Defamation, Artistic Criticism and Fair Comment

ANDREW KENYON*

1. *Introduction*

Fair comment is the primary protection available to critics in defamation actions. It is the defence which, most often, can protect their critical reviews of artistic work from civil liability for defamation. Certain issues, however, are unresolved about its operation, and its elements, at times, have been enunciated with less than crystal clarity in the courts. This article aims to explain, coherently and practically, the most constructive approach which can be taken to the defence of fair comment, at least within the realm of artistic expression and criticism. The article examines defamation, as it affects artistic criticism, in Part 2, and then, briefly, the defences to defamation, in Part 3. From that base, the defence of fair comment at common law, and its statutory version in New South Wales, are examined, and a schema of the elements of the defence proposed, in Part 4. By this process, the law as it has been espoused in cases and by commentators is synthesised into, it is hoped, a more useful creature for those involved in artistic expression and commentary, and for their advisers.

The article goes on to examine two important aspects of the defence, namely whether it protects, as comment, material in toto, or only the individual meanings which are conveyed by the material, and the question of what honest belief a critic need have in his or her comment. These aspects are investigated in Part 5 in relation to the proposed schema of the elements of the defence. They clearly have a significance for the wider application of the defence at common law and under the New South Wales legislation. It is argued that the defence should project material as comment and that the prevailing approach in New South Wales is incorrect. A relatively prominent example of litigation about artistic criticism is used, in the concluding Part 6, to illustrate and justify the need for the schema and the particular aspects of it which have been considered in detail. Without some clarification, confusion about these issues could effectively undermine the defence, and leave none of the artistic, critical, or wider communities well served by the law. The overall aim of this article is to demonstrate that the defence is, and should be, available to material which honestly expresses opinion and is logically related to the facts on which it is based such that it is part of a productive artistic debate.

Two examples of the material which has been the subject of litigation can serve to illustrate some of the legal practicalities of artistic criticism.

* LLB (Hons), Lecturer, Law School, University of Melbourne. The author thanks Professor Sally Walker, Roger Magnusson and other colleagues who commented on an earlier draft of this article, but remains solely responsible for its contents.

O'Shaughnessy v Mirror Newspapers Ltd[1] involved newspaper criticism of a production of Shakespeare's "Othello" directed by and starring the plaintiff. This review appeared under the heading "What a Tragedy":

> Only too rarely does it come to a critic to make use of superlatives ... [N]ever has so much talent gone into a production so out of contact with the audience, and so entirely bereft of ideas ... Stupidity and lack of talent are forgivable ... But the waste and dishonesty of this production, or rather recitation, make me very angry indeed ... In short the performance is a disaster which has all the makings of a fine production. All it needs is a producer with a little humanity, who understands that the actors on stage are people and the audience are people too.[2]

The defendant won at trial, and in the New South Wales Supreme Court on appeal, by relying on the defence of fair comment.[3] But, the High Court allowed the plaintiff's appeal with the majority joint judgment focussing upon the way the criticism could have conveyed factual allegations of dishonesty, which took it beyond the defence.[4] Both lower courts treated the criticism as conveying only opinion, rather than allegations of fact, illustrating that the fact or opinion distinction is difficult to apply, if not a more significant problem within the defence. Apart from this issue, other aspects of the Court's approach appear unusual, or archaic, at least in light of present artistic understandings of the issues, and these aspects are considered below in Part 4.

The treatment of other artistic criticism has been even more problematic, as *Meskenas v Capon*[5] shows. Edmund Capon, Director of the Art Gallery of New South Wales, criticised Vladas Meskenas' painting of Rene Rivkin, which was entered in the 1988 Archibald Prize competition for portraiture:

> It's simply a rotten picture. It's no good at all. I don't care what Rene thinks. I looked at the picture and thought "Yuk". The hand's all wrong, so are the eyes, and look at the neck. It looks like it's been painted with chewing gum.[6]

Meskenas argued that the criticism conveyed two defamatory meanings: that he was an inferior artist, and that he was so incompetent he painted a second rate picture. Capon gave evidence that he did not believe in the substance of either of these alleged meanings; neither represented his opinion. The case was decided under the *Defamation Act* 1974 (NSW) and, following the weight of precedent, Christie DCJ ruled out the defence of fair comment, which led to a jury verdict for Meskenas. Capon had expressed what was clearly comment on artistic work, but lost the case due to the criticism conveying an unintended meaning and the law, as applied in New South Wales, required the critic to genuinely believe in this unintended meaning. Although the decision was in line with the trend of authority, this article

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1 (1970) 125 CLR 166.
2 Id at 167–8.
3 *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 91 WN (NSW) 738.
4 Above n1 at 174 per Barwick CJ, McTiernan, Menzies and Owen JJ.
5 Unreported, District Court of New South Wales, Christie DCJ and jury, 28 September 1993 (2136/1991).
6 *The Sun-Herald*, 11 December 1988.

suggests that it was not the necessary result on the law, nor preferable in terms of policy, and is at odds with the best understanding of the defence.

The issues about the defence considered here largely remain unaffected by the latest reform proposals from the New South Wales Law Reform Commission which released a major report on defamation law late in October 1995.[7] It presented a draft Bill which would make substantial changes in defamation law and procedure, principally in three areas. The first would be to require, in most cases, the falsity of the meaning conveyed by the publication to be part of the cause of action. To have a cause of action, a plaintiff would have to prove that any imputation arising from a publication was defamatory and also show that it was false, incapable of being proved true or false, or not related to a matter of public interest. The public interest ground would be a temporary measure until the enactment of separate legislation dealing with privacy.[8] The second change would be to offer an alternative remedy of a court ordered declaration of falsity. This quick alternative remedy could be sought for material capable of being proved true or false, and could be granted with an order for its publication by the defendant.[9] The third change would legislatively allow a potential plaintiff to request a correction, prior to litigation, from the publisher of allegedly defamatory material, which if given promptly and adequately would bar damages for non-economic loss.[10] In the case of material which conveys comment, the only important change contemplated would be to the burden of proof. The defendant would gain the burden of showing that the comment represented the opinion of the defendant, or the defendant's servant or agent.[11] The issues addressed in this article have not been dealt with in the report, the question remaining, how and where a line should be drawn between actionable and defensible criticism. This is unfortunate and despite an earlier article, which raised some of these same issues, written in a personal capacity by a consultant to the Law Reform Commission.[12] Given statements by State Attorneys-General about the desirability for uniformity in defamation law,[13] the New South Wales proposals could have a national impact but leave unresolved the issues dealt with here.

As a final point of introduction, it is not suggested, in addressing this one aspect of the interaction between law and art, that the law should, necessarily, adopt an approach which mirrors an artistic understanding of the issues involved. The law's role need not be to advance any artistic avant-garde. Anderson has argued persuasively for the re-evaluation of many attacks on the legal treatment of art which assume that law should "support" art in this way. The evaluation of the law's impact upon the arts should acknowledge, rather, that law has a role in managing the entire "cultural field".[14] Thus, the objectives of law, at times, will be tangential to those of artists.

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7 New South Wales Law Reform Commission, *Defamation*, Report 75 (1995) New South Wales Law Reform Commission, Sydney.
8 Id, recommendations 5 to 8.
9 Id, recommendations 10 to 20.
10 Id, recommendations 22 to 28.
11 Id, recommendation 9.
12 Reichel, B, "Artists, Critics and Defamation Law Reform" (1994) 2 *Torts LJ* 26.
13 *The Australian*, 17 October 1994 at 5.
14 Anderson, P, "On the Legal Limits of Art" in Arts Law Centre of Australia, *Evident*

This is not to support the opposite fallacy, that when the law considers art it should adopt an approach equivalent to that for other subject matter. The law's division of human interaction into legal categories no more mirrors the artistic world's divisions than is the case for other areas of human activity. The legal approach to artistic criticism, however, has been influenced by the courts' understanding of art, criticism, and the social roles which both may play. A consideration of this understanding suggests that the law's treatment of artistic criticism is based, in part, upon dubious values about art and criticism, values which do not appear to have any worthwhile non-artistic rationale.

