HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

JOHN FAIRFAX PUBLICATIONS PTY LTD
& ANOR APPELLANTS

AND

ALEKSANDRA GACIC & ORS RESPONDENTS

John Fairfax Publications Pty Ltd v Gacic
[2007] HCA 28
14 June 2007
S480/2006

ORDER

1. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 30 June 2006 and in their place make the following orders:*

   "1. Appeal allowed with costs.

   2. Set aside the orders of Bell J made on 2 June 2005 and in their place order that:

      (a) verdicts be entered that the matter complained of by the appellants carries each of the imputations identified as imputations (a) and (c) and that imputations (a) and (c) are defamatory;

      (b) a verdict be entered for the respondents in relation to imputation (b); and

      (c) the issues of whether the matter complained of carries the imputation identified as imputation (d) and whether that imputation is defamatory be remitted for determination by a jury in accordance with s 7A of the Defamation Act *1974 (NSW).*

3. *The appellants to have a certificate under the* Suitors Fund Act *1951 (NSW) if so entitled.*

4. *Order that the appellants pay 25 per cent of the respondents' costs of the trial before Bell J and a jury, the respondents pay 50 per cent of the costs of the appellants of that trial, and that the balance of the costs of that trial abide the outcome of the further trial pursuant to s 7A of the* Defamation Act *1974 (NSW)."*

2. *Otherwise, appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

T D Blackburn SC with D R Sibtain for the appellants (instructed by Freehills)

G O'L Reynolds SC with C A Evatt and P Kulevski for the respondents (instructed by Beazley Singleton Lawyers)

CATCHWORDS

John Fairfax Publications Pty Ltd v Gacic

Defamation – Statutes – Interpretation of *Supreme Court Act* 1970 (NSW) ("Supreme Court Act") – Section 108(3) – Defamation action – Appeal challenging findings of a jury made under s 7A(3) of the *Defamation Act* 1974 (NSW) ("Defamation Act") on specific issues put to the jury – Powers of an appeal court to direct a verdict for the plaintiff on such issues in the event of a successful appeal.

Statutes – Interpretation – "May" – Appeal challenging findings of a jury on specific issues in defamation proceedings – Whether Supreme Court Act, s 108(3) confers a power, with a duty to exercise that power once the relevant entitlement to a verdict on any issue in the proceedings is established as a matter of law.

Statutes – Interpretation – Supreme Court Act, s 108(3) – Defamation Act, s 7A – Defamation action – Jury found that there were imputations conveyed but that those imputations were not defamatory – Role of the jury in defamation proceedings – Whether the Court of Appeal must order a new trial where it holds that a jury's answers to issues put to the jury in defamation proceedings are unreasonable.

Defamation – Business defamation – Nature of the test for defamation where a plaintiff alleges damage to business reputation – Procedure in jury trials in New South Wales – Application of Defamation Act, s 108(3).

Words and phrases – "any cause of action, issue or claim for relief", "may", "direct a verdict and give judgment accordingly", "as a matter of law", "entitled to a verdict", "business defamation".

Supreme Court Act 1970 (NSW), ss 75A, 85, 86, 90, 102, 107, 108.
Defamation Act 1974 (NSW), ss 7A, 9, 46, 46A.

1 GLEESON CJ AND CRENNAN J. The issue in this appeal concerns the power given to the New South Wales Court of Appeal by s 108(3) of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"), and the exercise of that power at a certain stage of an action being heard pursuant to the *Defamation Act* 1974 (NSW) ("the Defamation Act")[1].

2 The facts are set out in the reasons for judgment of Callinan and Heydon JJ. The case concerns that form of defamation which involves injury to business reputation, that is, the publication of imputations that have a tendency to injure a person in his or her business, trade, or profession. That the law of defamation affords such protection is not surprising. Suppose someone says: "X is a thoroughly decent person, but he is showing signs of age; his eyesight is poor, and his hands tremble". That would not be a reflection on X's character. It would be likely to evoke sympathy rather than hatred, ridicule or contempt. If, however, X were a surgeon, the statement could be damaging. To say that someone is a good person, but a dangerously incompetent surgeon, is clearly likely to injure the person's professional reputation. That is an established form of defamation, and it was not called in question by the parties to the present appeal.

3 Pursuant to s 7A of the Defamation Act, proceedings were held before Bell J and a jury, at which the jury was required to decide whether certain matter published by the first appellant about a business carried on by the respondents carried all or any of four specified imputations and, if so, whether the imputation or imputations was or were defamatory (s 7A(3)). The alleged imputations were said to have been contained in a critical review of a restaurant Coco Roco, which was owned by the respondents. Those with which the appeal to this Court is concerned were as follows :

> (a) The respondent sells unpalatable food at Coco Roco
>
> ...
>
> (c) The respondent provides some bad service at Coco Roco.

4 Each respondent sued on those imputations, and on two others which are not the subject of this appeal. One of the other imputations, identified as (d), was the subject of consideration by the Court of Appeal, but we are not asked to decide the issue in respect of that imputation that was before the Court of Appeal, and we have not heard argument on the point.

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1 The Defamation Act was repealed by the *Defamation Act* 2005 (NSW) but continues to apply because of the date when the causes of action accrued.

5 In relation to each of (a) and (c), the jury found that the imputation was conveyed by the article published by the first appellant, but that the imputation was not defamatory.

6 The respondents appealed to the Court of Appeal on two presently relevant grounds, both of which were upheld. One ground was that the jury had been misled by the way in which counsel had addressed on the subject of defamatory meaning, and that the trial judge's directions were inadequate to correct what had been put in address. The other ground was that the jury's answers to the second of the questions posed in respect of (a) and (c) were unreasonable. It is not necessary to go into the detail of the first ground. In brief, the Court of Appeal held that the combined effect of counsel's address and the trial judge's directions was to mis-state the nature of business defamation, and to leave the jury with the impression that, if the matter published would not lower the respondents in the estimation of right thinking members of the community, then the respondents were not defamed. To relate the point to the example given above, it was not made clear to the jury that it could be defamatory to say that X, a surgeon, although a good man, had deteriorated physically, even though that would not reflect badly on his character or his personal conduct. To say that a restaurant sells unpalatable food or provides bad service does not necessarily reflect badly on the owners personally. They might be worthy people who are themselves victims of circumstances, or incompetent staff. However, it has a tendency to damage their business reputation. That point, the Court of Appeal held, was not conveyed, or not conveyed with sufficient clarity, to the jury. The Court of Appeal went further, and upheld the second ground as well. Beazley JA, with whom Handley and Ipp JJA agreed, held that, having found that imputations (a) and (c) were conveyed, no reasonable jury, properly directed, could have given any answer other than that the imputations were defamatory. In that respect, it was noted that the case for the respondents was confined to a case of business defamation.

7 The s 7A proceedings were being conducted in advance of any consideration of whatever defences the appellants would raise. No defence has yet been filed.

8 In this Court, the appellants challenged the Court of Appeal's conclusion that no reasonable jury, properly instructed, could find that imputations (a) and (c) were not defamatory. As to that, Beazley JA said:

> "The appellants had recently opened their restaurant at King Street Wharf. The appellants had promoted the restaurant in terms: '*A new level of dining comes to Sydney's King Street Wharf*'. The restaurant had been fitted out expensively and had extensive views of Darling Harbour. The style and price of the food was, as it appears from the article, intended to indicate that this was a high class restaurant. As I have indicated, the

location at Darling Harbour was itself prestigious in a city which is sophisticated and cosmopolitan.

The food served in any restaurant is its essential business. If the food is '*unpalatable*' the restaurant fails on the very matter that is the essence of its existence. This is especially so of a purportedly high class restaurant. To say of a restaurateur of such an establishment that they sold '*unpalatable*' food injures that person in their business or calling and because of that, is defamatory. In my opinion, no reasonable jury properly directed could reach any other verdict.

Service is also an integral part of the experience of dining. Good service is expected at a high class restaurant. It is part of what the patron pays for. It is almost trite to say that poor service, even occasional poor service within the one dining experience, will not be tolerated by patrons of an expensive '*swank*' restaurant. To say, therefore, that the appellants provided '*some bad service*' at Coco Roco, even though the damnation was not total, would injure a person in their business or calling as a restaurateur and was likewise defamatory. No reasonable jury properly directed could reach any other verdict."

9 This reasoning appears to us to be correct. It was argued for the appellants that an ordinary reasonable reader might take the article in question as a criticism of the chef, not the owners of the restaurant, and, further, that a condemnation of some food or some service would not necessarily reflect on the reputation of the restaurateurs as traders. These arguments are unpersuasive, and to some extent reflect the approach that led the Court of Appeal to uphold the first of the grounds of appeal to it.

10 The principal complaint of the appellant was directed to the course taken by the Court of Appeal after it had arrived at the conclusions stated above. The Court of Appeal gave effect to its conclusion that no reasonable jury, having found that imputations (a) and (c) were conveyed, could reasonably fail to conclude that they were defamatory, by exercising the power under s 108(3) of the Supreme Court Act to enter what were in effect special verdicts in favour of the respondents on the s 7A issues in relation to (a) and (c). As Gummow and Hayne JJ have pointed out, it was accepted in argument by counsel for the respondents that the precise orders made by the Court of Appeal in that respect require some amendment, but the substance of what was intended is clear. According to the appellants, the Court of Appeal did not have the power to do that, or, alternatively, if the power existed, it should not have been exercised.

11 The Court of Appeal was right to hold that the power existed. The issue is not whether a trial judge in a defamation case has the power to direct a verdict for the plaintiff. The issue concerns the power conferred on the Court of Appeal by

s 108(3); a provision that should be construed amply so as to permit the Court of Appeal to respond to the requirements of justice in the variety of circumstances to which it might apply. In the circumstances of a s 7A proceeding, the concept of a plaintiff, as a matter of law, being entitled to a verdict on any issue in the proceedings is sufficiently flexible to cover a case where it appears to the Court of Appeal that, upon the evidence, no reasonable jury could fail to answer a question favourably to the plaintiff. Section 108 is concerned with appellate power, and s 108(3) is to be understood in the context of the full range of issues that might come before an appellate court. The issues determined by the jury in the present case were such that, according to the appellants, a Court of Appeal could never say that a plaintiff was, as a matter of law, entitled to a verdict. On the appellants' argument, an unreasonable jury verdict, or even a succession of unreasonable jury verdicts, could never be corrected by a Court of Appeal, but could only be set aside or, perhaps, ultimately accepted in the interests of finality. (We use "unreasonable" in the sense earlier explained). So to construe s 108 would be to import an unnecessary limitation upon the Court of Appeal's capacity to do justice between the parties.

12 It was assumed in argument, at least on the appellants' side, that the Court of Appeal, having concluded that the respondents were, as a matter of law, entitled to a verdict on the issues determined by the jury, nevertheless had a discretion as to whether to enter a verdict itself or simply order a new trial by a jury. It seems paradoxical that a Court of Appeal, having decided that a plaintiff is *entitled* as a matter of law to a verdict, might then choose not to give effect to that legal entitlement. Again, the statutory provision must be understood in the light of the wide range of possible circumstances in which it might apply. As is illustrated by the case of *Charlwood Industries Pty Ltd v Brent*[2], and as was pointed out by Hunt AJA in *Harvey v John Fairfax Publications Pty Ltd*[3], there may be cases where, in s 7A proceedings, the question whether matter conveys a certain imputation and the question whether that imputation is defamatory are so bound up that an unreasonable answer to the second casts doubt on the answer to the first. There may be other circumstances in which the legally correct response to an appellate finding that a jury's verdict was unreasonable is to order a new trial. The statutory power given by s 108(3) involves a compound concept. The proposition that a party is entitled as a matter of law to a verdict on an issue, and the proposition that the Court of Appeal should direct such a verdict, are not, in a case such as the present, separate and distinct. The one is the reflex of the other. Section 108(3) confers power to direct a verdict, which is an alternative to ordering a new trial. The hypothesis is that error justifying appellate intervention

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2 [2002] NSWCA 201.

3 [2005] NSWCA 255 at [104].

has been shown. The Court of Appeal, in deciding whether, upon the evidence, a party is, as a matter of law, entitled to a verdict on a s 7A issue, will have considered the competing possibility, which is that, in the circumstances of the case, there are questions that must be resolved by a jury. If, for example, the answer given by the jury to one question throws doubt on the answer given to another, and both answers are for that reason set aside, then it may not appear that upon the evidence one party is, as a matter of law, entitled to a verdict, and a new trial may be necessary.

13 Here, there was no reason to suppose that the jury's answers reflected a compromise. There was every reason to suppose that the jury, having found that the imputations were conveyed, decided they were not defamatory because of a misunderstanding of what was meant by defamatory. It was, after all, what was found to be an inadequate direction on that topic that was the ground for appellate intervention in the first place. The s 7A procedure seems apt to give rise to that kind of jury error. It may be difficult for jurors to appreciate that, in defamation practice, a decision that a publication is defamatory is not the end of the debate about liability; that often it is just the beginning. The word defamation, like negligence, is ambiguous. It may refer to a tort, or to an element of a tort. Notwithstanding the directions they are given, there may well be jurors who think that a decision that a publication conveys a defamatory imputation is tantamount to a decision that the defendant has committed an actionable wrong. There was nothing in the circumstances of the case that required a jury to revisit the first question, that is, the question that was answered favourably to the respondents. The Court of Appeal was itself in a position to answer the second question without doing any injustice to either party. The evidence was bare and undisputed. There were not, as was argued, "community standards", bearing upon the question whether to say that a restaurant has unpalatable food and bad service has a tendency to injure the proprietors in their business, of such a kind as to require the evaluation of a jury. The decision of the Court of Appeal was correct.

14 Subject to the alteration of the form of the orders made by the Court of Appeal referred to in the reasons of Gummow and Hayne JJ, the appeal should be dismissed with costs.

15 GUMMOW AND HAYNE JJ. In the issue dated 30 September 2003 of the *Good Living* supplement or "lift out" to the *Sydney Morning Herald*, published by the first appellant, there appeared an article under the name of the second appellant on a page headed "Good Eating". The article was a review of the experiences of the writer at the restaurant "Coco Roco" which he introduced as "the swank new eatery at King Street Wharf". The three respondents are the persons who apparently were proprietors of the business conducting the restaurant. They sued in the Supreme Court of New South Wales not only for defamation, but also for malicious falsehood. An amended statement of claim was filed on 8 November 2004 pursuant to an order of Nicholas J made on 26 October 2004. No defence has been filed.

16 The litigation giving rise to the appeal to this Court concerns only the claim in defamation and the four imputations that were pleaded, each as a cause of action in accordance with s 9 of the *Defamation Act* 1974 (NSW) ("the 1974 Act"). The imputations were that at "Coco Roco" unpalatable food was sold (imputation (a)), excessive prices charged (imputation (b)), some bad service provided (imputation (c)), and a chef was employed who made poor quality food (imputation (d)).

17 The outcome of the litigation to date, in particular after the order of the New South Wales Court of Appeal (Handley, Beazley and Ipp JJA)[4], is that each of imputations (a) and (c) is conveyed and is defamatory of the respondents, that this is not so as regards imputation (b), and that a jury must reconsider imputation (d). The appellants challenge in this Court the decision respecting imputations (a) and (c).

18 That outcome should not be disturbed by this Court. The sequel will be further litigation to determine not only the defamatory nature of imputation (d), but also, as to imputations (a) and (c) (and possibly (d)), any defences and questions of damages.

19 The issues before this Court turn upon the respective roles in New South Wales at the relevant time (before the commencement of the *Defamation Act* 2005 (NSW) ("the 2005 Act") of judge and jury in defamation actions and the scope for intervention by the Court of Appeal.

20 The division of functions between judge and jury in trials of defamation actions was settled by the common law so as to classify as a question of law the question of whether the matter complained of was or was not capable of bearing

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4 *Gacic v John Fairfax Publications Pty Ltd* [2006] NSWCA 175.

a defamatory meaning and, if it was so capable, the determination as a question of fact whether the matter was or was not defamatory[5].

21 At the time when the common law was settled in this way, the available appellate procedures in respect of trials at common law in New South Wales had the characteristics explained by Griffith CJ in the following passage from *Heydon v Lillis*[6]:

> "[I]f a case was set down for trial by a jury, and either party was dissatisfied with the result, the dissatisfied party, if there had been a verdict, might move for a new trial. Later a form of procedure had been adopted by which a verdict was taken, leave being reserved to either party to move to have it set aside or a different verdict or a nonsuit entered. Then the Court in Banco on motion could make the appropriate order. But if no leave was reserved all that the Court could do was to grant a new trial, and if there was no verdict there was nothing to be done but to set the case down again for trial, because nothing could be done except after a verdict, which was the foundation of the procedure. You could not depart from that rule, however plain the right might be, except by having leave reserved. Then the [New South Wales] legislature, being no doubt aware of the change that had been effected in the law and practice in nearly all other parts of the British dominions, passed, amongst other enactments, s 7 [of the *Supreme Court Procedure Act* 1900 (NSW) ('the 1900 Act')]."

22 There were various grounds upon which, under the common law procedure applying to civil trials in New South Wales, a new trial might be ordered. They included[7] cases where the plaintiff should have been non-suited, and of misdirections by the trial judge, and of wrongful admission or rejection of evidence. In the latter category, the Exchequer Rule associated with *Crease v Barrett*[8] was applied in New South Wales, as Isaacs J stressed in *Harris v Minister for Public Works (NSW)*[9]. If admissible evidence were rejected, then a

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5 *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at 775-776; *Australian Broadcasting Corporation v O'Neill* (2006) 80 ALJR 1672 at 1687 [45]; 229 ALR 457 at 473.

