v Littler* [1969] 2 QB 375 at 395 per Edmund Davies LJ. It was accepted as correct by Lord Porter in *Kemsley v Foot* [1952] AC 345 at 359-360, with the qualification that Fletcher Moulton LJ "had not to consider whether the facts must be set out in full or whether a reference to well known or easily ascertainable facts was a sufficient statement of those relied on", and hence was saying nothing about that issue. The passage is quoted and accepted as correct in *Gatley on Libel and Slander*, 10th ed (2004), par 12.11. See also *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 531-532 per Jordan CJ ("facts ... as things distinct from the opinions"); *Orr v Isles* (1965) 83 WN (Pt 1) (NSW) 303 at 312 per Walsh J ("if severable") and 329 per Taylor J ("must not be ... mixed up with the facts").

> purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses ... Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment."

And in *Smith's Newspapers Ltd v Becker*, Evatt J, speaking of a newspaper article containing a heading "German Quack runs riot on the Murray Flats", said[47]:

> "[S]o fortunate an avenue of escape via fair comment will seldom, if ever, be open to a newspaper which uses defamatory headlines or headings, without making it quite clear that a mere expression of opinion is being announced to the world, upon the basis of the facts to be stated in a subjoined article. Streamer headlines, the intermingling of facts with actual or possible expressions of opinion and screaming posters are features of this age of industrialism, and praise or blame is no concern of ours. But the legal defence of fair comment will very rarely protect defamatory matter contained in such journalism, not because the motives of the proprietors are mercenary (resembling those of all other industries), but because of the impossibility of achieving sensations, and still effecting a clear separation of the facts from the defamatory expressions of opinion."

42 The process of characterising the statement is not made easier by its obscurity. It is not clear whether it is said that there are inconsistencies between the data, dates and documents (and if so whether they are already known to viewers, or whether they are in the category of the "new Keogh facts"), or whether, although the data, dates and documents are consistent, they are incapable of proving Mr Keogh's guilt, or whether there is a mixture of these contentions. This obscurity strongly suggests that while there may be a comment – an opinion, an evaluation, a judgment, an ultimate inference – being asserted, it is impermissibly mixed up and intermingled with factual material.

43 *The four sentences taken together.* To this point the four sentences making up the promotion have been analysed separately, but the same conclusion would follow if they are taken together. The defendant submitted that the

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47 (1932) 47 CLR 279 at 303-304.

imputation of which the plaintiff complained arose not from the express words of the four sentences, but as a conclusion, judgment or inference from some or all of the four sentences. It was said that if it arose it was an "implied statement of deliberate concealment of evidence". There are two flaws in this submission. First, the plain meaning of the second sentence in particular is identical with the imputation: the imputation thus does not depend on any process of implication from the context and circumstances. Secondly, even if the imputation did depend on a process of implication, it remains the case that facts and comment are closely and inseverably intermingled in the publication.

44 Thus the statements pleaded in pars 3.1-3.4 of the further amended defence, whether taken separately or together, are not comments. On these grounds pars 3.1-3.4 of the further amended defence should be struck out, and with them their supporting allegations in pars 3.5-3.39.

Are the facts on which the supposed comment is alleged to be based sufficiently identified?

45 *Classification of the fair comment rules.* It is often said that in addition to the rule, considered in the preceding section, that the fair comment defence does not apply to material unless it is in truth comment rather than fact, there is a rule 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"[48]. That is, the alleged comment must be sufficiently linked to facts being commented on by reason of those facts being stated in the publication containing the comment, or being referred to in it, or being notorious[49]. Justifications have been offered for the first rule which are compatible with, but distinct from, those offered for the second. One justification for the first rule is that the law, in striking a balance between the plaintiff's interest in reputation and

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48 *Pryke v Advertiser Newspapers Ltd* (1984) 37 SASR 175 at 192 per King CJ.

49 An example of the rules being separately stated is *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 at 347 per Lord Nicholls of Birkenhead NPJ. See also *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 327 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ and 333 and 347-351 per McHugh J; *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 182 per Reynolds JA ("Even though a statement may be in form a comment, it cannot properly be regarded as such unless the facts or matter on which it is based is stated or sufficiently indicated").

competing interests in free speech, allows much more freedom to defendants who make defamatory comments than to those who publish untrue defamatory facts[50]:

> "To prohibit criticism in matters of public interest unless the critic could vouch the truth in fact of his comment would be incompatible with the principles of popular government. Abuses might exist; there might be misconduct on the part of public men; there might be extravagance and corruption; yet no person would venture to speak. Hence the law protects and encourages the interchange of opinion so vital to the conduct of popular government, even though others may believe, and it may subsequently appear, that the imputation was in fact mistaken and unjust."

While "[f]air comment cannot be made a cloak for defamatory misstatements of fact", it is the case that a "great deal of latitude is permitted to those who engage in criticism of the conduct and character of persons in the public arena"[51]. One justification for the second rule is that given by Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd*[52]: "[A]ny injustice ... will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based." "When the facts are truthfully stated, comment thereon, if unjust, will fall harmless, for the former furnish a ready antidote for the latter."[53] Further, 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"[54]. They could conclude that "the writer may by his opinion, libel himself rather than the subject of his remarks"[55]. Another justification for the second rule is that if

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50 Veeder, "Freedom of Public Discussion", (1910) 23 *Harvard Law Review* 413 at 416.

51 *Pryke v Advertiser Newspapers Ltd* (1984) 37 SASR 175 at 191 per King CJ.

52 [1908] 2 KB 309 at 319, quoted above at [41].

53 Veeder, "Freedom of Public Discussion", (1910) 23 *Harvard Law Review* 413 at 420. To "state accurately what a man has done, and then to say that in your opinion such conduct is dishonourable or disgraceful, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well-founded or not": *Christie v Robertson* (1889) 10 NSWLR 157 at 161 per Windeyer J.

54 *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 327 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

55 *Popham v Pickburn* (1862) 7 H & N 891 at 898 [158 ER 730 at 733] per Wilde B.

the underlying facts are not referred to the reader, the reader "will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him"[56]. That is, "if the facts are not known, the opinion carries with it the implication of facts which will justify it"[57].

46 It is sometimes suggested that the search for linkage between the supposed comment and the facts commented on is relevant not only to the second rule, but also to the first. On one view, a lack of linkage is a factor which may support the conclusion that the material is not comment. Thus in *Petritsis v Hellenic Herald Pty Ltd* Reynolds JA said that the factors which are relevant to deciding whether a publication is fact or comment include "the relationship between the material relied upon and the alleged comment"[58]. On this view, the fact that material fails to satisfy the second rule may be a sign that it does not satisfy the first either: for the fact that there is no apparent link between the supposed comment and any facts may be explained by the absence of any facts to be linked, leaving the supposed comment as in reality a factual statement. A more extreme view is that that relationship is not merely a relevant factor, but essential. Thus in *Crawford v Albu* Bristowe J said[59]:

> "[T]he allegation must appear and be recognisable to the ordinary reasonable man as comment and not as a statement of fact and for this purpose it is necessary that the facts intended to be referred to *should be clearly identified. They need not be set out. They may be merely referred to*." (emphasis added)

It follows from the words "for this purpose" that if there are no facts clearly identified, the supposed "comment" is not comment, but fact. This latter approach, which tends to collapse the two rules into one, was tentatively advocated by the defendant. It is not necessary to decide whether this submission is correct, for whether there are two rules or one, in this case the

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56 *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319 per Fletcher Moulton LJ, quoted above at [41].

57 Harper and James, *The Law of Torts*, (1956), vol 1, §5.28 at 459.

58 [1978] 2 NSWLR 174 at 182.

59 1917 AD 102 at 105. Similarly, in *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 532 Jordan CJ said: "A statement of opinion, if made to a person who has not had brought to his mind the *facts* on which it is based, is a statement of fact and not a comment." (emphasis added)

material claimed by the defendant to be fair comment does not satisfy any of them.

47 *The majority in Pervan's case.* For Australia, the rule that the facts on which the supposed comment is alleged to be based must be sufficiently identified was stated in *Pervan v North Queensland Newspaper Co Ltd*[60]. Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ posed the following question about s 377(8) of the *Criminal Code* (Q)[61]:

> "Is the protection under that sub-section for comment which is fair only available when the *facts* on which the comment is based are indeed true and *stated, referred to or notorious* to those to whom the matter is published?" (emphasis added)

They answered that question by saying that s 377(8) did not depart from the defence of fair comment as it exists at common law. In a passage referred to below as "the first passage", they said that that defence[62]:

> "is not lost by the absence of a statement of the *facts* on which the comment is based provided ... the *facts* on which the comment is based are *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". (emphasis added)

Their answer to the question posed was thus in the affirmative: the fair comment defence was not available unless the facts on which the comment was based were "stated, referred to or notorious to those to whom the matter [was] published". Their reasoning depends on giving the same answer to the question if asked

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60 (1993) 178 CLR 309 at 316.

61 Section 377(8) provided:

> "It is a lawful excuse for the publication of defamatory matter –
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> ...
>
> (8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair."

62 (1993) 178 CLR 309 at 327.

about the common law. The reason they gave for that state of affairs was: "If the publication of defamatory matter is to be excused as fair comment under s 377(8), the reader must be enabled to judge for himself or herself whether it is fair."[63] The reason so stated in what will be called "the second passage" has been repeatedly given as the basis for the common law rules relating to the fair comment defence[64].

48 The first passage from *Pervan's* case just quoted cited a common law authority, *Kemsley v Foot*[65]. The part of Lord Porter's speech in that case referred to by that citation began with the statement: "The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action ...". The majority in *Pervan's* case, by their repeated use of the words "the facts" in the first passage, revealed that they understood Lord Porter at that point in his speech to be using the words "substratum of fact" to mean "the facts". Lord Porter then said[66] his view was "well expressed" in the following quotation from *Odgers on Libel and Slander*[67]:

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63 (1993) 178 CLR 309 at 327.

64 Thus Fletcher Moulton LJ gave that reason in the third to sixth sentences quoted above from his much approved judgment in *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319-320, quoted above at [41]. See, for authorities approving what he said, n 46. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201, Lord Nicholls of Birkenhead said:

> "Readers and viewers and listeners can make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and which, expressly or implicitly, indicate in general terms the facts on which they are based."

He repeated that view in *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 at 347, 352 and 353. In *Kemsley v Foot* [1952] AC 345 at 356-357 Lord Porter approved a passage from *Odgers on Libel and Slander* advancing that reason in a portion emphasised in the quotation from it below at [48]. See also [45] above.

65 [1952] AC 345 at 356.

66 [1952] AC 345 at 356. This quotation from *Odgers* continues onto the next page, but the majority in *Pervan's* case did not refer to that material.

67 6th ed (1929) at 166-167.

> "Sometimes ... it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful', this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out he identifies the conduct on which he comments by a clear reference. In either case, the defendant *enables his readers to judge for themselves how far his opinion is well founded*; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth.
>
> The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference *without the facts on which it is based*, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment." (emphasis added)

49 According to the propositions which are stated in the first passage by the six majority Justices in *Pervan's* case, and which are supported by their reference to *Odgers*, 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 (ie 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". Those propositions are supported by other

authority in Australia[68], England[69], South Africa[70], Hong Kong[71] and the United States[72].

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68 See the emphasised parts of the passages quoted above from *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 531-532 (see [35]) and *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1 at 40 (see [37]). See also *Myerson v Smith's Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20 at 26-27; *Cole v The Operative Plasterers Federation of Australia (NSW Branch)* (1927) 28 SR (NSW) 62 at 67; and *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699 at 704.

69 See the emphasised parts of the passages quoted from *O'Brien v Marquis of Salisbury* (1889) 6 TLR 133 at 137 (see [35]); *Brent Walker Group Plc v Time Out Ltd* [1991] 2 QB 33 at 44 (see [35]); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201 (see [52]).

70 See the emphasised part of the passage quoted above at [46] from *Crawford v Albu* 1917 AD 102 at 105.

71 *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 at 347 per Lord Nicholls of Birkenhead NPJ: "[T]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded."

72 It is desirable to concentrate on the American position before the influence of *New York Times Co v Sullivan* 376 US 254 (1964) pushed United States authority into a different framework of thinking. *Restatement of the Law of Torts*, (1938), vol 3, §606 required that comment be on "a true or privileged statement of fact" or "upon facts otherwise known or available to the recipient as a member of the public". Comment (b) said: "the facts upon which the opinion is based must be stated or they must be known or readily available to the persons to whom the comment or criticism is addressed". Section 606 has frequently been applied: eg *Hoan v Journal Co* 298 NW 228 at 236 (Wis, 1941); *Kinsley v Herald & Globe Association* 34 A 2d 99 at 102 (Vt, 1943); *Fisher v Washington Post Co* 212 A 2d 335 (DC App, 1965). There is other authority to the same effect: *Cohalan v New York Tribune Inc* 15 NYS 2d 58 at 61 (NY Sup, 1939); *A S Abell Co v Kirby* 176 A 2d 340 at 348 (Md, 1961). In *Eikhoff v Gilbert* 83 NW 110 at 113 (Mich, 1900), Hooker J (Montgomery CJ and Long J concurring) said that the material must afford "an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not". The same position is supported by writers, for example, Baker, "Libel from Comment on Facts Generally Known", (1963) 23 *Maryland Law Review* 76 at 80; Harper and James, *The Law of Torts*, (1956), vol 1, §5.28 at 458-459; Thayer, "Fair Comment as a Defense", (1950)

(Footnote continues on next page)

50 An historian of the fair comment rule[73] has concluded that those propositions were made explicit for the first time (after being implicit in earlier authority) as long ago as 1889[74]. That historian saw this development as important, for in protecting only publications which "set out their premises explicitly", it increased the ease with which persons exposed to the publications could engage with them, it increased the significance given to reasoning and analysis, and it thus "both imposed and encouraged a minimum standard of reasoned debate"[75].

