

**Neutral Citation No. [2008] NICA 14**

Ref: **KER7114**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **10/3/08**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN  
NORTHERN IRELAND**

**QUEENS BENCH DIVISION**

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**BETWEEN:**

**CIARNAN CONVERY**

**Plaintiff/Respondent;**

**and**

**THE IRISH NEWS LIMITED**

**Defendant/Appellant.**

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**Before Kerr LCJ, Campbell LJ and Girvan LJ**

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**KERR LCJ**

*Introduction*

[1] For many years the clash of arms between the right to protect one's personal or professional reputation and the freedom to express opinion as a professional writer has presented its challenge to the law. This appeal is its latest manifestation in this jurisdiction.

[2] The plaintiff in this case is a restaurant owner who claims to be the victim of an unwarranted and false review about the service and fare that his establishment provides, and the defendant is the owner of a well known local newspaper in which the offending review appeared. So far as the legal

representatives of the parties and the court have been able to ascertain, this is the first occasion on which a restaurant review has been the subject of libel litigation in this jurisdiction although, perhaps unsurprisingly, an example of this type of litigation can be found in North America in the case of *Sara's Pyrohy Hut v. Brooker* (1993) 141 A.R.42 (C.A.).

[3] The article that triggered the defamation action appeared in the issue of the newspaper published on 26 August 2000. A writ was issued on 16 November 2000 and, after an appearance by the defendant, it was promptly followed by the service of a statement of claim on 12 December of the same year. The defence was served in March 2001 but thereafter the action lay in a somnolent (if not, indeed, dormant) state until it was set down for trial by the defendant in August 2005.

[4] The case began before Coghlin J and a jury on 29 January 2007 and ended on 8 February 2007 when the jury returned a verdict in favour of the plaintiff for £25000 damages. The judge entered judgment for the plaintiff for that amount and costs and it is against this order that the newspaper appeals.

#### *Background*

[5] In March 2000, Caroline Workman and Suzanne Doran began to write a weekly column for the Irish News in which they reviewed restaurants in various parts of Northern Ireland and, occasionally, the Republic of Ireland. During the week that began on 19 August 2000, the two young women and a friend went to have a meal at a restaurant known as 'Goodfellas' in West Belfast. The review that Ms Workman wrote of their experience appeared in the Saturday edition of the newspaper the following week under the *noms de plume*, May Sheridan and Frances Harper. The article was in the 'weekend gourmet' section of the paper in a feature column entitled, "Dining Partners". Although Ms Workman was the author of the article, as was customary, she showed it to Ms Doran before it was published for her comment. So far as she could remember, Ms Doran had no observations to make on the review, feeling that it was "a fair reflection of the experience that [they] had had".

[6] The review did not commend the restaurant's ambience. It did not praise the food. It did not compliment the service. There was little about the entire evening that pleased the reviewer. She described the approach to Goodfellas as "daunting". The restaurant's windows were fitted with brown tinted glass which obscured the view of the interior from outside. Closed circuit television recorded one's arrival. When they entered the restaurant, Ms Workman and the others were told rather abruptly not to stand in the path of the waitresses. They were then seated at a table which was supposed to be in a non smoking section but into which plumes of cigarette smoke from nearby tables wafted. The restaurant was described as having a "joyless atmosphere". Multiple misspellings or "completely new" Italian words or

dishes were said to feature on the menu. Staff had no more time to be involved with customers than would be expected in a motorway café. Although they noticed that Ms Workman and her companions had left uneaten most of the food, members of staff “did little to understand” why this was so.

[7] The cola drink that the party ordered was said to be “flat, warm and watery” and to have come from a tap. The starter courses were described as having been made “with the cheapest ingredients on the market” and Ms Workman claimed that they had been overcharged for one of these. She wrote that a squid dish, consisting of grey translucent rings, was made from “reconstituted fish meat”; had a hard batter coating and was served with “bottled Thousand Island dressing”. A chicken Marsala was said to be inedible, coated in a sickly saccharine sauce “that clashed horribly with the savoury food”. A spaghetti dish had a “Desperate Dan portion of heaped, overcooked pasta” and a sloppy sauce with “generous quantities of dodgy looking seafood”. The pizza that one of the group had ordered was covered with “nasty, processed salami”; chips were “pale, greasy and undercooked” and vegetables were “fresh from the freezer”. The restaurant, in Ms Workman’s view, rated 1 on a range of one to five which, the article explained, signified the verdict, “stay at home”. This was not, one can safely say, a flattering review.

*The pleadings and the issues to be considered by the jury*

[8] In its final, amended form the plaintiff’s statement of claim alleged that the words of the review, in their natural and ordinary meaning, were intended to and did in fact mean that the plaintiff did not train his staff; that he used the cheapest ingredients on the market; that he overcharged; that he served poor quality and inedible food; that he served frozen vegetables and pizza; that his restaurant was pretentious, badly managed, not worth going to and had a joyless atmosphere.

[9] The Irish News’ pleadings signalled that its primary defence was that the article represented fair comment on a matter of public interest. By way of alternative, it was averred that, insofar as the statements in the review consisted of fact rather than comment, they were true - in other words, a defence of justification. An amended defence gave the following particulars of the facts on which comment was based: -

“West Belfast has very few restaurants. Goodfellas has made a name for itself and continues to do very well. Cars lined Kennedy Way outside the restaurant and it was so packed that people were forming an orderly queue at the door when the reviewers visited on a week night.

Brown tinted glass prevents you from seeing inside the restaurant and a caged CCTV camera records your arrival *a la* Big Brother. There are numerous 'cead mile failte' signs and the reviewers were asked whether or not they had told reception they wanted a table and to make sure they were not standing in the way of the waitresses.

There was an extensive list of reservations for times well into the night. They did not have to wait long before they were led through the restaurant to a 'non-smoking' table which was in full view of the pizza ovens.

The waitresses brought menus and offered them a drink. Goodfellas is not licensed but you can buy alcohol from the adjoining pub.

The reviewers were happy to order cola but did not enjoy it. The cola was flat, warm and watery. There were blue plumes of smoke in the non-smoking section from the numerous cigarettes at the smoking tables. The reviewers thought that they were sitting under the exit for a ventilation pipe until they realised where the smoke was coming from. A lot of people were chain smoking.

There was a long extensive menu offering approximately ten varieties of pizza, ten starters, ten pasta dishes, ten steak dishes, five pork dishes, five fish dishes and ten Mexican dishes. With 'make your own' pizza and pasta sections and side orders there were eighty choices. There is a school of thought that claims the larger the choice, the better the restaurant.

There were a lot of misspellings of Italian words/ Italian dishes on the menu. The restaurant was busy and had a large number of customers.

The starters arrived very quickly. The starters were chicken liver pate, deep fried calamari (squid) and prawns in a creamy white wine sauce. The tomato, cucumber and shredded lettuce

garnish was swimming along with the prawns in the bowl of sauce. The squid rings were translucent grey rings which did not taste like squid and were in a hard batter coating and dressing. The starters were of poor quality.

