MORE THAN A MOUTHFUL: LIBEL AND THE RESTAURANT REVIEW

I. INTRODUCTION

Critics serve an essential function in modern society. Most newspapers and many magazines regularly feature movie and restaurant reviews to provide readers with information and recommendations regarding the current films and newest eateries. Due to the relatively higher price of dining out, restaurant reviews often have a greater impact than film reviews. Given the vast number of existing restaurants, the rapidly changing food trends and hot spots, and the large number of restaurant openings each year, both tourists and residents alike look for guidance in choosing where to dine.

Only the well informed will know which type of cuisine is "in" and which restaurants are the most popular. Reviews also provide descriptions of food, quality of service, ambience, clientele and prices. Whether one visits an area for a short time or lives there permanently, restaurant reviews and guides help millions of people, choosing from a veritable sea of restaurants, to attain the ultimate dining experience.

"[F]ood critics, whose words [are] ingested by a gullible public, can mean life or death to a restaurant."[1] The content of a review may significantly affect the patronage of the restaurant evaluated since the public often relies upon critic's recommendations. Naturally, owners are very concerned with the reviews their restaurants receive, and alleged inaccuracy sometimes leads to defamation litigation.[2]

The restaurant review libel cases have produced a clear and consistent outcome; the defendant food critic has prevailed in each case. Restaurants continue to bring these actions. Perhaps the potentially damaging effect the review could have on the restaurateurs' business and reputation is the driving force in their seeking a judicial remedy, or maybe each simply believes that his particular case is different from the others and, therefore, worthy of recovery.

Regardless of their motives for filing these actions, the res-

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[1] Terillo v. New York Newsday, 137 Misc. 2d 65, 67, 519 N.Y.S.2d 914, 917 (Civ. Ct. 1987). For a thorough discussion of *Terillo*, *see infra* notes 193-204 and accompanying text.

[2] *See* Part IV, *infra* notes 93-201.

taurant-plaintiffs have the difficult burden of proving that the defendant acted with actual malice, causing injury to the plaintiff. Even in cases where actual malice has been established, however, the restaurants' inability to prove that actual damages have been incurred as a result of the libelous statements has prevented recovery.[3]

This Note will suggest a broad standard that should be applied in restaurant review cases. Part II of this Note will document the most salient points in defamation law and set forth the criteria for modern libel actions. Part III will provide an analysis of the restaurant review and will discuss the possible defenses in libel actions, including the first amendment constitutional privilege for opinion. Part IV will then examine libel suits by restaurants against reviewers. Finally, Part V of this Note will analyze the case law in this area in relation to a hypothetical factual situation. This will provide boundaries and guidelines for critics and a practical mechanism to enable restaurateurs to prove the economic injury required for recovery in a defamation action.

II. DEFAMATION

A. *History*

Under common law the accurate portrayal of a reputation[4] is a protected interest in tort law. It is a "valuable asset"[5] capable of enhancing both financial success in business and respect in the community; conversely, a bad reputation can easily achieve the opposite. Defamation, as a reputational tort, encompasses libel, defamation through written publication,[6] and slander,[7] defamation through the spoken word.[8] Libel is divided into two subcat-

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[3] *See, e.g., Terillo*, at 65, 519 N.Y.S.2d at 914.

[4] "Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit." L. ELDREDGE, THE LAW OF DEFAMATION § 4 (1978) [hereinafter ELDREDGE].

[5] *Id.* § 2.

[6] Libel provides "substantial legal protection, within limited areas, to the interests in freedom from emotional distress and freedom from invasion of privacy." *Id. See* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1094-95 (1962). *See also* RESTATEMENT (SECOND) TORTS § 568(1) (1977) [hereinafter RESTATEMENT]. The protected interest in reputation must be balanced against the first amendment rights of freedom of speech and freedom of the press. *See infra* notes 26-41 and accompanying text (discussing the criteria for modern libel actions).

[7] "Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication [not defined as libel]". RESTATEMENT, *supra* note 6, § 568(2).

[8] At common law, libel is considered more serious an offense than slander since the written words are permanent, generally reach a wider audience, and require forethought. *See, e.g.*, Thorley v. Lord Kerry, 128 Eng. Rep. 367 (1842) (action for written words can be maintained although action for same words if spoken cannot).

egories, libel *per se*, where the defamatory meaning is evident, and libel *per quod*, where other facts must be inferred in order to comprehend the defamatory meaning.[9]

"Defamation is an invasion of the interest in reputation and good name [that] involves the opinion which others in the community may have, or tend to have of the plaintiff."[10] Damaging another's reputation has been historically recognized as a punishable offense. "Under Norman law, anyone who falsely[11] accused another person of being a thief was ordered to pay money and publicly confess. . . . [t]he libeler had to stand in the middle of the town square holding his nose and loudly proclaiming 'I'm a liar! I'm a liar!' "[12] Punishment grew harsher. "In ninth-century England, under Alfred the Great, the Anglo-Saxon libeler had to forfeit his tongue. The seventeenth-century English libeler had his ears lopped off."[13] These severe criminal penalties served both as a punishment and a deterrent rather than as a means of restoring the reputational injury that occurred as a result of the defamatory utterance.

English defamation law included four strict liability categories of slander *per se*:[14] criminal or immoral conduct,[15] loathsome

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"[P]ublication of defamatory matter may be made by conduct which by reason of its persistence it may be more appropriate to treat as a libel than a slander." RESTATEMENT, *supra* note 6, § 568 comment d.

9 The word "rapist," for example, is per se libel.

> If a newspaper runs a picture of a couple eating at a new restaurant with the caption "young lovers enjoying opening night at new eatery," it is not defamatory *per se*. However, if the woman is not the man's wife and people who know him thereby assume he is having an affair, the caption can be defamatory *per quod*.

R. LABUNSKI, LIBEL AND THE FIRST AMENDMENT 30-31 (1987) (emphasis in original).

10 Remedies in defamation actions seek to redress the unnecessary harm to one's reputation, to compensate for any financial injury suffered, and to deter future defamatory statements by this and other potential defendants. *See* R. SMOLLA, LAW OF DEFAMATION 1-19 (1986) [hereinafter SMOLLA].

11 Truth and absence of fault have always been complete defenses to defamation actions. *See* RESTATEMENT, *supra* note 6, § 581 comment a; Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q.R. 13, 28 (1925); Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 56-58 (1931); Harnett and Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425, 434-37 (1949).

"The settled common law rule is that the defense of truth is an affirmative defense which the defendant must plead and prove. . . . [T]he defamatory statement is presumed to be false." ELDREDGE, *supra* note 4, § 63. But when the plaintiff is a public figure or official he "must prove by clear and convincing proof . . . that the defendant published the false, defamatory communication with knowledge of its falsity or with reckless disregard for its truth or falsity." *Id.*

12 B. DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 9 (1986).

13 *Id.*

14 Slander was actionable without proof of damage if it fell within the four categories. *See* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 788 (5th ed. 1987) [hereinafter PROSSER].

15 *See* Fowler v. Dowdney, 174 Eng. Rep. 234 (1838) (saying the plaintiff is a returned

disease,[16] bad workmanship,[17] and the allegation that a woman was unchaste.[18] In cases involving statements outside these categories, the plaintiff was required to prove financial harm.[19] The common law considered libel a strict liability offense,[20] however, and special damages[21] were required to recover for libel *per quod*[22] but not for libel *per se*.[23] Recent constitutional precedent

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convict is actionable *per se* because the words imply that although he has already suffered the punishment, the stigma remains),

16 *See* Miller's Case, 79 Eng. Rep. 368 (K.B. 1791) (words charging a man's wife with having the pox and being unchaste are actionable *per se*).

17 Tex Smith, the Harmonica Man, Inc. v. Godfrey, 198 Misc. 1006, 102 N.Y.S.2d 251 (1951) (performer's words describing plaintiff manufacturer as inept, unskillful, ignorant in manufacture and unethical tend to injure plaintiff in business and, are therefore actionable).

18 *See* Miller's Case, 79 Eng. Rep. at 368; *but see* Terwilliger v. Wands, 17 N.Y. 54 (1858) (words charging a man with being unchaste are not actionable without proof of special damages).

19 "The prevailing rule today is that a general allegation, with proof of a general decline in business and the elimination of other causes, is sufficient where it is impossible to be more specific." PROSSER, *supra* note 14, at 794 n.16. *See* Ellsworth v. Martindale-Hubbell Law Directorory, 68 N.D. 425, 280 N.W. 879 (1938) (where plaintiff proved his business load had fallen off and that his profits had diminished since the publication, but gave no specific evidence of the loss of any particular customer or order, the court held the proof made was sufficient to sustain the action); Storey v. Challands, 173 Eng. Rep. 475 (1837) (witness' testimony that he was dissuaded from dealing with the plaintiff, as a result of slander constituted special damage).