2. *Defamation*

Civil defamation is a private law action available to those whose reputation has been harmed. It exists in Australia in a myriad of appearances, from a largely common law tort, with some statutory modification, to a variety of more or less codified regimes.[15] In Victoria, South Australia, and Western Australia civil defamation is a common law tort.[16] In New South Wales the *Defamation Act* 1974 (NSW) regulates defamation and draws substantially on the common law, although the latest reform proposals would make significant changes, as noted above. Queensland and Tasmania have codified regimes which also retain elements of the common law,[17] and in the Territories the common law survives slightly modified.[18]

Defamation has been under "active" review for many years, with significant reports from the New South Wales Law Reform Commission, the Attorneys General of New South Wales, Queensland and Victoria and the Australian Law Reform Commission,[19] and it is in dire need of simplification and being made uniform nationally.

The nature of an interest in individual reputation has been analysed little, but in short, it is the essence of the opinions about an individual held by others. Clearly, this distillation of opinion can influence one's economic and emotional well-being, so that harm to reputation, at times, can warrant a remedy. The level of protection which defamation law gives to reputation depends upon the ways in which the law balances interests in individual reputation and freedom of expression. Interests in reputation can be seen as either individual or societal, or more accurately both. Some writers, in acknowledging the significant and diverse impacts of speech, note the difficulties in the labels "private" and "public" which

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Tensions: Law and Culture in the Age of Post-Modernism, seminar papers (1994).

15 The historic and, in Victoria, South Australia and Western Australia, remaining differences between libel and slander are not considered in this article.

16 *Criminal Code Act* 1913 (WA) makes certain publications lawful in relation to civil defamation.

17 *Criminal Code* (Qld) and *Defamation Act* 1957 (Tas).

18 *Defamation Act* 1901 (NSW) and *Defamation (Amendment) Act* 1909 (NSW) for the ACT, and *Defamation Act* 1938 for the Northern Territory.

19 New South Wales Law Reform Commission, above n6, *Defamation*, DP 32 (1993) and *Report on Defamation* (1971); Attorneys-General of New South Wales, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (1990) and *Reform of Defamation Laws Discussion Paper (No 2)* (1991); Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report no 11 (1979).

inhere in the concept of reputation.[20] The operational value of expression is often explained in terms of a marketplace of ideas in the pursuit of truth. This, usually civil libertarian, approach to speech has certain difficulties and could warrant further investigation. Two points will be noted here, in passing. The freedom often is enunciated as only a negative freedom, namely "[f]reedom of speech, like the other fundamental freedoms, is freedom under the law".[21] The question of whether any positive rights could arise through the freedom may remain for future cases. In *Theophanous v Herald and Weekly Times Ltd*,[22] some judges commented that the freedom is a restriction on legislative and executive power, but left open the question as to whether it could contain any positive rights. Second, the fact that ideas may not operate in the same way as other items in a market is often not considered.[23] It is possible, however, that this will change as the "marketplace" receives further attention in writing upon spectrum scarcity and new media.

Whatever remains to be investigated in terms of reputation and the operative effects of speech, actionable defamation requires three elements to be established by the plaintiff at common law: publication, identification, and defamatory meaning. Publication is the release of the material to someone other than the person defamed.[24] The critic, editor, publisher and others intentionally or negligently involved can be liable for releasing the material,[25] although the defence of innocent dissemination may be available to some, such as distributors.[26] In general, publication poses no problem for plaintiffs suing in relation to artistic criticism. The material must also identify the plaintiff, but need not name that person. The test of identification is whether those who know a person would believe that they were being referred to by the publication.[27] Whilst identification is an important issue in relation to defamation *by* artistic expression, particularly by fiction, identification of the artist is normally self evident within a piece of criticism.

The publication must convey a defamatory meaning, either literally or through inferences as perceived by ordinary readers or those with special knowledge. Three cumulative tests of defamatory meaning exist at common law covering material which tends to lower the estimation in which people hold an individual,[28] expose a person to hatred, ridicule or contempt,[29] or cause people to shun or avoid an individual.[30] The Code States include a fourth test, material which is likely to injure a person in his or her profession or trade,[31] which is not addressed in this article. If defamation is about protecting

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20 See Abel, R, *Speech and Respect* (1994) at 28, 35–8.
21 *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 at 745 per Diplock J.
22 (1994) 124 ALR 1 at 14–5 per Mason CJ, Toohey and Gaudron JJ, cf Brennan J at 33.
23 Cf Edgeworth, B and Newcity, M, "Politicians, Defamation Law and the 'Public Figure' Defence" (1992) 10 *L in Context* 39 at 61.
24 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524.
25 *Webb v Bloch* (1928) 41 CLR 331.
26 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 486–8 per Lord Denning MR.
27 *Hulton (E) & Co v Jones* [1910] AC 20; *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331.
28 *Sim v Stretch* (1936) 52 TLR 669.
29 *Parmiter v Coupland* (1840) 6 M & W 105; 151 ER 340.
30 *Youssoupoff v Metro–Goldwyn–Mayer Pictures Ltd* (1934) 50 TLR 581.
31 *Criminal Code* (Qld) s366, *Defamation Act* 1957 (Tas) s5.

reputation, logically only material which disparages reputation can be defamatory. However, the concepts of "ridicule" and "shun or avoid" do not necessarily involve disparagement or blame. Some commentators argue that such material should not be part of defamation law,[32] whilst others suggest a broad content to "ridicule" in particular offers new scope for protection of damaging material.[33] The issue of non-disparaging material which may "ridicule" a person could benefit from further investigation. The point may be that positioning such material outside the scope of defamation law overlooks effects which it may have in common with material disparaging to reputation: both types of material can result in a lessening in the willingness of people to associate with an individual.[34] Hunt J has emphasised that imputations which place a person in a ridiculous light can be defamatory even without any element of moral blame.[35]

The meanings conveyed by the publication are determined objectively, by reference to the perception of average readers, who are ordinary sensible people neither "unusually suspicious [nor] unusually naive"[36] and who are not "perverse, morbid, suspicious [nor] avid for scandal".[37] The significance for artistic criticism is that rhetorical extravagance will not necessarily convey a meaning detrimental to reputation: a critic may "dip his [or her] pen in gall for the purpose of legitimate criticism".[38] The historical context of criticism, however, is influential in determining meaning and whether that meaning is defamatory. *Merivale v Carson*,[39] involving newspaper criticism of a stage play, is a good example. An implication of adultery appears to have arisen from the critic's description of "the naughty wife and her double existence" and the later reconciliation of husband and wife. It is most unlikely that the same meaning would be conveyed today, and even if adultery was implied, it is questionable whether it would meet any of the tests of defamatory meaning.

3. *Defences*

It is axiomatic that not all defamations are actionable. That is, certain defences exist which negate, in differing ways, the possibility of a remedy in defamation for harm to reputation. There are four general categories of defence: justification, privilege, fair comment, and the constitutional defence for political discussion. Other defences include, in some jurisdictions, innocent publication, triviality or unlikelihood of harm, and apology.[40]

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32 Walker, S, "Regulating the Media: Reputation, Truth and Privacy" (1994) 19 *Melb ULR* 729 at 735.

33 Watterson, R, "What is Defamatory Today?" (1993) 67 *ALJ* 811.

34 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 23–4 per Mason J.

35 *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 453 and *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

36 *Lewis v Daily Telegraph* [1964] AC 234 at 259 per Lord Reid.

