HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HEYDON, KIEFEL AND BELL JJ

RADIO 2UE SYDNEY PTY LTD APPELLANT

AND

RAY CHESTERTON RESPONDENT

Radio 2UE Sydney Pty Ltd v Chesterton
[2009] HCA 16
22 April 2009
S474/2008

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

R G McHugh SC with J Chambers for the appellant (instructed by Banki Haddock Fiora)

C A Evatt with R K M Rasmussen for the respondent (instructed by Beazley Singleton Lawyers)

CATCHWORDS

Radio 2UE Sydney Pty Ltd v Chesterton

Defamation – Statements amounting to defamation – Test to be applied in determining what is defamatory – Whether general test has application to imputations concerning business or professional reputation – Whether general test limited to imputations concerning character or conduct – Distinction between defamation and injurious falsehood – *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 considered.

Defamation – Statements amounting to defamation – Standards by which allegedly defamatory imputations to be judged – Distinction between general test for defamation and standards to be applied – Standards imported by describing hypothetical referees of whether person defamed as "right-thinking" – Relevance and applicability of general community standards.

Defamation – Statements amounting to defamation – Standards by which allegedly defamatory imputations to be judged – Whether in cases concerning business or professional reputation hypothetical referees assumed to have special knowledge of business or profession – When plea of true innuendo appropriate.

Defamation – Statements amounting to defamation – Test to be applied in determining what is defamatory – Whether jury misdirected – Whether substantial wrong or miscarriage occurred.

Words and phrases – "business defamation", "general community standards", "hypothetical referee", "ordinary decent person", "ordinary reasonable person", "reputation", "right-thinking", "true innuendo".

Defamation Act 1974 (NSW), s 4(2).
Defamation Act 2005 (NSW), s 6(2).
Uniform Civil Procedure Rules 2005 (NSW), r 51.53(1).

1 FRENCH CJ, GUMMOW, KIEFEL AND BELL JJ. The common law recognises that people have an interest in their reputation and that their reputation may be damaged by the publication of defamatory matter about them to others[1]. In *Uren v John Fairfax & Sons Pty Ltd*[2] Windeyer J explained that compensation for an injury to reputation operates as a vindication of the plaintiff to the public, as well as a consolation[3].

2 Spencer Bower[4] recognised the breadth of the term "reputation" as it applies to natural persons and gave as its meaning:

> "[T]he esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications, qualities, competence, dealings, conduct, or status, or his financial credit …".

3 A person's reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect.

4 Lord Atkin proposed such a general test in *Sim v Stretch*[5], namely that statements might be defamatory if "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally"[6]. An earlier test asked whether the words were likely to injure the reputation of a plaintiff by

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1 *Slatyer v The Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at 7 per Griffith CJ, 8 per Isaacs J; [1908] HCA 22; *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 290 per Dixon J; [1934] HCA 60; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638-639 per Mason and Jacobs JJ; [1979] HCA 3; *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507; [1982] HCA 4.

2 (1966) 117 CLR 118; [1966] HCA 40.

3 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150.

4 *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 3.

5 [1936] 2 All ER 1237.

6 *Sim v Stretch* [1936] 2 All ER 1237 at 1240; and see *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467 at 479 per Greer LJ.

exposing him (or her) to hatred, contempt or ridicule[7] but it had come to be considered as too narrow[8]. It was also accepted, as something of an exception to the requirement that there be damage to a plaintiff's reputation, that matter might be defamatory if it caused a plaintiff to be shunned or avoided, which is to say excluded from society[9].

5 The common law test of defamatory matter propounded by Lord Atkin was applied in *Slatyer v The Daily Telegraph Newspaper Co Ltd*[10], although Griffith CJ expressed some concern about the ambiguity of the expression "right thinking members of the community"[11]. The general test, stated as whether the published matter is likely to lead an ordinary reasonable person to think the less of a plaintiff, was confirmed by this Court in *Mirror Newspapers Ltd v World Hosts Pty Ltd*[12], *Chakravarti v Advertiser Newspapers Ltd*[13] and by Callinan and Heydon JJ in *John Fairfax Publications Pty Ltd v Gacic*[14]. Gummow and Hayne JJ in *Gacic* referred to the likelihood that the imputations might cause "ordinary decent folk" in the community to think the less of the plaintiff[15].

6 Putting aside Lord Atkin's additional requirement of being "right-thinking", the hypothetical audience, that is to say the referees of the issue of whether a person has been defamed, has been regarded as composed of

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7 *Parmiter v Coupland* (1840) 6 M & W 105 at 108 per Parke B; [151 ER 340 at 342].

8 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 477 per Scrutton LJ; *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.

9 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 at 587.

10 (1908) 6 CLR 1.

11 *Slatyer v The Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at 7.

12 (1979) 141 CLR 632 at 638-639 per Mason and Jacobs JJ, Gibbs J and Stephen J agreeing.

13 (1998) 193 CLR 519 at 545 [57] per Gaudron and Gummow JJ; [1998] HCA 37.

14 (2007) 230 CLR 291 at 351 [190]; [2007] HCA 28.

15 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 309 [53] referring to *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452.

ordinary reasonable people[16], whom Spencer Bower described as "of ordinary intelligence, experience, and education"[17]. Such persons have also been described as "not avid for scandal"[18] and "fair-minded"[19]. They are expected to bring to the matter in question their general knowledge and experience of worldly affairs[20].

7 In *Reader's Digest Services Pty Ltd v Lamb*[21] Brennan J explained that any standards to be applied by the hypothetical referees, to an assessment of the effect of imputations, are those of the general community[22]:

> "Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation … being a standard common to society generally …".

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16 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638; *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1719-1720 [10] per Gleeson CJ, McHugh, Gummow and Heydon JJ; 221 ALR 186 at 190; [2005] HCA 52; *Nevill v Fine Art and General Insurance Company* [1897] AC 68 at 72 per Lord Halsbury LC; *Capital and Counties Bank v Henty* (1882) LR 7 App Cas 741 at 745.

17 Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 37; and see *Slatyer v The Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at 7 ("of fair average intelligence") and *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 286 per Lord Devlin ("sensible").

18 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 260 per Lord Reid.

19 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 268 per Lord Morris of Borth-y-Gest.

20 *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1719-1720 [10] per Gleeson CJ, McHugh, Gummow and Heydon JJ; 221 ALR 186 at 190 referring to *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258.

21 (1982) 150 CLR 500.

22 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506.

