SUPREME COURT OF QUEENSLAND

CITATION:	*Baboolal v Fairfax Digital Australia and New Zealand Pty Ltd & Ors* [2016] QSC 175
PARTIES:	**KESHWAR BABOOLAL** (plaintiff) **v** **FAIRFAX DIGITAL AUSTRALIA AND NEW ZEALAND PTY LTD** (first defendant) and **TONY MOORE** (second defendant) and **AMY REMEIKIS** (third defendant)
FILE NO:	No 2564 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	12 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2016
JUDGE:	Daubney J
ORDERS:	**1. The application to strike out paragraphs 15 and 16 of the defence is refused.** **2. Otherwise, the plaintiff's application is adjourned to a date to be fixed.** **3. The defendants shall file and serve an amended defence within 21 days of today.** **4. In relation to the adjourned application, the parties shall be at liberty to make further submissions to me within 21 days of the service of the amended defence.** **5. Costs reserved.**
CATCHWORDS:	DEFAMATION – OTHER DEFENCES – MISCELLANEOUS DEFENCES – where the defence filed on behalf of the defendant seeks to invoke the Hore-Lacy Defence – where there is an application to strike out the paragraphs of the defence that seek to invoke the Hore-Lacy Defence – whether the Hore-Lacy defence is available under the common law of Queensland – whether the paragraphs of

the defence that seek to invoke the Hore-Lacy Defence should be struck out

DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where the defence filed on behalf of the defendant seeks to invoke the Hore-Lacy Defence – where there is an application to strike out the paragraphs of the defence that seek to invoke the Hore-Lacy Defence – whether the pleading of the Hore-Lacy Defence has the tendency to cause prejudice, embarrassment or delay – whether the principle relied on to permit the Hore-Lacy Defence is engaged under the practice and procedures in Queensland

Defamation Act 1889 (Qld), s 7
Defamation Act 2005 (Qld), s 6, s 7(2), s 8, s 24(1), s 47
Uniform Civil Procedure Rules 2005 (NSW), r 14.30(2)(a)

Chakravarti v Advertiser Newspapers (1998) 193 CLR 519, considered
David Syme & Co Ltd v Hore-Lacy [2000] 1 VR 667, cited
Fairfax Media Publication Pty Ltd v Kermode (2011) 81 NSWLR 157, cited
Fairfax Media Publications Pty Ltd v Bateman (2015) 321 ALR 726, distinguished
Polly Peck (Holdings) Plc v Trelford [1986] QB 1000, cited
Robinson v Laws [2003] 1 Qd R 87, distinguished
Setka v Abbott (2014) 44 VR 352, applied

COUNSEL:	B McClintock SC with M Polden for the plaintiff R Anderson QC for the first, second and third defendants
SOLICITORS:	Hall Payne for the plaintiff Bennett and Philp for the first, second and third defendants

[1] The plaintiff has sued the defendants, claiming damages for defamation arising out of the publication of four matters on the "Brisbane Times" website. The first three consist of separate web pages on that site and the fourth is a combined publication, being a web page together with readers' comments published on that page.

[2] By the present application, the plaintiff sought a range of interlocutory orders. The parties have agreed, however, that for present purposes I need confine myself to only one question, namely an application to strike out certain paragraphs of the defence which seek to raise the so-called "*Hore-Lacy* Defence", named for the authority on which it is premised.[1] The nature of this defence was succinctly described in the joint judgment of Warren CJ and Ashley JA in *Setka v Abbott*[2] as follows:[3]

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1 *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667.
2 (2014) 44 VR 352.
3 At [10].

> "Beginning with the denial that the words were defamatory of and carried the meanings pleaded by the plaintiff, such a defence sets up different (defamatory) meanings, which are alleged to be true in substance and in fact. Those different meanings, it must immediately be said, must be meanings upon which the plaintiff could succeed at trial, notwithstanding that the plaintiff has not in fact pleaded them."

[3] It was not in issue that each of paragraphs 15 and 16 of the defence filed on behalf of the present defendants seeks to invoke the *Hore-Lacy* Defence.