37 Walker, S, *The Law of Journalism in Australia* (1989) at 150 citing *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

38 *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 174 per Jordan CJ.

39 (1887) 20 QBD 275.

40 Walker, above n37 at 205–7.

Justification involves establishing the truth of the meanings conveyed by the material and, in some jurisdictions, the public interest or public benefit in its publication.[41] Much analysis has considered the statutory and common law developments which have refined the scope of this defence. This analysis will not be considered here because, in that aspect, the defence is not centrally relevant to artistic criticism. Justification may be required if material exceeds the bounds of criticism by conveying factual allegations, as *O'Shaughnessy*[42] illustrates. In such cases, the legal position is that the criticism conveys opinions rather than allegations of fact about an artist, and a critic's opinion cannot be in itself a matter of fact capable of legal proof. Some difficulties in applying such a categorisation are noted below in Part 4.

Through recent High Court decisions, first in *Australian Capital Television*[43] and then more specifically in *Theophanous*[44] and *Stephens*,[45] defamation law has begun a process of constitutionalisation. The extent to which this development may overtake the rest of defamation law, as has arguably been the situation in the United States, remains to be seen, although the defence as yet must be considered uncertain in light of the divisions within the High Court about the effect of any constitutional implication on defamation. For example, in *Theophanous*, Mason CJ, Toohey and Gaudron JJ said defamation law must conform to the constitutional implication;[46] and Deane J went further in finding that the implication would preclude the application of defamation laws to matters of political discussion.[47] Brennan J, however, said that the implication does not give rise to a personal freedom, and so creates no inconsistency with defamation law;[48] Dawson J said that there is no implied guarantee;[49] and McHugh J said that some implication exists only during the course of elections.[50] Recent changes to the High Court bench only underline the uncertainty about the future constitutional development of defamation law.

Two points can be noted in any case. The first is that the most significant short term developments seem likely to be through an expanded common law qualified privilege. Common law qualified privilege has traditionally been limited by a requirement of reciprocity of interest and duty between the conveyor and receiver of information.[51] This has not protected the media, but may now do so, at least for some discussion of political matters.[52] Where the constitutional implication exists it is unnecessary for the defendant to plead a

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41 A public benefit must be shown under *Criminal Code* (Qld) s376, *Defamation Act* 1957 (Tas) s15, and *Defamation Act* 1901 (NSW) s6 for the Australian Capital Territory; and a public interest must be shown under *Defamation Act* 1974 (NSW) s15. The latest New South Wales reform proposals, above nn7–10, would see the defence of justification made redundant in New South Wales.

42 Above n1.

43 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

44 Above n22.

45 *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80.

46 Above n22 at 15–7.

47 Id at 44–6 and 601.

48 Id at 33.

49 Id at 64–5.

50 Id at 74–6. See now McHugh J in *McGinty v Western Australia* (1996) 134 ALR 289.

51 *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.

52 *Theophanous* above n22 at 26 per Mason CJ, Toohey and Gaudron JJ.

duty to publish the material.[53] This approach is more solidly established than the implied protection for political discussion itself, given the comments of McHugh J in *Stephens*, who dissented as to the existence of the constitutional guarantee but supported a wider common law qualified privilege.[54] This privilege may provide a separate avenue for the protection of artistic criticism which has the requisite political content.

Artistic expression and the criticism of it also could be within the constitutional defence: "[t]here is a difference between entertainment and politics, though there may be occasions when one may merge into the other".[55] It would not be impossible for a work of art itself to engage in "discussion" relevant to Australia's constitutional system of representative democracy. Criticism of such a work also could come within the defence. The debates surrounding the intersection of the artistic and political spheres are beyond the range of this article, but contemporary United States experiences may be relevant. Specifically, recent controversies over the National Endowment for the Arts funding of politically contentious work, often due to its sexual or religious content, illustrate one way in which art can come within the general political debate. Also, recent moves from governments and artistic communities to reposition the arts within the Australian political environment could impact upon any use of this constitutional defence in relation to artistic material.

4. *The Defence of Fair Comment*

The elements of the common law defence of fair comment are characterised in differing ways, often simply being placed within three requirements: for the material to be a statement of opinion rather than fact; expressed upon a matter of public interest; and fair. The necessity for comment not to be actuated by malice is usually kept as a separate ground of defeasance, at least at common law. Malice, in its meaning of impropriety of purpose or ill will toward the plaintiff, is not an issue under the statutory defence in New South Wales.[56] In the Code States this idea of malice is irrelevant as the legislation imposes no requirement of good faith on the defendant.[57] These States, however, retain the element of honest belief, which has generally been understood as part of the "fairness" requirement imported from the common law. This is different to the approach recommended below as more accurately reflecting the common law, but the full effect of the proposed schema in the Code States is not pursued here.

The defence's other possible elements can be placed under either the requirement that the comment be fair or that it be an expression of opinion rather than fact. These elements are that the material has the quality of "comment", being based upon facts indicated which are true or otherwise protected; is comment which a fair minded person could possibly make upon those facts; and is the honest opinion of the commentator. A schema dealing with all these elements is proposed, specifically in relation to the protection of artistic criticism,

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53 *Stephens* above n45 at 90 per Mason CJ, Toohey and Gaudron JJ.
54 Id at 110 and 114.
55 *Theophanous* above n22 at 13 per Mason CJ, Toohey and Gaudron JJ.
56 See below nn106–10 and accompanying text.
57 See above n17.

although it also has significance for the defence as it operates more widely. The schema, it is suggested, best accommodates the various approaches which have been made in the cases and by commentators, and accords with the perhaps conflicting aims of protecting artistic reputation and promoting artistic criticism.

It is, of course, accepted that any schema dichotomises reality, and clearly this applies to matters of communication. This is not to deride the need for a legal method which provides useable frameworks of analysis, but rather to put them in a proper context and to underscore the need to examine the effects of any framework upon process and outcomes. This is especially necessary given the relative lack of empirical research on defamation litigation. If there is even a danger that formalism "must wilfully ignore context" and "elevate form over substance"[58] care must be taken with frameworks of analysis. To that end and, it is hoped, with an eye to discern at least some of the difficulties inherent in the endeavour, the classification schema and the details of each element are outlined.

A. A Proposed Schema: "Comment", "Public Interest", "Fair" and "Malice"

The classification most useful in dealing with the defence, particularly for the purpose of artistic criticism, could be via a division into four categories, being:

i *That the comment have the quality of comment*, meaning that it must:
   - a be an expression of opinion rather than fact;
   - b indicate the facts upon which it is based; and
   - c be logically related to those facts, by it being objectively possible for a fair minded person to make the comment upon those facts.

ii *That the comment be expressed upon a matter of public interest.*

iii *That the comment be fair*, meaning that it must be based upon facts which are true or otherwise protected.

iv *That the comment not be actuated by malice*, meaning that the comment must:
   - a not be motivated by feelings of spite or ill-will; and
   - b where the comment is that of the defendant (rather than comment of a third party repeated by the defendant), be the honest opinion of the commentator.

Within the elements of the defence there may be an objective test — that the comment is such that a fair minded person could possibly make, upon the facts indicated — and a subjective test — that the comment is the honest opinion of the commentator. An important question is where these elements fit within the requirements of comment, fairness and malice. Many apparently contradictory statements within the cases can be sourced, at least in part, in different approaches to these tests. This article, drawing on points originally made by Johnston,[59] suggests the preferable place for the objective element is

58 Abel, above n20 at 105–6.

59 Johnston, I D, "Uncertainties in the Defence of Fair Comment" (1979) 8 *NZULR* 359 at 381.

within the test of comment. The utility of this approach for criticism appears from the cases illustrating the proposed schema of the defence.