6 (1907) 4 CLR (Pt 2) 1223 at 1227-1228.

7 See Walker, *The Practice of the Supreme Court of New South Wales at Common Law*, 4th ed (1958) at 109-123.

8 (1835) 1 C M & R 919 [149 ER 1353]. See *Weiss v The Queen* (2005) 224 CLR 300 at 306-307 [13].

9 (1912) 14 CLR 721 at 728-729.

new trial was to be ordered unless the Court *in banc* was satisfied that, if admitted, the evidence could not have affected the result[10]. The consequences of improper admission of evidence, generally speaking, were similar[11].

23 A distinction of present importance is that a new trial might be ordered on an available ground which might or might not be sufficiently strong to warrant a conclusion that the applicant for the new trial was, as a matter of law, entitled to a verdict. To that situation, s 7 of the 1900 Act was addressed.

24 Section 7 of the 1900 Act stated:

> "(1) In any action, if the Court in Banco is of opinion that the plaintiff should have been nonsuited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a nonsuit or such verdict to be entered.
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> (2) If the Court in Banco orders a new trial of any action, issue, or question which has been tried before a Judge without a jury, it may direct such new trial to be heard before a Judge either with or without a jury."

Of s 7 in this form, Griffith CJ said in *Heydon v Lillis*[12]:

> *Primâ facie*, the words are to be construed literally, as they stand. They begin 'In any action,' and the succeeding words show that the provision is exactly applicable to every case where there has been an attempt to try a case with a Judge or a jury, where there has been a trial; they apply to all cases in which the plaintiff should have been nonsuited, or, on the evidence, the plaintiff or the defendant was entitled to a verdict as a matter of law. These words cover every case."

25 The 1900 Act was wholly repealed by the *Supreme Court Act* 1970 (NSW) ("the 1970 Act")[13]. Section 86(1) of the 1970 Act stated[14]:

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10 *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458 at 463-464.

11 See the discussion by Windeyer J in *Balenzuela v De Gail* (1959) 101 CLR 226 at 242-243.

12 (1907) 4 CLR (Pt 2) 1223 at 1228.

13 s 5, First Schedule.

"Proceedings on a common law claim in which there are issues of fact on a claim in respect of defamation are to be tried with a jury."

Section 102 is a general provision dealing with appeals after jury trials and provides:

"Where, in any proceedings in the Court, there is a trial of the proceedings or of any issue in the proceedings with a jury, an application for:

(a) the setting aside of a verdict or judgment,

(b) a new trial, or

(c) the alteration of a verdict by increasing or reducing any amount of debt, damages or other money,

shall be by appeal to the Court of Appeal."

Section 108 was included as a special provision to continue[15]:

"the power of the Court of Appeal to dispose of an appeal by final order where it is practicable to do so, rather than remit the case to the Court of first instance".

26 Section 108 of the 1970 Act states:

"(1) This section applies to an appeal to the Court of Appeal in proceedings in the Court in which there has been a trial with a jury.

(2) Where it appears to the Court of Appeal that on the evidence given at the trial a verdict for the plaintiff could not be supported and that, pursuant to any provision of the rules, an order ought to have been made for the dismissal of the proceedings either wholly or so far as concerns any cause of action in the proceedings, the Court of Appeal may make an order of dismissal accordingly.

(3) *Where it appears* to the Court of Appeal that upon the evidence the plaintiff or the defendant is, *as a matter of law, entitled* to a verdict in the proceedings or on any cause of action, issue or claim for

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14 Section 86 was repealed by the 2005 Act, Sched 6.17.

15 New South Wales, Law Reform Commission, *Report on Supreme Court Procedure*, Report No 7, (1969) at 15.

> relief in the proceedings, the Court of Appeal *may* direct a verdict and give judgment accordingly." (emphasis added)

27 It is with s 108(3) that this appeal is concerned. The affinity between s 108(3) and s 7 of the 1900 Act will be apparent. Both are predicated upon an "entitlement" to an outcome "as a matter of law". Where such an entitlement is made out, then the appellate court "may", in the case of s 108(3), "direct a verdict and give judgment accordingly".

28 What is the import of the term "may" in s 108(3)? Its use in s 108(3) is to confer a power with a duty to exercise it if the entitlement spoken of is established. This answer may be seen from a line of authority beginning with the decision of the Court of Common Pleas in *Macdougall v Paterson*[16]. There, in delivering the judgment of the Court, Jervis CJ said of a power conferred by statute upon the new County Courts in England[17]:

> "[W]hen a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.
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> For these reasons, we are of opinion, that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises."

This Court in terms has applied this reasoning in decisions including *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[18] and most recently in *Leach v The Queen*[19]. In *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section*[20], Fullagar J indicated that "[t]o overcome this very important rule of construction" a strong and direct provision is required. None is found in s 108(3) of the 1970 Act. The reference to entitlement to a verdict points in the other direction and to the operation of the rule of construction.

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16 (1851) 11 CB 755 [138 ER 672].

17 (1851) 11 CB 755 at 773 [138 ER 672 at 679].

18 (1971) 127 CLR 106 at 134-135.

19 (2007) 81 ALJR 598 at 608 [38]; 232 ALR 325 at 337.

20 (1960) 103 CLR 368 at 378.

29 However, in *Charlwood Industries Pty Ltd v Brent*[21], the New South Wales Court of Appeal proceeded without reference to this line of authority and on the footing that s 108(3) conferred a discretion to deny a remedy to a party with the entitlement at law spoken of in that sub-section. The Court of Appeal in the present case appears to have proceeded in the same fashion but decided that the present respondents should have an order in their favour.

30 In this Court, there was some debate as to the relevance to what was said to be that allegedly discretionary outcome of questions of "community standards", these being peculiarly jury questions. The appellants also submitted that, as a matter of discretion, the Court of Appeal should have declined to enter a verdict in relation to imputations (a) and (c), because it had decided to send back for retrial the issues respecting imputation (d). The debate on these topics was beside the point. If the respondents made out their entitlement, as a matter of law, to relief under s 108(3) with respect to imputations (a) and (c), then the Court of Appeal was obliged to provide the appropriate remedy.

31 Further issues in this appeal concern the application of s 108(3) in respect of the trial of defamation actions where the common law procedures described earlier in these reasons have been displaced by the statutory regime provided by s 7A of the 1974 Act.

32 Section 7A was inserted in the 1974 Act by the *Defamation (Amendment) Act* 1994 (NSW)[22]. The general provision made for jury trial by s 86 of the 1970 Act was subjected to the provisions of s 7A (s 7A(5)).

33 In the Second Reading Speech in the Legislative Assembly on the Bill which provided for the introduction of s 7A, the responsible Minister said[23]:

> "What is proposed is that at an early stage in a defamation action a jury will be required to answer two questions. The first is whether the imputations alleged are conveyed by the published material. The second is whether, if the answer to that question is yes, the imputations are defamatory. If the jury answers either of those questions no, the judge will enter judgment for the defendant.

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21 [2002] NSWCA 201 at [70]. See also *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255 at [102].

22 Sched 1(2).

23 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 November 1994 at 5901.

> That is what occurs now in defamation cases where a jury is empanelled. It is where the jury answers the threshold questions in the affirmative that the change will take place. In proceedings at present the jury is retained to determine some questions of fact inherent in certain defences. Under this bill that will not occur. Having dealt with the preliminary questions the jury will be discharged from further participation in the trial, which will then proceed before the judge alone, he or she determining all defences and, in due course, assessing any damages. By allocating to the jury what is a vital decision in the trial the arrangement maintains an appropriate degree of community involvement. At the same time, by providing that the trial shall thereafter proceed before the judge alone, a substantial amount of time and money will be saved and the complexities which now arise in the course of a trial because of the current division of functions of judge and jury will be overcome."

34 The history of the present litigation is an illustration of the false expectations that, by the introduction of s 7A into the 1974 Act, a substantial amount of time and money would be saved and that procedural complexities would be overcome. The 2005 Act contains in s 22 its own regime for division of functions between judge and jury, including determination of damages by judge not jury, but does not replicate the procedures required by s 7A.

35 Section 7A provided for three distinct curial proceedings, as the history of the present litigation shows. First, a judge (Nicholas J) determined in respect of each of the imputations pleaded that, in the terms of pars (a) and (b) of s 7A(3)[24], the matter was reasonably capable of carrying the imputation pleaded and was reasonably capable of bearing a defamatory meaning.

36 Secondly, there was a proceeding conducted on a subsequent occasion and before another judge (Bell J) and a jury of four. The only evidence before the Court was the article itself and no oral evidence was called. The task of the jury

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24 Section 7A(3) stated:

> "If the court determines that:
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> (a) the matter is reasonably capable of carrying the imputation pleaded by the plaintiff, and
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> (b) the imputation is reasonably capable of bearing a defamatory meaning,
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> the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory."

under this branch of s 7A was to determine whether the matters complained of carried each of the imputations and, if so, whether the imputation was defamatory (s 7A(3)). In respect of each plaintiff, the jury found that the article conveyed to the ordinary reasonable reader the imputations that unpalatable food was sold at the restaurant (imputation (a)), and that some bad service was provided there (imputation (c)), but that the plaintiff had not established that these imputations were defamatory. The jury also found that the article did not convey to the ordinary reasonable reader the imputation that excessive prices were charged at the restaurant (imputation (b)) or that the plaintiff was incompetent as a restaurant owner by reason of the employment of a chef who made poor quality food (imputation (d)).

37 Observations by McHugh J in *John Fairfax Publications Pty Ltd v Rivkin*[25] are in point here. His Honour said:

> "Falsity and hurt to feelings are, of course, irrelevant to the issues of meaning and defamation in the trial – whether it be a s 7A trial or the conventional defamation trial. But the plaintiff's evidence on those matters usually tends to create sympathy for the plaintiff and sometimes prejudice against the defendant. The s 7A procedure eliminates these advantages for the plaintiff who must conduct the case in the detached – and some would say unreal – atmosphere of a jury trial on documentary evidence."

38 In the present case the order of the Court was that judgment be entered for the defendants in respect of each of the four causes of action pleaded, that is to say the four imputations. Had the jury made findings favourable to the respondents, the third stage would have been reached. This would involve determination by the Court and not the jury of any defences and of the amount of damages (s 7A(4)).

39 The Court of Appeal made orders, the first four of which read:

> "1. Appeal allowed.
>
> 2. Set aside the verdicts for the [appellants].
>
> 3. There be verdicts for the [respondents] in respect of imputations (a) and (c).

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25 (2003) 77 ALJR 1657 at 1670 [76]; 201 ALR 77 at 94.

4. The [respondents'] claim in relation to imputation (d) be remitted for determination by a jury in accordance with s 7A of the [1974 Act]."

40 It will be apparent from the terms of order 3 that with respect to imputation (d) relief was not given under s 108(3), as it was with respect to imputations (a) and (c). Rather, in remitting that matter for redetermination by a jury, the Court of Appeal was exercising its powers under the general provision made by s 102 of the 1970 Act to deal with new trials of any issue determined by a jury. There had been no appeal to the Court of Appeal against the jury's rejection of imputation (b), respecting excessive prices, and this plays no part in the appeal to this Court.

41 The third of the three stages for which provision is made in s 7A thus has not been reached in the present litigation. What is involved in that third stage appears from s 7A(4):

> "If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury is:
>
> (a) to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established, and
>
> (b) to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount."

It will be apparent that, as in this case, the determination by the jury at the second stage of whether the matter complained of carries the imputation and, if so, whether it is defamatory, falls for determination in the absence of consideration of any defence that would be litigated only at the third and final stage.

42 Before turning to consider the remaining issues which arise on the appeal to this Court, there is a preliminary matter which should be noted. It concerns the form of the order made by the Court of Appeal. The respondents accept that this was defective and that, if the appeal to this Court otherwise failed, nevertheless it would be meet for this Court to reformulate the orders of the Court of Appeal. Upon that basis, the order proposed by the respondents includes the following:

> "1. Appeal allowed with costs.
>
> 2. Set aside the orders of Bell J made on 2 June 2005 and in their place order that:

(a) verdicts be entered that the matter complained of by the [respondents] carries each of the imputations identified as imputations (a) and (c) and that imputations (a) and (c) are defamatory;

(b) a verdict be entered for the [appellants] in relation to imputation (b); and

(c) the issues of whether the matter complained of carries the imputation identified as imputation (d) and whether that imputation is defamatory be remitted for determination by a jury in accordance with s 7A of the [1974 Act].

3. The [respondents] to have a certificate under the *Suitors Fund Act* 1951 (NSW) if so entitled."

There is also a dispute as to the appropriate provision for costs, consideration of which can be deferred until later in these reasons.

43 There are several issues of construction concerning s 108(3). One has been dealt with earlier in these reasons. This concerned the correct reading of the phrase "the Court of Appeal may direct" in the light of authorities beginning with *Macdougall v Paterson*[26].

44 The second construction issue concerns the phrase "on any cause of action, issue or claim for relief in the proceedings". These words, to adapt what was said by Griffith CJ in *Heydon v Lillis*[27], are apt "to cover every case". The jury, acting pursuant to s 7A(3) of the 1974 Act, had determined whether the matter complained of carried the imputations pleaded and, if so, whether the four imputations were defamatory. This was, at least, the determination "on any ... issue ... in the proceedings", and subject-matter for the exercise by the Court of Appeal of its power conferred by s 108(3).

45 The second issue is related to the first. The appellants fixed upon the concluding words of s 108(3), "direct a verdict and give judgment accordingly". Entry of the verdicts with respect to imputations (a) and (c) would not entitle the respondents to judgment on those causes of action in advance of the determination of any defences and of any damages to be awarded under the procedures of s 7A(4). Therefore, the appellants submitted, there was no power even to enter the special verdicts. But the terms of s 108(3) specify a particular

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26 (1851) 11 CB 755 [138 ER 672].

27 (1907) 4 CLR (Pt 2) 1223 at 1228.

treatment of "any cause of action, issue or claim for relief", and the concluding words "direct a verdict and give judgment accordingly" mandate relief of the appropriate description, which may not include the giving of judgment in the proceedings. The word "and" is used in the concluding phrase in s 108(3) to encompass either or both forms of relief, according to the circumstances of the case.

46 The remaining issue of construction concerns the phrase "is, as a matter of law, entitled to a verdict". In that regard, the submissions for the appellants indicated some conflation of ideas respecting the phrase "matter of law". No doubt the terms of s 7A(3), "the jury is to determine", rendered it a matter of law for the jury to determine whether the matter complained of carried the imputation and, if so, whether the imputations were defamatory. But, upon the completion by the jury of its task under s 7A(3) of the 1974 Act, another legal norm was engaged. This concerned the scope for appellate intervention under s 108(3) of the 1970 Act.

47 What confers, as a matter of law, an entitlement to appellate relief under s 108(3)? The meaning of that provision is elucidated by reference to various authorities upon s 7 of the 1900 Act. These include the reasons of Starke J and of Dixon J in *Shepherd v Felt and Textiles of Australia Ltd*[28], and of Latham CJ and of Dixon J in *Hocking v Bell*[29]. In the latter case, Dixon J observed of the use of the phrase "perverse verdict" in this context that[30]:

> "[s]ometimes it is used to describe a disregard of a direction from the judge. Sometimes it refers to a finding contrary to that which the facts of the case legally demand. But I think it always means something more than a verdict against the weight of the evidence".

48 In *Hocking v Bell*, Latham CJ and Dixon J (whose dissenting judgments were supported by the outcome in the Privy Council[31]) decided that s 7 was inapplicable in favour of the defendant because there had been evidence upon which a jury could reasonably find for the plaintiff. In the present case, the only evidence before the jury was the article complained of. There was no dispute as to its publication. The area of contention was the imputations alleged to be

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28 (1931) 45 CLR 359 at 373, 379-380 respectively.

29 (1945) 71 CLR 430 at 441-442, 497-498 respectively.

30 (1945) 71 CLR 430 at 498.

31 *Hocking v Bell* (1947) 75 CLR 125 at 130-132.

carried by it and their defamatory nature. This distinction, for the purposes of s 108(3), between a case such as the present under s 7A and the evidentiary dispute in cases such as *Hocking v Bell*, was emphasised by Hunt AJA in *Harvey v John Fairfax Publications Pty Ltd*[32].

49 The present case is closer to the situation in *Shepherd*. There the question of wrongful termination of an agency agreement turned upon the interpretation and effect of documents. Dixon J said[33]:

> "In *Morgan v Savin*[34] *Willes* J decided that when the circumstances of the engagement and the dismissal are all proved by written documents in evidence, the question whether the dismissal was justified is one of law for the decision of the Court and not for the jury. In the present case the contract is in writing and the justification for its termination is found in the telegrams and the letter of the appellant the despatch of which is undisputed. In my opinion the jury could not adopt any explanation or modification of these documents which is compatible with a due observance on the part of the appellant of the condition of his contract of agency. I therefore agree with the Supreme Court in thinking the respondent was, as a matter of law, entitled to a verdict."

50 It is true that s 7A(3) specifically entrusted to the jury the determination of the question whether the imputations (a) and (c) were carried by the matter complained of and, if so, whether they were defamatory. Thus, it could not be said, as Willes J had said of the issues in *Morgan*, that the present case concerned questions of law for the court to decide.

51 Nevertheless, to adapt what Dixon J said in the above passage from *Hocking v Bell*, the jury could not adopt any explanation of the matter complained of which was incompatible with its due consideration of the questions whether the imputations were carried by that matter and, that being so, whether they tended to injure the respondents in their trade or business. Put another way, could a reasonable jury, properly instructed, have given the answer that while the article conveyed the imputations (a) and (c), respecting unpalatable food and some bad service, that it did not have that tendency to injure?[35]

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32 [2005] NSWCA 255 at [101].