51 *The defendant's submissions on the construction of Pervan's case.* However, the defendant submitted that the reading just given to *Pervan's* case rested on a misconstruction of the first passage in *Pervan's* case. It submitted that that passage meant only that it "is enough that the subject matter, or factual substratum, of the comment" be "notorious or sufficiently indicated". The purpose of the supposed rule was to indicate to the reader, hearer or viewer merely that what was said was an opinion; to adhere to the stricter rule applied by the plaintiff in order to achieve a wider purpose, namely to receive sufficient factual material to enable an assessment of whether the opinion was right or wrong, would be unduly damaging to "the right of free expression". The defendant contended that the construction it urged was supported by another passage in the majority reasoning, by McHugh J's reasoning in his dissenting judgment in *Pervan's* case (which the defendant argued was not inconsistent with that of the majority), and by *Kemsley v Foot* (on which McHugh J's reasoning rested). It also submitted that that construction accorded with the view of Eady J in *Lowe v Associated Newspapers Ltd*[76]. It will be seen, then, 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.

Wisconsin Law Review 288 at 289; Titus, "Statement of Fact Versus Statement of Opinion – A Spurious Dispute in Fair Comment", (1962) 15 *Vanderbilt Law Review* 1203 at 1239-1240. Despite what were plainly extensive researches, the defendant cited no American case which is to the contrary of the test stated by the majority in *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 327.

73 Mitchell, *The Making of the Modern Law of Defamation*, (2005) at 179.

74 *O'Brien v Marquis of Salisbury* (1889) 6 TLR 133 at 137.

75 Mitchell, *The Making of the Modern Law of Defamation*, (2005) at 179.

76 [2007] QB 580 at 588-600 [21]-[60].

52 *Lowe v Associated Newspapers Ltd.* To some extent these submissions, and the analysis in *Lowe v Associated Newspapers Ltd* on which they are based, pose a false issue. The question is not, as some passages in *Lowe's* case suggest[77], whether all the facts relied on to support the comment must be expressly stated in the published material. Thus the principal object of the attacks made by counsel for the defendant and upheld by Eady J in *Lowe's* case, namely Lord Nicholls of Birkenhead's approach, did not assert any proposition of that kind. In *Reynolds v Times Newspapers Ltd* Lord Nicholls required only that the defamatory statements "*expressly or implicitly* ... indicate *in general terms* the facts on which they are based"[78]. Similarly, in *Cheng v Tse Wai Chun*, Lord Nicholls said only that "the comment must *explicitly or implicitly* indicate, *at least in general terms*, what are the facts on which the comment is being made"[79]. The question is rather whether the proposition stated by the majority in *Pervan's* case is correct, namely that the facts on which comment is supposedly based are "stated, referred to or notorious". That is a proposition compatible with Lord Nicholls' approach. It also accords with the following agreed statement by English counsel as late as 2002[80]:

> "[I]t is necessary ... to decide whether the hypothetical person could honestly express the commentator's views on the assumption that he knows (a) facts accurately stated in the article, (b) facts referred to in the article and (c) facts that are so well known that they may be described as general knowledge".

53 Eady J recorded counsel for the defendant in *Lowe's* case as contending that that was "an illustration of how deeply the heresy has taken hold in the minds of practitioners and judges; that is to say, the mistaken belief (as she submits) that it is a necessary ingredient in a defence of fair comment that the facts upon which the comment was based should be set out, at least in general terms, in the words complained of"[81].

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77 For example [2007] QB 580 at 596 [42]. A similar extreme proposition is put up to be demolished by Lord Ackner in *Telnikoff v Matusevitch* [1992] 2 AC 343 at 361, in a passage relied on by the defendant.

78 [2001] 2 AC 127 at 201 (emphasis added). See n 64.

79 (2000) 3 HKCFAR 339 at 347 (emphasis added). See n 71.

80 *Branson v Bower* [2002] QB 737 at 748 [30]. Agreements by counsel are not authorities and do not make the law, but they can provide lucid statements of it.

81 *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 591 [25].

54 The conclusion reached by Eady J is, with respect, not wholly clear. He rejected the submissions of counsel for the plaintiff and upheld the pleading of fair comment on which the defendant was relying. He quoted Lord Porter's statement that the key question was: "Is there subject-matter indicated with sufficient clarity to justify comment being made?"[82] He contended that *Kemsley v Foot* held "that comment may be made, if the matter is already before the public, without setting out the facts on which the comment is based – provided the subject matter of the comment is plainly stated"[83]. Later he said that *Kemsley v Foot* held that "a defendant is not precluded from pleading extrinsic facts in support of a plea of fair comment"[84]. He also said[85]:

> "[T]he readers need to be able to distinguish facts from comment for the defendant to be permitted to rely upon the defence of fair comment. A bald comment, made in circumstances where it is not possible to understand it as an inference, is likely to be treated as an assertion of fact which will only be susceptible to a defence of justification or privilege.
>
> Where facts are set out in the words complained of, so that the reader can see that an inference or opinion is based upon them, then the defence of fair comment will be available; but the defendant is not tied to the facts stated in the article. He may invite the jury to take into account extrinsic facts 'known to the writer' as part of the material on which they are to decide whether a person could honestly express the opinion or draw the inference.
>
> Whilst it is necessary for readers to distinguish fact from comment, it is not necessary for them to have before them all the facts upon which the comment was based for the purpose of deciding whether they agree with the comment (or inference). I draw that conclusion with all due diffidence, since Lord Nicholls has twice expressed the opposite view, but it does seem consistent with principle and, in particular, with the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment

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82 *Kemsley v Foot* [1952] AC 345 at 357: see *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 596 [42].

83 *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 596 [42].

84 *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 599 [55].

85 *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 599-600 [55]-[57].

> without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions. It is difficult to see why it should matter whether a reader agrees; what matters is whether he or she can distinguish fact from comment."

Of course it does not "matter whether a reader agrees": the point is that material which the reader perceives only to be a comment will be less damaging than material which the reader may take to be a factual assertion, particularly if the comment is not supported by the facts.

55 To this point Eady J's reasoning appears to accept in full the defendant's attack on the "heresy" reflected in the agreed statement of English counsel and in Lord Nicholls' approach. On that reasoning all that matters is that a subject matter be indicated – not a substratum of facts, let alone precisely identified facts. However, Eady J at once retreated from that conclusion by saying that sometimes the process by which a reader can distinguish fact from comment "will be possible, as it was in *Kemsley v Foot*, without any facts being stated expressly, because either they are referred to or they are sufficiently widely known for the readers to recognise the comment as comment"[86]. He gave three examples of these distinctions[87]:

> "(i) the minister is unfit to hold public office because he lied to the House of Commons; (ii) the minister is unfit to hold public office because of what he said in the House last week; (iii) Mr A (who is widely known to have pleaded guilty to perjury) is unfit to hold public office. Obviously, in the first example the *fact* is stated, in the second *it* is referred to, and in the third the *facts* are notorious." (emphasis added)

So to reason is to adopt the approach taken by the majority in *Pervan's* case, not to reject it, for it concentrates on "facts", not "subject matter".

56 *The third passage in Pervan's case.* Whatever the present state of English law, the defendant's submissions in relation to the majority reasoning in *Pervan's* case centred on what will be called below "the third passage" – the majority's statement that they had arrived at[88]:

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86 *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 600 [57].

87 *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 600 [58].

88 (1993) 178 CLR 309 at 330.

> "a rejection of the appellant's final contention that, if the whole of the publication consisted of comment, there were *no facts* relevantly stated or indicated on which it was based. There was a clear *substratum of fact* on which the publication was based, consisting of the statements made in Parliament, and that is all that is required." (emphasis added)

The "statements made in Parliament" were statements alleging that the appellant, a member of a Shire Council, had misapplied the Council's cyclone relief funds and had been "feathering his own nest". The respondent newspaper published an advertisement for a public meeting in the following terms[89]:

> "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 8 pm."

By "substratum of fact" the majority meant the statements in Parliament, which were notorious, having been the subject of a fair report by the newspaper which had published the advertisement and of replies by the Council, various councillors and the appellant's brother, to the allegations published by that newspaper[90] – a process described as "the subsequent newspaper debate"[91]. That is, "substratum of fact" meant only "facts". The two expressions were used indifferently in the two sentences making up the third passage. There is thus nothing in the third passage, relied on by the defendant, which is inconsistent with the first passage, relied on by the plaintiff.

57 *McHugh J's dissenting judgment in Pervan's case.* The defendant also contended that the explanation of the defence of fair comment in McHugh J's dissenting judgment was not inconsistent with the majority reasoning. The passage on which the defendant relied began with a statement that a defamatory comment may be based on facts "not published in the article". It continued[92]:

> "This is often the case where a play or sporting spectacle is being reviewed, but it is certainly not limited to plays or spectacles. To raise the defence of fair comment in this class of case, it is sufficient that either

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89 (1993) 178 CLR 309 at 310.

90 (1993) 178 CLR 309 at 314 and 332.

91 (1993) 178 CLR 309 at 318.

92 (1993) 178 CLR 309 at 340.

> expressly or by implication the defendant has identified the subject matter of the comment. 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[93]. The difference between identifying the subject matter or substratum of fact of the comment and the facts which justify the comment is vital. The comment must indicate the subject matter or substratum of fact of the comment, but the defence does not fail because the publication does not indicate the individual facts which are the basis of the comment. It is the 'substratum' of fact[94] not the individual facts which must be identified. If a critic states that a professional footballer played badly and the jury holds that the statement is comment, the critic is entitled to rely on any fact which will support that comment even though the fact is not stated in the article or notorious and no reader saw the game."

The passage continued[95]:

> "The distinction between the subject matter or the substratum of fact and the facts which justify the comment is drawn out in two illuminating passages in the speech of Lord Porter in *Kemsley v Foot*.
>
> > The first states[96]:
> >
> > 'the inquiry ceases to be – Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes – Is there subject matter indicated with sufficient clarity to justify comment being made? and was the comment actually made such as an honest, though prejudiced, man might make?'

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93 *Kemsley v Foot* [1952] AC 345 at 358, 362.

94 *Kemsley v Foot* [1952] AC 345 at 356.

95 (1993) 178 CLR 309 at 340-342.

96 [1952] AC 345 at 357.

The second states[97]:

> 'In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion, it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; but where, as here, they are contained only in particulars and are not published to the world at large, *they are not the subject matter of the comment but facts alleged to justify that comment*.
>
> In the present case, for instance, *the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press*. The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea.' ([McHugh J's] emphasis.)

Equally illuminating is a passage in the speech of Lord Oaksey[98]:

> 'A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and in order to do so much be entitled to allege and attempt to prove facts which he contends justify the comment. Whether the facts alleged are satisfactorily proved or not, it will still be for the jury to say whether they consider that the comment in the circumstances proved might have been made by an honest man.'

Fair comment in the *Kemsley* situation is very different from what may be called the conventional case of fair comment. In the conventional

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97 [1952] AC 345 at 357-358. Lord Tucker expressly agreed (at 362) with this passage in Lord Porter's speech.

98 [1952] AC 345 at 361.

> case, the basis of the comment appears in the publication. The reader is able to judge whether the facts justify the comment. Once the defendant proves the facts which are the basis of the comment, that person is entitled to the benefit of the defence unless the opinion expressed by the defendant was not honestly held. But in a situation such as that in *Kemsley*, the reader does not know what facts were the basis of the comment. Unless litigation ensues, the reader will never know what particular facts the defendant had in mind. Moreover, as the second passage from the speech of Lord Porter makes plain, the defence may succeed even though some or most of the 'facts' which the defendant had in mind were untrue.
>
> If the facts forming the basis of the comment always had to be drawn to the reader's attention, effective comment on many subjects would be frustrated. No doubt, it is for this reason that the common law provides for a defence of fair comment if the subject matter or 'substratum of fact' of the comment is sufficiently indicated without requiring that the particular facts justifying the comment be set out or indicated. The plaintiff's protection is found in the rule that the defence will fail unless the defendant proves the truth of sufficient facts to justify the comment."

