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"Unfair" Restaurant Reviews: To Sue Or Not To Sue

Abstract

In their discussion entitled - "Unfair" Restaurant Reviews: To Sue Or Not To Sue - by John Schroeder and Bruce Lazarus, Assistant Professors, Department of Restaurant, Hotel and Institutional Management at Purdue University, the authors initially state: "Both advantages and disadvantages exist on bringing lawsuits against restaurant critics who write "unfair" reviews. The authors, both of whom have experience with restaurant criticism, offer practical advice on what realistically can be done by the restaurateur outside of the courtroom to combat unfair criticism."

Well, this is going to be a sticky wicket no matter how you try to defend it, reviews being what they are; very subjective pieces of opinionated journalism, especially in the food industry. And, of course, unless you can prove malicious intent there really is no a basis for a libel suit. So, a restaurateur is at the mercy of written opinion and the press. "Libel is the written or published form of slander which is the statement of false remarks that may damage the reputation of others. It also includes any false and malicious publication which may damage a person's business, trade, or employment," is the defined form of the law provided by the authors.

Anecdotally, Schroeder and Lazarus offer a few of the more scathing pieces reviewers have written about particular eating establishments. And, yes, they can be a bit comical, unless you are the owner of an establishment that appears in the crosshairs of such a reviewer. A bad review can kneecap even a popular eatery. "Because of the large readership of restaurant reviews in the publication (consumer dining out habits indicate that nearly 50 percent of consumers read a review before visiting a new restaurant) your business begins a very dangerous downward tailspin," the authors reveal, with attribution. "Many restaurant operators contend that a bad review can cost them an immediate trade loss of upward of 50 percent," Schroeder and Lazarus warn.

"The United States Supreme Court has ruled that a restaurant owner can collect damages only if he proves that the statement or statements were made with "actual malice," even if the statements were untrue," the authors say by way of citation. And that last portion of the statement cannot be over-emphasized.

The first amendment to the U.S. Constitution does wield a heavy hammer, indeed, and it should. So, what recourse does a restaurateur have?

The authors cautiously give a guarded thumbs-up to a lawsuit, but you better be prepared to prove a misstatement of fact, as opposed to the distinguishable press protected right of opinion. For the restaurateur the pitfalls are many, the rewards few and far between, Schroeder and Lazarus will have you know. "... after weighing the advantages and disadvantages of a lawsuit against a critic...the disadvantages are overwhelming," the authors say.

"Chicago restaurant critic James Ward said that someone dumped a load of manure on his yard accompanied by a note that read - Stop writing that s--t! - after he wrote a review of a local restaurant." Such is a novel if not legally measurable tack against an un-mutual review.

Keywords

John Schroeder, Bruce Lazarus, Unfair Restaurant Reviews: To Sue Or Not To Sue, Libel/Slander, Malicious intent

“Unfair” Restaurant Reviews: To Sue Or Not To Sue

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Both advantages and disadvantages exist on bringing lawsuits against restaurant critics who write “unfair” reviews. The authors, both of whom have experience with restaurant criticism, offer practical advice on what realistically can be done by the restaurateur outside of the courtroom to combat unfair criticism.

After much hard work, time and money, your restaurant is beginning to make money; naturally, you are proud. In large part because of your restaurant’s success and popularity, a restaurant critic pays you a visit and writes a scathing review, parts of which might read as follows:

The decor: “...a packaged, prefab fern bar, a souless clone...It is all as familiar as McDonald’s...”

The cheese-and-fruit-board: “...looks like it was put together by a professional wrestler rather than a chef. What a mess...”

The bread: “Of course it isn’t cotton, but it is cottony soft.”

The pate: “...bow wow.”

The lamb: “...mystery meat, gray and flavorless, immersed in abrasive wine gravy. What an awful thing to do to a gentle lamb.”

The veal: “...reminds us of the thing that latched onto the guy’s face in [the movie] ‘Alien’.”

Desserts: “...vile.”¹

Because of the large readership of restaurant reviews in the publication (consumer dining out habits indicate that nearly 50 percent of consumers read a review before visiting a new restaurant)², your business begins a very dangerous downward tailspin. Many restaurant operators contend that a bad review can cost them an immediate trade loss of upward of 50 percent.³

Most of your friends and colleagues advise you to teach the critic and the publication a lesson—by “suing the S.O.B.’s.” Bringing a lawsuit is a very attractive proposition to right the wrong of an “unfair” restaurant

review. After all, as a restaurant operator, what else can you do other than go to court? However, as the reader will see, using the law and the courts may not always work in the favor of the restaurateur.

Law Protects the Publication

Historically, we as a democratic society have placed a high value on press freedoms, and in so doing have given the press a great deal of latitude in what can be printed. However, that latitude does not give people (including restaurant critics) the right to libel others. Libel is the written or published form of slander which is the statement of false remarks that may damage the reputation of others. It also includes any false and malicious publication which may damage a person's business, trade, or employment. However, under current court decisions, libel for public figures is actionable only if the publication was acting with willful malice or reckless disregard for the truth in the publication.⁴ For private persons, only some degree of fault is required on the part of the publisher, not just willful malice or reckless disregard for the truth.

