

# Restaurant Reviewer Liability For Defamation In A Global Context

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## ABSTRACT

*A restaurant review may contain statements that the restaurant owners would consider defamatory. While technically there is no bar to a successful defamation suit, there are numerous obstacles, including the opinion nature of the review, the “fair comment” qualified privilege, and free-speech jurisprudence that requires actual malice before a plaintiff can prevail in a defamation suit against a public figure. In jurisdictions outside of the United States, there are similar restrictions that will also create obstacles to the success of the lawsuit. Although the success of the suit would be more likely under other nations’ laws, the obstacles still do not rise to the level of a prohibition on such lawsuits. Any business on either side of the dispute – the writer/publisher of the review vs. the restaurant and its owners – needs to be aware of the evolving law and where a defamation case may or may not be successful. This article examines and discusses obstacles to successful defamation cases in order to provide guidance for businesses that are or may be involved in such litigation.*

**Keywords:** Libel; Slander; Defamation; Public Figure; Fair Comment; Restaurant Review; Tort; Liability; First Amendment; Freedom of Speech

## INTRODUCTION

The tort of defamation is designed to protect individuals, businesses, and others against untrue statements that may injure reputation. “The elements of the tort of defamation are: 1) a false and defamatory statement concerning another, 2) an unprivileged publication to a third party, 3) fault amounting at least to negligence on the part of the publisher, and 4) either actionability of the statement, irrespective of special harm or the existence of special harm caused by the publication.”<sup>1</sup>

A restaurant or its owners may feel defamed by a review in a publication or elsewhere. However, before they can prevail in a defamation lawsuit, there are certain of the foregoing elements that may create special problems. First, there must be a false statement of something purporting to be a fact; mere opinion will not create defamation liability. Second, the publication must be “unprivileged,” essentially meaning that it cannot fall into a category of communications specially exempted from defamation claims.

Third, in the United States, there is the issue of the First Amendment to the Constitution. Liability for defamation and other speech-related torts has always been in conflict with constitutionally-protected freedom of speech. Case law endeavors to balance that conflict. But, establishing a balance in this conflict is particularly difficult in the area of restaurant review because it is difficult for a restaurant owner to prove the “actual malice” that a public figure must prove before prevailing in a defamation case.

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<sup>1</sup> *Restatement (Second) of Torts* § 558 (1977), as cited by Martha L. Arias, “Internet Defamation,” *Information Policy*, 3/12/2010, [www.i-policy.org](http://www.i-policy.org).

However, there is no inherent legal prohibition against writer or publisher liability for defamation or related torts against a restaurant in a restaurant review. This means that as long as the restaurant can get past the legal obstacles, it ought to, at least in theory, be able to prevail in a defamation case. Whether or not such ability to prevail exists in practice is a separate question, and it remains to be seen whether in fact liability can be based on a restaurant review, even in situations that would otherwise be regarded as blatantly tortious. However, a review of case law reveals that there are guidelines that may be followed that would increase the likelihood of a plaintiff prevailing in such a case. Conversely, defendants will need to be familiar with these cases as well in order to best defend against such claims.

## **JUDICIAL PRINCIPLES IN UNITED STATES COURT CASES**

There are several lines of court cases in the United States that provide parameters for defamation claims based on a restaurant review. The first line of cases concerns the qualified privilege that the press has to report on matters of public interest, a principle that reached its peak in the United States in the middle of the last century. The second line of cases concerns Constitutional protection of speakers who make otherwise defamatory statements about public officials and public figures. The third line of cases concerns opinions, which are protected from defamation claims under both common law as well as Constitutional principles. Finally, as in most common law tort cases, there will need to be damages proved in order for a plaintiff to prevail.

### **Qualified Privilege**

“A defendant will not be liable for defamation if the communication is privileged. Privileges fall into two categories: absolute privilege, which means that the communication will always be privileged, no matter what, and conditional (or qualified) privilege, which means that the communication will be privileged unless the defendant knows it to be false, or makes the statement with reckless disregard of truth or falsity.”<sup>2</sup>

An example of an absolute privilege is in judicial proceedings. Any statement made in the course of a court case will always be exempt from a defamation action, regardless of the truth of the statement or even the motives of the person making the statement. This absolute privilege is designed to permit individuals freely to present evidence in court without fear of retribution for statements that they may not have other evidence to corroborate. This absolute privilege has also been extended to quasi-judicial proceedings, government hearings, and legislative hearings. An absolute privilege also applies to communications between spouses.