The squid was priced at £3.55 on the menu but at £4.25 on the bill presented to the reviewers.

Goodfellas has a very busy sit-in and home-delivery pizza trade. A lot of customers were eating pizza.

The main courses arrived very quickly. The chefs opened three blue industrial sized bags of processed cheese in the view of the reviewers. The chicken Marsala looked fine but was coated in a sauce which the waitress had warned was a sweet sauce. The sauce was very sweet and was a bad accompaniment for the savoury food. The reviewer ate very little of it. The spaghetti dish came with a very large portion of heaped, overcooked pasta, a lot of sauce and unattractive looking seafood in the sauce. The pizza was covered with processed salami. The reviewers did not enjoy their main courses. The chips were pale, greasy and undercooked. The vegetables had been frozen. The reviewers were not charged for the vegetables.

The reviewers did not witness the pizza bases being made. Staff were very busy and had little time to engage with customers. Service was very quick. Although staff observed that most of the food served to the reviewers was uneaten, they made little attempt to ascertain the reason.

The reviewers were unimpressed by the poor standard of their dining experience. There is a sign above reception which says 'customers required - no previous experience necessary'."

[10] In broad terms, therefore, the particulars were a paraphrase of the article and contained virtually all the factual material from the original review and much that might normally be regarded as comment. Many of the particulars were wholly unrelated to the defamation alleged. I shall have more to say

about this presently. The defence also gave details of the comments claimed to be fair: -

“Not good, fellas;

Perhaps it is for this reason that Goodfellas has made such a name for itself and continues to do so well;

From a newcomer’s point of view, Goodfellas is a bit daunting;

The numerous ‘cead mile failte’ signs ring a little false;

Lucky to get a table at all;

You can be sure it [the cola] was on tap;

[Blue plumes of smoke] rendered the idea of a separate section a bit of a farce;

It’s scary how much people still chain smoke;

This restaurant would have not trade in the States;

[Goodfellas serves] bizarrely ten Mexican dishes;

[The larger the choice] makes it impossible to use fresh food unless you’re prepared to spend a lot of money on staff;

[The multitude of misspellings] undermines the strength of the Italian/Irish connection boasted by (*sic*) Goodfellas;

[However, after one ring] it became clear that these dishes were made with the cheapest ingredients on the market;

You get what you pay for these days, although Goodfellas does not pass on any savings to its customers;

[Squid] ... reconstituted fish meat. [The translucent grey rings] cannot have been real squid;

The hard batter coating and bottled Thousand Island dressing did little to make them more appetising;

[Goodfellas] must have captured the lion's share of the home-delivery pizza market in this part of town. Pizza seems to be what Goodfellas does best. Indeed, this is what most people in the restaurant seemed to be eating. When our main course arrived we quickly understood why;

My chicken Marsala (£8.55) was inedible;

[The meat] was coated in a sickly, saccharine sauce that clashed heavily with the savoury food;

So it probably wasn't the first time that this dish had been a problem with customers. It's hard to know why it's still on the menu;

[The spaghetti dish] was only marginally more appealing if you could face the Desperate Dan size portion of heaped overcooked pasta;

The sloppy sauce had generous quantities of dodgy looking seafood;

Even the pizza was a let down, covered with nasty, processed salami;

It's possible that frozen pizza rounds are brought in;

At a very superficial level Goodfellas seems keen to give customers a warm Irish welcome, but the restaurant has a joyless atmosphere and the staff have no more time to be involved with their customers than those in the motorway café;

It's doubtful that things will change until Goodfellas has more competition or until the

owners learn that a wide choice and heaped portions are not a measure of quality;

1/5. Verdict: stay at home.”

[11] Again, virtually every statement in the article that might be described as a comment has been included in this pleading, irrespective of whether it has any connection with the defamation that has been alleged. This is not a practice that should be permitted, if for no other reason than that it will inevitably give rise to the risk of confusion and of distraction of the jury from a concentration on those facts and comments that are germane to the question whether the defence of fair comment has been made out.

[12] The particulars of justification pleaded were more closely related to the defamatory meanings that the plaintiff had alleged the article contained.

[13] In the course of the hearing of the appeal, Lord Lester of Herne Hill QC (who appeared with Mr Brian Fee QC and Mr Bernard Fitzpatrick for the appellant) produced a list which outlined three categories of fact: those that were admitted; those that had not been disputed; and those which had been disputed. (Lord Lester did not appear on the trial of the action). The last category contained the following: -

1. The reviewers were told to make sure that they were not standing in the way of the waitresses;
2. The cola was flat, warm and watery;
3. There were blue plumes of smoke in the non-smoking section from the numerous cigarettes at the smoking tables;
4. The reviewers thought that they were sitting under the exit for a ventilation pipe until they realised where the smoke was coming from;
5. A lot of people were chain smoking;
6. There were a lot of misspellings of Italian words/Italian dishes on the menu;
7. The tomato, cucumber and shredded lettuce garnish was swimming with the prawns in the bowl of sauce;

8. The squid rings were translucent grey rings which did not taste like squid and were in a hard batter coating and dressing;
9. The starters were of poor quality;
10. The main courses arrived very quickly;
11. The sauce with the chicken Marsala was a bad accompaniment for the savoury food;
12. The spaghetti dish was overcooked pasta and came with unattractive looking seafood in the sauce;
13. The chips were pale, greasy and undercooked;
14. The vegetables tasted as if they had been frozen;
15. The reviewers were not charged for the vegetables;
16. Staff had little time to engage with customers.

[14] Although these were described as disputed matters of fact, it appears to me that many were plainly comment. So, for instance, it is difficult to see how the statement about the cola could be regarded as other than the expression of an opinion. One person might think that the drink was warm, whereas another might consider it sufficiently cold, likewise in relation to its being watery or flat. None of these qualities can be measured as an objective fact. Paragraph 8 comprises partly factual statements and partly comments, while the statements in paragraphs 9, 11, 13, and 14 appear to me to be either entirely matters of opinion and comment, or at least arguably so.

[15] The manner in which the defence was pleaded created considerable problems for the judge in giving directions to the jury and, I have no doubt, made it enormously difficult for them to reach conclusions on which matters were fact and which were comment. Moreover, the task of deciding which facts had to be proved in order to establish the defence of justification and which were germane to the issue of fair comment – a task that of its very nature was one of some complexity – was made infinitely more taxing by the defendant's identification of various statements in the article as facts, when they were plainly comment. Finally, the fact that many of the statements were entirely unrelated to the defamation alleged made the disentanglement of the relevant facts from those which were wholly extraneous to the issues an

extremely complicated exercise. It is incumbent on the judge to isolate, for the benefit of the jury, those statements that are relevant to the defamation alleged by the plaintiff and those which can reasonably be said to be germane to the defendant's defence; to exclude from the matters that the jury is required to consider material extraneous to those issues; to identify which statements are plainly factual assertions and those which are comment; and to give the jury clear guidance on those statements on which their decision is required as to whether they constitute imputations of fact or comment.