The United States Supreme Court has ruled that a restaurant owner can collect damages only if he proves that the statement or statements were made with "actual malice," even if the statements were untrue.⁵ The decision puts restaurants in the same category as public figures. As public figures, restaurants may generate stories (restaurant reviews) that may not be accurate, but as long as there was no actual malice on the part of the reviewer toward the restaurant, the reviewer cannot be held liable for statements in the review, even though they may not be true.

Restaurant criticism has been considered opinion by the courts; a restaurant review is protected under the guarantees of a free press. Traditionally, decisions about certain types of controversial subjects—political questions and taste—have been deemed by the courts to lay with the general public, not to be decided in courts of law.⁶ Courts do not desire to become review boards for restaurant criticism. The article, as the reviewer's opinion, is a privileged publication and would be protected.

It is when the reviewer crosses over from opinion to expressing things as fact that there may be cause of action. There is a great difference from saying, "Dogs would not eat this food" and "The pancakes are made of shoe leather," as opposed to an opinion: "I wouldn't feed this to my dogs" and "The pancakes are like shoe leather." In the former examples, the reviewer is no longer summarizing his/her experiences at the restaurant, but is making absolute statements of fact. These "facts" may be untrue and no longer fall within the protection of the First Amendment. It is in these areas of "fact" that the courts may be more inclined to become involved. The aspect of the truth of the statements may become the central issue of the case: Is it true that dogs won't eat the food or that the pancakes are in fact made of shoe leather?

Truth is an absolute defense for the critic. If the restaurateur, in fact, serves a shrimp cocktail with two shrimp and the critic writes about "...two lone shrimp staring at each other across a sea of wilted lettuce," the statement would be protected. A word of caution must be interjected: Some statements of "fact" may appear to be so ridiculous or obviously tongue-in-cheek that no one is expected to believe them or take them

literally, e.g., “The sauce was cement, made of sand and water.”⁷ In fact, caustic or sarcastic comments generally are seen by the courts as protected by the Constitution, because they are seen as opinion rather than false statements of facts.⁸

Let us assume that you and your attorney believe that what the critic has written about your restaurant is not protected by the First Amendment. You feel that you have been libeled and your business has suffered as a result. You decide to sue. What are some of the advantages and disadvantages in pursuing this course of action?

Suits Have Some Advantages

- **Free Publicity:** Local papers or television may carry a story of your crusade to right the wrong allegedly done to you. It may give some patrons the chance to compare their meal to the critic’s review and decide for themselves. As a result, they may ignore all of his/her future reviews. Hospitality organizations and publications may write and speak of your bravery. (Some restaurant operators don’t think that the restaurant organizations have been very useful in helping operators deal with unfair restaurant criticism).⁹
- **Good Triumphant Over Evil:** You win and your reputation and your restaurant’s reputation has been saved against the untruths written about you. The little guy takes on the media and wins. You have single-handedly proven to the world that restaurant critics “...do hatchet jobs on local businesses just to create controversy and sell papers.”¹⁰
- **Unseating The Unelected:** No one elected these people to write reviews that might destroy your business. A 1980 Los Angeles Times study of restaurant reviewers across the nation reported that “Most critics are ill-informed and ill-prepared to do the job.”¹¹ The power of restaurant critics is out of control and in the future they will be more careful of what they write. They must be made to understand that “Freedom of the press is designed to protect the right to tell the truth, not to print lies.”¹²
- **Collecting Damages:** You may win monetary damages for your claim. Punitive damages may be awarded if the publication published the review with reckless disregard for the truth and with malice. (It should be pointed out that no restaurateur in the United States has ever won a libel case against a restaurant critic.)¹³ However, to win against a critic, even without a monetary award, would still be a moral victory.

Disadvantages Can Be Discouraging

- **Cost:** Attorneys and lawsuits are expensive. Even if damages are awarded, most likely they would not be an adequate compensation for the money invested in bringing the lawsuit.

- **Time:** In terms of time, not many business people have the time to take away from their businesses to testify in courts about lost business as a result of the unfair review and possibly lose more business as a result. Years could be invested in litigation with days and weeks away from the business.

- **Evil Triumphs Over Good:** The court rules in favor of the critic, or the more likely scenario, the case is thrown out of court (a very likely happening since it may be either a protected area or a non-actionable claim).¹⁴ What the critic has been writing all along is now perceived by the public as being true. The court action will also bring to a wider audience the critic's views of your restaurant—you are in fact spreading the bad news.