A qualified, or conditional, privilege will apply in many business settings. For instance, routine business communications (such as an employment reference) will be privileged, and exempt from defamation lawsuits, unless that privilege is lost through abuse, which generally means bad faith.

In the context of restaurant reviews, the conditional privilege that would apply is called “fair comment.” This principle allows leeway in reporting matters of public interest, providing a defense against otherwise defamatory statements, provided that the reporter was acting in good faith.

“A comment is fair when it is based on facts truly stated... and is an honest expression of the writer's real opinion or belief.” [citation omitted] Criticism, as to matters of public interest and concern, is privileged so long as the criticism is fair with an honest purpose and not intemperate and malicious.”<sup>3</sup>

Although this principle was well-established by the middle of the 20th century its significance in U. S. court cases waned from the 1960's on, as it was subsumed by the free-speech cases which granted Constitutional protection for speech that had previously been protected only by common law, as we see in the next sections.

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<sup>2</sup> Martin A. Goldberg and Cynthia Kruth, *Business Law*, 2008.

<sup>3</sup> *Hall v. Binghamton Press Co.*, 263 App. Div. 403, affd. 296 N.Y. 714 (1946).

### **Constitutional Limits on Defamation Cases**

At first blush it would appear that there should be no constitutional limits on defamation cases. The freedoms of speech and press contained in the First Amendment only prohibit the government from abridging these freedoms, and would not seem to apply to a case brought by a non-governmental individual.

The text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Amendment is written as a restriction on the ability of Congress to abridge free speech, later extended to any kind of federal or state governmental action. It is less clear how this would apply to a defamation case, which is a civil case between two private parties, and does not appear to be a restriction on free speech by the government.

The landmark Supreme Court case of *New York Times Co. v. Sullivan*<sup>4</sup> connected the dots to make a private action into a governmental action. "It matters not that that law has been applied in a civil action ... The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised."<sup>5</sup>

The Court held that modification of defamation laws would be necessary to balance the competing interests of the First Amendment and the rights of plaintiffs whose suffered injury to reputation resulting from false statements. As one later court described the Court's holding:

"The United States Supreme Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, recognized that to avoid the 'risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press' some modifications in the law of libel and slander were necessary. The problem for the court was to resolve the tension between first amendment rights and the legitimate state interest in redressing injury to reputation. Part of the solution, as to the recovery by *public officials and public figures* from their critics for injuries caused by libel, required proof that the defamatory falsehood was published with 'actual malice.' *Actual malice was defined as knowledge that the statement was false or reckless disregard of whether it was false or not.* The definition supports the central theme in this area: the United States constitution delimits a state's power to award damages for libel in actions brought by public officials and public figures against their critics.

"The evidence adduced to prove actual malice must do so with 'convincing clarity.' *New York Times Co. v. Sullivan*, supra, 285-86. The degree of belief conveyed by the words 'convincing clarity' has been restated as 'clear and convincing proof.' The standard of 'clear and convincing proof' is to be applied by the trier of fact to determine whether the defamatory falsehood was made with knowledge of its falsity or with reckless disregard of the truth.

"The question is whether the defendant knew of the falsity of its statements or recklessly disregarded whether they were false. The reckless conduct required by *New York Times* 'is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."<sup>6</sup>

Thus, the *New York Times* case creates a proof of "actual malice" requirement before a public official or public figure can prevail in a defamation suit. For these purposes, "actual malice" does not refer to malice as that word is commonly used (which still may apply in defamation cases outside of the United States). For purposes of U.S Constitutional law:

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<sup>4</sup> 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

<sup>5</sup> Id.

<sup>6</sup> *Dacey v. Connecticut Bar Association*, 170 Conn. 520 (1976), emphasis added.

-- “Actual malice” means knowledge that the statement was false, or reckless disregard of whether the statement was true or false.

