

CANADA / JUDGMENT

Cherneskey v. Armadale Publishers Ltd.

[1979] 1 SCR 1067

COURT

Supreme Court of Canada

DECIDED

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Cherneskey v. Armadale Publishers Ltd.

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Date

1978-11-21

Report

[1979] 1 SCR 1067

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; Pratte, Yves

On appeal from

Saskatchewan

Subjects

Torts

Decision Content

SUPREME COURT OF CANADA

Cherneskey v. Armadale Publishers Ltd., [1979] 1 S.C.R. 1067

Date: 1978-11-21

Morris T. Cherneskey (Plaintiff) Appellant; and

Armadale Publishers Limited and Sterling King (Defendants) Respondents.

1977: December 12, 13; 1978: November 21.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Libel — Defence of fair comment - Words complained of published in correspondence column of newspaper — Material found to be defamatory — No evidence that material represented honest opinion of writers of letter — Denial of honest belief by publisher and editor — Whether trial judge erred in taking away from jury defence of fair comment.

As a result of a letter written by two law students and published in the correspondence column of the Saskatoon Star-Phoenix, the appellant (an alderman and a practising [sic] lawyer in Saskatoon) brought an action for libel against the publisher of the paper and its editor. The writers of the letter were not sued, nor did they appear as witnesses, as both were out of the province at the time of the trial. The letter concerned a petition which was presented to the Saskatoon City Council and which was apparently drafted with the assistance of the appellant. The petition presented on behalf of 54 citizens was directed against the establishment of an alcoholic rehabilitation centre in what was alleged to be a residential section of Saskatoon and the report of its presentation to council as published in The Star-Phoenix referred in particular to Indians and Metis whose use of the centre was alleged to be detrimental to the area.

The only express reference made to the appellant in this report was contained in the last paragraph reading: "Ald. Morris Cherneskey told council he did not think the zoning laws of the area envisioned 15 people living in one place, and until it is fully clarified it should not operate as an alcoholic rehabilitation centre when the citizens of the neighborhood are concerned."

Having read this article, the two law students proceeded to write the letter in question to The Star-Phoenix. The letter was published in a column headed

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"Editor's Letter Box" and was itself headed "Racist Attitude". The appellant alleged that the tenor of the letter was such as to charge him with being "racist" and with conduct unbecoming a barrister and solicitor. He claimed that the heading and the letter would tend to lower him in the estimation of right-thinking members of society generally and the citizens of Saskatoon in particular and that the words were defamatory.

The trial judge refused to put to the jury the defence of fair comment on the ground there was no evidence that the words complained of expressed the honest opinion of anyone, either the writers of the letter, or any member of the editorial staff of the paper, or its publisher. The judge was of the view that without such honest opinion he could not tell the jury that the defence of fair comment was available to the defendants. The jury found in favour of the plaintiff and awarded him \$25,000 damages. On appeal, the Court of Appeal by a majority allowed the defendants' appeal and ordered a new trial. Pursuant to leave granted by the Court of Appeal, the plaintiff then appealed to this Court.

Held (Spence, Dickson and Estey JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Laskin C.J. and Martland and Beetz JJ.: A defence of fair comment is dependent upon the fact that the words in issue represent an honest expression of the real view of the person making the comment. In the present case the evidence was clear that the letter complained of did not represent the honest expression of the real views of either the owner and publisher of the newspaper or of its editor.

The writers of the letter were not called to give evidence, and so there was no evidence to prove that the letter was an honest expression of their views. The only evidence available was that the editor said, with reference to the writers of the letter, "we figured that was their opinion or their view or their observations".

This was not a sufficient basis to enable the respondents to rely upon the defence of fair comment. There was no evidence to show that the material published, which the jury found to be defamatory, represented the honest opinion of the writers of the letter, or that of the officers of the newspaper which published it. In these circumstances the trial judge was properly entitled to decide not to put the defence of fair comment to the jury.

Silkin v. Beaverbrook Newspapers Ltd., [1958] 1 W.L.R. 743, referred to.

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Per Laskin C.J. and Ritchie, Pigeon and Pratte JJ.: It is an essential ingredient to the defence of fair comment that it must be the honest expression of the writer's opinion, and each publisher in relying on the defence of fair comment is in exactly the same position as the original writer. Accordingly, in the absence of any proof of the honest belief of the writers of the letter complained of in this case, and having regard to the denial of honest belief by the defendants themselves, the defence of fair comment cannot prevail.

This does not mean that freedom of the press to publish its views is in any way affected, nor does it mean that a newspaper cannot publish letters expressing views with which it may strongly disagree. Moreover, nothing that was said here should be construed as meaning that a newspaper is in any way restricted in publishing two diametrically opposite views of the opinion and conduct of a public figure. On the contrary, as stated by Brownridge J.A., who dissented in the Court below, "what it does mean is that a newspaper cannot publish a libellous letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper."

Jones v. Skelton, [1963] 1 W.L.R. 1362; Turner v. Metro-Goldwyn-Mayer Pictures Ltd., [1950] 1 All E.R. 449; Slim v. Daily Telegraph Ltd., [1968] 1 All E.R. 497; Plymouth Mutual Co-operative and Industrial Society Ltd. v. Traders' Publishing Association Ltd., [1906] 1 K.B. 403; Lyon & Lyon v. Daily Telegraph Ltd., [1943] 2 All E.R. 316; Egger v. Viscount Chelmsford, [1965] 1 Q.B. 248, considered; "Truth" (N.Z.) Ltd. v. Holloway, [1960] 1 W.L.R. 997; Arnold v. King-Emperor (1914), 83 L.J.P.C. 299, applied; Globe and Mail Ltd. v. Boland, [1960] S.C.R. 203, referred to.

Per Spence, Dickson and Estey JJ., dissenting: A defendant should succeed on a defence of fair comment if he shows that the comment was objectively fair and the plaintiff does not establish malice on the part of this individual defendant. These principles of law apply alike to all defendants; no wider or different rule is necessary for newspapers. On the facts of the present case, in light of the enunciated principles, the trial judge should have left the issue of fair comment to the jury.

Lyon and Lyon v. Daily Telegraph Ltd., [1943] 2 All E.R. 316; Slim v. Daily Telegraph Ltd., [1968] 1 All E.R. 497, considered; Sim v. Stretch (1936), 52 T.L.R. 669; O'Brien v. Clement (1846), 15 M. & W. 435; Merivale v. Carson (1887), 20 Q.B.D. 275; Thomas v. Bradbury, Agnew & Co. (1906), 75 L.J.K.B. 726;

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Turner v. Metro-Goldwyn-Mayer Pictures Ltd., [1950] 1 All E.R. 449; Adams v. Sunday Pictorial Newspapers (1920) Ltd. and Champion, [1951] 1 K.B. 354; Lyle-Samuel v. Odhams Ltd., [1920] 1 K.B. 135; Hennessy v. Wright (1888), 4 T.L.R. 574; Silkin v. Beaverbrook Newspapers Ltd., [1958] 2 All E.R. 516; Bulletin Co. Ltd. v. Sheppard (1917), 55 S.C.R. 454; Winnipeg Steel Granary and Culvert Co. v. Canada Ingot Iron Culvert Co. (1912), 3 W.W.R. 356, Stopes v. Sutherland, [1925] A.C. 47; Egger v. Viscount Chelmsford, [1965] 1 Q.B. 248, referred to.

As to whether the statements were reasonably capable of being construed as comment, a statement that a person's attitude is "racist" or "unbecoming" is clearly capable of being classified as comment rather than fact. Certain facts forming the foundation of this opinion are of course implied but, where the main thrust of the statement is capable of being construed as opinion, it is up to the jury to determine just what is actually opinion.

With respect to the question whether the statements were capable of defaming the appellant directly, and by innuendo, in his capacity as a lawyer, the issue of law is whether the statement is capable of this construction, as it is a question for the jury whether in fact it is. This question was properly put to the jury. Everyone who is an alderman has another occupation. The fact that a statement says that he should carry these qualities into his public duties does not suddenly rob the statement of its quality of being in a matter of public interest. The fact that a statement about a person's work as a public official, or his position on a public matter, reflects on himself as a private individual does not mean that the statement is not one on a matter of public interest. Such statements will generally reflect on the individual in several aspects. Even if the statement defamed the appellant by innuendo, the respondents still have a defence if the statement was fair comment on a matter of public interest.

As to whether the statements were on a matter of public interest so as to be capable of protection as being fair comment, the statements in question concerned the appellant's opposition as an alderman to the establishment of an alcohol centre for native people. It stated that certain aspects of the position he took were incor-rect interpretations of the operation of zoning legislation, particularly with respect to the onus of proof that the existing use is permitted or forbidden. In effect, it stated that his position was inconsistent with that which a person with legal training should, in the opinion of the writers, take toward this issue. The important point is

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that the statement was a comment on the proposed alcohol centre. This is a matter of undoubted public interest, whether the statement is that the plaintiff should not be making certain remarks as a lawyer, priest, or whatever. The question of whether a comment is one on a matter of public interest must be clearly distinguished from the question of whether it is defamatory. The statement here may well be defamatory (again a question for the jury) but, even if it is defamatory, it is not actionable if the person publishing the statement has a good defence such as fair comment.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment rendered at trial by MacPherson J. sitting with a jury and ordering a new trial of an action for libel brought by the appellant against the respondents. Appeal allowed, Spence, Dickson and Estey JJ. dissenting.

