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DEFAMATION:
FAIR COMMENT AND LETTERS TO THE EDITOR

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DEFAMATION:
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I
HISTORY AND INCEPTION OF PROJECT

In February, 1979, the Institute became concerned about the law as it has stood since the decision of the Supreme Court of Canada in Cherneskey v. Armadale Publishers Ltd. and King [1978] 6 W.W.R. 618. We decided to review the law and to consider whether to recommend change. We accordingly commissioned Professor Lewis Klar of the Faculty of Law, University of Alberta, to prepare a research paper on the subject, which we have utilized.

The Attorney General of Ontario then announced his intention to refer the question to the Uniform Law Conference for consideration, and we communicated with both the Ontario Commissioners to the Uniform Law Conference and the Alberta Commissioners (who include three members of our Board). The Ontario and Alberta Commissioners decided to present a joint report to the Uniform Law Conference at its 1979 meeting, and the Institute withheld further work on its project pending that meeting.

The Uniform Law Conference met at Saskatoon on August 19 through 25, 1979. During that meeting it considered the joint report of the Ontario and Alberta Commissioners, and adopted an amendment to the Uniform Defamation Act, upon which Alberta's Defamation Act is based, to rectify the problem disclosed by the decision in the Cherneskey case. Having considered the action of the Conference, we decided to complete our own project with a report recommending that the Alberta Defamation Act be amended in accordance with the amendment to the Uniform Defamation Act. Our reasons follow.

II
EXISTING LAW

1. Defamation and fair comment

The law recognizes the interest of society in protecting the legitimate reputations of persons. Consequently, it permits either an individual or a corporation to recover damages from a defendant who makes a false statement to a third person which tends to lower the reputation of a plaintiff in the estimation of the community, unless the defendant has a legally recognized defence. Such a statement is said to be defamatory.

Because the law recognizes other interests as well as those of a defamed plaintiff, a defendant may escape liability by establishing any one of a number of legal defences. The most commonly understood defence available to a defendant is truth. It is the legitimate reputation of a plaintiff which the law seeks to protect. Therefore, the defendant will not be liable for publishing a statement to a third person defaming the plaintiff if the statement was true.

Other defences are available even if the statement was not true, when it was made under circumstances in which freedom of speech is regarded as especially important. One of the defences in this category is known as "fair comment", and it is this defence which was at issue in the Cherneskey case, and which is the subject of this report.

The fair comment defence is available when the defamatory statement consists of what may be described as a comment expressing an opinion, and in order to successfully invoke this defence the defendant must establish that the comment satisfies the three basic requirements of the defence. First, although the opinion need not be true in the objective sense, the facts upon which it is based must be true. Secondly, the comment must

concern a matter of public interest. One writer has said that the fair comment defence is allowed because "untrammelled discussion of public affairs and those participating in them is a basic safeguard against irresponsible political power", and is "one of the foundations supporting our standards of personal liberty". (Fleming, The Law of Torts, 5th ed., p. 574.)

The first two requirements of the fair comment defence summarized above created no legal controversy in the Cherneskey case, but the third requirement did. In the Supreme Court of Canada the majority held that it required that the person who published the opinion must honestly believe it. The minority held (1) that the opinion need only satisfy this objective test, "could any person honestly express that opinion on the proved facts?", and (2) even when the answer to this question is "yes," the defence is defeated if the plaintiff can prove express malice on the part of the defendant. This element of the two-fold test is subjective. There is no point in debating the issue of which of these two views represented the law before Cherneskey. Both opinions summoned weighty supporting authority.

The difference becomes important when, as in the Cherneskey case, the author of the comment published it to the defendant (a newspaper), the defendant republished it to others (the readers of the newspaper), the plaintiff sued the defendant and not the author, and the defendant raised the defence of fair comment. The majority held that the defendant must establish that either he or the author honestly held the opinion. Since the authors in Cherneskey were not before the court and the defendant did not hold the opinion, the majority held that he could not raise the defence of fair comment. The minority, on the other hand, held that the honest belief of the defendant was irrelevant, and that he was entitled to succeed on the defence of fair comment if he could show that someone could honestly express the opinion on the proved facts, unless, of course, the defendant was motivated by express malice.