20 At common law damages were presumed in libel cases. In an attempt to formulate a national standard, the Supreme Court began to prohibit presumed damages and strict liability in defamation actions. Today, actual damages are required for recovery. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

21 "Special damages is [sic] some 'actual or temporal loss'—the loss of some 'material or temporal advantage' which is 'pecuniary' or 'capable of being estimated in money.'" C. GATLEY, LIBEL & SLANDER § 203 (6th ed. 1967). The damage resulting from libel was actionable *per se* and the plaintiff only had to prove special damages for libel *per quod*, where the defamatory meaning was clear only by innuendo. PROSSER, *supra* note 14, § 112.

22 Libel *per quod* exists where a publication is innocent on its face and becomes defamatory only by innuendo to those who were aware of defamatory facts extrinsic to the matter published and when damages are established. *See* Prosser, *Libel* Per Quod, 46 VA. L. REV. 839 (1960). *See supra* note 9.

> An innuendo is a section of the complaint which sets forth the inference which allegedly harms the plaintiff. Where words are defamatory on their face, it is not necessary to plead innuendo. . . . If the words of the offending item are incapable of a defamatory meaning, innuendo will not make them so . . . . The innuendo cannot be used to enlarge the natural meaning of the words actually used.

Flotech, Inc. v. E.I. DuPont de Nemours Co., 627 F. Supp. 358, 369 n.4 (D. Mass. 1985), *aff'd*, 814 F.2d 775 (1st Cir. 1987). For a distinction between libel *per se* and libel *per quod*, *see* Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958) (a letter sent to the city mayor and several other important citizens which imputed to a police officer qualities that would render him totally unfit to serve in such a capacity and subjected him to public scorn and ridicule, constituted libel *per se*); Hinsdale v. Orange County Publications, Inc., 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966) (complaint that a newspaper article had announced an imminent marriage between two already married persons sufficiently alleged a publication libelous *per se*); MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959) (a charge of membership in the Communist Party or Communist affiliation or sympathy is libelous on its face); Youssoupoff v.

prohibits imposing strict liability in these actions,[24] and requires proof of damages for recovery. Modern law classifies defamation as a civil action and, in doing so, rejects its criminal strict liability status. Furthermore, non-punitive remedies have evolved to redress plaintiffs' economic and reputational injury. Monetary damages and public retractions have replaced the harsher punishments of removing bodily parts and subjecting the guilty party to public humiliation.[25] Compensatory damages will only be awarded if there is definitive evidence of economic injury or actual harm. Consequently, the restaurateurs' inability to prove actual damages stemming from the defamatory review have prevented recovery in libel actions.

B. *Criteria for Modern Libel Actions*

To sustain a successful cause of action in defamation, constitutional law requires: publication of an unprivileged statement of fact, of and concerning the plaintiff,[26] that is both false and defamatory[27] and which causes actual financial and reputational

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Metro-Goldwyn-Mayer Pictures, Ltd. 50 T.L.R. 581, 99 A.L.R. 864 (C.A. 1934) (libel is "a false statement about a man to his discredit. . . . [t]he Court very rarely interferes with a finding by the jury . . . [unless no] reasonable jury could possibly think this a libel. . ." *Id.* at 584, 99 A.L.R. at 869.).

See also Morrison v. Ritchie & Co., 4 Sess. Cas. 645, 39 Scot. L. Rep. 432 (Fr. 1902) (defendant newspaper published a report that plaintiff had given birth to twins but there were readers who knew plaintiff had only been married for one month); Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D 578, 268 N.W. 400 (1936) (libelous rating of lawyer in law directory required the pleading of an innuendo to show its defamatory meaning and is therefore not libelous *per se* but is libelous *per quod*.).

23 To be libelous *per se*, the publication must, on its face and without the aid of extrinsic facts, be recognized as injurious. 53 C.J.S. *Libel and Slander* § 11 (1987). *See also* Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958) (letter sent to mayor and other important citizens defaming police officer in such a way as to render him unfit to serve was libelous *per se*). Libel *per se* means libel on its face while slander *per se* refers to the four strict liability categories discussed *supra* notes 15-22 and accompanying text.

24 In *Gertz*, "the Supreme Court held that the First and Fourteenth Amendments prohibit the imposition of 'liability without fault' on 'a publisher or broadcaster of defamatory falsehood injurious to a private individual.' " ELDREDGE, *supra* note 4, § 1.

25 *See supra*, notes 11-13 and accompanying text. Although the financial damages imposed in Norman libel actions survive today, the public ridicule is no longer imposed. However, the publication of details surrounding libel actions can cause further harm to both parties and may lead to public ridicule. Often, damages are not awarded solely to restore actual financial harm. "[T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz*, 418 U.S. at 350.

26 *E.g.*, Jones v. E. Hulton & Co., 2 K.B. 444 (1909); Washington Post Co. v. Kennedy, 3 F.2d 207 (D.C. Cir. 1925) (plaintiff recovered damages from newspaper who relayed a true account of an attorney with the same name as plaintiff, even though the omitted middle initial differed).

27 RESTATEMENT, *supra* note 6, § 558. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* § 559.

harm[28].

Modern defamation law has changed drastically during the past quarter century. Prior to 1964, the law recognized libel as a strict liability offense,[29] under the premise that "[w]hatever a man publishes he publishes at his peril."[30] By carving out exceptions to the once uniform strict liability approach, the Supreme Court reinterpreted the constitutional standards for defamation actions and outlawed the application of liability without fault.[31] The severity of the standard applied depends upon whether the plaintiff is a private individual,[32] or either a public official[33] or public figure.[34]

A public official or public figure plaintiff must satisfy a more stringent standard, and can recover only when he can establish malice—the standard required by *New York Times Co. v. Sullivan*.[35] "[P]ublic officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual."[36] Consequently, the public plaintiff's right of privacy diminishes because the public's right to know under the first amendment expands. Conversely, in private plaintiff cases, the right of personal autonomy outweighs the first amendment concerns. Unlike public figure commentary,[37] speech re-

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28 Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977); *see also* SMOLLA, *supra* note 10, at 1-23.

29 ELDREDGE, *supra* note 4, § 3.

30 Peck v. Tribune Co., 214 U.S. 185, 189 (1909); Washington Post Co. v. Chaloner, 250 U.S. 290, 294 (1919).

31 *See* Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

32 *Id.*

33 New York Times v. Sullivan, 376 U.S. 254 (1964).

34 Plaintiffs have been considered public figures from many different positions. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (athletic director of University of Georgia); Associated Press v. Walker, 388 U.S. 130 (1967) (honorably recognized Army veteran); James v. Gannett Co., 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976) (belly dancer who was voluntarily interviewed); Tripoli v. Boston Herald-Traveler Corp., 359 Mass. 150, 268 N.E.2d 350 (1971) (mail robbery suspect who voluntarily gave interviews and called press conferences); Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976) (plaintiff who had run both successfully and unsuccessfully, for various state and local offices).

35 The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Sullivan, 376 U.S. at 279-80.

36 *Gertz*, 418 U.S. at 345.

37 In *Sullivan*, the Court held that first amendment freedom of speech and freedom of the press rights required that in a libel action, a plaintiff who is a public official may only recover if he shows that the defendant acted "with knowledge that [the defamatory utterance] was false or with reckless disregard of whether it was true or not." *Sullivan*, 376

garding the private plaintiff lacks social value to the community at large and a more lenient negligence standard is applied in private plaintiff cases.[38]

Public figures must meet the more rigorous malice standard in libel actions since they can ordinarily respond to or rebut allegedly defamatory comments through the media.[39] The Court reasons that the media, rather than the courts, can provide the most effective remedy for public plaintiffs.[40] In contrast, private

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U.S. at 280. This standard became known as the *New York Times* malice standard. Based on the same constitutional theory, the Court soon extended the *New York Times* actual malice standard to include "public figures." Associated Press v. Walker, 388 U.S. 130 (1967).

> Later, the Supreme Court in *Gertz v. Robert Welch, Inc.* defined public figures:
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> those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Gertz, 418 U.S. at 345.

[38] Most states apply a negligence standard, rather than an actual malice standard to private individual's defamation actions. *See*, SMOLLA, *supra*, note 10, at 3-22, 3-23, and 3-27. New York, however, takes an approach somewhat between the minority and majority views. *Id. See* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (gross negligence standard imposed).

Since strict liability is prohibited, courts may use a negligence standard. *Gertz*, 418 U.S. at 348. The *Gertz* Court recognized that the states have the power to decide which approach to follow, but it prohibited damage awards without proof of actual malice and actual harm. *Id.* at 349-52.

> [J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but . . . punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

Id. at 350. The *Gertz* punitive damage rule was later limited to defamatory statements that are matters of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751, 761-63 (1985) (construction contractor brought defamation action against credit reporting agency which issued false credit report to contractor's creditors).

Cases dealing with restaurant reviews consider a critical review as a matter of public concern. A restaurant actively engaged in advertising and seeking commercial patronage is a matter of public interest and therefore is open to fair comment under both the common law and the constitutional privilege. Mashburn v. Collin, 355 So. 2d 879, 889 (La. 1977).

[39] "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344.