D. E. Gauley, Q.C., and P. Foley, for the plaintiff, appellant.

R. H. McKercher, Q. C., and N. G. Gabrielson, for the defendants, respondents.

The Chief Justice and Beetz J. concurred with the judgment delivered by

MARTLAND J.—The facts which give rise to the present appeal are stated in the reasons of my brothers Ritchie and Dickson. I agree with the disposition of the appeal proposed by the former. I wish to comment on one of the grounds which he adopts for allowing the appeal which I consider to be sufficient to dispose of the matter.

The issue before this Court is as to whether the judge at trial erred in taking away from the jury the defence of fair comment. Before doing so, the trial judge discussed the matter with counsel and stated his reasons for taking this course. They are as follows, and I agree with them:

It is, of course, the burden of the defendant to prove this defence and it does not arise until after the jury has found the words complained of to apply to the plaintiff and that they are defamatory of him.

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I shall not try to decide whether if the opinion of the writers of the letter is honest and sincere that this fact absolves the publisher or the editor of the paper from a similar opinion. In the present trial that is not necessary because here there is no evidence that the offending words, if

they are in fact defamatory of the plaintiff, which is a matter for the jury—there is no evidence that those words express the honest opinion of anyone, either the writers of the letter or of anyone on the editorial staff of the Star—Phoenix or its publisher. The evidence seems to be that the defendants had a contrary opinion or none at all. Without such honest opinion I cannot tell the jury that the defence of fair comment is available to the defendant.

I thought I had better put that on the record, gentlemen, so that my position is clear and the reason for my ruling is clear.

The reason for the existence of the defence of fair comment in a suit for defamation, and the nature of that defence, are stated in *Salmond on Torts*, 17th ed., p. 180, as follows:

A fair comment on a matter which is of public interest or is submitted to public criticism is not actionable. This right is one of the aspects of the fundamental principle of freedom of expression, and the courts are zealous to preserve it unimpaired. It must not be whittled down by legal refinements. The jury are the guardians of the freedom of public comment as well as of private character. It is only on the strongest grounds that a court will set aside a verdict for a defendant when fair comment is pleaded.

Comment or criticism must be carefully distinguished from a statement of fact. The former is not actionable if it relates to a matter which is of public interest; the latter is actionable, even though the facts so stated would, if true, have possessed the greatest public interest and importance. Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's writings or actions. Being therefore a mere matter of opinion, and so incapable of definite proof, he who expresses it is not called upon by the law to justify it as being true, but is allowed to express it, even though others disagree with it, provided that it is honest.

Freedom to express an opinion on a matter of public interest is protected, but such protection is afforded only when the opinion represents the honest expression of the view of the person who

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expresses it. This requirement is stated in the passage quoted above. *Gatley on Libel and Slander*, 7th ed., p. 308, says:

Comment must be published honestly in that it is the expression of the defendant's real opinion.

A clear statement of the nature of the defence of fair comment is found in the summing up to the jury of Diplock J., (as he then was) in the case of *Silkin v. Beaverbrook Newspapers Ltd.*[2], at p. 747:

I have been referring, and counsel in their speeches to you have been referring, to fair comment, because that is the technical name which is given to this defence, or, as I should prefer to say, which is given to the right of every citizen to comment on matters of public interest. But the expression "fair comment" is a little misleading. It may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realize that the limits of freedom which the law allows would be

greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided—and this is the important thing—that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?

My brother Ritchie has referred to other authorities which are to the same effect, namely, that a defence of fair comment is dependent upon the fact that the words in issue represent an honest expression of the real view of the person making the comment.

In the present case, the corporate defendant is the owner and publisher of The Star-Phoenix, a Saskatoon newspaper in which the words complained of were published, and the respondent,

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King, is the editor of that newspaper. The evidence of the officer produced for examination for discovery by the respondent company, and that of the respondent, King, make it clear that the letter complained of did not represent the honest expression of their real views.

The writers of the letter were not called to give evidence, and so there is no evidence to prove that the letter was an honest expression of their views. The only evidence we have is that the respondent, King, said, with reference to the writers of the letter, "we figured that was their opinion or their view or their observations".

This is not a sufficient basis to enable the respondents to rely upon the defence of fair comment. There is no evidence to show that the material published, which the jury found to be defamatory, represented the honest opinion of the writers of the letter, or that of the officers of the newspaper which published it. In these circumstances the trial judge was properly entitled to decide not to put the defence of fair comment to the jury.

The Chief Justice and Pigeon and Pratte JJ. concurred with the judgment delivered by

RITCHIE J.—This is an appeal brought pursuant to leave granted by the Court of Appeal of Saskatchewan from a judgment of that Court setting aside a judgment rendered at trial by Mr. Justice MacPherson sitting with a jury and ordering a new trial of this libel action which was brought by the appellant, a practising lawyer and alderman of the Saskatoon City Council, as a result of a letter published in the correspondence column of The Star-Phoenix a newspaper published in Saskatoon, of which the respondent, Armadale Publishers Limited (hereinafter referred to as "Armadale") is the owner and publisher and the respondent Sterling King is the editor.

The facts giving rise to this litigation are accurately and fully stated in the dissenting judgment of Mr. Justice Brownridge in the Court of Appeal which is now conveniently reported at 79 D.L.R. (3d) 180 (hereinafter referred to as the "Report"), at pp. 183 et seq., but in order to fully understand

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the questions to which this appeal gives rise it will be necessary for me to summarize them briefly.

The alleged libel of which the appellant complains is contained in a letter written to The Star-Phoenix by two law students concerning a petition which was presented to the Saskatoon City Council and which was apparently drafted with the assistance of the appellant. The petition presented on behalf of fifty-four citizens was directed against the establishment of an Alcoholic Rehabilitation Centre in what was alleged to be a residential section of Saskatoon and the report of its presentation to Council as published in The Star-Phoenix referred in particular to Indians and Metis whose use of the centre was alleged to be detrimental to the area. In this regard Mr. Yaworski, who presented the petition, was reported as saying that the establishment of the centre was going to turn the area into "an Indian and Metis ghetto".

The only express reference made to the appellant in this report was contained in the last paragraph reading:

Ald. Morris Cherneskey told council he did not think the zoning laws of the area envisioned 15 people living in one place, and until it is fully clarified it should not operate as an alcoholic [sic] rehabilitation centre when the citizens of the neighborhood are concerned.

Having read this article, the two law students proceeded to write a letter to The Star-Phoenix which was published in a column headed "Editor's Letter Box" at the foot of which the following statement was printed:

Letter writers are requested to provide addresses and phone numbers to allow checking for authenticity and accuracy. Letters must be signed—no pseudonyms will be published. All are subject to editing for length, general interest, grammar, style and good taste. Letters under 250 words are preferred. (Emphasis added.)

In his charge to the jury, the learned trial judge touched on this phase of the matter saying:

The Star-Phoenix, as the evidence indicates has a right to decline to publish. They chose to publish and they, as

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they indicated, have a right to insist upon their right to edit. That's their privilege naturally.

The letter complained of was itself headed "Racist Attitude" and it is reproduced in full at pp. 183 and 184 of the D.L.R. Report, but the real sting of the language complained of is contained in the last three paragraphs which read:

As a law student and an articling law student, we are appalled by the stance adopted by Alderman Cherneskey, himself a lawyer. We appreciate his sympathy with the concerns of certain members of the white community; however, we thoroughly disagree with his contention the centre should cease its operation until such time as the application of the relevant zoning bylaw has been clarified. We feel this situation is not unlike that of a man charged with a criminal offence. Such a man is deemed innocent until proven guilty.

That Alderman Cherneskey should imply the onus is upon those operating the centre to establish their right to remain in the neighborhood until further clarification, is abhorrent to all concepts of the law. At the very least, it flies flagrantly in the face of the principles of natural justice. It is unbecoming a member of the legal profession to adopt such an approach.

Although we do not reside in the particular neighborhood in question, we would have no objection whatsoever to such a centre operating in our neighborhood. We entirely support the project initiated by Clarence Trotchie and hope the racist resistance exhibited will be replaced by the support and encouragement which the project deserves.

In the course of his reasons for judgment in the Court of Appeal, Mr. Justice Brownridge points out that:

Prior to the trial the defendants sought leave to join as third parties the two authors of the offending letter but this application was refused on appeal:...At the trial it was agreed by counsel that both letter writers were out of the jurisdiction and neither was called as a witness. (Emphasis added.)

By his statement of claim the appellant claimed damages for defamation of his personal character in relation to his profession and in his office as an

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alderman and by para. 8 made the following general claim:

The plaintiff further says that the said heading and letter as a whole would tend to lower the plaintiff in the estimation of right-thinking members of society generally and the citizens of Saskatoon in particular and that the words are defamatory.

By their joint defence the defendants pleaded;

8. In so far as the said letter, exclusive of the said heading, set out in paragraph 3 of the Statement of Claim consists of statements of fact they are true in substance and in fact and in so far as the said words consist of expressions of opinion, they are fair and bona fide comment made without malice upon the said facts which are a matter of public interest.

9. The publication of the said letter was an occasion of qualified privilege.

The plaintiff's reply is phrased in the following terms:

REPLY

In answer to the Defendant's Statement of Defence wherein they plead fair comment and qualified privilege, which is not admitted but denied, the Plaintiff says that the heading and the letter were published with express malice and joins issue.

The questions put to the jury by the learned trial judge and their answers are as follows:

1. Would a reasonably minded reader imply that the words 'racist attitude' in the heading over the letter refer to the plaintiff?

Answer: No.

2. If your answer to question number 1 is yes, then are those words defamatory?

Answer: Not applicable.

3. Would a reasonably minded reader imply that the words 'racist resistance' in the last sentence of the letter refer to the plaintiff?

