case would be taken there whatever they did which led the learned Lords Justices to decide that the difficult task of creating principles was simply not worth the candle.

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DEFAMATION—FAIR COMMENT ON A MATTER OF PUBLIC INTEREST

The decision of the Saskatchewan Court of Appeal in *Cherneskey* v *Armadale Publishers Ltd* 79 DLR (3d) 180 regarding the ingredients of a plea of fair comment by a newspaper over its publication of a defamatory letter to the editor, was discussed by the present writer at [1979] NZLJ 69 and also in an article entitled "Uncertainties in the Defence of Fair Comment" (1979) 8 NZULR 359. The case went on further appeal to the Supreme Court of Canada which, by a majority of 6-3, reversed the Saskatchewan Court of Appeal and upheld the trial judge's decision to withhold the defence of fair comment from the jury. The Supreme Court judgment is reported at 90 DLR (3d) 32.

It is submitted that the majority view in the Supreme Court of Canada is based on a misunderstanding of the elements of the defence of fair comment, fails to analyse clearly the policy issues at stake and entails an unrealistic view of the role of newspapers in providing a forum for public discussion in their correspondence columns. By contrast, the dissenting judgment of Dickson J., in which 2 other judges concurred, contains a lucid and convincing analysis of the meaning of "fair", a realistic appraisal of the policy factors involved, and is more in tune with the law relating to the attribution of malice between co-defendants, including the decision of White J. in *McLeod* v *Jones* [1977] 1 NZLR 441.

As explained in the above-mentioned article, the primary test of the fairness of comment was originally an objective one, albeit a very liberal one. The classic formulation was that of Lord Esher in *Merivale* v *Carson* (1887) 20 QBD 275, 280:

> ". . . is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question?"

The question, in effect, was whether the view expressed was one that could be honestly held (i.e. a *possible* view not a *reasonable* one) and for this purpose the comment could be judged on its face. It also came to be recognised, however, and this was made clear in *Thomas* v *Bradbury, Agnew & Co* [1906] 2 KB 627, that malice on the speaker's part necessarily undermined his defence. The test of malice was of course a subjective one and involved an inquiry into the speaker's state of mind: was his motive or purpose in expressing the comment an improper one? The principal way of establishing malice was to show that the speaker did not genuinely hold the view he expressed.

The position was, therefore, that strictly speaking a comment could be found to exceed the limits of fairness even without proof of malice on the speaker's part. On the other hand a comment might be held unfair on the basis of the speaker's insincerity even though it was within the objective limits of fairness, being a comment that someone else might honestly have made. In practice, however the objective and subjective tests commonly came to be merged into a single inquiry: was the speaker expressing his genuine view? If the answer was "yes" then this would not only negative malice (in nearly all cases) but would also tend to establish that the opinion was within the objective limits of fairness i.e. a view that could be honestly held on the facts. The "fair-minded" or "honest man" test appeared a very artificial one and it made sense in most cases to concentrate on the speaker's actual state of mind. This tendency to treat the essential test of fairness as a subjective one—was the speaker genuine?—can be seen in several modern cases including *Turner* v *M.G.M.* [1950] 1 All ER 449 and *Silkin* v *Beaverbrook Newspapers* [1958] 2 All ER 516. In the latter Diplock J. in his direction to the jury formulates "the cardinal test" of fairness both in its subjective form and in its original, objective form, apparently without recognising any difference between the two. First he gives as "the true test: was this an opinion, however exaggerated, obstinate or prejudiced ,which was honestly held by the writer?" (p.518). But at the end of his direction he uses this version, more than once: "Would a fair-minded man holding strong views, obstinate views, prejudiced views, have been capable of making this comment?"