8 This appeal raises questions as to whether the general test for defamation has application to imputations concerning a person's business or professional reputation, or whether it is limited to those concerning the character or conduct of that person. If injury to a person's business or professional reputation is to be adjudged having regard to different considerations, referable to the business or profession of that person, a further question arises as to whether the hypothetical referees are to be drawn from a class of persons who have particular knowledge associated with the business or profession.

9 Before turning to these questions, and the decisions which give rise to them, it is necessary to isolate the action for defamation from other actions which concern injury to a plaintiff's business.

Defamation and injurious falsehood

10 It is not in dispute that persons may be defamed in their business reputation. The common law has for some time recognised that words may not only reflect adversely upon a person's private character, but may injure a person in his or her office, profession, business or trade[23]. This may be so where the words reflect upon the person's fitness or ability to undertake what is necessary to that business, profession or trade. But in each case the injury spoken of is that to the person's reputation.

11 The remedy which the law provides for injury to a person's business or professional reputation must be distinguished from that for malicious statements which result in damage not to the reputation but to the business or goods of a person. The former is provided by an action for defamation, the latter by that for injurious falsehood[24]. Lord Esher MR explained the distinction in *South Hetton*

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23 Odgers, *A Digest of the Law of Libel and Slander*, 6th ed (1929) at 23; *Gatley on Libel and Slander*, 11th ed (2008) at 71 [2.26]; *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 13 per Stephen J; [1975] HCA 6; *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 294 [2] per Gleeson CJ and Crennan J, 315-316 [74] per Kirby J, 351 [190] per Callinan and Heydon JJ.

24 *Ratcliffe v Evans* [1892] 2 QB 524 at 527-528 per Bowen LJ; *Joyce v Sengupta* [1993] 1 WLR 337 at 341 per Sir Donald Nicholls V-C; [1993] 1 All ER 897 at 901; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139; *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 at 698; [1970] 1 All ER 1094 at 1103; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 639 per Mason and Jacobs JJ.

Coal Co Ltd v North-Eastern News Association Ltd[25]. A false statement that a wine merchant's wine is not good, which is intended to and does cause loss to the wine merchant's business, is an injurious (or "malicious") falsehood. A statement reflecting upon that person's judgment about the selection of wine, and therefore upon the conduct of his business, may be defamatory of him[26]. Gummow J observed in *Palmer Bruyn & Parker Pty Ltd v Parsons*[27] that the action for injurious falsehood is more closely allied to an action for deceit.

12 The distinction between defamation and injurious falsehood has some relevance to these proceedings, which are brought under the *Defamation Act* 1974 (NSW). That Act repealed the *Defamation Act* 1958 (NSW). The 1958 Act imported a meaning of defamation from the *Criminal Code* (Q)[28], which was extended beyond that of the common law and included injurious falsehood. The common law requirement that the plaintiff's reputation be disparaged, for matter to be found defamatory, was thereby removed. It was sufficient, relevantly, that an imputation concerned the plaintiff and was likely to injure the plaintiff in his or her profession or trade[29]. The 1974 Act reverted to the common law requirements of what is defamatory[30]. Accordingly for present purposes, a publication must have an effect upon the reputation of the plaintiff rather than upon the business, trade or profession of the plaintiff as such.

The imputations alleged

13 The plaintiff, Mr Chesterton, the respondent to this appeal, was a journalist at the time of the broadcast in question, by Radio Station 2UE on

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25 [1894] 1 QB 133.

26 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139.

27 (2001) 208 CLR 388 at 406 [59]; [2001] HCA 69.

28 *Criminal Code* (Q), s 366 (relocated by Act 37 of 1995 to become s 4 of the *Defamation Act* 1889 (Q) (since repealed)).

29 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632.

30 *Defamation Act* 1974 (NSW), s 4(2). The 1974 Act has been superseded by the *Defamation Act* 2005 (NSW) (see s 6(3)) but the meaning which the common law gives to defamation would not appear to be affected (see s 6(2)).

8 August 2005. The defendant appellant is the licensee of that station. The following words were said of the plaintiff by the presenter of the John Laws Morning Show:

> "Well that bombastic, beer-bellied buffoon Ray Chesterton, writes a column in the Telegraph called 'The Final Word'. Well it's not the final word today.
>
> What's the matter with you Ray?
>
> I mean, you know, I always knew you were a bit of a creep, but can't you get over it?
>
> He was fired by 2UE and blames me for it. He's never got over it and he talks about the Joey Johns saga and say (sic) Meanwhile the Johns saga is starting to run out of motivation.
>
> You know that when 70-year-old disc jockeys are drawn into the fray to support the argument.
>
> I talked to Joey Johns because I wanted to, because he is a friend of mine, a word you probably wouldn't understand because I doubt you'd have any, and those that you do have call you 'Ankles' and for a very good reason.
>
> I don't know. Why can't you get over it, Ray? I mean, you used to enjoy going to my farm and I used to give you the house and you used to take your family and your children up there. I was very happy that all that took place. But why can't you get over it?
>
> Well, I suppose you have some kind of inferiority complex. Well, I have to tell you, I have never met a man who deserved one more."

14 The imputations said to have been conveyed by those words were:

(a) the plaintiff is a creep in that he is an unpleasant and repellent person;

(b) the plaintiff is a bombastic, beer-bellied buffoon;

(c) that as a journalist the plaintiff is not to be taken seriously;

(d) the plaintiff was fired from Radio 2UE;

(e) the plaintiff falsely accuses John Laws of being responsible for his dismissal from Radio 2UE;

(f) the plaintiff is an ungrateful person in that he accepted the hospitality of John Laws and then attacked him.

Two further imputations, (g) and (h), were alleged but they are not relevant to the issues on this appeal.

15 At the trial, which took place before Simpson J and a jury, the jury were required to determine whether the words complained of carried those imputations and, if so, whether they were defamatory[31]. The jury found in the plaintiff's favour on both issues and with respect to all imputations. The imputations with which this appeal is concerned are those in (b), (c) and (d), which the plaintiff alleged injured him in his profession as a journalist. On the appeal to the Court of Appeal, and again on the appeal to this Court, the appellant contended that the trial judge misdirected the jury as to how they were to assess whether the imputations were defamatory. It is said that resulted from her Honour's application of the requirements of the New South Wales Court of Appeal in *Gacic v John Fairfax Publications Pty Ltd*[32] with respect to such a direction.