[16] As a preliminary to this exercise, a defendant must clearly identify those statements which are said to be assertions of fact and those which are comment. In *Control Risks Ltd v New English Library Ltd* [1990] 1 WLR 183 at 189, Nicholls LJ said that "... when fair comment is pleaded the defendant must spell out with sufficient precision to enable the plaintiff to know what case he has to meet, what is the comment which the defendant will seek to say attracts the defence of fair comment". That was not done in the present case and, regrettably, the confusion as to which statements constituted facts and which were comment persisted even on the appeal.

[17] The question whether words are fact or comment is in the first instance for the judge. In *Telnikoff v Matusevitch* [1992] 2 AC 343, Lord Keith of Kinkel quoted with approval the law as stated in *Halsbury's Laws of England*, 4th ed., vol. 28 (1979), p. 114, para. 228:

"The question whether all or some of the words complained of are statements of fact or comments is a question of construction for the judge. If, in his opinion, there is no reasonable doubt, he must direct the jury accordingly; but if, in his view, there is reasonable doubt as to whether the words are statements of fact or expressions of opinion he must leave it to the jury to decide."

[18] The first task for a trial judge, therefore, is to decide which, if any, statements are statements of fact or comments. This does not appear to have happened in the present case. It seems to have been assumed that all statements in the article were capable of being statements of fact or comments. It appears to me that, if the judge had been invited to consider this issue, he was bound to have concluded that some of the statements could only be characterised as comment.

[19] Directions to the jury as to how to approach the difficult question whether certain words in the article were to be regarded as statements of fact or comments must be carefully composed. This is because, as I shall discuss below, comment is not to be regarded as solely synonymous with opinion but can also arise as an inference drawn from facts. Only if the jury has a clear

understanding of what is capable of constituting comment, can it begin to address the thorny issue of whether the facts on which the comment is based are capable of justifying the comment made.

[20] Where defences of justification and fair comment are raised in the same case, it is also necessary to distinguish clearly those facts that are put forward as amounting to justification from those which are said to constitute the factual substratum that sustains the fair comment defence. One of the principal issues on the appeal was the identification of those facts that were necessary to sustain the defence of fair comment and those which had to be proved in order to establish justification. On the trial no attempt appears to have been made to segregate facts emerging from the article into possible categories such as those that were relevant to the defences, those that were admitted and those that were extraneous to the issues.

*The questions considered by the jury*

[21] Towards the end of his summing up, the judge outlined a series of questions to the jury and these were then provided to them as the issue paper. In this the jury were provided with instructions as to how they should deal with the questions. Directions were given as to which questions required a response, depending on the answers that the jury supplied to earlier queries. The judge told the jury that the questions set out the steps that they were to take in order to reach a verdict and emphasised the importance that should be attached to them in arriving at an appropriate verdict. The questions posed and the answers that the jury supplied to them were these: -

1. Do the words complained of contain any statements of fact or comment which are defamatory of the plaintiff? *(If the answer to question 1 is 'no' then do not answer any further questions and find for the defendant)* Answer: 'Yes'.
2. If the answer to question 1 is 'yes', did the said words contain statements of fact that were defamatory of the plaintiff? Answer: 'Yes'.
3. If the answer to question 2 is 'yes', has the defendant proved on the balance of probabilities that such statements were true in substance and in fact? *(If the answer is 'yes' then find for the defendant on this issue and proceed to question 5)*. Answer: 'No'.
4. If the answer to question 3 is 'no', and the said words contain two or more distinct charges, has the plaintiff's reputation been materially injured as a result of the words that the defendant had failed to prove true in substance and in fact? *(If the answer is 'yes' find for the plaintiff, if the answer is 'no' then find for the defendant on this issue and proceed to the next question)*. Answer: 'No'.

5. Did the words complained of contain any defamatory comments about the plaintiff? Answer: 'Yes'.
6. If the answer to question 5 is yes, were any of the facts upon which such comments were based untrue? Answer: 'Yes'.
7. If the answer to question 6 is 'no', has the defendant proved that such words were fair comment? (*If the answer is 'no' then find for the plaintiff and proceed to question 10*) [This question was not answered as the answer to question 6 had been 'Yes'.]
8. If the answer to question 6 is 'yes', has the defendant proved that the comment was fair having regard to such of the facts as have been proved true? (*If the answer is 'no', find for the plaintiff and proceed to question 10*) Answer: 'No'.
9. If the answer to question 7 or 8 is 'yes', has the plaintiff proved that the comment was written with malice in that the reviewers did not honestly hold any of the views or opinion expressed? (*If the answer is 'yes' find for the plaintiff and proceed to question 10, if the answer is no then find for the defendant on this issue*) [This question was not answered as neither question 7 nor question 8 had been answered 'Yes'.]
10. If you have found for the plaintiff on any issue to what damages is he entitled? NB: Unless you find for the defendant on all issues the plaintiff is entitled to damages. Answer: £25000.

[22] The order in which the defences of the newspaper were addressed in these questions, therefore, was first justification and then fair comment. This approach was criticised by Lord Lester. He suggested that the sequence of the questions was bound to confuse the jury and, indeed, had produced an obviously incongruous result in that, although the jury found that the defence of justification was made out, the defence of fair comment (which is conventionally less difficult to establish) failed.

#### *The defence of fair comment*

[23] A charge of defamation can be defeated by the defence that the words complained of are 'fair comment on a matter of public interest'. Analysis of this pithily expressed formula has detected five ingredients whose presence is necessary to establish the defence. These are reviewed authoritatively in the judgment of Lord Nicholls of Birkenhead in *Cheng Albert and another v Tse Wai Chun Paul* [2001] EMLR 777, (2000) 10 BHRC 525. The first ingredient is that the comment must be on a matter that is of public interest. It has been pointed out that there are two rather different approaches to what constitutes

public interest – either “matters that are expressly or impliedly submitted to public interest or attention” (per Cantley J in *London Artists v Littler* [1968] 1 WLR 607, 623) or matters or events in which the public has a legitimate concern. In any event, the trial judge here found that this was a matter of public interest and there has been no challenge to that finding.

[24] The second requirement is that the words must involve authentic comment as opposed to assertions of fact. As Lord Nicholls put it in *Cheng*, “the comment must be recognisable as comment, as distinct from an imputation of fact”. This is, however, a distinction that is not always easy to draw. An expression of opinion will usually constitute comment but comment in this context is not confined to opinion. An inference drawn from facts may properly be regarded as comment. In *Branson v Bower* [2001] EWCA Civ 791 statements in a newspaper article which suggested that although the appellant claimed to be organising a bid for the National Lottery franchise for charitable motives, he was in fact motivated by revenge and financial self interest were, in their context, comment because a reader would be in no doubt that they were inferences drawn by the respondent from the facts set out in the article. The Court of Appeal referred with approval to the passage in *Gatley 9th Edition*, Chapter 12.6 which dealt with what the court described as ‘the traditional test’. (This passage is also to be found at the same paragraph in the 10<sup>th</sup> edition). At paragraph 12 of his judgment, Latham LJ said: -

“Citing from a judgment of Cussen J in *Clarke -v- Norton* [1910] VLR 494 at 499, the editors state, as to what amounts to comment for the purposes of permitting the defence of fair comment: ‘More accurately it has been said that the sense of comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.’”