58 The defendant also pointed out that although Lord Porter quoted *Odgers* as saying "the defendant enables his readers to judge for themselves how far his opinion is well founded"[99], McHugh J had said that the later passages from Lord Porter which he had quoted "make it plain that his Lordship was not saying that the facts which justify the comment must be placed before the reader. Quite the contrary."[100]

59 Several points must be made about the defendant's reliance on these passages.

60 First, McHugh J's comments on the common law position were dicta. The case turned on s 377(8) of the *Criminal Code* (Q), and McHugh J held that s 377(8) differed from the common law[101].

61 Secondly, although McHugh J's account of the common law followed closely the reasoning in *Kemsley v Foot*, recourse to the written arguments, and the transcript of the oral arguments, in *Pervan's* case confirms what the reported

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99 See above at [48].

100 (1993) 178 CLR 309 at 345.

101 (1993) 178 CLR 309 at 342.

arguments suggest – that counsel did not refer to *Kemsley v Foot*. The first ground of the notice of appeal in that case was:

> "The Full Court erred in holding that for the purposes of [s 377(8)] it was not necessary for the [respondent] to establish that so much of the defamatory publication as consisted of comment had to be true or based on true facts stated."

The appellant contended that "fair comment" in s 377(8) "imports the common law requirement that fair comment be an honest or genuine opinion expressed with regard to facts that are truly stated or identified". The respondent contended that "fair comment" in s 377(8) did not cause "all the requirements of the common law defence of fair comment [to] be imported into [s 377(8)], including the requirements of proving that any comment be based on facts truly stated". The arguments of the parties do not reveal any controversy between them in relation to the content of the common law rule about facts being "stated or identified" or "stated". It is thus not surprising that they did not refer to any common law case bearing on that question, and in particular did not refer to *Kemsley v Foot*.

62 Thirdly, it may be true that facts which are not stated, referred to or notorious in reviews of plays or sporting spectacles can form the basis of a fair comment defence – perhaps because it is not easy to break up the relevant parts of the play or sporting spectacle into particular facts, or perhaps because the play or sporting spectacle is identified and its promoter holds it out for comment. 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* 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. Lord Porter in *Kemsley v Foot* did not suggest that the principle relevant to plays and spectacles extended to all publications. He said[102]:

> "If an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment ...
>
> The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is in general conducted, the subject-matter upon which criticism is made has been submitted to the public, though by no means all those to whom

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102 [1952] AC 345 at 355-356.

> the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter upon which the comment is founded."

63 But, subject to an argument put by the defendant to be considered below[103], the present circumstances are very remote from the problems arising with plays, sporting spectacles, newspapers or anything like them. The defendant submitted that "it is difficult to see the rationale for confining this category of case in that way". 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. It would also be necessary to consider submissions by the defendant that the paramount interest in free speech was unduly restricted by that approach, particularly in relation to very short broadcasts like the promotion, and submissions seeking to identify the precise rationale of particular rules with a view to ensuring that the rules conform to those rationales. 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.

64 *The specific use made by the defendant of McHugh J's analysis.* The defendant sought to make use of McHugh J's analysis of the common law in the following way. It submitted that the majority "reasons (like those of McHugh J) appear to indicate an endorsement of the approach taken in *Kemsley v Foot*". It referred to the first passage from the majority judgment quoted above[104] and said:

> "While their Honours referred to a requirement that the 'facts' be sufficiently indicated or notorious, the passage cited from the speech of Lord Porter in *Kemsley v Foot* uses the term 'substratum of fact'. (And, as McHugh J explained, the balance of their Lordships' speeches in *Kemsley v Foot* make it clear that the common law only requires that the substratum of fact, or subject matter, of the comment be sufficiently indicated or notorious.) Further, when the majority returned to this issue later in their reasons [in the third passage], they decided the issue on the basis that the 'substratum of fact' (as opposed to the 'facts') had been made clear.[105]"

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103 See [70].

104 At [47].

105 (1993) 178 CLR 309 at 330.

65 The defendant also submitted that the suggestion by the majority in *Pervan's* case that readers or viewers must be in a position to judge for themselves whether the comment was well founded had its origins in the extract from *Odgers* contained in Lord Porter's speech in *Kemsley v Foot*. It submitted:

> "For the reasons explained by McHugh J ... this sentence cannot be reconciled with the balance of the speeches ... in [*Kemsley v Foot*], and it follows that Lord Porter cannot have intended to endorse that particular sentence from *Odgers*.
>
> Given the apparent approval by the majority in *Pervan* of the decision in *Kemsley v Foot*, the majority's reference to a reader being able to judge the fairness of the comment cannot be taken literally, or as expressing a universal requirement. It is unlikely that their Honours intended to depart from the effect of *Kemsley v Foot* in this way."

66 These arguments must be rejected. The reasoning just quoted seems to be:

(a) despite Lord Porter's stated approval of the criticised sentence in the *Odgers* passage, that sentence is irreconcilable with the rest of *Kemsley v Foot*, and so Lord Porter did not in fact approve it;

(b) therefore the approval given by the majority in *Pervan's* case of the entire *Odgers* passage was in truth not an approval of the criticised sentence despite its summary and repetition.

Whatever the merit of step (a), step (b) does not follow from it – particularly since the criticised sentence in *Odgers* is in fact supported by much other authority[106].

67 In short, the citation by the majority in *Pervan's* case of a single page of Lord Porter's speech, most of which is a quotation from *Odgers*, cannot be taken as an adoption of all that Lord Porter said in other parts of his speech.

68 Nor can a passing reference to "substratum of fact" in the third passage amount to an adoption, as a general rule, of any principle that the facts on which the comment is based need not be "stated, referred to or notorious to those to whom the matter is published". First, that would contradict the answer which the majority gave to the question they isolated for determination in relation to s 377(8), for the answer they gave to the question posed about s 377(8) was the

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106 See n 64.

same as that which they gave in describing the common law: the facts on which the comment is based must be "stated, referred to or notorious". Secondly, for reasons given above[107], in the third passage the majority were using the expression "substratum of fact" to mean "facts". It would be peculiar to treat the meaning of the principle stated in the first passage as being controlled by reference to an expression, "substratum of fact", used only in the course of the application of the principle in the third passage, but not in the course of its statement in the first passage.

69 *Survival of the majority approach.* The defendant contended that what McHugh J said was a statement of the general law not limited to plays and sporting spectacles. It is not clear that it is to be read in that way. But even if it can be so read, it does not follow that it is either a guide to, or not inconsistent with, the majority approach. If the defendant's construction of the majority reasoning were sound, it would mean that the majority had concurred, without saying so, in an account of the common law relating to fair comment which, however much it might be supported by remarks in *Kemsley v Foot* on which they did not rely, was out of line with longstanding authority in many jurisdictions[108]. The majority would have changed the fair comment defence from one of fair comment on facts indicated and accurately stated into one of fair comment on indicated topics of public interest. To have made that change would have been to take a radical step not suggested as appropriate either by the main trends in the authorities or by any relevant principle. In these circumstances it is not possible to construe the majority as having taken any of these steps. The defendant's construction of what the majority said is not correct.

70 *Analogy with plays and spectacles.* Finally, the defendant submitted that the present case was analogous to plays or spectacles and should be governed by the special rules that apply to them. The defendant referred to what Lord Porter said about how playwrights, authors and composers submit their work to the public and invite comment[109]:

> "Not all the public will see or read or hear it but the work is public in the same sense as a case in the Law Courts is said to be heard in public. In many cases it is not possible for everyone who is interested, to attend a trial, but in so far as there is room for them in the court all are entitled to

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107 At [56].

108 See above at [49].

109 *Kemsley v Foot* [1952] AC 345 at 355.

> do so, and the subject-matter upon which comment can be made is indicated to the world at large."

This argument might call for close consideration if the imputation had been limited to what the plaintiff had done in court. But in large measure it was directed at what he had not done in court and at what he had done outside it, in the investigation stage – that is, it was directed to non-public events. Of the 20 paragraphs set out in pars 3.19-3.25 and 3.27-3.39 (par 3.26 having been abandoned), only eight relate to the behaviour of the plaintiff in court (as distinct from his behaviour outside the court and the behaviour of others in court). The defendant submitted that the forensic investigation was inextricably linked to the trial because "an aspect of the criticism is that in giving evidence in Court the [plaintiff] failed to disclose certain matters arising out of the investigation". That does not alter the fact that many of the matters alleged in pars 3.19-3.39 either had nothing to do with the plaintiff or had nothing to do with what could be observed of the plaintiff's conduct in court, and hence were quite unascertainable by viewers.

71 *The plaintiff's attack on Kemsley v Foot.* The plaintiff attacked the correctness of *Kemsley v Foot* on the ground that it extended a line of authority holding that where the defamatory material was criticism of literary, musical or artistic works which had been published or made available to the public, sufficient identification of the facts commented on could be found if the works were clearly identified in the publication even though they were not reproduced in it. The extension attacked by the plaintiff was an extension to holding, in relation to criticism of how well-known newspapers were conducted, that the facts were sufficiently identified by setting out excerpts from the newspapers and making adverse allegations about their inaccuracy, untruthfulness, faults of tone and improper dealing with the news reported in them. That attack of the plaintiff was designed to forestall the further extension which the defendant's submissions called for. The plaintiff pointed to what it described as language involving dangerous slides from "facts" to "substratum of fact" to "subject matter" or "topics"[110], and said that to embrace these slides generally would be to change the law very radically.

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110 An example discussed by the plaintiff is the first of the passages in Lord Porter's speech quoted by McHugh J in *Pervan's* case (1993) 178 CLR 309 at 340, quoted above at [57]. That passage was preceded by the words: "it was ultimately admitted on behalf of the appellant that the facts necessary to justify comment might be implied from the terms of the impugned article and therefore ...": *Kemsley v Foot* [1952] AC 345 at 357. It does not follow from the circumstance that the "facts" can legitimately be "implied" from the impugned publication that

(Footnote continues on next page)

72 The correctness of the plaintiff's attack need not be considered in this appeal. None of the three passages in the majority judgment in *Pervan's* case depended on any of these slides. They rest on the need for the facts on which comment is based to be "stated, referred to or notorious" – the facts, not a different thing labelled a "substratum of fact", a "subject matter" or a "topic". The law in Australia must be found in the majority judgment in *Pervan's* case, not in Lord Porter's speech. Since the defendant did not seek to have it overruled, it must be applied.

73 *Conclusion.* The factual material relied on in pars 3.19-3.39 of the further amended defence relates to the investigation of Anna-Jane Cheney's murder and Mr Keogh's criminal trials. First, if the four sentences pleaded in pars 3.1-3.4 of the further amended defence are, as the pleading alleges, comment, the promotion does not expressly state any facts on which that comment is being made. They do not identify the "evidence they kept to themselves", or any facts on which that statement is based. They do not specify the "data, dates and documents", or the discrepancies between them which prevent them from adding up. They do not say what the "new" facts are. They do not specify the "evidence" which changed or any facts on which that statement is based. Secondly, the four sentences do not identify, "by a clear reference" or otherwise, any facts, let alone those referred to in pars 3.19-3.39. Thirdly, it has not been shown that there are any notorious facts on which those four sentences can be understood as making comment. That there are no notorious facts is suggested by the statement: "The new Keogh facts". If they are new to viewers, and are only to be revealed when the programme being promoted is broadcast, they are not notorious. It is true that pars 3.15 and 3.16 of the "Particulars of Public Interest" refer to a television programme and a newspaper article voicing "a number of concerns regarding the conviction of Mr Keogh and, in particular, the forensic investigations and evidence of the plaintiff". But there is no allegation that those concerns were the matters referred to in the promotion. Paragraph 3.17 refers to a complaint to the Medical Board of South Australia about the plaintiff's conduct "in relation to his investigations and evidence in the Ms Cheney case", but this was not alleged to be notorious. So far as pars 3.19-3.39 refer to inadequacies in the plaintiff's investigations, they are not alleged to be notorious. And so far as pars 3.19-3.39 refer to errors in the plaintiff's evidence, while the trials took place in public, it is not alleged that those errors are notorious. Indeed the defendant accepted that at least some of the facts were not notorious: its

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the inquiry should shift from an inquiry into whether there are assertions of fact in the alleged libel to whether some "subject matter" has been indicated.

position was that they did not have to be notorious, and that it was sufficient that the "subject matter" was notorious.

74 It follows that pars 3.1-3.4 do not comply with the rules stated in *Pervan's* case. The facts which pars 3.19-3.39 alleged to be the facts on which the comments are based are not sufficiently indicated or notorious to enable the viewers who saw the promotion to judge for themselves how far the opinions expressed in the "comments" were well founded.

75 That conclusion is sufficient to lead to the conclusion that pars 3.1-3.39 should be struck out.

Is the meaning pleaded by the plaintiff relevant to the defence of fair comment pleaded by the defendant?

76 The plaintiff pleaded that the meaning of the promotion was that he "had deliberately concealed evidence from the trials of Mr Keogh". None of pars 3.18-3.39, 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, subject to one argument of the defendant to be considered later[111], not deliberate concealment. It was on this ground that the Full Court decided to order that pars 3.18-3.39 should be struck out: "The defence of fair comment must address the imputation pleaded."[112]

77 The defendant's argument rested on two propositions:

(a) unlike the position in New South Wales, under the now repealed *Defamation Act* 1974, s 9(2), which rendered each of the plaintiff's imputations a cause of action, at common law the cause of action lies in the words or matter published;

(b) the defence of fair comment "is not directed to meaning (let alone the plaintiff's imputation). Comment is concerned with the form of expression, that is, comment attracts protection because of the form in

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111 See [88]-[92].

