

TAKING THE UNCERTAINTY OUT OF DEFAMATION LAW—MUCH ADO ABOUT MEANING

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Defamation law is complex and requires the parties to be very clear about their strategy from day one of the action, especially in relation to the ‘meaning’ of the allegedly defamatory words. The meaning of the words determines, amongst other things, the extent that discovery must be made and the range of evidence that can be put forward by the parties. However, there is often confusion over the meaning of the words, especially in relation to the justification and fair comment defences. As such, it is argued that in all defamation actions the court should make a compulsory ruling on meaning shortly after the close of pleadings.

I. INTRODUCTION

‘Publish and be damned’, wrote the Duke of Wellington to a former mistress who threatened to publish their love letters. This rather theatrical quotation is used in law school to explain that you may say whatever you want about another person without prior restraint, but you will have to face the consequences of what you have said afterwards.¹

One such consequence facing the publisher is of course the law of defamation, which protects plaintiffs from wrongful attacks on their reputation.² The building blocks of defamation law are clear. The plaintiff must prove that the defendant has published to a third-person defamatory material which refers to the plaintiff and which lowers him in the eyes of right-thinking members of society. Once the plaintiff has done that, his claim will succeed unless the defendant proves that he has a valid defence.³

A plaintiff brings a claim for defamation because he believes that he has been wronged and he wants redress for that wrong. But defamation law is highly complex

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¹ “Every free man has an undoubted right to lay what sentiments he pleases before the public ... but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity”: W. Blackstone, *Commentaries on the Laws of England*, Book IV, 15th ed. (London: A. Strahan for T. Cadell and W. Davies, 1809; re-printed by Professional Books Ltd, Abingdon, 1982) at 151–152.

² Shakespeare, however, believed that something more serious than a lawsuit is needed to redress the wrong: “I am disgrac’d, impreach’d, and baffl’d here/Pierc’d to the soul with slander’s venom’d spear/The which no balm can cure but his heart-blood/Which breath’d this poison.”: Richard II (Act I, Scene I).

³ In cases of slander, as opposed to libel, the plaintiff would also have to prove special damage, unless the case falls within one of the established exceptions to that rule: Lord Brennan & Willaim Blair, eds., *Bullen & Leake & Jacob’s Precedents of Pleadings*, 15th ed. (London: Sweet & Maxwell, 2004) at para. 28-07.

and what may seem like an obvious claim (or defence to a claim) is often less compelling than the parties first assume. The law is marked by technical rules of pleading that require both parties to be very clear about their strategy from day one of the action. Arguably these complexities are the result of incremental case-law development over hundreds of years, but it has also been suggested that the blame lies with the lawyers themselves!⁴

The most contentious and complex issue in any defamation case is usually the question of what the allegedly defamatory words mean in the first place.⁵ Only after we determine the meaning of the words can we ascertain whether they are defamatory of the plaintiff. The meaning of the words determines not only whether the plaintiff has a *prima facie* case, but also the defences available to the defendant, which in turn will affect the scope of the trial and the range of evidence that can be put forward by the parties.

A layperson may, therefore, find it surprising to discover that it is the parties themselves who set the boundaries of the meaning of the words and thus the scope of the trial. This practice was described disapprovingly by Diplock L.J. (as he then was) as reducing the law of defamation to a “game of skill in which the contestants choose their own rules and the court is content to apply those rules as umpire”.⁶

This article looks at some of the practical and theoretical challenges facing the parties in framing their position on the meaning of the words—particularly in relation to the *context* in which those words are published—and how the current state of the law does not encourage early settlement of disputes. In fact, it will be submitted that giving the parties control over the setting of boundaries to the case has the effect of turning the lawsuit into a runaway train that cannot stop.

Of course, the court will rule on the meaning of the words in its final judgment, but by that time the trial has already taken place and the meanings of the words put forward by the parties (which form the basis of the issues in dispute at trial) may ultimately be rejected by the court. Since the court is at liberty to reject the meanings of both parties and form its own meaning, some of the issues at trial may bear at best a tenuous relationship to the ‘real’ issues in dispute.

It will be suggested, therefore, that in all cases, the meaning of the words in dispute should be determined by the court much earlier in the course of proceedings, i.e. shortly after the close of pleadings (but after the service of further and better particulars). This will lead to savings in time and costs because cases that are without merit would be identified early (and disposed of), and those cases that do go all the way to trial would be narrowed down to the real issues in dispute. Although it is acknowledged that a procedure currently exists for the early determination of the

⁴ “[L]awyers should be ashamed that they have allowed the law of defamation to have become bogged down in such a mass of technicalities”: *Boston v. Bagshaw & Sons* [1966] 1 W.L.R. 1126 (C.A.) at 1135 (*per* Diplock L.J.). Similarly, lawyers have been described as “tripping one another upon precedents, groping knee-deep in technicalities [and making] mountains of costly nonsense”: *Burrows v. Knightley* [1987] 10 N.S.W.L.R. 651(S.C.) at 654 (*per* Hunt J. (quoting Charles Dickens)).

⁵ References to the ‘words’ in this article refer to that part of the allegedly defamatory publication that is the subject of complaint by the plaintiff. It will usually be set out verbatim in the statement of claim.

⁶ *Slim v. Daily Telegraph* [1968] 2 Q.B. 157 (C.A.) at 177 [*Slim*]. In *McPhilemy v. Times Newspapers Ltd* [1999] 3 All E.R. 775 (C.A.) at 793 [*McPhilemy*], Lord Woolf M.R. described it as a “battle of tactics”.

meaning of the words, it is rarely used in practice, and this article gives a number of reasons why the parties quite legitimately do not avail themselves of it.⁷

From a practitioner's point of view, the implementation of this proposal would reduce the scope for clever lawyers to use the current law to their client's advantage. Since lawyering is a 'game of skill', that is arguably not something that any practitioner should welcome. However, from a purely objective point of view, this article takes the position that the cause of justice would be better served by restricting the freedom of the parties to set the boundaries of the case themselves.

This article is structured in the following manner: First, it looks at the rules on pleading the meaning of the words. Second, it examines a number of problem areas in determining meaning in relation to the justification and fair comment defences. The common theme to these problem areas is the extent to which the *context* in which the words are published creates uncertainty in the law. Third, the article takes the position that the scope to strike out pleadings under Order 18 Rule 19 of the Singapore *Rules of Court* is limited unless the court first gives a ruling on meaning. Fourth, although a procedure currently exists which enables the parties to ask for an early determination of the meaning, in practice, there are compelling reasons why it is seldom used. Fifth, the conclusion sets out the reasons why the early determination of meaning (which would be compulsory in all defamation actions) is necessary.

II. PLEADING THE MEANING OF THE WORDS

The plaintiff is obliged to set out in his statement of claim the words on which the action is based.⁸ At the minimum, the words must be set out with "reasonable certainty"⁹ and the words must be pleaded with sufficient particularity to enable the defendant to know the case he has to meet.¹⁰

Further, unless the meaning of the words is clear and explicit, the plaintiff should plead the meanings that he claims the words bear.¹¹ In practice, the plaintiff will usually plead a meaning regardless of how clear the words appear to be, since it serves little purpose for the plaintiff to risk having his statement of claim struck out under Order 18 Rule 19 of the Singapore *Rules of Court* on the ground that it is, for example, embarrassing.¹²

⁷ Order 14 Rule 12 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.) currently permits the Court to determine meaning upon application by one of the parties or of its own motion. As for the reasons why it is rarely used, see below.

⁸ *Zolkefly bin Haron v. Yahya bin Chik* [2001] 2 M.L.J. 1 (H.C., Muar).

⁹ *Collins v. Jones* [1955] 1 Q.B. 564 (C.A.); *Best v. Charter Medical of England Ltd* [2002] E.M.L.R. 18 (C.A.).

¹⁰ *British Data Management plc v. Boxer Commercial Removals plc* [1996] 3 All E.R. 707 (C.A.) at 717.

¹¹ *Chen Cheng v. Central Christian Church* (1998), [1999] 1 S.L.R. 94 (C.A.) [*Chen Cheng*].