We should point out that, because of the decision in the Cherneskey case, it is probable that, in order to satisfy the third requirement of the fair comment defence, a defendant who authored a defamatory comment must establish that he honestly held the opinion which it expressed. It might be desirable for us to consider the third requirement of the fair comment defence as it affects both the author and the republisher of a defamatory comment. Indeed, it might be desirable for us to go further and to recommend a statute encompassing the entire fair comment defence. However, we think that solution of the specific problem resulting from the Cherneskey decision is urgent, and that it should not be delayed pending the completion of the complex and time-consuming study which would be necessary as the foundation for a broader report. Consequently, this report will only consider the third requirement of the fair comment defence as it affects a defendant who republished a defamatory comment. We will now discuss the reasons which led us to the conclusion that this problem is quite serious.

2. Fair comment and the media

Generally speaking, the law is the same for proprietors of newspapers and broadcasting stations as it is for other people. If a newspaper or a broadcasting station republishes a defamatory statement, it is liable in damages unless one of the legal defences applies. Newspapers and broadcasting stations are quite important to the "untrammelled discussion of public affairs and those participating in them." They often, as part of their normal function, publish the views of others; they share some of these views and they disagree with others. If they refused to publish the views of others, dissemination of opinion, and "a basic safeguard against irresponsible political power," or, for that matter, any other kind of power, would be seriously weakened. That is why we find the decision in the Cherneskey case to be of great importance.

3. The Cherneskey case

A Saskatoon newspaper published a story concerning a meeting of the Saskatoon City Council at which a local public issue was under debate. Two persons not connected with the newspaper then wrote a letter to its editor, and this letter was published in the newspaper. The letter referred to facts published previously in the newspaper story, the correctness of which was not disputed by anyone, and upon these facts, made comments which one of the aldermen, and later the courts, considered to be defamatory of the alderman. The alderman sued the proprietor and editor of the newspaper for damages for defamation, and the defendants sought to establish the defence that what was said in the letter was fair comment.

The two authors of the letter had left Saskatchewan. They were not present at the trial, and there was no evidence establishing whether or not they honestly believed what they had written. The evidence introduced suggested that the officials of the newspaper did not share the views expressed in the letter, and there was no evidence showing that anyone connected with the newspaper did share them.

The defamation action was tried by a judge and a jury. The judge refused to ask the jury to make a finding on the defence of fair comment because, in his view of the law, the defence could not apply in the absence of evidence that the words expressed the honest opinion of someone. The plaintiff, therefore, obtained a judgment for damages against the defendants. The Saskatchewan Court of Appeal, by a majority, reversed the decision of the trial judge, and ordered a new trial so that the newspaper could attempt to establish a defence of fair comment. However, the Supreme Court of Canada, again by a majority, reinstated the judgment in favour of the plaintiff.

4. Effect of the Cherneskey decision

We will now describe the situation in which a newspaper finds itself when it contemplates publishing a letter to the editor after the Cherneskey case. Firstly, if the letter makes a defamatory allegation of fact about someone, the newspaper will be liable in damages if it publishes the letter and is subsequently unable to prove the truth of the allegation; that state of the law is generally accepted and would not be changed by our recommendations.

Second, the newspaper must evaluate any comments or inferences in the letter. If a comment or inference is based upon alleged facts which are not true, the newspaper will again be liable if it publishes the letter. Under the present law the newspaper must be sure of the facts at its peril in both the first and second cases, and this will remain the law if our proposal is adopted.

However, if the facts are true, and if the comment concerns a matter of public interest, and if it expresses an opinion which might honestly be held by someone, then on the minority view in the Cherneskey case the newspaper would have thought itself safe in publishing the letter. Now it is clear that the newspaper must go much further and must determine whether either the newspaper or the author of the letter actually holds the opinion expressed by the comment. (There are some passages in the Cherneskey decision which suggest that the opinion must be held by both, but it is unlikely that this is the correct interpretation of the decision.) If the newspaper shares the opinion expressed in the letter, it can safely publish it. The critical problem under the Cherneskey decision arises if the newspaper does not share the opinion; the newspaper is then

vulnerable in publishing the comment unless it is satisfied that, if either the publisher or the editor is sued, it can prove that the letter expresses the honest opinion of the author.