[4] The plaintiff submitted that these paragraphs of the defence ought be struck out because:

- the so-called *Hore-Lacy* Defence does not amount to a separate defence available under the general law;
- the pleading of such a purported defence has the tendency to cause prejudice, embarrassment or delay; and
- the principle relied on to permit a *Hore-Lacy* Defence is not engaged under the practice and procedures in Queensland.

[5] In advancing these arguments, the plaintiff relied particularly on *Robinson v Laws*,[4] which the plaintiff argued was a Queensland Court of Appeal decision which rejected a "*Hore-Lacy* form of pleading", and on the recent judgment of the New South Wales Court of Appeal in *Fairfax Media Publications Pty v Bateman*.[5]

[6] The defendants contended that:

- there is no authority for the proposition that a *Hore-Lacy* Defence is liable to be struck out in Queensland;
- the New South Wales judgment in *Bateman*, in which the availability of the *Hore-Lacy* Defence was rejected, turned on the application of the specific rules of pleading which apply to defamation actions in that State; and
- defamation law in Queensland is now quite different to that in force in this State when *Robinson v Laws* was decided.

Discussion

[7] Prior to the commencement of the *Defamation Act 2005* (Qld) ("the 2005 Act") on 1 January 2006,[6] the law of defamation in Queensland was codified under the *Defamation Act* 1889 (Qld) ("the 1889 Act"). Under the legal framework established by the 1889 Act, the "gist of the cause of action for damages for defamation [was] publication of defamatory matter: s 7 of the 1889 Act". "Defamatory matter" was defined under s 4 of the 1889 Act by reference to imputations, and specifically "the matter of the imputation". The "heart or essence of the cause of action in defamation in this State" was the particular matter of the imputation averred by the plaintiff to be contained in the defamatory matter.

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4 [2003] 1 Qd R 81.
5 (2015) 321 ALR 726.
6 Section 2.

It was, thus, for the plaintiff to plead the particular meaning or meanings relied on, and these would then bind the plaintiff in the pursuit of the proceeding.[7]

[8] The 1889 Act was repealed by s 47 of the 2005 Act. The 2005 Act was "the product of an agreement between the Attorneys-General of the States and Territories to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation."[8] Section 6 of the 2005 Act provides:

> "**6 Tort of defamation**
>
> (1) This Act relates to the tort of defamation at general law.
>
> (2) This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).
>
> (3) Without limiting subsection (2), the general law as it is from time to time applies for the purposes of this Act as if the Defamation Act 1889 had never been enacted."

[9] Accordingly, in contrast to the situation which applied under the 1889 Act, the common law of defamation now has force in Queensland, except to the extent that the 2005 Act provides otherwise.

[10] Moreover, unlike the position under the 1889 Act by which the essence of the cause of action was the defamatory imputation, the 2005 Act makes it clear that it is the "publication of defamatory matter" and not the individual imputation or imputations which is the gist of the cause of action – see in that regard s 7(2) and s 8 of the 2005 Act.

[11] It is convenient at this point to note that these changes mean that, in my respectful view, *Robinson v Laws* is not authority which binds me for the purposes of deciding the present application. That case was, relevantly, concerned with the availability under the then law of Queensland of the so-called *Polly Peck* defence.[9] By a *Polly Peck* defence, a defendant was permitted to plead a meaning different from that contended for by the plaintiff, and then seek to justify that different meaning. In *Chakravarti v Advertiser Newspapers*[10], Brennan CJ and McHugh J were highly critical of the so-called *Polly Peck* defence, saying it represented an approach which was "contrary to the basic rules of common law pleadings", and would in many contexts raise issues which could "only embarrass the fair trial of the action".[11] That line of reasoning was expressly adopted by de Jersey CJ and Williams JA in *Robinson v Laws*, founding a conclusion that the *Polly Peck* defence was not available under the then defamation law of Queensland. For example, de Jersey CJ said:

> "[51] When a plaintiff commences a defamation action in Queensland, the actionable wrong on which the plaintiff sues is publication of the defamatory matter, being essentially the meaning conveyed by the particular communication. The plaintiff particularises the meaning said to arise. If the plaintiff fails to establish that meaning, the plaintiff

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7 See *Robinson v Laws* (supra) at [44] and [49].
8 *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157 at [31].
9 *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000.
10 (1998) 193 CLR 519.
11 At [8].