¹² Order 18 Rule 19(1) (2004 Rev. Ed. Sing.) reads:

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that—(a) it discloses no cause of action or defence, as the case may be; (b) it is scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The meaning—or in its technical term ‘the natural and ordinary meaning’—is the meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense. It is not confined to the literal meaning of the words, but takes into account what an ordinary, reasonable person may reasonably infer from the words. The ordinary and reasonable person reads between the lines and is capable of a certain amount of loose thinking, but he is not avid for scandal and it would be wrong to select one bad meaning where other non-defamatory meanings are available. However, the meaning intended by the maker of the defamatory statement is irrelevant and no extrinsic evidence is admissible in construing the words.¹³ The court is required to look at the “broad impression” created by the words, not analyse each word in isolation.¹⁴

The natural and ordinary meaning of the words is to be contrasted with the meaning based on a true innuendo. The latter is different from the natural and ordinary meaning in that it requires proof of special facts in order for it to be defamatory. For example, if the allegation is that X was seen coming out of Y flat, that is not a defamatory statement unless X can prove on a true innuendo that at least one person knew that Y flat is a brothel.¹⁵ Unless stated otherwise, in this article all references to the “meaning” are in respect of the natural and ordinary meaning.

The court cannot find a more injurious meaning than that alleged by the plaintiff. As such, the usual practice is for the plaintiff to plead the highest defamatory meaning of the words. This is commonly referred to as the ‘higher’ meaning. At trial, the plaintiff is not pinned down by his pleading and he may contend that the words are defamatory in a ‘lower’ defamatory meaning. However, he is not permitted to change his case in this way where he has pleaded a “very high defamatory meaning, which is strained and unnatural and is totally unwarranted by the offending words”.¹⁶

So far, we have established that the plaintiff makes a number of important decisions in the early stages of a defamation lawsuit. First, he must choose the words on which to sue. Second, he must identify the meaning of those words. The plaintiff’s strategy will be influenced by (a) whether on his meaning he has made out a *prima facie* case that the words are defamatory of him, and (b) the knowledge that the seriousness of the allegation affects the level of damages.¹⁷ But the plaintiff also needs to keep one eye on the anticipated defence of the defendant because the meaning of the words

¹³ *Microsoft Corporation v. SM Summit Holdings Ltd* [1999] 4 S.L.R. 529 (C.A.) at 555–556 [*Microsoft*].

¹⁴ *Jeyasegaram David (alias David Gerald Jeyasegaram) v. Ban Song Long David* [2005] 2 S.L.R. 712 (C.A.) at 724–725 [*David Gerald*].

¹⁵ There was also formally a separate pleading for a ‘false innuendo’—this being inferences drawn from the words. An example would be: ‘X visits massage parlours in Geylang late at night.’ This is defamatory because the reasonable person in Singapore knows that Geylang is a red-light district and that the massage parlours in this area offer ‘extra’ services. The false innuendo pleading is no longer necessary because the natural and ordinary meaning includes inferences drawn from the words. See *Cruise v. Express Newspapers* (1998), [1999] Q.B. 931 (C.A.) [*Cruise*]; *Chiam See Tong v. Ling How Doong* (1996), [1997] 1 S.L.R. 648 (H.C.) [*Ling How Doong*]; *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1998] 3 S.L.R. 337 (C.A.) [*Goh*].

¹⁶ *Goh, ibid.* at 359.

¹⁷ For example, a false allegation of corruption against a politician would, of course, be considered a very serious libel for the purpose of assessment of damages: *JB Jeyaretnam v. Lee Kuan Yew* [1979] 2 M.L.J. 282 (C.A.) at 285.

determines the scope of the defences of justification and fair comment, and in some instances, will also play a role in qualified privilege.¹⁸

In principle, there is no duty on the defendant to plead any meaning at all. However, where his defence includes the justification defence (i.e. proving that the sting in the imputation is true) he must identify the meaning he intends to justify. Up until *Lucas-Box v. News Group Newspapers Ltd* [*Lucas-Box*],¹⁹ the defendant was constrained by the meaning put forward by the plaintiff and he was prohibited from pleading an alternative defamatory meaning that he intended to justify.²⁰ The court in *Lucas-Box* held, however, that the defendant must, just like the plaintiff, make it clear what his case was for the purpose of his justification defence.²¹ The requirement for the defendant to set out the meanings that he seeks to justify is now settled law.²² Most important, the defendant may seek to justify any reasonable meaning that the court may ultimately find to be the real meaning.²³ For example, a ‘general’ charge (e.g. of corruption) will enable the defendant to plead much wider particulars of justification than a ‘narrow’ charge (e.g. theft of \$10). The distinction between general and specific charges will be explored in greater detail below.

In practice, the defendant will usually plead that the words complained of are not defamatory. In case the court disagrees, the defendant will also plead an alternative defamatory meaning of the words, and will seek to defend that meaning as being true (justification) or fair comment. Common sense suggests that this meaning should be less defamatory than that pleaded by the plaintiff because otherwise the defendant will be setting himself a higher task than that demanded by the plaintiff’s pleading. However, the meaning put forward by the defendant must nevertheless be defamatory, and therefore the defendant will carefully craft a meaning that falls between non-defamatory and something less than that pleaded by the plaintiff.²⁴ As an alternative plea, the defendant will seek to defend the higher meaning ascribed to the words by the plaintiff because he cannot be sure that the Court will rule in his favour on the issue of meaning.²⁵

¹⁸ For example, in England the media is given a defence of qualified privilege to publish material in the public interest where they have acted responsibly in reporting the matter: *Reynolds v. Times Newspapers Ltd* (1999), [2001] 2 A.C. 127 (H.L.) [*Reynolds*]. The question of whether the reporters/editors have acted responsibly may impact upon the range of meanings the words could have conveyed to ordinary reasonable readers: *Bonnick v. Morris* (2002), [2003] 1 A.C. 300 (P.C.). However, since *Reynolds* has yet to be applied in Singapore, this article is limited to a discussion on justification and fair comment.

¹⁹ *Lucas-Box v. News Group Newspapers Ltd* (1985), [1986] 1 W.L.R. 147 (C.A.).

²⁰ *Slim*, *supra* note 6 at 176–177; *Goh*, *supra* note 15 at 359.

²¹ The new rule is not that the defendant must plead the meaning of the words *per se*, but that if he relies on the justification defence, he must identify the meaning he is seeking to justify: *Lee Kuan Yew v. Derek Gwyn Davies* [1989] S.L.R. 1063 (H.C.) at 1086 [*Lee*].

²² *Aaron v. Cheong Yip Seng* [1996] 1 S.L.R. 623 (C.A.) at 647 [*Aaron*]. However, see the position in respect of fair comment, below.

²³ *Prager v. Times Newspapers Ltd* (1987), [1988] 1 W.L.R. 77 (C.A.) at 86; *Wright Norman v. Oversea-Chinese Banking Corp Ltd* (1993), [1994] 1 S.L.R. 513 (C.A.) at 524–525 [*Wright Norman*].

²⁴ But the plea of justification must also be directed at the ‘sting’ of the defamation and not simply be a pretext to attack the plaintiff’s character: *Atkinson v. Fitzwalter* (1986), [1987] 1 W.L.R. 201 (C.A.).

²⁵ Consider, for example, the facts of *Bank of China v. Asiaweek* [1991] 2 M.L.J. 505 (Sing. H.C.) [*Bank of China*]. One of the defences relied on by the defendant was that the words were not defamatory. However, the court ruled that the words were defamatory, which on the facts left the defendant without any defence of justification or fair comment.

In rounding off this section, it should be noted that there will be a natural tendency for both plaintiff and defendant to exaggerate their pleaded meanings. The plaintiff will likely plead a more serious meaning couched in the form of a specific charge, while the defendant will plead a less serious meaning couched in the form of a general charge. To the neutral observer, it often seems as though the truth lies somewhere in the middle.

III. PROBLEM AREAS IN DETERMINING THE MEANING OF THE WORDS

We have established that the meaning of the words is a critical part of any defamation lawsuit because it determines the scope of the trial and range of evidence that will be presented. Since the parties have a natural tendency to exaggerate their meanings, cases can take on a rather unreal aspect where the 'real issues' become lost in the pleadings. It is submitted that this point is reason enough to make it compulsory to have meaning determined early in the course of proceedings. However, there are also a number of difficult areas in the law that make the determination of meaning especially important. In this section, we give four examples of these problem areas.

A. *The Context of the Words*

As stated above, the natural and ordinary meaning of the words includes not only the literal meaning of the words but also any inferences that a reasonable man would draw from the words.