Gacic – the Court of Appeal

16 *Gacic* concerned the publication of a review of the plaintiff appellants' restaurant in the first respondent's newspaper. A jury found that the two imputations in the review, that the appellants sold unpalatable food and provided bad service at the restaurant, were not defamatory. In the New South Wales Court of Appeal Beazley JA (with whom Handley and Ipp JJA agreed) held that a reasonable jury, properly directed, could reach no verdict other than that the imputations were defamatory. The Court set aside the verdicts of the jury and entered verdicts for the appellants.

17 Beazley JA stated the appellants' case to be that the imputations in the article "injured their business, trade or profession as owners of the restaurant and were thus defamatory"[33]. Her Honour said that "[a] person may be defamed in their business trade or profession regardless of whether the defamation lowers the

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31 *Defamation Act* 1974 (NSW), s 7A(3).

32 (2006) 66 NSWLR 675.

33 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 678 [32].

person in the estimation of others"[34] and cited the following passage from the 10th edition of *Gatley on Libel and Slander*[35]:

> "Any imputation is defamatory if it would tend to lower the claimant in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally. For instance, to say of someone that he is ungrateful would scarcely expose him to hatred, ridicule or contempt, or cause him to be avoided, yet it has been held defamatory. *To say of a person carrying on any trade or profession, or holding any office, that he is incompetent at it, may not even lower him in the estimation of others, but the words will be defamatory because of the injury to his reputation in his trade, profession or office* …". (footnotes omitted) (emphasis as added by Beazley JA)

18 Beazley JA concluded that the trial judge (Bell J) had not been right to direct the jury in such a way as to suggest that "business defamation"[36] was to be regarded as the same as words "having the tendency to lower a person in the estimate of ordinary, right-thinking members of the community."[37] Her Honour considered "business defamation" to be distinct from defamation in its "generally understood meaning"[38] and that it was incumbent upon the trial judge to direct the jury that[39]:

> "it did not matter whether the published material lowered the person in the eyes of right-thinking members of the community."

19 In her Honour's view, to say that a restaurateur sells "unpalatable" food "injures that person in their business or calling and because of that, is

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34 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 678 [32].

35 (2004) at 36-37 [2.7], which may be contrasted with the 11th ed (2008) at 38 [2.1].

36 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 682 [46] per Beazley JA.

37 As Bell J described it, see *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 681 [41].

38 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 678 [32], 682 [46].

39 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 683 [50].

defamatory."[40] The imputation of "some bad service" "would injure a person in their business or calling as a restaurateur and was likewise defamatory."[41]

20 Beazley JA did not suggest what test was to be applied, as an alternative to whether people might think the less of the plaintiffs by reason of the imputations, and did not refer to any standard by which injury to the plaintiffs was to be assessed, other than by reference to their business. The appellant on this appeal submits that the approach taken by her Honour either creates a separate tort for "business defamation" or reintroduces the meaning of defamation in the 1958 Act, which encompassed an injurious falsehood with respect to a person's business.

Gacic – this Court

21 The principal issue on the appeal to this Court in *Gacic* was the power of the Court of Appeal, under s 108(3) of the *Supreme Court Act* 1970 (NSW), to enter verdicts for the plaintiffs after it had reached its conclusion that no reasonable jury, properly instructed, could find that the imputations in question were not defamatory of the plaintiffs[42]. A majority of this Court resolved that issue in the plaintiff respondents' favour.

22 No issue was raised on the appeal concerning the application of the general test for defamation. A question as to the possible application of general community standards did arise, in connection with the appellants' argument that the Court of Appeal should not have entered a verdict itself. It was submitted that the attention of a jury was required for the application of community standards. The question therefore turned upon whether there were some such standards which were relevant to the imputations in question.

23 Gleeson CJ and Crennan J[43] and Callinan and Heydon JJ[44] rejected the appellants' submissions that community standards bore upon imputations concerning the provision of unpalatable food and bad service in a restaurant. The

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40 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 684 [56].

41 *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 684 [57].

42 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 296 [10].

43 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 298 [13].

44 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 351 [189]-[190].

standards to which their Honours' considerations were directed were standards referable to personal character. Their Honours pointed out that it was not necessary that imputations reflect badly upon the respondents' character to be defamatory; it was enough that they might damage their business reputation[45].

24 Callinan and Heydon JJ distinguished between the respondents' business reputation and their personal reputation. Their Honours referred to "restaurant standards" as those relevant to imputations about a "person as a restaurateur in relation to the conduct of the restaurant."[46] However their Honours did not suggest that such considerations were to be applied by persons having particular knowledge of the business of restaurants. It may be doubted that the imputations in question required such knowledge. Their Honours said[47]:

> "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."

25 Their Honours did not propose any alternative to the accepted test for defamatory matter. Gummow and Hayne JJ said that it was sufficient that the imputations be such as to be "likely to cause ordinary decent folk in the community, taken in general, to think less of [the plaintiff]"[48].

The directions in this case and *Gacic*

26 At one point in the directions given by the trial judge in this case, no doubt with the decision of the Court of Appeal in *Gacic* in mind, her Honour divided the imputations into two classes. The jury were told by her Honour that the imputations here in question ((b), (c) and (d) above):

> "are imputations concerned with Mr Chesterton's reputation in his profession as a journalist and in that respect you ask yourselves whether

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45 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 295 [6] per Gleeson CJ and Crennan J, 351 [190] per Callinan and Heydon JJ.

46 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 351 [190].

47 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 351 [190].

48 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 309 [53] referring to *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452.

> the imputations, if conveyed, damaged him in that respect, that is in the practice of his profession as a journalist."

The other imputations were described as saying "something personal about Mr Chesterton's personal reputation". Her Honour said that if the jury decided that any of them were conveyed by what was said:

> "… then you ask whether that imputation would be regarded by ordinary right-thinking members of the community as defamatory, as damaging to his reputation."

27 These aspects of the directions, in particular, are the focus of the appellant's submissions, although it was acknowledged that it is necessary to consider what the jury would have understood from the directions as a whole. That question will be considered later in these reasons.

The Court of Appeal

28 The appeal to the Court of Appeal in this matter, concerning the trial judge's directions, turned upon the correctness of the decision of the Court of Appeal in *Gacic*. The appellant in this case submitted that the Court of Appeal ought not to follow that decision. A majority of the Court declined to accept that submission (Spigelman CJ and Hodgson JA, McColl JA dissenting)[49].