-- To prove actual malice, a plaintiff must produce evidence that the defendant had reason to doubt the truth of the statement.

At this point it is helpful to highlight a small substantive distinction between the fair comment defense and the New York Times principle. Fair comment is premised on the protection of subjects of interest to the public, whether or not the plaintiff is a public official or a public figure. The U. S. Supreme Court expressly rejected an extension of the New York Times principle to matters of public interest where the plaintiff was neither a public official nor a public figure in *Gertz v. Robert Welch, Inc.*<sup>7</sup> There the Court went as far as to say that 1) a person who injects himself into the public arena for a particular purpose may be considered a public figure but for that purpose only, 2) there cannot be liability for defamation without some showing of fault, even if only negligence, and 3) before punitive or presumed damages may be imposed a greater showing of fault is required, the “actual malice” test of New York Times. In other words, the Court stopped short of giving Constitutional status to the fair comment defense that would apply in a matter of public interest whether or not the plaintiff was a public official or public figure.

These two Supreme Court cases set the stage for lower court and state court cases that followed, such as *Donald James Mashburn, D/B/A Maison De Mashburn v. Richard H. Collin*.<sup>8</sup> The background of the case is that Richard Collin, the restaurant reviewer, went to Maison De Mashburn, owned and operated by Donald Mashburn, and subsequently published a negative review of the restaurant in the Times Picayune Publishing Corporation's paper. Collin, while saying the coffee, wine, and service was good, disliked the food. He made several comments referring to the food as disgusting; such as, "the piece de resistance that turns this into a gourmet dish is to empty a shaker full (more or less) of paprika on top of it", "trout a la green plague" and "yellow death on duck". The trial court granted the defendants motion for summary judgment, which was affirmed on appeal, because the statements made by Collin were expressions of his opinion, they did not give rise to the inference that there are undisclosed defamatory facts, and the plaintiff did not contend that any of the expressions were statements of fact that were false. The court also noted that the New York Times and Gertz cases protected at least mere expressions of opinion by members of the press or media concerning public interest or concern when made without knowing or reckless falsity. Also, the court labeled Maison de Mashburn a limited purpose public figure for the purpose of restaurant reviews; which means Mashburn would have to prove actual malice and he did not. The court said that Maison De Mashburn was a public restaurant and therefore a matter of public interest subject to fair comment under common law.

At the heart of the Court's decision is a holding that no ordinary person would read "trout a la green plague" or "yellow death on duck" as statement of fact. It would be obvious to a reasonable person they are the writer's opinions which are protected under the First Amendment. The shaker full of paprika could possibly be interpreted as a statement of fact; however, when looking at the sentence and/or the review as a whole, which use a number of metaphors and similes to describe the food, it would be clear to an ordinary person that is a mere statement of opinion using exaggerating words.

### **Statements of Opinions**

In U. S. jurisprudence, a defamation case must include a statement that is an assertion of a fact. An opinion by itself cannot be defamatory, as an opinion inherently cannot be true or false. So much is a natural outgrowth of the common law of defamation. However, as a result of U. S. Supreme Court holdings, this common law principle has been elevated to a Constitutional mandate. That is, it is a violation of a speaker's freedom of speech to hold him or her liable for the expression of an opinion.

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<sup>7</sup> 418 U.S. 323 (1974).

<sup>8</sup> 335 So. 2d 879 (1977).

Is there any difference between the common-law rule that opinions may not be the basis of a defamation case, and the analogous Constitutional rule? There are two significant differences. First, a common-law rule may be modified by statute, or by later court cases, while a Constitutional rule cannot. It is possible that a Constitutional rule resulting from a Supreme Court case may be revised by a later Supreme Court case, but that is not likely to occur in the foreseeable future given the strong pro-speech stances taken by the Roberts court.

To recent U. S. Supreme Court cases illustrate the current pro-speech stance, *Citizens United v. FEC*<sup>9</sup> and *U. S. v. Stevens*.<sup>10</sup> In the first of these cases, the Court granted free speech rights to corporations and labor unions to spend money in support of or in opposition to political candidates. Citing the New York Times case, the Court declared it unconstitutional for a law to be "...seeking to exact a cost after the speech occurred..." The second case ruled that with videos depicting animal cruelty, the law must be narrowly tailored so as not to prohibit protected speech. Thus, it is fair to conclude, that any contraction of First Amendment freedom of speech in the future is not likely.