The reasonable man for the purposes of defamation law is said not to live in an ivory tower. He has attributed to him "general knowledge and common sense"²⁶ and "general knowledge of worldly affairs".²⁷ He is in fact the "ordinary man in Singapore society".²⁸ On the other hand, his ability to draw inferences does not extend to anything that requires 'special' knowledge on his part, as opposed to his general knowledge.²⁹ The 'general knowledge' test is used across common law jurisdictions.³⁰ To use an example given earlier, an allegation that X was seen coming out of Y flat is only defamatory if the plaintiff can show that at least one person knew that Y flat is a brothel, and, therefore, this special knowledge is not part of the natural and ordinary meaning of the words.

The law, of course, requires the plaintiff to plead a true innuendo where the words are defamatory only to those with that special knowledge. In such cases, the plaintiff would have to give particulars of the extrinsic facts supporting the innuendo and he would have to prove not only the facts, but also that at least one other person knew of these extrinsic facts. Given this additional burden placed on the plaintiff, it is understandable that a plaintiff would rather base his case on the natural and

²⁶ *Lee*, *supra* note 21 at 1080.

²⁷ *Ling How Doong*, *supra* note 15 at 661.

²⁸ *Chen Cheng*, *supra* note 11 at 104.

²⁹ *Jones v. Skelton* [1963] 3 All E.R. 952 at 958 (P.C., on appeal from the Full Court of N.S.W.S.C.).

³⁰ Patrick Milmo *et al.*, eds., *Gatley on Libel and Slander*, 10th ed. (London: Sweet & Maxwell, 2004) at para. 3.25 [*Gatley*].

ordinary meaning instead because he would much rather pass the burden of proof to the defendant to prove his defence, rather than prove additional facts for a true innuendo.

But if that is so, then how much understanding can or should be attributed to the ordinary and reasonable man? Certainly, the emphasis on his general knowledge recognizes that he will appreciate more than the literal meaning of the words. But the question is to what extent does the *context* in which the defamatory words have been published influence the meaning of the words.³¹

In the sections below, we explore how the question of context brings into focus the difficulty in applying the general knowledge test in practice. The section ends by suggesting an alternative test—called the ‘common knowledge’ test.

It is now accepted that the natural and ordinary meaning of the words complained of must be interpreted in the context of the entire article or entire speech in which they are a part.³² For example, the House of Lords held in *Charleston v. News Group Newspapers [Charleston]*³³ that if one part of an article is defamatory but other parts of the same article provide an “antidote” to that statement, then there is no defamation in the first place. In another example, the Singapore Court of Appeal held in *Aaron v. Cheong Yip Seng* that the juxtaposition of the article in question to other articles and photos on the same page was also part of the context.³⁴

In the recent case *Jeyasegaram David (alias David Gerald Jeyasegaram) v. Ban Song Long David [David Gerald]*,³⁵ the plaintiff commenced an action after the defendant accused him of “playing to the gallery” in a newspaper article dealing with the much-publicized NatSteel takeover battle. The plaintiff was the chief executive officer of an organization formed to protect investor rights and promote corporate governance in Singapore. NatSteel called an EGM at which the shareholders were to vote, amongst other things, on the payment of a special dividend. However, the dividend was contingent on the passing of another resolution that would amend the memorandum and articles of association of NatSteel. The investor rights organization raised reservations as to the linkage of the resolutions.³⁶

In respect of the allegation of “playing to the gallery”, the trial judge looked at dictionary definitions and held that although the phrase was not complimentary, it was not defamatory either. The Court of Appeal, however, disagreed, stressing that it was the broad impression of the words that should be considered, not the meaning

³¹ From the practitioner’s point of view, the first hurdle is to identify the context on which he wishes to rely and properly plead it: *Bookbinder v. Tebbit* (1988), [1989] 1 W.L.R. 640 (C.A.) at 647 [*Bookbinder*].

³² *Skuse v. Granada Television Limited* (1993), [1996] E.M.L.R. 278 (C.A.); *Polly Peck PLC v. Trelford* (1985), [1986] 1 Q.B. 1000 (C.A.) at 1020 [*Polly Peck*].

³³ *Charleston v. News Group Newspapers Ltd* [1995] 2 All E.R. 313 (H.L.).

³⁴ *Aaron*, *supra* note 22 at 640.

³⁵ *David Gerald*, *supra* note 14.

³⁶ This type of clever linkage has a much more famous predecessor. The framers of the U.S. *Constitution* of 1787 came up with the ingenious idea of preventing states from under-declaring their property for the purpose of direct tax liability by making representation in House of Representatives contingent on the amount of property owned by “free persons”—Article I, section 2. Students of American history will know that this clause led to something much more serious than a lawsuit—it led to the American Civil War with the loss of some one million lives!

of each word or sentence under analysis. The Court of Appeal held:

To the ordinary and reasonable reader who was familiar with corporate matters and the developments in the Natsteel saga, to say that the [plaintiff] was “playing to the gallery” suggested that he opposed the linkage with the predominant intention of impressing the public and gaining popularity, instead of dealing seriously with important matters such as the interests of those whose rights he ostensibly championed.³⁷

It is important to note that the Court of Appeal held that the ordinary and reasonable man is “familiar with corporate matters and the developments in the Natsteel saga”. It is submitted that this wider context to the meaning of the words explains why the Court of Appeal found the words defamatory while the High Court reached the opposite conclusion.

This is where we tread a fine line. On the one hand, special facts should be pleaded as a true innuendo, but on the other hand, the law attributes general knowledge to the ordinary and reasonable man. As far as general knowledge is concerned, this author takes the view that the facts and circumstances surrounding the NatSteel takeover battle were complicated and that the contemporaneous newspaper reports made rather heavy going of it all.³⁸

Of course, if the Court of Appeal had ruled otherwise, then we would have ended up with the very strange result that something that was in the public arena at that time must be pleaded as a true innuendo.³⁹ If the natural and ordinary meaning cannot accommodate the details of the NatSteel saga, that would suggest that there is a flaw in the test. Further, the failure to take into account this context would make the law appear inflexible and dogmatic, exactly the sort of criticism that led to the change in pleading practice as reflected in *Lucas-Box*. From this point of view, the Court of Appeal reached the right result in *David Gerald*, but the decision also brings into focus the drawbacks in the ‘general knowledge’ test that has become settled law across common law systems.

At this point, a consideration of some of the cases would be useful.

In *Bank of China v. Asiaweek Ltd*,⁴⁰ the High Court cited with approval *Gatley on Libel and Slander* for the proposition that in determining the natural and ordinary meaning, no evidence is admissible on how the words were understood or of any facts giving rise to any inferences that could be drawn from the words used. The exclusion of extrinsic evidence—as this is called—is settled law.⁴¹

In *Chiam See Tong v. Xin Zhang Restaurant Pte Ltd [Xin Zhang Restaurant]*,⁴² the plaintiff complained of an advertisement in an English language newspaper that he claimed cheapened his image. The advertisement contained text in Chinese that

³⁷ *David Gerald*, *supra* note 14 at 725.

³⁸ Note *Holdsworth v. Associated Newspapers Ltd* (1937) 53 T.L.R. 1029 (C.A.). The court dealt with an alleged libel in the context of conciliation agreements in the motor transport industry. Scott L.J. remarked that the ordinary and natural meaning of words would be different to an ordinary member of the public compared to a person who works in that particular industry (at 1033).

³⁹ For a similar argument, see Colin Duncan, Brian Neill & Richard Rampton, *Duncan and Neill on Defamation*, 2nd ed. (London: Butterworths, 1983) at para. 4.13.

⁴⁰ *Bank of China*, *supra* note 25 at 508.

⁴¹ *Microsoft*, *supra* note 13 at 555.