29 In her dissenting judgment, McColl JA held that whether matter is defamatory "turns on whether the hypothetical referee, whose standards are taken to reflect those of ordinary right-thinking people, would conclude that they tended to injure the plaintiff in his or her trade, business or professional reputation."[50] Her Honour considered that the Court of Appeal's direction in *Gacic* had overlooked the requirement that an imputation reflect upon the plaintiff's reputation[51].

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49 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,541 [3] per Spigelman CJ, 61,542 [18] per Hodgson JA.

50 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,544 [32].

51 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,569 [159].

30 Hodgson JA understood *Gacic* to turn upon a distinction between the ordinary reasonable reader, listener or viewer, and the community standards which might be applied by them[52]. His Honour said that in cases concerning injury in the area of general character or conduct, the ordinary reasonable reader must be considered as "accepting community standards" and viewing the matter accordingly; with respect to a plaintiff's business reputation, that reader would view the matter in light of their understanding as to "the requirements for fitness or competence for the plaintiff's business"[53]. The expression "right-thinking" could be misleading if it suggests community standards are to be applied to any imputation, his Honour said[54]. His Honour concluded that these propositions were consistent with *Gacic* and its statement that there "could be business defamation even though the defamatory statement did not lower the defamed person in the estimation of right thinking members of the community"[55]. His Honour took the Court of Appeal's decision in *Gacic* to involve a "de-emphasis of community standards in relation to business defamation and [an] insistence on reference to what is conveyed to the ordinary reader."[56]

31 Spigelman CJ considered that it was not always necessary to ensure that the jury are aware "that community standards is the relevant test."[57] Such a test was appropriate to imputations directed to reputation generally. Injury to the reputation of a person in their trade, profession or business directs attention to a

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52 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,542 [18].

53 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,543 [19].

54 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,543 [20].

55 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,543 [24] referring to *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 at 682 [46] per Beazley JA.

56 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,543-61,544 [24].

57 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,542 [14].

narrower section of the community, in his Honour's view[58]. Tests of defamation such as that in *Gardiner v John Fairfax & Sons Pty Ltd*[59], as to whether a publication "is likely to cause ordinary decent folk in the community, taken in general, to think the less of [the plaintiff]" and the broadly equivalent test in *Sim v Stretch* may be appropriate in most cases, his Honour said[60]. However his Honour noted that Lord Atkin in *Sim v Stretch* had not suggested that the test was appropriate in every case[61]. His Honour said that Lord Atkin's reference to the effect upon "right-thinking members of society generally" should be read in context. Lord Atkin had said that the question of what is defamatory is complicated by the need to consider the class of persons whose reaction to the publication is the test[62]. This sectional approach had been taken up by Willmer J in *Drummond-Jackson v British Medical Association*[63], who had observed that the fact that the plaintiff was a dental surgeon and the article in question related to dentistry was "sufficient to indicate the class of persons whose reaction to the publication is to be considered."[64] Spigelman CJ noted that such an approach had been followed in some Australian cases[65].

Resolution of this appeal

32 At this point it is necessary to return to and consider the effect of the decision of the Court of Appeal in *Gacic*, so far as it concerns directions to a jury

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58 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,542 [11].

59 (1942) 42 SR (NSW) 171 at 172 per Jordan CJ.

60 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,541 [5]-[6].

61 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,541 [8].

62 *Sim v Stretch* [1936] 2 All ER 1237 at 1240.

63 [1970] 1 WLR 688; [1970] 1 All ER 1094.

64 *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 at 700; [1970] 1 All ER 1094 at 1106.

65 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,542 [10] and see per McColl JA at 61,561-61,562 [125]-[127].

as to whether matter is defamatory. The effect of the direction it required to be given to a jury is that the general test for defamation – stated as whether a person is lowered in the eyes of right-thinking persons – is not applied to cases of "business defamation". The reasoning of the Court did not involve an analysis of the general test or its application to different aspects of reputation. It assumed, incorrectly, that the relevant injury was that to the plaintiffs' business, not to their reputation. It is disparagement of reputation which is the essence of an action for defamation[66]. The reasons in *Gacic* contain no reference to the plaintiffs' reputation as affected by the imputations. To say that imputations may injure the plaintiff "in their business or calling" does not identify their reputation as relevant. The approach of the Court of Appeal in *Gacic*, which emphasised the possible damage to the plaintiffs' restaurant business, may be relevant to an action for injurious falsehood, but it is not to one for defamation.

33 The Court of Appeal may have been influenced to its view that "business defamation" is to be treated otherwise than by applying the general test by the passage from the 10th edition of *Gatley on Libel and Slander*, to which it referred. That passage may have been intended to convey that it is not necessary that an imputation injure a person in their reputation as to character for it to be actionable; an action will also lie where an imputation injures them in their business or professional reputation. Such an opinion would be unexceptionable. The passage did not suggest that it was injury to a plaintiff's business which was relevant. It clearly identified the plaintiff's reputation as relevant in this respect. However in the way it is expressed, the sentence in the passage highlighted by Beazley JA has the potential to mislead. It could be taken to say that the general test, whether a person is lowered in the estimation of others, does not apply to cases involving damage to business, trade or professional reputation.

34 In the 11th edition of *Gatley on Libel and Slander*[67], published following the decisions in *Gacic* and of the Court of Appeal in this case, it is said that:

> "Without suggesting that there is a separate tort of 'business defamation', as a practical matter it has been thought necessary where the words denigrate the claimant's business or professional capacity to recognize that

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66 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638-639 per Mason and Jacobs JJ; *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 290 per Dixon J; and see *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 295 [6] per Gleeson CJ and Crennan J, 351 [190] per Callinan and Heydon JJ.

67 11th ed (2008) at 38 [2.1].

> words may be defamatory even though they in no way reflect on the *character* of the claimant … "

and that "community standards" of "right-thinking people" may have less of a role in such cases[68].

35 The majority of the Court of Appeal in this case did not deny that the focus of an action for defamation is upon the plaintiff's reputation. However their Honours viewed aspects of reputation as distinct and subject to differing standards or considerations and, in the case of Spigelman CJ, to be judged by a different class of referee[69]. It was by this process of reasoning that the general test for defamation was held by the majority not to apply in cases of imputations concerning a person's business or professional reputation.

36 The concept of "reputation" in the law of defamation comprehends all aspects of a person's standing in the community[70]. It has been observed that phrases such as "business reputation" or "reputation for honesty" may sometimes obscure this fact[71]. In principle therefore the general test for defamation should apply to an imputation concerning any aspect of a person's reputation. A conclusion as to whether injury to reputation has occurred is the answer to the question posed by the general test, whether it be stated as whether a person's standing in the community, or the estimation in which people hold that person, has been lowered or simply whether the imputation is likely to cause people to think the less of a plaintiff. An imputation which defames a person in their professional or business reputation does not have a different effect. It will cause people to think the less of that person in that aspect of their reputation. For any imputation to be actionable, whether it reflects upon a person's character or their business or professional reputation, the test must be satisfied.