Answer: Yes.

4. If your answer to number 3 is yes, then are those words defamatory?

Answer: Yes.

5. Do the words in the fourth and fifth paragraphs of the letter directly or by innuendo defame the plaintiff as Alderman?

Answer: Yes.

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6. Do the words in the fourth and fifth paragraphs of the letter directly or by innuendo defame the plaintiff as a lawyer?

Answer: Yes.

7. If you have answered yes to questions 2, 4, 5 and 6 or any one or more of them, what damages do you award the plaintiff?

Answer: \$25,000. & costs.

I think it convenient at this stage to say that I am in agreement with Mr. Justice Brownridge, for the reasons which he has stated at p. 187 of the Report, that the defence of qualified privilege is not available to the defendants in the present case. This view was adopted by Mr. Justice Bayda who observed at p. 196:

I have read the reasons for judgment of my brother Brownridge, and respectfully agree that for reasons similar to those expressed by the Supreme Court of Canada, in *Douglas v. Tucker*, [1952] 1 D.L.R. 657, [1952] 1 S.C.R. 275; *Globe and Mail Ltd. v. Boland* (1960), 22 D.L.R. (2d) 277, [1960] S.C.R. 203, and *Jones v. Bennett* (1968), 2 D.L.R. (3d) 291, [1969] S.C.R. 277, 66 W.W.R. 419, the defence of qualified privilege is not available to the defendants in the present case. I also agree with the conclusions reached by him in respect of the other grounds of appeal, save the ground involving the plea of fair comment. In that regard, I have reached the opposite conclusion, namely, that the learned trial Judge should not have taken away from the jury the defence of fair comment.

Mr. Justice Brownridge found no merit in "the other grounds of appeal" and Mr. Justice Hall stated at the opening of his reasons for judgment:

The significant ground of appeal is that which alleges error by the trial Judge in refusing to put to the jury the defence of fair comment.

It is thus apparent that all members of the Court of Appeal were concerned only with the complaint that the trial judge had erred in taking the defence of fair comment away from the jury and this was the main issue presented in this Court.

In the present case the plaintiff's (appellant's) plea that the words used in the letter are defamatory is couched in language which has long been accepted as giving rise, upon publication, to an

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action for defamation by the person to whom it refers. In this regard I refer to the following excerpt from *Gatley on Libel and Slander*, 7th ed, p. 5, para. 4, where he said:

Any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of society generally or to expose him to hatred, contempt or ridicule is defamatory of him.

This language was in large measure adopted by the trial judge in addressing the jury.

Accordingly, as I agree with the trial judge that the words used are capable of being construed as tending to lower the plaintiff in the estimation of right-thinking members of society generally, a prima facie cause of action arises and in my view a plea of fair comment by way of defence does not of itself have the effect of saddling the plaintiff with the burden of proving that the comment was unfair. This plea constitutes a vital part of the case for the defendants and in my view the burden of proving each ingredient of the defence so pleaded should rest upon the party asserting it. One of these ingredients is that the person writing the material complained of must be shown to have had an honest belief in the opinions expressed and it will be seen that, in my view, the same considerations apply to each publisher of that material.

The question of burden of proof in such cases was considered by Lord Morris of Borth-y-Gest in *Jones v. Skelton*[3], at p. 1379 where he said:

... if a defendant publishes of a plaintiff words which a jury might on the one hand hold to be fact or might on the other hand hold to be comment, and if a plaintiff does not accept that any of the words are true or does not accept that any of them are comment and if a defendant chooses to assert that some of the words are fair comment (made in good faith and without malice) on facts truly stated it must (assuming that the judge rules in regard to the public interest) be for the defendant to prove that which he asserts. If a plaintiff does not acknowledge that there are any words of comment and if the words are reasonably capable of being held by a jury to be statements of fact the plaintiffs overall burden of proving his case does not involve a duty of proving that comment (the existence of which he denies) is unfair.

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In commenting on this statement, Mr. Justice Bayda observed at p. 200 of the D.L.R. Report:

It is plain from these remarks (which I adopt as a correct statement of the law) that where the pleadings, as in the present case, disclose that the plaintiff does not acknowledge the words complained of are comments or opinions, but the defendants, in their pleadings, raise the issue of comment and of fairness of the comment, the onus is on the defendants to prove fair comment. The normal principle that he who asserts, must prove, applies. In such event (assuming the words complained of are capable of being a comment and further assuming that condition (b) mentioned above is not applicable as is the situation here), it is for the Judge to determine, as a matter of law, (1) whether there is any evidence of condition (a), that is, any evidence entitling the jury to find that the statements upon which the comments are based are true; and (2) whether there is any evidence of condition (c), viz., the requirement of honesty. If he finds there is some evidence to support the finding that those conditions are met, he must place the defence of fair comment before the jury for their consideration (assuming that he has previously ruled that the element of public interest was proved). If, on the other hand, the trial Judge finds as a matter of law, that there is no evidence to support the presence of either of these two conditions, he should not put the defence of fair comment to the jury.

In cases where the essential ingredients of either the plea of "qualified privilege" or that of "fair comment" have been established by the defence, then if it can be proved that the statements complained of were made or written maliciously, the plea must fail; but in my view no burden lies upon the complainant to prove malice unless and until either plea has been shown to be supported by the evidence.

Here the plea of "express malice" was added midway through the evidence called on behalf of the plaintiff (appellant) and it is in my view important to appreciate that this allegation forms no part of the main case but is inserted entirely by way of answer to the respondents' claim of "qualified privilege" and "fair comment". As I have indicated, the defence of qualified privilege is not available to the defendants and the question of malice could only arise in the present case if there were some evidence to indicate that the comment complained of was otherwise fair and this cannot

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be said unless the opinions expressed are honestly held.

As I have already observed, it is an essential ingredient to the defence of fair comment that it must be the honest expression of the writer's opinion and in this regard I refer to the following statement made by Lord Porter in *Turner v. Metro-Goldwyn-Mayer Pictures Ltd.*[4] at p. 462, where he said, commenting on the charge to the jury in that case where the defence was qualified privilege:

Its early words on this part of the case express exactly what the authorities convey. "Fair comment" (in effect the learned judge says) "has to be an honest expression of the real opinion of the defendants when they wrote it ..." "Did they honestly and really think that she" (the appellant) "was completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners and that her criticisms are on the whole unnecessarily harmful to the film industry? Did they honestly hold that opinion and really believe it? If they did —then they were not abusing the occasion." Such a direction is, I think, entirely accurate and could not be attacked, and similar language is to be found in other parts of the summing-up. On the other hand, language of this kind is frequently interspersed with words which suggest that the criterion is whether fair-minded men could hold that view. Let me take one example only. It runs:

"First of all ... do you think that a fair-minded man capable of impartial judgment of the plaintiff's (appellant's) talks ... could come to that conclusion. Was there anything in them or in her conduct which would lead a fair man honestly to entertain the opinion that the defendants expressed in this letter?"

Similar observations appear throughout the summing-up and, undoubtedly, if they were found alone there would have been clear misdirection. It is said, however, in the first place, that, in his cross-examination and address, leading counsel for the respondents used the phrase and accepted the burden that fair-mindedness was required. I do not think that the record justifies this allegation, but if it did I should think it immaterial. Secondly, it is argued with more force that, when the summing-up is regarded as a whole, a jury would not be misled, but would rightly apprehend that honesty, not reasonableness,

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was the state of mind required. My Lords, I cannot take this view. I have read the summing-up as a whole more than once and I think a jury might well have come to the conclusion that both honesty and reasonableness were necessary and that the defendants were unreasonable and therefore malicious. It is, I think, difficult for the uninstructed mind to guard against such a misconception, and to my mind the clearest direction is necessary to the effect that irrationality, stupidity or obstinacy do not constitute malice, though in an extreme case they may be some evidence of it. The defendant, indeed, must honestly hold the opinion he expresses but no more is required of him.

In the same case Lord Oaksey stated at p. 475:

In the absence of any evidence that the respondents did not honestly hold the opinions expressed in their letter, I see no grounds on which they could be held to have exceeded the limits of fair comment.

After having heard lengthy argument as to whether or not this defence should be left to the jury in the present case, the trial judge made the following ruling:

I shall not try to decide whether if the opinion of the writers of the letter is honest and sincere that this fact absolves the publisher or the editor of the paper from a similar opinion. In the present trial that is not necessary because here there is no evidence that the offending words, if they are in fact defamatory of the plaintiff, which is a matter for the jury—there is no evidence that those words express the honest opinion of anyone, either the writers of the letter or of anyone on the editorial staff of the Star-Phoenix or its publisher. The evidence seems to be that the defendants had a contrary opinion or none at all. Without such honest opinion I cannot tell the jury that the defence of fair comment is available to the defendant.

Honesty of belief has been characterized by Lord Denning M.R., in *Slim et al. v. Daily Telegraph Ltd.* et al.[5], at p. 503, as "the cardinal test" of the defence of fair comment, and in the context of the present case this must mean honesty of belief in the opinions expressed in the letter complained of.

It has long been established that the state of mind of the publisher of the alleged libel is directly in issue where there is a plea of fair comment. This

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is illustrated in the case of *Plymouth Mutual Co-operative and Industrial Society Ltd. v. Traders' Publishing Association Ltd.*[6], where the question was whether an interrogatory addressed to the state of mind of the defendant who had pleaded fair comment was admissible and after referring to the case of *White & Co. v. Credit Reform Association and Credit Index Ltd.*[7], Vaughan Williams L.J. said, at p. 413:

It seems to me that that case shews that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege. In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other whether he published it in the spirit of unfairness. In either case, I think such an interrogatory as the one now in question is admissible.