> fails. The defendant may deny the meaning alleged, and may – perhaps must under r. 166(4) of the *Uniform Civil Procedure Rules* – identify any different meaning said to arise, by way of explaining the denial. I accept the following submission for the appellant, that 'if it is accepted that the meaning for which the defendant contends is the meaning properly conveyed by the words of which the plaintiff complains, to the exclusion of the meaning asserted by the plaintiff, the plaintiff fails to make out the actionable wrong on which the plaintiff has sued. There is no scope for a defendant then to advance any positive grounds of defence in respect of an entirely different actionable wrong, on which the plaintiff has not chosen to sue.'
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> [52] The criticism of any proposed adoption of the *Polly Peck* regime discussed by Brennan C.J. and McHugh J. in *Chakravarti* would be applicable were that proposed in Queensland. The system of pleading in this State is geared to early comprehensive disclosure of the case to be mounted by the plaintiff, and the response of the defence. Beyond that, it remains geared, consistently with good commonsense, upon the plaintiff's having the obligation to define the case he mounts, such that whether he succeeds depends on his sustaining that case. Civil litigation is, sensibly must be, claimant-driven."

[12] Importantly for present purposes, however, this passage in the Chief Justice's judgment was immediately preceded by reference to the judgment of Kirby J in *Chakravarti*. The concluding sentences from the following paragraph in the judgment of Kirby J were extracted (omitting references and citations):[12]

> "4. In an attempt to reconcile the desirable encouragement of particularisation of claims, the avoidance of 'trial by ambush' and the consideration of the entirety of the publication in question, courts will uphold the discretion of the trial judge, including a discretion to confine parties to the imputations pleaded where that is required by considerations of fairness. However, a more serious allegation will generally be taken to include a less serious one unless the latter is of a substantially different kind. It is true that dicta appear in decisions of this Court, other Australian courts and courts overseas which favour a strict approach: binding a plaintiff at the trial to the precise imputations pleaded. However, I do not consider that these dicta represent the law. The better view is that the rules of pleading must, in those jurisdictions governed by the common law, adapt to the fair evaluation by the tribunal of fact of the matter complained of. If the publisher claims surprise, prejudice or other disadvantage, the trial judge may protect it. No complaint can arise where additional imputations found represent nothing more than nuances or shades of meaning of those pleaded. **The position will be otherwise in jurisdictions which, by statute, provide that each imputation is a cause of action upon which the plaintiff may sue.** But South Australia is not one of these." (emphasis added)

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[12] At [139].

[13] In *Robinson v Laws*, de Jersey CJ acknowledged that Kirby J's proposition that the position would be otherwise "in jurisdictions which, by statute, provide that each imputation is a cause of action upon which the plaintiff may sue" encompassed the (then) situation in Queensland. As explained above, however, that is not now the situation in this State.

[14] Part 4 Division 2 of the 2005 Act provides for a number of defences to defamation actions. Notably, by s 24(1), a defence under that division "is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability".

[15] Section 25 of the 2005 Act provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true."

[16] In *Setka v Abbott*,[13] the Victorian Court of Appeal (Warren CJ and Ashley JA; Whelan JA dissenting in part) affirmed the availability of the *Hore-Lacy* Defence under the common law. In the course of extensive reasons for judgment, Warren CJ and Ashley JA said:

> "[93] In our opinion, for the reasons which follow, *H-L* justification can be pleaded in a proceeding brought under the 2005 Act. The preferable explanation is that a common law defence in that form is preserved by that Act. But otherwise it should be concluded that a pleading in that form is available in pursuing a defence under s 25 of the 2005 Act."