33 (1931) 45 CLR 359 at 380.

34 (1867) 16 LT 333 at 334.

35 See *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at 1658 [2], 1698-1699 [185]; 201 ALR 77 at 78, 130.

52 In the Court of Appeal, Beazley JA answered that last question as follows[36]:

> "The food served in any restaurant is its essential business. If the food is '*unpalatable*' the restaurant fails on the very matter that is the essence of its existence. This is especially so of a purportedly high class restaurant. To say of a restaurateur of such an establishment that they sold '*unpalatable*' food injures that person in their business or calling and because of that, is defamatory. In my opinion, no reasonable jury properly directed could reach any other verdict.
>
> Service is also an integral part of the experience of dining. Good service is expected at a high class restaurant. It is part of what the patron pays for. It is almost trite to say that poor service, even occasional poor service, within the one dining experience, will not be tolerated by patrons of an expensive '*swank*' restaurant. To say, therefore, that the appellants provided '*some bad service*' at Coco Roco, even though the damnation was not total, would injure a person in their business or calling as a restaurateur and was likewise defamatory. No reasonable jury properly directed could reach any other verdict." (original emphasis)

53 In this Court, the appellants have not demonstrated any error in those critical passages. The respondents properly emphasise that the fundamental difficulty here in the path of the appellants lies in the concept of "tendency" which pitches the common law test at a fairly low threshold. It is sufficient that the imputation "be such as is likely to cause ordinary decent folk in the community, taken in general, to think the less of [the plaintiff]"[37].

54 The result is that, subject to the allowance of the appeal to this Court to enable substitution of the reframed Court of Appeal orders 1-3 set out earlier in these reasons, in substance the appeal to this Court has failed.

55 There remains the question of costs. The conduct at the trial before Bell J and the jury of the then senior counsel for the present respondents, even if, as is by no means apparent from the record, it had the shortcomings now asserted by the appellants in this Court, is no reason for denying the respondents their costs in this Court. Nor is there any good ground to disturb the substance of the cross-order made in the Court of Appeal. As reformulated, this states:

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36 [2006] NSWCA 175 at [56]-[57].

37 *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452.

"4. Order that the [respondents] pay 25 per cent of the [appellants'] costs of the trial before Bell J and a jury, the [appellants] pay 50 per cent of the costs of the [respondents] of that trial, and [that] the balance of the costs of that trial abide the outcome of the further trial pursuant to s 7A of the [1974 Act]."

56 KIRBY J. This appeal, from orders of the Court of Appeal of the Supreme Court of New South Wales[38], involves the meaning and operation of s 108(3) of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") in the context of a jury trial in a defamation case[39].

57 Ultimately, the appeal concerns the maintenance of the limited role of the jury in defamation trials. Citizens do not always share the faith of appellate judges in the judicial resolution of the central issues arising in defamation actions. Typically (and here) those issues require the determination of a clash between a claim to protection of reputation and honour and a claim to exercise the right of "free speech" and a "free press". In New South Wales, the *Defamation Act* 1974 (NSW) ("the Defamation Act"), whilst furthering the general curtailment of jury trials in the State, even in defamation proceedings, exceptionally preserved its availability for the limited functions assigned by s 7A of that Act. In this appeal, this Court is asked to uphold the appellants' right to that mode of trial. In my view, the Court should so order, correcting the error of the Court of Appeal which decided to make the critical determination for itself.

58 By the *Defamation Act* 2005 (NSW) ("the 2005 Act") and companion legislation, a new regime, designed to secure uniform State and Territory laws on defamation in Australia, has been enacted[40]. However, it was common ground that the uniform law did not apply to the present case[41]. The appeal must therefore be decided in accordance with the pre-existing law. As has been noted[42], that law (and the associated practice) involves distinct peculiarities.

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38 *Gacic v John Fairfax Publications Pty Ltd* [2006] NSWCA 175.

39 That trial was conducted pursuant to the Supreme Court Act, s 86 and the *Defamation Act* 1974 (NSW), s 7A(3). Section 86 of the Supreme Court Act was repealed with the enactment of the *Defamation Act* 2005 (NSW), Sched 6.17. Section 21 of that Act provides for (limited) jury trials in defamation proceedings. Note also Supreme Court Act, s 85(6).

40 See also *Defamation Act* 2005 (Vic); *Defamation Act* 2005 (SA); *Defamation Act* 2005 (Q); *Defamation Act* 2005 (WA); *Defamation Act* 2005 (Tas); *Defamation Act* 2006 (NT); *Civil Law (Wrongs) Act* 2002 (ACT).

41 It was not suggested that transitional arrangements in the 2005 Act affected the future trial of the respondents' claims against the appellants, which remain to be determined in accordance with the law and procedures stated in the Defamation Act. See 2005 Act, Sched 4 Pt 2.

42 See *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 578-581 [139]; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at 1677 [119]; 201 ALR 77 at 104-105.

59 The appeal concerns, specifically, the correctness of the disposition by the Court of Appeal in respect of four jury determinations, equivalent to "special verdicts"[43]. It was agreed between the parties that one of them[44] should stand. One of them[45], the Court of Appeal decided, should be remitted for redetermination by a second jury in accordance with s 7A of the Defamation Act[46]. Neither party challenged the foregoing outcomes. However, in relation to the two remaining determinations[47], the Court of Appeal concluded, purportedly under s 108(3) of the Supreme Court Act, that it had the power to, and should, substitute its own answers in favour of the respondents, rather than remitting the issues for redetermination by the second jury.

60 Some of the questions in this appeal overlap those considered by this Court in *John Fairfax Publications Pty Ltd v Rivkin*[48]. There, the jury were asked whether the published articles conveyed certain imputations, and, if so, whether the imputations were defamatory. In each case, the jury had found that the imputation alleged was not conveyed. Accordingly, they did not need to consider whether the imputations were defamatory. In *Rivkin*, as here, the Court of Appeal found that some of the jury's answers were unreasonable[49]. But there, the Court of Appeal ordered that a new trial should be had before a new jury on *all* of the alleged imputations. This Court substituted an order limiting the new trial to those imputations in relation to which it found that the first jury's determinations had been unreasonable[50].

61 In *Rivkin*, the Court of Appeal did not assert, still less did it exercise, a power to determine the outstanding issues for itself. No party in *Rivkin* submitted that this Court, exercising the powers of the Court of Appeal[51], should

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43 The appellants agreed that they could be so described. See [2007] HCATrans 079 at 706-708.

44 In respect of imputation (b).

45 In respect of imputation (d).

46 Court of Appeal Order 4. See [2006] NSWCA 175 at [105].

47 In respect of imputations (a) and (c).

48 (2003) 77 ALJR 1657; 201 ALR 77.

49 *Rivkin v John Fairfax Publications Pty Ltd* [2002] NSWCA 87.

50 See *Rivkin* (2003) 77 ALJR 1657 at 1685 [170], 1702-1703 [213], [217], 1704-1705 [223], [225]; 201 ALR 77 at 116, 135-136, 138.

51 *Judiciary Act* 1903 (Cth), s 37.

substitute determinations, or "verdicts", favourable to Mr Rivkin. In this case, the course adopted by the Court of Appeal, of substituting its own determinations of the contested issues, followed a recent line of authority in that Court, upholding the power[52] and identifying considerations to be taken into account in deciding whether such power should be exercised in the particular case[53].

62 In effect, special leave was granted in these proceedings to permit this Court to consider the correctness of the foregoing line of authority[54]; whether it conforms to the applicable legislation; whether it is consistent with longstanding authority of this Court about appellate review of orders following jury verdicts; and whether, in the deployment of any power that is found, the disposition was insufficiently respectful of the parties' right to jury trial which was exceptionally reserved in defamation cases for determinations of this kind.

The facts and legislation

63 *The facts*: The facts are described in the reasons of Callinan and Heydon JJ[55]. Those reasons set out the entirety of the matter complained of by Aleksandra Gacic, Ljiljana Gacic and Branislav Ciric (the respondents). Their proceedings in the Supreme Court of New South Wales against John Fairfax Publications Pty Ltd and Mr Matthew Evans (the appellants), claimed damages for defamation and injurious falsehood. By their statement of claim, the respondents alleged the collapse of their restaurant business and a loss of profits in consequence of the subject publication. They pleaded the cause of action in defamation as follows:

> "[T]he plaintiffs have been greatly injured in their character, credit, reputation, trade and profession and have been brought into public hatred, ridicule and contempt."

64 *The legislation*: In their reasons, Callinan and Heydon JJ have set out relevant provisions of the Defamation Act[56] and also of the Supreme Court Act[57].

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52 *Charlwood Industries Pty Ltd v Brent* [2002] NSWCA 201. See also cases referred to in [2006] NSWCA 175 at [59]-[74].

53 *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 225.

54 See reasons of Gleeson CJ and Crennan J at [1].

55 Reasons of Callinan and Heydon JJ at [153]-[155], [161].

56 ss 7A, 9, 46. Reasons of Callinan and Heydon JJ at [156]-[159].

As Callinan and Heydon JJ observe, no separate provision is made in the Defamation Act for appeals to the Supreme Court in defamation matters. Accordingly, the general provisions of the Supreme Court Act, specifically s 108(3), must be adapted, so far as their language and the circumstances permit, to extend to the exercise of that power by the Court of Appeal in cases where a discontented party appeals against a jury determination made pursuant to s 7A(3) of the Defamation Act.

65 In addition to the provisions of s 108 mentioned by Callinan and Heydon JJ, further provisions of the Supreme Court Act should be noted. First, ss 85 and 86 concern the applicable mode of trial within the Supreme Court. Relevantly, they provided:

> "85 Trial without jury unless jury required in interests of justice
>
> (1) Proceedings in any Division are to be tried without a jury, unless the Court orders otherwise.
>
> …
>
> 86 Common law claim – defamation
>
> (1) Proceedings on a common law claim in which there are issues of fact on a claim in respect of defamation are to be tried with a jury.
>
> (2) Despite subsection (1), the Court may order that all or any issue of fact be tried without a jury if:
>
> (a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury, or
>
> (b) all parties consent to the order."

66 Three further provisions of the Supreme Court Act should be mentioned:

> "90 Special verdict
>
> It shall be the duty of a jury to answer any question of fact that may be left to the jury by the presiding Judge at the trial.

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57 s 108. Reasons of Callinan and Heydon JJ at [179]. Also set out are the provisions of the *Supreme Court Procedure Act* 1900 (NSW), s 7. See reasons of Callinan and Heydon JJ at [167] fn 167.

...

102 Appeal after jury trial

Where, in any proceedings in the Court, there is a trial of the proceedings or of any issue in the proceedings with a jury, an application for:

(a) the setting aside of a verdict or judgment,

(b) a new trial, or

(c) …

shall be by appeal to the Court of Appeal.

...

107 Substituted verdict

Where, in an appeal to which this section applies:

(a) the Court of Appeal would, but for this section set aside the verdict, finding, assessment or judgment and order a new trial on an issue of the amount of debt or damages or of the value of goods,

(b) the Court of Appeal is satisfied that:

…

it is fully able to assess the amount of debt or damages or the value of the goods on perusal of the evidence … and

(c) (i) the parties consent to the exercise of the powers given by this section,

(ii) it appears to the Court of Appeal to be desirable to exercise the powers for the purpose of avoiding a multiplicity of trials, or

(iii) it appears to the Court of Appeal that, as a result of an error of law on the part of the trial judge or (where there has been a trial with a jury) a manifest error on the part of the jury, some item of debt or damages or valuation has been wrongly included in or excluded from the assessment,

> the Court of Appeal may draw inferences and make findings of fact, assess the amount of debt or damages or the value of goods in such sum as in the opinion of the Court of Appeal the debt or damages or value ought to be assessed if a new trial were had forthwith and substitute that sum for the sum awarded in the Court below and give such judgment and make such order as the nature of the case requires."

67 *Meaning of the legislation*: The meaning and application of s 108(3), which is critical to the power of the Court of Appeal in the instant case, is, by the approach now conventionally taken, to be discovered not solely from the words of that sub-section but also from those words as understood in their context[58]. That context includes s 107, which is a most detailed provision. It controls the power of the Court of Appeal to substitute its order or judgment in a case concerned with claims about "the amount of debt or damages or the value of goods". Clearly, the present case does not attract s 107. Apart from anything else, the parties did not consent as s 107(c)(i) would require. However, a question is presented as to whether that section was intended to exhaust the Court of Appeal's power to enter a "substituted verdict" in a trial with a jury.

68 Obviously, the limited power provided by s 108(3) is also to be contrasted with the general powers afforded to the Court of Appeal by s 75A of the Supreme Court Act[59]. Those powers do not apply to an appeal arising out of "a trial with a jury in the Court"[60]. The wide powers afforded to the Court of Appeal by s 75A[61] are thus to be contrasted with the narrower powers afforded by s 108(3), applicable in this instance.

69 Nevertheless, the ambit of the powers of the Court of Appeal, where there has been a trial with a jury, is clearly intended to be wide. Thus, s 102 providing for an "appeal to the Court of Appeal" applies where there has been "a trial … of any issue in the proceedings with a jury". When that provision is read with s 7A of the Defamation Act, it cannot be doubted that an appeal, such as the present, lay to the Court of Appeal from the jury's determination of the "issue" presented

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58 See *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 140-141 [470]; 231 ALR 1 at 127; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1529 [91]; 229 ALR 1 at 25; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397.

59 *Fox v Percy* (2003) 214 CLR 118 at 125-127 [22]-[26].

60 Supreme Court Act, s 75A(2)(c).

61 Supreme Court Act, s 75A(10).

by s 7A and the determinations concerning the imputations upon which the respondents had sued the appellants. That conclusion is relevant to the power of the Court of Appeal under s 108(3), given that the sub-section, like s 102, addresses the disposition of an "issue ... in the proceedings". In a s 7A proceeding, the questions answered by the jury constitute the "trial … of any issue in the proceedings with a jury" pursuant to s 102. The answers present an "issue … in the proceedings", as that phrase is used in s 108(3).

70 This apparent symmetry in Pt 7[62] of the Supreme Court Act is important. In New South Wales, under s 9 of the Defamation Act[63], the cause of action for publication of defamatory matter arose not from the matter complained of, as such, but from each defamatory imputation contained in that matter. Once a judge has determined, pursuant to s 7A(3) of the Defamation Act, that the matter complained of is reasonably capable of carrying the imputation pleaded and that the imputation is reasonably capable of bearing a suggested defamatory meaning, it is the jury that must determine whether (that is, as a matter of fact) "the matter complained of carries the imputation and, if it does, whether the imputation is defamatory"[64].

71 Section 7A thus envisages that, if the imputation pleaded passes the test of capability and is then resolved by the jury in favour of the plaintiff, the jury's function in the defamation trial is concluded. The determination of any defence relied on by the publisher and of the damages (if any) to which the plaintiff is entitled, are issues left entirely to the judge[65]. The procedure in s 7A, as interpreted, has been subject to much judicial[66] and academic criticism[67]. However, it is pointless to examine the criticism as the procedure is not copied in the new uniform legislation[68]. This appeal represents, it may be hoped, the last

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62 Headed "Appeal to the Court of Appeal" and including ss 102, 107 and 108.

63 Reasons of Callinan and Heydon JJ at [157].

64 Defamation Act, s 7A(3). See reasons of Callinan and Heydon JJ at [156].

65 Defamation Act, s 7A(4).

66 *Drummoyne Municipal Council v Australian Broadcasting Commission* (1990) 21 NSWLR 135 at 148-151; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 162.

67 Kenyon, *Defamation: Comparative Law and Practice*, (2006) at 159-161.

68 Relevantly, the 2005 Act, s 6(3). Section 22(2) of that Act provides: "The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established."

time that this Court will have to consider s 7A. But it is important that we give the answer required by law.

Common ground

72 *General issues*: A high measure of common ground between the parties narrowed the issues before this Court:

- The respondents' claim for injurious falsehood has not been heard. Nor, pending the outcome of these proceedings, have any issues of the defences to defamation or of damages (if any) been decided[69];

- The appellants have not yet filed a defence in the proceedings. During argument, it was said that the action in defamation will be defended, if needed, "on the basis of comment"[70]. Even in respect of the s 7A issues, no formal defence was filed[71]; and

- Given that this appeal concerns only imputations (a) and (c), this Court is unconcerned with those parts of the Court of Appeal's reasons that address the suggested prohibition on supporting a defamatory imputation such as (d) by drawing an inference based on an inference[72].

73 It follows that this Court's attention is concerned only with the Court of Appeal's disposition in respect of imputation (a) (the respondents sell unpalatable food at Coco Roco) and (c) (the respondents provide some bad service at Coco Roco). Upon each of those imputations the first jury concluded that the matter complained of conveyed the imputation pleaded but that in neither case was it defamatory.

74 *Business defamation*: It was also common ground that a class of defamation exists (described as "business defamation"[73]) where published material conveys defamatory imputations that injure a plaintiff in the plaintiff's business, trade or profession.

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69 Including in respect of imputations (a) and (c). See reasons of Gummow and Hayne JJ at [41]-[42].

70 [2007] HCATrans 079 at 2734-2735. See also at 3423-3424.

71 [2007] HCATrans 079 at 559-564, 630-639.

72 [2006] NSWCA 175 at [11]-[25] per Handley JA, [77]-[92] per Beasley JA, [107]-[133] per Ipp JA. See reasons of Gleeson CJ and Crennan J at [4].