And later at p. 418 of the same report Fletcher-Moulton L.J. said:

... I am clear that, both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue .. .

Perhaps the most singular feature of the present case is that the state of mind of the defendants is established by their own evidence to the effect that they did not honestly hold the opinions expressed in the letter. This is illustrated by the following excerpt from the evidence of the defendants in relation to the comments complained of. Mr. R. Struthers, who was the executive vice-president of the defendant, Armadale, stated in the course of cross-examination as follows:

Q. But of course there is no question but what you do not believe Morris Cherneskey to be a racist?

A. No, I do not.

Q. You do not believe Morris Cherneskey to be a person with a racist attitude?

A. I do not believe him to be so.

Q. And in any capacity, as a lawyer, you don't believe him to be a lawyer with a racist attitude?

A. No.

Q. Or an alderman with a racist attitude?

A. No.

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The same witness had given the same answers when speaking as the officer examined for discovery on behalf of the defendant, Armadale.

The second defendant, Sterling King, who was the editor of The Star-Phoenix, stated that he had no opinion as to the approach of Cherneskey in relation to the white community in the area in question but it was his honest opinion that Cherneskey had a reputation for honesty and integrity as a lawyer and an alderman.

It will be remembered that Mr. Justice Bayda adopted the passage from the reasons for judgment of Lord Morris of Borth-y-Gest in *Jones v. Skelton* which I have already quoted and the reasons for judgment of Mr. Justice Brownridge and Mr. Justice Bayda both satisfy me that if the writers of the letter here in question had been the defendants in this action and had entered a plea of fair comment, both these judges would have found that the burden of proving honest belief in the opinions expressed rested upon the defence.

Mr. Justice Bayda, however, allowed this appeal on the ground that a newspaper in republishing defamatory opinions which do not reflect its honest opinion is nevertheless entitled to rely on the defence of fair comment on the ground that it honestly believed that those who wrote the letter were honestly expressing their true views. In this regard reliance is placed on the case of *Lyon and Lyon v. Daily Telegraph, Ltd.*[8] In that case the author, who had used a nom de plume and given a fictitious address, was never discovered and the newspaper therefore had no means of determining whether the views expressed were honestly held by the writer or not, but the defence of fair comment was upheld in the Court of Appeal where Scott L.J. said at p. 318:

There is no question but that the comment contained in the letter represented the honest opinion of the "Daily Telegraph"; and at the trial no doubt was cast upon the complete belief of the newspaper that they were publishing a letter in which the writer was making a fair comment on a matter of public interest.

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The obvious distinction between that case and the present one is that the letter complained of here did not express the honest opinion of The Star-Phoenix and there is no evidence that the views therein expressed were honestly held by the writers, but Scott L.J. later in the same judgment said at p. 319:

Although there is no direct authority, I think that the question of law is really implicit in the well-established rule that the publishers of a newspaper, when defendants in an action for libel, cannot, on the issue of fair comment, be required to disclose the source of their information. If the innocent state of mind of the writer of a letter published in the newspaper was a relevant fact, which had to be proved by him before his plea of fair comment could be established, it would go far towards justifying counsel's argument; but the very existence of the exceptional rule about interrogatories and discovery in the case of newspaper defendants seems to me to presuppose a rule of law that, at least in the absence of special circumstances (on the possibility of which I express no opinion), there is no such presumption or onus, and that fairness of the comment contained in the newspaper's correspondence columns must be judged by its tenor, subject only to the proviso that the statements of fact upon which the comment is based are not untrue.

This latter passage is primarily concerned with the rule that the publishers of a newspaper cannot be required to disclose their source of information, but the language employed in the last sentence might be construed as meaning that the fairness of the letter complained of is to be judged by its tenor which I construe as a suggestion that the language used in correspondence columns of a newspaper is to be judged according to whether there is anything in the letter in question which would lead a fair man honestly to share the opinion which the language conveyed. It is to be remembered that the judgment of the Court of Appeal in the Lyon case was rendered some seven years before the House of Lords decided the case of Turner, supra, and I do not think there is anything in the views expressed by Scott L.J. which can be taken as fixing any standard except honesty as the touch-stone of the defence of fair comment. It is to be noted also that Scott L.J. limited his opinion to cases where there was "an absence of special

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circumstances" as to which he expressed no opinion. The opinion expressed therefore cannot be treated as including the special circumstances of the publisher and editor of the newspaper having stated affirmatively that the letter does not express their honest opinion.

Mr. Justice Bayda, however, expressed the following opinion:

Where, however, the defendant is a publisher of the impugned words and in particular is a newspaper which publishes in its letters-to-the-editor column a letter capable of being defamatory, what is the acceptable standard? It is indisputable that if such a newspaper honestly holds the opinions expressed in the impugned writing, and was not actuated by malice, then as in the case of the writer, condition (c) [honesty] would be satisfied (*Slim v. Daily Telegraph, Ltd.*, supra; *Lyon and Lyon v. Daily Telegraph, Ltd.*, supra). But is a different (I hesitate to say "lower") standard acceptable? Suppose the newspaper cannot be said to hold the opinions expressed in the impugned writing but honestly believes that they represent the real opinions of the writer (in other words, an honest belief that they were publishing a letter in which the writer was making a fair comment upon a matter of public interest) and, in addition, is not actuated by malice in publishing the letter, is that an acceptable state of mind for a plea of fair comment to succeed? I have concluded that it is.

This conclusion which lies at the very heart of this case, is based on an obiter dictum of Lord Denning in the case of *Slim v. Daily Telegraph*, supra, where, as in the *Lyon* case, it was found that the newspaper honestly held the views expressed and Lord Denning observed at p. 503:

... the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions.

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In the penultimate paragraph of the same judgment, Lord Denning stated:

On the face of these letters, I think that the comments made by Mr. Herbert and the Daily Telegraph were fair comments on a matter of public interest. They honestly said what they thought. (Emphasis added.)

It must be apparent, as it seems to me, that the sentence last above quoted refers to the honesty of both the writer and the newspaper so that this case in my opinion affords no authority for the proposition that comments published in a newspaper need not be honest expressions of the newspaper's opinion in order to support a defence of fair comment so long as the newspaper can show its belief that the comments were an honest expression of the real opinion of the writer.

If the publication of the libel had been confined to the letter and the writers had been sued, or alternately, if it had originated with the newspaper and its publisher, it would in either case have been necessary to show honest belief in order to sustain the defence of fair comment. The same considerations would thus in my opinion apply to the newspaper and the writers.

In my opinion each publisher in relying on the defence of fair comment is in exactly the same position as the original writer. In this latter regard, I refer to the opinion delivered by Lord Denning in the Privy Council in "Truth" (N.Z.) Ltd. v. Holloway^[9], where a newspaper published an article calling for an inquiry concerning import licences in which it stated that a Mr. Judd had told a man who was inquiring about import licences to "see Phil and Phil would fix it". The newspaper's comment on this was: "By Phil his caller understood him to mean the Honourable Philip North Holloway the Minister of Industry and Commerce." Holloway brought an action for libel against the newspaper and in commenting on the trial judge's charge to the jury, Lord Denning had this to say at p. 1002:

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The words actually used by the judge to the jury were these:

If you accept that those words were spoken by Judd, it is not a defence at all that a statement that might be defamatory is put forward by way of report only. It does not help the defendant that the way that it is put is that Judd said "See Phil and Phil would fix it." The case is properly to be dealt with as if the defendant itself said "See Phil and Phil would fix it."

Their Lordships see nothing wrong in this direction. It is nothing more nor less than a statement of settled law put cogently to the jury. Gately opens his chapter on Republication and Repetition with the quotation:

Every publication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him,

see Gately on Libel and Slander, 4th ed., p. 106. This case is a good instance of the justice of this rule. If Judd did use the words attributed to him, it might be a slander by Judd of Mr. Holloway in the way of his office as a Minister of the Crown. But if the words had not been repeated by the newspaper, the damage done by Judd would be as nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the people at large: and it made it worse by making it one of the grounds on which it called for an inquiry, for thereby it suggested that some credence was to be given to it.

It appears to me to follow from this that where, as here, there is no evidence as to the honest belief of the writers of the letter, and the newspaper and its publisher have disavowed any such belief on their part, the defence of fair comment cannot be sustained.

In this regard the language employed by Lord Shaw in *Arnold v. The King-Emperor*^[10], at p. 300, is appropriate. He there said:

Their Lordships regret to find that there appears on the one side of this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and

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no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

These views were adopted in this Court in *Globe and Mail v. Boland*[11], at p. 208.

These authorities satisfy me that the newspaper and its editor cannot sustain a defence of fair comment when it has been proved that the words used in the letter are not an honest expression of their opinion and there is no evidence as to the honest belief of the writers. In view of this finding, I do not consider it necessary to deal with the other submissions made on behalf of the appellant.

I cannot leave this question without reference to the reasons for judgment of Mr. Justice Hall wherein he expressed the view, which was not shared by the two other judges sitting in the appeal, that, where the defence of fair comment is pleaded the burden of disproving "honesty of belief" lies upon the plaintiff. In so deciding Mr. Justice Hall equates lack of "honest belief" with "malice", saying at p. 194 of the Report:

It is apparent that saying that there must be an honest belief is the same as saying that the comment cannot be made maliciously. We are, therefore, in the instant case really dealing with the reply of malice.