⁴² *Chiam See Tong v. Xin Zhang Restaurant Pte Ltd* [1995] 3 S.L.R. 196 (H.C.).

removed any defamatory imputation, but the words in English (coupled with a picture of the plaintiff) had a defamatory imputation. The court found for the plaintiff because non-Chinese speaking readers would not understand the Chinese characters that removed the defamatory imputation. The editors of *Gatley on Libel and Slander* suggest that this case stands for the proposition that where the defendant wants to rely on extrinsic facts to show that the words are not defamatory in their natural and ordinary meaning, he must show that all persons to whom it was published knew those facts.⁴³ On that basis, therefore, knowledge of the Chinese language must be treated as an extrinsic fact.⁴⁴

On the other hand, in *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [*Lee Kuan Yew*], the Court of Appeal held that the ordinary and reasonable man has “some background knowledge of matters of public interest”.⁴⁵ In that case, knowledge of a public figure’s suicide and the facts surrounding that suicide were background knowledge attributed to the ordinary and reasonable man. That is a reasonable conclusion given that knowledge of such high profile events (which are reported in the media) should be part of the context. The Court of Appeal decision in *David Gerald* may be interpreted as going one step further in attributing knowledge and understanding to the ordinary and reasonable man of rather technical issues related to a corporate takeover battle.

Another thorny issue is whether previous articles leading up to the article that is the subject of defamation action can be relied upon as part of the context. The decision in *David Gerald* suggests that they are part of the context because it is through the media that the public would have obtained their information about the NatSteel takeover battle in the first place. The editors of *Gatley on Libel and Slander* state that if a book states at page 100 that the plaintiff entered a certain house, and at page 110 identify the house as a brothel, then the apparently innocuous earlier statement becomes defamatory. They then suggest that there should be no difference if instead of being found in a single publication, the book is serialized weekly.⁴⁶ They go on to cite an Australian case, *Brown v. Marron*,⁴⁷ for the proposition that oral material accompanying the written words complained of (in this particular Australian case, the spoken words were said subsequent to the written words complained of) is also a part of the context. Owen J. held:

There must be an intimate connection between the primary source of the alleged defamation and the other material which is said to form part of the context. The primary and secondary sources must be so closely connected, interwoven or enmeshed that it is necessary to take them effectively as one transaction in order to arrive at the true import and meaning of what was written and said.

However, it is respectfully submitted that this case is less innovative than it appears. The persons to whom the oral words were spoken were exactly the same persons to

⁴³ *Gatley*, *supra* note 30 at para 3.21.

⁴⁴ Note *Hasnul bin Abdul Hadi v. Bulat bin Mohamed* [1978] 1 M.L.J. 75 (C.A.) at 76 (*per* Ibrahim J.), where a Malaysian court narrowed the test to an “ordinary right-thinking and reasonable Malay of ordinary intelligence with the ordinary man’s general knowledge of the Islamic religion and experience of worldly affairs ...”.

⁴⁵ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 S.L.R. 310 (C.A.) at 321.

⁴⁶ *Gatley*, *supra* note 30 at para. 3.31.

⁴⁷ *Brown v. Marron* [2001] W.A.S.C. 100 (S.C.).

whom the written words were published. As such, the case arguably goes no further than *Xin Zhang Restaurant*. In both cases, the defendants wanted to rely on extrinsic facts to negative a defamatory imputation. In *Xin Zhang Restaurant*, the defendants failed because not everyone to whom the words were published would understand Chinese. On the other hand, in *Brown v. Marron*, the defendant succeeded in bringing in these extrinsic facts as part of the context because everyone to whom the words were published also heard the subsequent oral material.

Unfortunately, this brings us back to square one. We know that the ordinary and reasonable man does not live in a vacuum but at the same time the application of the 'general knowledge' test appears problematic to say the least. It is submitted that the problem with the expression 'general knowledge' is that it does not represent a constant. No single person will have the same amount of general knowledge compared to any other person. As such, it is in fact a highly subjective phrase that is ill-suited to determining what people objectively know (or should know).

There is fortunately a viable alternative to the 'general knowledge' test. In *Chiam See Tong v. Ling How Doong [Ling How Doong]*,⁴⁸ the High Court treated as part of the context anything within the "common knowledge" of the ordinary and reasonable man. On closer analysis, 'common knowledge' is an appropriate expression that offers a workable solution to the problem of how much of the context should be taken into consideration in determining the natural and ordinary meaning of the words. In the Singaporean vernacular, this expression is used very much as a sort of friendly accusation: 'Why don't you know that; it's common knowledge!' It refers to something that is so obvious that you should be aware of it even if you are not. Unlike 'general knowledge', it is set at one standard—what you are assumed to know, whether you actually know it or not.

This phrase is rarely, if ever, used in so-called 'British' English and it is certainly not used in the manner referred to here. Although that may be a good reason why it should not be applied by English courts, the fact that 'common knowledge' means something to Singaporeans and is a part of local language is a very good reason why it could be used in Singapore to fill the deficiencies of the 'general knowledge' test.⁴⁹

The 'common knowledge' test is consistent with the cases cited above. Knowledge of a foreign language is certainly not part of common knowledge (*Xin Zhang Restaurant*), but well-known political events are (*Lee Kuan Yew*), and it would also explain why the ordinary and reasonable person knows about corporate matters generally and the NatSteel saga in particular (*David Gerald*).

Regardless of what is the most appropriate test to determine the amount of context that should be taken into consideration, the benefits of having meaning determined early in the trial are clear. On the one hand, it may dispose of the action altogether because the words, in context, are not defamatory at all (*Charleston*). On the other hand, given that the defendant will often attempt to broaden the issues in dispute as far as possible, it is usually in the interests of the plaintiff to obtain a ruling on

⁴⁸ *Ling How Doong*, *supra* note 15 at 661: "In the present case, it was not disputed that the facts leading to the publication of the ... press statement were so well known amongst ordinary persons in Singapore as to constitute common knowledge."

⁴⁹ You do find some people who object to these local colloquialisms simply because they are not standard English. Bearing in mind that English is a messy language cobbled together by immigrants to the British Isles over a few thousand years, it is probably best to discount the opinions of these people altogether.

meaning early on so as to restrict the defendant's case to the real issues in dispute (as determined by the court).

B. *Determining Meaning for the Fair Comment Defence*

Whereas under the justification defence the defendant must prove the truth of the defamatory imputation, for fair comment the defendant must prove, *inter alia*, that the words complained of are comment on a matter of public interest.⁵⁰ This section shall demonstrate that the thorny question of *context* applies as much to fair comment as it does to justification. Further, it will be submitted that the rather peculiar rules on pleading for fair comment are a recipe for confusion.

For fair comment, a key question is whether the words complained of are comment or assertions of fact because assertions of fact are not covered by fair comment.⁵¹ A standard textbook example of the difference between assertions of fact and a comment runs something like this—'You are a criminal, therefore you are a disgrace'. The first part of the sentence is an assertion of a fact (that you are a criminal), while the second is a comment on that assertion of fact.⁵² Only the second part could be protected by the fair comment defence.

A defendant, of course, will want to raise as many defences as possible, including fair comment. If the words are held to be assertions of fact, the defendant must rely on the justification defence. If they are comment, he can rely on both fair comment and/or justification.⁵³ It is accepted that it can be very difficult to distinguish between a comment and an assertion of fact.⁵⁴ In *Oei Hong Leong v. Ban Song Long David*, the Court of Appeal held: "While there are statements which can be clearly characterized as either statements of fact or comments, the distinction is not always easy to make."⁵⁵ For example, giving the facts on which the comment is based ('you are a criminal') makes 'therefore you are a disgrace' a comment. On the other hand, if you call someone 'a disgrace' without indicating the facts on which it is based, it will be treated as an assertion of fact.⁵⁶

The defendant is given some flexibility over how he should set out his pleading on fair comment. He is required since *Control Risks Ltd v. New English Library Ltd*⁵⁷ to plead with sufficient precision the comment that it is claimed attracts the fair comment defence.⁵⁸ However, the defendant need not specifically plead a 'meaning'

⁵⁰ *Chen Cheng*, *supra* note 11 at 107.

⁵¹ *Chen Cheng*, *ibid.* at 107–112.

⁵² A comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, remark, observation etc": *Clarke v. Norton* [1910] V.L.R. 494 (*per* Cussen J.), cited in *Branson v. Bower* [2001] EWCA Civ 791 (C.A.).

⁵³ *Sutherland v. Stopes* (1924), [1925] A.C. 47 (H.L.) at 62–63.

⁵⁴ *Oversea-Chinese Banking Corp Ltd v. Wright Norman* [1994] 3 S.L.R. 760 (H.C.) at 770.

⁵⁵ *Oei Hong Leong v. Ban Song Long David* [2005] 3 S.L.R. 608 (C.A.) at para. 44 [*Oei*].