73 [2005] NSWCA 175 at [32].

75 Upon one view, an injury to a business (being to a plaintiff in respect of its business or occupation) amounts to nothing more than a particular form of damage suffered in consequence of the general wrong of defamation. The tort itself is constituted by the lowering of the subject of the publication in the estimation of ordinary persons with whom the subject has dealings, whether such dealings are personal, societal, occupational or otherwise[74].

76 The notion that there is a special sub-variety of the tort of defamation concerned with a particular aspect of the damage suffered by an individual in consequence of a "business defamation" is arguably an illustration of an error quite common in the law of torts, as traditionally expressed in the casebooks. It elevates a particular category, based on past decisions and specific relationships and damage, into a species of the wrong as distinct from simply an instance of the wrong's operation. In the recent past, this Court has endeavoured to reduce such categories by encouraging more conceptual thinking in this area of the law[75].

77 In the *Defamation Act* 1958 (NSW) ("the 1958 Act"), which preceded the Defamation Act applicable to these proceedings, an attempt was made to define with some precision the kinds of actionable defamation for which proceedings might be brought in New South Wales. Thus, s 5 of the 1958 Act provided that:

> "Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be *injured, or by which he is likely to be injured in his profession or trade,* or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.
>
> The imputation may be expressed either directly or by insinuation or irony." (emphasis added)

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74 As for example in a sporting, religious, associational or different relationships; cf *Sim v Stretch* [1936] 2 All ER 1237. See reasons of Gleeson CJ and Crennan J at [2].

75 See, for example, *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 20, 32; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484-488; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544-550; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 549-551 [79]-[83], 591-594 [203]-[211]; *Leichhardt Municipal Council v Montgomery* (2007) 81 ALJR 686; 233 ALR 200.

78 Such was the provision considered by this Court in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*[76]. However, the 1958 Act was repealed in its entirety when the Defamation Act was enacted in 1974[77] so that "[t]he law relating to defamation, in respect of matter published after the commencement of [the Defamation Act] shall be as if [the 1958 Act] had not been passed and the common law and the enacted law … shall have effect accordingly."[78] The 1958 Act definition did not, therefore, apply to the present proceedings.

79 In the Court of Appeal, the substantial reason for concluding that the trial before the primary judge (Bell J) had miscarried was that Court's decision that her Honour had misdirected the jury concerning the content of the "business defamation" complained of by the respondents[79].

80 The repeal of the 1958 Act, with its express reference to "business defamation", restored the common law in New South Wales. The text books on defamation, both in England[80] and in Australia appear to accept that, at common law[81]:

> "[D]efamation is concerned to protect the plaintiff's business reputation just as much as his or her personal or social attributes, so that statements which disparage a person in his or her calling will also be branded as defamatory."

81 In its review of the law of defamation, the Australian Law Reform Commission also concluded that defamation included publication of "matter concerning a person which tends … to injure that person in his occupation, trade,

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76 (1975) 134 CLR 1 at 3. Section 5 of the 1958 Act, which was also s 5 of the *Defamation Act* 1957 (Tas), was repeated almost verbatim from the *Criminal Code* (Q), s 366, in turn a re-enactment of the *Defamation Law of Queensland* 1889.

77 Defamation Act, s 4(1).

78 Defamation Act, s 4(2).

79 [2006] NSWCA 175 at [50] per Beasley JA (Handley and Ipp JJA concurring at [1] and [106]).

80 Milmo and Rogers (eds), *Gatley on Libel and Slander*, 10th ed (2004) at 36-37 [2.7], cited by Beasley JA: [2006] NSWCA 175 at [32].

81 Balkin and Davis, *Law of Torts*, 3rd ed (2004) at 557 [18.2]. See also Fleming, *The Law of Torts*, 9th ed (1998) ("Fleming") at 582.

office or financial credit."[82] Given the agreement of the parties on this issue, I will not attempt to re-express the law of defamation at common law upon which the respondents relied. Any such re-expression or re-conceptualisation must await a case in which the grounds of appeal require this Court to address the relevance to the cause of action (as distinct from the damage) of the particular capacity or relationship in which the harm to reputation is said to have been done.

82 The appellants did not contest the conclusion of the Court of Appeal that the primary judge had misdirected the jury (by elaborating before them the test for general defamation); and had erred in the way in which she redirected the jury on that subject. Nor did they argue that such deficiencies had been waived by the conduct of the respondents' trial counsel[83]. The manner in which counsel for the appellants at trial addressed the jury, and the primary judge instructed them, on the test for concluding that the imputations, specifically (a) and (c), bore a "defamatory meaning", were arguably consistent with the way the respondents had pleaded their cause of action in defamation, as set out above[84]. Be that as it may, because of the way the parties have defined the issues, this Court can disregard such questions.

83 One particular problem presented by accepting a particular category of "business defamation" is identifying the relevant audience in whose eyes the complaining party's reputation has then been diminished. Does it remain all ordinary people in the community, "taken in general"[85]? Or, in the case of business defamation, is it confined to those who have, or might have had, business dealings with the plaintiff? This question is unanswered by those who propound the special category.

84 In a sense, the address to the jury by the appellants' counsel, and the directions of the trial judge complained of before the Court of Appeal, left it to the jury to determine whether the imputations which they found were conveyed by the article damaged the appellants' business reputation and were therefore

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82 Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11, (1979) at 47-48 [84]. See s 9(1)(c) of the Draft Commonwealth Bill for an Unfair Publication Act, Appendix C at 210-211; cf Trindade, Cane and Lunney (eds), *The Law of Torts in Australia*, 4th ed (2007) at 339-340.

83 See [2006] NSWCA 175 at [40]-[51], [75]-[76].

84 Above these reasons at [63].

85 *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW), 171 at 172. See also Fleming at 582-583.

defamatory. They were to do so having regard to the effect of the publication on ordinary decent people[86] in general who might have become aware of the matter complained, which appeared in both the print and online versions of the first appellant's newspaper, *The Sydney Morning Herald*. On the premise that has been adopted, I accept, as the appellants do, that a misdirection occurred. It was not made sufficiently clear to the jury that some statements will be defamatory not by virtue of their impact on people *generally*, but, rather, based on the damage caused to their *business reputation*. It was therefore incorrect to speak generally of the effect of the publication on ordinary people at large and not also of (or alternatively of) the effect on the business reputation of the respondents or their business[87].

85 The foregoing analysis confines the attention of this Court to the correctness of the Court of Appeal's dispositions concerning imputations (a) and (c).

The issues

86 It follows that the issues in the appeal are:

(1) *The appellate power issue*: Did the Court of Appeal err in concluding that it had the power, pursuant to s 108(3) of the Supreme Court Act, to substitute its own answers for those of the first jury in respect of imputations (a) and (c)?

(2) *The exercise of power issue*: If the Court of Appeal had such power, did it err in exercising that power in the circumstances of this case by failing to order a retrial before the second jury of all of the issues that were held to have miscarried before the first jury?

Arguments for the absence of the appellate power

87 *Appellants' textual submissions*: The primary submission of the appellants was that the Court of Appeal lacked the power under the Supreme Court Act to make the orders that it did in respect of imputations (a) and (c).

88 This argument was advanced not only on the technical (or verbal) footing that the Supreme Court Act did not authorise "verdicts" for the respondents in respect of those imputations. More fundamentally, it rested on the fact that the only basis upon which the Court of Appeal could act under the propounded

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86 See Fleming at 583.

87 See reasons of Gleeson CJ and Crennan J at [6].

power in s 108(3) was where the party concerned was "as a matter of law, entitled to a verdict … on any … issue … in the proceedings". The appellants' arguments need to be addressed by appropriate textual and contextual analysis. It is not enough to say that, if correct, they would lead to inconvenient, surprising, paradoxical or unreasonable outcomes. Unfortunately, that is sometimes the case with legislation. The rule of law does not readily bend to necessity, paradox or convenience but only to the requirements of the law as properly elucidated.

89 The appellants submitted that, for two reasons, the power granted to the Court of Appeal was not engaged so as to permit it to substitute its own determinations for those of a jury. First, the foundation for the Court of Appeal's intervention was not "a matter of law". If anything, it was purely a matter of fact. Secondly, the entitlement to "a verdict", in the context, did not correspond with the determination *actually* made by a jury within s 7A(3) of the Defamation Act. The jury did not produce a "verdict" strictly so called. Even if, loosely, the jury's determination of the limited questions arising under s 7A(3) might be described as a kind of "special verdict", it was not a "verdict" of which s 108(3) of the Supreme Court Act was speaking. This was so because the closing words of the sub-section indicated that the type of "verdict", with which s 108(3) was concerned, was one by which the Court of Appeal could "give judgment accordingly", that is, judgment disposing of the entire action. As this was not possible in the present case, where defences and damages (if any) remain outstanding under s 7A(4) of the Defamation Act[88], the powers expressed in s 108(3) were not engaged. The Court of Appeal had therefore erred in concluding that it had the power to substitute "verdicts" as it did.

90 It may be accepted that these arguments, advanced for the appellants in favour of their interpretation of s 108(3), derive some support from the language of the legislation, from past authority and from considerations of legal principle and policy.

91 The provisions of s 107 of the Supreme Court Act, by which the Court of Appeal is empowered in very limited circumstances (and subject to strict conditions) to enter a "substituted verdict", including where there has been a trial with a jury, give support to the argument that s 108(3) should be read narrowly. Unless the phrase "as a matter of law" is given a substantive operation, the differentiation of the powers stated in s 107, in the limited circumstances to which that section applies, could not so easily be understood. True, s 107 has no application to a case such as the present. But the appellants pointed to the section, by way of contrast, to demonstrate that s 108(3) was not intended to provide a broad power to the Court of Appeal to enter a "substituted verdict",

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88 Reasons of Gummow and Hayne JJ at [18], [41].

save in terms of the sub-section, limited to where "as a matter of law" that course was warranted.

92 The limited character of the powers conferred by s 108(3) also appears in sharp contrast to the broad powers conferred by s 75A of the Supreme Court Act. The specific exclusion of the operation of those broad powers in relation to an appeal arising out of a "trial with a jury in the [Supreme] Court", made it plain that, in this respect, Parliament was maintaining the traditional control over the powers of the appellate court where the trial had been by jury. According to the appellants, the maintenance of such control was understandable. A jury gives no reasons[89]. An appellate court is in a much better position to make findings or assessments and to give judgments or make orders which ought to have been given at trial, where it has the advantage of *judicial* reasons disposing of the trial. After a *jury* trial, an appellate court can ordinarily only speculate on the reasons for a jury's verdict, including if the determination of an issue under s 7A(3) is a "special verdict" of sorts. The appellate court does not actually know the jury's reasoning in such cases.

93 The appellants also relied on the special provision made in s 86 of the Supreme Court Act for "issues of fact on a claim in respect of defamation". According to their argument, this provision, and the particular and limited function assigned to the jury by s 7A of the Defamation Act, indicated a general purpose on the part of Parliament that, save in limited circumstances inapplicable in these proceedings, it was for a jury to determine whether the matter complained of carried the imputation alleged by the plaintiff and, if it did, whether that imputation was defamatory. Express provisions for such a trial should be given proper effect. Reading s 108(3) of the Supreme Court Act against the background of the role contemplated for the jury in defamation proceedings, lent support, in that context, to adhering to a traditional approach to the meaning of s 108(3), rather than adopting one that would expand that meaning beyond its orthodox ambit[90].

94 *Appellants' submissions of principle*: The determination by a jury as to whether the matter complained of carries an imputation alleged and, if it does, whether the imputation is defamatory, involves the jury in the interpretation of the matter in question. This function presents a question of fact and not one of law[91]. It is an evaluative function which engages the jury precisely because they

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89 *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 579 [199].

90 *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 88.

91 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 277, 281; reasons of Gummow and Hayne JJ at [20].

are taken to represent a cross-section of the community in a way that judges may not do[92].

95 Past experience shows that juries sometimes "baffle" appellate judges by repeatedly coming to conclusions which judges regarded as "unreasonable" or, in the old language, "perverse"[93]. In matters of evaluation and judgment concerning words and conduct, and particularly where issues of free expression are at stake, the determination of the meaning of a publication and whether it is defamatory of a person complaining about it, does not (on the face of things) involve "a matter of law". Were it otherwise, that determination would not be assigned by s 7A(3) to a jury, whose only province is to reach conclusions on the facts.

96 Unless it can be said that in some circumstances a factual conclusion is so manifestly wrong and unreasonable that, without more, it evidences an error of law, the precondition for the operation of s 108(3) is not attracted. Because the jury are not *bound* to accept any particular interpretation or meaning ascribed to a publication, or any evaluation of the publication as defamatory or otherwise, it has not conventionally been considered that a plaintiff in such issues is entitled, as a matter of law, to a verdict in its favour[94].

97 The respondents contested this conventional view by reference to some early decisions of this Court[95] and to some authority overseas[96]. However, the respondents could not point to a single reported case in a defamation trial in Australia, where a trial judge has directed the jury, over the opposition of a defendant, that they *must* return a verdict in favour of the plaintiff. Or that they *must* determine that the matter complained of carried the imputation alleged and

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92 *Rivkin* (2003) 77 ALJR 1657 at 1661-1662 [23]-[26] per McHugh J; 201 ALR 77 at 82-83.

93 *Hocking v Bell* (1945) 71 CLR 430 at 486, 488, 497-498. See also (1947) 75 CLR 125 (PC).

94 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151.

95 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 373; *Hocking v Bell* (1945) 71 CLR 430 at 441-442. See reasons of Callinan and Heydon JJ at [185]-[186].

96 The respondents quoted Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 9 at 305-306 (§2495) and authorities cited therein, including *Leach v Burr* 188 US 510 at 513 (1903); *Jerke v Delmont State Bank* 223 NW 585 at 590 (1929). See also *City of Chanute v Higgins* 70 P 638 at 640 (1902); *McCaskill v Ford Motor Co of Canada* (1955) 17 WWR 239 at 245.

that such imputation was, as a matter of law, defamatory of the plaintiff. Such a verdict on factual questions, in favour of the party bearing the onus of establishing the facts, on the face of things, denies the residual function of the jury to believe or disbelieve the asserted facts, or to derive a meaning, purpose and effect from the facts, contrary to the plaintiff's submissions.

98 The appellants invoked the many cases in this Court which, they said, supported their view as to the ambit of the power conferred on the Court of Appeal by provisions such as s 108(3). As these cases are collected by Callinan and Heydon JJ[97], I will not repeat them. For the most part, the authorities derive from a time when jury trial of factual issues in civil litigation was much more common in Australia than it is today[98]. At this late stage in the elucidation of such provisions, and their application to an appeal following "a trial of ... any issue ... with a jury", the appellants urged this Court to adhere to the old law. They submitted that the Court should avoid imposing a strained interpretation of the phrase "as a matter of law", inapt to any error that was felt to exist in a jury determination of the issues presented by s 7A(3) of the Defamation Act.

99 The appellants also emphasised the fact that, when the s 7A procedure was introduced into the Defamation Act, the Attorney-General, supporting its introduction, acknowledged the continuing importance of the role assigned to the jury by this section. He described that role as involving "a vital decision in the trial" and as maintaining "an appropriate degree of community involvement"[99]. Why was such a role retained, especially when, at the same time, jury trials were effectively abolished for virtually all other civil causes in New South Wales? The appellants argued that this was because the decision assigned to the jury by s 7A(3) required the jury to give meaning to the matter complained of; to evaluate it against the pleaded imputations; and then to form a judgment on behalf of the community on whether the imputations were conveyed by the matter complained of and, if so, whether they were capable of bearing the defamatory meaning(s) alleged by the plaintiff.

100 The first step in this process (deriving meaning) might be one that a judge could perform as well as a jury. After all, under s 7A(3), a precondition for the matter coming before a jury at all is a determination by a judge of the reasonable

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97 Reasons of Callinan and Heydon JJ at [186] fn 166.

98 *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Swain* (2005) 220 CLR 517.

99 Reasons of Callinan and Heydon JJ at [195] fn 179, quoting the speech of the Hon J P Hannaford: New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 22 November 1994 at 5472.

capability of the matter to carry the imputation pleaded and to bear a defamatory meaning of the plaintiff. However, in judging the second question, community values will often be important. To the extent that a defamatory meaning is accepted, free speech is diminished. This, according to the appellants, was why jury trial had been preserved in the present context. They submitted that this Court should read the powers of the Court of Appeal in the light of that consideration.

101 If, for reasons of economy, finality, convenience or otherwise, it was thought appropriate that the Court of Appeal *should* have the power to substitute its judgment for that of a jury, Parliament could so provide expressly. It had not done so in the Defamation Act. Nor did such a particular power exist in the predecessor or successor to that Act. In such circumstances, the language of s 108(3) should not be interpreted to afford the power. The appellants asked this Court to overrule the recent line of authority in the Court of Appeal holding to the contrary.

102 It will be apparent from the foregoing statement of the appellants' arguments that their construction of s 108(3) is far from meritless. Nevertheless, I have ultimately come to the conclusion that the better view of s 108(3) is that a power does exist in the Court of Appeal to substitute its determination of an issue arising under s 7A(3) of the Defamation Act for that reached by a jury where the jury's determination is unreasonable. I must explain why.

Appellate power exists to direct a verdict for the plaintiff

103 *Wide reading of courts' powers*: In interpreting the powers of the Court of Appeal, it is conventional to give a broad ambit to statutory provisions affording jurisdiction and power to such a court[100]. This is done out of recognition of the wide range of circumstances to which such powers must respond and because of the confidence that such a court will not misuse its jurisdiction or powers. Of course, it remains to construe the powers by reference to the language in which they are expressed, read in the light of their history, and in the context in which they are stated and having regard to any relevant considerations of principle and policy.