[40] The standard for public official and public figure plaintiffs is heightened due to their access to the media; however, the greater importance of public commentary regarding their public role, as compared to that involving the private plaintiff, is another crucial factor in the differentiation in criteria required in defamation actions. Because the classification of the plaintiff is the sole determinant of the legal standard to be applied, it is considered a question of law rather than a question of fact for the jury. *See* PROSSER, *supra* note 14, at 805-06.

individuals who do not have easy access to the media need judicial intervention for redress, and consequently, they must prove less to obtain relief.[41]

III. The Restaurant Review

A. *Classifying the Plaintiff*

"The question of whether the plaintiff is a public official or a public figure subject to the rules set forth . . . is one of federal law for the judge to resolve."[42] In *Gertz v. Robert Welch, Inc.*,[43] the Supreme Court established the criteria for what constitutes a public figure plaintiff.[44] It is defined as "a person who has assumed a role of importance in the resolution of public affairs or affairs of general importance or concern to the people generally."[45] Courts have consistently treated restaurants as public figures for libel purposes.[46] Therefore, restaurateurs must prove malice pursuant to the *New York Times* standard in order to recover.

B. *Classifying the Statement*

1. Fact or Opinion

Since defamation seeks to remedy damage caused by false com-

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41 New York uses a gross negligence standard for libel cases brought by private individuals. Private plaintiffs must prove "by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau, Inc.*, 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64 (1975) (newspaper which publishes a false statement is not guilty of gross negligence when two authoritative sources are consulted, and two staffers checked the accuracy of the article prior to publication).

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.

RESTATEMENT, *supra* note 6, § 580B. Many states have adopted the negligence standard. *See* ELDREDGE, *supra* note 4, at 291.

42 PROSSER, *supra* note 14, at 806.

43 418 U.S. 323 (1974). *Gertz* overruled *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which distinguished between matters of public interest and matters of general concern.

44 *Gertz*, 418 U.S. at 339-40.

45 PROSSER, *supra* note 14, at 806. *See also supra* notes 34-46, for a discussion of the public figure status.

46 *See infra* notes 93-201 and accompanying text. For an example of a court's discussion of a restaurant as a private figure, *see* Havalunch v. Mazza, Inc., 294 S.E.2d 70 (W.Va. 1981) (a small restaurant in a university town was considered a private plaintiff). Note, however, that this case held for the defendant reviewer.

ments, the first requirement is that the comment be false.[47] The plaintiff must show that a statement is a fact rather than an opinion, since a factual allegation can be proven false, while an opinion, a statement of one's own belief, cannot.[48]

In *Ollman v. Evans*,[49] the D.C. Circuit formulated a four-part analysis for classifying the allegedly defamatory statement as fact or opinion:[50] (1) the meaning of the words as the ordinary reader would infer from common usage;[51] (2) whether the words are verifiable;[52](3) the context in which the statements were made;[53] and (4) the social context in which the statements appeared.[54]

"In determining whether an expression is a statement of fact or opinion under the common law, words must be read in their context."[55] Since criticism by its nature is controversial,[56] opinions that plaintiffs consider false and actionable, such as an unfavorable restaurant review, are generally protected under the first amendment.[57] However, in cases where the speaker made the comments with malice, *i.e.*, the author knew such statements were false or acted in reckless disregard for the truth, the privilege is penetrable and recovery is allowed if damages are established.[58]

Some statements which appear to be factual may be seen as opinion in the eyes of the court. For example, in *Mr. Chow of New York v. Ste. Jour Azur S.A.*, [59] the critic stated that green peppers accompanying the pork remained frozen on the plate.[60] Although this seems factual, the reviewer actually meant that "[t]he green peppers served with the pork were not hot enough."[61] In *Mr. Chow*, as in many other restaurant review libel cases, the court considered whether "the writer's use of meta-

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47 RESTATEMENT, *supra* note 6, § 558.

48 *Id.* § s 566, 606.

49 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

50 *Id.* at 979.

51 *Id.*

52 *Id.* at 981.

53 *Id.* at 982.

54 *Id.* at 983.

55 *Mashburn v. Collin*, 355 So. 2d 879, 885 (La. 1977). *See infra* text accompanying notes 126-34.

56 Greer v. Columbus Monthly Publishing Corp., 448 N.E.2d 157, 162 (Ohio Ct. App. 1982).

57 "Criticism by its nature is controversial. . . . However, the First Amendment . . . protects freedom of speech and the press. Those rights are fundamental to the protection of our democracy and are not to be interfered with lightly." *Id.* at 162. *See also Mashburn*, 355 So.2d at 885.

58 This standard mirrors the *New York Times* standard as formulated in New York Times v. Sullivan, 376 U.S. 254 (1964).

59 759 F.2d 219 (2d Cir. 1985). *See infra* notes 179-94 and accompanying text.

60 *Id.* at 221.

61 *Id.* at 228.

phors and hyperbole turn his comments into factual statements."[62] The court concluded that using such figurative language did not transform opinion into fact, because the average reader would understand the statements to be the critic's opinion.[63] Once the court qualifies the defamatory statement as opinion, which by definition cannot be false, a libel action may not proceed without a showing of actual malice to penetrate the qualified privilege.[64]

Careful analysis of a factual statement[65] for defamation purposes necessarily includes an evaluation of the person defamed, the speaker, and the audience or forum. For example, the assertion, "X cooks with poison,"[66] will result in greater damage to X's professional reputation if X is a master chef than if X is a private person because a chef's career depends on his culinary expertise. Whether a competitor or X's child stated the comment plays a role in establishing a malicious motive. Finally, damages, if provable, would most likely be greater if the statement is heard in a public forum, such as at X's restaurant or a press conference, than if heard at an intimate private gathering.

2. Privileged Commentary

Certain defenses to libel actions can ameliorate a defendant's liability.[67] A true statement, for example, is an absolute defense in a defamation suit.[68] Protection by either the absolute[69] or qualified privileges also prevents liability absent a showing of malice. Due to the first amendment guarantees of freedom of speech and freedom of the press, the law recognizes that certain

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62 *Id.*

63 *Id.* at 228-29.

64 The constitutional privilege protecting statements of opinion recognizes the importance of preserving freedom of speech and freedom of the press by allowing, and even encouraging, freedom of thought and expression, as well as freedom of opinion and critical commentary. Granting recovery in libel cases involving actual malice acts as a deterrent against malicious behavior, which is not afforded any constitutional protection or privilege. In these cases, the plaintiff's freedom from defamation outweighs the defendant's freedom of expression. *See supra* notes 5-7 and accompanying text.

65 A factual statement is one which is provable as either true or false. It is not generally a matter of discretion or taste.

66 For purposes of this discussion, assume that this statement is factual rather than either figurative or hyperbolic.

67 There will be no liability imposed if an expression of opinion sets forth the truthful facts upon which the opinion is based. Ocean State Seafood, Inc. v. Capital Newspaper, 112 A.D.2d 662, 665 (1985).

68 *See* RESTATEMENT, *supra* note 6, § 581 comment A; ELDREDGE, *supra* note 4, § 63.

69 The absolute privilege applies to official governmental statements, legislative or judicial communications, and inter-spousal communication. *See* RESTATEMENT, *supra* note 6, § 585-92.

commentary is privileged and, therefore, shielded from liability in defamation actions.

The absolute privilege is an absolute defense, protecting official judicial,[70] legislative,[71] executive,[72] or domestic[73] commentary and acts, regardless of malice, motivation, or excessive publication.[74] A qualified or conditional privilege, on the other hand, exists when a publication is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."[75] This privilege applies to communications that concern the publisher's interest,[76] the interest of third persons,[77] common interest between recipient and publisher,[78] speech to

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70 Witnesses, attorneys, judges, jurors and parties to an action are privileged to speak defamatory utterances, without incurring liability, relating to the matter at issue. *Id.* § 586. *See, e.g.*, Simon v. Stim, 11 Misc. 2d 653, 176 N.Y.S.2d 475 (Sup. Ct. 1958), *aff'd* 10 A.D.2d 647, 199 N.Y.S.2d 405 (1960) (statements made by an attorney that were both in furtherance of the client's interest and relevant to court proceedings were considered absolutely privileged and insufficient to form a basis for a libel action).

71 Federal and state legislators may speak defamatory statements during a committee hearing or meeting. This commentary need not relate to any specific subject matter. *See* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 131-140 (1910). *See also* RESTATEMENT, *supra* note 6, § 590.

72 Cabinet members and department heads, as well as federal and state executives, may utter defamations relating to the issue being discussed. *See* Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941) (defamatory statements in press release by Secretary of the Interior were considered absolutely privileged). *See also* RESTATEMENT, *supra* note 6, § 591.

73 One spouse may defame third persons while communicating to the other spouse. The origin of this privilege lies in the common law notion of the husband and wife as one entity. ELDREDGE, *supra* note 4, § 76. *See also* Springer v. Swift, 59 S.D. 208, 239 N.W. 171, 176 (1931).