- **Lack Of Documentation:** Not many restaurateurs keep the necessary records of what happened the evening the critic reviewed their restaurant. In fact, most times, because of the anonymity of the critic, they may never know it was reviewed until the publication appears.¹⁵ These records are important in a court of law. In the event that you are going to claim a false statement was knowingly published with malice, what was the basis of the malice? Did the critic have an argument with a waiter or a dinner companion? Was there anything out of the ordinary that evening? Was the restaurant full or empty? These are just a few of the things that should be documented to win a lawsuit. But even then there are evidentiary problems that are unique to taking a restaurant critic to court. "The food that the critic has written about has been consumed and is no longer in existence as a factor in determining whether the truthfulness of the statements can be verified."¹⁶

If the wronged party wants little more than personal satisfaction without regard for the costs involved, perhaps a lawsuit against a critic or the publication may be worth it. But even a casual reader, after weighing the advantages and disadvantages of a lawsuit against a critic, must see that the disadvantages are overwhelming.

Restaurateurs Can Take Action

This is not to say that people in the restaurant business are in a hopeless situation. There are things a restaurateur can do to minimize the damage done by a "unfair" review without seeking the help of the courts.

The first thing to do is to keep under control. Maintaining control is sometimes very difficult to do when you feel that your very livelihood may be threatened by an unfair review. "Someday I'm going to go to jail for killing a critic," stated Chicago restaurateur Nick Nickolas.¹⁷ Nickolas is not alone in his hostility. One critic was paying by credit card in a restaurant previously given a bad review when "...the owner publicly flayed her with a menu."¹⁸ Chicago restaurant critic James Ward said that someone dumped a load of manure on his yard accompanied by a note that read, "Stop writing that s--t!" after he wrote a review of a local restaurant.¹⁹ Another critic, Robert Shoffner, received a telephone

death threat after writing an unfavorable review of a Washington, D.C., restaurant.²⁰ These kinds of attacks may make the perpetrator feel better for a time, but they do little for combating the results of an unfavorable review and may place the restaurateur in an unfavorable light and a very dangerous legal position.

Do not attack or threaten the critic—either physically or verbally. It must be remembered that the critic is just an employee, hired by a publication to write restaurant reviews. Did the reviewer only visit the restaurant once? It might not be the fault of the critic at all; most professional critics would like to visit a restaurant more than once, but are limited by the publication's expense money.²¹ Has the publication in question hired a knowledgeable person to be its restaurant critic? For example, the Sterns who wrote the scathing review of the Connecticut restaurant at the beginning of the article were fine arts and art history majors before writing for a living.²² To save money, publications have been known to assign staff persons to write restaurant reviews when their expertise is in some other area.

Both you and your loyal patrons should address all letters, telephone calls, and the like to the editor or the owner of the publication about the unfairness of the review. However, the loyal patronage to write those letters and make those phone calls does not develop only because you serve good food and offer fine service. It comes about, in part, because your restaurant is an active member of the community—not simply a business taking a profit out of the community. You, as a business operator, must be involved in community activities and charitable organizations. In short, you must care about the community. A restaurant that is part of the community with a loyal clientele is almost always impervious to unfair restaurant reviews.

Most, if not all publications, are very sensitive to the advertising dollar. Pull your advertising dollars from this publication if they will not write a retraction or another review. Ask others in your local restaurant association to do likewise. The present New York Times critic, Bryan Miller, partially as a result of publicity concerning the issue of unfairness, does not write cruel or sharp-tongued barbs.²³

Another form of action would be to place, in the same publication which wrote the "unfair" review, an advertisement quoting what other reviewers have said about your restaurant. This is not inexpensive, but it would show the readership of the publication that there are dissenting opinions and that the publication's regular critic may have made a error in judgment.

But by the same token, we must remember that all critics are not "out to get us." Most are very qualified and very concerned about a restaurateur's livelihood. They filter the audiences in regard to price and taste, keep the restaurant on its toes, encourage people to eat out more often, and provide publicity that most restaurants could not afford to buy.²⁴ As America's interest in food and restaurants has grown, the popularity of restaurant critics has kept pace. Restaurant criticism may not yet have the same stature as theater, music, and art criticism, but it has been established as a force to be accepted in American life. We can

not “wish away” or “sue away” critics. There may be some solace in the solitude of going it alone and looking nostalgically back to the good old days before critical restaurant reviewers existed. But this ostrich-type approach will do nothing to improve food and service in the nation’s restaurants, and, most importantly, it will not generate more patrons or profits. Rather than just condemn, we must learn to communicate with the restaurant critics and be willing to work with them and their publications to build clientele and increase revenues. It also must be remembered that the majority of restaurant reviews around the nation are positive but “...because they (restaurant critics) are dealing with a subject as elemental and intimate as sex or sleep, they tread on someone’s toes every time they turn to their typewriters.”²⁵

In the final analysis, the decision of a lawsuit involving an “unfair” review, must be determined on the basis of whether the review was made up of opinion or fact. If it was opinion, the restaurateur cannot win. If it wasn’t true, it must be determined if the reviewer wrote the review with malice—a concept very difficult to prove. With all things being considered, it would seem highly unlikely that a restaurateur would get much redress in a court of law for an unfair restaurant review. It would be far easier and less costly in time and money to use an alternative method to fight what is considered unfair restaurant criticism.

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