104 The language of, and history behind, s 108(3) sufficiently indicate a different and more limited grant of power to the Court of Appeal in respect of an issue decided by a jury than an issue determined in the reasoned decision of a

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100 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422-423 [108]; *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at 499-500 [84]. See also reasons of Gleeson CJ and Crennan J at [11].

judge. Nevertheless, given the grant of power to the Court of Appeal, in an appeal after a "trial of … *any issue* in the proceedings with a jury"[101], it would be inappropriate to adopt a narrow construction of the power so conferred. Nor, in the operation of s 7A of the Defamation Act and ss 102 and 108 of the Supreme Court Act, should it be assumed that all of the old authorities concerned with appeals following jury verdicts are necessarily imported into the determination of what may be done in such a case.

105 *Trial of "issues" is included*: It is significant that both the grant of jurisdiction and power in s 102, and the provision in s 108(3) for the disposition by the Court of Appeal of an appeal to it in proceedings in which there has been "a trial with a jury", contemplate a trial of an "issue" in the proceedings. In other words, by the language of these two sections, Parliament has provided a role for the Court of Appeal following a jury trial of an "issue in the proceedings". The provisions of s 108(3) are therefore well adapted to respond to the very limited functions assigned to a jury by s 7A(3) of the Defamation Act[102].

106 When, therefore, ss 102 and 108 of the Supreme Court Act are read alongside s 7A of the Defamation Act, it is not difficult to conclude that s 108(3) applies to such a case. If it applies, on the face of things, it would not be surprising if it applied in a useful way, responsive to the limited kind of "issue" which this form of "trial with a jury" typically presents. That "issue", as the present trial instances, usually involves a determination by a jury on the basis of little or nothing more than the evidence of the matter complained of, the identification of the alleged imputations, argument from both sides and directions from the trial judge[103].

107 *Absence of appellate constraints*: Such an attenuated "trial with a jury", inherent in the kind of involvement of the jury contemplated by s 7A(3), typically (as in this case) involves no contested evidence; no questions of credibility; and no room for the kinds of determinations of an evidentiary or factual kind that might otherwise make a principled appellate review of the jury determination difficult or impossible to perform.

108 Here, equally with the jury in the trial, the appellate judges would have the entirety of the evidence and be able to read and assess the matter complained of, just as the jury might do. Whilst the jurors come from different backgrounds and might have a wider range of experience in the community, such substitution

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101 Supreme Court Act, s 102 (emphasis added).

102 Reasons of Gummow and Hayne JJ at [44]-[45].

103 *Rivkin* (2003) 77 ALJR 1657 at 1677 [119]; 201 ALR 77 at 104-105.

would not be impossible. It would not even be particularly difficult. Most of the reasons that ordinarily restrain disturbance of jury verdicts are absent in this particular class of case. The residual restraints involve considerations relevant to the *exercise* of the power. They do not suggest an *absence* of the power.

109 *Contextual meaning to "verdict"*: So far as concerns the argument of the appellants based on the closing words of s 108(3), there are several answers. The sub-section does not purport to state exhaustively all of the powers of the Court of Appeal in disposing of an appeal after a "trial … of any issue in the proceedings with a jury"[104]. Necessarily, the Court must have other general powers as required for it to discharge its appellate functions. Such powers are available to supplement those expressed in s 108(3).

110 In any case, the power given to the Court of Appeal in s 108(3) to "direct a verdict and give judgment accordingly" must be read in a way apt to the disposition of an "issue … in the proceedings". This is because, by its terms, s 108(3) contemplates that that is all that the proceedings in the Court in which there has been a trial by jury might involve. In disposing of an "issue" alone, self-evidently a "verdict" and "judgment" will not necessarily be a "verdict" or "judgment" of the entire proceedings[105]. From the context, therefore, the "verdict" and "judgment" mentioned in s 108(3) must be such as is appropriate to an appellate determination of an "issue". It must therefore allow the possibility of application to the kind of "special verdict" for which s 7A provides.

111 Reading s 7A with s 108(3) makes it sensible to treat a s 7A(3) determination as a kind of special verdict. Likewise, the giving of a "judgment" must be read as including a "judgment" of the Court of Appeal disposing of the appeal before it, including following a determination in a trial by jury of a limited "issue". In fact, the formal disposition of the Court of Appeal's decision in the present case was described as a "judgment or order". That description was correct. Indeed, these are the descriptions of curial dispositions used in the Constitution itself[106]. No difficulty is therefore presented for the respondents' construction of the powers of the Court of Appeal by the closing words of s 108(3).

112 *Meaning of "as a matter of law"*: But what of the phrase "as a matter of law" in s 108(3)? It is true that many decisions of this Court suggest that a jury verdict in a trial of an action at common law will not present "a matter of law",

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104 Supreme Court Act, s 102.

105 Reasons of Gummow and Hayne JJ at [18], [41], [45].

106 Constitution, s 73.

unless there is no evidence at all to sustain that verdict. How does that interpretation operate in a circumstance, as here, that expressly hypothesises that the jury trial in question may be confined to the determination of an "issue" and where that "issue" is one involving the factual determination reserved to the jury by s 7A(3)?

113 The appellants' argument was that this analysis simply demonstrated that s 108(3) had no work to do in an appeal against a jury determination of an "issue" under s 7A(3). However, that would not be a conclusion that one would readily reach, given the inferred purpose of providing an effective remedy of appeal, including against a jury determination under s 7A of the Defamation Act. So far as s 108(3) is concerned, this is now effectively the only decision "in proceedings … in which there has been a trial with a jury" in which a plaintiff may be entitled to a "[special] verdict ... on [an] … issue … in the proceedings". It would not therefore be reasonable to interpret s 108(3) as having no application to such a case. Such an interpretation would reduce s 108(3) in this regard to a fatuity. This is not an interpretation of the sub-section that should be adopted.

114 When this conclusion is reached, it is necessary to reconsider, in this context, some of the old authorities addressed to the phrase "as a matter of law". Without exception, those authorities date from the time of jury verdicts of a general kind, which determined the totality of a civil dispute between the parties. In their reasons, Callinan and Heydon JJ have pointed out that, even when that was the case, a number of judges of this Court accepted that, in given circumstances, when the evidence was all one way, it was open to an appellate court to conclude "*as a matter of law* [that] the verdict must be for the party entitled to succeed"[107].

115 *Jury determinations evidencing legal error*: I would not wish to rest my conclusion on scattered judicial expressions of such a kind. Instead, as it seems to me, a different and broader foundation exists. It is one apt to the kind of "appeal" enlivened in the present case by the challenge to the determination of the jury under s 7A(3).

116 Since many of the cases upon which the appellants relied were decided, there has been a great expansion of the facility of appeal. This has accompanied, and stimulated, an appreciation that the facility of appeal is as important where "there has been a trial with a jury" as where there has been a trial before a judge sitting alone. In each case, the legal system is committed to the principles of

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107 Reasons of Callinan and Heydon JJ at [185]-[186], quoting *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373 and also citing *Hocking v Bell* (1945) 71 CLR 430 at 441-442.

lawfulness, fairness and rationality. This is why, in *Rivkin*[108], I suggested that it was "erroneous to elevate a jury verdict in favour of a defendant in a defamation case to a status comparable to that of a verdict of acquittal of a defendant in a criminal case."

117 To similar effect is the reasoning of the House of Lords in *Grobbelaar v News Group Newspapers Ltd*[109]. In that case, Lord Scott of Foscote wrote[110]:

> "Each side is equally entitled to justice. The appellate court must, of course, pay proper respect to the jury verdict. The jury are the fact finders. In a civil case, the jury, as fact finders, are entitled to the same respect, no more and no less, than that which is due to a trial judge sitting without a jury. The difference is that the trial judge's reasoning will be, or should be, on the face of the judgment whereas the jury's reasons, being undisclosed, will need to be re-constructed by the appellate court. Subject to that important difference, however, the factual conclusions of juries in civil cases should, in my opinion, be treated by an appellate court no differently, with no greater and no less respect, than the factual conclusions of judges."

118 In the same case, Lord Bingham of Cornhill observed[111]:

> "The oracular utterance of the jury contains no reasoning, no elaboration. But it is not immune from review. The jury is a judicial decision-maker of a very special kind, but it is a judicial decision-maker none the less. While speculation about the jury's reasoning and train of thought is impermissible, the drawing of inevitable or proper inferences from the jury's decision is not, and is indeed inherent in the process of review."

119 When, therefore, in performing their functions of determining the limited issues reserved to them by s 7A(3), a jury reaches a conclusion that appears to an appellate court to be unreasonable[112], such an error is not now to be categorised as purely or only a factual one. In some cases, such a verdict may indicate "as a

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108 (2003) 77 ALJR 1657 at 1676 [116]; 201 ALR 77 at 103-104.

109 [2002] 1 WLR 3024; [2002] 4 All ER 732.

110 [2002] 1 WLR 3024 at 3053 [75]; [2002] 4 All ER 732 at 759. See also *Rivkin* (2003) 77 ALJR 1657 at 1676 [116]; 201 ALR 77 at 103-104.

111 [2002] 1 WLR 3024 at 3029-3030 [7]; [2002] 4 All ER 732 at 737-738.

112 In the now discarded language, "perverse": *Rivkin* (2003) 77 ALJR 1657 at 1675 [111]; 201 ALR 77 at 102.

matter of law" that the jury must have applied the wrong legal standard or must have reasoned in a way contrary to that envisaged by the applicable law.

120 More than 20 years ago, in *Azzopardi v Tasman UEB Industries Ltd*[113], I questioned the correctness of some of the very wide language deployed in the cases which the appellants invoked in this appeal. *Azzopardi* involved the question of whether, in defined circumstances, factual determinations by a judge might appear to an appellate court so manifestly erroneous as to indicate that the judge had made an error of law. I did not accept that errors of fact-finding could never give rise to an "error of law", grounding an appeal so limited. However, the majority of the New South Wales Court of Appeal decided otherwise.

121 As I pointed out in *Azzopardi*, many of the old cases arose in the circumstances of jury trial where different considerations were presented because of the absence of reasons and the heightened difficulty of appellate analysis of the decision under review[114]. The intervening years have not shaken the opinions that I expressed in *Azzopardi*. On the contrary, the intervening case law confirms me in the view that I stated there. Reasoning such as that of Lord Bingham in *Grobbelaar* suggests that the view I favoured in *Azzopardi* may be as true of jury determinations as of the reasoned decisions of judges. It is simply more difficult to establish the error where there has been "a trial with a jury" than where judicial reasons are available to the appellate court to assist in that task and to help demonstrate the relevant error.

122 In either case, if it can be shown that the outcome is unreasonable, a decision on the facts may betoken a misunderstanding or misapplication of the law. Then, "as a matter of law", the Court of Appeal may "upon the evidence" conclude that "the plaintiff … is … entitled to a verdict … on … [the] issue"[115]. It may do so where that "issue" is the jury's determination under s 7A(3) of the Defamation Act.

123 This conclusion is not inconsistent with my belief that a trial judge may not direct a verdict in favour of the onus-bearing plaintiff in proceedings before a jury under s 7A(3). The powers of a trial judge remain the same. In such trials they are, in my view, limited. However, s 108(3) of the Supreme Court Act says nothing at all about the powers of the trial judge. It addresses only the jurisdiction and powers of the Court of Appeal. Those powers are larger than the powers of a trial judge. There will still be reasons for restraint. But, given the

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113 (1985) 4 NSWLR 139 at 141-145.

114 (1985) 4 NSWLR 139 at 151.

115 cf reasons of Gummow and Hayne JJ at [24]-[27].

attenuated nature of the proceeding involving the jury under s 7A(3); the limited evidence typically (as here) adduced; and the limited issues reserved for the jury's determination, there is no reason why the Court of Appeal, having all the evidence, could not conclude that the jury had erred. In such a case the Court of Appeal might decide that a party, as a matter of law, is entitled to a (special) verdict on the "issue" presented by s 7A(3).

124 Many of the considerations suggesting restraint on the part of the Court of Appeal remain to be considered in relation to the second issue in this appeal, namely the exercise of the power in disposing of an appeal in such a matter. Thus, the Court of Appeal might conclude (as in my view would often be appropriate) that a second jury should consider "the evidence" on a retrial and reach their own conclusions. Or the Court of Appeal, which has the power or discretion ("may"), could decide to "direct a [special] verdict". In each case, it is for the Court of Appeal to dispose of the appeal as its powers permit and the circumstances require.

125 In support of this conclusion is a consideration repeatedly mentioned by the Court of Appeal itself in justifying its conclusion as to its powers under s 108(3). In *Charlwood Industries Pty Ltd v Brent*[116], Ipp AJA put the matter in this way[117]:

> "[I]f the imputation is plainly defamatory and, on the relevant material, any other decision would be perverse, it would follow, as a matter of law, that the Court of Appeal may direct a verdict on the issue whether a defamatory meaning arises and give judgment accordingly.
>
> Any other result would be quite incongruous. For example, in a case where the Court of Appeal holds that a verdict was perverse by failing to hold that an imputation was defamatory, it would be incongruous to hold a new trial in accordance with law, with all the expense and solemn paraphernalia … In such circumstances the practicalities of the situation and common sense cry out for the Court to proceed under s 108(3)."

126 *Conclusion: appellate power exists*: In the result I would reject the submission of the appellants that the Court of Appeal had no power to answer the questions presented for the determination of the jury, in a way different from the answers given by the first jury. Under the Supreme Court Act, such a *power* exists. However, as has been recognised in a number of the cases, there are countervailing considerations that need to be given weight. This brings me to the

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116 [2002] NSWCA 201.

117 [2002] NSWCA 201 at [67]-[68].

appellants' alternative challenge. This is to the *exercise* by the Court of Appeal of the power not to order a retrial of all of the outstanding imputations before a jury. It is here that I part company with the other members of this Court. I will explain why.

The Court of Appeal's decision miscarried

127 *Basis of the decision*: The Court of Appeal exercised the power to substitute its own determination of the issues reserved for jury determination under s 7A(3) on the basis that the determinations of the first jury had been unreasonable[118]; that any result other than that which it favoured would be incongruous; and that no relevant reason stood in the way of adopting that course given that the only possible verdict was that the imputations were defamatory.

128 I agree with what Gummow and Hayne JJ have written[119] concerning the legal character of the "power" conferred on the Court of Appeal by s 108(3) of the Supreme Court Act. It is not a discretionary faculty in the usual sense of that expression. This classification affects the standard to be applied to appellate review of the subject order. That order involves the exercise of a power that is to be given effect, once the entitlement to it is made out. This follows from the identity of the repository of the power and much legal authority. However, the decision on whether the entitlement has been made out itself involves evaluation and judgment. It is not beyond contest and reasonable differences. In resolving such contest and differences, it is necessary to return to fundamental considerations.

129 Specifically, the Court of Appeal rejected the appellants' submissions that a jury decision was appropriate in the case because "any decision by a jury as to whether a particular meaning found by them is defamatory raises community standards"[120]. Beazley JA contrasted the circumstances where general community standards with respect to sexual morality or immorality were raised by a publication[121] and a case such as the present. Her Honour concluded that:

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118 [2006] NSWCA 175 at [63].

119 Reasons of Gummow and Hayne JJ at [27]-[28]. See also reasons of Gleeson CJ and Crennan J at [12].

120 [2006] NSWCA 175 at [71].

121 [2006] NSWCA 175 at [72].

> "The question whether a restaurant serves unpalatable food or provides some bad service does not raise questions of community standards of the type discussed in *Cairns v John Fairfax*."[122]

130 Because, in her Honour's view, "the only verdict that could have been returned by the jury was that the imputations were defamatory", it followed that "there is no reason why [the Court of Appeal] ought not to enter verdicts in respect of imputations (a) and (c)"[123].

131 With respect, it is my opinion that this approach indicates error on the part of the Court of Appeal[124]. Indeed, there were several reasons why the Court of Appeal's exercise of its power miscarried in this respect.

132 The reasons of Gleeson CJ and Crennan J state that the power given to the Court of Appeal by s 108(3) involves a compound concept. They conclude that the proposition inherent in the sub-section, that as a matter of law a party becomes *entitled* to a verdict, ensures that any notion of discretion would be "paradoxical"[125]. Yet their Honours accept that, in determining whether, as a matter of law, the respondents were entitled to a verdict on imputations (a) and (c), the Court of Appeal "will have considered the competing possibility ... that, in the circumstances of the case, there are questions that must be determined by a jury"[126]. In my respectful view, the other reasons in this Court fail to give weight to this consideration.

133 Section 108(3) applies generally to *all* matters where there has been a trial with a jury. The role entrusted to juries in defamation proceedings is, unlike that role in criminal matters, particular and limited. Where Parliament has specifically entrusted a jury with the role of making "determinations" under the Defamation Act, the power granted by s 108(3) must adapt accordingly. This is because it will not always be possible in defamation proceedings, conducted in accordance with s 7A(3), to determine that, upon all the evidence "as a matter of law" a party is entitled to a particular determination.

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122 *Cairns v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708 at 720.

123 [2006] NSWCA 175 at [74]. See also at [56]-[57].

124 cf reasons of Gummow and Hayne JJ at [51]-[54].