112 *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462 at 480 [43] per Gray and Layton JJ.

which it is expressed. It follows logically that the defence of comment is, and should be, directed to the words or matter complained of, and not the imputations conveyed."

78 *Pleading does not meet defendant's criterion.* Even if the defendant is correct in arguing that it suffices for the defence of comment to be directed to the words complained of, the pleading does not meet that criterion. If the words referred to in par 3.2 of the further amended defence, "the evidence they kept to themselves", had not been used, the promotion would have been a very different and much less serious defamation. Paragraphs 3.5-3.39 do not allege any instance of the plaintiff keeping evidence to himself – that is, deliberately suppressing it. The defendant relied on pars 3.25.2, 3.26.1, 3.33.3, 3.35, 3.35.4, 3.35.15, 3.38.2 and 3.39.2. Paragraph 3.26.1 must be treated as abandoned, because the particulars given have been abandoned for the reason that the event referred to post-dated the broadcast. Paragraphs 3.25.2 and 3.33.3 do not allege deliberate suppression. Paragraph 3.35 alleges that the plaintiff "failed to adequately disclose the basis" for his exclusion of accidental drowning as a possible cause of death and par 3.35.4 alleges that "he knew that he had not excluded on any scientific basis" the possible causes of death which did not involve foul play. To allege a failure "adequately" to disclose leaves open the possibility of some disclosure. To allege that the plaintiff knew that he had failed to exclude matters "on any scientific basis" leaves open other possibilities. Neither paragraph alleges deliberate suppression. Paragraph 3.35.15 shares these characteristics of pars 3.35 and 3.35.4. Paragraphs 3.38.2 and 3.39.2 allege a failure by the plaintiff to disclose in evidence his failure to conform to certain aims and requirements, but they do not allege that the plaintiff was conscious of those aims and requirements, or of his failure to conform to them. One cannot deliberately suppress something unless one is aware of that thing, and turns one's mind to it at a time when it should be disclosed. Indeed in the end the defendant conceded that taken individually the paragraphs did not allege any deliberate failure to disclose.

79 *Flaws in defendant's criterion.* However, it is desirable to deal with the parties' arguments on the issue of principle[113].

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113 There is authority against the defendant's contention. It is contradicted by the following dictum of Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 528 [8]: "A plea of ... fair comment ... in respect of an imputation not pleaded by the plaintiff does not plead a good defence." See also *Moir v Flint* [2002] WASC 48 at [24] per McLure J.

80 One point about nomenclature should be made. Both the Full Court[114] and the parties spoke of the meaning which the plaintiff pleaded of the promotion as an "imputation". That is not an uncommon usage in discussing the common law defence of fair comment[115]. But in view of the fact that the cases in New South Wales on the *Defamation Act* 1974 apply the expression "imputation" – because it was the expression compelled by s 9 – it is desirable to avoid that expression when discussing the common law, which applies in South Australia.

81 One vice in the defendant's argument was that it consisted of, and relied largely on[116], statements asserting the desired conclusion but without any explanation of why that conclusion followed in principle. The fullest explanation of why the conclusion follows in the authorities on which the defendant relied appears in a case which does not involve the common law defence, but rather the defence given by the *Defamation Act* 1974 (NSW), Pt 3, Div 7. In *Petritsis v Hellenic Herald Pty Ltd*[117] Samuels JA said:

> "[A] defence of comment, accepting that the comment is defamatory, is not concerned with the precise nature of the defamatory meaning or imputation. It asserts that, whatever the defamatory character of the matter ... the words complained of are comment (within Div 7) and are, therefore, not actionable. The defence does not challenge that the matter has a defamatory meaning, or defamatory meanings; or what those meanings are. It is directed to the character of the vehicle by which those meanings, whatever they are, are conveyed; that is by a statement of fact or by a statement of opinion. It must, therefore, penetrate beyond the alleged meanings to the raw material of the actual words employed.
>
> In my opinion, a defence of comment under the 1974 Act must be directed, not to the imputations specified in the statement of claim, but to the matter as defined in s 9(1). It should identify those parts of the matter which the defendant accepts as defamatory and alleges to be comment ...

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114 *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462 at 480 [43] per Gray and Layton JJ.

115 See, for example, *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 253 per Buckley LJ.

116 For example, *Bob Kay Real Estate Pty Ltd v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 505 at 512 per Hunt J: "[T]he common law defence of fair comment was never directed to the imputation".

117 [1978] 2 NSWLR 174 at 193. See Reynolds JA's similar conclusion at 184.

> [The trial judge] may tell the jury that the defendant ... contends that the words said to carry the imputations are not statements of fact, but statements of opinion. And this is the issue which he may invite the jury first to consider; because, if the portions of the matter which allegedly give rise to the imputations specified amount to comment, then if that comment satisfies the provisions of Div 7, the defence is made good, subject to s 34(2). It is only if the jury rejects the defence that they need to examine the imputations. Whether the jury starts with comment, or with truth, their consideration of comment concerns the matter and not the imputations."

82 That passage ceased to represent the law in relation to the fair comment defence under the *Defamation Act* 1974 (NSW)[118]. In any event, Samuels JA had dealt with the common law position earlier when he said that the problem did not arise before 1974[119]:

> "The defendant pleaded fair comment either to 'the matter complained of which is defamatory of the plaintiff' (a defence of comment is, of course, a plea in confession and avoidance[120]), or to a specified portion of the matter complained of 'which is defamatory of the plaintiff'. In every case, the defence was pleaded to the matter alleged to be defamatory and not to the particular imputations which that matter was alleged to convey."

83 Here the defendant, after denying the meaning alleged by the plaintiff and denying that the promotion referred to the plaintiff, "[f]urther, or in the alternative", pleaded fair comment to the matter complained of which is defamatory of the plaintiff, namely the four sentences set out in par 4 of the statement of claim and pars 3.1-3.4 of the further amended defence. The issues set up by the pleadings are thus structured as follows. The plaintiff pleaded in par 5 of the statement of claim only one meaning – that the plaintiff had deliberately concealed evidence. The defendant denied that the promotion bore

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118 *David Syme & Co Ltd v Lloyd* [1984] 3 NSWLR 346 at 356-358 and 361; *Lloyd v David Syme & Co Ltd* [1986] AC 350 at 365; *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 470-471; *New South Wales Aboriginal Land Council v Perkins* (1998) 45 NSWLR 340; cf *Bob Kay Real Estate Pty Ltd v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 505.

119 *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 191-192.

120 *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 531 [per Jordan CJ: "The defence is one which assumes the defamatory nature of the matter complained of."]

that meaning. If the plaintiff were to fail to establish that the promotion bore that meaning or a meaning not substantially different, the trial judge would not have to go further and the proceedings would be dismissed. If the plaintiff's allegation were to succeed and the defendant's denial were to be rejected, the defendant's further and alternative plea of fair comment would have to be considered. There would be no disparity or difference between the "precise nature of the defamatory meaning" on the one hand and the "matter" or "the raw material of the actual words employed" on the other. The matter sued on – 28 words spoken while a picture of the plaintiff was displayed on the screen – would have been found to have had the meaning alleged, and the only question would be whether those 28 words, bearing that meaning, constituted fair comment. Hence the defendant's contention that in this case the meaning pleaded by the plaintiff is irrelevant to the defence of fair comment at common law is wrong. It is wrong because by the time the trial judge comes to consider the fair comment defence the question of meaning will have been decided adversely to the defendant. The meaning found is the comment to be scrutinised for its fairness. An initial question will be whether the ordinary reasonable viewer would have understood that the meaning found to have been conveyed was conveyed as comment[121]. Another question would be whether that meaning was objectively fair. Another would be whether it was based on true facts. Each of the questions must be answered by treating the comment as being the 28 words in the meaning which the court found. If the defendant's contention were not wrong, it would be open to the defendant to contend that the promotion bore some meaning other than the defamatory meaning which the trial judge had already found, which is impossible. What the Privy Council said in *Lloyd v David Syme & Co Ltd*[122], in a case on the *Defamation Act* 1974 (NSW), is equally applicable to the common law:

> "Comment must have a meaning, and ex hypothesi the [trier of fact is] proceeding on the footing that its meaning is defamatory in the sense of the pleaded imputations which have been found established."

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121 *Myerson v Smith's Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20 at 26; *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 296-297 and 302; *Bailey v Truth and Sportsman Ltd* (1938) 60 CLR 700 at 724-725; *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 464 and 469.

122 [1986] AC 350 at 365 per Lords Keith of Kinkel, Elwyn-Jones, Roskill and Griffiths.

Similarly, in *Pervan's* case[123] the majority said:

> "[A]t common law ... it is for the jury to decide whether what has been published is a statement of fact or an expression of opinion. It is only if the imputation is reasonably capable of being regarded only as fact or only as comment that the trial judge may take the question away from the jury."

Thus it is "the imputation" which must be "reasonably capable of being regarded ... only as comment".

84 The defendant's position depends on a distinction between the "raw material of the actual words employed" and their meaning. Words are, when used orally, sounds, and when used in writing, marks on paper or some other material. In some contexts words have significance independently of their meanings. If the question is whether a person is dumb, the fact that a witness heard that person speak words in a language which the witness cannot speak would be relevant, even though the witness did not understand their meaning. If the question is whether a piece of paper was blank or not, the fact that a person observes marks on it is relevant even though the person cannot say what those marks, being words, are because of illiteracy. Words arranged in a montage could be part of a work of visual art even though they are in a language unknown to viewers. But outside contexts of this kind, the only significance of words lies in their meaning. There is no relevant difference between the "raw material of ... actual words" and their meaning.

85 Another flaw in the defendant's position is that the defendant accepts, correctly, that the meaning of defamatory words is relevant to the fair comment defence in several ways: in determining whether the comment is fair; in determining the issue of malice, to which an absence of honest belief in the proposition stated is relevant; in determining whether the plaintiff's pleaded meaning was conveyed as a statement of fact or a statement of opinion; in determining whether the plaintiff's pleaded meaning and the defendant's comment relate to the same allegation; in determining whether the comment is based on facts which are true or protected by privilege, a question which cannot be answered without assessing what the comment means; and in determining whether the comment relates to a matter of public interest, which also depends on its meaning. It would be anomalous if the meaning of the comment is relevant in all these respects, but not relevant in an assessment of whether it responds to the meaning of the promotion pleaded by the plaintiff.

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123 (1993) 178 CLR 309 at 317 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

86 Finally, the defendant's submissions would lead to an injustice. In this case the defendant's submissions would lead to the conclusion that if the plaintiff establishes the meaning pleaded, he will have been accused of deliberately concealing evidence, while the defendant will escape liability by saying merely that he was incompetent and mistaken in various respects. There is a great gulf between displaying incompetence and deliberately concealing evidence.

87 For these reasons too pars 3.1-3.39 should be struck out.

Could the criticisms in pars 3.19-3.39 lead an honest person to think that the plaintiff had deliberately concealed evidence?

88 The defendant submitted that an "honest person, allowing for the fact that that person might be prejudiced and hold exaggerated or obstinate views, could, on the basis of the pleaded accumulation of such a large number of inconsistencies and inadequacies, hold the opinion that there had been some deliberate concealment on the part of the plaintiff".

89 This submission must be rejected.

90 First, the test propounded does not accord with classic statements of the law. Thus in *Goldsbrough v John Fairfax & Sons Ltd*[124] 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" (emphasis added). And in *O'Shaughnessy v Mirror Newspapers Ltd*[125] 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" (emphasis added). In final address it was submitted for the defendant that on appeal in that case the High Court said that "reasonableness was not a requirement of the test". But neither at the place indicated by the submission[126] nor elsewhere did the High Court explicitly deny what Jacobs and Mason JJA had said. It is true that Barwick CJ, McTiernan, Menzies and Owen JJ stated as a test for fair comment that it be an

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124 (1934) 34 SR (NSW) 524 at 532.

125 (1970) 72 SR (NSW) 347 at 361.

126 *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166 at 175.

"honest expression of opinion ... as an inference open to a fair-minded person"[127], without any reference to the adverb "reasonably", but this omission appears to lack significance: there was no specific attack by the Court on Jacobs and Mason JJA's test, there were no submissions from counsel about its correctness, and in the course of argument[128] Barwick CJ adopted a similar test in saying that one question was "whether what was said travelled beyond what a *reasonable* and honest man might in the circumstances have thought or said" (emphasis added).

91 Secondly, an accumulation of items of allegedly inadequate or incompetent work, none of which is said to be a piece of deliberate concealment, is incapable of leading an honest person reasonably – or, for that matter, a fair-minded person acting honestly – to the conclusion that there was deliberate concealment. As indicated earlier[129], to reach that conclusion would be a grave result. An honest person acting reasonably, or a fair-minded person acting honestly, would look for more than instances of incompetence, however many there were said to be.