The second difference is that the common-law rule is a matter of fact, to be determined by a jury, while the Constitutional rule is a matter of law to be determined by a court. This makes it much easier for a defendant to have a case dismissed by a judge before the start of a trial, making the defense much less costly.

Given the fact that the Constitutional rule carries immeasurably greater weight than the analogous common law rule, the modern jurisprudence in this area can be found more in federal cases than in state cases.

One of the most instructive (and colorful) cases outlining the opinion issue in a defamation case against a restaurant review can be found in the "Mr. Chow" case in the U. S. Court of Appeals for the Second Circuit.<sup>11</sup> That case involved a review in a restaurant guide called *Gault/Milau Guide to New York*, one containing every restaurateur's nightmare:

"...the dishes on the menu (very short) have only the slightest relationship to the essential spirit of Chinese cuisine. With their heavy and greasy dough, the dumplings, on our visit, resembled bad Italian ravioli, the steamed meatballs had a disturbingly gamy taste, the sweet and sour pork contained more dough (badly cooked) than meat, and the green peppers which accompanied it remained still frozen on the plate. The chicken with chili was rubbery and the rice, soaking, for some reason, in oil, totally insipid. ... At a near-by table, the Peking lacquered duck (although ordered in advance) was made up of only one dish (instead of the three traditional ones), composed of pancakes the size of a saucer and the thickness of a finger. At another table, the egg-rolls had the gauge of andouillette sausages, and the dough the thickness of large tagliatelle ... It is, however, true, that when one sees with what epicurian airs his customers exclaim at canned lychees, one can predict for him a long and prosperous life uptown."

Ruling as a matter of law that the statements were opinions rather than facts, the Court stated: "Recognizing that reviews are normally conveyors of opinion, we turn to the language in the review before us to see if it makes factual representations. Examining the language in the review itself, we cannot say that it would cause the average reader to believe that the writer in five of the six contested remarks had gone beyond statements of opinion. It is clear that the writer's statements would be protected if he had merely said: I found it difficult to get the basic seasonings on my table. The sweet and sour pork was too doughy for my tastes. The green peppers served with the pork were not hot enough. The fried rice was too oily. And the pancakes served with the Peking Duck were too thick. The question thus becomes, did the writer's use of metaphors and hyperbole turn his comments into factual statements. We believe that it did not."<sup>12</sup>

As there is so much riding on whether a statement is of a fact or opinion, many courts have taken pains to distinguish between the two.

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<sup>9</sup> 558 U.S. \_\_\_ (2010).

<sup>10</sup> 559 U.S. \_\_\_ (2010).

<sup>11</sup> *Mr. Chow of New York v. Ste. Jour Azur*, S.A. 759 F.2d 219 (2d Cir. 1985).

<sup>12</sup> *Id.*

In *Milkovich v. Lorain Journal Co.*,<sup>13</sup> the U. S. Supreme Court provided a chronology of cases to summarize the case law guidelines as to which opinions could be expressed without fear of being held libelous. The Supreme Court highlighted the standards to help determine whether a statement is fact or opinion: “(1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.” Despite the fact that this defense, in a restaurant review case, is predicated on the review containing misstatements of fact rather than statements of opinion, in several state cases, the reviewers seem to have crossed an uncertain boundary.

One state court case example is *Robert L. Pritsker & Karen C. Pritsker v. David Brudnoy & WHDH Corporation*.<sup>14</sup> Radio talk-show host and restaurant critic David Brudnoy stated on the air that “...the people who own the place [the restaurant owned by the Pritskers] are unconscionably rude and vulgar people. And the attitude that they communicate is awful. But the food is fine. And it kills me to say this because I would like to be able to dump on their restaurant. I keep going there hoping it will decline and it doesn't. The food is fine, the people who run it are PIGS.”

Brudnoy acknowledged that his statements were about the Pritskers, and that he had not in fact ever met them.