74 Encouraging these types of free commentary is meant to achieve fair and just results in the judicial, legislative, and marital contexts. There is a "paramount public need for keeping open sources of information . . . to such an extent that all communications . . . however false and malicious are absolutely privileged." Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537, 540 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951) (construing White v. Nicholls, 44 U.S. 266 (3 How. 266) (1845) (informing the President and Secretary of Treasury about removing plaintiff from federal office)). *See also* Hallen, *Excessive Publication in Defamation*, 16 MINN. L. REV. 160 (1932).

75 Toogood v. Spyring, 149 Eng. Rep. 1044, 1049-50 (1934).

76 One such communication, for example, is a publication to defend the publisher's own reputation. *See* Preston v. Hobbs, 161 A.D. 363, 146 N.Y.S. 419 (1914) (reply publication was held to be qualifiedly privileged because one has the right to reply to a libelous publication).

77 The conditional privilege extends to commentary regarding the protection of others. *See, e.g.*, Todd v. Hawkins, 173 Eng. Rep. 411 (1837) (advising a family member not to marry one considered to be a scoundrel); Brown v. Prudden-Winslow Co., 195 A.D. 419, 186 N.Y.S. 350 (1921) (informing customers of salesman's release for dishonesty); Morton v. Knipe, 128 A.D. 94, 112 N.Y.S. 451 (1908) (warning landlord that tenant is an undesirable). *But see* Watt v. Longsdon, 1 K.B. 130 (1930) (a third party's letter telling a husband of his wife's conduct is not privileged since it interferes with domestic sanctity).

78 *See, e.g.*, A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc. 245 F.2d 775 (2d Cir. 1957) (reports of credit agency).

one capable of acting in the public interest,[79] and fair comment[80] on matters of public concern.[81]

The fair comment privilege allows for true creativity in opinion and satirical writings. "To deny to the press the right to use hyperbole, under the threat of removing the protecting mantle of *New York Times*, would condemn the press to an arid, desiccated recital of bare facts."[82]

The common law limited fair comment privilege to protect statements made concerning the public at large.[83] This privilege covers those expressions of opinion which are not made solely for the purpose of causing harm, regardless of whether the opinion is considered reasonable.[84] "Criticism is privileged as fair comment only when the facts on which it is based are truly stated or privileged or otherwise known. . . ."[85] The court must first decide whether a false and defamatory critical statement falls within the conditional privilege. Upon determining that it does, the court must then consider whether such publication constitutes an abuse of that privilege.[86]

C. *Classifying the Restaurant Review*

Restaurant critiques, evaluative reviews, and political commentary are qualifiedly privileged communications between the

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79 Hutchinson v. New England Tel. & Tel. Co., 350 Mass. 188, 214 N.E.2d 57 (1966) (telephone operator not held liable for misidentifying voice as caller of a bomb threat).

80 "[T]he privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." RESTATEMENT, *supra* note 6, § 566 comment a.

81 Matters of public concern have included a variety of areas, such as singing, horse racing, comedy, and reviews, among others. *See, e.g.*, Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901) (singing); Lloyds v. United Press Inter., Inc., 63 Misc. 2d 421, 311 N.Y.S.2d 373 (Sup. Ct. 1970) (horse racing); Polygram Records, Inc. v. Superior Court, 170 Cal.App. 3d Supp. 543, 216 Cal. Rptr. 252 (1985) (Robin Williams' comedy performance); Mashburn v. Collin, 355 So.2d 879 (La. 1977) (restaurant review).

82 Time, Inc. v. Johnston, 448 F.2d 378, 384 (4th Cir. 1971). The Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974), found that under the first amendment, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statement of fact." *Id.*

83 *See* Triggs v. Sun Printing Publishing Ass., 179 N.Y. 144, 154, 71 N.E. 739, 742 (1904).

84 RESTATEMENT, *supra* note 6, § 566 comment a.

85 *Mashburn*, 355 So.2d at 885.

86 Unlike the impenetrable absolute privilege, the conditional privilege may be defeated. "[O]ne who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he (a) knows the matter to be false, or (b) acts in disregard as to its truth or falsity." RESTATEMENT, *supra* note 6, § 600. *Cf.* The *New York Times* malice standard, *supra* notes 35-37 and accompanying text.

press and its readers.[87] Therefore, a plaintiff may pierce this privilege by demonstrating that the defendant had an improper purpose in publishing the allegedly defamatory remarks.[88] "Restaurant reviews are also the well recognized home of opinion and comment."[89] In a recent restaurant review defamation case, *Terillo v. New York Newsday*,[90] the court reasoned that:

> The purpose of a restaurant review is to convey the reviewer's opinion of the food, service, and atmosphere of a restaurant. It is the reviewer's opinion to which the reader looks; it is the critic's personal taste to and by which the reader seeks and may be guided. However, when the reviewer goes beyond comment on food, service, and decor, and prints factual statements, such statements are taken out of the realm of protected opinion.[91]

Since most critiques are opinion, however, they are generally considered to be privileged commentary. In cases where the speech is not protected, the restaurant as a public figure is held to the heightened standard. Therefore, even when critics offer provable facts and lose their first amendment constitutional protection, the public figure restaurant must still meet the actual malice standard and prove actual damages incurred as a result of the critics inaccuracy.[92]

IV. Libel Actions Against Restaurant Reviewers

The law recognizes the strong policy interest served by allowing publication of criticism and grants protected status to a reviewer's opinion concerning a restaurant's food. Since this occupation demands accurate publication of opinions regarding food quality, critics should not be penalized for the ramifications of unfavorable reviews. A critic gains credibility through his honesty in conveying both positive and negative reviews.

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87 *See supra* notes 67-86 and accompanying text for a discussion of privilege.

88 *See* Prosser, *supra* note 14, at 833-835; *see also* Restatement, *supra* note 6, § 603.

89 Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 227 (1985). *See also infra* notes 179-94 and accompanying text.

90 137 Misc. 2d 65, 519 N.Y.S.2d 914 (Civ. Ct. 1987). *See also infra* notes 195-201 and accompanying text.

91 Terillo v. New York Newsday, 137 Misc. 2d 65, 68, 519 N.Y.S.2d 914, 916 (Civ. Ct. 1987).

92 Mere inaccuracy and mistake, absent knowledge of falsity, or statements made in reckless disregard of these matters does not meet the actual malice standard. *See* Restatement *supra* note 6, § 580A. Where a defamatory statement is found to be malicious, a retraction or correction will mitigate damages. *Id.* § 623; Prosser *supra* note 14, § 116A. Damages are appropriate only to compensate for actual injury caused by the critic's malice. Restatement, *supra* note 6, § 621 comment B.

The following chronological survey of the restaurant review libel cases examines the requirements for sustaining a successful defamation action against a food critic. It also provides an amusing and informative examination of what types of commentary restaurateurs claimed was libelous, but was found to be protected by the fair comment constitutional privilege.

In the earliest reported restaurant review defamation suit, *Wilson v. Sun Publishing Co.*[93] the Epler Cafe owners sought to recover damages for business injuries allegedly caused by a series of articles printed in the *Seattle Sun*.[94] The first article, appearing August 1, 1913, began: "If it were not for the big rotary ceiling fan in the Epler Cafeteria kitchen, nothing could live there—not even a microbe. Certainly nothing could exist there without holding its nose."[95] The author, apparently pleased with the above description repeated it in a later paragraph. The article vividly continued, "[t]he floors of the kitchen were wet, slippery and littered with food scraps. Dishes covered with food from the last meal were left standing on the drain board near the dishwashing machine. Filthy saturated wooden tables were absorbing the moisture from the latest left-overs."[96]

Although the critic praised the menu for its variety, he added that, "it was not quite so appetizing when we took a knife and scraped from the saturated wooden trays and walls of the ice box the remains of former meal preparations—generations upon generations of them, it appeared to me."[97] Although the critic's use of the phrase, "it appeared to me," clarified for the reader that these words were opinion,[98] the unsanitary, offensive scenario depicted by the reviewer would understandably encourage readers to rely upon his opinion and to lunch elsewhere.

A second *Seattle Sun* article reported that men were working undercover as dishwashers to gain information regarding the restaurant's sanitary conditions.[99] This investigation and reporting of unhealthy conditions served a greater purpose than traditional food critiques. Here the newspaper reported that the "task of

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[93] 85 Wash. 503, 148 P. 774 (1915). This case was brought in the early part of the century, when sanitary conditions were of great importance due to the lack of advancement in modern culinary arts, refrigeration, air conditioning, etc.

[94] *Id.* at 775-76. The *Seattle Sun* was then being published by the defendant.

[95] *Id.* at 776.

[96] *Id.*

[97] *Id.* The novel idea of searching for food remaining on wooden trays should certainly increase the modern restaurant-goer's appreciation for the development of plastic trays.

[98] *See supra* notes 47-66 and accompanying text (discussing fact versus opinion).