92 These are further reasons for striking out pars 3.1-3.39.

Did the Full Court wrongly ask whether the facts pleaded by the defendant were capable of proving the truth of the meaning pleaded by the plaintiff?

93 The defendant submitted, in the words of ground 3.3 of the notice of appeal, that the Full Court erred in holding "that it is necessary that the facts relied upon in support of the comment be capable of supporting the comment in the sense pleaded by the plaintiff and hence address (and, it seems, be capable of establishing as true) the imputation of deliberate concealment of evidence". The defendant argued:

> "Whereas the particulars of fact pleaded in support of a justification defence must be capable of establishing the truth of the plaintiff's imputation, particulars of fact in a fair comment defence perform an entirely different function.
>
> Particulars of fact pleaded in support of a fair comment defence are the facts put forward by the defendant as those upon which the comment was

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127 *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166 at 176.

128 *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166 at 171.

129 See [76]-[78].

based and which are capable of sustaining the comment as objectively fair. There is no occasion for the Court to consider whether those facts are capable of establishing the truth of either the defendant's comment or the plaintiff's imputation."

94 These submissions are based on a misreading of the Full Court's judgment. The Full Court saw the question as being whether the facts pleaded in pars 3.19-3.39 were capable of supporting the fair comment defence[130]. The Full Court did nothing inconsistent with the propositions of law stated in the defendant's submissions.

Pleading deficiencies

95 The plaintiff's notice of contention criticised the form in which pars 3.1-3.39 were pleaded. Since the conclusions reached above require the striking out of these paragraphs on other grounds, and since the defendant's criticisms of the Full Court's reasoning have been rejected, it is not necessary to consider these arguments.

Orders and repleading

96 The Full Court struck out pars 3.18-3.39 of the further amended defence. The reasoning set out above requires the striking out of pars 3.1-3.4 as well, and hence, as a consequence, pars 3.5-3.17. It follows that par 8.1 ("The defendant repeats paragraphs 3.5-3.39 ...") must also be struck out. The same is true of par 8.2 ("The defendant repeats paragraphs 6.1-6.3 ..."), because Master Rice struck out pars 6.1-6.3. However, the defendant submitted that it should have leave to replead the paragraphs struck out – that is, pars 3.1-3.4, 3.5-3.39, 8.1 and 8.2[131].

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130 *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462 at 480-481 [43]-[46] per Gray and Layton JJ.

131 The making of this application came about in the following way. As the result of a change in position by the plaintiff, by letter of 26 September 2007 the Registrar requested further submissions from the parties on various questions. One was whether leave should be given to the defendant to replead pars 3.1-3.4, 3.5-3.39, 8.1 and 8.2 if any of them were struck out. On 9 October 2007 the defendant contended that it should have leave to replead unless the defects were incapable of being cured. The warning in the Registrar's letter of 26 September 2007 that the defendant might be deprived of an opportunity to replead pars 3.1-3.4 and any other paragraphs which were struck out led it to advance submissions in support of its being given that opportunity.

97 The defendant's application to replead these paragraphs appears to rest on an assumption shared by many parties to defamation litigation, particularly defendants. That assumption is that proceedings can proceed in very leisurely fashion through every level of appeal in relation to repeated pleading refinements. Quite apart from the excessive consumption of court time which this custom engenders – disproportionate when compared with other forms of litigation – it has the effect of being unfair to the less well-resourced of the two parties, as continual rounds of repleading keep the party which does not want to face trial well away from that ordeal. The assumption ought not to receive any encouragement. The repleading which the defendant now wishes to undertake should have been undertaken at much earlier stages in this litigation. Paragraph 8.2 required attention at least from the time par 6 was struck out by Master Rice. Paragraph 8.1 required attention from the same time, since Master Rice struck out various parts of pars 3.5-3.39. The same is true of pars 3.5-3.39 themselves. The repleading which the defendant wishes to undertake should not be permitted now unless the interests of justice plainly require it.

98 The defendant did not in terms deal with the question whether leave should be granted to replead pars 3.1-3.4 in specific terms, although it did make an application to do so. That application should be rejected. The defects in pars 3.1-3.4 described above[132] are incapable of being cured by amendment.

99 Turning to pars 3.5-3.39, they have been exposed to much criticism, and to examination by 10 judicial officers sitting at four levels of appeal, without any concession by the defendant that there is anything wrong with them save in minor respects which have been abandoned. The defects identified in the reasoning set out above in relation to the first five issues are incapable of being cured by further pleading. The defects are more fundamental than the possible defects to which the defendant referred in its submissions as being curable – defects of form and pleading "facts going beyond those sufficiently indicated in the matter". It is therefore not appropriate that the defendant have leave to replead pars 3.5-3.39.

100 The defendant proposes to amend par 8.1 by replacing the existing cross-reference to pars 3.5-3.39 with a full setting out of their text. The defendant pointed out that the cross-reference to pars 3.5-3.39 was not attacked as defective until the matter came before this Court. It also pointed out that even if those paragraphs did not support a defence of fair comment, it did not follow that they could not support the defence of extended qualified privilege. It submitted that

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132 At [33]-[75].

pars 3.5-3.17, taken with pars 8.2-8.9, sufficiently pleaded "the government and political matter" relied on to establish the occasion of privilege. And it submitted that pars 3.19-3.39 were "maintainable as an articulation ... of the particular aspects of the forensic investigation and evidence which the [defendant] says either have been, or are worthy of being, the subject of the public and political debate and discussion referred to in [pars 3.13-3.17 and 8.3-8.9]". Whatever the adequacy of pars 8.3-8.9, these two submissions must be rejected. None of the matters alleged in pars 3.5-3.39 are referred to in the relevant publication – the promotion. Hence they cannot be said to be particulars of the allegation in par 8 that the promotion "constituted the discussion of government and political matters". A publication cannot be said to discuss government and political matters if it does not refer to them. Further, the matters which are said to have made up the "discussion" which the promotion is alleged to have constituted, according to pars 3.5-3.39, do not relate to the imputation that the plaintiff had deliberately concealed evidence: a discussion about supposedly incompetent investigation and testimony is not a discussion about deliberately concealed evidence. It follows that there should be no leave to replead in relation to par 8.1.

101 Finally, turning to par 8.2, the defendant noted that it had not been attacked before the present appeal. It noted that pars 6.1-6.3 "pleaded an impaired reputation on the part of the [plaintiff] by reason of errors made by the [plaintiff] in his role as Senior Director of Forensic Pathology at the State Forensic Science Centre, the publicity given to those errors, and other public allegations about the [plaintiff]". It submitted that the object of par 8.2, in picking up pars 6.1-6.3, was to assert that deficiencies in the plaintiff's conduct as Senior Director, including his conduct in respect of the Keogh prosecution, had become a source of significant public concern and debate, with the result that his conduct had become a matter of significance in the politics and government of South Australia, justifying the discussion (and proposed discussion) in the defendant's broadcast. These submissions must be rejected. The defendant did accept that par 8.2 so far as it incorporates pars 6.1-6.3 "might be better pleaded". But the defendant wanted to replead along the lines of pars 6.1-6.3. The plea of bad reputation made in these paragraphs is in this case irrelevant to qualified privilege. Further, the matters referred to in pars 6.1-6.3 are not referred to in the promotion, and are incapable of constituting particulars of an allegation that it "constituted the discussion of government and political matters". In addition, like pars 3.5-3.39, which to some degree pars 6.1-6.3 resemble, they pose issues about the plaintiff's competence, but say nothing relevant to an allegation that he deliberately concealed evidence.

102 The appropriate orders are:

(1) Appeal dismissed;

(2) Special leave to cross-appeal be granted and the cross-appeal be treated as instituted, heard instanter and allowed;

(3) Set aside orders 2-5 of the Full Court of the Supreme Court of South Australia made on 18 October 2006 and, in their place, order that paragraphs 3.1-3.39, 8.1 and 8.2 of the further amended defence be struck out; and

(4) The appellant pay the respondent's costs of the appeal and the cross-appeal.

103 KIRBY J. Justice David Ipp has described defamation as the "Galapagos Islands Division" of the Australian law of torts[133]. He has explained how the tort of defamation has "evolved all on its own" and "created legal forms and practices unknown anywhere else". His sharpest comments were reserved for the subject matter of this appeal[134]:

> "Pleadings in defamation actions are as complex, as pedantic and as technical as anything known to Dickens[135]. Interlocutory disputes continue to beset plaintiffs and there are often massive delays in getting defamation cases to trial."

104 Seventeen years earlier I described the same features of defamation practice as "unduly and unnecessarily complex"[136]. I expressed regret for the "excess of refinement"[137] that "ensnare[s] plaintiffs unjustly in burdensome, costly and dilatory pleading disputes"[138] when the preferable course would normally be to get the litigation as quickly as possible before the tribunal of fact "for a robust and commonsense decision that will reflect the general merits of the case"[139].

105 I continue to hold these opinions. I have repeated them in this Court[140]. Similar issues now arise, not out of the defamatory imputations alleged by a plaintiff (as in the foregoing cases), but from the defendant's defence of fair comment. The boot is therefore on the other foot. Nevertheless, in the dying hours of the common law of defamation in Australia, specifically as applicable to statements published in the State of South Australia before the Uniform

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133 Ipp, "Themes in the law of torts", (2007) 81 *Australian Law Journal* 609 at 615.

134 (2007) 81 *Australian Law Journal* 609 at 615.

135 See *Burrows v Knightley* (1987) 10 NSWLR 651 at 654 per Hunt J.

136 *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 149.

137 (1990) 21 NSWLR 135 at 151.

138 (1990) 21 NSWLR 135 at 151.

139 (1990) 21 NSWLR 135 at 151. See also Kenyon, *Defamation: Comparative Law and Practice*, (2006).

140 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 578 [139]; *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1721-1722 [20]-[22]; 221 ALR 186 at 192-193.

Defamation Acts[141] commenced operation, it would be desirable for this Court, so far as it can, to uphold sensible procedures and to discourage rulings that impede the prompt, just and lawful resolution of such claims. Where possible, such disputes should be resolved at trial, rather than in interlocutory skirmishes, of which these proceedings are but the latest unhappy illustration.

The proceedings, issues, concurrence and disagreement

106 *The joint reasons*: Before this Court are an appeal and cross-appeal from a judgment of the Full Court of the Supreme Court of South Australia[142]. The reasons of Gummow, Hayne and Heydon JJ ("the joint reasons") describe the factual and procedural background[143]. They also describe the appeal, notice of contention and cross-appeal in this Court[144]. They identify the issues requiring decision[145].

107 One has only to reflect on the course of the litigation, concerning a television broadcast that went to air nearly four years ago, and the different opinions of so many judicial officers, at four levels in the courts, before any trial is had of the merits, to realise how destructive of the utility of the cause of action is this form of interlocutory litigation. If such pleading skirmishes are suitable for review by a final national court, this can only be because considerations of principle are presented for decision. As matters transpire, there are three such considerations.

108 *The resulting issues*: I will follow the style of reference to the parties and the issues contained in the joint reasons. Thus, the issues for decision in the proceedings are:

(1) The comment or fact issue[146];

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141 *Defamation Act* 2005 (SA). The Uniform Defamation Acts have been enacted in each of the jurisdictions of the Commonwealth; cf George, *Defamation Law in Australia*, (2006) at 96-97.

142 *Manock v Channel Seven Adelaide Pty Ltd* (2006) 95 SASR 462.

143 Joint reasons at [14]-[27].

144 Joint reasons at [28]-[30].

145 Joint reasons at [31].

146 Joint reasons at [33]-[44].

(2) The sufficient identification of facts issue[147];

(3) The correlative meanings issue[148];

(4) The deliberate concealment issue[149];

(5) The response to the plaintiff's meaning issue[150];

(6) The residual pleading deficiencies issue[151]; and

(7) The consequential orders issue[152].

109 *Issues of concurrence*: Upon the premises on which they proceed, I agree with the substance of the joint reasons in their treatment of the issues numbered (3), (4), (5) and (6). However, I agree in part only with the resolution of issue (1). If that had been the full extent of my disagreement, I would, in all probability, have considered whether such substantial concurrence would be enough to join the joint reasons, given the other alternative pathways that they provide for coming to the conclusions that they reach. But there is more.

110 *Disagreement and orders*: The centrepiece of the joint reasons is a detailed analysis, comprising almost half of their length, concerning the requirement that, to be entitled to avail itself of the defence of fair comment, the defendant must, in the matter complained of, sufficiently identify the facts upon which the comment is alleged to be based. The defendant must do so either by stating those facts in appropriate detail or by making adequate reference to them, or it must refer to facts that are so notorious that they do not require explicit elaboration. As this issue is explained, I disagree with the analysis in the joint reasons[153]. I therefore disagree with the conclusion that, on this basis, pars 3.1-3.39 of the further amended defence[154] ("the defence") should be struck out.

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147 Joint reasons at [45]-[75].

