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# Honest belief and the defence of fair comment: *Simpson v. Mair*

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THE DEFAMATION COLUMN

# Honest belief and the defence of fair comment: *Simpson v. Mair*

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It is often thought that the defence of fair comment where a claim of defamation is asserted is reserved for the media. This is not so, although without doubt the defence is invoked most commonly by media defendants. Matters of public interest — which are the subject of fair comment when the defence is raised — are matters on which not just newspaper reporters, editorialists and broadcasters, but citizens generally, are entitled to comment. Social discourse and, indeed, the vibrancy of our very democracy depend on the free flow of ideas, particularly in relation to matters of public interest. The defence of fair comment, therefore, often defines an important boundary when courts are called on to adjudicate disputes where the right of one citizen to preserve his or her reputation from harm conflicts with the right of another citizen to speak his or her mind freely.

Before turning to *Simpson v. Mair and WIC Radio Ltd.*,[1] a very recent case that has shed new light on an aspect of the fair comment defence, a brief review of the essential elements of that defence is appropriate.

Those who comment fairly, *i.e.*, honestly, in good faith and without malice, upon matters of public interest enjoy an immunity from civil liability, even where their comments are defamatory. However, to qualify for that protection, the maker of the statement must establish, among other things, that his or her statement was a "comment" (as opposed to a statement of fact) and that that comment expresses an "honest opinion on facts that are true and known to persons to whom the comment is made".

For the reasons cited above, the defence is a robust one but it does have its limits. As Lord Nicholls stated recently:[2]

> Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. *The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it*: see Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 2 All ER 516 at 518, [1958] 1 WLR 743 at 747.

(Emphasis added.) It can be seen in this passage that, provided a comment can be proven to express an honestly held belief (and provided the other requirements of the defence are satisfied), the fair comment defence will avail, even if the comment and the beliefs it expresses are unreasonable. As the trial judge in *Simpson* correctly observed "honest belief does not require that the belief be reasonable nor fairly stated or right nor held by a majority or even a minority of others".[3] The decision of the British Columbia Court of Appeal in *Simpson* sheds new light on the honesty of belief requirement of the fair comment defence.

Briefly, *Simpson* concerned a broadcast by controversial Vancouver radio talk-show host, Rafe Mair, in which he

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took aim at the plaintiff/appellant Kari Simpson. Simpson holds strong views about homosexuals and was and is openly critical about what might be described as the small-l liberal perspective concerning same-sex rights. Mair, on the other hand, approaches the debate regarding same-sex rights from a different perspective, and in the broadcast at issue in the *Simpson* litigation he was sharply critical of Simpson's views. Among other things, in seeking to get across his criticisms of the plaintiff's intolerance for homosexuals and their lifestyle Mair associated Simpson with infamous historical figures like Adolph Hitler and Governor George Wallace.

The trial judge in *Simpson* dismissed the claims against Mair, in part on the ground that his impugned words were protected by the defence of fair comment. The appeal focused considerable attention on the honest belief requirement of that defence and, in the end, reversed the decision of the court below, concluding that Mair's honest belief in one of the *implications* of his actual words was not established.

By associating Simpson with figures like Adolf Hitler and Governor Wallace — both of whom history has shown to have actively condoned violence (against Jews and blacks, respectively) — Mair had conveyed to the listener that Simpson condoned violence against homosexuals. It did not matter that Mair had intended to get across no more than that he considered Simpson to be an intolerant bigot. Indeed, the court found that had he gone that far, and no farther, the evidence supported his contention that his belief about her and her attitudes was an honest belief and would have supported the defence of fair comment. But his words, and particularly those that associated Simpson with Hitler and Wallace, carried an implication that Simpson condoned violence against homosexuals, a meaning that Mair claimed he did not intend them to carry, but that the reasonable man would nevertheless take from those words.[4]

The narrow question for the B.C. Court of Appeal then became whether, in order to benefit from the protection of the fair comment defence, Mair had to demonstrate an honest belief in:

(a) the imputation found in Mair's words by the trial judge (that is, that Simpson condoned violence against homosexuals); or

(b) the imputation that he, himself, subjectively intended by his words (that is, that Simpson was bigoted and intolerant toward homosexuals).

Southin J.A. (with whom Thackray and Prowse, JJ.A. agreed) determined that there had to be evidence of honest belief *in the imputation that the trial judge found Mair's words carried for the reasonable man, regardless of how he may have intended them to be taken.* In concrete terms, the court determined that Mair would only be able to deflect liability for defamation by recourse to the defence of fair comment if the evidence showed that he held an honest belief that Simpson condoned violence against homosexuals. Insofar as the record revealed "no evidentiary foundation for a finding that the appellant would condone violence",[5] or that Mair believed that she would condone violence, the defence was shown to be unsustainable.