The proposed schema could be said to reduce the test of fairness substantially. It also differs from recent cases which have placed the objective element within the test of fairness. In *Telnikoff v Matusevitch*,[60] the House of Lords held that the test of fairness was wholly objective and the test of malice subjective. However, it should be remembered that *Telnikoff* approved of the minority position in *Cherneskey*[61] which was concerned with, particularly, the media's publication of letters to the editor and what burdens of proof would be placed upon each party. Dickson J in the minority in *Cherneskey* held that the test of fairness was objective, namely that the comment was one possible upon the facts, and the test of malice subjective and separate for each defendant.[62] Whilst these decisions placed the objective element within the test of fairness, they more importantly placed it outside the test of malice, and should not necessarily affect whether the objective element is understood to be within the test of fairness or that of comment. The important point is that the subjective element of the defence was placed within a separate test of malice. The outcome of the litigation would not have been altered by a placement of the objective element within either fairness or comment. An important reason for placing the objective element within the test of comment, however, is that the *Defamation Act* 1974 (NSW) retains the common law meaning of comment but does not use the term fairness.[63] The schema proposed here means that the statutory defence would retain an objective limit to defensible material. This is an important limit to the defence if, as suggested in Part 5, the honest belief required of a critic is an honest belief in the meaning intended by the critic, rather than the meaning perceived by the audience. It is not suggested that the enactment of New South Wales legislation has altered the common law of other Australian jurisdictions! But, case law support exists for placing the objective test within "comment" and the legislation illustrates the importance of this placement.

i. Comment Must Have the Quality of Comment

a. Comment Must be an Expression of Opinion Rather than Fact

Courts are concerned to differentiate statements of opinion from fact, because the latter must be defended as other than comment, generally by the defences of justification or privilege. The form of expression is not conclusive, the test being seen as one of substance. However, inferences of fact which are drawn from other facts can be understood as comment, and, if material appears to be criticism, *prima facie* it is opinion rather than fact.[64]

The High Court dealt expressly with the question of fact or comment in *O'Shaughnessy*. The plaintiff actor and director won as the criticism could have conveyed factual allegations of dishonesty. The majority said:

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60 [1991] 3 WLR 952; applied in *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309.

61 *Cherneskey v Armadale Publishers Ltd* (1978) 90 DLR (3d) 321.

62 Id at 345.

63 Sections 32–34.

64 *Whitford v Clarke* [1939] SASR 434.

> It appears to us that the passages quoted could fairly have been regarded by the jury as going beyond criticism of the production and attributing a dishonourable motive to the plaintiff as a statement of fact ... [S]he wrote what could, we think, have been regarded as amounting to a defamatory statement of fact, viz. that the producer dishonestly suppressed the roles of other players to highlight his own role ... If what was written had been no more than comment it only had to be fair, but, if it were fact, it had to be correct to defeat the plaintiff's claim.[65]

The majority of the High Court did not find that the material actually conveyed allegations of fact, but that it was capable of conveying such allegations. It would have been up to the jury to determine whether factual allegations were conveyed. The finding still limits a critic's ability to convey his or her response to an art work. The fact or opinion division supposes that the critic's words will have a qualitatively different impact upon the audience depending on the nuances of the critic's expression. Whilst, obviously, there is a qualitative difference between a bluntly expressed fact and a clear expression of opinion, the boundary between the categories is inherently imprecise. It is worth repeating that inferences of fact which are drawn from other facts can be understood as comment.[66] That may have been a better approach to the criticism in *O'Shaughnessy.*

A separate point is that judicial attitudes to the role of criticism emerge through the fact or opinion issue. Fair comment was originally seen as part of the common law defence of privilege,[67] and the conceptual shift from privilege to comment saw egalitarian language used. Privilege was available only to "privileged people" (on certain occasions) while comment would be available to all persons equally.[68] In contrast, discussions of the fact or opinion issue have revealed a deference to "professional" artistic criticism in the application of the defence: only opinions with a particular authorised source may really deserve protection. This belief follows from an archaic view about the role of criticism and warrants investigation. The judicial comments about criticism may have been coloured particularly by the apparently poor quality of the art criticised in these cases. But, the rationale for such precedents needs to be re-evaluated to properly apply them to contemporary criticism.

An example is *Gardiner*,[69] which involved newspaper criticism of a detective story, "The Scarlet Swirl". This had been self published under the pseudonym "Mythrilla", and only about six copies were available in Australia! It was a literary work, seemingly, of no particular interest to anyone. The majority of the Court defended, at some length, criticism of such a work. In relation to the fact or opinion issue, Davidson J noted that if a critic "states what is essentially an opinion it can never be really proved to be true or false unless a jury is to be at liberty to decide such an issue by the use of an intelligence or knowledge probably much inferior to that of the critic", and concluded with remarks about the problem of "sound and valuable public

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65 Above n1 at 174 per Barwick CJ, McTiernan, Menzies and Owen JJ.

66 Walker, above n37 at 173 fn45 and the cases noted there.

67 *Henwood v Harrison* (1872) LR 7 CP 606; disapproved in *Campbell v Spottiswoode* (1863) 3 B & S 769; 122 ER 288 at 292.

68 *Merivale v Carson* (1887) 20 QBD 275 at 280 per Lord Esher.

69 Above n38.

criticism ... being unduly shackled, whilst the literary and artistic market is being smothered in a spate of rubbish".[70]

The leading judgment contains a similar view about the role of criticism: "English literature would be the poorer" if the critic did not denounce "twaddle, daub or discord".[71] Although over 50 years old, the case is seen as "a classic statement of the law of the defence of fair comment in the context of literary or artistic criticism"[72] and remains influential — the majority in *O'Shaughnessy*[73] quoted Jordan CJ at length. But, the assumptions in the case about art and criticism have not been made explicit.

Given the supposed "quality" of the work in *Gardiner*, it perhaps is understandable that the Court so strongly perceived criticism's role as defining and upholding standards for the wider community. However, the rationale for defending fair comment may be found, increasingly, in a benefit believed to derive from speech of differing views on cultural matters, rather than any effect as an arbitrator to exclude from a critically authorised canon all that is "twaddle, daub or discord". This change would accord with the diversity of perceptions being recognised in the determination of defamatory meaning[74] and the scholarship in an arena beyond law dealing with meaning and interpretation. The very existence and strength of such a wider debate about meaning should lead to the questioning of beliefs as displayed in this case. The change would not take the criticism in *Gardiner* outside the defence of fair comment, but would alter the underlying rationale for the protection of statements of "opinion" rather than "fact".

b. Comment Must Indicate the Facts upon Which it is Based

The requirement that the facts be indicated could be seen as an element of a test of fairness.[75] It is suggested, however, that it sits better within a test of comment, where various cases place it: "[e]ven 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 [sic] stated or sufficiently indicated".[76] The point really is that "opinion" includes the concept of statements being related to evidence or facts. It is impossible to repeat all the facts within a piece of criticism on which comment is based. This has long been recognised and indicating the facts, even through the title of a novel for example, can suffice for the purpose of artistic criticism. This would allow the audience to compare the criticism to the artwork itself. It is also possible for an "implied substratum" of facts to support the comment in the required sense without those facts being indicated expressly, but being implied by the words used in the criticism.[77]

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70 Id at 179–80.
71 Id at 174 per Jordan CJ.
72 Heerey, P J, "The Biter Bit — Literary Criticism and the Law of Defamation" (1992) 11 *U Tas LR* 17 at 17.
73 Above n1 at 173 per Barwick CJ, McTiernan, Menzies and Owen JJ.
74 *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682 at 687 per Hutley JA, at 693–4 per Glass JA.
75 *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100 at 109 per Collins MR.
76 *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 182 per Reynolds JA.
77 *Kemsley v Foot* [1952] AC 345.

c. *Comment Must be Possible for a Fair Minded Person to Make upon the Facts Indicated*