148 Joint reasons at [76]-[87].

149 Joint reasons at [88]-[92].

150 Joint reasons at [93]-[94].

151 Joint reasons at [95].

152 Joint reasons at [96]-[102].

153 Joint reasons at [45]-[75].

154 Set out in the joint reasons at [22].

111 Having come to different conclusions upon two lines of reasoning that support the outcome favoured in the joint reasons, it is necessary for me to address the orders that would be appropriate to dispose of the defendant's appeal and of the plaintiff's cross-appeal (and notice of contention). Because my opinion is a minority one, and because it partly follows the earlier reasoning of McHugh J in *Pervan v North Queensland Newspaper Co Ltd*[155], I must explain my reasons and the slightly different orders to which they lead me.

Recognisable comment or fact?

112 *Classification of statements*: The first pathway provided by the joint reasons to their conclusion, adverse to the defendant, is the opinion that none of the statements in pars 3.1-3.4 of the defence[156] constitute "comment".

113 On that basis, upholding an argument advanced by the plaintiff in his cross-appeal, but not propounded by him in the Full Court[157], the joint reasons conclude that none of the core statements in the matter complained of constitute "comment". Accordingly, by definition, they cannot be "fair comment", protected by the common law. To be defensible, they must rely on other grounds of defence, if available, such as justification or privilege.

114 It is on the basis that the statements pleaded in pars 3.1-3.4 were statements of *fact* and not *comment* that the joint reasons conclude that those grounds of defence should be struck out. Because the remaining allegations, relied on in pars 3.5-3.39, are supportive of (and dependent on) the statements pleaded in pars 3.1-3.4, this conclusion leads the joint reasons to an outcome that the entire defence of fair comment in par 3 of the defence must be rejected. The joint reasons observe that the answer to the first issue "constitutes an independent reason for the conclusion that the appeal must be dismissed and the cross-appeal allowed"[158].

115 *Bulwark of free speech*: The defence of fair comment is extremely important to the exercise of free expression in Australia. It has been rightly described as "the bulwark of free speech in the law of defamation"[159]. In effect, it

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155 (1993) 178 CLR 309 at 340-351.

156 Set out in the joint reasons at [22].

157 Joint reasons at [26]-[27].

158 Joint reasons at [32].

159 Sutherland, "Fair Comment by the House of Lords?", (1992) 55 *Modern Law Review* 278 at 278; cf Rares, "No Comment: The Lost Defence", (2002) 76

(Footnote continues on next page)

allows everyone to express opinions, so long as the necessary legal preconditions are met. Those preconditions do not distinguish between orthodox and heterodox comments; majority and minority comments; popular and unpopular, "moral" and "immoral", respectful and disrespectful comments.

116 This Court should not take a narrow view of what constitutes a "comment", for the purpose of attracting the fair comment defence. It has not done so in the past[160]. To the extent that it takes a narrow view, it will place an unwarranted restriction on the availability of the defence of fair comment. It will thereby impose unjustified restrictions upon freedom of discussion and the expression of opinions in our community.

117 It is by freedom of discussion, including the expression of unorthodox, heretical, unpopular and unsettling opinions, that progress is often made in political, economic, social and scientific thinking. Courts have to give more than lip-service to free expression, including in the making of protected comment, lest legal protection for comment on a matter of public importance becomes illusory or non-existent from a practical point of view[161]. It is by the public expression of diverse opinions, expressed as comment, that our form of society is distinguished from others which enjoy a lesser freedom[162].

118 I accept that a price has to be paid for the defence of fair comment. Some comment is intensely hurtful, unreasonable and unjust. Publishers of mass media, such as the defendant, enjoy great power to harm reputation and manipulate public perceptions, including by published comments. One way of doing so (more common today than in the past) is by mixing fact and opinion in

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Australian Law Journal 761 at 773-774; Kenyon, "Defamation, Artistic Criticism and Fair Comment", (1996) 18 *Sydney Law Review* 193 at 213-216. See also reasons of Gleeson CJ at [3].

160 *Pervan* (1993) 178 CLR 309 at 317-318 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ, 333 per McHugh J. On this issue in *Pervan*, the Court was unanimous.

161 See *Pervan* (1993) 178 CLR 309 at 328; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 170; *Telnikoff v Matusevitch* [1992] 2 AC 343 at 361 per Lord Ackner (diss).

162 For example, it was the persistently expressed belief in Mr Andrew Mallard by his family and supporters and critical media comment on the proceedings leading to his conviction of murder that eventually led to a second challenge to that conviction before this Court. Orders quashing his conviction were followed by acceptance that he was in fact innocent and by an inquiry into the circumstances of his conviction. See *Mallard v The Queen* (2005) 224 CLR 125.

the presentation of "news". This is why some limitations on the ambit of the fair comment defence are necessary in the law. It is why the ambit of fair comment involves a threshold differentiation between what is classified as a "fact" and what is classified as a "comment".

119 *Point of distinction*: No clear line can be drawn between a "comment" and a statement of "fact". No single differentiating test can be propounded as a universal rule. Great care must therefore be taken at the interlocutory stage of a defamation action in classifying hurtful, opinionative statements as statements of fact rather than comment. It is not quite correct to describe the classification as "a matter for the discretion of the judge"[163]. It is, however, certainly a matter calling for judgment and evaluation on the part of the judge.

120 Part of the process of judgment and evaluation involves a recognition of the great importance which the defence of fair comment affords to the enjoyment of comparatively free expression of opinions in Australia. Exclusion of the defence of fair comment at an interlocutory stage, in advance of a trial on the merits (and more especially, as now proposed, its complete exclusion from the trial[164]), is a most serious step. It deprives a defendant of a most important defence. It is a defence especially significant for a publisher and broadcaster, like the defendant, operating in the public media. It requires a very clear case to warrant sending such a defendant to trial without the opportunity of argument based on that defence. Loss of the defence might happen at trial, when the merits of the case are before the tribunal of fact (judge or jury). That is one thing. Pre-trial exclusion of the defence, effectively as unarguable, is quite another.

121 *Recognisable comment*: Are any of the matters pleaded by the defendant in pars 3.1, 3.2, 3.3 or 3.4 arguably recognisable as comments? Or are all of them (as the joint reasons hold) statements of fact?

122 I will assume, as the joint reasons do, that par 3.1, with its reference to "the new Keogh facts", constitutes, on its own, a statement of fact and not a comment[165]. The words are the defendant's. They are not hedged about with protective indicia of comment such as "in our opinion", or "in other words", or "we would say", or "Channel Seven believes"[166].

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163 cf joint reasons at [33] citing *Favell* (2005) 79 ALJR 1716 at 1719 [6]; 221 ALR 186 at 189.

164 Joint reasons at [98]-[99].

165 Joint reasons at [38].

166 cf George, *Defamation Law in Australia*, (2006) at 340.

123 While it is possible that the word "new" connotes the broadcaster's differentiation between "facts" earlier presented in evidence at Mr Keogh's trial for murder and facts that are "fresh" and "different" in the sense of recently discovered, I would not dissent from the view of my colleagues that par 3.1 is simply a statement of fact. Paragraph 3.1 of the defence is thus susceptible to the strike-out order favoured in the joint reasons.

124 When, however, I pass beyond par 3.1, the characterisation of the statements as "fact" is much more contentious. It is a basic mistake to divorce the impugned words, as they appear in the matter complained of, from the context in which they appear. That context was a brief promotional broadcast published by a commercial television broadcaster to a mass audience. The broadcast was one aimed at attracting as many viewers as possible, who saw the promotion, to view and listen to the advertised broadcast. The whole point of the promotion was to encourage the greatest possible attention to the entire programme.

125 The defendant is not, was not pretending to be, and would not be seen by the vast majority of its audience as, an authoritative public tribunal for determining guilt or innocence, propriety or wrong-doing. On the return of the plaintiff's action at trial, it is at least arguable that the tribunal of fact could conclude that the ordinary, reasonable viewer, watching the promotion, would conclude that statements made there were nothing more than comments by the broadcaster.

126 In short, the promotion, arguably, did nothing but indicate to those who saw it that, at the advertised time, they would have the opportunity of viewing and hearing a description of facts and statements of opinion, advanced by or for the defendant, concerning the Keogh case and the role in it of the (pictured) plaintiff. The promotion arguably offered comment on the promised "new Keogh facts" (which, by inference, the plaintiff should have disclosed to authorities but which had been "kept to themselves" (par 3.2)); that data, dates and documents "don't add up" (par 3.3); and that evidence called before the earlier courts was "changed from one Court to the next" (par 3.4). All of these appear to be recognisable as comments, ie remarks, observations or criticisms by the defendant, support for which was promised in the advertised programme.

127 *Opinions, conclusions and criticisms*: Given that, self-evidently, the defendant had no authority to decide any such matters conclusively, it is impossible to say that the statements pleaded in pars 3.2-3.4 of the defence were pure statements of fact. To the contrary, they appear as opinions in the form of conclusions or criticisms, based on foreshadowed facts. As such, they arguably

amount to *comments*, for which the fair comment defence was available in law, and not *facts*, for which it was not[167].

128 Revealed in the analysis in the joint reasons is the danger of taking each of the impugned paragraphs separately and out of the context in which the matter complained of was published. Promotions and advertisements, especially on Australian commercial television, are generally received by those who view and hear them for what they purport to be – attempts to attract a large viewing audience with the aim of increasing advertising revenue and thereby generating profits for the broadcaster's shareholders. Entertainment, personality, sensation, opinions and comment are commonly the means by which such profits are maximised. Sometimes, incidentally, larger causes are advanced. But, for the most part, material such as that in pars 3.2-3.4 may be characterised as promotional "comment".

129 To exclude the fair comment defence, plaintiffs may be able to demonstrate that the comment does not relate to a matter of public interest[168], a classification which, at common law, the judge rather than the jury had to make[169]. Or the publication may be contested on the basis that the comment was not fair, in the sense of not being the defendant's honest opinion[170]. Or it may not be based on facts that are sufficiently indicated within the rule to which I will next turn. Or the plaintiff may be able to establish that, although the statements were comment, they were denied the fair comment defence because they were affected by malice[171].

130 However, to classify pars 3.2-3.4 as pure statements of fact and not comment, and to deprive the defendant of the fair comment defence in advance of the trial on that basis, is in my opinion wrong. Such a classification takes the words and images out of context. It divorces them from the character of a promotional broadcast on commercial television. It overlooks their object and purpose. And it seriously diminishes the availability of the fair comment defence in a way that is unjustifiable and undesirable.

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167 See George, *Defamation Law in Australia*, (2006) at 345.

168 *Pervan* (1993) 178 CLR 309 at 317 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

169 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 191; *Henwood v Harrison* (1872) LR 7 CP 606 at 628.

170 *Falcke v The Herald and Weekly Times Ltd* [1925] VLR 56 at 69-75; *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 487, 498.

171 *Pervan* (1993) 178 CLR 309 at 329; *Davis v Shepstone* (1886) 11 App Cas 187.

131 *Outcome: comments not facts*: The first thoughts of the plaintiff, before the Full Court, were therefore correct. In a full hearing on the merits at trial, the defendant might fail in its fair comment defence. In South Australia, that trial would take place before a judge sitting alone and not with a jury[172]. Nevertheless, the interlocutory argument on the availability of the defence proceeded in the same way as it would in those jurisdictions of Australia that have hitherto preserved different modes of jury trial for the determination of some or all of the factual issues arising in such trials.

132 It follows that the first argument advanced for the plaintiff in his cross-appeal should be rejected. The contrary opinion expressed in the joint reasons rests on a differentiation between "fact" and "comment" that would seriously reduce the availability and utility of the fair comment defence to the public media in Australia. This is not a step that this Court has previously taken. It is not one that I would take now. It is a step that has the potential to erode free expression. Our society is strong and vibrant enough for, and often benefits from, the robust expression of opinions.

The reference to the factual basis for a comment

133 *Sufficient indication of factual basis*: An even more serious limitation on the availability of the fair comment defence to media organisations such as the defendant is the conclusion, expressed in the joint reasons, that the facts, on which the comment was based, must be sufficiently indicated at the time of the publication of the matter complained of.

134 It was not contested that the general test to be applied was that propounded in the joint majority reasons in *Pervan*[173]:

> "[T]he 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."

135 Self-evidently, if the facts are "sufficiently indicated" by setting them out in the matter complained of or if, in the particular circumstances concerning the

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172 The position in Australia in relation to jury trials before and after the Uniform Defamation Acts 2005 is explained in George, *Defamation Law in Australia*, (2006) at 225-226.

173 (1993) 178 CLR 309 at 327 (footnote omitted).

plaintiff, they are notorious, no issue for striking out the defence of fair comment on this basis will arise. The defence will go to trial.

136 The defendant did not contend that the comment relating to the plaintiff concerned notorious facts. Having regard to its assertion in the promotion of "new … facts", such a contention would have been unpersuasive. Similarly, because of the brevity of the promotion, it was not submitted that the factual material on which the posited comment was made appeared, in terms, in the publication complained of. In the nature of a promotional broadcast, such could scarcely ever be the case.

137 The question for decision by this Court is therefore whether, by reference to any earlier binding or persuasive authority, a narrow or broad view should be taken of what is meant by the requirement of sufficient "indication" of the facts for the purpose of attracting the common law defence of fair comment.

