- a copyright owner who industrially applies a design corresponding to the artistic work by mass producing objects to the design will be unable to enforce their copyright (unless the work is one of artistic craftsmanship, in which case copyright will still be enforceable).

It is the exception to the third part above, for "works of artistic workmanship", which may assist designers who have industrially applied a design but failed to register it (as with Mr Swarbrick). The High Court's analysis of the term (which is undefined in the Copyright Act) in *Burge v Swarbrick* remains relevant despite the overlap provisions having since been amended.

"Works of artistic craftsmanship"

Before the High Court, Mr Swarbrick submitted that the plug and the mouldings were "works of artistic craftsmanship" and that he should therefore retain his ability to enforce copyright in relation to them despite industrial application. Mr Swarbrick argued that he had intended to design a yacht of great aesthetic appeal, and that the JS 9000 realised this intention. The respondents contended that Mr Swarbrick had set out to design a functional racing yacht to meet the practical demands of a specific market, and that visual and aesthetic appeal was simply one of a number of considerations. In endorsing the respondents' analysis the Court:

- rejected the idea that utility and beauty, or function and art, are mutually exclusive. A work could be one of artistic craftsmanship despite its form being partially dictated by functional considerations; and
- held that determining whether a work is one of artistic craftsmanship "turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations" [at 83 to 84]. The greater the requirements in a design brief to satisfy utilitarian considerations, the less scope to encourage substantial artistic effort.

The High Court disagreed with the Federal and Full Federal Courts' view that the plugs and mouldings were works of artistic craftsmanship. In designing the plug for the boat, Mr. Swarbrick's key aim was creating speed on the water, and in seeking to achieve it he was acting in the role of an engineer rather than an artist-craftsman. In other circumstances he may have fulfilled the latter role but that was not the case with this design brief.

The artistic craftsmanship exemption is significant for designers: if they can bring their work within its scope, they will be able to mass produce objects corresponding to the design while still being entitled to enforce their copyright against infringers. The High Court's judgment in *Burge v Swarbrick* has usefully clarified this scope. However, once a copyright owner has registered an artistic work as a design, a separate section of the overlap provisions will apply and the artistic craftsmanship exemption will not assist.

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(Endnotes)

1 (2007) 72 IPR 235

A Very Expensive Lobster:

Jennifer Lusk revisits *Blue Angel Restaurant v John Fairfax and Sons Ltd (1989)* and the mutual dislike that exists between defamation law and restaurant reviewers.

One would think that the very purpose of a review is to offer the critical opinion of the reviewer on any given subject. One might also think that a reviewer who constantly lied about that opinion would soon find him or herself on the scrap heap due to complaints. Leo Schofield, whilst known for being highly critical, is also a well respected journalist, commenting on and critically reviewing the arts and food for over thirty years. In 1984, he reviewed the *Blue Angel Restaurant* for the *Sydney Morning Herald*, with, according to him, the same critical eye with which he had reviewed many other establishments across the country. But in this case, a harsh but honest opinion created one of the most well known and controversial defamation cases in Australian history. The restaurant and its owner, Mr Marcello Marcobello, sued for defamation and won, receiving over $100,000 from John Fairfax and Sons Ltd and Leo Schofield.

On May 21st, 1984, Mr Schofield dined at the Blue Angel Restaurant with the intention of reviewing it. He took note of the tank of live lobsters, a trend that was only just beginning at the time, and the appearance of the restaurant and staff for comment in the review. He and his companion ordered and dined, Mr Schofield forming a critical opinion of his meal for the pending review. The pair finished their meal, left a tip and Mr Schofield's card and left. The review which appeared in the Sydney Morning Herald on May 29th was not particularly favourable and was written in Schofield's satirical and flamboyant style, prefaced with a reworded version of Lewis Carroll's Lobster Quadrille. He drew attention to the live lobsters and the polyester shirts of the waiters. With regard to the meal, he claimed the lobster was overcooked, a culinary crime against such an expensive creature, and that the garlic prawns and lemon sole 'suffered from the same over-enthusiastic exposure to heat'[1].