37 The reference in the general test, as stated in *Sim v Stretch*, to a plaintiff being "lowered in the estimation" of the hypothetical referee does not imply the exercise of a moral judgment, on their part, about the plaintiff because of what is said about that person. It does not import particular standards, those of a moral

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68 *Gatley on Libel and Slander*, 11th ed (2008) at 38 [2.1].

69 *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,542 [11] per Spigelman CJ.

70 *Berkoff v Burchill* [1996] 4 All ER 1008 at 1018 per Neill LJ.

71 *Berkoff v Burchill* [1996] 4 All ER 1008 at 1018 per Neill LJ.

or ethical nature, to the assessment of the imputations. It simply conveys a loss of standing in some respect.

38 The expression "right-thinking" should not be taken to refer to the application by the hypothetical referee of moral or social standards, those referable to general character. Such an approach might also limit the application of the general test. It should be understood as a rejection of a wrong standard, one not held by the community. It should be taken to describe a person who shares the standards of the general community and will apply them.

39 The expression has been criticised. Griffith CJ in *Slatyer v The Daily Telegraph Newspaper Co Ltd*[72] considered it to be ambiguous, but thought that it was intended to refer to a person of "fair average intelligence" and otherwise accepted the test as stated in *Sim v Stretch*. Murphy J in *Reader's Digest Services Pty Ltd v Lamb* also thought its meaning was unclear[73]. Bray CJ in *Potts v Moran*[74] considered that it involved "question-begging assumptions and circuity of reasoning."[75]

40 The term most clearly implies a standard of decency in a person. The references in *Gardiner v John Fairfax & Sons Pty Ltd*[76] and in *John Fairfax Publications Pty Ltd v Gacic*[77] to the hypothetical referees as being ordinary decent persons, or folk, appear to accept this to be the case. Such a description may serve to distinguish a person in society who abides by its standards, values and rules, from a person who does not. A difference of perspective about the position of an informer to police illustrates this point[78]. It was said of such a person that "[t]he very circumstances which will make a person be regarded with

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72 (1908) 6 CLR 1 at 7.

73 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 502.

74 (1976) 16 SASR 284.

75 *Potts v Moran* (1976) 16 SASR 284 at 303.

76 (1942) 42 SR (NSW) 171.

77 (2007) 230 CLR 291 at 309 [53] per Gummow and Hayne JJ.

78 Accepting that there may be a difference of views about informers within society generally – see Fricke, "The Criterion of Defamation", (1958) 32 *Australian Law Journal* 7 at 10-11.

disfavour by the criminal classes will raise his character in the estimation of right-thinking men"[79]. The expression does not necessarily import a particular social standard. It may be seen as a benchmark by which some views would be excluded from consideration as unacceptable[80]. It confirms that the hypothetical referee is a person who will apply general community standards. It may be taken to refer to ordinary decent persons[81].

41 It is important to distinguish between the general test for defamation and any general community standards which may be relevant in a particular case. Some such standards may be necessary to the assessment of the effect of an imputation upon the reputation of the plaintiff, but they do not form part of the test. Hodgson JA said that it was necessary to separate the concepts of the ordinary reasonable reader and the standards which they might apply. This should be restated as a separation of the general test from the standards which the ordinary reasonable person might consider relevant and apply.

42 There are a number of assumptions apparent, in the decisions of the Court of Appeal in *Gacic* and in this case, about general community standards which might be applied to defamatory imputations, which require correction. Any standards which might be applied by the ordinary reasonable reader will vary according to the nature of the imputation. It should not be assumed that such standards are limited to those of a moral or ethical kind, such as may reflect upon a person's character. It should not be assumed that moral standards have no relevance to imputations concerning a person's business or professional reputation. And it should not be assumed that it will be necessary in every case to apply a standard in order to conclude that a plaintiff's reputation has been injured.

43 There are many standards held within the general community which are not of a moral or ethical kind but which may be relevant to an assessment of whether a person's standing in the community has been lowered. It may be inferred that Hodgson JA in the court below did not take the references of

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79 *Mawe v Piggott* (1869) Ir R 4 C L 54 at 62 per Lawson J, referred to in *Byrne v Deane* [1937] 1 KB 818 at 833 per Slesser LJ.

80 Even if from the Court's perspective: see McNamara, *Reputation and Defamation*, (2007) at 124.

81 See *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 309 [53] per Gummow and Hayne JJ.

Brennan J in *Reader's Digest Services Pty Ltd v Lamb* to "social" standards to add to, or be descriptive of, standards different from those which are "moral". It is not apparent why those words should be taken to have the same meaning. In any event the point made by Brennan J is that any standards to be applied must be those of the general community.

44 *Reader's Digest Services Pty Ltd v Lamb* concerned the admissibility of evidence that the conduct attributed to the plaintiff amounted to a breach of a code of ethics or a standard of behaviour which was required of him as a journalist. The question which arose was whether the standards contained in the code were to be applied in determining whether the publication was defamatory. It was held that they were not admissible for that purpose, as they did not reflect general community standards but rather the attitude of a particular group or class[82]. The general community standards of which his Honour spoke were not expressed to be moral standards but shared moral or social standards.

45 The distinction sought to be drawn between the standards which might apply to imputations concerning a person's business or professional reputation and those as to their character may be more theoretical than real. Moral or ethical standards may be relevant to imputations about a person's business or professional reputation, for example those concerning a person's honesty or fidelity[83] in the conduct of a business or profession, failure to conform to relevant ethical standards pertaining to that profession[84] or which suggest misconduct in the discharge of professional duties[85]. Some statements may convey more than one meaning and bring into question moral or ethical standards as well as conveying a lack of ability to carry on a business or profession. A charge of unfitness for office furnishes an example. Closer to the present case, a statement that a person has been fired by their employer may provide another.

46 That moral or ethical standards held by the general community may be relevant to imputations which reflect upon a person's business or professional reputation does not suggest a true dichotomy as between imputations of that kind and those as to character, with different standards applying to each. Rather it confirms as practicable the general test as applying in all cases involving all

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82 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507.

83 *Jones v Jones* [1916] 2 AC 481 at 491 per Viscount Haldane.