125 See reasons of Gleeson CJ and Crennan J at [12]. See also reasons of Gummow and Hayne JJ at [27]-[28].

126 Reasons of Gleeson CJ and Crennan J at [12].

134 Simply because a misdirection of the applicable test of defamation has occurred, I do not accept that imputations found to have been conveyed by a jury are necessarily defamatory. If they were, Parliament would not have provided for jury determinations of separate and distinct questions in s 7A(3). Although one might "suppose that the jury, having found that the imputations were conveyed, decided they were not defamatory because of a misunderstanding of what was meant by defamatory"[127], this should not be assumed[128]. It is not necessarily so. For my own part, I do not agree that the "Court of Appeal was itself in a position to answer the second question without doing any injustice to either party"[129]. That is the very role which the Defamation Act entrusts to a jury. I cannot accept that there are no questions in this case that remain to be determined by a jury, certainly in a matter in respect of which the first (jury) trial has been held to have miscarried through no fault of the appellants.

135 *The postulated approach of juries*: It cannot be the position that a conclusion by judges in the Court of Appeal that imputations are conveyed and are clearly defamatory always deprives a publisher of the right to have a second jury reconsider the matter. If that were so, it would render the procedure for limited jury trial provided for in s 7A(3) incongruous. Effectively, it would make it a pointless exercise to have the jury reach a determination at all. Yet, by definition, Parliament has concluded that a jury *should* decide such matters. It has provided for that mode of trial and in current circumstances this is notable because it is so exceptional.

136 It is not for the Court of Appeal, by a universal approach to all cases in which it concludes that a publication "is reasonably capable of carrying the imputation" and "of bearing a defamatory meaning", contrary to the first jury's verdict, to proceed to substitute determinations by its judges for those of juries. Doing that ignores the distinctive legislative scheme. Moreover, it evidences insufficient respect for the continuing role and function of juries in cases of this kind[130].

137 Where, therefore, a determination has miscarried for misdirections, *prima facie* it remains a party's right to have a determination of the stated questions, relevant to liability in defamation, decided by a jury. History teaches that jury determinations in such cases are not infrequently different from those of judges –

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127 Reasons of Gleeson CJ and Crennan J at [13].

128 cf reasons of Gummow and Hayne JJ at [48], [51]-[53].

129 Reasons of Gleeson CJ and Crennan J at [13].

130 *Swain* (2005) 220 CLR 517 at 568-569 [160].

a fact that McHugh J noticed in *Rivkin*[131]. His Honour cited Lord Devlin's well-known remarks in *Lewis v Daily Telegraph*[132]:

> "[T]he layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory."

138 Lord Reid, in *Morgan v Odhams Press Ltd*[133], pointed out that the "ordinary reader does not formulate reasons" but "gets a general impression". Moreover, there are uncounted cases where jurors have been more protective of liberties and freedom than judges have been.

139 One such liberty is the freedom of the press to publish criticisms of people and institutions that are ironical, sarcastic, satirical, witty or designed to mock perceived pretension. It is true that such issues attract defences under the Defamation Act that are then available to publishers, such as the appellants. However, even before the defences are reached, the scheme of the legislation envisages that a decision will be taken from a jury, affirming or denying the complaint of defamation. Proper respect has to be paid to that legislative scheme. The approach of the Court of Appeal, and now of the majority of this Court, evidences insufficient attention to this consideration.

140 *Absence of a true verdict on imputations (a) and (c)*: The conclusion that the Court of Appeal should substitute its own determinations on imputations (a) and (c) also departed from its own recognition, in an earlier case, correctly in my view, that[134]:

> "This Court should rarely, if ever, proceed to decide the issue of whether an imputation is defamatory of the plaintiff before a jury has first determined that issue. That is because the jury has an especially significant constitutional role … in evaluating the impact of the matter complained of on the community."

141 In the present matter, the Court of Appeal had concluded that the primary judge had misdirected the jury concerning the law applicable to their decision on

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131 (2003) 77 ALJR 1657 at 1661-1662 [23]-[28]; 201 ALR 77 at 82-84.

132 [1964] AC 234 at 277.

133 [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1163.

134 *Harvey* [2005] NSWCA 255 at [105] per Hunt AJA.

imputations (a) and (c). In this sense, on the Court of Appeal's holding, the determinations by the first jury were not true determinations, as s 7A(3) contemplated. On the approach of the Court of Appeal, there has therefore never been a jury determination of those imputations in accordance with law. The Court of Appeal recognised this consideration[135]. However, their Honours gave insufficient, if any, weight to it. Yet it was a very important factor confirming the entitlement of the appellants (and also the respondents) to have a second jury consider the imputations afresh, absent any misdirection that caused the first jury determination to miscarry.

142 *Juries and community standards*: I cannot agree that the function of the jury in reflecting "community standards" was somehow immaterial, or of little relevance, to a decision in a case of "business defamation", such as the present[136]. Some judges may feel themselves better able to decide imputations damaging to a business than, for example, imputations concerned with sexual morality. However, it is not the case that "community standards" are irrelevant in such matters. To say that would be to deny the legislative scheme that preserves the touchstone of community standards provided by a civil jury. It is far from inconceivable to me that a contemporary jury of Australian citizens might reasonably conclude that the review of the respondents' restaurant was not defamatory of the respondents. They might take the view that it was basically an example of media entertainment in which any publicity is good publicity. Or that high price restaurateurs have to exhibit a thicker skin. Or that defamation should be reserved to more serious complaints because "free speech" and the "free press" really matter. Or that any defamation was of the respondents' chef and waiting staff and not of them.

143 Moreover, on subjects such as a criticism of a restaurant's food and service, lay jurors are much more likely to reflect community standards than judges, many of whom, like myself, have no special interest in culinary matters, expensive restaurants or cuisine generally. Astonishing as it may seem, judges may occasionally lack a sense of irony or humour. Some may undervalue "free speech" or sometimes even feel hostility to a "free press". In such matters, therefore, there is safety in the numbers of a jury. It was an error of the Court of Appeal to consider that community standards were insignificant in judging the suggested defamatory character of the review of the respondents' restaurant. With all respect, such an attitude contradicts the legislative preservation by s 7A(3) of the function of a jury. That function is not unreviewable. It does not exclude a proper role for the Court of Appeal. But the jury's function is still very

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135 [2006] NSWCA 175 at [73].

136 cf reasons of Gleeson CJ and Crennan J at [13].

important. Because Parliament exceptionally provided for it, it is to be respected in defamation actions.

144 *Successive jury verdicts prevail*: Experience at the time when civil jury trials were much more common than today, demonstrates that sometimes juries continued to reach conclusions about defamatory imputations that were different from those reached by judges. In these circumstances, it is not the case, as Ipp AJA put it in *Charlwood*[137], that:

> "[S]hould the jury again bring in a verdict that the imputation was not defamatory, that verdict would once more be overturned on the same ground."

An appellate court, in such a case, might take that course. However, in several well-known instances, appellate judges have ultimately accepted that jurors were entitled to reach a conclusion different from that of the judges.

145 The best known of such cases in Australia is *Hocking v Bell*[138]. In that case, which involved the prospect of successive "unreasonable" jury verdicts being set aside, this Court pointed out[139] that each order for a further new trial was discretionary. Latham CJ, whose reasons[140] were upheld by the Privy Council, concluded that because the appeal involved a second jury verdict in favour of the plaintiff, that verdict should be allowed to stand. That should happen although the appellate court might itself have come to a conclusion different from the jury's verdict. To the same effect, Dixon J[141] quoted from Forsyth's *History of Trial by Jury*[142]:

> "But to this ['a general verdict can only be set right by a new trial'] there is a limit. Juries may baffle the court by persisting in the same opinion, and in such cases it has been the practice for the latter ultimately to give way."

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137 [2002] NSWCA 201 at [68].

138 (1945) 71 CLR 430; (1947) 75 CLR 125 (PC).

139 (1945) 71 CLR 430 at 445, 463, 468, 499-500.

140 (1945) 71 CLR 430 at 444-445.

141 (1945) 71 CLR 430 at 488.

142 (1852) at 191.

In *Hocking v Bell*, Dixon J, like Latham CJ, concluded that such was the course that this Court should adopt. It was that conclusion that ultimately prevailed in the Privy Council.

146 The same approach was followed recently by the Court of Appeal itself in *Harvey v John Fairfax Publications Pty Ltd*[143]. That was a case involving a second trial in a defamation action where the jury returned the same determinations of the s 7A issues adverse to the plaintiff. In such a case, Hunt AJA sensibly asked "whether the time [had] come to call a halt to the succession of 'unreasonable' verdicts"[144]. In the end, in that case, that was the course which the Court of Appeal took. The jury's verdict was allowed to stand[145].

147 Callinan and Heydon JJ ask, in effect, whether the appellate court would require two, or three, or more trials before surrendering its opinion that a jury determination under s 7A was "unreasonable"[146]. In practice, it rarely comes to more than two. Normally the problem does not arise. But where it does, the approach adopted by Latham CJ and Dixon J in *Hocking v Bell*, affirmed by the Privy Council, is by no means irrational. It is sensible. It is practical. It is another instance of the great truth that the life of the common law is not logic alone but includes experience[147]. And in any case, in the present appeal, on the hypothesis upheld by the Court of Appeal, there has *never* been a proper trial of the imputation issues before a jury, accurately instructed on the law. The appellants ordinarily have a right by statute to such a trial. The Court of Appeal should not have deprived them of that right in the circumstances of this case in respect of imputations (a) and (c).

148 *Retrial of the whole matter*: There is one final consideration. It was mentioned in passing by Ipp JA in the present case[148]. This Court has endorsed the general proposition that "if there is to be a new trial it ought to be of the case

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143 [2005] NSWCA 255.

144 [2005] NSWCA 255 at [108].

145 [2005] NSWCA 255 at [117].

146 Reasons of Callinan and Heydon JJ at [188].

147 Holmes, *The Common Law*, (1882) at 1.

148 [2006] NSWCA 175 at [134]-[139].

as a whole unless the Court thinks that 'they shall do more injustice by setting the matter at large again'"[149].

149 The Court of Appeal unanimously concluded that imputation (d) should be remitted to a jury for redetermination. Having so ordered, the position has been reached that there must be a second jury trial in these proceedings. A jury will be empanelled and will have the matter complained of before them, with argument from the present parties and with correct directions on the law, so as to determine the issues presented by imputation (d).

150 Because the Court of Appeal affirmatively addressed this consideration before making the differential orders that it did, it would not, standing alone, have warranted disturbance, given the discretionary elements inherent in such a disposition. However, once other errors are demonstrated in the determination by the Court of Appeal, it falls to this Court to make its own orders, freed of those errors. In that circumstance, it is appropriate to take into account the necessity for a new trial before a second jury under s 7A. When that consideration is added to the others that I have identified, there are compelling reasons why, in this case, all of the remaining imputations, (a), (c) and (d), should be returned for trial before the second jury. That course alone will fulfil the procedures that Parliament has laid down. That is therefore the course that I would favour.

151 In case it should become important, in respect of the retrial of imputation (d) and the issue of an inference on an inference, I agree with what Callinan and Heydon JJ have written on that subject[150].

Orders

152 The appeal should be allowed. Orders 3 and 4 of the orders of the Court of Appeal should be set aside. In place of those orders, this Court should order that the claims by the present respondents against the appellants in relation to imputations (a), (c) and (d) be remitted for determination by a jury in accordance with s 7A of the *Defamation Act* 1974 (NSW). The respondents should pay the appellants' costs of the appeal to this Court.

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149 *Pateman v Higgin* (1957) 97 CLR 521 at 527. See also *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at 1820-1821 [20], [22], 1836 [133]; 221 ALR 402 at 408, 429; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 475 [81]; 224 ALR 1 at 21.

150 Reasons of Callinan and Heydon JJ at [191]-[194].

CALLINAN AND HEYDON JJ.

Facts and Previous Proceedings

153 The respondents were the owners of Coco Roco, a restaurant in Sydney. The first appellant is a publisher of newspapers, and the second appellant is a restaurant reviewer for the first appellant. The respondents sued the appellants for damages for defamation in the Supreme Court of New South Wales on the review of their restaurant published in the first appellant's newspaper, the *Sydney Morning Herald*.

154 Before the trial of any issue by a jury in this case, a judge of the Supreme Court of New South Wales (Nicholas J) ruled that four imputations were reasonably capable of being carried by the review, and were reasonably capable of bearing a defamatory meaning.

155 Those four imputations were as follows:

(a) The respondents sell unpalatable food at Coco Roco.

(b) The respondents charge excessive prices at Coco Roco.

(c) The respondents provide some bad service at Coco Roco.

(d) The respondents are incompetent as restaurant owners because she/he employs a chef at Coco Roco who makes poor quality food.

The Section 7A Trial

156 A trial of some of the issues was then conducted pursuant to s 7A(3)(b) of the *Defamation Act* 1974 (NSW) ("the Defamation Act")[151] before a judge (Bell J) and a jury. It was a trial colloquially known as a "s 7A trial". That section provides as follows:

"7A Functions of judge and jury

(1) If proceedings for defamation are tried before a jury, the court and not the jury is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the

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151 Since repealed by the *Defamation Act* 2005 (NSW), s 46, however it was common ground that the 1974 Act continues to apply in this case.

plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning.

(2) If the court determines that:

(a) the matter is not reasonably capable of carrying the imputation pleaded by the plaintiff, or

(b) the imputation is not reasonably capable of bearing a defamatory meaning,

the court is to enter a verdict for the defendant in relation to the imputation pleaded.

(3) If the court determines that:

(a) the matter is reasonably capable of carrying the imputation pleaded by the plaintiff, and

(b) the imputation is reasonably capable of bearing a defamatory meaning,

the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory.

(4) If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury is:

(a) to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established, and

(b) to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(5) Section 86 of the *Supreme Court Act 1970* and section 76B of the *District Court Act 1973* apply subject to the provisions of this section."

157 Section 9 of the Defamation Act relevantly draws a distinction between published matter and any imputations conveyed by it:

"9 Causes of action

(1) Where a person publishes any report, article, letter, note, picture, oral utterance or other thing, by means of which or by means of any part of which, and its publication, the publisher makes an imputation defamatory of another person, whether by innuendo or otherwise, then for the purposes of this section:

(a) that report, article, letter, note, picture, oral utterance or thing is a **matter**, and

(b) the imputation is made by means of the publication of that matter.

(2) Where a person publishes any matter to any recipient and by means of that publication makes an imputation defamatory of another person, the person defamed has, in respect of that imputation, a cause of action against the publisher for the publication of that matter to that recipient:

(a) in addition to any cause of action which the person defamed may have against the publisher for the publication of that matter to that recipient in respect of any other defamatory imputation made by means of that publication, and

(b) in addition to any cause of action which the person defamed may have against that publisher for any publication of that matter to any other recipient.

…

(5) Notwithstanding subsection (2), where proceedings for defamation in respect of the publication of any matter are tried before a jury, the jury shall, unless the court otherwise directs:

(a) give a single verdict in respect of all the causes of action on which the plaintiff relies.

(5A) Notwithstanding subsection (2), if the court or the jury (if any) finds for the plaintiff as to more than one cause of action in the same proceedings for defamation, the court may assess damages in a single sum.

(6) This section does not affect:

(a) any law or practice relating to special verdicts, or

(b) the powers of any court in case of vexatious proceedings or abuse of process."

158 It is sufficient to note that the Defamation Act provides for all of the analogous defences to defamation at common law: truth[152]; absolute privilege[153]; qualified privilege[154]; protected reports[155] and comment[156]. Under the procedure mandated by the Defamation Act the issues raised by the defences, as well as damages, are the province of the trial judge to be decided after the s 7A trial.

159 To complete the context in which s 7A appears, reference is required to Pt 4 of the Defamation Act which is concerned with damages and costs. Section 46 defines "harm":

"46 General

(1) In this Part **relevant harm** means, in relation to damages for defamation:

(a) harm suffered by the person defamed, or

(b) where the person defamed dies before damages are assessed, harm suffered by the person defamed by way of injury to property or financial loss.

(2) Damages for defamation shall be the damages recoverable in accordance with the common law, but limited to damages for relevant harm.

(3) In particular, damages for defamation:

(a) shall not include exemplary damages, and

(b) shall not be affected by the malice or other state of mind of the publisher at the time of the publication complained of or

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152 Sections 14, 15 & 16; including contextual truthful imputations.

153 Sections 17 to 19.

154 Sections 20 to 23.

155 Sections 24 to 28.

156 Sections 29 to 35.

at any other time, except so far as that malice or other state of mind affects the relevant harm."

160 Section 46A gives guidance as to the "factors relevant in damages assessment": that they be "appropriate and rational" having regard to the relevant harm, and to the general range of damages for non-economic loss awarded to personally injured plaintiffs. Clearly, "harm" consisting of financial harm or loss will sound in damages.

161 The better to understand imputation (d) in particular and its relevance to the case, the review should be set out:

"**Crash and Burn**

When dining on the view is the only recommendation

If a restaurant serves good as well as bad food, do you give it the benefit of the doubt? I wouldn't do that with a three chef's hat restaurant, so why should I do it here? Especially when more than half the dishes I've tried at Coco Roco are simply unpalatable.

Coco Roco is the swank new eatery at King Street Wharf. The opening was touted as 'Sydney's most glamorous restaurant'. If glamour peaked at about 1985, then perhaps they're right. Something about the polished stainless steel around the open kitchen and the black reflector tiles in the bathroom make me feel I should be wearing a pink shirt and a thin leather tie. Maybe it's just me.

What isn't disputable is that this place has had a $3 million fitout, has views westwards over the water and scored Sarah O'Hare as its official guest at the opening. It has set itself up as a flash restaurant with big-end-of-town prices. Its business card even boasts that 'A new level of dining comes to Sydney's King Street Wharf.' I couldn't agree more.