[99] *Sun Publishing*, 148 P. at 776.

bringing all local restaurants up to a general high average of cleanliness is making the *Sun* some enemies among proprietors and managers. . . . The sensible restaurant proprietor who has been criticized will devote all his energies to immediately putting his kitchen in a condition above reproach. . . ."[100] The follow-up piece, printed August 4, 1913, recognized the "[o]bjections . . . made by Mr. Wilson, one of the proprietors, and by others who are friends of the management."[101] The article discussed a tour Wilson gave to show its patrons the kitchen's satisfactory condition. The newspaper urged that "[t]here is not the slightest desire upon the part of the *Sun* to misrepresent the conditions in Epler's or in any other eating place. . . . The men sent out by the *Sun* to investigate . . . do not in any way alter their report, however. They were absolutely unbiased. . . ."[102] The third and final article, appearing in the August 5, 1913 *Sun*, began: "The same afternoon last week on which I visited the Epler Cafeteria I made a trip also through the kitchens of [other restaurants]. These were all cleaner than the Epler kitchen."[103] The reviewer then continued to praise the cleanliness of the other establishments.

Plaintiffs sought recovery of $25,000. The jury found for plaintiffs at trial, awarding $7,500 in damages; however, the verdict was reversed on appeal. The remarks in these articles were found to be libel *per se*,[104] and the plaintiff was unable to prove special damages. The *Sun* prevailed, even though courts in 1915 recognized neither the qualified privilege, actual malice standard[105] nor private plaintiff/public figure plaintiff distinction.

In *Cherry v. Des Moines Leader*,[106] a case not involving restaurants, the court found that a facetious, critical review of a singing trio qualified as privileged commentary.[107] The case contains language foreshadowing the public figure category[108] created

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100 *Sun Publishing*, 148 P. at 776-77. *Id.*

101 *Id.* at 776.

102 *Id.* In addition to Epler's, the *Sun* investigated other restaurants which reportedly had unsanitary conditions.

103 *Id.* at 777.

104 The court uses the phrase libel *per se*; however, libel *per quod* was the term used at common law to describe a statement not defamatory on its face, but for which, upon proof via innuendo and special damages, recovery for libel would be granted.

105 The actual malice standard was applied during criminal cases only during this time period.

106 114 Iowa 298, 86 N.W. 323 (1901).

107 *Id.* at 323. The court determined that the privilege applied because the article concerned a public performance.

108 *Id.* The court noted that "the editor of a newspaper has the right to freely criticise any and every kind of public performance, provided that in doing so he is not actuated by malice." *Id.* *See supra* notes 35-41 and accompanying text.

more than seventy years later in *Gertz*.[109] The applicable Iowa libel statute required a showing of actual malice for recovery. The court recognized that "[t]he public should be informed as to the character of the entertainment, and, in the absence of proof of actual malice, the publication should be held privileged."[110] Finally, the court affirmed the verdict for the defendant publisher, stating: "Viewing the evidence in light of the rules . . . and remembering that the trial court had the plaintiff before it and saw her repeat some of the performances given by her on stage, we are of the opinion that there was no error in directing a verdict for the defendants."[111] In this case, the Cherry Sisters would have been better off not having exhibited their talents to the jury.

In *All Diet Foods Distributors, Inc. v. Time, Inc.*,[112] the first post-*New York Times v. Sullivan* restaurant review libel action, plaintiff's health food restaurant was mentioned in an article entitled "Food, Fads and Frauds." It was described as "display[ing] exotic foods favored by faddists [and prices that] reflect the high cost of health-food diets."[113] The plaintiff argued that the article's title implied "that [his] business is one founded on fraud."[114] The plaintiff further argued that another line in the article implied that the plaintiff's "products were outright frauds cynically promoted to line the pockets of unscrupulous quacks."[115] Ironically, it seems that the plaintiff's own descriptive interpretation is arguably more defamatory than the comments in the defendant's article. The court dismissed the plaintiff's complaint for its failure to meet the *New York Times* actual malice standard—signifying the paramount public interest in preserving the publication of such articles.

Twenty-Five East 40th Street Restaurant Corp. v. Forbes, Inc.,[116] also fell within the emerging pattern. There again, a restaurant

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[109] 418 U.S. 323 (1974). In *Cherry*, the court held that "if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public . . . . [and a] public performance may be discussed with the fullest freedom, and may be subject to hostile criticism. . . ." *Cherry*, 86 N.W. at 325. In *Gertz*, the Supreme Court observed that "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. . . . [T]hey invite attention and comment." *Gertz*, 418 U.S. at 345.

[110] *Cherry*, 86 N.W. at 325.

[111] *Id.* The jury obviously agreed with the critic's opinion after observing a sample of the reviewed performance in the courtroom. Recall that truth is a defense in defamation actions. *See supra* note 11.

[112] 56 Misc. 2d 821, 290 N.Y.S.2d 445 (1967).

[113] *Id.* at 822, 290 N.Y.S.2d at 446.

[114] *Id.*

[115] *Id.* at 823, 290 N.Y.S.2d at 447.

[116] 37 A.D.2d 546, 322 N.Y.S.2d 408 (1971), *aff'd* 30 N.Y.2d 595, 331 N.Y.S.2d 29 (1972).

sued a magazine for an allegedly libelous review. The trial court denied the defendant's motion for summary judgment, but the Appellate Division reversed, recognizing the societal value of the review in the absence of fraud and deceit.[117] The New York Court of Appeals affirmed the judgment for the publisher. Although the reported decision did not detail the objectionable review, the court held that the review of the restaurant, motivated by a desire to protect the public through "the disclosure of a highly important matter affecting the public interest" [was] "privileged under the first amendment" and did not warrant recovery for libel in the absence of a showing of actual malice.[118]

In *Steak Bit of Westbury, Inc. v. Newsday, Inc.*,[119] a case litigated at approximately the same time as *Twenty-Five East 40th Street Restaurant Corp.*, the trial court smugly began its opinion with a question: "The fact that a featured newspaper article likely will never be in the running for the Pulitzer Prize, nor even be a model for a journalism workshop, is excusable. But, can it blithely knock a public restaurant? And in Yiddish yet?"[120]

In *Steak Bit*, the plaintiff's restaurant, Lollypop Drive-In, received the lowest rating in a survey of take-out restaurants[121] which described plaintiff's food as "mostly all fake food, ground-up *schmutz*."[122] The court provided the following definition, for those unfamiliar with this terminology: " '*Schmutz*' is a word in wide use in Yiddish parlance. . . . In generally accepted pronunciation, the word rhymes with 'puts.' It means 'dirt, filth, smut, mud' . . . [and] it must be noted that 'shmutz' fails to make Leo Rosten's, *The Joys of Yiddish* (1968)."[123] The court stated that "[i]n the case of claimed defamation of a corporation the test is whether the published statement relates to its business so as to affect the confidence of the public and drive away its customers."[124] The court saw the article as a "witty and anecdotal experience . . . the adventurous tale of a latter day band of 'noshing'

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117 *Id.* at 546, 322 N.Y.S.2d at 409.

118 *Id.*

119 70 Misc. 2d 437, 334 N.Y.S.2d 325 (1972).

120 *Id.* at 438, 334 N.Y.S.2d at 325.

121 *Id.* In a humorous and "lightheaded manner," the *Newsday* writer evaluated the food and quality of service at twelve take-out restaurants located along a mile and one-half stretch of Old Country Road in Westbury, New York. Appearing at the center of the article was a table of ratings for "Food Quality" and "Food Quality Adjusted for Other Factors." Plaintiff's restaurant was rated lowest in both tables. *Id.* at 438-39, 334 N.Y.S.2d at 328.

122 *Id.* at 439, 334 N.Y.S.2d at 329.

123 *Id.* at 440, 334 N.Y.S.2d at 330.

124 *Id.* at 438, 334 N.Y.S.2d at 328.

Nader's Raiders."[125]

In *Mashburn v. Collin*,[126] a restaurateur brought a $2,000,000 libel action against a reviewer for humiliation, loss of business and injury to his professional reputation. The Louisiana Court of Appeals found for the plaintiff, declaring that "[t]he fact that Mr. Mashburn ran a restaurant open to the public and advertised his restaurant publicly does not make him a *public* figure."[127] The court, therefore, found it unnecessary to apply the actual malice standard applicable to public figures. On appeal, however, the Louisiana Supreme Court held the plaintiff restaurant to be a public figure, reinstating the trial court judgment for the defendant critic.[128] The decision was based on plaintiff's failure to establish *New York Times* malice; the defendant's review was thus protected under the fair comment privilege.

The review of Maison de Mashburn began, "*T'aint Creole, t'aint Cajun, t'aint French, t'aint country American, t'aint good.*"[129] The critic described the food at this New Orleans restaurant with phrases such as, "*hideous sauces*," "*a travesty of pretentious amateurism*," "*ghastly concoction*," "*horrible multi-flavored rice*," "*trout a la green plague*," "*ugly green sauce*," and "*yellow death on duck.*"[130] The most colorful and least appetizing of the detailed descriptions found in this extensive review vividly depicts "well cooked duck with an ugly sauce that tastes too sweet and thick and makes you want to scrape off the *glop* to eat the plain duck . . . a travesty of taste."[131] Such inhibited criticism could dissuade potential patrons from attending Maison de Mashburn, or at least from ordering the duck.