⁵⁶ *Kemsley v. Foot* [1952] A.C. 345 (H.L.) at 356 [*Kemsley*] (citing Williams Odgers, *Odgers on Libel and Slander*, 6th ed. (Philadelphia: Blackstone Publishing Co., 1929)).

⁵⁷ *Control Risks Ltd v. New English Library Ltd* [1989] 3 All E.R. 577 (C.A.).

⁵⁸ *Lee Kuan Yew v. JB Jeyaretnam (No. 1)* [1990] S.L.R. 688 (H.C.).

of the words that he will defend as comment (like in *Lucas-Box*), but as a minimum, he must identify the words of the publication to which the defence is directed.⁵⁹

Since the words complained of can only have one single defamatory meaning,⁶⁰ it is not clear why the defendant is given this flexibility in presenting his case.⁶¹ The focus should surely be on the meaning of the words—or rather, the defamatory imputations drawn from the words—because that is what the plaintiff is seeking redress for in the first place.⁶² Furthermore, where justification has been pleaded, it is likely that the parties have set out ‘higher’ and ‘lower’ meanings and there will therefore at least be definable boundaries to the dispute (albeit set by the parties themselves). But under the fair comment defence, the defendant is given this discretion to pick any comment and seek to defend that as fair comment (rather than identify a particular meaning ascribed to those words).

Of course, the trial judge—regardless of how the defendant pleads his case—will have to decide eventually whether the fair comment defence succeeds in respect of the defamatory imputations in the words. But the point is that until the meaning is determined once and for all, it will be harder for the plaintiff to successfully argue that the fair comment defence should be struck out under Order 18 Rule 19 of the *Singapore Rules of Court*, for example. In this regard, it is important to remember that although the words have a single right meaning, that does not mean that the meaning must be expressed in one sentence. It may take the form of several sub-paragraphs, all of which are a part of the ‘meaning’.⁶³ Some of the sub-paragraphs may be assertions of fact (which must be justified) whereas others may be matters of opinion (which are subject to the fair comment defence). Although a subsequent part of this article will examine more closely the law on striking out pleadings, suffice it to say at this stage that without a definitive ruling on meaning, it will be a bold judge who orders the defence, or part of the defence, struck out except in the clearest of cases.

Tactics are therefore very important in pleading the fair comment defence. The plaintiff will avoid ascribing to the words any meaning that suggests they are a comment. In response, the defendant will seek to broaden the case as far as possible and will argue that the words—when placed in *context*—are comment.

Therefore, just like the justification defence, the context of the words is vital. In *Chen Cheng*, the Court of Appeal held:

At the end of the day much depends on how the defamatory statement is expressed, the context in which it is set out and the content of the entire article or passage in question. One should adopt a common sense approach and consider how the

⁵⁹ The defendant therefore has a choice. He can either focus his fair comment defence on the meaning he ascribes to the words or simply identify the comment in the publication by identifying the words which are comment: *Gatley*, *supra* note 30 at para. 27.12.

⁶⁰ *Slim*, *supra* note 6 at 174–175 (*per* Diplock L.J.).

⁶¹ Under the new English *Civil Procedure Rules*, English law now requires the defendant to specify the defamatory meaning he seeks to defend as comment (*Civil Procedure Rules*, Practice Direction 53, para. 2.6).

⁶² “It is the ‘sting’ of the libel to which the defences of justification and fair comment are directed.”: *Polly Peck*, *supra* note 32 at 1021 (*per* O’Connor L.J.).

⁶³ *Tang Liang Hong v. Lee Kuan Yew* (1997), [1998] 1 S.L.R. 97 (C.A.).

statement would strike the ordinary reasonable reader, i.e. whether it would be recognizable by the ordinary reader as a comment on a statement of fact.⁶⁴

The House of Lords in *Telnikoff v. Matusevitch* [*Telnikoff*] held that in determining whether a letter to the forum page of a newspaper is fact or comment, the court cannot have regard to a previous article that was published in that newspaper and to which the letter was a response.⁶⁵

However, the Singapore High Court in *Ling How Doong* held that *Telnikoff* did not prevent the court having regard to what is within the “common knowledge” of the reasonable reader when deciding whether a defamatory statement is one of fact or comment.⁶⁶ This approach is arguably consistent with the House of Lords’ decision in *Kemsley v. Foot*, which held that the facts on which a comment is based need not be found in the article itself so long as there is a “sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action”.⁶⁷

In the final analysis, the court must consider whether the statement would strike the ordinary reasonable reader as a comment or a statement of fact.⁶⁸ The issue of meaning, therefore, is critical to whether the defendant is entitled to raise the defence of fair comment. Again, the difficult question of the *context* plays a big role and it is only after meaning has been determined by the court that the scope of the defendant’s right to plead fair comment will become clear. On a separate point, it is submitted that the defendant should be compelled to plead fair comment as to the meaning of the words and should not be given the option to merely identify the comment he intends to defend as fair comment. The current practice is a recipe for confusion and is arguably an anachronism in modern pleading practice.

C. *Separate and Distinct Allegations*

This section looks at the situation where the plaintiff limits his claim to some, but not all, of the defamatory statements made by the defendant. In law, the defendant is not permitted to prove the truth of statements which are not the subject of complaint by the plaintiff (i.e. set out in the statement of claim as the defamatory words) even though they appear, for example, in the same article—*Polly Peck PLC v. Trelford* [*Polly Peck*].⁶⁹ If there is any confusion as to why the defendant would even want to justify matters that are not the subject of complaint, it will be helpful to note that the defendant need not prove under the justification defence the truth of every word of the libel, so long as the main charge—or “gist”—is proved.⁷⁰ The defendant may

⁶⁴ *Chen Cheng*, *supra* note 11 at 108. This passage was cited with approval in *Oei*, *supra* note 55 at para. 44.

⁶⁵ *Telnikoff v. Matusevitch* (1991), [1992] 2 A.C. 343 (H.L.).

⁶⁶ *Ling How Doong*, *supra* note 15 at 666.

⁶⁷ *Kemsley*, *supra* note 56 at 356 (*per* Lord Porter). In *Hawke v. Tamworth Newspaper Co Ltd* [1983] 1 N.S.W.L.R. 699 at 704 (S.C.), Hunt J. held that the material on which the comment is based “must constitute a matter of contemporary history or general notoriety”.

⁶⁸ *Chen Cheng*, *supra* note 11 at 108; *Radio 2ue Sydney Pty Ltd v. Parker* [1992] 29 N.S.W.L.R. 448 (C.A.) at 466–467.

⁶⁹ *Polly Peck*, *supra* note 32 at 1020; *Lee Kuan Yew v. Devan Nair* [1990] S.L.R. 779 (H.C.) at 782 [*Devan Nair*]. The separate and distinct test also applies to the fair comment defence: *Polly Peck*, *ibid.* at 1032.

⁷⁰ *Aaron*, *supra* note 22 at 649.

not be able to prove the truth of the words complained of, but only of allegations that are not strictly the subject of complaint by the plaintiff.

However, the *Polly Peck* rule only applies where the allegations are “separate and distinct”. Alternatively, if the defamatory allegations have a “common sting”, then the defendant may seek to justify the sting by proving the truth of the statements that are not the subject of complaint by the plaintiff.⁷¹ Although it may seem strange that the defendant is permitted to widen the case beyond what has been complained of by the plaintiff, the rationale is that if there is a common sting between the various allegations, then that is in fact the real issue between the parties.⁷²

In effect, the Court balances two competing issues as part of case management considerations. On the one hand, the plaintiff should not be permitted to artificially limit the case in a manner that is unfair to the defendant. On the other hand, the defendant should not be permitted to base his case on peripheral issues that go beyond the proper confines of the case. In an oft-quoted passage from *Polly Peck*, O’Connor L.J. held:

[T]he trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties.⁷³

Before we move on, it should be noted that the question of what are the real issues in dispute will have to be determined in light of the context of the words. As the English Court of Appeal has noted, although defamation lawsuits “should not descend into wide-ranging investigations akin to public enquiries”, that will not apply where the real issue is just such a wide-ranging investigation in the first place.⁷⁴ However, until the meaning has been determined, who is to say whether or not a particular case should be run along the lines of a public enquiry or not?