Coco Roco is actually two restaurants: Coco, the posh place upstairs off Lime Street, and sibling Roco, also smartly fitted out on the foreshore. Forever in pursuit of excellence, we chose the more expensive option.

Expensive is right. Mains skid dizzily from a vegetarian dish at just under $30 and crash over the $50 mark. It's a brave restaurateur who tries that without the goods to back it up.

A degustation of oysters ($28 for six/$40 for 12) arrives as different flavoured bivalves, rather than as oysters from various regions. There's a saffron infused gin one. There's a seafood foam which looks

like it's been piped on top. The texture is scary and, let's be polite, not to my tastes. The limoncello, however, is worse – flavours jangle like a car crash; all at once it's sickly sweet, overtly alcoholic, slippery, salty and bitter.

Only the lone natural oyster is gloriously free from interference and there's an exquisite verjuice jelly on another.

Next up, the carpaccio of beef ($22) comes with a dreary roast almond paste underneath and far too many yellowing rocket leaves on top. The meat itself is fine, although the parmesan cheese strips taste tired.

Small Queensland scallops ($24) on jagged shells with cauliflower and vanilla nearly work but are uninteresting.

Why anyone would put apricots in a sherry-scented white sauce with a prime rib steak is beyond me. A generous chock of meat comes perfectly rested, medium as ordered. But the halves of apricot are rubbery and tasteless (which is probably a good thing). I scrape the whole wretched garnish to one side. The meat has a good length of flavour and is a damned fine steak, even if it is $52. I can't help but think at this price I could be dining at Rockpool.

On a side dish, three house-made mustards – milk, Guinness and lavender – prove that some things are better left alone.

The other main, roast chicken ($35) is outstandingly dull, which is odd considering it's a Glenloth bird that I usually love.

A few days later, in the interests of impartiality, I'm back. This time it's salad to start ($8), sweetly dressed with honey and balsamic vinegar and topped with fine cress. It's not great but passable, except for a few wilting leaves.

A poached beef fillet ($46) shows, like last visit, that they can cook steak. This time it's medium rare, although the meat is curiously dry on the edges. But the accompanying broth is well below average. It is sticky sweet with port and overcooked potatoes floating in it do it no favours. Oxtail and sweetbread dumplings are a delight, however.

I've never had pork belly that could almost be described as dry. Until tonight. A generous square of pig's paunch ($33) is snuggled into a mass of starchy lentils. The meat is unevenly spiced with Moorish flavours and the lentils are poor. Texturally, it brings to mind the porcine equal of a parched weetbix.

For dessert, honeycomb cheesecake ($17) has little to recommend it, with its soggy pastry base. Compared with the raspberry and shiraz sorbet, however, it's heaven.

A dismal pyramid of sorbet ($15) jangles the mouth like a gamelan concert. Poached berries underneath are OK, except for what I guessed might have been soggy blackberries.

It could be argued that Coco is still settling in. But apricots in sherry-scented white sauce aren't meant to garnish a rib eye of beef. The menu isn't held back by minor glitches; it's flawed in concept and execution.

In a city where harbourside dining has improved out of sight in recent years, Coco Roco is a bleak spot on the culinary landscape.

…

The address: 17 Lime Street, King Street Wharf, City.

…

The Hours: Coco lunch Tue-Fri noon-3pm, dinner Tue-Sat from 6pm. (Roco lunch and dinner daily.)

The Food: Contemporary Mediterranean.

The Wine List: Good, solid list with plenty of interest.

The Owners: Aleksandra and Liliana Gacic, Branislav Ciric.

The Chef: Adam Birtles.

The Service: Good and bad.

The Noise: Could get loud.

The Vegetarians: Three dishes, plus plenty of sides.

The Wheelchair access: Yes to Roco, stairs to Coco.

The Cards: Major except Diners Club.

The Bill: Entrees $17-$24, mains $28-$52, desserts $15-17. Less at Roco.

The Value: A shocker.

> **The Summary:** Unpalatable flavours on one hand and pricey but good steak with flawed garnishes on the other add up to a restaurant where the view is the best bit. And you can't eat that.
>
> Coco Roco, city, 9/20."

162 The s 7A trial consisted of the tender of the review, addresses by counsel for the parties, directions by the trial judge, and the return of answers by the jury to the questions put to them, that is, to use the language of s 7A(3)(b) of the Defamation Act, the "determin[ation]" of the questions whether the imputations were carried by the review and whether they were defamatory.

163 Beazley JA in the Court of Appeal relevantly summarised the stances of the parties and the trial judge's responses to them at the s 7A trial[157]:

> **"Addresses to the jury:**
>
> **[Respondents'] case**
>
> The [respondents] had specifically pleaded a case of business defamation in paragraph 6 of the Statement of Claim and this was the basis upon which their counsel addressed the jury. No case of general defamation was pleaded or pursued before the jury. When addressing the jury the [respondents'] counsel explained the way that the [respondents] brought their claim in these terms:
>
> > '... that imputation if you found it to be conveyed [was] likely to injure the [respondents'] reputation in their business, trade or profession as restaurant owners. Any imputation which suggests some unfitness or incompetence for a trade, business or profession is defamatory and we say that these imputations are defamatory because they injure the [respondents'] reputation in their trade or profession.'
>
> **[Appellants'] case**
>
> However, senior counsel for the [appellants] took a different approach altogether and made the following comments to the jury in respect of imputation (a):

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157 *Gacic v John Fairfax Publications Pty Ltd* [2006] NSWCA 175 at [33]-[42]. Note that text in bold is the emphasis of the trial judge (Bell J), and the text in italics is the emphasis of Beazley JA in the New South Wales Court of Appeal.

'Now, members of the jury, you haven't heard much about the test of what is defamatory. Her Honour will explain it to you, the legal test; because that is her Honour's job.

Incidentally, if her Honour says anything to you about the law that conflicts with what Mr Evatt or I have said, then you follow her Honour ...

The test of whether something is defamatory is whether the thing would tend to make ordinary decent people in the community think the less of the [respondents]. It is a very simple test. It is the usual way it is put ... [s]ometimes it is put slightly differently but that is the usual test and her Honour, I apprehend, will tell you something like that or very similar to that.'

Senior counsel continued, in relation to imputation (a):

'How is it defamatory? How would it tend to make decent people think less of another person, even if they are the owner of a restaurant, to say that they sell unpalatable food? I mean, isn't it just it is one of those things. If you sell unpalatable food, then maybe you are a restaurant owner who owns a restaurant which isn't very good, but how does it make an ordinary decent person think less of somebody else to say that they sell unpalatable food?

... Isn't it a bit neutral? You think, "Oh, well, yep, he says that this person sells unpalatable food. Yeah, okay, fine", but you are not going to march around are you, going to make some sort of judgment of that person or think any the less of them.

It is a matter for you, members of the jury, but if you think that ordinary decent people, which is the test, in the community would tend to think the less of somebody because it is said about them that they sell unpalatable food, well, it is a matter for you. You are the community arbiters on that question.'

Senior counsel for the [appellants] then dealt with imputation (b). The jury found that imputation (b) was not conveyed by the article. There is no appeal from that finding. However, it remains relevant to refer to senior counsel's comments to the jury as to the meaning of defamation in relation to this alleged imputation so as to provide an overview of the approach taken at trial by the [appellants] to defamatory meaning. Thus, having referred to the terms of imputation (b), senior counsel said:

'Again you have got this problem, you might think – and I don't want to labour the point – but you might think that you have got

> this problem that even if the reader thought that the prices were excessive, the reader who reads this article on the bus or at the table or whatever, is not going to get a meaning that these individual people who are just named in the side-bar are charging – it is just not a meaning that is going to occur to the reader, is it?'

Senior counsel concluded his address in relation to imputation (b) by saying:

> 'It wouldn't make the reader, you might think, **think less of someone** if that were said ...'

The same approach was taken when senior counsel for the [appellants] addressed the jury in relation to imputation (c). He again asked the jury to consider how it was defamatory of the [respondents] to say that they provided some bad service in the sense that '*nobody [was] going to think the less of them*' because of what was said in that part of the article.

Senior counsel for the [appellants] then dealt with imputation (d). He indicated to them that no defamatory imputation could arise where there was an inference upon an inference. This latter goes to the second ground of appeal. In relation to this ground of appeal, senior counsel for the [appellants] also suggested to the jury that the imputation was not defamatory. In that respect, he said:

> 'Is the ordinary reader going to think, or decent people, going to think the less of somebody? I should tell you that it is only fair to say that **it can also be defamatory of somebody if you impugn their professional competence in their job**. It is what the law says. But at the end of the day it is your decision.'

That was the only reference in senior counsel's address to a business defamation.

Directions sought

Before her Honour commenced her summing [up] and in the absence of the jury, counsel for the [respondents] indicated to her Honour that he needed some directions. The exchange between her Honour, Mr Evatt, counsel for the [respondents] and Mr Blackburn SC, senior counsel for the [appellants], was as follows:

> 'EVATT: On defamatory meaning, my friend put that the test, which is pretty standard test -- (sic)

HER HONOUR: He did, at the very end.

EVATT: But not applicable to this case.

HER HONOUR: He did, at the very end.

EVATT: I know that, but that was --

BLACKBURN: I am happy for any correction.

EVATT: I have the relevant passages from Gatley.

BLACKBURN: I am happy for any corrections.

HER HONOUR: I intend telling the jury that whilst, ordinarily, the notion of something being defamatory carries with it that it would lower a person in the estimate of ordinary, right thinking members of the community, the case here depends upon another aspect of the notion of being defamatory, acknowledged by Mr Blackburn towards the conclusion of his address, and that is that the meaning conveyed would be likely to injure a person in his or her trade or profession by reason of suggesting unfitness or incompetence or something of that nature. Does that address your problem?

EVATT: Yes. That's what I put. My friend just, in the last minutes of his address, did make a number of correct statements but four times he said about the ordinary reasonable reader, even if they read the side bar, and he said that at long intervals of time. But he did end up saying that they would have to read the whole of the article.

BLACKBURN: I accept that. I am happy for any reinforcement.'

Trial judge's directions to the jury

In her summing up to the jury, her Honour dealt with the question of defamatory meaning in the following terms:

> 'Let me now turn to the question of whether or not the imputations that are pleaded are defamatory ...
>
> Generally, defamatory means having the tendency to lower a person in the estimate of ordinary, right-thinking members of the community. But there is another way in which an article or publication may be defamatory and it is the way that the [respondents] put their case here. It is important you understand that the question of whether or not the imputations were

> defamatory of the [respondents] takes up the concept of whether they may have the tendency to injure a person in his or her profession or trade by the suggestion of unfitness or incompetence or the like. Just to make that clear. Generally, defamatory means having the tendency to lower a person in the estimate of ordinary right-thinking members of the community **but equally, and importantly for this case**, defamatory has the meaning of having a tendency to injure the [respondents] in his or her profession or trade by the suggestion of unfitness or incompetence.'
>
> After further summing-up to the jury on matters not relevant to this ground of appeal, her Honour concluded by asking counsel for the parties whether there were any matters they wished to raise. Mr Evatt, counsel for the [respondents], replied in the negative."

164 There had been submissions by the respondents before the trial judge concluded her summing up that imputation (d) was an inference from another inference. Following argument about that, her Honour said that she would direct the jury in this way:

> "HER HONOUR: What I propose saying to the jury, subject to anything further that either of you want to put to me, is this, or words to this effect, because I have not made a note of it: Mr Blackburn told you something about the law relating to inferences. You will recall he addressed submissions that the law of defamation does not admit of an imputation being drawn by a process of inferential reasoning involving one inference being drawn upon another inference.
>
> BLACKBURN: That's correct.
>
> HER HONOUR: There is provision, if an imputation is not, as a matter of law, capable of arising, for that matter to be tested before a judge. The question for you is, as a matter of fact, whether an ordinary reasonable reader, reading this article, would have understood that article to be conveying the meaning set out in paragraph (d). That is a question of fact. It is not necessary or desirable for you to analyse the matter by reference to what you were told concerning legal principles, about whether it involves a process of inferential reasoning, or something to that effect.
>
> Now, Mr Evatt, would that address your concerns?
>
> EVATT: I think it would."

165 Despite the fact that the present appellants' counsel appeared to agree with her Honour's proposed direction, albeit without enthusiasm, subsequently, he chose to seek a redirection with respect to the jury's role in deciding whether

imputation (d) consisted of an inference from an inference. Her Honour was accordingly induced to redirect in these terms:

> "Members of the jury, there is a matter that is necessary for me to give you further directions in relation to. It arises out of the question … of the imputation pleaded in questions 1, 3 and 5(d) and to the submissions that Mr Blackburn made to you concerning the law. I did not wish to convey to you, and I do not direct you, that anything Mr Blackburn said to you was wrong as a matter of law. It is the law that a defamatory imputation cannot be drawn or conveyed by a process of reasoning that involves drawing one inference upon another inference. That correctly states the law. The matter that I wanted to make clear to you was that if, as a matter of law, the imputation pleaded in questions 1, 3 and 5(d) was not capable of arising, you would not be concerned with it. That does not mean that if you, in your role as the trier of fact, conclude that the imputation does not arise because it involves the ordinary reasonable reader drawing one inference upon another inference, if that is the process of reasoning that you are attracted to, then you would find that the imputation does not arise. This leads me necessarily to tell you something briefly about the process of inferential reasoning.
>
> An inference is a conclusion drawn from a number of established facts. If (a), (b) and (c) are proved as facts, then one might conclude or infer that (d) is also a fact. An inference relevantly means a conclusion that you draw from the established material. I do not propose to go back to the factual submissions advanced with respect to the imputation pleaded in (d) of those questions. You understand that, as a matter of law, imputation (d) is capable of arising; whether you find that it does or not is a matter for you, and in answering that question you are concerned with whether the ordinary reasonable reader would have taken, from the article, the meaning that each of the [respondents], that he or she is incompetent as a restaurant owner because he or she employs a chef at Coco Roco who makes poor quality food."

166 The debate about the impermissibility or otherwise of the drawing by juries of inference from inferences was stimulated by the observations on that topic made by Hunt CJ at CL (Mason P and Handley JA agreeing) as a member of the Court of Appeal in *Amalgamated Television Services v Marsden*[158] in which his Honour treated *Lewis v Daily Telegraph Limited*[159] as authority for the

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158 (1998) 43 NSWLR 158 at 167.

159 [1964] AC 234.

proposition that an imputation was bad if it could be discerned to contain an inference upon an inference.

167 The jury found that imputations (a) and (c) were conveyed but were not defamatory, and that imputations (b) and (d) were not conveyed. Judgment was in consequence entered for the appellants.

The Proceedings in the Court of Appeal

168 The respondents appealed to the Court of Appeal (Handley, Beazley and Ipp JJA). Their appeal sought no disturbance of the jury's finding that imputation (b) was not conveyed.

(a) Reasonableness of the jury's answers and the relevance of community standards

169 The Court of Appeal upheld the appeal, finding for the present respondents on imputations (a) and (c), remitting imputation (d) for determination by a jury, and making various orders for costs. The Court of Appeal held that the only verdicts on imputations (a) and (c) which a reasonable jury, properly directed, could have reached were those that their Honours held should have been reached. The Court of Appeal was, if so empowered, effectively obliged, in the circumstances of this case, to decide the issues raised by these imputations in favour of the present respondents, without any further jury trial. As to a submission that counsel for the respondents should have sought a further redirection by the trial judge, the Court of Appeal was of the view that counsel's failure in that regard did not oblige the Court to permit the miscarriage of justice which would otherwise result. The trial judge's directions, the Court of Appeal said, failed to draw the necessary distinction between business defamation and personal defamation: directions appropriate to the latter were not to the point in a case of damage to business people claiming injury of a business kind.

(b) Interpretation of s 108(3) of the *Supreme Court Act* 1970 (NSW)

170 Handley JA gave separate consideration to the Court's jurisdiction under s 108(3) of the *Supreme Court Act* 1970 (NSW) (the "Supreme Court Act"). His Honour's view was that, in general, an appellate court should not enter a verdict in favour of a party bearing a legal onus on a question of fact. The proper course for an appellate court in the case of an erroneous direction would usually, but not in an exceptional case, be to order a new trial. Section 108(3) of the Supreme Court Act does not dictate any different an approach. In cases of business defamation in particular, in which community standards are of less significance than in others, an appellate court may not be as reluctant to enter a verdict without remitting the issues to another jury. This was such a case.

(c) An inference upon an inference

171 Beazley JA (Handley JA agreeing) was of the opinion that the question whether an imputation involves an inference upon an inference is part of the question of the capacity of a matter to convey the imputation in question, and, accordingly, a matter for determination by a judge and not a jury. Their Honours held that imputation (d) did not, however, involve an inference upon an inference. Beazley JA said this in her reasons[160]:

> "The question of whether an imputation involves an inference upon an inference is a question of capacity, which, under the provisions of s 7A(1) of the *Defamation Act* must be determined by the court and not by the jury. In this case, if the [appellants] wished to contend that the imputation contained an inference upon an inference, it was necessary for them to do so before the judge. It was not a jury question."

172 Her Honour concluded that as there was no inference upon an inference involved in imputation (d), it was proper, in her opinion for a jury, properly directed, to make a determination whether imputation (d) was actually conveyed or not, and whether it was defamatory. Handley JA said[161]:

> "As oral argument in the appeal on this question developed the clearer it became that this analysis was not appropriate for the consideration of a jury, who were likely to be distracted and confused by its complexities."