This statement appears to me to overlook the distinction between the defence of "privilege" which can only be defeated by proof of malice and the defence of "fair comment" which presupposes honest belief on the part of the author or publisher. This distinction is recognized in the case of *Plymouth Mutual Co-operative and Industrial Society Ltd. v. Traders' Publishing Association Ltd.*, supra. Speaking of the different considerations affecting the defence of "privilege" on the one hand and "fair comment" on the other, Vaughan Williams, L.J. said at p. 413:

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In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other whether he published it in the spirit of unfairness. (Emphasis added.)

As honesty of belief is an essential component of the defence of fair comment, that defence involves at least some evidence that the material complained of was published in a spirit of fairness.

I cannot accept the proposition apparently adopted by Hall J.A., that where, as here, the words are capable of a defamatory meaning they are presumed to give expression to an opinion honestly held until the contrary is shown.

Mr. Justice Hall appears to find some support for his views in the decision of Lord Denning in *Egger v. Viscount Chelmsford et al.*[12], at p. 265, from which I extract the following excerpt.

If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must prove malice .. .

I read this statement as meaning that where the defendant has shown that the comment is "otherwise fair", the burden rests upon the plaintiff to prove malice. Here, as I have said, the defence of "qualified privilege" is not available to the defendants and the defence of fair comment can only be sustained if the comment made is "otherwise fair".

In the present case, as I have said, there is no allegation of malice in the statement of claim, but if there had been any evidence to sustain a plea of fair comment, it would have been for the jury to say whether malice had been established.

On the pleadings here it was for the judge to determine whether the words used were capable of a defamatory meaning and for the jury to decide whether they were in fact defamatory. The question of whether they constituted fair comment would also be for the jury if there were any

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evidence whatever to support it; but in the absence of such evidence, and in face of the defendants' evidence as to lack of honest belief, no question of malice arises.

It will have been seen, however, that in the absence of any proof of the honest belief of the writers, and having regard to the denial of honest belief by the defendants themselves, the defence of fair comment cannot, in my view, prevail.

This does not mean that freedom of the press to publish its views is in any way affected, nor does it mean that a newspaper cannot publish letters expressing views with which it may strongly disagree. Moreover, nothing that is here said should be construed as meaning that a newspaper is in any way restricted in publishing two diametrically opposite views of the opinion and conduct of a public figure. On the contrary, I adopt as descriptive of the conclusion which I have reached, the language used by Brownridge J.A., in the following excerpt from his reasons for judgment in the Court of Appeal where he said at p. 192 of the Report:

What it does mean is that a newspaper cannot publish a libellous letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper.

For all these reasons I would allow this appeal and restore the judgment at trial. The appellant is entitled to his costs throughout.

The judgment of Spence, Dickson and Estey JJ. was delivered by

DICKSON J. (dissenting)—This case involves a letter written to the editor of the Saskatoon Star-Phoenix by two law students. They were concerned with an issue of public interest and importance which had evoked substantial controversy in the City of Saskatoon, namely, whether an Indian and Metis rehabilitation centre for alcoholics would be permitted in a predominantly white neighbourhood. The letter was published in The Star-Phoenix. The appellant, Morris T. Cherneskey, who is an alderman and a practising lawyer in Saskatoon,

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alleges that the tenor of the letter was such as to charge him with being "racist" and with conduct unbecoming a barrister and solicitor. He brought an action for libel against Armadale Publishers Limited, owner and publisher of The Star-Phoenix, and Sterling King, editor of the paper. The writers of the letter were not sued, nor did they appear as witnesses, as both were out of the province at the time of trial.

I

At a meeting of the Saskatoon City Council held on March 5, 1973, Mr. Cherneskey inquired whether the City had given permission for a native alcoholic rehabilitation centre which was in operation at 401 Avenue H. South, and whether there were any zoning ramifications. He also asked whether the opinion of adjoining residents had been sought. Mr. Cherneskey had earlier been consulted by a Mr. Yaworski and other residents opposed to the centre. He had advised them to present a petition to City Council and told them how to draft it.

At a meeting of the City Council held on March

1973, Mr. Yaworski appeared with a petition containing signatures of fifty-four persons antagonistic to the centre. He spoke vehemently against it. He warned that the area would turn into "an Indian and Metis ghetto" and he questioned whether fifteen people could be asked to "sit inside a hot old house in the summer." Mr. Cherneskey told Council he did not think the zoning by-laws of the area envisaged fifteen people living in one residence. He suggested that the centre should not operate until the zoning situation had been clarified.

The Star-Phoenix carried a full and accurate report of the meeting in its news columns. Following this, the two law students, Jackie Dorgan and Connie Hunt, wrote a letter to the paper, reading:

Having read the article in the Star-Phoenix of March 13, concerning a petition by Saskatoon residents against the continuation of the Alcoholic Rehabilitation Centre, we wish to express our shock and disgust at the racist attitude reported in the article.

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We had thought optimistically we were developing beyond the point where our image of native people was dominated by ill-conceived and dehumanizing stereotypes. Mr. Yaworski's remarks indicate he still considers native people to be something less than human and not entitled to the citizens' rights to which we continually pay lip service.

Surely the white community has indulged itself sufficiently in complaints and criticisms of native people and their drinking habits. Now our energies should be directed in support and encouragement of the efforts of native people who recognize the problem and are taking concrete and positive steps to alleviate it.

As a law student and an articling law student, we are appalled by the stance adopted by Alderman Chernesky, himself a lawyer. We appreciate his sympathy with the concerns of certain members of the white community; however, we thoroughly disagree with his contention the centre should cease its operation until such time as the application of the relevant zoning bylaw has been clarified. We feel this situation is not unlike that of a man charged with a criminal offence. Such a man is deemed innocent until proven guilty.

That Alderman Chernesky should imply the onus is upon those operating the centre to establish their right to remain in the neighbourhood until further clarification, is abhorrent to all concepts of the law. At very least, it flies flagrantly in the face of the principles of natural justice. It is unbecoming a member of the legal profession to adopt such an approach.

Although we do not reside in the particular neighbourhood in question, we would have no objection whatsoever to such a centre operating in our neighbourhood. We entirely support the project initiated by Clarence Trotchie, and hope the racist resistance exhibited will be replaced by the support and encouragement which the project deserves.

The letter was published under the caption "Racist Attitude" in that portion of the paper entitled "Forum," in which letters to the editor appeared.

The action came on for trial before MacPherson J. and a jury. The questions put to the jury and the answers given by the jury were as follows:

1. Would a reasonably minded reader imply that the words 'racist attitude' in the heading over the letter refer to the plaintiff?

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Answer: No.

2. If your answer to question number 1 is yes, then are those words defamatory?

Answer: Not applicable.

3. Would a reasonably minded reader imply that the words 'racist resistance' in the last sentence of the letter refer to the plaintiff?

Answer: Yes

4. If your answer to number 3 is yes, then are those words defamatory?

Answer: Yes.

5. Do the words in the fourth and fifth paragraphs of the letter directly or by innuendo defame the plaintiff as Alderman?

Answer: Yes.

6. Do the words in the fourth and fifth paragraphs of the letter directly or by innuendo defame the plaintiff as a lawyer?

Answer: Yes.

7. If you have answered yes to questions 2, 4, 5 and 6 or any one or more of them, what damages do you award the plaintiff?

Answer: \$25,000. & costs.

Judgment was entered in favour of Mr. Chernes-key for \$25,000 and costs. On appeal, the principal ground taken was that the trial judge had erred in refusing to put to the jury the defence of fair comment which had been pleaded in these terms in the statement of defence:

8. In so far as the said letter, exclusive of the said heading, set out in paragraph 3 of the statement of claim consists of statements of fact they are true in substance and in fact and in so far as the said words consist of expressions of opinion, they are fair and bona fide comment made without malice upon the said facts which are a matter of public interest.

The trial judge took the defence of fair comment away from the jury on the ground there was no evidence that the words complained of expressed the honest opinion of anyone, either the writers of the letter, or any member of the editorial staff of the paper, or its publisher. The judge was of the view that without such honest opinion he could not tell the jury that the defence of fair comment was available to the defendants. The Court of Appeal for Saskatchewan by a majority (Hall and Bayda JJ.A.) allowed the appeal and ordered a new trial. Mr. Justice Brownridge, dissenting, would have dismissed the appeal.

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II

The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshold which a statement must pass in order to be defamatory. The virtually universally accepted test is that expressed by Lord Atkin "after collating the opinions of many authorities" in *Sim v. Stretch*[13], at p. 671. He stated that the test of whether a statement is defamatory is: "Would the words tend to

lower the plaintiff in the estimation of right-thinking members of society generally?" In the earlier case of *O'Brien v. Clement*[14] at p. 436 Baron Parke said that, subject to any available defences, "[e]verything printed or written, which reflects on the character of another" is a libel. It is apparent that the scope of defamatory statements is very wide indeed. In particular, a great deal of what is printed in the Letters to the Editor columns of newspapers unquestionably has the effect of lowering the subject's reputation in the estimation of right-thinking people generally. In all cases, nevertheless, the statement is not action-able if it is the truth, or fair comment, or protected by privilege. This is the reason why most defama-tion actions centre on the defences of justification, fair comment, or privilege. It is these defences which give substance to the principle of freedom of speech.

The important issue raised in this appeal is whether the defence of fair comment is denied a newspaper publishing material alleged to be de-famatory unless it can be shown that the paper honestly believed the views expressed in the impugned material. It does not require any great

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perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press. One can readily draw a distinction between editorial comment or articles, which may be taken to represent the paper's point of view, and letters to the editor in which the personal opinion of the paper is, or should be, irrelevant. No one believes that a newspaper shares the views of every hostile reader who takes it to task in a letter to the editor for error of omission or commission, or that it yields assent to the views of every person who feels impelled to make his feelings known in a letter to the editor. Newspapers do not adopt as their own the opinions voiced in such letters, nor should they be expected to.

