The Defence of "Fair Comment"

In *WIC Radio Ltd. v Simpson*, the Supreme Court of Canada has redefined and strengthened the defence of "fair comment" in defamation cases. This important decision will be of assistance to all Canadian media in reducing the risk of liability in defamation for controversial expressions of opinions.

The case arose out of a 1999 radio editorial broadcast by Rafe Mair, the well-known B.C. journalist. In the editorial, Mair attacked a speech by Kari Simpson, a social activist who opposed the introduction of materials dealing with homosexuality into public schools, and who had a public reputation as a leader of those opposed to any positive portrayal of a gay lifestyle. Mair likened Simpson's speech to those "bigots" attacking Jews and blacks, and invoked comparisons to Hitler, George Wallace and others declaring their hostility to a minority.

Simpson sued Mair and the radio station. At trial, the judge had little trouble finding that Mair's words were defamatory of Simpson. The judge further found that they imputed that Simpson would condone violence towards gay people, notwithstanding Mair's denial that he intended such an imputation. However, the judge held that they were spoken without malice, and were fair comment on a matter of public interest. Accordingly, the case was dismissed.

The B.C. Court of Appeal reversed the dismissal on the basis that the trial judge misapplied the defence of fair comment. The Supreme Court allowed the appeal and reinstated the dismissal of the claim.

The defence of fair comment applies to comments on any matter of public interest. Historically, the defence required that the defendant show that:

- the comment was on a matter of public interest
- the comment was based on fact
- the comment is recognizable as comment, as opposed to fact, and
- the comment satisfies the objective test of whether it could be an honestly expressed opinion on the facts.

The Supreme Court decision largely revolves around this last factor and what it means. The court held that the person writing or speaking the defamatory words does not necessarily need to honestly believe the defamatory imputation, but rather it is enough for the defence to show that, objectively, *someone* could honestly have expressed the opinion in controversy on the proven facts.

The court noted that the objective test is not a high threshold and does not require the court to assess the reasonableness of someone's belief in the opinion. In other words, consideration of "objective honest belief" would include the honest belief of persons who are prejudiced, exaggerated, or obstinate in their views. While proof that the person making the defamatory statement subjectively and honestly believes in the statement and its imputations may be used to satisfy the test, it is not necessary for the defence to succeed.

In this case, the court noted that, although the speeches of Simpson did not advocate violence against homosexuals, they contained violent images and metaphorical references to war. Given this, the court held that some listeners could honestly believe that she would condone violence to gay people.
Accordingly, the honest belief component of the defence was made out.

In redefining the honest belief component of fair comment and focusing on the objective nature of the test, the court explicitly referred to and relied upon the right to free expression endorsed as a fundamental value of our society by section 2(b) of the Charter. The purpose of the fair comment defence is primarily to protect the freedom of the press and other media of communication; without it, expression and debate on matters of legitimate public interest might otherwise be inappropriately limited in order to reduce or eliminate the risk of defamation liability.

The effect of this decision is to clarify and re-emphasize the broad scope of the fair comment defence. While the scope is broad, it is not unlimited. Of course, there must be some nexus or relationship between the comment and the underlying facts. As well, even if the defence is established, the plaintiff may defeat the defence by establishing express subjective malice on the part of the defendant.

While there is clear benefit in establishing a more precise test in order to help parties understand their rights and obligations, of additional significance are the majority’s comments on how Canadian courts have frequently pointed to the need to develop the common law in accordance with Charter values. The court’s decision has increased the scope of a defence that serves to protect the freedom of expression and the rights of the media to communicate freely but fairly. This could foreshadow further such developments in the perpetual struggle to balance media and free expression issues against the obligation to respect and right to protect an individual’s reputation, especially in light of the related communication and Internet issues of this rapidly developing technological age.

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