The same idea of "basing" an opinion on facts also raises issues of the opinion having a logical relationship to the facts by it being possible for a fair minded person to make. This objective test can be traced to Lord Esher in *Merivale v Carson*: "would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?"[78] This test in no way imposes an obligation of reasonableness upon the comment. However, where comment implies a dishonourable motive to an individual it has been held that the facts must warrant the comment.[79] This stricter test has been doubted,[80] and it has been abolished in New South Wales.[81]

This objective element is the one which most clearly falls between, or perhaps upon both, the proposed tests of comment and fairness. However, if the objective element is understood as part of the test of fairness, there is a danger that fairness will be perceived as reasonableness. This would be an untenable position for artistic criticism, which, if it is to be beneficial, must require the expression of vigorous and dissenting opinions, which some may well think unreasonable. There is case law support for the common law test of comment to include this objective element: "[T]here is a preliminary legal issue as to whether the statement in question is capable of being construed as comment (in that it is an opinion which could possibly be held on the material indicated as its basis)."[82]

The objective element was placed there in the joint judgment of Jacobs and Mason JJA, when *O'Shaughnessy* was before the Court of Appeal in New South Wales:

> [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, but, because it simply does not flow and is not capable of being regarded as flowing from the facts, will be treated as an independent allegation of fact.[83]

This was quoted by Priestley JA in *David Syme & Co Ltd v Lloyd*,[84] who noted that the High Court did not criticise that passage, although the joint judgment of the majority in the High Court in *O'Shaughnessy* did not so clearly place the objective element within the test of comment. The passage from Jacobs and Mason JJA could aid in clearly defining material which properly has the quality of comment, which could be useful in suggesting that fair comment really addresses the publication as a whole rather than only the meanings which it conveys. This possibility is taken up in Part 5.

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78 Above n68 at 280.
79 *Campbell* above n67.
80 Fleming, J G, *The Law of Torts* (8th edn, 1992) at 590–1.
81 *Defamation Act* 1974 (NSW) s30(4).
82 *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699 at 704 per Hunt J.
83 Above n3 at 750.
84 [1984] 3 NSWLR 346 at 360.

ii. Comment Must be Expressed upon a Matter of Public Interest

Publicly released artistic works are clearly matters of public interest. The concept covers material which the public has a real interest in having discussed, and material which has been placed before the public for a response:

> A person exposes himself to comment if (inter alia) he invites the acceptance or approval by the public of his literary or artistic productions ... Any member of the public is therefore entitled freely to express his opinion of the work ... The critic himself is as much exposed to comment for his criticism as is the author criticised.[85]

The use of the term "public" suggests a division with a private arena for art, which could raise the issue of the extent to which a work must be made public for the defence to apply. The private viewing of a performance by an invited audience would not necessarily justify the publication of a critical review to the general public. What public interest would be served by such criticism is unclear. However, those within the audience would seem to have been invited to "accept" or "approve" the production and therefore be able to respond to it with fair comment. The extent to which an art work is "public", and the location and context of its display or performance, would seem to be considered within this element of fair comment, although usually they are not enunciated within legal decisions.

iii. For Comment to be Fair the Facts Underlying it Must be True or Otherwise Protected

It is usually stated that facts underlying the comment must be true. It seems this requirement is for truth alone, even in those jurisdictions requiring public benefit or public interest to be demonstrated for the defence of justification.[86] It clearly is a requirement for truth alone in New South Wales.[87] The High Court's approach in *O'Shaughnessy*[88] supports the truth alone requirement, and it would appear to be the better view, with the defence otherwise being "unduly hampered".[89]

In relation to artistic criticism, the need for factual accuracy means misconception of an artwork could invalidate criticism: this may be the major danger for a critic.[90] In *O'Shaughnessy*, the majority of the High Court emphasised that a critic's impression of an artwork is not a "fact" upon which fair criticism can be based:

> If, for instance, a painter were to exhibit an abstract picture, an attack upon him as a debased libertine, based upon the critic's misapprehension that the picture was of a group, including the artist, indulging in obscene practices, might not be defensible ... In such a case the jury would, of necessity, see the picture and form its own conclusion, and

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85 *Gardiner* above n38 at 173–4.
86 See above n41.
87 *Defamation Act* 1974 (NSW) s30(2).
88 Above n1 at 174 per Barwick CJ, McTiernan, Menzies and Owen JJ.
89 Fleming, above n80 at 588.
90 Tobin, T K, and Sexton, M G, *Australian Defamation Law and Practice* (1995) at para [13,040].

> would not be bound to accept the critic's statement of what he thought he saw in the picture.[91]

This analysis has problems parallel to those discussed above in relation to the fact or opinion issue. However, the law may develop so that the meaning of an art work comes to be seen as inherently contingent, which at least would severely limit the application of this concept of misdescription.

There is another issue concerning truth which arises if facts underlying the comment are themselves defamatory. If fair comment does not protect defamatory facts, they must be otherwise defended. The issue is noted in passing, but it should not arise in the usual situation of artistic criticism, the art criticised not being defamatory. *Orr v Isles*[92] would make the defence protect defamatory facts as well as comment, at common law. That decision has been abrogated in New South Wales[93] and is unlikely to prevail elsewhere.[94] The related issue of protecting defamatory facts under qualified privilege is likewise distant from the realm of artistic criticism. The better view appears to be that comment based upon the fact that absolutely privileged statements have been made will be protected.[95]

iv. Comment Must Not Have Been Actuated by Malice

It appears that malice must be absent from the publication of material for the defence of fair comment to be available at common law.[96] Malice is an important way in which the defendant's state of mind is central to fair comment. Unlike justification, the same words can be defensible or actionable if said with different intentions.

Thomas v Bradbury, Agnew & Co Ltd[97] illustrates malice's role. The case involved strong criticism of a biography of a famous and deceased newspaper proprietor, written by his former private secretary. The tone of the criticism would not have made it actionable, but factual inaccuracies and extrinsic evidence of the critic's malice confirmed the plaintiff's success. Collins MR, with whom Cozens-Hardy LJ and Barnes P agreed, focussed upon the way in which malice could "distort" comment and thus take it beyond the bounds of fairness.

The content of the malice element within the defence is unsettled.[98] The approach adopted here does not mirror that for qualified privilege, where malice incorporates actions made for a purpose other than that for which the defence exists.[99] Rather, the narrower ground of a critic acting due to actual ill will or hostility toward the plaintiff is suggested as the appropriate content of this aspect of malice. Otherwise, criticism may be indefensible which is honest, based upon facts stated or inferred, logically related to those facts, expressed upon a

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91 Above n1 at 176 per joint judgment Barwick CJ, McTiernan, Menzies and Owen JJ.
92 (1965) 83 WN (Pt 1) (NSW) 303.
93 *Defamation Act* 1974 (NSW) s35.
94 Cassimatis, A, "Civil Defamation — The Defence of Fair Comment" (1994) 2 *Torts LJ* 171 at 176–7.
95 Id at 174 and Tobin and Sexton, above n90 at par [13,070].
96 *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35 at 53–9; and Walker, above n37 at 177–8.
97 [1906] 2 KB 627.
98 Sutherland, P J, "Fair Comment by the House of Lords?" (1992) 55 *Mod LR* 278 at 282.
99 *Horrocks v Lowe* [1975] AC 135.

matter of public interest, and such that another critic could have made the same comments about the artistic work. If the defence is to protect criticism as criticism, the narrower ground of actual ill will is preferable. Obviously, proof of such malice could often be difficult.