[25] The third requirement for the defence of fair comment is that the comment must be based on facts which are true or protected by privilege. Apart from statements made on a privileged occasion (and this does not arise in the present case) if the facts on which the comment purports to be made are not proved to be true, the defence of fair comment will fail – see, for instance, *London Artists Ltd v Littler* [1969] 2 QB 375 and *Cheng* (2000) 10 BHRC 525 at 530. Even if the facts stated are not defamatory, they must be true in order for the comment based on them to be regarded as fair. But it is important to recognise that not all the facts in a particular article need to be shown to be true, provided such facts as will support the comment are accurate. In this context, section 6 of the Defamation Act (Northern Ireland) 1955 is relevant. It provides: -

“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

[26] At common law it was necessary to prove that all the allegations of fact in the words complained of were true – see *Sutherland v Stopes* [1929] AC 42, at 62-63, *per* Viscount Finlay. It was not, however, required that all the particulars in a defence (where those included material that had been indicated but not articulated in the actual words complained of) were true, provided material was shown to be accurate that was sufficient to support the comment on which it was based – see *Kemsley v Foot* [1952] AC 345 at 358, *per* Lord Porter. In a case where the defence of fair comment is raised, it is therefore necessary that the jury be directed that they should find in favour of the defendant where they conclude that facts sufficient to support the defence of fair comment have been established, even though other facts contained in the same article have not been proved to be true.

[27] The fourth requirement is that it should be possible to readily identify the facts on which the comment is being made. In the words of Lord Nicholls in *Cheng*, “the reader or hearer should be in a position to judge for himself how far the comment was well founded”. In order to do so, it must be sufficiently clear to him which are the facts on which the writer of the article or the speaker of the words has based the comment. Here again the directions given to the jury are of critical importance. They should receive clear instruction that, when they have segregated comment from the imputations of fact, they should examine the factual matrix on which that comment is based for evidence of its sufficiency to support the comment made. In this context, it is important that it be explained to the jury that the examination of facts for the purpose of deciding whether they substantiate the comment is a very different exercise from assessing whether defamatory statements have been justified. The difference between the two defences is neatly described in *Gatley* at paragraph 12.3: -

“Justification is a defence to any imputation contained in the words complained of, whether of comment or of fact, but if that is the plea the defendant must show that his comment is ‘correct’. The defendant who pleads fair comment does not take upon himself this burden; the issue is not whether the jury agrees with his opinion of the claimant’s conduct but whether it is a comment

which might fairly be made on the facts referred to.”

[28] The final requirement for the defence of fair comment is that the comment must be one which an honest person might make or an opinion that might genuinely be held. The opinion need not be reasonable in the sense of being temperate. The criticism does not have to be moderately expressed. It can be couched in pungent or even offensive language— see *Keays v. Guardian Newspapers Limited* [2003] EWHC 1565 QB at [21]. The comment may be exaggerated, even grossly exaggerated and prejudiced. As Lord Esher MR said in *Merivale v Carson* (1887) 20 QB 275 at 280/1: -

“Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this - would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?”

#### *The judge's charge*

[29] The judge introduced his discussion about the defence of justification by saying that “justification is proving that the words in the meaning you find are true in substance and in fact”. Later he said, “justification is where you set out to prove statements of fact true”. What this formulation omits, of course, is that justification is a defence to any imputation contained in the words complained of, whether it be an assertion of fact or the expression of opinion or comment.

[30] Turning to fair comment, the judge referred the jury to paragraph 9a of the defence (which set out the facts on which the comment was said to be based and which is reproduced in paragraph [9] above). As I have said, this contained virtually all the factual material from the original review and much of it was wholly unrelated to the alleged defamation. At this stage in his charge the judge should have identified for the jury those statements that clearly bore or were capable of bearing on the defamation alleged by the plaintiff and those which can reasonably be said to be germane to the defendant's defence. He should have directed the jury to ignore those matters that were plainly irrelevant to those issues. Thus, for example, the entire first paragraph of the passage set out in paragraph 9a was completely immaterial, as were the statements that there was an extensive list of reservations for times well into the night; that the reviewers did not have to wait long before

they were given a table; that the waitresses brought menus and offered them a drink; that Goodfellas is not licensed but one can buy alcohol from the adjoining pub; that Goodfellas has a very busy sit-in and home-delivery pizza trade; and that a lot of customers were eating pizza. The inclusion of this extraneous material which did not bear at all on the issues that the jury had to decide gave rise to the risk (at least) of their being misled into believing that it should be taken into account on those issues.

[31] Of greater consequence, however, was the judge's acceptance that all of this material was factual in nature. In fairness to him, it had been portrayed by the defendant as such but, as I have already observed, much of it was plainly comment and other statements might reasonably have been regarded as opinions or inferences drawn from facts rather than unvarnished imputations of fact. Thus, for example, the statements that the reviewers were happy to order cola but did not enjoy it; that the cola was flat, warm and watery; that the squid rings were translucent grey in appearance; that they did not taste like squid; that the starters were of poor quality; that the sauce on the chicken Marsala was very sweet and a bad accompaniment for the savoury food; that the spaghetti dish had overcooked pasta, a lot of sauce and unattractive looking seafood in the sauce; that the reviewers did not enjoy their main courses; that the chips were pale, greasy and undercooked; and that the reviewers were unimpressed by the poor standard of their dining experience were all matters of comment and not statements of fact. They should have been identified as such by the judge and he should have directed the jury that they should so regard them.

[32] The judge should also have invited the jury to consider whether other statements in paragraph 9a of the defence, although they had been described by the defendant as statements of fact, were actually matters of comment, as representing inferences drawn from the facts or opinions which merely appeared to be factual statements. Examples of these include: the pizza was covered with processed salami; the vegetables had been frozen; and that staff were very busy and had little time to engage with customers.

[33] Rather than give directions along these lines, the judge, as I have said, appears to have accepted the proffered 'facts' as being indisputably in that category and this had some incongruous results when he came to discuss the issue with the jury, as the following passage from his charge illustrates: -

"Comment in these circumstances is something that can be inferred to be a deduction, an inference, a conclusion, a remark, opinion or observation. It is something that the reviewer or the speaker looks at the facts and says, 'well, I think that ...'. An example from this would be the observation that the Coke was flat, warm and

watery. That's a fact, the Coke was physically flat, warm and watery. The comment is, 'you can be sure it came from a tap, it was on tap, you can be sure it was on tap'. That, as you can see, is an opinion based on the fact that it was flat, warm and watery. It's not, the comment must be based on fact, and the facts for it to be fair comment, the facts must be stated clearly enough to enable you to ascertain the matter upon which the comment is being made. It's not always easy to identify what is fact and what is comment. In the review, let me give you another example; I've given you a fairly clear one, I think, where one sees the physical condition of the Coke and then the comment that it must have been on tap. But in the review, the writer is also saying, 'my chicken Marsala was inedible'. Now, you may think that that is a statement of fact but if you go further on, you'll see, if you look at the article in the middle column, 'my chicken Marsala was inedible', it goes on to say 'the meat itself looked fine but it was coated in a sickly, saccharine sauce that clashed horribly with the savoury food'. So there you have a fact, it actually comes after the comment here but, nevertheless, the comment is there and the fact upon which it is based is there. It is for you to decide in respect of comments whether the facts upon which a comment is based has (*sic*) been shown to be true and whether the comment was fair. You might take into account the popularity of the restaurant and the dish which remained on the menu, if you're looking at the chicken Marsala. If you think that the fact here was accurate, was it true, that it was coated in a sickly saccharine sauce that clashed horribly with the savoury food, because if it's not true then the comment may not have the necessary fact and the comment may then be defamatory. Well the comment is defamatory, but there may be no basis upon which the defence succeeds. You can only succeed with fair comment if you have both fact and comment."