173 Handley JA (Beazley JA agreeing) was of the opinion that in determining whether a matter is capable of conveying an imputation, a judge should rule against it if it is derived from an inference, because, in that event, the matter does not of itself convey the imputation pleaded: although his Honour had agreed with Hunt CJ at CL in *Marsden* that this was a jury question, on reconsideration, he had come to the view that this was not so.

174 Ipp JA was of a different mind on this last topic. In his opinion, there could well be cases in which further inferential conclusions may be available and reasonably open to be regarded, suitably cautiously as defamatory. In so holding, his Honour said, and in our view correctly[162]:

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160 *Gacic v John Fairfax Publications Pty Ltd* [2006] NSWCA 175 at [90].

161 [2006] NSWCA 175 at [23].

162 [2006] NSWCA 175 at [113], [119].

> "while reasoning based on an inference drawn from an inference should be looked at with caution, there is no absolute rule of law that precludes such reasoning in an appropriate case … The question as to the meaning that the words convey to the ordinary person should be a simple and straightforward one, as befits a law that governs the everyday life and actions of all levels of persons in the community. The question should not be obscured by overly complex and subtle metaphysical distinctions that stand as a formidably esoteric barrier to what should be an easily comprehensible reasoning process akin to common sense."

175 Ipp JA too did not doubt that in this case an order for a new trial in relation to imputations (a) and (c) would be unjust to the respondents and that the Court should reverse the jury's answers to the questions concerning them.

176 Accordingly the Court of Appeal ordered that imputation (d) be remitted for re-determination by a jury, by reason of the trial judge's further directions which left a question to the jury whether the imputation did involve an inference upon an inference.

The Appeal to this Court

177 The appellants appealed to this Court on several grounds including that the orders of the Court of Appeal were in excess of the powers conferred upon it by s 108(3) of the Supreme Court Act. Because the respondents carried the onus on the relevant matters, which were all factual ones, they were uniquely and exclusively for the jury. They argued that even if error by the jury did enliven a discretionary power to enable the Court of Appeal to set aside the jury's answers, and to enter verdicts for the respondents, the Court erred in exercising its discretion by not ordering new trials of the issues here. They further submitted that it was erroneous for the Court of Appeal to hold that "community standards" were of little or no relevance to cases of injury to plaintiffs in respect of their trades or businesses. The notice of appeal also raised a question whether the jury was correctly instructed by the trial judge on the drawing of an inference from an inference as it related to their decision on imputation (d). That ground was not, however, the subject of any specific written or oral submissions by the appellants, and ultimately, in argument, the appellants said that they did not cavil with the decision of the Court of Appeal to remit imputation (d) for another s 7A trial[163].

178 It is necessary to refer further to the relevant legislation.

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163 [2007] HCATrans 079 at 26, lines 1086-1087.

179 The first matter to notice is that the Defamation Act makes no provision, separate or otherwise, for appeals from decisions made under it. It follows that appeals in such cases are, as are other appeals from the Supreme Court generally, governed by the Supreme Court Act. The latter, by s 108, makes special provision for appeals from decisions of juries:

> **"108 Nonsuit or verdict after jury trial**
>
> (1) This section applies to an appeal to the Court of Appeal in proceedings in the Court in which there has been a trial with a jury.
>
> (2) Where it appears to the Court of Appeal that on the evidence given at the trial a verdict for the plaintiff could not be supported and that, pursuant to any provision of the rules, an order ought to have been made for the dismissal of the proceedings either wholly or so far as concerns any cause of action in the proceedings, the Court of Appeal may make an order of dismissal accordingly.
>
> (3) Where it appears to the Court of Appeal that upon the evidence the plaintiff or the defendant is, as a matter of law, entitled to a verdict in the proceedings or on any cause of action, issue or claim for relief in the proceedings, the Court of Appeal may direct a verdict and give judgment accordingly."

180 There are, as the appellants point out, substantial differences between that section and s 75A of that Act. It would be surprising if it were otherwise. Decisions of juries have always, and rightly, been accorded especial respect. Why this is so is obvious, and needs no repetition here[164]. That does not mean of course that decisions of juries are immunized against appellate review and reversal. In any event it is upon the statutory language that provides for appeals that the Court must focus.

The Appellants' Submissions

181 A s 7A trial is within the language of s 108(1) of the Supreme Court Act. This case is not within s 108(2) because there was no verdict at first instance for the respondent plaintiff. Nor is it, so the appellants argue, within the language of s 108(3). They submit that upon the evidence, the respondents were not, as a matter of law, entitled to a verdict in the proceedings: there was always a live factual controversy as to the defamatory nature or otherwise of imputations (a)

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164 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at 1660 [17] per McHugh J, 1676 [115] per Kirby J, 1698 [184] per Callinan J; 201 ALR 77 at 80, 103, 129-130.

and (c). In defamation, as opposed to other areas of the law, the meaning of words is always a question of fact, and therefore a matter for the jury and not a judge. The appellants submit that the Court of Appeal does not have power to set aside a jury verdict and enter a contrary verdict except to the extent that statute so provides. They cite several statements to that effect[165].

182 Section 108(3), is, they argue, quite explicit in limiting appellate intervention and substitution of an appellate verdict, if, and only if, as a matter of law a plaintiff is so entitled. Several cases[166] decided under s 7 of the *Supreme Court Procedure Act* 1900 (NSW) ("Supreme Court Procedure Act") which was in similar terms to s 108(3) of the Supreme Court Act[167], so hold.

183 The appellants also argue that as a matter of ordinary construction, s 108(3) of the Supreme Court Act can have no application here, because on no view are the respondents "entitled to a verdict in the proceedings or on any cause of action, issue or claim for relief in the proceedings". It is inapt, they submit, to refer to a jury's answers to questions which do not conclude a case and could not result, without more, in a judgment for the plaintiffs, as a verdict, that is to say, even a verdict on an issue. They accept however that the jury's answers to the questions "could be described as special verdicts"[168].

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165 *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 379 per Dixon J; *Hocking v Bell* (1945) 71 CLR 430 at 441 per Latham CJ; *Williams v Smith* (1960) 103 CLR 539 at 542 per Dixon CJ, McTiernan, Fullagar, Kitto and Menzies JJ.

166 *Hocking v Bell* (1945) 71 CLR 430 at 441 per Latham CJ and at 488 per Dixon J (their Honours' reasons for judgment were approved by the Privy Council in *Hocking v Bell* (1947) 75 CLR 125 at 130-132); *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1 at 4 per Jordan CJ.

167 Section 7 of the *Supreme Court Procedure Act* 1900 (NSW) stated: "In any action, if the Court in Banco is of opinion that the plaintiff should have been nonsuited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a nonsuit or such verdict to be entered."

168 [2007] HCATrans 079 at 18, lines 706-707.

Disposition of the Appeal

(a) Reasonableness of a jury's decision and the power of a Court of Appeal to substitute a different decision

184 It is true that in defamation the meaning of words is a question of fact[169]. But it does not follow that a jury may give them a wholly unreasonable, unavailable or perverse meaning. They may no more do that than they may decide that words which are inescapably or unmistakably defamatory, are not defamatory. And whether they have done any of these things is a question of law, reviewable as such and, if the jury has reached an unreasonable or perverse view, reversible by a Court of Appeal. If, as here, the issues presented were issues which, as a matter of law, no other conclusion was reasonably open on them to a properly instructed jury, the case is within s 108(3) of the Supreme Court Act, and the Court of Appeal was entitled to determine them accordingly itself.

185 This case is within the language of Starke J in *Shepherd v Felt & Textiles of Australia Ltd*[170]:

> "Where on the uncontroverted facts the action or an issue must be determined in favour of one party, then, as a matter of law, that party is entitled to the verdict in the action or upon the issue. And it is necessarily wrong to leave any conclusion or inference in such circumstances as a question of fact to the jury. In such a case a direction should be given to the jury that *as a matter of law* the verdict must be for the party entitled to succeed …" (emphasis added)

186 Before citing the passage which we have just quoted, Latham CJ in *Hocking v Bell*[171] said this of s 7 of the Supreme Court Procedure Act:

> "If there is evidence upon which a jury could reasonably find for the plaintiff, unless that evidence is so negligible in character as to amount only to a scintilla, the judge should not direct the jury to find a verdict for the defendant, nor should the Full Court direct the entry of such a verdict. The principle upon which the section is based is that it is for the jury to decide all questions of fact, and therefore to determine which witnesses should be believed in case of a conflict of testimony. But there must be a

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169 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 281 per Lord Devlin.

170 (1931) 45 CLR 359 at 373.

171 *Hocking v Bell* (1945) 71 CLR 430 at 441-442.

> real issue of fact to be decided, and if the evidence is all one way, so that only one conclusion can be said to be reasonable, there is no function left for the jury to perform, so that the court may properly take the matter into its own hands as being a matter of law, and direct a verdict to be entered in accordance with the only evidence which is really presented in the case …"

187 The evidence here, the review only, was all one way. The fact that the respondents did not ask for a directed "verdict" or answers, as perhaps they might have, does not mean that the Court of Appeal was disqualified from reversing the jury's decision. They were, having regard to the clear meaning of the words of imputation (a) and (c), and the jury's unreasonable determinations in respect of them, bound to do so.

188 An important purpose of the Supreme Court Procedure Act, the predecessor of the Supreme Court Act, was to reduce costs and delays and, to that end to confer rights of appeal upon litigants and powers upon courts of appeal to give the judgments or decisions that the courts of first instance should have given, including verdicts and determinations by juries. The appellants' submission that a court of appeal could only do this after a second or third unreasonable or perverse determination must be rejected.

(b) The relevance of community standards

189 The appellants submitted that a community standard or standards could properly bear upon the question, indeed effectively determine, whether the imputation that the respondents, as restaurateurs, sell unpalatable food and provided some bad service at their restaurant was conveyed, not conveyed, or conveyed and defamatory.

190 We would reject that submission. Business capacity and reputation are different from personal reputation. Harm to the former can be, as here, inflicted more directly and narrowly than harm to a person's reputation. A person who does not have an admirable character may be a very good restaurateur. It might be possible to say things about him or her personally that are not defamatory, but not about that person as a restaurateur in relation to the conduct of the restaurant. Restaurant standards rather than community ones are the relevant standards in that situation. No community standard or value could obliterate or alter the defamatory meaning of the imputations in this case. It is unimaginable, in any event, that the estimation of the respondents in the mind of any adult person, let alone a reasonable reader, would not be lowered by a statement that they sold unpalatable food and provided bad service at their restaurant, and did so for considerable sums of money. The reinforcement, by the trial judge in her redirections, of the present appellants' submission to the jury that they should have regard to community values and standards in assessing the defamatory

nature or otherwise of the imputations, was, as the Court of Appeal held, erroneous.

(c) Drawing inferences

191 Because, as the appellants accept, imputation (d) must be remitted for another s 7A trial it is necessary to say something about the content of directions appropriate to it. The Defamation Act, unlike in many other jurisdictions which allow and generally encourage general verdicts on the matter complained of, requires of a plaintiff in New South Wales, perhaps not as explicitly as has been assumed, the pleading and giving of answers in respect of specific imputations even when the imputations do no more than restate verbatim the defamatory matter or part of it (Defamation Act ss 7A and 9)[172]. Once, as happened here, the antecedent legal questions that the relevant matter was capable of carrying the imputations complained of, and that they were capable of bearing a defamatory meaning were decided, the only questions remaining, and for the jury at the s 7A trial, were whether the imputations were defamatory and were carried by the published matter. These are relatively simple questions, focused as they are on particular imputations. They admit of clear answers, and ones which can more readily perhaps be seen to be unreasonable or otherwise, than a general verdict in relation to defamatory matter at large.

192 Properly understood, *Lewis v Daily Telegraph Ltd*[173] does not however provide a foundation for a principle, either that all defamatory matter must, for the purposes of pleading and delineating issues, be translated into express imputations, regardless of its clearly defamatory meaning according to its ordinary and natural meaning, or that an imputation when pleaded must be rejected unless it can be seen to have the character of exclusively one inference.

193 In *Lewis* one of the plaintiffs was obliged to plead an imputation because he wished to allege a meaning that went beyond the ordinary and natural meaning of the published matter; that a report that the police were making an inquiry or "probe" into the affairs of a company, conveyed that the chairman of the company was guilty of fraud, or suspected by the police of being guilty of fraud. As Lord Devlin pointed out[174], it is only if the words do not speak for themselves, that such innuendos and insinuations, going beyond the literal meaning, as could reasonably be read into them, must be pleaded. The words

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172 Section 9(6) preserves special verdicts.

173 [1964] AC 234.

174 [1964] AC 234 at 279.

published in *Lewis* neither insinuated nor implied the meaning alleged by the plaintiff. It is the language of the Defamation Act and the way in which it has been construed in New South Wales, and not the common law, that has given rise to insistence upon strictures of pleading of imputations in New South Wales in defamation cases[175].

194 It is too categorical to say that imputations must be scrutinized for a duality of inferences, and, if a duality is found, rejected. We certainly do not think that their Lordships went nearly so far in *Lewis*. We take Lord Hodson[176],

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175 See the criticism of the New South Wales requirements in this regard in the second reading speech for the Defamation Bill 2005 (NSW) to replace the Defamation Act. New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 18 October 2005 at 18683:

"Clause 8 will bring a significant but very welcome change to NSW law. Under the current NSW law, each defamatory imputation (or meaning) gives rise to a separate cause of action. In all other jurisdictions, it is the publication of defamatory matter that gives rise to the cause of action.

In a speech to university students some years ago, the former Supreme Court Defamation List Judge, the Honourable Justice David Levine RFD, lamented the 'excruciating and sterile technicalities' that resulted from making the imputation the cause of action. 'Fortnight after fortnight I have to deal with arguments concerning whether a pleaded imputation is proper in form and is capable of arising from the relevant publication … The amount of the Court's time, let alone litigants' resources, expended profligately in the determination of what words, sentences and phrases mean is positively scandalous: and this is at the initiation of proceedings … Matters of principle have been elevated to an obsessive preoccupation, the playthings of forensic ingenuity, fantasy and imagination, at the expense of the early, quick and cheap litigation of real issues that affect the people involved in libel actions … The question is not simply what does a publication mean and whether what it means is defamatory. The jury has to determine, in the no doubt novel environment for the jurors of the courtroom and the jury room, whether the words that constitute the imputation carefully crafted by lawyers are in fact carried by the publication complained of to ordinary reasonable people'.

Clause 8 will finally put an end to this needless complexity. Clause 8 reflects the position at common law by making it clear that it is the publication of defamatory matter that is the basis for a civil action for defamation. Both the NSW Law Society and the NSW Bar Association strongly support this long-awaited change."

176 [1964] AC 234 at 274.

in referring to the drawing of an inference from an inference, to be saying no more than that in the circumstances of the case, to allege that suspicion implied or meant actual guilt was unreasonable. Lord Devlin[177] stated that "two fences have to be taken instead of one," and that to impute guilt would be to "take the second in the same stride". In this case both the trial judge initially and Ipp JA in the Court of Appeal were sceptical about such a far-reaching proposition, and, in our opinion, rightly so. The real question is as to the impression that the words are likely to make upon the reasonable reader[178]. The way in which the trial judge put that issue to the jury in this case initially, was substantially correct. To say that because the words of an imputation may reasonably convey more than one defamatory meaning or impression, or that because implications, inferences and imputations suggest more than one meaning or successive meanings, they must be rejected, would be to introduce unnatural and excessive refinement to the basic factual question whether the words (or the imputation) have defamed the plaintiff. Published matter may well convey a duality of meanings and impressions, not necessarily exclusive of one another, and sometimes with one leading to another, successive, inevitable or almost inevitable one.

(d) Interpretation of s 108(3) of the Supreme Court Act

195 It remains to deal with other aspects of the argument of the appellants as to the effect and operation of s 108(3) of the Supreme Court Act. Section 7A of the Defamation Act was enacted after the Supreme Court Act, but neither expressly nor impliedly repealed any part of s 108. They must, as far as possible, be read consonantly with each other. The whole purpose of s 7A and the amendments enacted to the Defamation Act was to save costs and simplify defamation proceedings.[179] It was thought that the segmentation of issues, and

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177 [1964] AC 234 at 286.

178 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 285 per Lord Devlin.

179 Presenting the second reading speech, the Attorney-General, the Hon J P Hannaford said:

> "At present the jury is retained to determine some questions of fact inherent in certain defences. Under this bill that will not occur. Having dealt with the preliminary questions the jury will be discharged from further participation in the trial, which will proceed before the judge alone, he or she determining all defences and, in due course, assessing any damages. By allocating to the jury what is a vital decision in the trial the arrangement maintains an appropriate degree of community involvement. At the same time, by providing that the trial shall thereafter proceed before the judge alone, a substantial amount of time and money will be saved and the complexities which now arise in the course of a trial because of the current

(Footnote continues on next page)

the assignment of different roles to the trial judge and the jury would assist in achieving these ends. The issues decided by the jury here were to be decided finally for the purposes of the trial. The appellants in their submissions treated the jury's answers as at least in the nature of a special verdict. According to traditional notions a decision or determination by the jury in a s 7A trial might not be a "verdict" in a conventional sense, but it is indisputable that it is a final decision on an "issue" in the trial on the way to a "verdict". In that sense it should be regarded as susceptible to appeal, reversible when, as here, the facts are all one way, and therefore a matter of law, within the language of s 108(3) of the Supreme Court Act.

196 We would dismiss the appeal with costs.

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division of functions of judge and jury will be overcome." New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 22 November 1994 at 5472.