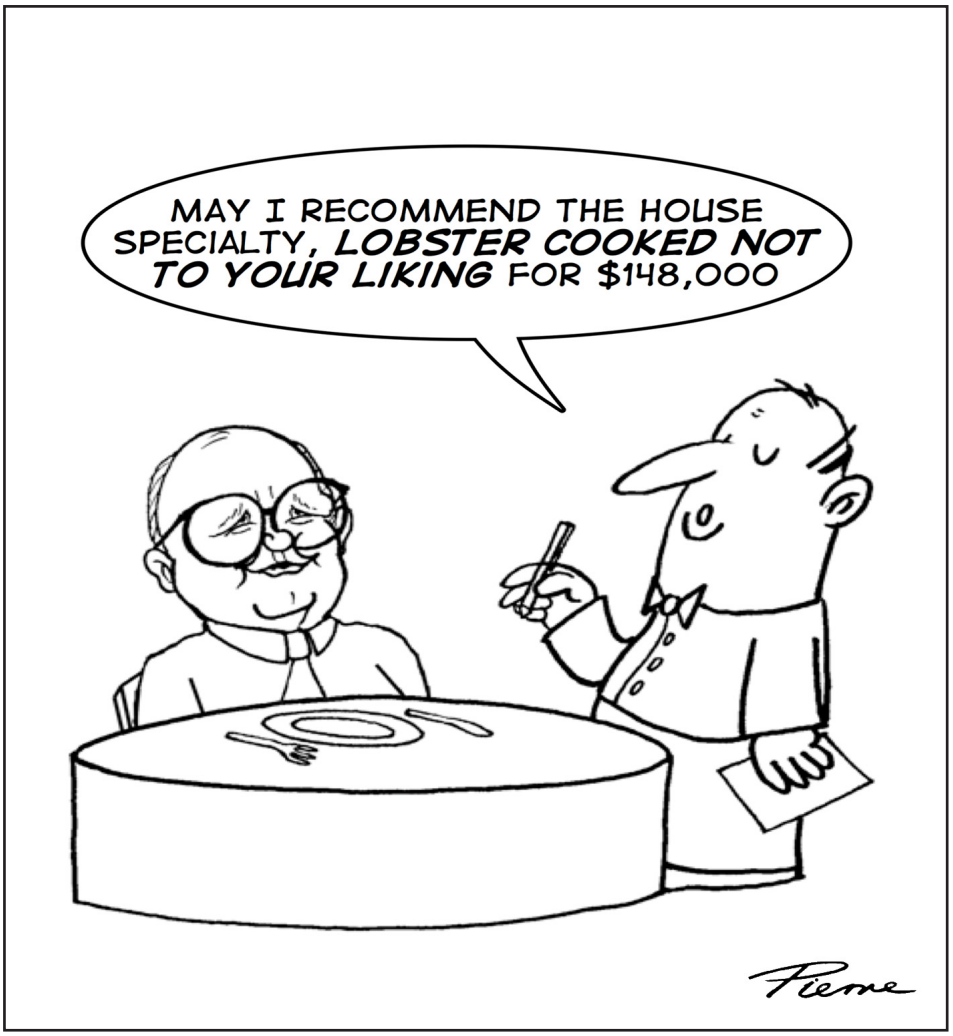
Mr Marcello Marcobello, the owner of the Blue Angel Restaurant took offence to Mr Schofield's review, claiming that it was 'all lies'[2] and that the review carried defamatory imputations. The restaurant and Mr Marcobello sued both Schofield and his publishers for defamation, the case coming before Justice Enderby and a four person jury in 1989. The claim was that the article imputed that the plaintiff:

- Was a cruel and inhumane restaurateur in that [the restaurant] killed live lobsters by boiling them alive;
- Was an incompetent restaurateur in that [the restaurant] broiled lobsters for 45 minutes contrary to accepted culinary methods;
- Was a restaurateur that charged a price for excellent fresh lobster which when later cooked incompetently… did not then represent good value,
- Was an incompetent restaurateur in that [the restaurant] served lobsters with charred husks of shells, meat destroyed as to quality and claws containing white powder;
- Was an incompetent restaurateur in that [the restaurant] served severely overcooked garlic prawns and lemon sole that was severely overcooked and slimy with oil.[3]

Mr Marcobello claimed that these defamatory imputations had resulted in a loss of business from Australian customers for his restaurant and personal pain and suffering due to the loss of his reputation as a restaurateur.

The case was tried under New South Wales defamation law, with the defences of fair comment and truth. The defence claimed that not only was Mr Schofield's opinion fairly held and reasonably stated, but that it was based on truth, at least pertaining to that particular occasion. Witnesses, including Mr Schofield's dining companion, Mr David Spode, claimed that they too had eaten overcooked meals there and Mr Marcobello's own father, Frank Marcobello, stated that he had misgivings about the cook, Ms Antonnella Cortese, and her cooking methods. It was also pointed out that there had been errors in the original printing of the article, specifically the mistyping of 'broiled' as 'boiled'. The plaintiff pointed out that no correction of these errors had been printed. The plaintiff also offered witnesses claiming that the food in question was very good and not overcooked and Ms Cortese offered detailed explanations of her cooking methods. The plaintiff also threw doubt on Mr Frank Marcobello's testimony, claiming that his ongoing feud with his son was his reason for testifying for the defence.