The malice being addressed is a concept of an ill will toward the plaintiff, but malice is also often described in the cases in terms of lack of honesty, sometimes combined with ill will, or an improper purpose. It is possible that honesty really just means a lack of ill will in regard to malice, the point being that a critic may have an honest belief in a particular comment, but not make the comment in the furtherance of the "rational debate" for which the defence exists.[100] It may be comment which "is dishonourable because [it is] not straightforward but designed to serve an unworthy end".[101] However, this article suggests that malice also should be seen as containing the element of subjective honest belief in the comment on the part of the commentator which clearly is established as part of the defence.

This requirement is for honest rather than reasonable belief:

> [T]he expression "fair comment" is a little misleading ... People are entitled to hold and to express freely on matters of public interest strong views, views which some of you ... may think are exaggerated, obstinate or prejudiced, provided — and this is the important thing — that they are views which they honestly hold....[T]he true test [is]: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?[102]

But what is it which must be honestly believed in? The issue can arise when a stranger's comments are published by a newspaper as a letter to the editor. The media need not have an honest belief in the comment published,[103] but must not have repeated the comment due to a subjective impropriety of purpose, such as hostility toward the plaintiff. The issue also arises where comment conveys an unintended meaning, as in *Meskenas v Capon*.[104] The case was decided under the *Defamation Act* 1974 (NSW) which requires the material to be the genuine opinion of the commentator,[105] but makes malice, as such, irrelevant. The critic could not rely on the defence of fair comment because an unintended meaning was conveyed by the criticism. This result is evaluated below, in Part 6, after investigating the precedents which lead to the defence's failure.

B. The Defamation Act *1974 (NSW)*

The *Defamation Act* 1974 (NSW) should be noted in relation to the schema proposed above. Under the Act, some elements of the tort retain their common law meaning, such as "public interest",[106] but certain changes are also made. The publication is called a "matter" under the Act and each imputation, being

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100 Jaffey, A J E, "The Right to Comment", in J W Bridge (ed), *Fundamental Rights* (1973) at 60.
101 *O'Shaughnessy* above n1 at 177 per Windeyer J.
102 *Silkin* above n21 at 747 per Diplock J.
103 *Telnikoff v Matusevitch* above n60.
104 Above n5.
105 *Defamation Act* 1974 (NSW) s32.
106 *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43.

the meaning pleaded by the plaintiff as arising from the matter, is a separate cause of action.[107] The common law defence of fair comment has been changed by a statutory defence of comment in Division 7 of Part 3. The extent to which this has altered the common law is not resolved by the cases: although the Privy Council has suggested that comment is "governed exclusively by ... a self-contained legal code which replaced the common law",[108] it would appear that Division 7 is, in reality, only a partial codification.[109] In any event, the Act generally can be accommodated within the first three categories of the proposed schema. Sections 30 and 32–34 deal with the three elements of *comment having the quality of comment*; section 31 imposes the second element of the schema: *that the comment be expressed upon a matter of public interest*; and although the Act does not use the term "fair", section 30 has a similar requirement *that the comment be based upon true or otherwise protected facts*. The situation is largely the same for the defence of comment under the latest reform proposals. These would shift onto the defendant the burden of showing that the comment represents the opinion of the defendant or the defendant's servant or agent, but otherwise leave the defence unchanged, as noted above in the Introduction. Malice, the fourth category of the proposed schema, is not dealt with in the same way under the Act. For comment made originally by the defendant or the defendant's servant or agent, there is no concept of propriety of purpose under the Act. An improper purpose, alone, will not defeat the statutory defence. The comment, however, must represent the commentator's genuine opinion, unless the defendant has repeated the comments of a stranger, in which case the publication must have been made in good faith and for public information or the advancement of education.[110] This is analogous to the common law honest belief requirement placed within the element of malice in the proposed schema. It is an important issue for criticism at common law and under the Act and is dealt with further in Part 5, under the sub-heading "Comment and honesty: the unintended meaning".

5. *Issues in Fair Comment: Congruency and Honest Belief*

Within the above schema, two issues need to be investigated. First, what does the defence of comment properly protect? Second, what is the preferable treatment of an unintended meaning conveyed by criticism. This involves considering what the defendant must have an honest belief in. Various cases which have considered these issues have arisen under the *Defamation Act* 1974 (NSW).[111] None of these cases involved issues of artistic criticism, but the problems for criticism will be apparent from the cases about art already discussed.

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107 Section 9.

108 *Lloyd v David Syme & Co Ltd* [1986] AC 350 at 362.

109 *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 69 per Hunt J.

110 Sections 32–34; *Bickel v John Fairfax & Sons Ltd* [1982] 1 NSWLR 498.

111 *Petritsis* above n75; *David Syme v Lloyd* above n84, and in the Privy Council as *Lloyd v David Syme* above n108; *Bob Kay Real Estate Pty Ltd v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 505; *Lewis v Page* unreported, Supreme Court of New South Wales, Hunt J, 19 July 1989; and *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448.

A. Comment and Congruency: What the Defence Answers

As to what the statutory defence of comment properly protects, the initial position was that, as at common law, the defence was pleaded to the material rather than the imputations. In *Petritsis*, Samuels JA drew a distinction with justification which must answer the imputations. He noted that other defences under the Act, such as privilege, did not go to the imputations, and said the defence of comment:

> asserts that, whatever the defamatory character of the matter ... the words complained of are comment ... 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.[112]

However, the weight of recent decisions is that the defence must answer the imputations which arise from the material:

> [T]he question for the jury's determination was not whether [the defendant's] actual words were comment but whether the defamatory imputation which they would already have found was conveyed by these words, expressly or by implication, was conveyed as a statement of opinion or as a statement of fact.[113]

Each of these two approaches flows from a different understanding of the appropriate relationship between a publication and the defence of comment. The courts have compared comment with either those defences relating to the content of the imputations, or those depending on the form or occasion of the material's publication. Justification is clearly linked to the content of the imputations which arise from the material. That is, the defendant cannot just prove the truth of the matter published, but must prove the truth of the content of the imputations themselves, their substantial or contextual truth in New South Wales,[114] or the somewhat analogous *Polly Peck* position at common law.[115] The justification must "be as broad as the defamatory imputation itself".[116] Public benefit or a public interest in the publication may also need to be shown.[117] Under the latest reform proposals, justification will be made redundant as a defence, due to falsity becoming, in most cases, a necessary part of the cause of action. But, contextual implications largely will remain unchanged.[118]

In comparison, the defence of absolute privilege does not need to answer the content of the imputations which arise from the published material. Rather, privilege attaches to the form or occasion of the publication and makes non-actionable any defamatory imputation within that publication.[119]

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112 Above n76 at 193.
113 *Parker* above n111 at 470–1, per Clarke JA with whom Handley and Crisp JJA agreed.
114 *Defamation Act* 1974 (NSW) ss15(2), 16.
115 *Polly Peck (Holdings) Plc v Trelford* [1986] 2 WLR 845.
116 Fleming, above n80 at 554, citing *Crowley v Glissan (No 2)* (1905) 2 CLR 744 at 767.
117 Above n41.
118 Above n7 at 231–3, and nn8–10.
119 *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 at 188.

The content of the imputations does not need to be considered in relation to the defence. Similarly, a fair and accurate report of an absolutely privileged occasion is protected by qualified privilege due to its status as such a report.

The present position that comment answers only the imputations,[120] owes much to the judgment of Glass JA in *David Syme v Lloyd.*[121] It will be looked at in some detail because Glass JA discussed the issue at length, although his comments were obiter. Priestley JA agreed with Glass JA upon these points, whilst adding nothing further. The various weaknesses with the approach which are suggested here, several of which have also been raised by Hunt J,[122] have not all been addressed in later cases, such as *Lloyd v David Syme*[123] in which the Privy Council found that the defence had to meet the plaintiff's pleaded imputations, but did not address weaknesses in the approach. Thus, it is arguable that the conclusions in *Parker*[124] are not necessitated by the law, nor desirable on policy.