Although calling someone a “pig” is clearly hyperbolic opinion, it may be regarded as a factual claim if the opinion implies some undisclosed fact. The question presented then is whether the word “pig” is making an undisclosed factual assertion about the restaurant owners. This was dismissed by the court in a footnote. “We reject the Pritskers' assertion that Brudnoy's use of the term ‘pigs’ implied that “the Pritskers and their restaurant were unhygienic and unsanitary and were infested with cockroaches or other vermin.”<sup>15</sup>

The court decided that Brudnoy and WHDH were entitled to summary judgment. The court said the average listener could not reasonably conclude that Brudnoy's comments were based on undisclosed defamatory facts and that they were based totally on his observations and experiences at the restaurant. They also said that although his comments may have given the false impression that he knew the Pritskers and had observed them at the restaurant; his opinion is still not actionable because it does not reasonably imply defamatory facts.

The court opinion stated: “It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct . . . .’ Restatement (Second) of Torts § 566 comment c (1977). In making this determination we look to the entire context of the communication. See *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 313 (1982). In all the circumstances, we think that the average listener could not reasonably conclude that Brudnoy's comments were based on undisclosed defamatory facts.”

Another illustrative state court case is *David Pegasus and Beverly Pegasus D/B/A Salsa Dave's v. Reno Newspapers Inc., D/B/A Reno Gazette Journal*.<sup>16</sup> In this case the Pegasuses, who owned and operated Salsa Dave's sued Stacy Ferrante, a freelance journalist and the publisher of the article, The Reno Gazette Journal, for defamation because the article allegedly contained false factual allegations. The article supposedly contained three defamatory statements:

"I scooped out guacamole with my fork and dug in. One taste told me what I had feared: this pale green stuff was definitely not the real deal."

"At this point my spouse pointed out what I was beginning to realize: 'All this came out of some sort of package'."

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<sup>13</sup> 497 U.S. 1 (1990).

<sup>14</sup> 389 Mass. 776 (1983).

<sup>15</sup> *Id.*, fn 8.

<sup>16</sup> 118 Nev. 706 (2002).

"The cost cutting measure applied to the ornamentation had spilled into the kitchen. The can of name brand beans we spy while paying our check confirms this."

Ferrante, with her spouse, went to Salsa Dave's as a restaurant reviewer and commented on how authentic the décor was, but how gross and fake the food was. The Pegasuses said although they do sometimes have canned beans in the store for emergency purposes there was no way that Ferrante could have seen them because they were not near the door where she paid for her meal. Ferrante said she did see a can of canned beans in the kitchen through a louvered door while paying; her husband had pointed them out to her; however, she could not remember the brand of the canned beans or what the can looked like.

The courts in the end granted summary judgment. They said that a restaurant review by nature is essentially an expression of opinion and should be considered as a whole article and not by statements. This court also held that a statement is not defamatory if it is an exaggeration or generalization that could be interpreted by a reasonable person as "mere rhetorical hyperbole". Nor is a statement defamatory if it is absolutely true or substantially true. A statement is, however, defamatory if it "would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject in contempt." The court looked at the four general elements of defamation and decided that the Pegasuses could not prove them. However, even if they could prove defamation they would have to prove actual malice because a restaurant is limited purpose public figure when in reference to a restaurant review and the Pegasuses could not prove actual malice by Ferrante.

This holding is questionable. It was decided by the court that Ferrante probably did not see any canned beans in the restaurant while eating or paying and that the food served to Ferrante was not canned or pre-packaged food; therefore, she lied about seeing something at the restaurant that wasn't there and claiming the food was something that it was not. She stated factually that the food was pre-packaged and/or canned; which is a factually false defamation. Also, saying something without any proof or lack of substantial proof is recklessly disregarding whether the statement is true or false and therefore meets the definition of actual malice as defined in the New York Times case.