The court conceded that some of the allegations could be misinterpreted as statements of fact if read alone and out of context, but that: "In the final analysis, when we read the entire piece of criticism to determine how ordinary reasonable persons hearing or reading the statements would be likely to understand them, we find that they would be regarded as expressions of the writer's opinion, and not as statements of fact."[132] This court's recognition of a fair comment privilege protecting such a

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125 *Id.* at 441, 334 N.Y.S.2d at 331.
126 355 So. 2d 879 (La. 1977).
127 Mashburn v. Collin, 341 So. 2d 1236, 1238 (La. Ct. App. 1976), 355 So. 2d 879 (La. 1977).
128 *Mashburn*, 355 So.2d at 879.
129 *Id.* at 887. The review was printed in the critic's June 22, 1974 "Underground Gourmet" column.
130 *Id.* at 887-88.
131 *Id.* at 887.
132 *Id.* at 889. *See also infra* notes 187-190 and accompanying text.

strongly unfavorable restaurant review[133] is an indication of its willingness to apply the fair comment privilege.

Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders[134] adds another dimension to this analysis. In an interview with a staff writer for the *Courier-Journal*, Colonel Harlan Sanders, founder of Kentucky Fried Chicken offered criticism of the new operators of the restaurant chain.[135] The local Kentucky Fried Chicken restaurant sued the Colonel, the newspaper, and the article's author, but the court dismissed the complaint for its failure to state a claim. In the interview, the Colonel made the following allegedly defamatory statements: "that gravy is horrible"; "[t]hey buy tap water [mix it] . . . with flour and starch and end up with pure wallpaper paste"; "they ought not to be able to sell it."[136] The Colonel further commented, "[t]hat new 'crispy recipe is nothing in the world but a damn fried doughball stuck on some chicken.' "[137]

The court dismissed the complaint on two grounds. First, there are over 5000 Kentucky Fried Chicken outlets worldwide, and the article did not specifically refer to the Kentucky Fried Chicken of Bowling Green.[138] Second, the fact that "chicken served by Kentucky Fried Chicken Corp. was not prepared exactly according to Sanders' original recipe was not defamatory."[139]

In *Kuan Sing Enterprises, Inc. v. T. W. Wang, Inc.*,[140] a review published in *The World Journal* mistakenly listed a restaurant as plaintiff's dumpling house. The evaluation was "critical both of the cuisine and the conduct of the waitresses."[141] The critic had, in fact, dined at another dumpling house near the plaintiff's establishment. The newspaper printed an effusive apology and a long retraction along with a picture of the plaintiff's restaurant.

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133 *See* Ihle v. Florida Publishing, 50 Fla. Supp. 47, 5 Media L. Rep. (BNA) 2005, *aff'd*, 6 Med. L. Rep. (BNA) 2081, 392 So. 2d 1375 (1976).

134 563 S.W.2d 8 (Ky. 1978).

135 *Id.*

136 *Id.* at 8-9.

137 *Id.* at 9.

138 *Id.* In order to recover for defamation the comment must be of and concerning an indentified plaintiff. *See supra* note 26 and accompanying text. Recovery has been consistently denied where the defendant allegedly defamed is a member of a large class or group. *See, e.g.*, Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952) (statement implying that all or most of the saleswomen at the store are prostitutes does not defame any particular one of them since the size of the class, 382 saleswomen, is much too large).

139 *Kentucky Fried Chicken*, 563 S.W.2d at 9. The court noted that there is an expectation of variation, and therefore, a statement to that effect is not defamatory.

140 86 A.D.2d 549, 446 N.Y.S.2d 76 (App. Div. 1982).

141 *Id.* at 549, 446 N.Y.S.2d at 77.

The plaintiff was denied recovery because the reporter's mistake was innocent, and not motivated by malice, as demonstrated by the reporter's immediate retraction.[142]

In *Havalunch, Inc. v. Mazza,*[143] the court considered the restaurant a private plaintiff and applied the less stringent standard of negligence, but still found for the defendant. Havalunch did not hold itself out as an establishment of particular quality or interest, and did not solicit published reviews. The court decided that "since Havalunch is a small restaurant in a community with a large number of other restaurants . . . [it] is not of sufficient public concern to warrant it's removal from the normal status of a 'private person.' "[144]

In *Havalunch*, the review was published in a university newspaper. While eating her bacon, lettuce and tomato sandwich, the reviewer's "careful gaze remarked the amblings of one peripatetic roach. The roach did not enhance the overall ambience [of the restaurant, and the writer] departed [from] Havalunch with the opinion that it was not an establishment which she would recommend to a friend."[145]

The review was published in the article, *Good Time Guide Movers, Booze, Food Abound at Night Spots*, which included a review of more than twenty local restaurants. It continued: "Bring a can of Raid if you plan to eat here. And paint your neck red; this place looks like a truck stop. You'll regret everything you eat here, especially the BLT's."[146] The plaintiffs interpreted this critique as alleging "that the overall characterization of Havalunch conveyed the false impression that vermin were pervasive and all food was of poor quality."[147] Even under the negligence standard, the trial jury awarded zero general damages but $15,000 punitive damages, which is clearly an inappropriate remedy absent a showing of actual malice.[148] The court concluded that the reviewer's expression of opinion did not demonstrate actual mal-

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142 *Id.* This use of retraction as an appropriate remedy is evidence of the public figure distinction.

143 294 S.E.2d 70 (W. Va. 1981).

144 *Id.* at 74.

145 *Id.* at 72. It was the reviewer's first visit to Havalunch and the court record indicated that she harbored no ill feeling, ill will, or malice towards that establishemnt. *Id.*

146 *Id.* The author's assignment was to prepare a "tongue-in-cheek, humorous review of Morgantown restaurants." *Id.* The creative wording should be taken in the context of the overall humorous tone of the column.

147 *Id.* at 74. Here, as in some other restaurant review libel cases, plaintiff's interpretation seems to exaggerate the stated opinion of the critic. *See, e.g., infra* notes 165-68 and accompanying text.

148 *Id.* at 73.

ice and this article, when examined in its entirety, embodied a tone of "humor and overstatement which would be obvious to any reasonable reader."[149]

In *Greer v. Columbus Monthly Publishing Corp.*,[150] plaintiff restaurant brought a libel suit based on defendant newspaper's classification of the Aspen Inn as a "high-class fast-food joint,"[151] suffering from "geographic schizophrenia."[152] Plaintiffs objected to the following descriptions of their food: "[s]ome innocent scallops had been immersed in a sauce that tasted of nothing more than bouillon and milk"; "the [s]alad . . . suffers a fate similar to that of the scallops"; and "[a] hunk of veal with a sauce that tastes more Chinese than Italian."[153] The management further opposed the critic's claim that the croutons came from a can and the dressing from a bottle,[154] and that "[a]ll of the seasoning comes from the Lawry's seasoned salt in the juice."[155] The plaintiff was especially upset by the description of the "fish tasting like old ski boots."[156] The court commented, "[o]bviously, that was a hyperbole used to indicate that the reviewer found the fish to be dry and tough and not a statement of fact to be taken literally."[157]

The court's reasoning in finding for the defendant publisher may serve as an appropriate analysis for all restaurateurs to ponder before commencing a defamation action: "The fact that the reviewer's opinion is not shared by the owners of a restaurant or by its regular diners does not make the article actionable."[158]

In *Golden v. Elmira Star Gazette*,[159] a defamation action was

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149 *Havalunch*, 294 S.E.2d at 76. The author contended that because her conclusive opinion was stated in humorous terms, it did not detract from the legitimacy of her overall review that Havalunch was a poor place to eat. The court agreed with her that "opinion does not suddenly become defamatory because it is expressed with either humor or a touch of style." *Id.* at 75.

150 4 Ohio App. 3d 235, 448 N.E.2d 157 (1982).

151 *Id.* at 159. "High-class fast-food joints" were described as restaurants where "[f]or a substantial cash outlay, you get a ritzy decor, something to eat and waiters who aren't surly . . . a thinly disguised effort to milk you for every penny of profit . . . by cut[ting] corners on the preparation of the food." *Id.*

152 *Id.* This term implies that "the menu and the decor are a couple of thousand miles apart." *Id.*

153 *Id.*

154 *Id.* at 161. Plaintiffs claimed that describing the croutons as canned and the dressing as bottled indicated "a lack of class as well as use of cost-savings measures. [However, the] testimony supported the fact that the croutons did come from a can and most of the dressing served came from a bottle." *Id.*

155 *Id.* at 159. Although the night manager "specifically stated that Lawry's Seasoned Salt was not used [he] was unable to explain a substantial purchase order by the Aspen Inn of Lawry's seasoned salt." *Id.* at 161.

156 *Id.* at 161.