[17] Their Honours continued:

> "[95] Before the 2005 Act was enacted, the common law had reached the point that a plaintiff was required to plead meanings of a defamatory publication.[14]
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> [96] The common law also recognised that, because the plaintiff sued on the publication, the single cause of action residing in the defamatory publication, he or she should be able to succeed on a meaning which was not pleaded but which was not substantially different from and not more injurious than the meanings pleaded."

[18] In relation to the availability of the *Hore-Lacy* Defence under the 2005 Act, Warren CJ and Ashley JA said:

> "[102] By s 8 of the 2005 Act, a plaintiff sues on the defamatory matter. Consistently with the development of the common law, however, it is implicit in s 8 that a plaintiff must plead the imputation or imputations upon which he or she relies. 'Imputation' where used in s 8 connotes what the common law sometimes referred to as

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[13] (2014) 44 VR 352.

[14] At least in all but a case in which the defamation was singular and evidence – as by accusing the plaintiff of murder.

'meaning'; and sometimes, interchangeably, 'imputation'. The common law has a part to play in giving meaning to words used in the Act. Sections 6(1) and (2) of the Act are in point.

[103] It would not be consistent with the common law if a plaintiff was confined to the imputations pleaded.[15] It must be accepted that a plaintiff will be entitled to succeed on unpleaded variants which meet the description noted at [48] above.

[104] Underlining the intended irrelevance of the 1974 Act in the present connection is s 6(3) of the Defamation Act 2005 (NSW), to which we have earlier referred.

[105] Prima facie, 'imputation' where used elsewhere in the Act should be given the same meaning.[16] Relevantly for present purposes, the word is used in s 25 of the 2005 Act, which provides for the 'defence of justification'.

[106] In s 25, reference to 'the defamatory imputations carried by the matter of which the plaintiff complains' must thus be understood as embracing the imputations pleaded, and also unpleaded variants meeting the description noted at [48] above. Section 25 should not be understood, by a back door, to be inhibiting a plaintiff's entitlement to succeed at trial on both pleaded meanings and permissible variants as understood by the common law.

[107] On its face, s 25 requires a plea of confession and avoidance. A defendant will defeat a plaintiff's claim by proving that 'the defamatory imputations carried by the matter of which the plaintiff complains are substantially true' – that is, 'true in substance or not materially different from the truth'.[17] We doubt that this formulation adds to or subtracts from the common law plea of 'true in substance and in fact'.

[108] If a defendant were to be required to plead the substantial truth of all imputations – pleaded or not – which permissibly arise from a publication of defamatory matter, it would have two consequences. First, a defendant might, in effect, be put to defending as true in substance a meaning which he or she says is incapable of arising. Second, the obscurity of confession and avoidance would conceal from the plaintiff the beneficial effect of a defendant being required to identify permissible meanings upon which the defendant accepts that the plaintiff could succeed, and pleading justification to them. We reject as an adequate response to those consequences the plaintiff's submission that, because 'imputations' in s 25 can include (some) variants, and because a defendant can plead justification

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[15] Nor would it be consistent, not that it is decisive, with *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 771 ('*Morosi*'), where the New South Wales Court of Appeal held that a plaintiff could succeed, in respect of the cause of action constituted by a particular imputation, upon a meaning which did not differ in substance from the imputation pleaded.

[16] Context perhaps suggests that the meaning will not be the same where 'imputations' is used in Div 1 of Pt 3 of the Act. But it is not necessary to develop that matter.

[17] See the definition of 'substantially true' in s 4 of the 2005 Act.