### **Damages**

Even with proof that there has been a statement of a fact, and that the statement is false, that is still not the end of the inquiry. In *Maryann Terillo, Doing Business as Le Café de la Gare v. New York Newsday*<sup>17</sup> Terillo sued Newsday for publishing an article written by food critic, Molly O'Neill. The review listed incorrect ingredients of a restaurant dish in the review and then subsequently published a purported correction which also listed incorrect ingredients. O'Neill, when visiting the restaurant, was given a menu with all the ingredients on it which stated the meal contained "white beans, garlic, duck confit, pork sausage, and garlic sausage not what O'Neill printed, "lamb, sweet and hot sausages baked under parmesan cheese crust". And then O'Neill printed an addendum that also contained the wrong ingredients. The courts applied four tests from *Mr. Chow of N.Y. v. Ste Jour Azur, supra*, at 226. First, they decided that the list of wrong ingredients were not opinion but a statement of fact. Second, an ordinary person would O'Neill's statement as something she knew as fact. Third and fourth, the court looked at the context of the statement and the broad social context in which the statement was made. The court decided that the statement of ingredients was not metaphorical, metaphysical, nor hyperbolic, and that the review contained facts capable of being objectively proven true or false.

Unfortunately, although the restaurant won on the issue of defamation, it ultimately lost the case for failure to prove any monetary damages as a result of the restaurant review or addendum published.

This may be as close as any reported case in the United States has ever gotten to winning. The reviewer clearly stated false truths about the ingredients of the meal. And, even if Le Café is to be seen as a public figure, it provided evidence of the actual malice required by the New York Times principle. O'Neill knew the ingredients she published were wrong because she had seen a list of the ingredients contained in the food and therefore knowingly printed false facts and acted in reckless disregard for the truth. Although the plaintiff restaurant in this case lost, the

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<sup>17</sup> 519 N.Y.S. 2d 914 (1987).

case provides a road map that would enable a restaurant in a future case to prevail any restaurant suing a reviewer need only to follow this case, just present evidence of economic loss. Conversely the defendant can introduce evidence that there was no loss.

## **INTERNATIONAL DEFAMATION CASES**

As previously noted, the “fair comment” defense became less important in the United States after the standard enunciated in *New York Times* created a Constitutional obstacle to defamation cases that served much the same function as the fair comment defense. Outside of the United States, in countries where free speech might be a societal goal without being a Constitutional mandate, the fair comment doctrine has continued to be a vital defense to defamation claims.

As we’ve seen, the New York Times principle is similar to fair comment, but distinguishable. For instance, fair comment may apply to a matter of public concern involving an individual who is not a public official or public figure, but the New York Times principle would not.<sup>18</sup>

Another difference is that fair comment created immunity for untrue statements, but only if they are somehow originally founded on true facts. To give a hypothetical example, if a restaurant reviewer truthfully notices that a particular type of vegetable is unusually soft, the reviewer may state that the vegetables seem canned. Such a statement would be eligible for a fair comment defense. However, the reviewer would not be eligible for the defense for stating that the vegetables were canned if there were no evidence at all upon which such a conclusion might be made.

Overall, then, the fair comment defense outside of the United States bears a lot of similarity to the *New York Times* defense within the United States, with minor substantive variations.

Two recent cases highlight the importance of the fair comment defense outside of the United States, one case in Northern Ireland, and the other in Australia.

The Irish News of Belfast, Northern Ireland, and its restaurant reviewer, were sued over an unfavorable review of a pizza restaurant called Goodfellas, claiming the service was bad, the restaurant was smoky, and the cola was warm, flat, and watery. In 2007, a jury found the review defamatory and awarded the restaurant £25,000. In 2008, the decision was reversed by a higher court on the grounds that the jury wasn’t given sufficient instructions regarding the fair comment defense, and that the instructions were confusing with regard to the difference between fact and fair comment.

One would think that the reversal of the restaurant’s victory in the Goodfellas case would be unqualified good news to restaurant reviewers. Actually there were two distinctly different types of responses. First, the unabated glee of reviewers:

“Lord Lester of Herne Hill, QC – may his name be whispered as a blessing – won the appeal for The Irish News on the following basis (I’ll have got this only more or less right, so don’t quote me or sue me): 1) that anything written in an article flagged as a review is to be accepted as “comment” (regardless of whether it is presented as opinion or fact), 2) that the bare substratum of fact required to sustain that comment is that the reviewer has had the experience he or she claims, in this case, that he has ordered and been served the meal described, 3) that “fair comment” is defined as any comment an honest person could have drawn from the “facts” available, 4) that a comment may be called “fair”, “however exaggerated, or even prejudiced, the language may be”, and 5) that malice has no power to mitigate a defense of fair comment, as long as the reviewer genuinely holds the views he expressed.