It should be noted that Samuels JA sat in both *Petritsis*[125] and *David Syme v Lloyd.*[126] Although he agreed with Glass JA on the substantive issue in *Lloyd*, Samuels JA reserved his opinion on the other matters and did not criticise his own earlier comments in *Petritsis.*[127]

In *David Syme v Lloyd,* Glass JA linked the defence of comment to justification, stating:

> [T]he defence of comment in my view is properly to be classed not with [the defence of privilege] but with the defence of justification. I would deduce this from the fact that each imputation distilled from the published matter is a separate cause of action and that a defamatory imputation expressed as a fact must, if it is to be defended, be justified whereas an imputation expressed as an opinion may be defended as comment. There can be no doubt that a defence of justification, if it is to succeed, must answer each defamatory imputation individually by satisfying the conditions of section 17(2). If a defendant elects not to justify an imputation but to defend it as comment, I do not see how it can escape the burden of meeting each defamatory imputation individually by proving the elements of that defence as set out in ss30–34.[128]

This approach seems to downgrade the distinctive quality of comment. It suggests that material which is properly comment can be justified, and that if the defendant chooses not to justify, then the defendant must still meet the burden of answering each imputation as would be necessary for justification.

Three points can be made. First, the test of what is really "of the nature of comment" would seem to answer concerns to maintain the integrity of the justification defence. If criticism is of the nature of comment it will not be open to empirical proof, that being a logical impossibility. Whilst the defence of

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120 As explained in *Parker* above n111.
121 Above n84.
122 Primarily in *Bob Kay* above n111.
123 Above n108 at 365.
124 Above n111.
125 Above n76.
126 Above n84.
127 Above n76 at 358.
128 Id at 357–8. Justification is presently dealt with in s15(2), not s17(2) of the Act.

comment also is available for factual inferences which are deductions from the indicated facts,[129] such material must still be presented *as opinion*. In that way, it can be distinguished from a simple assertion of fact, in that it exists within the field of rational debate envisaged by the defence of comment. The statement of Jacobs and Mason JJA in *O'Shaughnessy* noted above could be used to support this.[130] Perhaps it could be said that this point relies upon the very fact or opinion division which has been criticised in relation to the High Court's judgment in *O'Shaughnessy*.[131] That there can be problems at the point of division, however, does not mean the general concept of a distinction between fact and opinion cannot be supported within this legal framework for the defence.

Second, because other defences survive under the Act which do not directly answer the imputations, "the fact that each imputation distilled from the published matter is a separate cause of action" has little weight. Glass JA recognised the survival of other defences such as privilege,[132] but did not investigate the wording and structure of the Act so as to clarify whether each imputation being a separate cause of action necessarily requires defensible comment to meet each imputation. The statutory wording does not appear to support, or even less require, the linking of comment and justification. The defence of justification is clearly linked to the "imputations" by the Act, the defence of absolute privilege is linked to the "publication", and the defence of comment is linked to the "comment".[133] Surely, that wording supports the retention of the common law situation for comment which looks to the quality of the material complained of.[134] The latest reform proposals which it has been noted would make redundant justification, could perhaps more easily allow a re-examination of the proper understanding of comment.

A third point is that Glass JA may be alluding to the cases, and textbooks, which raise justification of "comment" imputing an improper motive. This is probably best explained as an added requirement of a reasonable relationship between the comment and the facts which is placed, by some cases, upon a comment which imputes improper motives to an individual.[135] As well as the criticism of such a requirement,[136] section 30(4) of the Act has abolished it in New South Wales.

Having said that the defence must relate to the imputations, Glass JA introduced the term "congruent" in considering the proper treatment of an unintended imputation, saying:

> I am of the opinion that the statutory defence of comment on the proper construction of Div 7 requires that the comment established by the defendant should be congruent with the imputation to which it is pleaded. If a

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129 *Kemsley v Foot* above n77 at 356–7 per Lord Porter.
130 Above n3 at 361, and see above n83 and accompanying text.
131 See above n83 and accompanying text.
132 Above n84 at 357.
133 Sections 15(2), 17, 30–34 respectively.
134 *Petritsis* above n76 at 191 per Samuels JA; *Bob Kay* above n111 at 515–7 per Hunt J.
135 See Johnston, above n59 at 372 fn73, and at 374–80.
136 See above nn79–81 and accompanying text.

> comment is established which falls short of such congruency the defence is not made out.[137]

Glass JA was concerned that if the defendant established that a less serious meaning existed within the comment, then a defence could be made out against a more serious imputation which the plaintiff had shown to have arisen. The term congruent appears to be used in the sense of consistency, or harmony, between the comment and the imputations. Congruency has been used by various commentators, and was most recently considered by the New South Wales Court of Appeal in *Parker*, when Clarke JA, with whom Handley and Cripps JJA agreed, said that "the form of the pleaded imputation cannot dictate whether a defence of comment succeeds or fails. This was the position at common law and in my opinion remains the position under the Act". [138] This statement of Clarke JA seems to be simply a restatement of the requirement in *Morosi v Mirror Newspapers Ltd*[139] that an imputation which is found to arise can be different in form, but not substance, from the plaintiff's pleaded imputation, and has come to be the effective realm of congruency. The cases, however, have gone further, and consistent with the original use of "congruent" by Glass JA, have utilised the concept of congruency to support the requirement that the defence be made out against the imputations rather than apply to the matter as a whole. Clarke JA, however, failed to address the wider issues raised by Hunt J in *Bob Kay* criticising this approach, which were similar to the weaknesses suggested above about the approach of Glass JA in *David Syme v Lloyd*.[140]

One should note Hunt J in the later *Lewis v Page*,[141] who said "[i]t is sufficient if the comment of the defendant is congruent with (in the sense of not being different in substance from) the imputation pleaded by the plaintiff". This may be a move from his earlier statement in *Bob Kay* that congruency was an "important and fundamental question — one [to] which, so far as I am aware, no conclusive *and* binding answer has yet been given".[142] Then Hunt J doubted that "congruency" was required, but believed that normally it would be present.[143] Congruency, as used, follows logically from the finding that the defence of comment must answer the imputations under the Act. But, it has been argued here that the defence should be available to protect material as comment rather than needing to answer the imputations individually, in which case congruency is not a helpful term. Congruency, as a concept, also denies protection to an unintended defamatory meaning conveyed by comment.

B. Comment and Honesty: The Unintended Meaning

The statutory defence of comment is defeated "if, but only if, it is shown that at the time when the comment was made, the comment did not represent the opinion of the defendant".[144] This could be compared to the common law expressions

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137 Above n84 at 358.
138 *Parker* above n111 at 467.
139 [1977] 2 NSWLR 749.
140 See nn129–36 and accompanying text.
141 Above n111 at 12.
142 *Bob Kay* above n111 at 513 (emphasis in original).
143 Id at 515.
144 *Defamation Act* 1974 (NSW) s32(2); similarly for comment made by a servant or agent, ss33–34.

about the importance of honesty, that it is the "cardinal test",[145] and that the comment express the "genuine opinion" of the defendant.[146] The latest reform proposals would require the defendant to show that the comment represents the opinion of the defendant or the defendant's servant or agent, rather than the plaintiff being able to disprove this element of honest opinion in defeasance, as noted above. In the proposed Bill, the wording would remain the same apart from this shift in the burden of proof.[147]

The Act requires comment to "represent" the defendant's opinion. If anything, this would suggest the defendant is required by the sections to have an honest belief in the meaning he or she intended to convey, or that the defendant's servant or agent is required to have that belief. This would leave protected an unintended defamatory meaning and overcome the problem of requiring a critic to have "an honest belief in an unintended meaning".[148] Several points should be noted in relation to this. They are equally applicable to the common law situation for honesty where an unintended meaning is conveyed by material.