The distinction between the original and the modern approach to the question of fairness might seem academic and in many cases it is but there are situations in which it can take on practical significance. The principal reason for this relates to the burden of proof. The authorities are not consistent on the matter but the better view appears to be that the defendant has the burden of establishing the elements of his defence, including fairness. This is subject, however, to the rule that the burden of proof of malice is on the party alleging it i.e. the plaintiff. Strictly speaking therefore the defendant has only to show that his comment is within the objective limits of fairness while it is up to the plaintiff to satisfy the court that the defendant was not genuine or was otherwise improperly motivated if he wants to rebut the defence of fair comment. The modern tendency to merge two originally distinct elements of fairness into a single inquiry (in effect to interpret the primary test of fairness as a subjective one) creates confusion over the burden of proof. In the situation that arose in the *Cherneskey* case this assumed vital importance.

The letter to the editor which the defendants published was written by two law students and it attributed a racist attitude to an alderman and lawyer in his stand over the location of a Native Alcoholic Rehabilitation Centre. The letter was reasoned and moderate in tone and the interpretation it presented of the stated facts was certainly a possible one. The writers appeared to be expressing their genuine view. They were not themselves sued, an attempt to join them as third parties was unsuccessful and they were not available as witnesses in the action against the newspaper. There was therefore no evidence of the actual state of mind of the letter writers. The editor admitted that he did not himself subscribe to the views

expressed. In these circumstances the trial judge ruled that a plea of fair comment by the paper should not be put to the jury because "there is no evidence that the offending words express the honest opinion of anyone". That decision, after being reversed by the Saskatchewan Court of Appeal, was reinstated by a majority of 6-3 in the Supreme Court of Canada.

Ritchie J. (with whom Laskin C.J.C., Pigeon and Pratte J.J. concurred) gave the leading judgment for the majority. The learned judge reasoned that

> "The burden of proving each ingredient of the defence . . . rests 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 . . . the same considerations apply to each publisher of that material."

This approach clearly merges the objective and subjective elements of fairness into a single ingredient—honest belief—and effectively deprives the defendant of the benefit of the rule that the burden of proof of malice is on the party who alleges it. The problem of the burden of proof has never been satisfactorily resolved, as was shown in the writer's earlier article, but it is submitted that it is being further confounded by the above reinterpretation of the concept of fairness.

Ritchie J. sought to distinguish *Lyon* v *Daily Telegraph* [1943] 2 All ER 316, in which a newspaper was held entitled to plead fair comment in relation to its publication of a letter by a writer who gave fictitious particulars about himself and was never identified, on the ground that in that case the newspaper itself believed the opinion expressed. But that factor was only mentioned by one judge in the Court of Appeal (Scott L.J.) and even he did not clearly treat it as material. The members of the Court of Appeal, including Scott L.J., all indicated "that fairness of the comment contained in the newspaper's correspondence column must be judged by its tenor . . .". The approach taken in the *Lyon* case was consistent with the original meaning of fairness.

At the end of his judgment Ritchie J. briefly raises some policy considerations relevant to the issue. He apparently finds support for his legal conclusion in the often-repeated judicial view that the press should not be put in a special position regarding freedom of speech and its protection via the defences to defamation. He suggests that his formulation of the law does not mean "that a newspaper cannot publish letters expressing views with which it may strongly disagree" or "that a newspaper is in any way restricted in publishing two diametrically opposite views of the opinion and conduct of a public figure". But then he adds the qualification that this freedom for newspapers does not extend to *defamatory* letters. Given the low threshhold involved in the determination of whether a statement is defamatory the alleged freedom becomes largely illusory. The effect of Ritchie J.'s view is that a newspaper can only safely publish a potentially defamatory letter to the editor either if the paper itself genuinely holds the view expressed or if it has proof that the writer is sincere. Regarding the second alternative, the editor could not rely on the letter itself but would have to examine the writer over his opinions. It is submitted that this position is unsatisfactory. First of all, a newspaper in its correspondence columns is providing a forum for public discussion and should not be

required to adopt a position of its own on the views expressed. Secondly it is unrealistically demanding to expect the editor to inquire into the bona fides of a correspondent where the letter on its face appears genuine. Only if the letter appears insincere is it reasonable to require the editor to inquire further before publishing it.

