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INTEREST RATE

The base interest rate changed to 5.25% on 7 February 2008. The Law Society's interest rate is 9.25%.

Media law

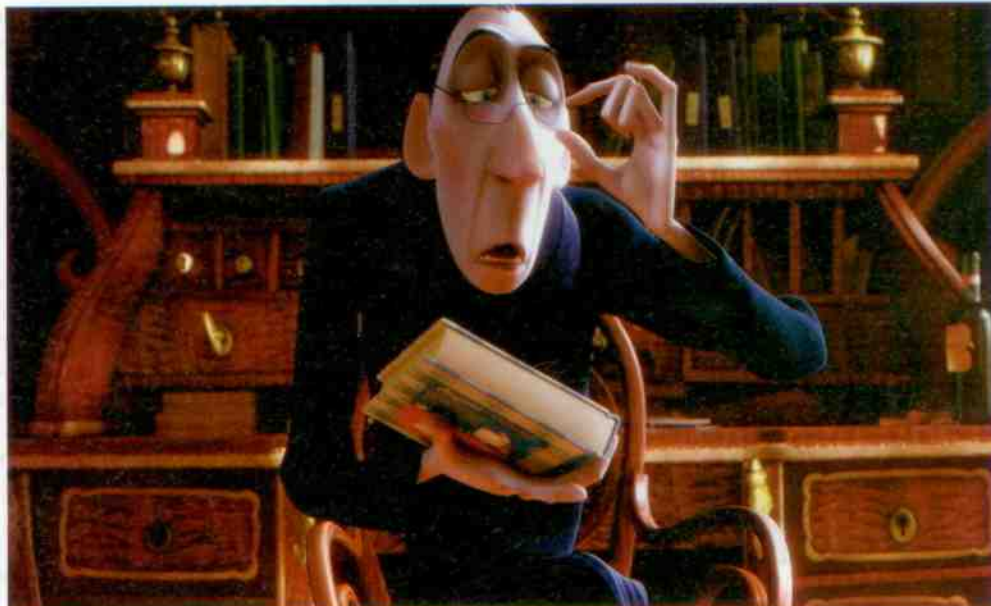
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What price criticism?

The Northern Ireland Court of Appeal's judgment (*Ciarnan Convery v Irish News*, Neutral Citation No. [2008] NICA 14) will have settled the stomachs of reviewers and critics of all disciplines, from Belfast to Birmingham and beyond. The court has overturned a jury award of £25,000 in favour of a Belfast restaurant owner arising out of a critical review of his restaurant, ordering a retrial.

Ciarnan Convery, restaurateur and owner of Goodfellas Italian restaurant in Belfast, sued the *Irish News* for libel over a review by its critic Caroline Workman. In his leading judgment, the Irish Lord Chief Justice Sir Brian Kerr summarised the publication of complaint: 'The review did not commend the restaurant's ambience. It did not praise the food. It did not compliment the service.' Indeed, 'there was little about the entire evening that pleased the reviewer'. Workman described her disappointing experience, starting with the 'daunting' approach to the restaurant and the perfunctory manner in which she said she and her companion were treated by busy staff. It was not improved by the restaurant's 'joyless atmosphere' and her spirits were not lifted by food which she described as including 'flat, warm and watery' cola, starters of 'the cheapest ingredients on the market' and a 'Desperate Dan portion of heaped, overcooked pasta' with 'generous quantities



Dishing it out: Anton Ego from 'Ratatouille' may be a caricature but food critics are notoriously outspoken

of dodgy looking seafood'. Aply summarised by Kerr, 'this was not, one can safely say, a flattering review'.

One might imagine reviews to be fertile territory for libel actions. The more florid the language, the more enjoyable the review is for the reader; but conversely the more likely it is to do significant damage to the subject. For example, a review by critic A A Gill of a dish with the texture and temperature of 'happy youthful vomit' can hardly have had people queuing at the door of the unfortunate establishment where he had dined.

But despite the endless possibilities for offence, reviews of restaurants, theatre, film, literature and art do not generate as many formal legal complaints as one might imagine. In fact, reviewers tend to get away with reputational murder. No doubt many a criticised subject prefers the review to be treated as fish and chip paper – here today, forgotten tomorrow – but they

are usually also well aware that the critic has a good chance of successfully pleading the defence of fair comment.

The defence is available where the defendant can establish the following with regard to what he has published: (1) that it concerned a matter of public interest – reviews will generally fall into this category; (2) that it was comment and not fact – the usual battle ground for the defence; (3) that the comment was based on facts which are true or protected by privilege; (4) that the reader can readily identify the fact upon which the comment was based and judge for himself how far the comment was well founded; (5) that the comment or opinion is one which an honest person might make or genuinely hold based on the facts proved to be true. There is, as the Court of Appeal explained in *Convery*, no need for the opinion to 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... [it can be] exaggerated, even grossly exaggerated and prejudiced'.

The *Irish News* pleaded the defences of fair comment and justification. Both require the defendant to prove true facts; in justification, that the statements of fact made are true; in fair comment, that there is a substratum of truth on which the comment is based.

Untangling comment from fact in this case and the true facts underlying either apparently caused some not inconsiderable difficulty, both for the judge and the jury. According to the Court of Appeal, the first task for the judge 'is to decide which, if any, statements are statements of fact or comments. This does not appear to have happened in the present case'. Only when the jury can distinguish what is comment 'can it begin to address the thorny issue of whether the facts on which the comment is based

Photograph: Moviestore Collection

are capable of justifying the comment made!

For example, the judge had identified as fact the statement that the cola was flat, warm and watery, going on to say that the subsequent statement that it must have been on tap was comment. That was wrong, said Kerr. The temperature and consistency of the cola 'represented the reviewer's opinion not an objectively verifiable fact'. Lord Justice Campbell gave a very clear indication of the kind of fact upon which a restaurant reviewer is entitled to make their comment: '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... 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'.

This clarification – simple although it might appear – is of huge significance to those who feared that the defence of fair comment might have been about to be taken off the menu. The matter is not entirely concluded, as the Court of Appeal has remitted the case to the lower court for a retrial and it is possible that the claimant will persuade another jury that the review was not fair comment. As Kerr pointed out: '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'. Also, a defence of fair comment can be defeated by evidence of malice that was not considered by the jury at first instance. In practice, however, establishing a malicious intent on the part of a reviewer where they have already established that their publication was an expression of opinion an honest person might properly hold will be a heavy burden.

The word 'critic' comes from the ancient Greek for someone who offers reasoned judgment or analysis. Joe Public, busy in his everyday life, needs someone to provide such judgment before he jumps in to evaluate the establishment, play or book for himself.

Consequently, what springs from the critic's pen, be it praise or poison, has historically been given a degree of latitude by the courts. This judgment will go some way to satisfying defendants that nothing has changed.

It may be that litigation is an unwise way to deal with a negative review that should rather be taken with a pinch of salt. Bruised and damaged artists of the kitchen, stage or screen might do better to take their cue from the German composer Max Reger who, in response to one critical review, clearly considered that the best form of defence was attack: 'I am sitting in the smallest room of my house. I have your review in front of me. Soon it will be behind me'.