

John Fairfax Publications v Gacic ([2007] HCA 28) - A case note

If you go to an expensive restaurant and don't think much of the food, you've a right to say so, don't you? Well, maybe not.

The *Gacic* case, which has been the subject of litigation for the last four years (and isn't over yet), has yielded a High Court decision which displays the judiciary's apparently profound lack of respect for jury decisions.

The case dates back to 2003 when *The Sydney Morning Herald* published a review of the *Coco Roco* restaurant by Matthew Evans. The review, though not entirely negative, was extremely critical of the restaurant, which later closed. The restaurant's proprietors sued Fairfax seeking damages for business defamation.

The Supreme Court found that four imputations were reasonably capable of being carried by the review and were reasonably capable of being defamatory. These four imputations were put to the jury:

1. The respondents sell unpalatable food at *Coco Roco*.
2. The respondents charge excessive prices at *Coco Roco*.
3. The respondents provide some bad service at *Coco Roco*.
4. The respondents are incompetent as restaurant owners because s/he employs a chef at *Coco Roco* who makes poor quality food.

The jury found that imputations 2 and 4 were not conveyed and that imputations 1 and 3 were conveyed but were not defamatory.

The restaurant owners appealed.

The NSW Court of Appeal ordered that the fourth imputation be remitted to another jury to be re-determined. However, with respect to the second and third imputations the Court of Appeal found that no reasonable jury, properly directed, could reach any verdict other than that imputations would injure a person in their business and were therefore defamatory. Rather than remitting the second and third imputations for a further jury determination, the court substituted its own determination for that of the jury.

The publisher appealed to the High Court.

A number of issues were addressed in the High Court's judgment, several of which warrant critical attention.

A key issue was the appropriate test for business defamation and whether the jury had been misdirected in this regard. Whereas defamation is normally defined as being an imputation that has a tendency to make ordinary people in the community think less of a plaintiff, business defamation is defined as being an imputation that is likely to injure a plaintiff in their business, trade or profession. The majority affirmed that view and accepted the contention that the jury had been misdirected because the trial judge had not made this sufficiently clear.

Apart from the apparent breadth of that test, an aspect of the way this issue was dealt with that should be of concern to publishers is the High Court's disregard of community standards. Callinan and Heydon JJ essentially stated that community standards have no relevance in determining whether a business has been defamed, finding that "restaurant standards rather than community ones are the relevant standards ... [and that] no community standard or value could obliterate or alter the defamatory meaning of the imputations in this case" (@ ¶190). In other words, the findings of the jury are irrelevant. Arguably, in demonstrating such contempt

for the views of the jury in cases of business defamation, the High Court is demonstrating an equal contempt for the recently passed nationally harmonised defamation legislation that makes it clear that defamatory meaning is a matter for the jury to determine. (It is also of interest to note that the harmonised defamation laws have removed the ability of corporations to bring actions for defamation unless they are non-profit organisations or have fewer than ten employees. Where this leaves the question of 'business defamation' is hard to say.)

Having accepted the argument that the jury had been misdirected, the Court was required to determine whether the Court of Appeal had the power under s 108(3) of the *Supreme Court Act* to substitute its own findings for those given by the jury, or whether the Court of Appeal was required to remit the matter for a further jury determination. The judges were unanimous in their view that the Court of Appeal does have that power. Related to that question was whether the Court of Appeal exercised that power erroneously. In this question, as is so often the case, only Kirby J. dissented in stating that the imputations should be remitted for further consideration by a jury properly directed. The majority, however, accepted that it was correct for the Court of Appeal to substitute its own finding.

It should be noted that the *Gacic* case has not been lost since the Supreme Court has yet to hear the publisher's defences. When issues such as truth and fair comment have been aired, the plaintiffs may well fail.

Publishers would be advised to bear in mind that the test for business defamation, developed in this case, is a broad one - even if public regard for the plaintiff is undiminished, defamation may have occurred due to potential impact on profits or income.

More importantly in this case the Court of Appeal's position, when logically considered, implies that a jury determination as to defamatory meaning will only be valid if the jury returns the finding that the court wants. That is, that the sole element in defamation litigation that is left to the jury, supposedly representing community standards, is one where judges feel that they can substitute their own standards for those of the community. The High Court not only failed to challenge that attitude, it reinforced that view, seemingly at odds with the intent of the legislatures.

Although one cannot help but feel dismay at the outcome of the *Gacic* case and what it reveals about judicial arrogance and contempt for community standards, it should be remembered that the legislation has been amended since this matter was commenced. Since "7A trials" (in NSW the jury's decision on defamatory meanings has been considered at a separate trial from the judge's determinations on any defences and on damages) and the artificial separation between imputations and defamatory meaning have been removed, it is unlikely that an appeal decision will duplicate the particular findings handed down in this case.

However, the lack of judicial regard for community standards, particularly in the context of business defamation, may well skew future decisions towards plaintiffs. It is crucial that defenders of free speech monitor the impact of the uniform defamation legislation and consider whether amendment might be warranted in order to protect the singular role of juries.

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