> across the board, the point and utility of *H-L* justification is subsumed by s 25.
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> [109] But if it be assumed that s 25 permits a defendant to plead justification to some only of a plaintiff's pleaded imputations, the argument advanced for the plaintiff before this court would be no better. To meet unidentified but permissible variants, a defendant might well need to plead justification *en bloc*, this compounding the obscurity of the situation. Such a pleading would carry with it the potential for unfairness to both plaintiff and defendant, and the setting up of false issues, which were the progenitors of the common law developments in *Lucas-Box* and then *Hore-Lacy*.
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> [110] *Hore-Lacy* contemplates a situation in which the plaintiff pleads certain meanings. The defendant wishes to contend that those meanings simply do not arise. It is not a question of admitting that the imputations arise and then seeking to justify them. But the defendant is aware that the trier of fact is entitled to find for the plaintiff on permissible variants of the pleaded meanings. He, the defendant, has identified variants; and those variants, he says, he can justify. In order to expose this situation, and set a full framework for trial, he needs to be able to deny the plaintiff's pleaded imputations, specify the variants which he has identified, and seek to justify them."

[19] Whelan JA, while disagreeing in part with the reasoning of the majority, nevertheless expressly stated his agreement that: [18]

> "(1) the principles articulated by the majority in *David Syme & Co Ltd v Hore-Lacy* ('*Hore-Lacy*')[19] were part of the common law of Victoria prior to the passage of the Defamation Act 2005 ('the Act');
>
> (2) those principles remain part of the law of defamation in this State; and
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> (3) where a defendant pleads a variant meaning pursuant to the principles articulated in *Hore-Lacy*, the role of the judge is to determine whether that variant meaning is capable of falling within those principles."

[20] Subsequently, in *Fairfax Media Publications Pty Ltd v Bateman*,[20] the New South Wales Court of Appeal (Basten and Macfarlan JJA; McColl JA dissenting) held that the *Hore-Lacy* Defence is not available in New South Wales. It is, however, clear from the majority judgments in that case that the fundamental reason for this turns on the particular points of defamation pleading and practice which apply in New South Wales under the *Uniform Civil Procedure Rules* 2005 (NSW).

[21] In that regard, Basten JA said:

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[18] At [302].
[19] (2000) 1 VR 667.
[20] (2015) 321 ALR 726.

> "[147] Because the 2005 Act must be given effect, so far as possible, to ensure that common law principles will operate uniformly across the country, it may be necessary to disregard statutory variations of the common law in this state which have now been repealed, but which have affected practices and procedures in this state. **On the other hand, where those procedures are contained in rules of court which continue to operate it is possible that the common law in this state will differ from the common law in other jurisdictions.** There is nothing in the 2005 Act which seeks to prevent such an outcome. Indeed, the outcome is perhaps inevitable in so far as the 2005 Act does not prescribe procedures. Furthermore, variation is possible to the extent that legislation governing statutory interpretation varies from one jurisdiction to another." (emphasis added)

[22] His Honour continued:

> "[150] The significant aspect of s 25 for present purposes is that the statutory defence requires proof by the defendant that the defamatory imputations of which the plaintiff complains are substantially true. Until modern pleading practices developed, a plaintiff did not strictly need to plead specific imputations which were conveyed by the natural and ordinary meaning of the publication unless they were necessary because an innuendo arose from extraneous facts. However, in accordance with the pleading requirements which operate in New South Wales, the plaintiff must identify the imputations upon which he or she sues.[21] The somewhat inflexible rule of pleading in New South Wales, may, at least in part, derive from the 1974 Act, in so far as it provided that each imputation constituted a separate cause of action. Although that approach has been abandoned with the repeal of the 1974 Act, the pleading rules remain. Subject to an appropriate amendment, the plaintiff will be held to his or her pleaded imputations, or to meanings which are not substantially different from those pleaded.
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> [151] The question then becomes whether there is room under the common law for a pleading which seeks to justify publication of the material complained of, either without identifying particular imputations or by identifying imputations in different terms from those relied upon by the plaintiff. Ultimately, it may be seen that the defendants, by relying on a single common law in Australia which permits them to plead the substantial truth of imputations other than those pleaded by the plaintiff, raise a false issue. Accepting, as they do, that their other imputations must be not substantially different from those pleaded by the plaintiff, the question becomes one of permissible pleading practice, which involves no right or entitlement, nor reliance upon the general law, but rather the discretionary application of rules relating to pleadings which tend to cause prejudice, embarrassment or delay or are otherwise an abuse of process."