157 *Id.*

158 *Id.*

159 9 Media L. Rep. (BNA) 1183 (N.Y. Sup. Ct. 1983).

brought against defendant's newspaper because of an article published in its *Dining Out* column. The critic described the restaurant's lettuce as "yellowed," the duck as "awash with grease,"[160] the pork as "tough and fibrous," and the pie as having an "inedible crust."[161]

The court entered judgment for the defendant, recognizing that "the average reader would certainly understand it as the opinion of the writer."[162] Although a statement such as the "tomato sauce had a high acid content"[163] seems like a factual assertion, "when read in the context of the entire article, these comments also formed a part of the writer's apparent purpose to state an opinion."[164]

In *Pritsker v. Brudnoy*,[165] the plaintiff restaurant sued defendant reviewer and radio talkshow host for his comments during a radio call-in show discussing local Boston restaurants. Brudnoy said: "The food is fine, the people who run it are Pigs."[166] The plaintiff asserted that this statement implied that "the Pritskers and their restaurant were unhygienic and unsanitary and were infested with cockroaches or other vermin."[167] The court rejected this contention because a critic would not classify the food as "fine" or "superb" if prepared in unsanitary conditions.[168]

Here, as in *Havalunch* and *All Diet Foods Distributors, Inc.*, the plaintiff's interpretation of the allegedly defamatory remarks was colored with unfavorable descriptive adjectives.[169] The court clearly recognized the commentary regarding the restaurant owners as an opinion because "[w]hat may be 'unconscionably rude and vulgar' and suggestive of 'pigs', to one person may be only mildly offensive to a second, merely not to the taste of a third, or even pleasing to a fourth."[170] Once again, the fair comment privilege for opinion resulted in a victory for the critic.

The plaintiffs in *Ocean State Seafood, Inc. v. Capital Newspa-*

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160 *Id.* at 1184.

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* "The court concludes that the article, taken as a whole, would reasonably be understood by readers as an expression of opinion which is constitutionally protected and immune from tort liability." *Id.*

165 389 Mass. 776, 452 N.E.2d 227 (1983).

166 *Id.* at 228. Defendant never formally met the plaintiffs but knew them by name. *Id.* at 228 n.4.

167 *Id.* at 230 n.8.

168 *Id.*

169 Perhaps the plaintiffs' felt that such adjectives enhanced their chance of recovery.

170 *Pritsker*, 452 N.E.2d at 230-31.

per[171] sued based on an inaccurate factual assertion, and the court denied the defendant's summary judgment motion. The article[172] began: "This is a story about greed and sickness on the half shell."[173] The article discussed bushels of contaminated clams, two[174] of which were allegedly found at plaintiff's establishment without identification tags,[175] and reported that "plaintiffs were fined $25 as a 'civil compromise' in a Bethlehem Town Justice Court."[176]

Ocean State Seafood was fined for the lack of proper labelling on the bushels, and argued that the article "suggest[ed] more serious misconduct."[177] The court found a litigable issue here, and said that "the issue of whether that charge [alleging that plaintiff was greedy] is a constitutionally protected expression of opinion cannot be disposed of without a trial."[178]

In a recent case, the owners of Mr. Chow restaurant[179] brought a libel action against a French publisher, Ste. Jour Azur S.A.,[180] for an allegely defamatory review of Mr. Chow, printed in the April 1981 edition of the *Gault/Millau Guide to New York*. The review, translated[181] from French to English, discussed the poor service by the Italian waiters, who were primarily concerned with the sale of alcohol rather than food. It depicted the clientele as "beautiful people" who were at the restaurant to be seen rather than to eat.[182] The critic described his meal in a less than favorable manner.

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171 112 A.D.2d 662, 492 N.Y.S.2d 175 (Sup. Ct. 1985).

172 This article, although not a review, is included because it presents a similar fact pattern to the cases discussed in this Note. A study of *Ocean State Seafood* illustrates the difference between the constitutional privilege as applied to opinion and to factual statements.

173 *Ocean State Seafood*, 112 A.D.2d at 663, 492 N.Y.S.2d at 176.

174 There were ten contaminated bushels all together. *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 666, 492 N.Y.S.2d at 179.

178 *Id.* at 665, 492 N.Y.S.2d at 178. The fact/opinion distinction is often not clear cut. In cases like those involving libel of a critique, for example, the court recognizes the communication as opinion and, thus, privileged. Therefore, courts often grant summary judgment in favor of defendant reviewer as a matter of law, a remedy seen as inappropriate for the question of fact before this court.

179 Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985). Mr. Chow is a well-known New York City Chinese restaurant.

180 Because Ste. Jour Azur S.A. is a French corporation, this case was brought in United States District Court, with jurisdiction based on diversity of citizenship as well as damages claimed in excess of $10,000. *Id.* at 222.

181 Dr. Lawrence Joseph, a professor of language and literature at Smith College, testified as an expert witness to translate the review. He paid special attention to the comment regarding the green peppers, which, for some reason, was especially difficult to translate. *Id.* at 222.

182 *Id.* at 221-22.

> [T]he dishes on the menu (very short) have only the slightest relationship to the essential spirit of Chinese cuisine. With their heavy and greasy dough, the dumplings, on our visit, resembled bad Italian ravioli, the steamed meatballs had a disturbingly gamy taste, the sweet and sour pork contained more dough (badly cooked) than meat, and the green peppers which accompanied it remained still frozen on the plate. The chicken with chili was rubbery and the rice, soaking, for some reason, in oil, totally insipid. . . . [T]he Peking laquered duck (although ordered in advance) was made up of only one dish (instead of the three traditional ones),[183] composed of pancakes the size of a saucer and the thickness of a finger.[184]

The *Mr. Chow* court explicitly followed the standards espoused in *Ollman v. Evans*.[185] In studying the immediate and broader context in which the statement occurred,[186] it looked to *Myers v. Boston Magazine Co.*,[187] where a sportscaster brought a libel action against a magazine for claiming that he was "the only newscaster in town who is enrolled in a course for remedial speaking."[188] Although this seems libelous, since the plaintiff was named worst sports announcer in the magazine's annual "Best and Worst" survey,[189] such statements are protected by the first amendment if reasonable readers would recognize the column as the writer's opinion, similar to those opinions expressed in film critiques or restaurant reviews.[190]

Mr. Chow turns on the statement regarding the serving of Peking Duck,[191] the only statement the court found to be factual.[192] Mr. Chow's had difficulty proving damages since it could not link revenue lost directly to the Peking Duck comment.[193] There was no showing of actual malice by the reviewer, even though he was mistaken as to the proper number of dishes traditionally served with

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183 The comment regarding the Peking Duck remained the only factual statement considered by the Court of Appeals.

184 *Id.* at 221-22. Evidence included a video tape recording of the chefs at Mr. Chow preparing sweet and sour pork, green peppers and fried rice. The chef provided a live demonstration in court of his preparation of Chinese pancakes. *Id.* at 222.

185 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see supra* notes 49-54 and accompanying text.

186 *Mr. Chow*, 759 F.2d at 227.

187 380 Mass. 336, 403 N.E.2d 376 (1980).

188 *Id.*

189 *Id.*

190 *Mr. Chow*, 759 F.2d at 227.

191 He said Peking Duck was served in one instead of three dishes. *See supra* note 181 and accompanying text.

192 *Mr. Chow*, 759 F.2d at 229. Even if this fact is proven false, plaintiff, as a public figure, would have to show "actual malice" in order to recover here. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

193 *Mr. Chow*, 759 F.2d at 229 n.10.

Peking Duck.[194] The circuit court reversed the trial court's award of $20,000 compensatory and $5 punitive damages to Mr. Chow, and entered judgment for defendant restaurant guide. Although the court said the Peking Duck comment was factual and not privileged, the public figure plaintiff failed to prove actual malice or damages and thus, could not prevail.

In *Terillo v. New York Newsday*,[195] the court's opinion began with a quotation by Mark Twain.[196] Here, the reviewer from defendant *Newsday* described plaintiff's cassoulet as "clunky Tuscan stew,"[197] and incorrectly listed the ingredients of the cassoulet served at Plaintiff's restaurant. When notified of the error, *Newsday* published the following addendum:

> In a March 4th column, Molly O'Neill described the cassoulet at Le Cafe de la Gare as having lamb, pork and sweet and hot Italian sausage baked under a Parmesan cheese crust. Maryann Terillo, the chef and owner of the restaurant on Perry St., said her cassoulet does not contain lamb, sweet and hot Italian sausages or parmesan cheese. It does contain duck confet and garlic sausage, she said.[198]

Plaintiff considered this an inappropriate retraction, and subsequently filed suit. The court found the ingredient list a "factual statement not constitutionally protected in the manner of statements of opinion."[199]

This case represented a departure[200] from those previously discussed, since the plaintiff established liability, yet the defendant prevailed because the plaintiff could not produce documentation proving actual injury.[201] As *Terillo* demonstrates, even where the defendant behaved in a malicious or irresponsible manner, the fail-

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194 *Id.* at 230 (discussing the proper number of dishes in Peking Duck). Considering the confusion among the parties over the traditional Peking Duck dish(es), it is doubtful that this fact alone can constitute knowing or reckless falsity worthy of damages.