In *Cruise v. Express Newspapers plc* [*Cruise*],⁷⁵ Tom Cruise and Nicole Kidman sued over a newspaper article which portrayed their married life in unflattering terms. The article also made unflattering statements on a number of other matters, including the couple’s purported belief in Scientology. The plaintiffs set out the entire article in the statement of claim. As part of its defence on justification and fair comment, the defendants pleaded that Scientology is a “dangerous cult, notorious for: (a) its ridiculous doctrines; (b) its policy and practice of ensnaring and exploiting gullible believers for the financial gain of its leaders”. The plaintiffs sought to strike out that part of the defendants’ defence dealing with Scientology.⁷⁶

According to Brooke L.J., the question was: if an article contains two separate and distinct stings, and a plaintiff complains of the whole article in his statement

⁷¹ *Polly Peck*, supra note 32 at 1032. Note that these principles also apply to the fair comment defence: *Polly Peck*, *ibid.* at 1032.

⁷² *Gillian McKeith v. News Group Newspapers Ltd* [2005] EWHC 1162 (H.C.) at para. 3.

⁷³ *Polly Peck*, supra note 32 at 1021.

⁷⁴ *McPhilemy*, supra note 6 at 791 (*per* May L.J.).

⁷⁵ *Cruise*, supra note 15.

⁷⁶ Counsel for the defendants admitted that the particulars given by his clients in support of their pleading on Scientology could turn the case into a “a major inquiry into the harm allegedly done by the Church of Scientology and could run for months and months”: *Cruise*, supra note 15 at 945.

of claim, but only complains of one of the stings contained in the article, are the defendants allowed to rely on pleas of justification and fair comment in relation to the other sting.⁷⁷ The difference between this case and *Polly Peck* was that here, the plaintiffs pleaded the whole article in the statement of claim and then objected to the defendants seeking to justify and/or defend as comment that part of the article that made alleged criticisms of Scientology. *Polly Peck* was different in that the plaintiff excluded from the words complained of those matters that they wanted to treat as separate and distinct (and therefore were claimed to be irrelevant).

The Court of Appeal adopted the reasoning of Nicholls L.J. in *United States Tobacco International Inc v. British Broadcasting Corporation* [*United States Tobacco*].⁷⁸ In that case, Nicholls L.J. held that:

- (i) the *Polly Peck* ‘separate and distinct’ test refers to defamatory imputations which are separate and distinct from each other, not to two passages in the text which are separate and distinct; and
- (ii) even if the defamatory imputations are textually severable, this makes no difference so long as the plaintiff has unequivocally selected only one of the defamatory imputations for complaint because the judge and jury will see the whole article in determining the meaning of the words anyway.

Taken at face value, this means that the plaintiff can prevent the defendant from basing his justification and fair comment defences on an imputation contained in the words (which are set out in black and white in the statement of claim). As for the fact that the plaintiff must nevertheless “unequivocally” select an imputation for complaint, that can only mean on the facts of *Cruise*, omitting reference to the other imputation in the plaintiff’s pleading on meaning amounted to an unequivocal selection. It is submitted that one would have thought that an ‘unequivocal’ act would be something more than an omission to say something!

In *Cruise*, the Court of Appeal held on the facts that the part of the article about Scientology could not be separated textually from the rest of the article, and further that there was no common sting between the statements on Scientology and the rest of the article. In a telling passage, the Court held:

In my judgment, Nicholls L.J. correctly set out the relevant principles in his judgment in [*United States Tobacco*]. I share his unwillingness, and that of Russell L.J. to accept that the length and cost of a libel action must be greatly extended simply because it is not easy for a pleader to extricate the sting or stings of which his client complains from the words surrounding them, which may contain a quite separate and distinct sting.⁷⁹

The difficulty with the *Cruise* decision is that at no point is the plaintiff forced to say one way or the other whether the words they have pleaded as defamatory contain

⁷⁷ The use of the word “sting” rather than “allegation”—as in ‘separate and distinct sting’ is useful in that it focuses attention on the key issue—the sting of the words. “It is the ‘sting’ of the libel to which the defences of justification and fair comment are directed;”: *Polly Peck*, *supra* note 32 at 1021 (*per* O’Connor L.J.).

⁷⁸ *United States Tobacco International Inc v. British Broadcasting Corporation* [1988] E.M.L.R. 816 (C.A.).

⁷⁹ *Cruise*, *supra* note 15 at 954.

separate and distinct imputations of which they do not complain. It is ironic that the Court of Appeal was at pains to stress that under the 'new' approach to pleading, both plaintiff and defendant must set out their respective cases (as discussed above). But if that is so, it should also be incumbent on the plaintiff to make it clear—no doubt in its reply—that some of the imputations relied upon by the defendant are not the subject of complaint anyway.⁸⁰ It may very well be the case that the plaintiff's pleaded meaning in the statement of claim is not clear on this point one way or the other, regardless of whether it is a *Polly Peck*- or *Cruise*-type case. If so, at what point will the defendant be informed of the plaintiff's case? In a normal case, there will be various interlocutory applications for discovery and suchlike. Unless the plaintiff has clearly indicated on his pleadings that a part of the defendant's case is based on a separate and distinct allegation of which no complaint has been made, it seems likely that discovery will have to be ordered on matters that upon final determination of the lawsuit may be found to be irrelevant.

The current situation where the parties can proceed all the way to trial without knowing one way or the other whether there are separate and distinct allegations is, from an objective point of view, most unsatisfactory, and would be solved by a compulsory early ruling on meaning. Further, the decision in *Cruise* only encourages more confusion over the meaning of the words and it is submitted that at the very least the plaintiff must make it clear whether there are parts to an article of which he is in fact not complaining.

D. General and Specific Charges

The issue of 'general' and 'specific' charges raises similar problems. If the plaintiff is accused of stealing \$100 from the cash register, that is what is described in law as a 'specific' charge. In response to the same facts, the meaning put forward by the defendant may be more general, such as 'the plaintiff is an immoral person'. This is a 'general' charge. If the words constitute a specific charge the defendant is not permitted to rely on other instances of specific acts of misconduct or other general charges. He must justify only that specific charge.

In practice, it is important to bear in mind that a defendant will usually find it advantageous to widen the meaning as far as possible because a general charge gives the defendant scope to plead wider particulars of justification.⁸¹ Furthermore, if it is a general charge, the defendant may in his particulars of justification rely on events that occurred after the defamatory publication that is the subject of the lawsuit.⁸² The question of the scope of the charge will also have an impact on the discovery process, since the plaintiff is required to give discovery of all documents

⁸⁰ If the plaintiff intends to rely on malice to defeat a plea of justification or fair comment, he must set out the particulars of malice in the reply. Order 78 Rule 3(3) of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.).

⁸¹ Note, however, that it is possible that a defendant might argue for a specific meaning, for example, where the plaintiff has a spotless record but has been accused of a single transgression in a lifetime of good works. In such cases, it would be in the interests of the defendant to narrow the case to the alleged single transgression.

⁸² *Maisel v. Financial Times Ltd* [1915] 3 K.B. 336 (C.A.).

relevant to the defendant's particulars of justification.⁸³ To use the example quoted above, the defendant will give particulars of other occasions of wrongdoing and/or immorality—in effect putting the plaintiff's whole life under the microscope. So long as his case is properly pleaded, the defendant should be able to obtain discovery on these wider issues from the plaintiff.

It is easy to see, therefore, why the early determination of meaning would be helpful, if not vital, to the progress of the lawsuit in respect of general/specific meanings. In *Bookbinder v. Tebbit [Bookbinder]*⁸⁴ the plaintiff originally pleaded a general meaning—that the plaintiff had acted irresponsibly in squandering public funds. Unsurprisingly, the defendant gave particulars of other occasions of alleged squandering of public money. The plaintiff then amended his pleading and replaced his general meaning with a specific meaning; namely 'squandering 50,000 Pounds Sterling on x, y, z'. Based on the amended Statement of Claim, the court held that a plaintiff should be able to set up his case based on a specific charge without having to face the burden of a trial on many other issues unrelated to that specific charge. As such, the defendant's particulars relating to proving the general meaning he asserted were struck out as disclosing no reasonable defence.⁸⁵

Bookbinder is a case where the plaintiff at first failed to consider the implications of his statement of claim because he pleaded a meaning far wider than was necessary. Although the words on their face were clearly a specific allegation, the defendant was obliged to defend the meaning put forward by the plaintiff (even excepting the obvious advantages to the defendant in doing so). The lesson of *Bookbinder* is that a plaintiff must think very carefully about the meaning he pleads in the statement of claim.