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[21] Rule 14.30(2)(a) of the UCPR.

[23] Basten JA examined the interplay between s 25 of the 2005 Act, on the one hand, and specific pleading rules under the *Uniform Civil Procedure Rules* (NSW) on the other, noting:

> "[164] The rules expressly require that the pleading of a defence of justification (whether under the 2005 Act or at common law) 'must specify to what imputation or imputations the defence is pleaded'.[22] That obligation arises where the plaintiff has pleaded two or more imputations. The ordinary grammatical understanding of that provision is that the imputation or imputations to which the defence is pleaded are those identified by the plaintiff. A suggestion made by the defendants that this provision permitted them to plead their own imputations, albeit imputations which were not substantially different from those pleaded by the plaintiff, does not conform to the ordinary meaning of the language. The rule addresses the confusion which might arise in the case of a plurality of plaintiff's imputations; it would make no sense to allow the defendant to plead its own imputations, but only where the plaintiff had pleaded more than one. Similarly, the proposition in r 14.32(2) that a defence of justification is sufficiently pleaded if it alleges that 'the imputation in question' was substantially true, picks up the language of s 25 which, as already noted, refers to the imputations of which the plaintiff complains."

[24] After setting out details of the primary judgment in that case, and essaying the arguments which had been advanced on appeal, Basten JA, under the heading "Assessing the appeal", said:

> "***(a) Application of principle***
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> [209] It is commonplace for lawyers, especially those operating regularly in specialist areas, to refer to legal principles by the names of cases which are thought to establish them. At least where the precise scope and application of a principle is in question, that practice may lead to error. **If the question had been more precisely defined it would have been apparent, as indeed it was from the primary judge's own reasoning, that a condition for the engagement of the principle was not to be found in New South Wales. Under the UCPR, the plaintiff was required to specify each imputation on which he relied but could not allege two imputations which did not differ in substance. While the jury could travel beyond a strict reading of the plaintiff's pleading, the jury could not be invited to decide any aspect of the case on a basis that did not conform in substance to the meanings pleaded. That was inconsistent with the premise on which the decision in *Hore-Lacy* was founded.**
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> …
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> [211] It follows that the primary judge was not bound to apply *Hore-Lacy*, not because *Hore-Lacy* was in any sense wrong, but because **the**

[22] Rule 14.31(2).

> **principle it established, once identified by the reference to the condition of its engagement, was not engaged, given the practice and procedures in this state.**" (emphasis added)

[25] In separate reasons agreeing with Basten JA, Macfarlan JA said:

> "[231] As is apparent from his Honour's judgment, the decision in *David Syme & Co Ltd v Hore-Lacy* [2000] 1 VR 667; [2000] VSCA 24 (*Hore-Lacy*) was founded on the proposition that a plaintiff in defamation proceedings is entitled to rely upon unpleaded imputations so long as they do not differ in substance from those pleaded in his or her statement of claim: [190]-[195] above and, in particular, at [2], [5], [23], [46] and [69] of *Hore-Lacy*. **This proposition is unsound in the context of NSW practice** as r 14.30(2)(a) of the Uniform Civil Procedure Rules (NSW) (the UCPR) requires a statement of claim to 'specify each imputation on which the plaintiff relies'." (emphasis added)

[26] Macfarlan JA continued:

> "[232] This latitude does not detract from the basic requirement of the UCPR that the imputations upon which a plaintiff relies are to be pleaded. Once that is acknowledged, the rationale given in *Hore-Lacy* for allowing a defendant to plead imputations alleged to be not substantially different from the plaintiff's pleaded imputations disappears. That rationale is that if the plaintiff can succeed on unpleaded imputations, the defendant should be able to plead and justify them."