[34] The statement that the cola was warm, watery and flat was unmistakably categorised by the judge as a fact but it was plainly a comment. It represented the reviewer's opinion, not an objectively verifiable fact. The same holds true for the statement that the chicken Marsala was inedible. This is indubitably a

comment – it is clear that the reviewer found it inedible, not that it was physically incapable of being eaten. The judge’s direction on this is, in my opinion, erroneous in characterising the statement that the chicken was inedible as a fact. This amounted to a misdirection but the difficulty that it created for the jury was compounded by the next passage in his charge. When he said, “So there you have a fact, it actually comes after the comment here but, nevertheless, the comment is there and the fact upon which it is based is there”, it is not clear which is the fact and which is the comment to which he is referring. I have reluctantly come to the conclusion that it would simply be impossible for the jury to have a reliable insight into the fairly subtle task of recognising which statements were fact and which were comment, much less of being able to then address the question whether there was a sufficient factual substratum to support the comment.

[35] If the jury had been informed, as I believe they should have been, that all the matters that I have set out at paragraph [31] were matters of comment and that it was open to them to conclude that the matters outlined in [32] were likewise comment, it seems to me highly likely that they would have concluded that an elaborate factual substratum to support those comments was not required. It may well be that if they accepted that the reviewers had been served the food and drink described in the article and that they had experienced cigarette smoke wafting into the area where they sat, this would have provided a sufficient factual foundation for the comment of which, in my view, the article was principally composed.

*The questions in the issue paper*

[36] I have had the advantage of reading in draft the judgment to be delivered by Girvan LJ. For the reasons that he gives I agree that the manner in which the questions were framed had the potential to confuse the jury. Furthermore, the failure to segregate the defence of justification (insofar as it related to justification of defamatory comment) from the defence of fair comment was misleading. It should have made unambiguously clear that the exercise of identifying a factual substratum for the fair comment was quite different from examining the imputations of fact and deciding whether the evidence that the defendant adduced established whether they were true in substance and in fact.

[37] I further accept that the sequence in which the questions appeared had itself the potential to mislead. What was necessary at the outset of the jury’s deliberations was a clear identification of the matters in the article that constituted comment. The next stage was to address whether there was a sufficient factual foundation for that comment. If the jury had recognised from the start that most of the article comprised comment, it would have realised that a fairly slender substratum for this was all that was needed. By requiring the jury to focus first on statements of fact and comment that were

defamatory of the plaintiff, a significant risk arose that the facts that were examined for the defence of justification were elided into the exercise of deciding whether there was an adequate underpinning of the comment.

*Absence of requisitions of the judge's charge*

[38] For the respondent, Mr Michael Lavery QC, who appeared with Mr Aiken, submitted that the failure of the appellant to object to the judge's charge immediately after it had been completed and to give him an opportunity to correct himself, if that were necessary, was fatal to the appeal. In support of this argument, counsel referred to paragraph 36.4 of *Gatley* where it is stated: -

“...if a party at the time takes no objection to a non-direction by the learned judge or to a misdirection as to a matter of fact or to a question put to the jury, he will generally be deemed to have waived the point and thus to have debarred himself from raising the matter on appeal.”

[39] Mr Lavery also cited in support of this submission the judgment of Lord Phillips MR in *Jameel & another v Wall Street Journal* [2005] EWCA Civ 74 where at paragraph 64 he said: -

“Mr Price referred us to a substantial body of relevant authority in footnote 40 to paragraph 36.4 of the 10th Edition of *Gatley on Libel and Slander*. This gives strong support to the proposition that this court will not entertain a complaint of misdirection in a defamation action if counsel has failed to avail himself of the chance of raising the matter at the trial. We consider that this principle is particularly significant in the present case. The only remedy for a misdirection is a re-trial. The trial of this action spanned nearly three weeks. The costs incurred must dwarf the damages awarded. We would be very reluctant to permit a point to be raised on appeal which could and should have been taken below in circumstances such as this. Were it plain that the misdirection had resulted in a miscarriage of justice we might have been persuaded to grant permission to appeal none the less. But that is far from the case, as we shall explain.”

[40] What the earlier part of the paragraph from *Gatley* referred to by Mr Lavery makes clear, is that this is a 'general rule' and is a matter for discretion. The rule is not absolute. Moreover, the paragraph goes on to say that "it is not ... appropriate to object to directions as to the law and a failure to do so will not count against the appellant". I do not consider, therefore, that the rule applies in the present case.

#### *Disposal*

[41] For the reasons that I have given, I have decided that there was a misdirection in the present case. I would allow the appeal and quash the order made in favour of the respondent. Although I consider it likely that a properly directed jury would conclude that a sufficient factual substratum existed for the comment which constituted the preponderance of the article, I cannot be certain that this is so and I would therefore order a retrial. In any event, the question of malice has not been decided by the jury and this therefore remains an issue that requires to be determined if it is concluded that the defence of fair comment is otherwise available.

#### **CAMPBELL LJ**

[42] When Mr Convery issued these proceedings following publication of the review of his restaurant in the Irish News of 26 August 2000, the newspaper relied on the defences of fair comment and justification and the jury had to reach a verdict on both. Presumably the Irish News adopted this course because it considered that the words in the article consisted partly of fact and partly of opinion. In so far as it contained allegations of fact that were defamatory these had to be justified.

[43] Since the passing of the Defamation (NI) Act 1955 the defence of justification does not fail by reason only that the truth of every charge is not proved if the words that are not proved do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. The answer that the jury gave to the defence of justification was that those statements of fact in the review that were not proved to be true did not materially damage the reputation of Mr Convery. The Irish News therefore succeeded in justifying the facts in the review.

[44] The jury went on to consider the defence of fair comment. The matters that have to be established to make out a defence of fair comment were described by Lord Nicholls of Birkenhead in *Albert Cheng and Another v Tse Wai Chun Paul* [2001] EMLR 777 (Court of Final Appeal of Hong Kong) in these terms;

i. the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today;

ii the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege;

iii the comment must be based on facts which are true or protected by privilege;

iv the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded;

v the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views .... It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purpose of legitimate criticism."