The counsel for the defence, Mr McPhee QC, asked the jury to consider that Mr Schofield had merely offered his honest, albeit rather harsh, opinion on the meal he received on that particular occasion. He pointed out that Mr Schofield had no reason to lie and that it was not beyond the bounds of possibility that mistakes were made in the kitchen that night resulting in a below standard meal. He also made it clear that the genre and style of the review allowed for some exaggeration and creative flair and that a reasonable audience would recognize details included in the article in order to create amusing and entertaining reading. Mr Neil QC, counsel for the Plaintiff, on the other hand, claimed that Mr Marcobello and his restaurant were the butt of undeserved ridicule in the article. He pointed out that Mr Schofield had gone beyond mere humour and that in doing so what he had written 'did not accurately describe the meal'[4]. He also claimed that it was not a possibility for Ms Cortese to have overcooked three dishes in one evening and that therefore, Mr Schofield must have been mistaken in his claims about his meal.



The Jury found in favour of Mr Marcobello and the Blue Angel Restaurant and the court asked that Mr Schofield and John Fairfax and Sons Ltd pay $22,000 to the Blue Angel and $78,000 to Mr Marcobello personally. Interest of over $50,000 was also added.

It would appear, both under the defamation law in New South Wales at the time and the new nationally consistent *Defamation Act 2005* (NSW) (***Defamation Act***), that Mr Schofield had a strong defence of what is now called honest opinion. As it stands today, honest opinion holds as a defence if the following can be shown. Firstly, that the publication in question 'was an expression of opinion of the defendant rather than a statement of fact'[5]. Secondly, that the 'opinion related to a matter of public interest'[6]. Thirdly, that the 'opinion is based on proper material'[7], which is provided in some form so the public can form their own opinions. Proper material, for these purposes, is considered to be material that can be proven to be substantially true. This is a little more restrictive than the law at the time of the case, but it would seem reasonable for this case to be argued with this defence.

The very nature of a review is that the opinion of the reviewer is being presented for the reader's interest, to both inform and challenge the opinions of others. In this sense, the apparent dislike of both the food and the restaurant is clearly the opinion of Mr Schofield and not fact. The facts of the article are the barest descriptions of the meals and surrounds, on which Mr Schofield forms his opinions. Readers can see from what was described why Mr Schofield would form the opinion that he did, especially given his role as a critical reviewer. Whilst that exact evening can never be recreated, the reader also has the opportunity at all times to attend the restaurant in question and form their own opinion.

The problem is that while a jury can be shown the tank of lobsters and the polyester shirts of the waiters – both matters which came up in court as carrying imputations of a defamatory nature – It is very difficult to prove that the descriptions of the food are true. Whilst Mr Schofield provided the jury with other witnesses

who claimed it was indeed possible to receive an over cooked meal at the Blue Angel, and had a great deal of experience and clout behind his own testimony, and although he had no reason to lie in his review, it was clearly not enough for that particular jury. As for being a matter of public interest, it is generally considered that reviews are aimed at informing consumers about the products or services they are purchasing. Therefore reviewing is very much a matter of public interest and would not exist were it otherwise.

The case is much more difficult to defend under the broader defences of justification and contextual truth. The law is yet to be tested in court in its current form, but one assumes that the degree to which a defendant must prove the truth of the material on which an honest opinion is based is lower than the requirements for proving the truth of statements and imputations defended under the justification defence. Here the defence is that the imputations made are true. The equivalent section of the *Defamation Act 1974* (NSW) was used a part of the defence of the Lobster case at the time, one presumes in relation to the overcooked meals and the imputations of incompetence. Unfortunately, without the actual meal, photos of the meal, multiple witness statements about that particular meal or video footage, and some proof as to whether such a meal was an accidental occurance or the standard fare for that restaurant, it is almost impossible to genuinely prove the truth of such statements. The burden of proof falls on the defence rather than the plaintiff and can be difficult to uphold.