[27] McColl JA, as I have noted, dissented. It is sufficient for present purposes to refer to the following passage in the conclusion to her Honour's dissenting judgment (omitting footnotes and citations):

> "[99] The Australian authorities decided before the uniform defamation legislation was enacted requiring a defendant to particularise alternative meanings to be advanced in support of a justification defence have also sought to accommodate the premise that a defence must meet the plaintiff's case. Thus, *Hore-Lacy* was reasoned within acceptance of Brennan CJ and McHugh J's strictures concerning a defence being a plea in confession and avoidance, but taking into account their Honour's acknowledgment that a defendant may have to plead an alternative meaning to avoid the plaintiff being caught by surprise and, too, Gaudron and Gummow JJ's acceptance that a defendant may advance such meanings.
>
> [100] Accordingly, the underlying premise of *Hore-Lacy* pleadings is that the alternative meanings the defendant advances are not substantially different from (being mere nuances of) the plaintiff's imputations. The purpose of them being identified is to put the plaintiff on notice that these are the meanings the defendant will contend at trial were not substantially different from those of which the plaintiff complains (and are therefore imputations on which the plaintiff may

> prima facie succeed) but are those the defendant will contend are substantially true. *Hore-Lacy* pleading thus avoids trial by ambush and ensures that there can be no doubt about how a defendant's justification case is to be advanced. It also reduces the risk of a defendant being left in the position outlined by Beach J in effect, of winning the battle, but losing the war."

[28] *Bateman's* case, in my respectful view, turns very much on the particular circumstances which apply in New South Wales because of the specific pleading rules and practice which have effect in law by reason of the *Uniform Civil Procedure Rules* (NSW). In particular, r 14.30(2)(a) in New South Wales requires that a statement of claim "specify each imputation on which the plaintiff relies", thereby denying a plaintiff the capacity to rely or succeed on unpleaded imputations. That removes the basal condition for the raising of a *Hore-Lacy* Defence.

[29] The position in Queensland is different from New South Wales. In this State, following the enactment of the 2005 Act, it is available to a plaintiff in defamation proceedings, on the application of common law principles, to succeed on unpleaded imputations, so long as they do not differ in substance from the pleaded imputations. There are no rules of court or pleading rules in Queensland which affect or derogate from this position.

[30] That being the case, the law in Queensland on this point is the same as in Victoria, and it is proper for me to follow and apply *Setka v Abbott*.

[31] Finally, it seems to me that the plaintiff's objection that the pleading of a *Hore-Lacy* Defence has the tendency to cause prejudice, embarrassment or delay is answered by the following observation by Warren CJ and Ashley J in *Setka v Abbott*:[23]

> "It is next the fact that, as we have previously noted, although there have been a number of *H-L* justification defences pursued at trial in this State in the past decade, only in one has an appeal eventuated after trial. That case does not stand as an indication that judges or juries, or for that matter counsel, have been incapable of adequately addressing the issue raised."

Disposition of the present application

[32] It follows from what I have written above that the plaintiff has not persuaded me that the *Hore-Lacy* Defence is not available under the common law of Queensland, and accordingly I would refuse to strike out paragraphs 15 and 16 of the defence on that basis.

[33] Some further argument was addressed in relation to the particular way in which each of those paragraphs had been pleaded, and whether they sufficiently and properly raise a *Hore-Lacy* Defence. In the course of oral argument, however, it was agreed that it would, in any event, be necessary for the defendants to deliver an amended defence and, to the extent that such deficiencies as were identified by the plaintiff in this regard may have merit, they can be addressed in the next version of the defendants' pleading.

[34] The parties also agreed on directions with a view to expediting resolution of the other interlocutory matters raised on the application.

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[23] At [173].

[35] Accordingly, having regard to my conclusions above and also the agreements reached in argument concerning the further directions to be made, there will be the following orders:

1. The application to strike out paragraphs 15 and 16 of the defence is refused;

2. Otherwise, the plaintiff's application is adjourned to a date to be fixed;

3. The defendants shall file and serve an amended defence within 21 days of today;

4. In relation to the adjourned application, the parties shall be at liberty to make further submissions to me within 21 days of the service of the amended defence;

5. Costs reserved.