III

The issue is broader than that. A free and general discussion of public matters is fundamen-tal to a democratic society. The right of persons to make public their thoughts on the conduct of public officials, in terms usually critical and often caustic, goes back to earliest times in Greece and Rome. The Roman historian, Tacitus, spoke of the happiness of the times when one could think as he wished and could speak as he thought (1 Tacitus, *History*, para. 1). Citizens, as decision-makers, cannot be expected to exercise wise and informed judgment unless they are exposed to the widest variety of ideas, from diverse and antagonistic sources. Full disclosure exposes, and protects against, false doctrine.

It is not only the right but the duty of the press, in pursuit of its legitimate objectives, to act as a

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sounding board for the free flow of new and different ideas. It is one of the few means of getting the heterodox and controversial before the public. Many of the unorthodox points of view get newspaper space through letters to the editor. It is one of the few ways in which the public gains access to the press. By these means, various points of view, old and new grievances and proposed remedies get aired. The public interest is incidentally served by providing a safety valve for people.

Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. Healthy debate will likely be replaced by monotonous repetition of majoritarian ideas and conformity to accepted taste. In one-newspaper towns, of which there are many, competing ideas will no longer gain access. Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement. This runs directly counter to the increasing tendency of North American newspapers generally to become less devoted to the publishers' opinions and to print, without fear or favour, the widest possible range of opinions on matters of public interest. The integrity of a newspaper rests not on the publication of letters with which it is in agreement, but rather on the publication of letters expressing ideas to which it is violently opposed.

I do not wish to overstate the case. It is my view, however, that anything which serves to repress competing ideas is inimical to the public interest. I agree that the publisher of a newspaper has no special immunity from the application of general laws, and that in the matter of comment he is in no better position than any other citizen. But he should not be in any worse position. That, I fear, will be the situation if one fails to distinguish between the writer of a letter to the editor, and the editor, or if one compresses into one statement the

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several steps in the requisite process of analysis of the defence of fair comment.

Here, the newspaper, as such, had no opinion on the matter published. Although the executive vice-president of Armadale and the editor happened to know the appellant, and did not share the opinion expressed by the writers of the letter in question, the newspaper, in fact, operated merely as a conduit for the opinion.

Another important fact should also be noted. Mr. Justice MacPherson, speaking with reference to the newspaper, said "malice is out." Counsel acknowledged that was right, and the judge's ruling was not challenged before us.

IV

There is in some of the cases confusion between the requirement that a comment be "fair" and that it not be made with malice. In fact, these two requirements are quite distinct. Shortly stated, the test of whether a comment is "fair comment" in law is an "objective" test, i.e. is the comment one that an honest, albeit prejudiced, person might make in the circumstances? The cases of *Merivale v. Carson*[15]; *Lyon and Lyon v. Daily Telegraph Ltd.*[16], and *Slim v. Daily Telegraph Ltd.* [17], in my opinion, support this view. Even if the comment passes this test, the defence of fair comment will fail if it does not pass the subjective test of whether the publisher himself was actuated by malice: see *Thomas v. Bradbury, Agnew & Co.*[18] There would be no point in having the second test if the first one included the ingredient of the subjective test. Many cases merge these two elements to ask whether the statement in question is the publisher's real opinion. This works passably well when the defendant is the writer, but it does not work at all if he is not, as in the case where, as here, a newspaper has printed a letter in its Letters to the Editor space.

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In my view, the legal position is this: if a defendant raises the defence of fair comment, he has the burden of establishing that the facts on which it is based are true and that it is objectively fair; if he discharges this burden he will, nevertheless, lose the defence if the plaintiff proves that the comment was published maliciously. It is this second stage of the analysis which raises the subjective issue of the defendant's state of mind or motive. Malice is not limited to spite or ill will, although these are its most obvious instances. Malice includes any indirect motive or ulterior purpose, and will be established if the plaintiff can prove that the defendant was not acting honestly when he published the comment. This will depend on all the circumstances of the case. Where the defendant is the writer or commentator himself, proof that the comment is not the honest expression of his real opinion would be evidence of malice. If the defendant is not the writer or commentator himself, but a subsequent publisher, obviously this is an inappropriate test of malice. Other criteria will be relevant to determine whether he published the comment from spite or ill will, or from any other indirect and dishonest motive.

V

The most recent authority for the double test is to be found in a text which has just come to hand, *Duncan and Neill on Defamation* (1978). In a foreword, the Right Honourable Lord Salmon says that Mr. Duncan is "recognized as the doyen of those counsel who have concentrated most of their attention on the law of defamation and his experience and expertise in this field is unrivalled." The authors state the main principles relating to the defence of fair comment, as follows (p. 62, para. 12.02):

- (a) the comment must be on a matter of public interest;
- (b) the comment must be based on fact;
- (c) the comment, though it can include inferences of fact, must be recognisable as comment;

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- (d) the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?
- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

(Emphasis added.)

The following appears later (p. 68, para. 12.14):

12.14 The general rule is that, in order to qualify as fair comment, an expression of opinion must satisfy the following objective test: could any man honestly express that opinion on the proved facts? It is to be noted, however, that although the comment may satisfy the objective test, the defendant may still be liable if the plaintiff proves that in making the comment the defendant was actuated by express malice.

It is, I think, important to note the line clearly drawn by the authors between the objective test and the subjective test. Equally important is their view that the burden of proving malice rests upon the plaintiff. Some writers have violently com-pressed this whole process of analysis into one statement, ignoring the shift in the burden of proof with respect to objective fairness and subjective malice, and have used the test for malice which is applicable only to the writer as a universal test for all defendants. The result is a statement such as this: "the comment must be published honestly in that it is the expression of the defendant's real opinion." This statement is contained in *Gatley on Libel and Slander* (7th ed.) (1974), p. 308, para. 729. Notwithstanding the general high esteem in which this authoritative work is held, the statement in my view is unfortunate, as an entirely wrong conclusion may be drawn in attempting to apply it in circumstances such as those now before us. Indeed, the accuracy of the statement is belied by numerous passages in the same text which surround it. The very footnote it rests on recognizes that the test of "honest expression of one's real opinion" is appropriate only if the defendant is the writer or commentator. This footnote, purporting to be authority for the statement in the text, reads as follows:

"... the question is not whether the comment is justified in the eyes of judge or jury, but whether it is the honest

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expression of the commentator's real view and not merely abuse or invective under the guise of criticism": per Lord Porter in *Turner v. M.-G.-M.* [1950] 1 All E.R. at p. 461; .. .

(Emphasis added.)

An earlier statement in the text also recognizes the inherent limitation of this test. At p. 300, para. 716, it is said that the comment "must be the honest expression of the writer's real opinion". (Emphasis added.) A later statement, discussing this matter more fully than the laconic statement in para. 729, shows clearly that the proper test is a two-stage one of objective fairness and subjective malice: see pp. 309-10, para. 731, as follows:

It is clear, however, that a document which purports to be a criticism on a matter of public interest, though admittedly fair in the sense that it is not inspired by malice, may yet exceed the limits of fair comment in that the language in which it is couched "passes out of the domain of criticism itself," for example, descends to "mere invective." "The view expressed must be honest and must be such as can fairly be called criticism." .. .

The question which the jury must consider is this: Would any [honest] man, however prejudiced he might be, or however exaggerated or obstinate his views, have written this criticism?

(Footnotes omitted.)

Further, in discussion of malice itself, Gatlery recognizes (i) that malice is the only question after objective fairness is established, and (ii) that there are many kinds of appropriate evidence of malice other than merely whether the comment was the defendant's real opinion. Different types of evidence of malice may be appropriate for different types of defendants: see paras. 763, 765. See also para. 769 which reads:

769. Honesty and fair comment. Similarly, under a plea of fair comment, proof that the defendant did not really entertain the opinion expressed in such a comment, or published it knowing that it was unjust, would be evidence of malice. If the defendant is to succeed, the words complained of must be published honestly. "Fair comment" must be "the honest expression of the real opinion of the defendants when they wrote it." The defence of fair comment "will fail if the jury are satisfied

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that the libel is malicious." If the plaintiff can prove that the defendant "was actuated by a malicious motive, that is to say, by some motive other than that of a pure expression of a critic's real opinion," the defendant will fail in his plea of fair comment, even though the language used does not otherwise exceed the limits of fair comment. "Comment which may be objectively and prima facie fair may become unfair if made with a malicious motive."

(Footnotes omitted.)

In another paragraph, which refers back to the statement in para. 729 quoted above, Gatlery expressly recognizes that the test of honest expression of the defendant's views is, in fact, a part of the issue of malice, and that the onus in this matter lies on the plaintiff (p. 342, para. 789):

789. Onus of proof of malice: fair comment. In the same way, the defendant who relies on a plea of fair comment does not have to show that the comment is an honest expression of his views. "In alleging any unfairness the plaintiff takes on him or herself the onus, also taken by an allegation of malice, to prove that the criticism is unfair either from the language used or from some extraneous circumstance."

(Footnotes omitted.)