It would be possible for a lawyer to argue Mr Schofield's case under the defence of qualified privilege, which allows defamatory material to be published if it can be proved that:

> the recipient has an interest or apparent interest in having information on some subject, [that] the matter is published to the recipient in the course of giving to the recipient information on that subject [and that] the conduct of the defendant in publishing that matter is reasonable in the circumstances.[8]

All reviewers would argue that their role in providing information to consumers is a vital part of our business system. Fellow journalist, Stephen Downes went as far as to say that 'criticism is essential to cultural development.'[9] The hole in the defence for Mr Schofield then is whether or not he acted reasonably in the circumstances. Given the caustic nature of the review, it would be fair for the plaintiff to argue that the review was unnecessarily negative and that the humourous tone added unnecessary connotations to the information and opinion Mr Schofield was sharing with the public.

There are other changes in the *Defamation Act* to consider that would change how this case would be tried today. Firstly there would be a single cause of action from Mr Marcobello, since all imputations must now be carried under the one suit. Also, the Blue Angel restaurant itself would not be able to sue, given that it is a corporation which one assumes had more than ten staff members at the time and certainly has more than ten now. The amount in damages requested by the court may also change, given that there is now a new cap on the amount paid for non-economic damages in any defamation suit. This cap is $250,000, which one assumes is the amount to be awarded in the most severe cases. The Blue Angel Restaurant suffered no financial difficulty after the review, despite its claims of losing Australian clientele, virtually doubling its sale figures in the four years before the trial. Therefore, Mr Marcobello would only be entitled to non-economic damages. It would be for the judge to decide to what extent he had suffered as a result of the defamation. There is no precedent under the new laws yet to say how much Mr Marcobello would be entitled to, but it would seem the that the $100,000 total would be more than he would get today. Even the $78,000 he was initially awarded personally may be excessive today, given that the claimed damage to his reputation did not relate to moral or financial matters, or indeed his general character outside his business.

There is a possible debate about whether a review as scathing and as sartorial as Mr Schofield's review could be considered ethically sound. The Sydney Morning Herald subscribes to the code of ethics laid out by the Australian Journalists Association (***AJA***). Mr Schofield's review is in compliance with this code of conduct barring two points. It was pointed out in the trial that Mr Schofield did not identify himself as a reviewer or as an employee of the Sydney Morning Herald until after he had left, which could be seen as ignoring the point in the AJA code which asks that journalists 'use fair, responsible and honest means to obtain material'[10], though this point goes on to show that it is clearly intended to relate more to interviewing sources openly and honestly. The code also asks that reporters 'do [their] utmost to achieve fair correction of errors.'[11] This clearly was not done by either Mr Schofield or the paper, regarding the apparently minor errors, which actually caused contention in the case.

It would seem under the new *Defamation Act* that Mr Schofield would have had strong defence available to him, with two weaker defences to fall back on. But the case would come down to the skill and arguments of the lawyers and the leanings of the jury, just as it did in 1989. Unfortunately the one thing Mr Schofield could no more do today than he could in 1989 is offer up exact evidence that the meal was as he claimed it to be. This is a potential danger facing food reviewers. *Blue Angel Restaurant v John Fairfax and Sons (1989)* was a landmark case in defamation law as it highlighted this dilemma. Not only restaurant reviewers, but theatre and literary reviewers were effected by the outcome. It became apparent that stating an opinion might no longer be defensible in court. The concern is that there is no way to absolutely recreate a performance or meal as evidence for a jury. Whilst having documented evidence and second opinions to back up a review seems to be the first step to protection in defamation suits, eventually it will come down to a jury and whether there is sufficient evidence to support the opinion of the reviewer.

Jennifer Lusk's essay was Highly Commended in the 2006 CAMLA essay competition.

(Endnotes)

1 L Schofield, 'High Drama Where Lobsters Have No Privacy' *Sydney Morning Herald*, (29 May 1984) as cited in J Fife-Yeomans, 'Schofield Puts The Knife In, Court Told' *Sydney Morning Herald* (4 April 1989)

2 Mr Marcello Marcobello, as cited in J Fife-Yeomens, 'No Joke Seen in Bad Food Review' *Sydney Morning Herald* (6 April 1989)

3 M Pearson, *The Journalist's Guide to Media Law* (2004) at 201-202.

4 J Fife-Yeomans, 'Father Warned About Overcooked Lobsters' *Sydney Morning Herald* (13 April 1989) at 2

5 *Defamation Act 2005* (NSW) s31

6 Ibid

7 Ibid

8 *Defamation Act 2005* (NSW) s30

9 S Downes, 'The Case of the Libelled Lobster' *Australian Financial Review* (28 April 1989) at 5

10 Media, Entertainment and Advertising Alliance, *Australian Journalists Association Code of Ethics*, available at <http://www.alliance.org.au/media/code_of_ethics.htm>

11 ibid