84 *Angel v H H Bushell & Co Ltd* [1968] 1 QB 813 at 825-826 per Milmo J.

85 Odgers, *A Digest of the Law of Libel and Slander*, 6th ed (1929) at 46.

aspects of reputation. In such cases the ordinary reasonable person may be expected to draw upon such community standards as may be relevant, in order to answer the question whether there has been injury to that reputation. In keeping with that test it may be said such standards are those by which a person's standing in the community, the esteem in which others hold them, is lowered.

47 The focus upon moral or ethical standards, in discussions about standards of the community, no doubt reflects the fact that they are the standards most often identified as relevant in actions for defamation. There are obviously other standards, for example as to the behaviour expected of persons within the community, which may not involve a sense of wrongdoing. In some cases injury to reputation may appear so obvious that a standard, which may unconsciously be applied, is not identified. And in some cases such a conclusion may be possible without the need to identify a standard. It may be obvious that people will be thought the less of simply because of what is said about them.

48 The imputations in *Gacic* were considered to fall within this latter category. Another example may be the attribution of authorship of a work of very inferior quality, which may be taken to affect an established author's high reputation, without more[86]. Whether a social standard applies to an imputation of a person's lack of competence to carry out a profession or business may not be so clear, particularly where it is also conveyed that the person held themselves out as competent and for reward. It is not necessary to determine such questions; in each case the plaintiff will have been defamed because he or she has suffered a loss of reputation. The applicability of the general test towards that conclusion cannot be denied because a general community standard does not apply in a particular case. The test does not depend for its exercise upon the existence of standards.

49 In *Reader's Digest Services Pty Ltd v Lamb* Brennan J emphasised that any standard to be applied must be one common to society, rather than one which reflects an attitude of a section of it[87]. Questions have been raised concerning the notion of there being one general community standard with respect to all topics[88];

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86 See *Ridge v The English Illustrated Magazine (Limited)* (1913) 29 TLR 592.

87 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507; and see *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467 at 479 per Greer LJ.

88 McNamara, *Reputation and Defamation*, (2007) at 120 ff and Fleming, *The Law of Torts*, 9th ed (1998) at 583.

and as to whether standards applied by the courts in some cases are in reality those of the general community. Cases involving what are said to be community-held attitudes to police informers are sometimes referred to in the latter regard[89]. And it has been suggested that sectional attitudes may be valid, when regard is had to the cultural diversity of countries such as Australia[90]. Such an approach would require further consideration of the meaning of "community".

50 This case does not involve these fields of discourse. The only distinctive character of the class of persons suggested as necessary to assess imputations of the kind here in question, it may be inferred, is special knowledge of the business or profession in question. The issue is not whether general community standards apply. It is whether the ordinary reasonable person has knowledge of the facts necessary to determine the meaning of an imputation in a business or professional context. It may be taken that this was the concern shared by Spigelman CJ in the court below and by Willmer J in *Drummond-Jackson v British Medical Association*[91]. The technique used by the plaintiff in *Drummond-Jackson v British Medical Association*, which was the subject of the article in question, furnishes an example. Willmer J considered the article, which discussed the technique and its risks, to be of a highly technical nature, "barely intelligible to the ordinary layman". It was for that reason that he considered that it would be necessary to gauge the reaction of dentists to it[92].

True innuendo

51 Reference was not made, in the cases to which Spigelman CJ referred, to evidence which may be admitted where it is contended that the words bear a meaning different from that which might be conveyed to the ordinary reasonable reader, as when a true or legal innuendo is pleaded[93]. This does not involve

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89 Fricke, "The Criterion of Defamation", (1958) 32 *Australian Law Journal* 7 at 10-11.

90 McNamara, *Reputation and Defamation*, (2007) at 122-123 but see *Arab News Network v Al Khazen* [2001] EWCA Civ 118 at [30].

91 [1970] 1 WLR 688; [1970] 1 All ER 1094.

92 *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 at 700-701; [1970] 1 All ER 1094 at 1106.

93 As McColl JA observed: *Radio 2UE Sydney Pty Ltd v Chesterton* (2008) Aust Torts Reports ¶81-946 at 61,562 [128].

calling people to say that they understood the words in a defamatory sense, as Greer LJ observed in *Tolley v J S Fry & Sons Ltd*[94]. When a true innuendo is pleaded evidence may be given of special facts, known to those to whom the matter was published, such as would lead a reasonable person knowing those facts to conclude that the words have another, defamatory, meaning[95]. The essential requirement of the plea is that the matter is not one within the general knowledge of the hypothetical referees[96]. A plea of true innuendo might have been, but was not, made in *Reader's Digest Services Pty Ltd v Lamb*. It may have permitted proof of the existence of the code of ethics, in support of the meaning sought to be attributed to the words.

52 No true innuendo was pleaded in this case, at least with respect to the imputations in question. It is difficult to see what special facts might be necessary to be applied to the particular imputations – that the plaintiff is not to be taken seriously as a journalist and that he had been fired by the radio station – in order to determine whether they are defamatory. They do not suggest as necessary knowledge limited to journalists, although their impact within that profession might sound in damages. The ordinary reasonable reader could apply their general knowledge to the imputations in order to determine their defamatory meaning.

The directions as a whole

53 It was necessary that the jury in this case be told that the imputations as to the plaintiff's professional reputation were to be adjudged by reference to whether they would be likely to make an ordinary reasonable person think less of the plaintiff. In doing so they were to assume that that hypothetical person applied whatever community standards as were appropriate and relevant to the imputations.

54 The outstanding features of the trial judge's directions were their emphasis upon injury to the plaintiff's reputation, as the subject of the jury's assessment, and the requirements of the general test of defamation.

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94 [1930] 1 KB 467 at 480.

95 See *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467 at 480 per Greer LJ; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 264 per Lord Morris of Borth-y-Gest.

96 *Gatley on Libel and Slander*, 11th ed (2008) at 121-122 [3.26].

55 At the outset her Honour described defamation as being "about reputation … something that injures a reputation". She went on to explain the concept of the ordinary reasonable listener and said that something is defamatory if it is disparaging or derogatory, "something that is damaging to reputation and this is important, something that would make ordinary, decent members of the community think less of the plaintiff".