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<sup>18</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).



“In short, loyal readers, as long as I ate the meal I tell you I ate, and as long as I truly believe what I write, I can say anything. If you thought the critics were scary before, you wait ‘till you get a load of us now.”<sup>19</sup>

Then, there is the portion of the restaurant reviewing public that is in fear. The proximity with which these plaintiffs came to winning, and the clarity with which the courts have articulated what they could have done differently to win, has given pause to reviewers globally. Said one former restaurant reviewer:

“I’m not entirely sure who coined the phrase ‘Everybody’s a critic,’ but, in my line of work as a food writer and erstwhile restaurant reviewer, everyone sort of actually is... But the business of writing about food--and saying exactly what you think about it, the circumstances in which you ate it, what it tasted and looked like, how good your server was, and who was sitting near you while you ate -- can be a potentially dangerous bit of work”<sup>20</sup>

A more recent case in Australia may bear out some of that concern, *John Fairfax Publications v. Gacic*.<sup>21</sup> In that case, the High Court of Australia upheld an intermediate appellate (Court of Appeal) decision that reversed a jury verdict. The jury found that the *Sydney Morning Herald* review stated that Coco Roco restaurant sold unpalatable food and provided bad service, but that this was not defamatory. The appellate court ruled (and the high court agreed) that if the jury determined those facts then it must conclude that the statements were defamatory. The High Court determined that “no reasonable jury could find it wasn’t defamatory to declare a restaurant sold bad food and offered poor service.”<sup>22</sup> Under the procedure in effect at that time, the case was remanded back to the trial court to determine whether there were any defenses, and the amount of the damages to be awarded.

On remand, the lower court ruled on December 18, 2009, in favor of the defendants: fair comment as to the food, and truth as a defense regarding the poor service. While this was another situation where a restaurant lost a defamation case, it laid out the map to a successful one.

## CONCLUSION

There are several obstacles that must be overcome before a restaurant may recover damages resulting from defamatory statements in a restaurant review. First, the restaurant must be able to demonstrate that the review contained misstatement of facts rather than just opinions. Second, the restaurant must prove that the statements were made with “malice,” that is, the reviewer knew or had reason to know that the statements were not true. Third, even if the first two obstacles are overcome, the restaurant must be able to prove its economic damages.

All told, these obstacles make it virtually impossible for a restaurant to recover damages in a defamation suit, irrespective of the outrageousness of the statements in the review. However, if a case by a restaurant against an unfriendly review is to prevail, it will contain these elements:

First, the claim must clearly distinguish between statements of opinion and statements of fact. Where a statement of an opinion suggests an underlying defamatory fact, the plaintiff restaurant should be able to demonstrate that there is no non-defamatory implication of the opinion.

Second, there should be evidence of “actual malice,” that is, that the reviewer knew the facts alleged to be false or was reckless about whether they were true or false. Outside of the United States being able to prove this will help prevent the defendant from raising a fair comment defense.

Third, the restaurant should have hard numbers, broken down by season if possible, showing a loss of business attributable to the defamation.

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<sup>19</sup> Giles Coren, “I’d have guessed it was strips of mole poached in Ovaltine,” (*London*) *Times Online*, timesonline.co.uk, March 15, 2008.

<sup>20</sup> Elissa Altman, huffingtonpost.com, March 21, 2008.

<sup>21</sup> [2007] HCA 28, 14 June 2007.

<sup>22</sup> *Sydney Morning Herald*, June 14, 2007.

These strategies should be taken into account by any restaurant pursuing a defamation case based on a restaurant review. Conversely, a defendant being sued will need to have evidence negating all these points. Possibly the strongest move a defendant can make it to make sure that all statements are made in a larger context that indicates that all of the statements are opinion or fair comment.

While these court cases confirm that a plaintiff's likelihood of success may be remote, they also provide guidance as to when a case might win. Accordingly, a restaurant review needs to also take these cases into account, as should any restaurant hoping to recover defamation damages for an unfavorable review.

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