[45] It is for the judge, in the first instance, to decide whether the statements are capable of amounting to comment and it is for the jury to decide whether in the circumstances they were comment or allegations of fact. How was the judge to distinguish fact from opinion? What was described by Latham LJ in *Branson v Bower* [2001] EWCA Civ 791 as the traditional common law test is found in *Gatley 10<sup>th</sup> Ed.* Ch 12.6. Citing from a judgment of Cussen J. in *Clarke v Norton* [1910] VLR 494 at 499, the editors state, as to what amounts to comment for the purposes of permitting the defence of fair comment:

"More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc'."

Into which category a statement falls can depend upon the particular context in which it is made. In order for the jury to decide if the writer was commenting or stating fact it had to consider the review as a whole and not

piecemeal. I respectfully agree with Robertson J. in *Television New Zealand Ltd v Haines* [2006] 2 N.Z.L.R. 433 at [104] where, in delivering the judgment of the Court of Appeal, he said;

“... the approach adopted of isolating particular phrases or clauses and considering whether those taken in isolation are expressions of opinion is flawed. It is not necessary for the jury - still less the Judge, who is not the trier of fact - to isolate which passages in the broadcast are expressions of opinion and which are statements of fact. The jury is entitled to look at the entire broadcast in determining whether imputations which it has found to exist were conveyed by the publication as expressions of opinion.”

[46] Not only must the words be comment but a defendant must also prove that the basic facts on which the comment is based are true. Lord Porter said in *Kemsley v Foot* [1952] AC 345 at 356 that what is required is “a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action.” In *Reynolds v Times Newspaper* [2001] 2 AC 127 at 193 Lord Nicholls said “The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made.”

[47] The writer of the article in question visited the restaurant, tasted the food and drink that was served to her and gave the reader her opinion. In *Lowe v Associated Newspapers Ltd.* [2007]2 WLR 595 Eady J. said;

“the purpose of the defence of fair comment is to protect honest expressions of opinion upon, or inferences honestly drawn from, specific facts. The ultimate test is the objective one of whether someone could have expressed the commentator’s defamatory opinion (or drawn the inference) upon the facts known to the commentator, at least in general terms, and upon which he was purporting to comment...”

[48] The judge gave the jury guidance on distinguishing comment from fact and used as an example the observation that the cola “was flat, warm and watery, you can be sure it was on tap.” He suggested to them that the writer was stating as a fact that the cola was physically flat, warm and watery, and her opinion based on that fact was that you can be sure it was on tap. In my view in the context of a review the entire description of the cola as being “flat, warm and watery, you can be sure it was on tap” is not fact but the reviewer’s value judgment of it. Nor do I agree with the judge that when the reviewers

said of the chicken marsala “The meat itself looked fine, but it was coated in a sickly saccharine sauce that clashed horribly with the savoury food” the latter remark was fact. Other diners may not have agreed about the sauce but this was their opinion. Similarly the “assertion that the vegetables were unmistakably fresh from the freezer...” was an expression of opinion.

[49] Once it was established that the various dishes and the cola on which the reviewer commented were served to her there was a sufficient substratum of fact for any comment on them that followed.

[50] Provided the writer honestly held the opinions that she expressed and did not go beyond the boundary of fair comment or, as it is more accurately described, comment the defence was made out. The jury was not required to answer whether the views that were expressed could honestly be held and this remains to be decided before the defence of fair comment can be said to have succeeded or failed. I would order a retrial.

## GIRVAN LJ

### **Introductory comments**

[51] A number of clearly established principles may be usefully stated at the outset to a consideration of the issues raised in this appeal:

(a) The defendant/appellant raised two separate defences to the plaintiff/respondent’s claim, namely justification and fair comment. Each defence had to be separately and fully considered by the jury.

(b) Justification is a defence to any imputation contained in the words complained of whether of comment or of fact. It is for the publisher of the words to prove that the statements of fact are true and that the statements of opinion are correct. It is the imputation contained in the words which has to be justified not the literal truth of the words. A defendant may succeed in a plea of justification even though what he has said may be inaccurate in a number of respects. As much must be justified as meets the sting of the charge and anything contained in a charge which does not add to the sting need not be justified. If the defendant can prove that the main charge or the gist of the libel is true, a slight inaccuracy in one or more of its details will not prevent him from succeeding in a defence of justification. Section 5 of the Defamation Act (Northern Ireland) 1955 provides that in an action for libel in respect of words containing two or more distinct charges against the claimant a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the claimant’s reputation having regard to the truth of the remaining charges. It is a question for the jury whether the words not proved to be true

do or do not materially injure the plaintiff's reputation having regard to the truth to the remaining charges.

(d) The defence of fair comment relates to comments, effectively expressions of opinion, and not to statements of fact, though drawing an inference of fact from other facts referred to may amount to a comment. There must be a basis for the comment contained in or expressly or impliedly referred to in the matter complained of. The comment must be one on a matter of public interest. The publisher does not have to show that the comment was objectively fair. The adjective "fair" in this field has a very attenuated meaning. The comment must be one that an honest person could make in the circumstances. A comment may be "fair", however exaggerated or even prejudiced the language of criticism may be. The jury has no right to apply the standard of its own views as to what it considered to be fair. The question is whether an honest person, even one holding a strong or perhaps prejudiced view, could have formed that view and been capable of expressing himself in the impugned words.

(e) If the plaintiff can show that the comment was activated by malice he will defeat the plea of fair comment but, as noted although, as noted, it is not enough to show that the comment was prejudiced or exaggerated or "unfair" in the ordinary sense of the word. In Cheng v Tse Wai Cheung [2000] 10 BHRC 525 Lord Nicholls put the matter thus:

"A comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant does not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred."

(f) The fact that the defendant is a newspaper and that the article is written by a journalist confers no special privilege on the maker of the statements or the expression of opinion:

"To whatever length the subject in general may go, so also may the journalist ... the range of his assertions, his criticisms and his comments is no wider than that of every subject."

(per Lord Shaw in Arnold v The King Emperor [1914] 83 LJ PC 299.)

### **The differentiation of fact and comment**

[52] In the impugned article there were facts clearly asserted as objective facts (e.g. "it was so packed that people were forming an orderly queue outside"). There were statements which clearly represented the expression of opinion and thus represent comment (cf. the ultimate verdict of one star and the words "stay at home"). There are statements which contain subjective deductions or assessments of facts as perceived by the writers (e.g. "the coke was flat, warm and watery"). These, too, could qualify as comment. The differentiation of statements of fact and comment was an exercise which the jury had to carry out properly directed.