VI

Confusion arises because the writer is the most common defendant, and the need to keep clear the distinction between the sequential tests of "fair comment" and "malice" is not so great. Where the publisher is not the writer, the need is imperative. If the analysis set out in Duncan and Neill is accepted, and I suggest it should be, it is readily apparent that newspapers need not be in any different position from the rest of the population. Once a comment which is defamatory (in the sense of lowering the subject's reputation) is shown to be objectively fair, the only question is whether it was published with malice. This will depend on whether there is appropriate evidence of malice, which will be different depending upon whether the newspaper, or its staff, writes the comment, or whether the newspaper publishes comments written by others.

There is abundant authority to support the Duncan and Neill analysis of the defence of fair

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comment. One of the clearest and most authoritative statements is found in 24 Halsbury (3rd. ed.), p. 76, para. 131, as follows:

In the case of a defence of fair comment on a matter of public interest the burden is on the defendant to show that the facts are true and, if there is any evidence of unfairness, that the comment is objectively fair, and it is then open to the plaintiff to prove that the defendant made the comment maliciously, for example, from a motive of spite or ill-will.

The authority for this statement is the House of Lords decision in *Turner v. Metro-Goldwyn-Mayer Pictures Ltd.*[19], at pp. 461-2, and the Court of Appeal decision in *Adams v. Sunday Pictorial Newspapers (1920) Ltd. and Champion*[20], at pp. 359-60. In the passage referred to in the Adams case, Denning L.J. says, p. 360:

If [the defendant] proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about; nevertheless it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice.

(Emphasis added.)

The leading case on the defence of fair comment is *Merivale v. Carson*, supra. In it, Lord Esher M.R. enunciated a test which has been applied in numerous cases since. This test, which is clearly an objective one, reads as follows (p. 281):

The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?

This test was adopted with one modification by Lord Porter in the *Turner* case, in these terms, p. 461:

To a similar effect were the words of Lord Esher, M.R. (20 Q.B.D. 281), in *Merivale v. Carson* which are so often quoted:

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"... would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have [written] this criticism ... ?"

I should adopt them except that I would substitute "honest" for "fair" lest some suggestion of reasonable-ness instead of honesty should be read in.

Thomas v. Bradbury, supra, is the case which definitely established that this objective test was supplemented by a subjective test of malice. Speaking for a unanimous Court of Appeal, Collins M.R., at p. 732, said that:

Proof of malice may take a criticism prima facie fair outside the right of fair comment, just as it takes a communication prima facie privileged outside the privilege.

In *Lyle-Samuel v. Odhams Ltd.*[21], at p. 143, Scrutton L.J. repeated this principle, emphasizing that the first, prima facie, test of fairness is an objective test: "[I]n the case of fair comment, a comment, which may be objectively and prima facie fair, may become unfair if made with a malicious motive." Or, as Mr. Justice Stephen said in *Hennessy v. Wright*[22] at p. 577: "as to 'fair comment,' it turned upon the nature of the comments and not upon the feelings of the writer."

A most helpful case on this matter is *Lyon and Lyon v. Daily Telegraph*, supra, which concerned a newspaper's defence of fair comment with respect to a letter it published. The main holding in the case was that a newspaper is not precluded from raising a defence of fair comment by the failure of the writer of a letter to come forward and plead his bona fides, or by the newspaper's inability to prove affirmatively that the writer was not actuated by malice. In the *Lyon* case, the writer had given both a fictitious name and a fictitious address. There was no evidence of malice on the part of the newspaper itself. Scott L.J. clearly endorsed an objective test of fairness plus a subjective test of malice on the part of the defendant, saying, p. 319:

[F]airness of the comment contained in newspaper's correspondence columns must be judged by its tenor,

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subject only to the proviso that the statements of fact upon which the comment is based are not untrue .. .

[W]hilst malice or indirect motive may destroy the fairness of an apparently fair comment negligence does not. I hold, accordingly, that the letter itself in no way exceeded the bounds of fair comment on a matter which was obviously one of public interest, and that, on the facts in evidence, there was nothing to destroy the defendant newspaper's plea of fair comment.

In the course of his judgment, Scott L.J. made some significant comments on the publication of letters by newspapers, pp. 318-20:

I cannot accept the submission implied in the argument of counsel for the respondents before us, that there is a general rule of law making it the duty of every newspaper to verify the signature and address of the writer before publishing it; although it may be desirable on public grounds that, so far as is practicable, the newspaper should take such steps. In most cases, writers unknown to the newspaper establish their identity by enclosing a visiting card or a private note to the editor, but to hold as a matter of law, where that has not been done, that the absence of such verification of itself destroys the newspaper's plea of fair comment, would be to put upon newspapers a heavy burden—a burden so deterrent in practice as very much to reduce the valuable contribution to public discussion which results from a free publication of correspondence in the press. If the comment is in itself fair within the meaning of the law, and if the newspaper publishes it solely as [a] matter of public interest, I cannot see that any hardship is caused to the persons criticised, if the newspaper is able to succeed on its plea of fair comment; whereas, if the rule laid down by the judge were made general, a very heavy burden of contingent liability would be put upon the press—a burden which on balance does seem to me undesirable from the public point of view, and contrary to the principle of the existing law about fair comment. The reason why, once a plea of fair comment is established, there is no libel, is that it is in the public interest to have free discussion of matters of public interest. In the case of criticism in matters of art, whether music, painting, literature, or drama, where the private character of a person criticised is not involved, the freer criticism is, the better it will be for the aesthetic welfare of the public.

[The right of "fair comment"] is one of the fundamental rights of free speech and writing, which are so

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dear to the British nation, and it is of vital importance to the rule of law upon which we depend for our personal freedom, that the courts should preserve the right of "fair comment" undiminished and unimpaired.

In the Court of Appeal decision in the present case, Brownridge J.A., dissenting, relied strongly on the following statement also found in the judgment of Scott L.J. in *Lyon* at p. 318:

There is no question but that the comment contained in the letter represented the honest opinion of the "Daily Telegraph"; and at the trial no doubt was cast upon the complete belief of the newspaper that they were publishing a letter in which the writer was making a fair comment on a matter of public interest.

In the light of the above comments of Scott L.J. concerning the importance of free discussion on matters of public interest in the correspondence columns of newspapers, and his statement that the fairness of a comment must be judged by its tenor, it is inconceivable that he could have meant that comments in letters must represent the newspapers' own opinion. He must have meant that the newspaper honestly published the opinion "solely as a matter of public interest" and therefore did so without malice. This interpretation is consistent with earlier cases on the nature of malice, which Scott L.J. undoubtedly had in mind when making this statement. It is also consistent with the more felicitous expression of Goddard L.J. in the Lyon case, as follows, p. 320:

The words complained of in this case are contained in a letter addressed to and published by the defendants in their newspaper, and were a comment on a stage production of the plaintiffs. It is not contended that the comment in its terms exceeds the limits of fair and honest criticism Here there was no evidence of malice and the criticism itself contains none.

Understood in this way, Scott L.J.'s statement fits well with his other comments as well as previous authority.

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In the well-known case of *Silkin v. Beaverbrook Newspapers Ltd.*[23], the following passage, embodying an objective test, was included in the charge of Diplock J. to the jury, p. 520:

Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view—could a fair-minded man have been capable of writing this? That is a totally different question from the question: Do you agree with what he said?

So in considering this case, members of the jury, do not apply the test of whether you agree with it. If juries did that, freedom of speech, the right of the crank to say what he likes, would go. Would a fair-minded man holding strong views, obstinate views, prejudiced views, have been capable of making this comment? If the answer to that is yes, then your verdict in this case should be a verdict for the defendants. Such a verdict does not mean that you agree with the comment. All it means is that you think that a man might honestly hold those views on those facts.

This Court has already implicitly accepted that the primary test is an objective one: see the judgment of Davies J. in *Bulletin Co. Ltd. v. Sheppard*[24], at pp. 461-2, where he says:

In construing that article and forming a conclusion as to what is really meant, one must place oneself in the position of a resident of Edmonton to whom it was specially addressed on the then eve of an election for mayor and aldermen for the then coming year. One must ask oneself in

view of the then existing proved conditions in civic matters, of Judge Scott's report, of the evidence given at the trial and of all other surrounding circumstances, whether, as the trial judge found, the article did not go beyond what, in the extraordinary and unfortunate civic circumstances, was fair and legitimate criticism or had crossed the line as the Appeal Court found and become libellous. But in forming one's conclusion, one must not confine one's mind to the *ipsis-verba* of the extract from the article in question found to be libellous but upon the language of the article as a whole and in the light of all the surrounding conditions and circumstances.

This objective test is subject, of course, to malice on the part of the defendant: see *Winnipeg Steel Granary and Culvert Co. v. Canada Ingot Iron Culvert Company*[25].

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VII

Various texts dealing with defamation, in addition to those noted above, also support the existence of a two-stage test, of objective fairness plus the question of malice: see, for example, *Salmond on Torts* (17th ed.) (1977), at pp. 187-8:

The burden of proving that a comment is fair is on the defendant. He must establish that the facts upon which the comment is based are true, and that the comment thereupon is warranted in the sense that it is such as might be made by an honest man. Once the defendant has established that in this sense the comment is fair, the onus is shifted to the plaintiff if he wishes to prove that the *prima facie* protection is displaced by the presence of malice in the defendant.

(Footnote omitted.)

Again, it will be noted that the burden of proof of malice rests upon the plaintiff. See also *Fleming, The Law of Torts*, (5th ed.) (1977), at pp. 579-81:

The comment must be fair in order to qualify for protection, but fairness is not synonymous with truth or even reasonableness. The test is not whether reasonable men might disagree with the comment, but whether they might reasonably regard the opinion as one that no fair-minded man could have formed or expressed.