56 When her Honour later returned to the meaning of defamatory matter, she reiterated what she had earlier said and advised the jury that:

> "… you measure that against community standards. That is, what would ordinary decent people in the community think? That is the test that you apply in relation to the six imputations[97] contained in question A.
>
> You listen to the broadcast. You ask yourselves what that would have conveyed to ordinary reasonable listeners, and in doing so, you apply the standards of the community. What would ordinary decent people in the community have drawn from that? And you also apply that to whether or not it was defamatory, you apply the standards of ordinary decent members of the community."

57 It was at this point that her Honour explained the two different and relevant aspects of a person's reputation. It was in this context that her Honour discussed the jury's approach to the two classes of imputations. With respect to imputations (a), (e), (f), (g) and (h) they were to ask themselves whether they would be understood by ordinary, right-thinking members of the community as damaging the plaintiff's reputation. Her Honour said that those in (b), (c) and (d) concerned the plaintiff's reputation as a journalist and that they could ask themselves whether it damaged him in the practice of his profession as a journalist. Her Honour gave an example of a statement which might not damage a person in their personal reputation but might injure them in their professional reputation. Her Honour explained, again, that the imputations in question, particularly that which suggested the plaintiff should not be taken seriously, concerned the plaintiff's professional reputation.

58 The only question which arises, with respect to these otherwise impeccable directions, is whether the jury would have understood that a test different from the general test was to apply to imputations (b), (c) and (d). The

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97 It was accepted by the parties that the transcript reference to the "sixth imputation" was erroneous.

only basis for a submission to that effect could be that her Honour did not reiterate that the jury were to consider these imputations from the perspective of the ordinary right-thinking members of the community, as she had done with respect to the other imputations, in the passages set out above. The answer to that question is not provided by a close examination of the words appearing in the transcript of directions, with a lawyer's eye for fine distinctions. The question is what a jury would have understood.

59 There can be no doubt that the jury would have understood, from the general directions given by her Honour, that they were to assess any injury to the plaintiff's reputation resulting from the imputations and they were to undertake that assessment from the point of view of ordinary reasonable decent members of the community. The only distinction that is likely to have been obvious to the jury was that drawn by her Honour as between the two different aspects of reputation to which different imputations were to be attributed. The jury would not have understood that they were to ask whether the plaintiff was injured financially in the practice of his profession. It was made abundantly clear that they were to consider the effect upon his professional reputation in connection with the imputations in question. In that regard they had been told that the question was whether ordinary reasonable members of the community would think less of the plaintiff. No miscarriage of justice resulted from the trial judge's directions.

Conclusion and orders

60 The Court of Appeal in *Gacic* was in error in requiring a jury to be directed that the general test as to whether an imputation is defamatory is not to be applied in cases involving defamation in the way of a plaintiff's business or professional reputation. The reasons of the majority of the Court of Appeal in this case do not provide additional support for such an approach. The general test for defamation is relevant to all imputations which are said to have injured a plaintiff's reputation in some respect. The likelihood that the ordinary reasonable person may think the less of a plaintiff because of the imputations is assessed by reference to that person's general knowledge and their knowledge of standards held by the general community, as they may apply to what is said about the plaintiff. Because such a person can be expected to apply the standards of the general community, he or she may be described as "decent". The standards are not limited to those of a moral or ethical kind. That a particular imputation may not require the application of a community standard does not render the general test inapplicable. The inquiry as to the effect upon reputation remains. In a case where a secondary defamatory meaning is alleged, which may require knowledge of particular facts within a business or profession, those special facts may be pleaded and led in evidence in support of a true innuendo. There is no warrant

for the application of the knowledge or attitudes of a hypothetical referee other than those of the ordinary reasonable person.

61 The majority of the Court of Appeal should have held that the general test applied in the case of the imputations in question. Nevertheless the Court was correct in its conclusion that the appeal should be dismissed. The trial judge's directions would have conveyed to the jury that they must apply the general test, adjudged by reference to the ordinary reasonable reader.

62 The appeal should be dismissed with costs.

63 HEYDON J. The background is set out above[98]. The appeal turns on whether the trial judge erred in saying to the jury that the question for them was whether the three "business reputation" imputations, "if conveyed, damaged [the respondent] in the practice of his profession as a journalist", and on whether she failed to tell them that the question was whether "ordinary people in the community … would tend to think less of" the respondent.

64 The Court is invited to embark on the enterprise of considering whether it should interfere with the refusal of a divided intermediate appellate court, comprising three judges experienced in defamation law, to overrule an earlier decision of that court, comprising another three judges experienced in defamation law. The parties submitted that the enterprise would be assisted by examining many authorities, a significant amount of specialised professional writing, and shifts in the way in which doctrine was expressed from edition to edition of those writings. However, unless it is absolutely necessary for the just disposition of the appeal that the invitation be accepted, it is undesirable to accept it. It is not necessary because the appeal can be dismissed for two separate reasons specific to this particular case.

Even if there was a misdirection, there was no substantial wrong or miscarriage

65 The only complaint which the appellant pursued on appeal either to the Court of Appeal or to this Court was a complaint that the trial judge had misdirected the jury. The primary remedy desired by the appellant reflected both in its notice of appeal to the Court of Appeal and its notice of appeal to this Court, was an order for a new trial. The misdirection alleged was that the trial judge directed the jury that they were not required to assess whether the "three 'business reputation' imputations were defamatory in accordance with the standards of the general community". The Court of Appeal was prohibited from ordering a new trial for misdirection unless it appeared to it that some substantial wrong or miscarriage had been occasioned by that misdirection[99].

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98 At [13]-[15] and [26]-[31].

99 Rule 51.53(1) of the Uniform Civil Procedure Rules 2005 (NSW) provides:

> "The Court must not order a new trial on any of the following grounds:
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> (a) misdirection, non-direction or other error of law,
>
> …
>
> unless it appears to the Court that some substantial wrong or miscarriage has been thereby occasioned."

66 A substantial wrong or miscarriage in relation to jury misdirection exists where "the result of the case is such as to show that [the jury] may have been influenced in their verdict by the misdirection"[100].

67 The appellant submitted that it had argued before the jury that the broadcast would not have been understood as conveying any defamatory meaning, but rather would have been understood as constituting mere vulgar abuse. In this Court the appellant argued that the '"business defamation' direction to the jury made it impossible for the jury to understand or accept the basis of the vulgar abuse submission". The appellant submitted that the trial judge's direction to the jury excluded any reference to community standards, and, if it had, that this destroyed the "substratum" of its argument in relation to vulgar abuse.