[53] Lord Lester took issue with the judge's summing up which, it was argued, misled or had the potential to mislead the jury in carrying out the exercise of determining which were true statement of facts and which were comment. By way of example the judge said that the observation that the coke was flat, warm and watery was fact and that it was comment to go on the say that the writers felt sure it was on tap. He treated the words as a statement of fact followed by a comment. I accept the thrust of counsel's criticism of the summing up in this regard. The judge's direction failed to point out to the jury that the statement that the coke was flat, warm and watery was an evaluative assessment made by the writers arising from their experience of drinking coke which appeared to the drinker to be flat, warm and watery. The underlying fact was that the drinker had consumed the coke and had made a subjective assessment of it, it being a fact that she had made such an assessment. Some one else disliking ice cold drinks may have found the coke sufficiently effervescent and of a pleasing room temperature. In relation to the chicken Marsala dish the judge suggested to the jury that the statement that the chicken was inedible was a statement of fact. Further, he suggested that the statement that the sauce with it was sickly saccharine sweet and clashed horribly with the meat was a statement of fact, going on to say "so there you have a fact, it actually comes after the comment here, but nevertheless the comment is there and the fact upon which it was based is there." This direction is confusing and gives insufficient guidance to the jury for their task. In relation to the statements in relation to the chicken dish the underlying facts were (a) that the writer ate the chicken; (b) that her reaction was that she found in inedible to her taste, an evaluative assessment based on her having a reaction to the taste of the dish; (c) that the meat was coated in a sweet sauce; and (d) that her reaction to that sauce was to find it sickly and saccharine sweet and that in her opinion it clashed badly with the meat. It was for the jury to decide whether she truly ate the dish, whether she had the reaction she described and whether she honestly formed the evaluative opinion expressed in the article.

[54] My conclusion reading the summing up as a whole is that jury were liable to be confused on the way in which they were to go about carrying out the exercise of differentiating statements of fact and comments.

### **The questions**

[55] Mr Lavery QC persuaded the judge to invite the jury to provide sequential answers to questions set out in a questionnaire which Mr Lavery had prepared. It is on occasions clearly helpful to provide the members of a jury with a list of questions or issues to assist them in focussing their minds on the right issues and on the questions of fact which have to be answered in order to reach a logical and soundly based decision. Great care must be taken to ensure that the questions are correctly formulated and are clear and unambiguous to avoid the members of the jury being misled or falling into error in their reasoning process. Where a jury are provided with a written set of questions and no other written directions there is a danger that the focus of attention will be directed to the written document as containing the source of the legal points they must apply at the expense of the oral directions which in this case were quite lengthy and spread over two days. Lord Lester contended strongly that the questionnaire was flawed and should not have been placed before the jury.

[56] The questions set out in the issue paper were as follows:

**(1) Do the words complained of contain any statements of fact or comment which are defamatory of the Plaintiff? (If the answer to question 1 is no then do not answer any further questions and find for the Defendant).**

**(2) If the answer to question 1 is yes, did the said words contain statements of fact that were defamatory of the Plaintiff?**

**(3) If the answer to question 2 is yes, has the Defendant proved on the balance of probabilities that all such statements were true in substance and in fact? (If the answer is yes then find for the Defendant on this issue and proceed to question 5).**

**(4) If the answer to question 3 is no and the said words contain two or more distinct charges, has the Plaintiff's reputation been materially injured as a result of the words that the Defendant had failed to prove in substance and in fact? (If the answer is yes find for the plaintiff, if the answer is no then find for the defendant on this issue and proceed to the next question).**

**(5) Did the words complained of contain any defamatory comments about the Plaintiff?**

**(6) If the answer to question 5 is yes, were any of the facts upon which such comments were based untrue?**

**(7) If the answer to question 6 is no, has the defendant proved that such words were fair comment? (If the answer is no then find for the plaintiff and proceed to question 10).**

**(8) If the answer to question 6 is yes, has the Defendant proved that the comment was fair having regard to such of the facts as had been proved true? (If the answer is no, find for the plaintiff and proceed to question 10).**

**(9) If the answer to question 7 or 8 is yes, has the plaintiff proved that the comment was written with malice in that the reviewers did not honestly hold any of the views or opinion expressed? (If the answer is yes find for the Plaintiff and proceed to question 10, if the answer is no then find for the Defendant on this issue).**

**((10) If you have found for the Plaintiff on any issue to what damages is he entitled? NB: Unless you find for the defendant on all issues the plaintiff is entitled to damages.**

#### **The questions relating to the defence of justification**

[57] Where a defendant pleads defences of justification and fair comment it is a question for judgment which defence the jury should be asked to consider first. Whichever defence is first considered the jury should fully consider that defence rather than deal with the question on a piecemeal fashion. The effect of the line of questioning set out in questions 2, 3 and 4 was to separate the statements of fact from the statements of opinion in the context of the defence of justification. If an alleged libel contains defamatory statements both of facts and of opinion the defendant under a plea under justification must prove that the statements of fact were true and the statements of opinion were correct (see, for example, Lord Finlay in Sutherland v Stopes [1925] AC 47 at 62-63). Section 5 is of significance in the present instance because had the jury been properly directed on the justification issue in questions 2-4 to consider the charges made against the plaintiff both in relation to fact and comment, it was open to the jury to conclude that having regard to the proven facts divorced from comment which it accepted had been sufficiently justified for the purposes of section 5 the added comments did not materially injure the plaintiff's reputation. If, as it appears, it was intended to limit the jury's consideration of the defence of justification to looking at the issue of justification under section 5 in the context of the factual allegations, question 4 did not properly reflect the intent of section 5 which requires a consideration by the jury of the "charges" against the plaintiff which included the allegations in the factual claims and the allegations in the comments or opinions. The meaning of the words "two or more distinct charges" contained in section 5 and in question 4 were not fully explained by the judge in his summing up. It seems very likely that the jury addressed the question of justification in the context only of the imputations arising from the

statements of fact and hence the jury did not consider, as it should have, the question of justification in the light of the charges of fact and opinion.

### **The questions relating to the defence of fair comment**

[58] Before looking at the judge's directions and the question posed in respect of the defence of fair comment it is appropriate to set out a number of general propositions which can be deduced from the authorities. As pointed out by Lord Nicholls in Cheng:

"The comment must explicitly or implicitly indicate at least in general terms what are the facts on which the comment is being made. The reader or hearer should be in a position for himself to see how far the comment was well founded."

In Kemsley v Foot [1952] AC 345 Lord Porter said:

"The facts necessary to justify comment might be implied from the terms of the impugned article and therefore the inquiry ceases to be – can the defendant point to definite assertions of fact in the alleged libel on which the comment was made? and becomes – is there subject matter indicated with sufficient clarity to justify comment being made?"

Lord Porter quoted Kennedy J's statement in Joint v Cycle Trade Publishing Company [1863] 2 B&S 769:

"A comment cannot be fair which is built up on facts which are not truly stated."

He also quoted Fletcher Moulton LJ's statement in Hunt v Star Newspapers Co Limited [1908] 2 KB 309:

"In order to give room for the plea of fair comment the facts must be truly stated."

While accepting those propositions Lord Porter, however, did make the point that in some cases any facts sufficient to justify the statement impugned may entitle a defendant to succeed in his defence of fair comment. Twenty facts might be given in the particulars and only one justified yet if that one fact were sufficient to support the comment so as to make it fair a failure to prove the other 19 would not have necessarily defeat the plea. Lord Porter however, then went on to say:

“The protection of the plaintiff in such case would, in my opinion, be, as it often is in cases of the like kind, the effect which the allegation of a number of facts which cannot be substantiated would have upon the minds of a jury who would be unlikely to believe the comment was made upon the one fact or was honestly founded upon it and accordingly would find it unfair.”