The decision of the B.C. Court of Appeal in *Simpson* is important because it focuses some helpful, clarifying light upon the meaning of impugned words that must be supported by a reasonable belief if the defence of fair comment is to avail. It shows that one cannot make defamatory remarks that, to the reasonable listener or reader, carry a particular defamatory imputation, and then ward off civil liability by recourse to the fair comment defence unless one has an honest belief in the words as the reasonable man would interpret and understand them.

The decision in *Simpson* advances the law in relation to a defence that, as Lord Nicholls observed in the quote noted above, is sometimes raised "as a cloak for mere invective". In an era when constitutional protection of freedom of speech has led some to believe that they can say anything they wish, with impunity — however damaging to the reputations of others — it is well to remember the cautionary words of Southin J.A. in another seminal British Columbia defamation decision called *Pressler v. Lethbridge*:[6]

> ... this is an argument that every citizen has a right, protected by law, to publish to all and sundry, of and concerning persons who hold and publicly profess objectionable opinions, defamatory statements. No authority was cited in support of such a broad concept of occasion of qualified privilege. If adopted, such a concept would enable every citizen to arrogate unto himself the right to decide, according to his view of the public good, when reputations may be ruined.
>
> I do not accept that. The citizen's right of free speech neither imposes upon him a duty, nor gives him a right, to damage the reputations of others.[7]

Those who are given to extravagance when expressing their critical views not uncommonly will indulge in the use of invidious comparisons, invoking notorious historical figures like Hitler, Attila the Hun and (for a more contemporary example) Clifford Olson. The odious associations that attach to such names are many and varied and when one links the practices of living persons or existing companies to those of infamous histor-

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The first significant court decision dealing with insurance claims made in the aftermath of 9/11 was released only in the last year. Although the first trickle of cases have started to come out at the trial division level from Hurricane Katrina, it will likely be a long time before the Katrina claims find their way through the whole court system.

### What if there's no damage?

The more subtle scenario, though, of a tenant unable to access its premises to carry on its business in its virtually undamaged premises, may not be something that the tenant's insurance is required to respond to. There is no relief for the tenant in the damage and destruction sections of the lease, because there has been no significant damage to either the premises or the building. Many leases simply do not contemplate an event which would leave the tenant dispossessed for an extended period of time.

On the flip side, almost all retail leases in regional shopping centres require tenants to be open and conducting their business in their premises on a continuous basis. The wording of the *force majeure* clause will be meaningful, as it may be relevant to whether the tenant's obligation to operate is suspended.

And what if the tenant, which knows it will be out of possession for 12 to 18 months, wants to open up another store while this one is being restored in a location which is within the radius restriction imposed in its existing lease? Will that radius restriction stand?

### Conclusion

What does all this mean to prudent Canadian landlords and tenants? If you have not already seen these events as a wake-up call to reassess your master lease and policies in an effort to avoid some of these quagmires, perhaps the best takeaway is to make sure that all the jigsaw pieces of the lease fit before it is necessary to confirm your rights for real! ■

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ical figures as a form of "shorthand," it will often if not usually be difficult to call in aid the fair comment defence because the honest belief requirement, as *Simpson* demonstrates, must embrace the associations that are triggered in the mind of the reasonable man, including associations that may not have been intended. Moreover, *Simpson* shows that the damaging effects of an invidious comparison cannot be undone by adding to a sharply critical account words that are intended to blunt the impact of a comparison that carries such force in and of itself that its sting cannot effectively be blunted. Mair learned this salutary lesson the hard way when the B.C. Court of Appeal denied him the protection of the fair comment defence for likening Simpson to Hitler and Governor Wallace, despite his disclaimers that he was not "suggesting that [she] was proposing or supporting any kind of violence". These disclaimers, beyond furnishing positive evidence that he lacked the honest belief in one of the meanings that his words would convey to the reasonable man, were ineffective in softening the harm caused by bringing Adolf Hitler and Governor George Wallace into an editorial that could have gotten the main points across without invoking those infamous figures.

[1] 2006 BCCA 287. The judgment in *Simpson* was given on June 13, 2006.

[2] *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.), at p. 615.

[3] *Supra*, note 1, at para. 33.

[4] Importantly, as the trial judge noted, Mair's editorial had to be taken as a whole. The court held that, as a whole, the reasonable meaning that the words of the editorial bore were that the plaintiff would condone violence. Thus, Mair's attempt in the course of the editorial to soften his attack by saying things like "Now I'm not suggesting that Kari was proposing or supporting any kind of violence ..." and "Kari Simpson is not a violent person. I in no way compare her to the violent people in the past that I spoke of and alluded to ..." was unsuccessful.

[5] Reasons for judgment on appeal, *supra*, note 1 at para. 43.

[6] (2000), 86 B.C.L.R. (3d) 257 (C.A.), at paras. 67-8.

[7] This passage comes from the court's discussion of the defence of qualified privilege in *Pressler* but its characterization of the interplay between free speech and the law of defamation transcends that particular subject. ■

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