68 A "vulgar abuse" argument can take one or both of two forms. One form contends that an alleged imputation is not conveyed because the ordinary reasonable reader would not take notice of what is only abuse. The second form contends that an imputation which is conveyed is not defamatory because the ordinary reasonable reader would not take notice of what is only abuse. The appellant advanced both forms of the argument to the jury. In relation to the first form, the trial judge directed the jury that the question whether an imputation was conveyed was to be answered by considering whether it was conveyed to the ordinary reasonable listener. The appellant did not criticise that test. The trial judge's direction that that was the test could not have made it impossible for the jury to understand and accept that aspect of the vulgar abuse submission. The appellant's argument rather was that the impact of the trial judge's alleged error in her direction to the jury unjustly damaged the second form of the vulgar abuse submission. It thus relates to the question whether the imputations were defamatory.

69 Despite that argument, even if the jury had been directed in the manner which the appellant now submits it should have been, there is no possibility that the answers to the questions put to the jury could have changed. The appellant's complaint was that the trial judge erred in failing to ask the jury whether, if the business reputation imputations were conveyed, they would be regarded by ordinary reasonable members of the community as defaming the respondent. Even if the trial judge erred in that respect, the broadcast was of a character so egregious as to make it inevitable that the jury would find not only that the pleaded imputations, including the business reputation imputations, were conveyed, but also that they were defamatory. That is so whether the relevant test for what is defamatory is what the appellant contends the trial judge put to

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100 *Holford v The Melbourne Tramway and Omnibus Co Limited* [1909] VLR 497 at 526 per Cussen J, approved in *Balenzuela v De Gail* (1959) 101 CLR 226 at 233 per Dixon CJ; [1959] HCA 1.

the jury or whether the relevant test is what the appellant contends should have been put to the jury. Whichever of the two tests were to be applied, had the jury returned different answers, the Court of Appeal could have set those answers aside and substituted the correct ones. Each of the imputations was inescapably and unmistakably defamatory. A contrary conclusion would be perverse[101].

There was no misdirection

70 There is a second ground on which the appeal may be dismissed. Let it be assumed that, as the appellant submitted, the jury should have been told that the question whether the imputations as to the respondent's professional reputation were defamatory ought to have been determined by reference to whether they would be likely to make an ordinary reasonable person think less of him, applying community standards. Or let it be assumed that, as the dissenting judge in the court below said, the jury should have been told to consider whether "the hypothetical referee, whose standards are taken to reflect those of ordinary right-thinking people, would conclude that [the imputations] tend to injure the [respondent's] reputation in the relevant … professional respect"[102]. Even if one or other of those assumptions is made, the directions given by the trial judge, read as a whole, did not fail to conform to the standard assumed.

71 In the passage in the trial judge's summing up about which the appellant complained, she said that the question for the jury was whether the three business reputation imputations, "if conveyed, damaged [the respondent] in the practice of his profession as a journalist". That passage was part of a sentence. A summing up is a structured and solemn piece of prose. When considering prose of that kind, to find out the meaning of particular words forming part of a sentence, it is normal not to examine the words in isolation, as though they were recorded on a fragment of papyrus or were part of an edict of Asoka on a broken pillar. Rather it is desirable to ascertain the meaning of the sentence as a whole[103]. And to ascertain the meaning of a sentence, it is normal to consider the context in which it appears. In context, as the respondent submitted and as Hodgson JA pointed out in the court below, it is plain that the trial judge was saying that the question was whether the respondent was damaged in respect of his reputation in his profession as a journalist. That is because the entire sentence in which the impugned passage occurs is:

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101 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 350-351 [184]-[187]; [2007] HCA 28.

102 These are assumptions. As such, they do not derogate from what was said in *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 336-354 [153]-[195].

103 See *XYZ v The Commonwealth* (2006) 227 CLR 532 at 592-593 [176], n272; [2006] HCA 25.

> "Imputations (b), (c) and (d) are imputations concerned with [the respondent's] *reputation in his profession as a journalist* and in that respect you ask yourselves whether the imputations, if conveyed, damaged him in *that respect*, that is in the *practice of his profession as a journalist*". (emphasis added)

The words "that respect" refer back to the words "reputation in his profession as a journalist" and transfer that meaning to the words "practice of his profession as a journalist". Hodgson JA also pointed out that in addition to that reference to "professional reputation" in the sentence containing the impugned passage there were references to it in the succeeding two paragraphs. Indeed, there were three additional references to it in the two paragraphs after that. And just before the impugned passage, the trial judge had told the jury that the reference by counsel for the respondent to "business reputation" was to a claim by the respondent "to have been defamed in relation to the practice of his profession as a journalist".

72 What did the trial judge tell the jury about the meaning of the word "defamed"? First, in an earlier passage the jury had been told that defamation is "a publication of something that injures a reputation". Secondly, the jury had been told that the test for assessing whether an imputation damages the respondent's reputation was "the test of ordinary reasonable members of the community". Thirdly, the jury had been told: "The ordinary, reasonable recipient of this broadcast is a hypothetical person who reflects community views, standards, attributes and behaviour". And, fourthly, they had been told that defamatory matter is "something that would make ordinary, decent members of the community think less of the [respondent]". In none of those four passages just quoted did the trial judge distinguish between the three business reputation imputations and the others. The same is true of later references by the trial judge to whether the imputations "were damaging to [the respondent's] reputation" and to what "ordinary decent people in the community" would think. The only angle from which, if one makes either of the assumptions set out above, the direction could be criticised is that just before the passage containing the impugned part-sentence, the trial judge said of the five non-business imputations:

> "[T]hey are imputations of something personal about [the respondent's] personal reputation. If you decide that any of those imputations have been conveyed by the broadcast, then you ask whether that imputation would be regarded by ordinary right-thinking members of the community as defamatory, as damaging to his reputation."

The appellant argued in effect that the express reference to the test for the non-business imputations at that point, coupled with the trial judge's failure to repeat it in the immediately following sentence containing the impugned passage, was an exclusion of its applicability to the business imputations. That submission must fail, on the ground that there are so many other passages

conforming to what is being assumed to be the correct approach that the jury cannot have misunderstood the point made by the trial judge in them.

73 It will be remembered in relation to the issue whether there was a substantial wrong or miscarriage that the appellant contended that if the trial judge's direction excluded any reference to community standards then what his counsel said to the jury about the three business reputation imputations in relation to vulgar abuse lost its substratum. The trial judge's admirably short summing up, read as a whole, did not exclude any relevant reference to community standards. This is an additional reason for concluding that there was no substantial wrong or miscarriage.

Orders

74 The appeal should be dismissed with costs.