The plaintiff in *Bookbinder* was also most fortunate that the defendant had not pleaded the *context* in support of his contention for a wider meaning because the court may very well have not struck out the particulars had that been the case.⁸⁶ Again, therefore, *context* is vital.

IV. JURISDICTION TO STRIKE OUT PLEADINGS UNDER ORDER 18 RULE 19 IS LIMITED

The main theme of this article is that the meaning of the words is important because this question determines the scope of the trial and the range of evidence that may be presented by the defendant in his justification and fair comment defences. Of course, it has always been open to a party to make an application under Order 18 Rule 19 of the Singapore *Rules of Court* to strike out either part or all of the other party's

⁸³ *Yorkshire Provident Life Assurance Company v. Gilbert & Rivington* [1895] Q.B.D. 148 (C.A.).

⁸⁴ *Bookbinder*, *supra* note 31.

⁸⁵ For a Singapore example, the Court of Appeal in *David Gerald* held that the words "playing to the gallery" were a "general criticism of the [plaintiff's] behaviour throughout the NatSteel saga". As such, the defendants were entitled to rely on all relevant facts to justify the charge: *David Gerald*, *supra* note 14 at 726. As to what is a 'relevant' fact, that will be determined in accordance with the *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.).

⁸⁶ *Bookbinder*, *supra* note 31 at 652 (*per Russell L.J.*).

case.⁸⁷ However, given that the power to strike out is a drastic remedy, it is available only in “plain and obvious” cases.⁸⁸

As far as challenging the pleaded meaning *per se*, the other party is not even required to show that their meaning is *capable* of bearing that meaning, but only that it is *arguably capable*.⁸⁹ This is a low threshold for the party resisting the striking out application and will invariably result in the rejection of that application.⁹⁰ It has been held that a defendant’s case, or part of his case, should only be struck out where “it is quite clear that the pleading objected to discloses no arguable case”.⁹¹ The Singapore Court of Appeal has held that the plaintiff would have to show that no court could, under any circumstances, find for the defendant on the particulars of justification given by the defendant.⁹²

As part of this “game of skill” the pleader should draft his case in anticipation of a striking out application being taken out by the opposing party because he must have arguments that show his pleading is at least “arguable”. Further, the discussion in this article suggests that it is advisable to plead *context* in support of a chosen meaning simply because it is difficult to determine what comes within *context* to begin with. If it is true that this question is difficult to answer, then no matter how long the lawyers fight over it, the applicant will find it difficult to show a plain and obvious case.⁹³

Striking out applications face an uphill struggle because it is not the job of the judge hearing the application to decide questions that are for the trial judge to decide. On the other hand, it should be noted that in *Bookbinder*, the court did determine the question whether the words were a specific or general charge pursuant to a striking out application. In a case very similar to *Bookbinder*, the Malaysian High Court struck out the defendant’s general charge meaning under Order 18 Rule 19 of the Malaysian *Rules of Court* because it held that no reasonable reader would conclude that the words conveyed such a general charge.⁹⁴ The same argument can of course be made in relation to the *Polly Peck*-type case as regards whether or not there are separate and distinct allegations.

⁸⁷ For the terms of the relevant part of Order 18 Rule 19 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.), see *supra* note 12.

⁸⁸ *Bank of China*, *supra* note 25 at 507. In *Gabriel Peter & Partners v. Wee Chong Jin* (1997), [1998] 1 S.L.R. 374 (C.A.), the Court of Appeal held that the striking out of an action is a “draconian” step that should only be used where the plaintiff’s case is “wholly devoid of merit”.

⁸⁹ *Morgan v. Odhams Press Ltd* [1971] 1 W.L.R. 1239 (H.L.) at 1268; *Aspro Travel v. Owners Abroad Group plc* [1995] 4 All E.R. 728 (C.A.) at 736. The position in England has now been changed by section 7 of the *Defamation Act* (U.K.), 1996, C. 31, which states that the court may no longer be asked if a statement is arguably capable, as opposed to capable, of bearing a particular meaning.

⁹⁰ *Keays v. Murdoch Magazines Ltd* [1991] 1 W.L.R. 1184 (C.A.) at 1191 [*Keays*].

⁹¹ *Waters v. Sunday Pictorial Newspapers* [1961] All E.R. 758 (C.A.) at 761; *Devan Nair*, *supra* note 69 at 782.

⁹² *Wright Norman*, *supra* note 23 at 524.

⁹³ In *Bank of China*, *supra* note 25, the defendant pleaded a bare denial that the words complained of were defamatory of the plaintiff, without giving his own meaning or relying on justification or fair comment. The High Court decided that the words conveyed at least some of the meanings pleaded by the plaintiff and, as such, the defendant’s bare denial was struck out. The case suggests that pleading a bare denial is not a good idea because it invites an application by the plaintiff under Order 18 Rule 19 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.).

⁹⁴ *Tan Sri Dato Paduka (DR) Ting Pek Khing v. Hii Chang Pee @ Hu Chang Pee* [2000] M.L.J.U. 209 (H.C.).

It is submitted that there is plenty of scope for a party to introduce doubt into the mind of the judge hearing a striking out application. In this regard, arguments based on *context* are particularly fertile ground for a party to resist the application.⁹⁵ The parties will of course know that striking out applications face an uphill struggle and that the party resisting the application need only show an arguable case to defeat it—which probably explains why Order 18 Rule 19 of the Singapore *Rules of Court* is resorted to only infrequently.

But where the court has already determined meaning once and for all, it is in a much stronger position to strike out pleadings. Whatever confusion there is in solving the thorny issue of how much context to take into consideration, once the court has ruled on meaning, that is the end of the matter. The underlying point is that once the meaning of the words has been determined, then the key obstacle preventing the court from exercising its power under Order 18 Rule 19 of the Singapore *Rules of Court* is removed.

V. THE SCOPE TO DETERMINE MEANING BEFORE TRIAL

The law does in fact currently permit the parties to make an application to determine the meaning of the words under Order 14 Rule 12 of the Singapore *Rules of Court*.⁹⁶ The application must be made not more than 28 days after the pleadings are deemed closed.⁹⁷ In *Microsoft Corporation v. SM Summit Holdings Ltd*,⁹⁸ the Singapore Court of Appeal held that Order 14 Rule 12 can be used to determine the natural and ordinary meaning of the words in a defamation action.

Surprisingly, parties rarely apply for the meaning of the words to be determined under Order 14 Rule 12. Looking at the matter objectively, you would have thought that in almost every case there would be an application on meaning given the importance of meaning to the progress and development of the case. In particular, since the defendant's objective will be to broaden the issues in dispute, it is in the interests of the plaintiff to determine meaning early so as to cut down the scope of the

⁹⁵ Note *Bookbinder*, *supra* note 31 at 652 (*per* Russell L.J.) where the court was clearly influenced by the fact that neither party had pleaded context (which may have turned the specific allegation into a general allegation). The court was therefore in a position to use its powers to strike out part of the defence based on the pleadings before it. "Whilst recognizing that the striking out of a pleading, or part of it, is a Draconian step, I do not shrink from it in this case so long as the pleadings do not assist in ascribing to the words a broader meaning than that which they bear when looked at in isolation."

⁹⁶ Order 14 Rule 12(1) and (2) of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.) reads:

(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter where it appears to the Court that—(a) such question is suitable for determination without a full trial of the action; and (b) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein. (2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

⁹⁷ Order 14 Rule 14 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.). The time period is a mandatory rule—*United Engineers (Singapore) Pte Ltd v. Lee Lip Hiong* [2004] 4 S.L.R. 305 (H.C.). Pleadings are deemed closed either at the expiration of 14 days after service of the reply or the defence (in cases where there is no reply): Order 18 Rule 20 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.).

⁹⁸ *Microsoft*, *supra* note 13; *Fraser & Neave Ltd v. Aberdeen Asset Management Asia Ltd* (2001), [2002] 4 S.L.R. 473 (H.C.).

defendants' justification and fair comment defences.⁹⁹ It will rarely be in the interests of the defendant to make a request for the meaning to be determined early in the course of proceedings because even if he believes that the plaintiff's pleading is vulnerable, why would he risk a ruling that may imperil his own particulars of justification and fair comment? It is far better for him to sit back and focus on obtaining further and better particulars and discovery.¹⁰⁰

It is submitted that there are a number of reasons why Order 14 Rule 12 has not been utilized as much as may have been expected.