138 *Use of foreign judicial authority*: 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"[174]. However, such remarks address what seem to me to be the wholly orthodox and unremarkable submissions of the defendant. The defendant argued that, in resolving this issue in the present appeal, it would be necessary to give weight to society's interest in "encouraging free discourse through the expression of opinion".

139 When there is no clearly applicable earlier determination of a legal issue in Australia, in reasoning expressed by a majority of this Court addressed to the same legal question as in the case at hand, this Court will derive a new or elaborated principle by analogical reasoning from earlier authority. Such earlier authority will, primarily, be this Court's own decisions. In common law cases, they may be supplemented, where appropriate, by reference to the reasoning of the Privy Council, particularly in the period when it was the ultimate appellate court of Australia; to the reasons of English courts of high authority; and (where relevant) to reasoning in decisions of other foreign courts grappling with the same or similar problems[175]. However, no decision of any court of a foreign country is any longer binding in Australia as a matter of law.

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174 Joint reasons at [63].

175 *Viro v The Queen* (1978) 141 CLR 88; cf *Commissioner of Stamp Duties (NSW) v Pearse* (1953) 89 CLR 51; *Skelton v Collins* (1966) 115 CLR 94; *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336; *Cook v Cook* (1986) 162 CLR 376.

140 We look to the reasons of foreign courts for the assistance that they may provide for the ascertainment of the content of the Australian common law. It is especially relevant to consider foreign decisional law in cases where Australian constitutional[176] or statutory law[177] has copied the law of foreign nations. But it is a mistake to treat overseas judicial observations on the common law as if they conclusively state the common law of this country, with its distinctive legal and social characteristics. It is an even more serious mistake to select passages from earlier opinions in overseas courts, and to analyse them textually as if, *ipsissima verba*, they represent a statement of the contemporary common law of Australia. Worst of all is it a mistake to treat words in judicial speeches of the House of Lords, which was never part of the Australian judicial hierarchy, as affording, statute-like, an authoritative statement of the ambit of the fair comment defence provided by the common law of Australia to allegedly defamatory matter published in this country.

141 With respect, these appear to me to be the mistakes that have occurred in the central part of the joint reasons. They include a close textual examination of the 1952 House of Lords decision in *Kemsley v Foot*[178], including the passage in Lord Porter's leading speech in that decision which endorsed a quotation from the 1929 sixth edition of the English text *Odgers on Libel and Slander*[179].

142 *Decision in Pervan's case*: Much attention is then given by the joint reasons to the current state of English authority[180] and to the opinion of Lord Nicholls of Birkenhead, expressed in the Hong Kong Court of Final Appeal[181].

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176 See eg *D'Emden v Pedder* (1904) 1 CLR 91; *Ex parte Nelson [No 2]* (1929) 42 CLR 258 at 263 per Isaacs J; *Huddart Parker Ltd v The Commonwealth* (1931) 44 CLR 492 at 524-526 per Evatt J; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 55-56 per Dixon CJ, 66 per Menzies J.

177 *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 at 198-200 [85]-[90]; *Cornwell v The Queen* (2007) 81 ALJR 840 at 848-853 [32]-[54], cf at 870-871 [134]-[137]; 234 ALR 51 at 61-69, 92-93.

178 [1952] AC 345. See joint reasons at [48].

179 6th ed (1929) at 166-167, quoted in *Kemsley* [1952] AC 345 at 356-357.

180 Joint reasons at [52]-[55]; cf *Telnikoff* [1992] 2 AC 343 at 361; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201; *Lowe v Associated Newspapers Ltd* [2007] QB 580 at 588-600 [21]-[60].

181 *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 at 347. See the joint reasons at [52].

Ultimately, the joint reasons accept, as they were bound to, that this Court must find the rule applicable to the present case in its own earlier authority. They nominate *Pervan*[182]. However, when *Pervan* is properly analysed, it can be demonstrated that neither the joint reasons in that case, nor any other decision of this or another Australian court, answer the exact problem now presented for our decision.

143 *Pervan* was a case concerned not with the common law of defamation but with the enacted provisions of s 377 of the *Criminal Code* (Q). Section 377(8) of that Code provided that there was a "lawful excuse for the publication of defamatory matter" if the publication was "made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair". The reference in the first part of the enacted Queensland defence to the requirement that the relevant discussion must be "for the public benefit" has never been part of the common law. In particular, it has never been part of the law of South Australia.

144 Necessarily, in deciding *Pervan*, this Court was therefore concerned not with the common law of Australia but with the meaning of the defence provided in the Queensland Code. The primary holding in *Pervan* was that s 377(8) of the Code did not import a requirement that the "comment", upon which the defendant relied, had to be based on facts which were true. Nor did s 377(8) require that the publisher hold the opinion expressed in the defamatory publication. Such were the issues in that case.

145 The publication sued upon in *Pervan* was an advertisement in a regional newspaper. The advertisement, in the public notices section of the newspaper, summoned a meeting of ratepayers. The notice repeated statements made originally under privilege in the Queensland Parliament[183].

146 Factual circumstances more different from the present case would be difficult to imagine. *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.

147 To conclude that, for the defendant to succeed in invoking a defence of fair comment in the circumstances of the present case, it must persuade this

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182 See joint reasons at [72].

183 *Pervan* (1993) 178 CLR 309 at 331-332.

Court to overrule a legal principle for which *Pervan* stands (as the joint reasons suggest[184]) mis-states the requirement of the Australia law of precedent[185]. Although due respect will be paid to judicial observations, as a matter of law, only the *ratio decidendi* is binding. The *ratio decidendi* of *Pervan* is, as I have demonstrated, far removed from the legal question in issue in this appeal. That question is, relevantly, whether, in a publication such as the words and images broadcast by the defendant in the promotion, the facts in respect of which the defence of fair comment was claimed were sufficiently "indicated". Was this achieved by identifying the time and place where, very soon afterwards and conveniently, those who wished to receive the promised facts could do so, in order to decide for themselves whether such comment was, or was not, "fair" in the legal sense? Or was this "identification" insufficient to meet the common law requirement?

148 *Considering concepts not words*: To attempt to draw from the judicial *dicta* in *Pervan* a legal rule binding in the present case is to fall into an error quite frequent in common law reasoning. It is to perceive legal rules as inextricably related to particular evidentiary facts rather than as endeavours to express a general legal principle, albeit in the context of particular facts.

149 The general principle that emerges from the case law governing the defence of fair comment at common law is that, to be "fair" in the legal sense, a "comment" must sufficiently *identify* the facts on which it is based so that the recipient of the publication may form his or her own view about the comment. The relevant facts may be identified in one of three ways:

- Sometimes, the relevant facts will be identified in the publication itself;
- Sometimes, although referred to, they will not be elaborated because they are notorious. As such, they will be known both to the publisher and the recipient; and
- Sometimes, whilst neither stated nor notorious, they may be "identified" or "referred to" adequately, so as to enliven the fair comment defence.

The question in this appeal is whether the present facts and circumstances fall within this third category. That question is not answered by invoking the words used in *Pervan*. Still less is the question decided authoritatively or conclusively by any earlier decision.

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184 Joint reasons at [63].

185 See *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

150 *Test of sufficient identification*: For these reasons, I disagree with the analysis on this point, contained in the joint reasons. In his minority reasons in *Pervan*, McHugh J correctly recognised that the defence of fair comment was available at common law beyond circumstances where the comment was based on facts themselves published in the matter complained of[186].

151 Clearly, in *Pervan*, McHugh J was not postulating a particular legal subcategory of cases "where a play or sporting spectacle is being reviewed"[187]. I deprecate reasoning in such tiny subcategories, based on no more than factual illustrations afforded by earlier judicial reasons[188]. Such an approach was expressly disclaimed by McHugh J in *Pervan*[189]. Indeed, his Honour was seeking to express a conceptual category, necessarily larger than one confined to plays or sporting spectacles. The concept that he described was conformable with the legal concept apparent in earlier cases, even if (for the most part) it had not required elaboration there, as it does here. As McHugh J put it[190]:

> "To raise the defence of fair comment in this class of case ['based on facts which are not published in the article'], it is sufficient that *either expressly or by implication the defendant has identified the subject matter 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."

In support of this proposition addressed to the underlying legal concept, McHugh J referred to passages in the reasoning in *Kemsley*[191].

152 Given that the legal issues under consideration in *Pervan* were significantly different from those now presented in this appeal, it is distracting to debate (as the joint reasons do[192]) whether counsel's arguments in *Pervan* contain

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186 (1993) 178 CLR 309 at 335 ("comment … based on defamatory facts that are published with the comment"), 336 ("based on non-defamatory facts which are published with the comment"), 340 ("based on facts which are not published in the article").

187 (1993) 178 CLR 309 at 340.

188 See joint reasons at [70].

189 (1993) 178 CLR 309 at 340 ("it is certainly not limited to plays or spectacles").

190 (1993) 178 CLR 309 at 340 (emphasis added, footnote omitted).

191 [1952] AC 345 at 358, 362.

192 Joint reasons at [61].

no reference to *Kemsley*. That is entirely irrelevant to the task that this Court now faces. In *Pervan*, the joint reasons[193], as well as those of McHugh J, refer to *Kemsley*. The speeches in *Kemsley*, so far as they describe a "substratum of facts" required to provide the recipient of a publication with sufficient facts to judge the "fairness" of a comment, are useful. However, they are useful only as illustrations of the way, historically, the common law principles have evolved.

153 In this appeal, this Court reaches a point in the elaboration of decisional law where there is a need for a new and different expression of the old principles. We may look to the matters of history in the hope that, so assisted, we will develop any new principles by analogical reasoning so that they fit comfortably into the surrounding body of the common law. But we deceive ourselves, and mistake the judicial process in which we are engaged, if we pretend that the governing legal rule exists, fully formed, in the remarks written by judges in earlier cases.

154 *Inescapability of legal policy*: Unpleasant, therefore, as the joint reasons appear to have considered the need to evaluate questions of legal policy[194], it is my respectful view that attempts to resolve the problem presented, solely by the invocation of *obiter dicta* in *Pervan* or other earlier cases, divorced from legal policy and principle, are doomed to fail. This is so because, when the judges wrote *Kemsley*, *Pervan* and the other decisions cited in this appeal, none of them had under consideration a problem precisely like the one that this Court now faces.

155 When the sixth edition of *Odgers* (approved in *Kemsley*) was published in 1929, television was in the earliest stages of its development. John Logie Baird had only recently (in 1926) demonstrated the first system that would be refined into what we now know as television[195]. Even when *Kemsley* was decided in 1952, mass audience television was still rudimentary. *Pervan* itself was not addressed to the availability of the common law defence of fair comment to a brief television promotion. The case concerned the print media. In judging whether the defence of fair comment may be available to such a broadcast, this Court deludes itself if it considers that the answer is to be extracted directly from judicial remarks addressed in a different time, to a different technology, presenting different legal problems.

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193 (1993) 178 CLR 309 at 317, 327.

194 Joint reasons at [63].

195 "Baird, John Logie", in *Encarta World English Dictionary*, (1999) at 134.

156 I accept that weighing the considerations of legal policy at stake in an appeal such as this is not a simple task. However, we needlessly complicate this Court's function by pretending that there is a clearly applicable common law rule. Or by protesting that it should be derived in a policy-free zone.

157 It is equally clearly the case that mixing fact and comment can involve serious risks of abuse of the power of publishers such as the defendant. Keeping comment separate from the purported presentation of facts enhances the proper evaluation of the comment by its recipients. It avoids the usurpation or attempted usurpation of evaluation. Likewise, demanding that sufficient facts must be stated (or be notorious or adequately identified) contemporaneously with the publication of the comment enhances the recipient's capacity to perceive the comment for what it is, to evaluate it and to reach conclusions about it.

158 *Relevant changes in technology*: The technology of communications has advanced greatly since the early cases on the fair comment defence were decided. Because that defence is very important to the maintenance of free expression in Australian society, it is essential that the understanding of the ambit of the defence at common law should keep pace with (and be relevant to) the new technology by which comment is now often published. That new technology includes television, notably commercial television in which every minute of broadcasting time is extremely valuable. The value of air time results in highly abbreviated communications. They may contain, at once, the publication of useful facts, fair comment and material damaging to honour and reputation.

159 If, to attract a defence of fair comment, it were a requirement of the common law of Australia that a promotion measured in seconds had to contain all relevant facts that a recipient would need to judge the "fairness" of the comment, self-evidently this would destroy the practical availability of that defence for many such publications. Unless some abbreviated identification of notorious facts were adequate to the circumstances, the brevity of the promotion would effectively render the contemporaneous presentation of the relevant facts impossible.

160 Nor is the problem so presented confined to promotional broadcasts on television. Many of the new electronic technologies by which publications are now made (email, text message, interactive internet exchanges etc) place a high premium on brevity. Is the common law defence of fair comment to be expelled from application to publications using these new technologies simply because the message itself does not elaborate the facts upon which the publisher relied to sustain the "fairness" of the comment?