It may be that such an unintended meaning cannot come within the concept of comment at all as set out in the proposed schema, if it lacks the requisite relationship with the facts upon which it is based. That is, if it is impossible for any fair minded person to express that opinion upon those facts, then the material, *not being comment*, may only be understood as an allegation of fact and be defended by justification, privilege or other less common defences. This possibility does not raise difficulties, and could remain as an objective limit to the defence, the importance of which was noted above.[149]

If the opinion does satisfy the test of comment, it would be an opinion which another critic honestly may have intended to express, based upon the facts indicated. If so, it is not immediately clear why the plaintiff should have a remedy, just because this particular defendant did not intend to convey that meaning. The situation can be distinguished from one where a critic is motivated by ill will. The requirement should be, rather, that the critic have an honest belief in the intended meaning, which would leave the ill will element of malice as a ground of defeasance at common law. This approach mirrors those for the defences with which this article has argued fair comment should be grouped. For example, under the Act, the statutory defence of qualified privilege requires the publication of the matter to be reasonable. This depends, in part, upon the defendant having an honest belief in the meaning *intended* to be conveyed.[150] A similar approach has been taken to the defence of protected report under the Act[151] and the common law defence of qualified privilege.[152]

It could be suggested that this approach to unintended meaning, especially as it draws on debates emphasising the contingency of meaning generally, unreasonably

145 *Silkin* above n21 at 747 per Diplock J.
146 *Turner v Metro–Goldwyn–Mayer Pictures Ltd* [1950] 1 All ER 449.
147 New South Wales Law Reform Commission, above n7 at 241, proposed cl 32.
148 Reichel, above n12 at 28.
149 See n63 and accompanying text.
150 *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 362.
151 *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58.
152 *Horrocks v Lowe* [1975] AC 135.

treats critics on a different basis to their usual treatment of artists and art works. A critic may well state, in absolute language, the supposedly singular meaning of a work and proceed to criticise it on that basis. The approach advocated here, however, allows the critic to rely on one meaning, perhaps one of several conveyed by the material, within the defence whilst an artist would not have the same luxury in his or her treatment by a critic. There could be an issue about how far actual criticism does do this, although at times it certainly occurs. Two points, however, can be made generally. Criticism, in conveying opinion, could be seen to convey necessarily, if implicitly, a partiality of view about meaning rather than an absolute one, and this could be so whatever language was used in the criticism. Second, the critic's intended meaning still must satisfy the other elements of the defence and be possible for another critic honestly to have made. It is these aspects which support the apparent special treatment of meaning for critics. Admittedly this provides wide protection to criticism, but it is suggested that this approach more accurately accords with the defence's rationale of promoting reasoned debate.

Lord Denning MR, when considering a hypothetical unintended meaning, emphasised that honesty was the cardinal test, and overcame any problems of an audience reading more into the comment than intended:

> [I]n considering a plea of fair comment ... [t]he important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest ... no matter that ... it was badly expressed so that other people read all sorts of innuendos into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test....[153]

This is at the heart of the problems with the current judicial approach to the defence. No cogent explanation has been given as to why precision in word choice is required of a critic, beyond that required to make the criticism have the quality of "comment". If comment is worth protecting as part of a social discourse on matters of public interest, including matters of artistic practice, the defence should be broad and defend the matter as comment, rather than be tied to the individual imputations and demand the "impossible", that is, an honest belief in an unintended meaning. Such an approach seems open to the courts in this unresolved matter.[154] This is notwithstanding the approach of the New South Wales Court of Appeal in *David Syme v Lloyd*[155] and *Parker*,[156] which has been shown to be questionable. As Johnston suggests:

> [T]he defence of comment is unusual in that it is primarily concerned with the defendant's state of mind. If the commentator is required to defend the defamatory meaning which his words convey to ordinary readers by proving honest belief in that meaning, including unintended references, the defence is effectively undermined. There is a case in the context of this defence, which is specifically designed to protect a right of free public discussion, for

153 *Slim v Daily Telegraph* [1968] 2 QB 157 at 170; and similar in *Stewart v Biggs* [1928] NZLR 673.

154 *Bob Kay* above n111 at 513 per Hunt J.

155 Above n84.

156 Above n111.

striking the balance between freedom of speech and protection of reputation differently from elsewhere in the law of defamation.[157]

6. *Conclusion*

In light of this possible and, it is suggested, desirable approach, the decision of *Meskenas v Capon*[158] again can be considered. Although it is an unreported decision of a State intermediate court, the case has received attention in legal and artistic circles.[159] Legal notes about the case have focussed upon the shortcomings in the law which the case reveals. However, it may be instead that the case is not necessarily correct on the legal issues, in that those issues remain open to debate. The approach investigated in Part 5 suggests that the honest belief required of the critic in *Meskenas v Capon* has undermined the defence of comment. The case proceeded upon the basis that the defence must answer the imputations, and that the defendant's honest belief must be in the perceived meanings found to arise from the material.[160] The problem was that an unintended imputation was found to arise. The result in *Meskenas v Capon* was a jury award of only $100 in damages to Meskenas, which appears to be the lowest jury verdict in an Australian defamation action.[161] This could suggest that juries, at times, are wary about the true worth of an artist plaintiff. The accurate and unfortunate parallel may be with artists' particularly low incomes: visual artists earned a reported average of about $9 000 from creative work in 1992–3.[162] Costs, however, were awarded in favour of the successful plaintiff, meaning that Capon did not escape a substantial financial burden, reported at between $60 000 and $80 000.[163] This award of costs may have been against the spirit of some Australian jurisdictions, which allow a plaintiff to be deprived of costs if the verdict is below $4.00,[164] a threshold sum which does not appear to have been indexed since introduced, removing any substance to the limit intended by Parliament.

The approach in *Meskenas v Capon* may well have been in line with *Parker*, and correct for Christie DCJ to adopt in terms of court hierarchy. However, the review of the case law in Part 5 suggests that such an approach is not the only one available, nor is it the preferable approach. No compelling reason exists why criticism which is merely careless in its choice of words must fail: it does not take the criticism outside the purpose for which the defence exists. Given the degree of commentary upon *Meskenas v Capon*, it is important that its inconclusive status is not overlooked. Some commentators would suggest that art has become like a religion for the educated in the twentieth

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157 Johnston, above n59 at 381.

158 Above n5.

159 For example, Donald, B, "Not the Death of Opinion, Just a Slight Virus" [1993] 20 *Gazette L and Journalism* 13; Waite, G, "'Yuk' Defamatory or Fair Comment" [Dec 1993] *Art Monthly Australia* 44.

160 Above n5 transcript 24 September 1993 238–244 and judgment 27 September 1993.

161 See two damages surveys in [1993] 19 and [1994] 27 *Gazette L and Journalism* entire issues.

162 Throsby, D and Thompson, B, *But What Do You Do For a Living* (1995) at 23–7.

163 Donald, above n159 at 15 suggests $80 000; and Good, R, "The Increase in Uncertainty: *Meskenas v Capon*" [1993] 20 *Gazette L and Journalism* 13 suggests $60 000.

164 *Defamation Act* 1957 (Tas) s30 and *Defamation Act* 1901 (NSW) s9 for the Australian Capital Territory.

century, with a believed capacity to provide an experience of transcendence.[165] Whatever the truth of such a suggestion, this decision of the District Court of New South Wales on artistic criticism should not pass into either the artistic or legal worlds as "gospel". Rather, it should be recognised that the defences of comment and fair comment are available to protect material which is the honest expression of opinion, is logically related to facts which are indicated, and is part of a productive artistic debate: a debate which, it could be hoped, goes some way towards invigorating the critics, audiences and artists who participate in it.

165 Wolfe, T, "Introduction" in Adams, L, *Art on Trial: From Whistler to Rothko* (1976) at xii.