[59] The provisions of section 6 of the Defamation Act (Northern Ireland) 1955 are also material:

“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression is fair comment having regard to such of the facts alleged or referred to in the words complained as are proved.”

[60] In Hunt v Star Navigation Co Ltd [1908] 2 KB 309 the Court of Appeal sent back the case for a new trial in order that it might be ascertained (1) whether the facts were truly stated and (2) if the comments were such as an honest man might make on those facts. The way in which the questions were formulated in that case is instructive. It focussed the trial court’s mind on the true questions to be answered in deciding whether the defence of fair comment was made out and it made crystal clear to the trial court the precise nature of the questions to be addressed when deciding whether there had been “fair comment.” Thus, in the present case in which malice was an issue the jury had to decide:

- (a) Whether the comments were such that an honest person might make them; and
- (b) Whether the writers of the article did honestly believe what they wrote by way of comment.

[61] The matter is further complicated by the fact that the article contained a number of comments. The jury could have concluded that some individual comments were fair comment (properly defined) and some were not. In respect of the comments which were not fair comment, if question 8 were answered in the negative the jury was directed to immediately proceed to the question of damages. It fails to deal with fact that there was not one comment but several and fails to deal with the issue of the sting of the alleged libel. The jury were not directed to the question as to what they should do if they

concluded that, notwithstanding that there was one or more unfair comment in the article, the thrust of the article and the comments was not unfair and that the unfair comments led to no material damage to reputation having regard to the truth of the remaining charges. This is a matter on which the jury were not fully directed and the questions formulated failed to deal with that possibility. This point interlinks with the issue of the inadequacy of the direction in relation to justification.

### **The proper questions**

[62] Taking these points into consideration it appears to me that the proper sequencing of questions in relation to the defence of fair comment in this case should have been as follows:

- (a) In relation to the comments in the article which the jury found to be defamatory, were those comments based on facts which were true?
- (b) If so were those comments such as an honest person might make?
- (c) If some but not all of the facts on which the comments were based were true were the comments such as an honest person might make having regard to such of the facts as were true?
- (d) If the answer to (b) or (c) is yes, has the plaintiff proved on the balance of probabilities that the writers of the article did not genuinely hold the views expressed in the comments?
- (e) If some of the comments were such that an honest person might make them and some were not, has the plaintiff's reputation been materially injured having regard to the truth of the remaining charges against the plaintiff?

### **The judge's directions on the questions**

[63] In his summing up on the questions in the issue paper the judge put the position thus:

“Did the words complained of contain any defamatory comment about the plaintiff? Now, therefore, you have got to say ‘did the words contain comment as well as statements of fact’. If the answer to question 5 is yes were any of the facts upon which the comments were based untrue? That I think you may find is one of the major issues in this case. 7. If the answer to question 6 is no and you are satisfied that the facts upon which the comments were based were all true, has the defendant proved that the

comment was fair comment and that's the test, *would* an honest person with all the prejudices and whatever, *would* he or she have held that view. If the answer is no then you find for the plaintiff and you go to question 10. That is the issue of damages. If the answer is yes, which would be that some of the facts are not true, has the defendant proved that the comment was fair having regard to such of the facts as have been true and that is your section 6 of the Defamation Act. If the answer is no you find for the plaintiff and you proceed to question 10. Then, if you are finding unfair comment, that the facts on which the comment were based were all true, that the comment was fair and only if you come to that view, you then move to consider whether the plaintiff has proved that despite the facts being true, despite the comment being fair, the sense that an honest person could hold it, did these reviewers honestly hold and that is what question 9 is about. If the answer to question 7 or 8 is yes, has the plaintiff proved that the comment was written with malice in that the reviewers did not honestly hold any of the views or opinion expressed. Let me say one final thing about malice in this case. Malice in this case depends on whether if you come to considering malice, malice depends on whether or not the plaintiff (*sic*) is sure that these reviewers did not honestly believe the opinions that they expressed. You may or may not accept the motives attributed to them by Mr Lavery but these motives in themselves do not constitute malice. They may indicate to you that the reviewers did not honestly believe what they were saying. That is somewhat complicated but let me explain it, I hope in a slightly more simple way. If you thought that these reviewers after a poor reception and a poor impression of the restaurant simply decided then to write as bad a review as they could out of spite because they felt they hadn't been badly treated they would not be malicious because of spite but ... You might say that spite is relevant to deciding whether or not they honestly believe what they said and that is the key issue in this case for malice. ..." (italics added)

The judge then went on to deal with the question of damages.

[64] Directing a jury in a libel is never a simple or straightforward task and it is difficult to get across to lay people difficult legal concepts which use misleading terminology, which introduce shifting burdens of proof and which to members of jury coming fresh to a libel case must appear baffling. A misplaced word here or there can introduce confusion. Bearing in mind these points it is necessary to analyse the questions posed and the explanation of the questions with care though one must also bear in mind that the direction must be read as a whole in a fair and reasonable way.

[65] In the summing up when dealing with questions 7 and 8 the test is formulated as “*would* an honest person with all the prejudices and whatever, *would* he or she have held that view”. Earlier and later on in his summing up the Judge correctly poses the question “*could* an honest person” have held the view. There is a subtle but important difference between *could* and *would* in this context. The words “fair comment” are in themselves a trap to the uninitiated since they do not mean what *ex facie* they appear to mean. For this reason, rather than posing the question whether the comments were fair, the question which should have been posed to the jury was whether the comments were such that an honest person might make. In question 8 the legal term “fair comment” used in question 7 has broken up and the question is posed whether the comment was “fair” thus potentially creating confusion. A legally qualified person reading the question as a lawyer may well have seen that there was no difference intended and would have remembered with clarity the summing up by the judge. The jury of lay people after a lengthy and, no doubt for them, a complex and difficult summing up were sent out with the issue paper as the only written part of the summing up together with the pleadings and the text of section 5 and 6. The written list of questions would have been central to the debate and, hence, it was important that it kept the jury on the right track and that it avoided any ambiguity. The question as formulated in Hunt would have made clear to the jury what they had to decide on that issue. The somewhat differing versions of the test of “fairness” in the latter part of the summing up dealing with the questions was apt to increase the real possibility that the jury failed to focus on the right question. One cannot leave out of account that in his closing to the jury Mr Lavery was essentially making out a case of malice, an issue the jury felt they did not need to address according to the answers given. This point lends strength to the real possibility that the jury failed to properly apply the proper test.

## **Conclusion**

[66] In the circumstances I, also, conclude that the verdict cannot stand and should be set aside and that the proper course is to direct a retrial of the action. I agree that this is not a case in which it is inevitable that a jury, properly directed, would find for the defendant. Furthermore the jury did not

decide the issue of malice which would still require to be determined if it is concluded that the defence of fair comment is otherwise available.