195 137 Misc. 2d 65, 519 N.Y.S.2d 914 (Civ. Ct. 1987).

196 "The difference between the right word and the nearly right word can be the difference between the lightning and the lightning bug." *Id.* at 65-66, 519 N.Y.S.2d at 914.

197 *Id.* at 67, 519 N.Y.S.2d at 916. Plaintiff, however, did not regard this comment as libelous. *Id.*

198 *Id.* at 66, 519 N.Y.S.2d at 915.

199 *Id.*

200 N.Y.L.J., Oct. 16, 1987, at 30. As a lower court decision, it was not inconsistent with other lower court libel cases involving restaurants. *See, e.g.*, Kuan Sing Enterprises, Inc. v. T.W. Wang, Inc., 86 A.D.2d 549, 446 N.Y.S.2d 76 (1st Dept. 1982).

201 The plaintiff's only assertion of damages was "the alleged disappearance of a 'Mr. Chen,' a regular customer." The court concluded this was insufficient proof of injury and granted the defendant's motion to dismiss. *Terillo*, 137 Misc.2d at 69, 519 N.Y.S.2d at 918.

ure to prove damages linked to a defendant's actions may bar plaintiff's recovery.

V. Analysis of a Hypothetical Review

Courts have consistently denied restaurant proprietors compensation for any damage to their business alledgedly caused by bad reviews. The previous survey presents cases where courts refused to impose liability because of inadequate proof of damages.

In *Kentucky Fried Chicken*, the plaintiff did not prevail because he could not prove that the allegedly defamatory comments referred specifically to his restaurant, which was one of many in a large, nation-wide restaurant franchise. In *Kuan Sing*, where the critic mistakenly discussed the wrong restaurant, the court considered a printed retraction a sufficient remedy. The *Ocean State Seafood* court found a litigable issue where the defendants implied that the plaintiff sold contaminated clams. Although the restaurant review in *Mr. Chow* contained a factual error regarding the traditional number of dishes in Peking Duck, the plaintiffs could not prove actual damage. The *Terillo* court deemed an incorrect ingredient list to be a factual assertion, and found that the newspaper's subsequent retraction was an inadequate remedy, but, as in *Mr. Chow*, the failure to prove injury prevented a financial award despite the showing of actual malice.

The following hypothetical restaurant review will provide an example of an extreme case where a court may grant recovery, since these facts present both malice and damages.

HOME RESTAURANT

> Home Restaurant's only advertisement is the "Dine at Home" slogan engraved on its matchbooks. Despite this lack of promotion and its location in the most desolate area in town, young people have been waiting patiently, sometimes for up to two hours, since the grand opening last month. My reputation did not afford my dining companion and me the customary privilege of bypassing the waiting list, as most finer establishments recognize; instead, the owner barked "I'm sorry, but everyone is treated equally at Home."
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> Premised on the oxymoron Nouvelle Homecooking, most mothers would be horrified upon seeing the bite-sized portions and nauseated upon tasting the hors d'oeuvre-like entrees. . . . [T]his ill-prepared cooking lacks quality, quantity and nutritional value . . . the gravy over the chicken was pure mud. . . . [M]y hunch that the spaghetti was actually bottled

> worms was confirmed when I noticed roaches in the rice, wild rice indeed. . . . [E]very morsel of food was soaked in grease and salt . . . they served vinegar as wine . . . for dessert, brick a la mode with chocolate sauce that looked and tasted just like automobile oil. They should serve Alka Seltzer or Maalox rather than after dinner mints. The owners would be best off closing up now rather than infecting anyone else; potential patrons would live longer if they stayed home.

Now assume that immediately following publication of this review on the front page of the town's only newspaper, Home suffered a steep decline in patronage and the management fired the chefs. No competing restaurant opened nearby and no other reason can explain this extreme change. The owners and customers to date considered the chefs' performances outstanding. The restaurateurs maintained a mailing list by requesting that each patron fill out an index card with his or her name, address, description of the meal and other comments or suggestions. No card evidenced a major complaint and nearly every card indicated an intention to return to Home again. Since most of this review is opinion, although it may be argued that some allegations are factual, the owners, as public figures, must establish actual malice in order to recover.

The critic's comment about having to wait for a table begins to show a retaliatory motive. Evidence that the reviewer hastily left the establishment after learning of a two hour wait would surely prove malice. If it was discovered that the critic actually ate turkey, not chicken with gravy (Home's chicken is only served with barbecue sauce) a retraction may suffice to correct this factual error. Assume instead that an examination of that evening's menu discloses that neither spaghetti nor rice were served, the allegation that these dishes were contaminated with roaches and worms would probably establish actual malice as well.

Provided that the Home owners have proven malice, no recovery would be granted unless they can document damages. These facts present the possibility of clearly proving injury by questioning the patrons on the mailing list as to why they are not going back to dine at Home. Retractions are often appropriate remedies for an inadvertent error. However, the author of this review exhibits the very behavior to which the malice exception to the fair comment privilege is addressed. Awarding damages to the owners would produce a fair and just outcome on these facts.

The difficulty of establishing injury may prevent a restaurant's recovery even in true libel cases where defamation can be estab-

lished.[202] Since only actual damages are recoverable in defamation actions, those damages proven and recoverable will often be inadequate considering the speculative nature of the damages a restaurant may suffer. Restaurants should protect themselves by enhancing their ability to produce evidence of damages suffered if a defamation case arises. Rather than turning to the courts, restaurants receiving unfavorable reviews may mitigate their damages by choosing other alternatives. "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[203]

The *Terillo* court suggests some possible methods for a restaurateur to show damages stemming from a defamatory review, but notes that "records or competent proof as to past business either of Mr. Chen, or any other customer, or an accountant's testimony as to decline in business income or profits is insufficient to prove damages."[204] Computerized bookkeeping, cash registers and credit card receipts can easily document any change in revenue. An accurate recordkeeping by those restaurants without modern technological advances can also establish damages.

Seeking retractions or corrections by the reviewer, inviting the critic to return to the restaurant for another meal, perhaps publicizing any changes the restaurant makes whether or not in response to the review, or informing their patrons of the positive reviews they receive can provide a substantial boost in patronage and decrease the impact of the defamatory review. The extreme burden of the restaurant, public figure status coupled with the fair comment privilege for opinion and the difficulty of proving damages make recovery nearly impossible; choosing a more positive retaliation can help a restaurant regain popularity since litigation costs and bad publicity surrounding the battle would probably outweigh the benefits of a favorable verdict.

VI. Conclusion

Restaurant reviews convey one critic's personal experience and observations at a given establishment. This information often provides guidance to individuals who choose to rely on or consider the offered opinion. An individual critic's reputation determines the extent to which the public relies on their restau-

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202 *See, e.g., id.* at 66, 519 N.Y.S.2d at 915.
203 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).
204 *Terillo*, 137 Misc.2d at 69-70, 519 N.Y.S.2d at 918.

rant reviews. Since a prominent critic's words can have a devastating effect on the public perception of a restaurant, an abuse of this power in the form of assertions known to be false or those made in reckless disregard of the truth will lead to liability, when damages can be shown.

A restaurant review, like most critiques, falls into the protected speech category of opinion. Due to the public interest in disseminating these reviews, courts have established strict standards in order to preserve free commentary and expression of opinion. Therefore, in order to prevail in a libel action, restaurateurs have to penetrate the constitutional privilege afforded to reviewers by proving that the critic was motivated by an improper or malicious purpose.

A restaurant, as a public figure, must meet the elevated actual malice standard as described by *New York Times v. Sullivan* and its progeny, and prove substantial damages to achieve a victory despite the qualified privilege. The difficulty of establishing damages and causation provide the greatest obstacles for a restaurant's recovery. The variety of potential reasons which may contribute to a decline in restaurant patronage adds to the burden of proving that any damages suffered occurred as a result of the allegedly defamatory statements.

Restaurants may actually benefit from avoiding legal action, which imposes a financial burden and focuses more attention on an unfavorable review through the media coverage of the court battle. Additionally, restaurateurs rarely, if ever, prevail in this area of law. A restaurant should only turn to the courts in situations where malicious intent can be shown, rather than in cases of unfavorable reviews. As long as critics are expressing opinion, rather than fact, are reviewing a restaurant's cuisine, and not acting with reckless disregard for the truth, they will be free from tort liability for defamation, regardless of the outrageousness[205] of their opinions. Instead of considering a judicial remedy, restaurateurs and chefs should do their best to take unfavorable restaurant critiques with a grain of salt.

Amy G. Borress

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[205] In Hustler Magazine v. Falwell, 485 U.S. 46 (1988), a recent case following *New York Times v. Sullivan*, the Supreme Court unanimously overturned a jury verdict awarding $200,000 for intentional infliction of emotional distress flowing from an outrageous, but not libelous, cartoon printed in *Hustler*. " 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.* at 882.