Martland J. (with whom Laskin C.J.C. and Beetz J. concurred) also emphasised the subjective test of fairness—was the statement an honest expression of opinion?—and considered that it was for the defendants to produce evidence of such honest belief. They admitted that the statement did not represent their own belief and they could not produce any evidence (as opposed to mere inference from the tone of the letter) that it conveyed the honest opinion of the writers. In those circumstances the trial judge was entitled to decline to put the defence of fair comment to the jury.

Dickson J. in his dissenting judgment (in which Spence and Estey J.J. concur) gives a clear and convincing explanation of how the difficulties have arisen in this area:

> "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? . . . 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 . . .. 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."

He then deals with the burden of proof and suggests that the defendant must show that the comment is fair in the objective sense while the legal burden is on the plaintiff as far as the subjective issue of the defendant's state of mind is concerned. Dickson J. backs up his position with an impressively thorough and very persuasive examination of the relevant authorities.

Regarding the meaning of malice in relation to a defendant who has merely published someone else's view without adopting it as his own Dickson J. points out that to ask whether the statement is the honest expression of the defendant's real opinion is to pose an obviously inappropriate test. He does not indicate any more precisely than does the traditional legal definition of malice (improper purpose) what the appropriate test is. But it is submitted that the judge impliedly accepts that a newspaper editor would be acting properly in publishing a letter if he believed he was dealing with a sincere comment. This was also the position arrived at by Bayda J.A. in the Court below.

Dickson J. also considers the question of attribution of malice between writer and subsequent publishers. He points out that there is authority both ways but prefers the view that proof of malice against the writer does not destroy a subsequent publisher's plea of fair comment. Malice, involving as it does a subjective issue, should be assessed in relation to each defendant individually. This view is supported by a New Zealand decision of which Dickson J. was apparently unaware viz *McLeod* v *Jones* [1977] 1

NZLR 441. In that case White J. held that proof of malice on the part of the host of a radio talk-back show would not destroy a plea of fair comment by the radio station itself. The host was an independent contractor not an employee. In the case of an employee the position would be different because vicarious liability would apply.

Finally Dickson J.'s consideration of the policy factors involved in the case should be mentioned. He emphasises the importance of the defence of fair comment in giving substance to the principle of freedom of speech and points out the consequences of only giving newspapers protection with respect to letters with which they agree. It is submitted that at this point the learned judge impliedly overstates the effect of the majority opinion in the case because that opinion does not insist on honest belief by the paper in the views expressed as the *only* basis for a successful plea of fair comment. It allows alternatively proof of honesty on the part of the writers. While this is a less serious restriction on the functioning of newspapers it is still an unjustifiable one, as was submitted above. It is to be hoped that the approach of Dickson J. ultimately prevails.

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THE EVIDENCE AMENDMENT ACT (No. 2) 1980

The Evidence Amendment Act (No. 2) 1980 which came into force on the 1st January 1981 comprises five parts, namely: admissibility of hearsay evidence; convictions, etc., as evidence in civil proceedings; privilege of witnesses; taking of evidence overseas or on behalf of overseas courts and proof of photographic copies of documents. Comments in this legislation note will be confined to the first three parts of the Act.

The law relating to hearsay evidence has been altered in several respects.

By s. 3(1) of the Act documentary hearsay evidence of fact or opinion is admissible in both civil and criminal proceedings. Documentary hearsay evidence of facts was allowed in civil proceedings under the rather more rigid rules of s. 3 of the Evidence Amendment Act 1945; in criminal proceedings such documentary hearsay evidence was limited by the Evidence Amendment Act 1966 to "certain business records". In neither Act was documentary hearsay evidence of opinion specifically allowed. Uncertainty prevailed as to whether it was permitted by implication. That uncertainty has been dispelled in this respect by the 1980 Act.

Documentary hearsay evidence admitted under the Act, whether of fact or opinion, must be first hand hearsay unless the document in question is a "business record" when the admission of second hand hearsay is a possibility. A "business record" is defined in s. 2(1) of the Act as:

> "a document made—
>
> (a) Pursuant to a duty; or
>
> (b) In the course of, and as a record or part of a record relating to, any business,—from information supplied directly or indirectly by any person who had, or may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information he supplied:"