[I]t is now settled that the defence is forfeited even in the absence of malice, if the comment exceeds the limits of fairness. In *Thomas v. Bradbury*, however, the Court of Appeal partially reverted to the older view by holding that comment which is *prima facie* fair may lose its protection by proof of malice. This conclusion is hard to justify, since fairness would seem to have reference to the criticism, not the state of mind of the critic. Against this, however, it has been urged that, if there is malice, the mind of the writer would not be that of a critic; and that, from the point of view of policy, while it is undoubtedly in the public interest that public matters should be open to comment, it is not in the public interest to allow dishonest comment or comment inspired by personal motives of spite.

(Footnotes omitted.)

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Further support for the two-test theory, and the view that the subjective test is the question of malice, is to be found in Carter-Ruck, Libel and Slander, (1972), where the following passage appears, p. 126, under the heading "Defences-Malice":

DEFENCES

Malice

If, considered objectively, the comment is fair comment the second, subjective, question 'Did the defendant honestly hold the opinion which he has expressed?', then has to be considered.

The question of the honest belief of the defendant may be of relevance if and when the question of malice, proof of which rests upon the plaintiff, arises, but in the case at bar malice on the part of the defendants has been held by the trial judge, and accepted by counsel for the plaintiff, to be no longer an issue.

VIII

There is no doubt that the objective limits of fairness are very wide. The best compendious statement of the principles to be applied in determining whether a comment is fair is probably the following passage from the summing up in *Stopes v. Sutherland*[26] by Lord Heward C.J. (found in House of Lords, Printed Cases, 1924, at p. 375, and quoted in *Gatley*, pp. 310-11, para. 732):

What is it that fair comment means? It means this—and I prefer to put it in words which are not my own; I refer to the famous judgment of Lord Esher M.R. in *Merivale v. Carson*: 'Every latitude,' said Lord Esher, 'must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say [not whether they agree with it, but] whether any fair man would have made such a comment.. . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have

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said that which this criticism has said?' Again, as Bray J. said in *R. v. Russell*: 'then you come to a question of fair comment you ought to be extremely liberal, and in a matter of this kind—a matter relating to the administration of the licensing laws—you ought to be extremely liberal, because it is a matter on which men's minds are moved, in which people who do know, entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you to say. If they do believe it, and they are within anything like reasonable

bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments.' That is the kind of maxim which you may apply in considering whether that part of this matter which is comment is fair. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view—could a fair-minded man have been capable of writing this?—which, you observe, is a totally different question from the question, Do you agree with what he has said?

As a result of the breadth of the scope of fairness when considered objectively, the issue in most cases concerns whether the defendant published the comment maliciously. Lord Denning recognized this fact in *Slim v. Daily Telegraph*, supra, at p. 503 in a passage which, although some statements seem to go far, does express the importance of free discussion in the correspondence columns of newspapers:

In considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendos into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it, see *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.* per Lord Porter and *Silkin v. Beaverbrook Newspapers, Ltd.* per Diplock, J. I stress

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this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions.

IX

If the plaintiff does prove that the writer was activated by malice, is the defence of fair comment destroyed for subsequent publishers? While there is authority both ways, in my opinion the answer is in the negative. Malice concerns the subjective state of the defendant. As such it is an issue particular to the defendant alone.

In *Egger v. Viscount Chelmsford*[27], at p. 265, Lord Denning M.R. said:

If the plaintiff seeks to rely on malice ... to cause a comment, otherwise fair, to become unfair, then he must prove malice against each person whom he charges with it. A defendant is only affected by express malice if he himself was actuated by it; or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.

This statement was preferred by the English Faulks Commission on Defamation (1975, Cmd. 5909, at pp. 70-71) to the contrary opinion of Davies L.J. in Egger's case.

In *Lyon and Lyon v. Daily Telegraph*, supra, it was not necessary to decide the issue because malice on the part of the writer was not established, but Scott L.J. nevertheless said at p. 319:

It is unnecessary to consider how far the rule, that the fairness of comment may be destroyed by any oblique motive, extends, where it is the defendant's own motives which are concerned; but, assuming that comment inspired

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by indirect, improper or private motives ipso facto ceases to be fair, and that the writer of such a letter to a newspaper will, when sued for libel, have put himself outside the pale of the defence of fair comment, it does not necessarily follow, as contended by counsel for the respondents, that, if he is made co-defendant with the newspaper, the newspaper also will lose its defence of fair comment.

In *Hennessy v. Wright* (No. 2)[28], Lord Esher M.R. supported the position that malice is a question particular to each defendant alone. He said, p. 447:

What must be shewn is, that the defendant was malicious, and to shew that his reformants were malicious is not evidence that he was malicious.

This position is also supported in the leading case on malice, *Thomas v. Bradbury*, supra, per Collins M.R. at p. 732:

The right, though shared by the public, is the right of every individual who asserts it, and is, qua him, an individual right whatever name it be called by, and comment by him which is coloured by malice cannot from his standpoint be deemed fair. He and he only is the person in whose motives the plaintiff in the libel action is concerned.

Fleming, in *The Law of Torts*, says at p. 581:

One person's malice cannot be properly imputed to another so as to defeat his defence of fair comment any more than in the analogous case, already considered, of qualified privilege. Accordingly, if the comment is otherwise fair, the malice of one publisher does not prejudice another, except when he would be vicariously liable for the first on ordinary principles of agency.

(Footnotes omitted.)

Thus, I would conclude that a defendant should succeed on a defence of fair comment if he shows that the comment was objectively fair and the plaintiff does not establish malice on the part of this individual defendant.

These principles of law apply alike to all defendants. It is clear that no wider or different rule is necessary for newspapers.

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On the facts of the present case, it is equally clear that, in light of the principles I have enunciated, the trial judge should have left the issue of fair comment to the jury.

X

The appellant raises several subsidiary points. The first is whether the statements were reasonably capable of being construed as comment. Neither Court below held that the statements complained of could not be construed as comment. A statement that a person's attitude is "racist," or "unbecoming," is clearly capable of being classified as comment rather than fact. Certain facts forming the foundation of this opinion are of course implied but, where the main thrust of the statement is capable of being construed as opinion, it is up to the jury to determine just what is actually opinion.

The second question is whether the statements were capable of defaming the appellant directly, and by innuendo, in his capacity as a lawyer. The issue of law is whether the statement is capable of this construction, as it is a question for the jury whether in fact it is. In my opinion, this question was properly put to the jury. Everyone who is an alderman has another occupation. The fact that a statement says that he should carry these qualities into his public duties does not suddenly rob the statement of its quality of being in a matter of public interest. Put more simply, the fact that a statement about a person's work as a public official, or his position on a public matter, reflects on himself as a private individual does not mean that the statement is not one on a matter of public interest. Such statements will generally reflect on the individual in several aspects. Even if the statement defamed the appellant by innuendo, the respondents still have a defence if the statement was fair comment on a matter of public interest. We are back again at the defence of fair comment, and not whether the appellant's reputation was damaged.

The third subsidiary question is whether the statements were on a matter of public interest so

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as to be capable of protection as being fair comment. The statements in question concerned the appellant's opposition as an alderman to the establishment of an alcohol centre for native people. It stated that certain aspects of the position he took were incorrect interpretations of the operation of zoning legislation, particularly with respect to the onus of proof that the existing use is permitted or forbidden. In effect, it stated that his position was inconsistent with that which a person with legal training should, in the opinion of the writers, take toward this issue. The important point is that the statement was a comment on the proposed alcohol centre. This is a

matter of undoubted public interest, whether the statement is that the plaintiff should not be making certain remarks as a lawyer, priest, or whatever. The question of whether a comment is one on a matter of public interest must be clearly distinguished from the question of whether it is defamatory. The statement here may well be defamatory (again a question for the jury) but, even if it is defamatory, it is not actionable if the person publishing the statement has a good defence such as fair comment.

I would dismiss the appeal with costs.

Appeal allowed with costs, SPENCE, DICKSON and ESTEY M. dissenting.

Solicitors for the plaintiff, appellant: Gauley, Dierker & Dahlem, Saskatoon.

Solicitors for the defendants, respondents: McKercher, McKercher, Stack, Korchin & Laing, Saskatoon.

[1] [1977] 5 W.W.R. 155, 79 D.L.R. (3d) 180.

[2] [1958] 1 W.L.R. 743.

[3] [1963] 1 W.L.R. 1362.

[4] [1950] 1 All E.R. 449.

[5] [1968] 1 All E.R. 497.

[6] [1906] 1 K.B. 403.

[7] [1905] 1 K.B. 653.

[8] [1943] 2 All E.R. 316.

[9] [1960] 1 W.L.R. 997.

[10] (1914), 83 L.J.P.C. 299.

[11] [1960] S.C.R. 203.

[12] [1965] 1 Q.B. 248.

[13] (1936), 52 T.L.R. 669.

[14] (1846), 15 M. & W. 435.

[15] (1887), 20 Q.B.D. 275.

[16] [1943] 2 All E.R. 316.

[17] [1968] 1 All E.R. 497.

[18] (1906), 75 L.J.K.B. 726.

[19] [1950] 1 All E.R. 449.

- [20] [1951] 1 K.B. 354.
- [21] [1920] 1 K.B. 135.
- [22] [1888], 4 T.L.R. 574.
- [23] [1958] 2 All E.R. 516.
- [24] (1917), 55 S.C.R. 454.
- [25] (1912), 3 W.W.R. 356 (Man. C.A.).
- [26] [1925] A.C. 47.
- [27] [1965] 1 Q.B. 248.
- [28] (1888), 24 Q.B.D. 445n.
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