161 These are not esoteric questions. They may affect the survival of the fair comment defence as relevant to the electronic media by which the majority of businesses and individuals in Australia communicate today. In expressing the content of the fair comment defence for the present case, and reaching into legal

writings that preceded the contemporary technology, this Court should spare a thought for the significance of what it now decides for other forms of electronic publication, beyond that presently in issue.

162 These reasons demonstrate why it is a mistake simply to apply earlier *dicta* on the common law, addressed almost exclusively to print media, without adequate analysis of the basic legal concept in issue and without appropriate consideration of the changing technology of communications in respect of which the defence of fair comment will be invoked.

163 *Specification of available facts*: In the present appeal, the recipient of the matter complained of in the promotional broadcast was arguably afforded an adequate specification of where and when the facts relied on by the commentator could be found. The recipient was told how, without undue inconvenience or delay, he or she might obtain those facts. This was indeed encouraged by the publisher. In such circumstances, in my view, it would be open to the trier of fact to conclude that the facts were sufficiently "identified" in the promotion, in order to attract the fair comment defence. If such an approach is not taken to the availability of the defence under the common law of Australia, this Court must face the consequence that, in many media, its decision will effectively abolish or greatly confine the defence at common law and any statutory equivalents that are held to import the common law requirements. Because of the significance of the fair comment defence for free expression in Australia, this is a step I would not take.

164 Some recipients of communications in the form of the defendant's promotion would not watch the promoted programme. Some would therefore not receive the "new … facts" at all or receive them in their entirety[196]. Some would form their own opinions about the plaintiff solely on the comment contained in the promotion. Those who did not watch the full programme (or some of them) might derive, or retain, from the promotional broadcast adverse conclusions about the plaintiff. In determining the ambit of the fair comment defence at common law, weight must be given to the cases where the foundation (if any) for the comment fails to catch up with the damage occasioned by the abbreviated broadcast.

165 On the other hand, effectively to withdraw the fair comment defence from all such abbreviated communications would, potentially, be such a serious erosion of free expression, specifically of opinions, that this Court should reject it as a universal rule. A viewer watching a promotion such as that complained of on a commercial television broadcast could be expected to retain a degree of scepticism about such promotions in general and any comments contained within

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196 cf reasons of Gleeson CJ at [10]-[11].

them, in particular. In the circumstances of abbreviated electronic publications, it is therefore not unreasonable to treat as sufficiently "identified" facts that are referred to in the matter complained of which the recipient can conveniently and with reasonable promptness access. Such a principle would apply fairly to the extended television programme referred to in the defendant's promotion. It would also apply fairly to facts conveniently and readily accessible in interactive forms of electronic communication for which, likewise, the fair comment defence continues to play an important role in protecting free expression.

166 *Conclusion: adequate identification*: When, in the present proceedings, the foregoing approach is taken to the problem presented, the answer to the second issue is clear. Although the publication, in what I would hold to be the defendant's comments broadcast in the promotion, did not itself contain all of the facts necessary to allow the recipient to evaluate the comment being made (communication of all such facts being impossible in that type of publication), the facts relied on were sufficiently "identified". They were adequately "referred to". The recipients were told when and where such facts would be available. If they were interested they could conveniently, promptly and without cost have secured access to those facts. That is arguably enough to attract the fair comment defence.

167 No legal authority in this Court requires a conclusion different from the one that I favour[197]. Nor does legal authority persuasively suggest a contrary result[198]. Relevant considerations of legal policy and legal principle support this adaptation and extension of earlier expositions of the common law defence of fair comment. Most such expositions were written before the advent of modern telecommunications. They were stated without consideration of the impact

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197 The closest analogy is the consideration of defamatory headlines in *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 303-304 per Evatt J.

198 See *A S Abell Co v Kirby* 176 A 2d 340 at 348 (1961), where the Court of Appeals of Maryland acknowledged the possibility of incorporation of facts by reference. See also *Fisher v Washington Post Co* 212 A 2d 335 at 338 (1965) where the District of Columbia Court of Appeals concluded that it was sufficient that the facts should be "available to the public"; *Cohalan v New York Tribune Inc* 15 NYS 2d 58 at 61 (1939) ("accessible to any one who wished to examine the record"); *Restatement of the Law of Torts*, (1938), vol 3 at 277, commenting on §606; cf Jensen, "Recent Developments in the Law of Privilege and Fair Comment", (1965) 42 *North Dakota Law Review* 185 at 191 ("readily available"); Taylor, "Constitutional Limitations on the Defenses of Fair Comment and Conditional Privilege", (1965) 30 *Missouri Law Review* 467 at 470 ("known or available to the recipient") and Harper, "Privileged Defamation", (1936) 22 *Virginia Law Review* 642 at 659 ("accessible to" the recipient).

which such technology has on the defence. In expressing the common law, we cannot ignore those impacts.

168 The decision that the defence of fair comment is arguably *available* in such circumstances is not, of course, an indication that it will necessarily be *upheld*. It would remain for the tribunal of fact at the trial to decide whether the words published constitute comment or fact; whether the defendant can prove the truth of every fact so identified as the basis of the comment[199]; whether or not the comment relates to a matter of public interest; whether it is "fair"[200]; and if all the foregoing is established, whether the defence is defeated by proof of malice on the part of the defendant[201]. All of these are issues for trial. They are not apt to interlocutory peremptory determination which is what the plaintiff now seeks.

The proper outcome to the substantive issues

169 *Consequences of concurrence*: For the foregoing reasons, I reject each of the first two lines of reasoning favoured in the joint reasons[202]. However, this leaves me in agreement with the other arguments in the joint reasons affording alternative, and independent, grounds for arriving at the conclusion that pars 3.1-3.39 of the defence should be struck out[203]. I also agree with the treatment in the joint reasons of the remaining pleading issues[204]. So do my differences with the joint reasons on the two issues that I have explained require different orders disposing of these proceedings?

170 *Claim of deliberate concealment*: My disagreement with the joint reasons over issues (1) and (2) is not ultimately determinative. In the circumstances of

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199 *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 250, 254, 256-257.

200 *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166 at 173.

201 *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 72 SR (NSW) 347 at 352; *Pervan* (1993) 178 CLR 309 at 329.

202 That the defence of fair comment is unavailable because (1) the statements pleaded in pars 3.1-3.4 constitute statements of fact, not comment; and (2) the relevant facts are not sufficiently identified as required by law.

203 That the defence of fair comment pleaded by the defendant must address the meaning pleaded by the plaintiff, which it does not do; and that the matters pleaded in pars 3.1-3.39 are insufficient to lead an honest person to think that the plaintiff deliberately concealed evidence.

204 Joint reasons at [96].

this case, agreement on issues (3) and (4) is fatal to the defendant's reliance on fair comment as pleaded.

171 The plaintiff pleaded that the meaning of the promotion upon which he relied was that he had "*deliberately* concealed evidence from the trials of Mr Keogh" (emphasis added). This is the interpretation of the matter complained of with which the plaintiff goes to trial. In any fair comment defence, the defendant is substantially obliged to respond to that pleading. There may have been other interpretations of the publication (eg that the plaintiff was grossly careless, unprofessional, incompetent etc). However, the plaintiff has not chosen to sue on those interpretations. He has nailed his colours solely to the mast of dishonesty. Thus, he has not sued the defendant for defamation in respect of the full programme which the promotion foreshadowed.

172 I agree with the conclusion expressed in the joint reasons[205] that there is a great difference between a person such as the plaintiff displaying incompetence (or carelessness, unprofessionalism etc), on the one hand, and *deliberately* concealing evidence that could result in the conviction of an accused person of murder, on the other. If, at trial, the plaintiff *succeeded* in establishing the meaning he had pleaded, it is and should be no defence at law for the defendant to prove that the plaintiff was incompetent and mistaken in the performance of his professional duties. If the plaintiff *failed* to prove that meaning, his action must likewise fail.

173 *Resulting strike-out order*: The result is that the facts pleaded in pars 3.1-3.39 must be struck out. However, I would make that order on these grounds alone. I would not make that order on the analysis of the ambit and requirements of the fair comment defence.

174 It follows that there must be consequential amendment to other paragraphs of the defence[206]. Still further paragraphs should be treated as struck out, for reasons explained in the joint reasons[207].

175 *Ordinary facility to re-plead*: This leaves only the issue of re-pleading. Ordinarily, where there has been dispute about the admissibility of pleadings, a party is afforded the opportunity to reconsider its position in the light of the court's ruling on the applicable law. The party which fails is normally permitted

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205 Joint reasons at [86]. See also reasons of Gleeson CJ at [2].

206 Joint reasons at [96] referring to par 8.1.

207 See joint reasons at [25], [101].

to re-plead[208]. Re-pleading may be refused where the party's case is obviously hopeless and doomed to fail or where repeated opportunities to re-plead have failed or been abused.

176 The present is a case where there must, in any event, be a trial of the plaintiff's action on the merits. This is so because the defendant has grounds of defence that are unaffected by the disputes over the defence of fair comment. Certainly, the trial has been grossly delayed over the fair comment controversies, as the joint reasons hold. Cases do exist where courts will mark their disapproval of the unjustified conduct of proceedings by making appropriate orders, including as to costs[209].

177 The joint reasons decide that the defendant should be given no opportunity to re-plead its fair comment defence. The stated explanation[210] is that the pleadings have been repeatedly criticised without any concession by the defendant that there was anything substantially wrong with them. The joint reasons also refer to what appear to me to be policy considerations concerning delays generally in defamation litigation, the delays in the present case and the need to teach the defendant and other powerful publishers like it a salutary lesson. I agree that, where established law or legal practice is abused or not complied with, the correct way for a court to mark disapproval and right legal wrongs is to make orders giving effect to such conclusions, not just to resort to judicial admonitions in the form of *dicta*[211]. However, there were novel questions in issue in this appeal.

178 *Fair warnings of novel outcomes*: This is not a case where there has been unanimity, in the various levels in which these proceedings have been litigated, concerning the relief to which the plaintiff was entitled. I agree that, generally speaking, repeated re-pleading is unfair to less well-resourced litigants, usually plaintiffs, and should be discouraged. However, it is one thing to mark disapproval of a party's conduct of the litigation by imposing costs orders. It is another to put a party out of court in an action, or on an aspect of its legal claims,

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208 See *The Laws of Australia*, Title 5, "Civil Procedure", Subtitle 5.2, "Pleadings and Amendment" at 136 [111]; see also *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 at 774-775; 144 ALR 677 at 686-687.

209 cf *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116 at 128-129 [28]-[32] per Heydon JA; cf *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 196 [116].

210 Joint reasons at [99].

211 *Libke v The Queen* (2007) 81 ALJR 1309 at 1322 [49]-[50]; 235 ALR 517 at 532-533; *Gately v The Queen* [2007] HCA 55 at [48].

after deciding disputed questions of law regarding the elements of a claim or defence that that party has sought to plead. By inference, this Court granted special leave to the defendant because there were contestable questions of defamation pleading practice to be settled. Those questions have now been decided. Indeed, by virtue of the plaintiff's cross-appeal, they have been decided in a way different from the conclusion reached in the Full Court.

179 In the Full Court, the plaintiff did not even object to pars 3.1-3.4, which this Court now strikes out with no right to re-plead. The plaintiff there agreed that the defendant should be afforded a final opportunity to plead particulars in support of its defence of fair comment[212]. Now to deny the defendant that opportunity strikes me as unfair. The defendant received no warning of the risk that it might be deprived of its normal right to re-plead, if the present appeal were decided against it[213]. Normally, a party would be warned of such a peril, either in earlier judicial observations of a general kind or in exchanges during oral argument. No such warning was afforded to the defendant here. The course now adopted may be viewed as a punishment to the defendant for pursuing its legal rights which this Court granted it leave to argue.

180 It is true that the defendant may find it difficult to re-plead a fair comment defence in the light of the conclusions expressed in the joint reasons and also in my own reasons. However, it should have the opportunity to take advice on the point, the warning having now been given to it and others in a similar position. I would grant leave to re-plead but impose a strict time limit within which to do so.

181 *Re-pleading and importance of fair comment*: Doubtless my differing conclusion in respect of the proper orders is influenced to some degree by the views that I hold concerning the importance of the fair comment defence in the protection of free expression in Australia, particularly in the broadcasting media, such as the defendant. The defence of fair comment, and the pleading of that defence, can be abused and misused, that is true. Yet, ultimately, the right of fair comment defends the entitlement of us all to live in a society where diverse comments and opinions may be expressed under fair conditions established by law. This Court now having spoken on the subject, the defendant should have a last opportunity to be advised on whether it can re-plead – just as the plaintiff accepted before the Full Court that it should have. The saga has been protracted and expensive. Further such litigation is to be discouraged, including by appropriate costs orders. However, the present proceedings having come so far, they must be finished justly.

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212 *Manock* (2006) 95 SASR 462 at 472 [21].

213 cf *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 293-297.

Orders

182 I agree in the orders proposed in the joint reasons[214]. To those orders I would propose that a fifth order be added:

(5) The appellant to have leave within twenty-eight days to re-plead particulars to support its defence of fair comment, consistently with the reasons of this Court.

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214 Joint reasons at [102].