First, the law of defamation is a game of strategy. There is a tendency for both plaintiff and defendant to exaggerate their plea on meaning (the plaintiff going for a 'higher' and 'specific' meaning; the defendant going for a 'lower' and 'general' meaning). After taking so much trouble to craft these tactical positions, it is hardly surprising that the parties are unlikely to make use of the Order 14 Rule 12 procedure for fear that an adverse ruling will put a big hole through their case. Since the application needs to be made within about six weeks of the last pleading filed, the parties would risk having to re-think their case from scratch or having to make amendments to their case at such an early stage.

Second, the consequences of an application under Order 14 Rule 12 are so serious that the parties may not want to commit themselves to a make or break application so early in the course of proceedings. The complex issues discussed in this article are all relevant to the determination on meaning, so if given the choice, the parties may prefer to put such matters aside until trial and closing submissions.

Third, the early stages of a defamation lawsuit are taken up by gathering evidence and pinning down the other party's pleadings. It is easy to see how resources would be focused on that, rather than diverted to what may seem at the time like an overly technical question of the meaning of the words.

Fourth, defamation suits are about 'saving face'. The parties' positions can become entrenched and these suits are, by definition, very personal. There are much more effective ways for a party to put pressure on the other side—by discovery, for example—than an application under Order 14 Rule 12.

Fifth, the parties often negotiate behind the scenes to try and reach a settlement. The pleadings represent a kind of warning to the other side of the consequences if a settlement is not reached. Again, why jeopardize that process by making an application under Order 14 Rule 12?

Sixth, in defamation cases, the parties' case theory often takes time to formulate, and it is likely that it will not be complete until after discovery/interrogatories and applications for further and better particulars have been completed. This does not fit smoothly with the objective of Order 14 Rule 12, which is to determine the meaning early in the course of proceedings so as to *delimit* the scope of the pleadings, discovery and evidence. As such, the objective behind Order 14 Rule 12 is at odds with the realities of how the parties put together their case for trial.

⁹⁹ Note, however, *De Souza Tay & Goh v. Singapore Press Holdings Ltd* [2001] 3 S.L.R. 380 (H.C.), where the plaintiff applied under Order 14 Rule 12 of the Singapore *Rules of Court* for a ruling on meaning only to have his claim struck out for disclosing no reasonable cause of action on the ground that the words were not defamatory.

¹⁰⁰ Furthermore, it is important to remember that post-publication facts, if relevant, can be relied upon by the defendant in his justification defence: *David Gerald*, *supra* note 14 at 726.

It is also important to note that parties do make late applications to have the meaning determined by the court. For example, in *David Gerald*, the defendant took out an application to determine the meaning of the words a week before the start of the trial. The application was fixed for the first day of trial, but the trial judge held that it would be “pointless” to proceed with the application “because my decision might not result in a final determination of the suit”.

Should I rule in the defendant’s favour and dismiss the action and should the plaintiff subsequently succeed on appeal, the parties would have to come back for trial again.¹⁰¹

Of course, an additional argument against late applications is that the timelines in Order 14 Rule 12 are mandatory and that to allow late applications—after discovery, further and better particulars and exchange of affidavits of evidence-in-chief—would defeat the purpose of Order 14 Rule 12.¹⁰² Late applications may also appear to the court like a last-ditch attempt to shift the focus of the case away from a certain point that a party is not keen to have explored at trial. Given that no extrinsic evidence is admissible in determining meaning anyway, there is no reason why that application should not have been made much earlier in the course of proceedings.

The result is that if a party misses the timelines set down in Order 14 Rule 14, he will find himself stuck with his case, regardless of whether or not the pleaded matters bear any resemblance to the real issues in dispute between the parties. Like a juggernaut, the lawsuit goes full speed ahead—destination: trial, but on the wrong tracks.

VI. CONCLUSION

Defamation law is highly complex and provides fertile ground for the parties to engage in what has been described as a “battle of tactics” to the apparent exclusion of the court. It is submitted that regardless of how the parties conduct their case, there are strong public interest grounds to prevent defamation trials from being diverted from the real issues in dispute.¹⁰³ Furthermore, the current problem that needs to be addressed is that the parties themselves set the boundaries for the meaning of the words and this in turn determines the scope of the trial and the evidence that will be presented. It has been submitted in this article that there is a natural tendency for

¹⁰¹ *Jeyasegaram David (alias David Gerald Jeyasegaram) v. Ban Song Long David* (2004), [2005] 1 S.L.R. 1 (H.C.) at 16.

¹⁰² There are conflicting authorities on whether the court can determine meaning as a preliminary issue under Order 33 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.). See *Keays*, *supra* note 90; and *contra Morris v. Sanders Universal Products* (1953), [1954] 1 W.L.R. 67 (C.A.). The English equivalent of Order 14 Rule 12 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.), Order 14A, *Rules of the Supreme Court* (U.K.), was used—albeit sparingly—to answer the same sort of questions as that allowed under Order 33 of the Singapore *Rules of Court* (2004 Rev. Ed. Sing.): see the Order 14A, *Rules of the Supreme Court* (U.K.) case of *Berkoff v. Burchill* [1996] 4 All E.R. 1008 (C.A.) (whether words capable of being defamatory); as opposed to *Keays*, *supra* note 90 (whether words capable of bearing a pleaded meaning). As such, it would seem likely that the Singapore courts would prevent litigants from side-stepping the timelines in Order 14 Rule 14 by relying on Order 33 instead.

¹⁰³ Of course, it is always possible that the “real issue” on the facts may be something akin to a public enquiry after all. See *McPhilemy*, *supra* note 6 at 791 (*per* May L.J.).

both plaintiff and defendant to exaggerate the meaning they put forward. In these circumstances, a defamation case can take on a rather unreal form because the parties find themselves fighting over issues that to any objective observer have nothing to do with the alleged defamation in the first place!

The question is what should be done about this. The thorny conceptual arguments surrounding the *context* of the publication make striking out applications under Order 18 Rule 19 of the Singapore *Rules of Court* problematic. Likewise, although from an objective perspective there are good reasons why the meaning of the words should be determined soon after close of pleadings, there are also very good reasons why parties actually involved in litigation do not favour making Order 14 Rule 12 applications.

This article recommends that the meaning of the words should be determined by the court in all cases at a fixed point soon after close of pleadings (but after the service of further and better particulars). Such hearings should be compulsory.¹⁰⁴ This change in practice would have the following benefits:

- (1) It would force the parties to fight the case on the real issues (as determined by the court), not the issues that the parties would prefer to fight the case on.
- (2) The court's ability to strike out unsustainable pleadings would be enhanced.
- (3) Applications for documentary discovery, interrogatories and further and better particulars would be limited to the key issues in dispute.
- (4) Weaknesses in a party's case would become much clearer once the meaning has been determined. This would influence any decision on whether or not to settle the case.
- (5) From a broader point of view, parties to defamation lawsuits would no longer be in any doubt about the importance of determining meaning and they would be forced to focus on this critical point from the commencement of the lawsuit.

In conclusion, this change of practice would, from a case management perspective, lead to significant savings in time and costs because cases that are without merit would be identified early (and disposed of), and those cases that do proceed all the way to trial would be narrowed down to the real issues in dispute.

¹⁰⁴ The current English *Civil Procedure Rules* allow the parties to make an application to the court for a ruling whether *inter alia* the statement is capable of being defamatory (C.P.R. P.D. 53, para. 4.1). However, the procedure is not compulsory. Although the fact that most defamation trials in England are heard before a jury makes it problematic to compare the law in England with that in Singapore, suffice it to say that in England the jury has the final say on the exact meaning to be ascribed to the words (and the court at most will set a range of meanings from which the jury will choose: *Mapp v. News Group Newspapers Ltd* (1997), [1998] Q.B. 520 (C.A.)). The situation is different in Singapore because it is the court (rather than a jury) that will decide the meaning of the words. That factor can be used as an additional argument for why the determination of meaning should be compulsory in Singapore even if it is only optional in England.