The newspaper is in a difficult position. In most situations the only evidence which it will have is the letter itself. In the absence of any evidence of an ulterior or malicious motive, the newspaper might assume that the author of the letter believed what he wrote, but it would make this assumption at its peril. The newspaper might send an investigator to ask the writer if he believed what he wrote, but it would only learn what the author chose to tell the investigator; it could not be certain that the author would say the same thing in court, or that the judge would believe him if he did. The ability of the newspaper to avoid a successful action for damages will be dependant upon the existence of a state of facts which, in most cases, it will be unable to verify in any practical way.

The conclusion is that a newspaper can form a fairly confident opinion about its potential liability if it publishes opinions which it shares, but it cannot achieve a similar degree of assurance if it publishes opinions which it does not share. That conclusion seems likely to suggest to a newspaper that it should only publish controversial comments if it agrees with them, and we believe that this will have a tendency to interfere with the free dissemination of ideas with which newspapers do not agree. It is for this reason that we think that the law should be changed. Our proposal is not designed to salvage the narrow personal interests of newspapers. Rather, it is intended to promote the general interest of the public in free discussion of ideas, which can be served if newspapers are willing to publish views they do not share.

Moreover, the Cherneskey decision probably has a broader application than we have so far suggested. Its statement of the law appears to extend to radio "hot lines" and to any other radio or television broadcasts which convey the views of persons other than members of the staff of the broadcasting station. In addition to newspapers, it appears to encompass magazines, articles and books, and indeed, publications generally, for all publications may well contain opinions of both their authors and others. As to all publications, it seems probable that the publisher of another person's views will be assured of the defence of fair comment only if he shares these views, and accordingly will be inhibited from publishing views of others which he does not share.

III
PROPOSALS

1. Principle

We have given the reasons supporting our opinion that the law laid down by the Cherneskey case places a publisher in greater jeopardy for publishing opinions of others which it does not share than for publishing opinions of others which it does share. We see no justification for a legal distinction which results in protecting the dissemination of opinions of those who control the means of widespread dissemination, and inhibiting the dissemination of opinions of those who do not; such a distinction discourages, rather than encourages, the open discussion of ideas. We unanimously recommend that the law be changed in order to eliminate this distinction.

Recommendation No. 1

That the law should be changed so that a publisher will not be in greater jeopardy under the law of defamation for the publication of opinions of others which he does not share than for the publication of opinions of others which he does share.

2. Proposed legislation

We will address ourselves solely to the problem of devising legislation which will accomplish the objective described in our recommendation and which will not otherwise disturb the law of fair comment. We will consider a number of different ways in which our objective might be achieved.

The Ontario and Alberta Commissioners to the Uniform Law Conference recommended that the Conference adopt an amendment to the Uniform Defamation Act reading as follows:

> 8.1 Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion.

It may be seen that under this proposal a publisher who satisfied the other requirements of the defence of fair comment would succeed if he could establish that some person honestly held the opinion expressed in the comment. This amendment would have achieved our objective, for it would have made both the publisher's opinion and the writer's opinion irrelevant in an action against the publisher, and in a situation in which the publisher disagreed with the opinion, it would have made it unnecessary for him to seek out the writer and attempt to determine whether or not he actually held the opinion.

This amendment, however, was questioned at the Uniform Law Conference, because in one respect it might have gone too far; it might have protected a publisher even if he knew that the author did not hold the opinion. Consequently, the Conference adopted a slightly different amendment designed to achieve the basic objective without producing this possible

defect. This amendment, which the majority of our Board recommends, reads as follows:

> 8.1(1) Where the defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant did not hold the opinion if,
>
> (a) the defendant did not know that the person expressing the opinion did not hold the opinion; and
>
> (b) a person could honestly hold the opinion.
>
> (2) For the purposes of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

In substance, the adopted amendment differs from the amendment first proposed in only one respect; section 8.1(1)(a) would deprive the publisher of the opinion of the defence of fair comment if he actually knew that the writer of the opinion did not hold it. Although we think that it is highly probable that a publisher who published an opinion which he did not share, and which he knew was not the writer's opinion, would have a malicious intention which would deprive him of the fair comment defence, our majority believes that section 8.1(1)(a) is a sensible way to make it quite clear that the fair comment defence would not protect a publisher under these circumstances.

Section 8.1(1)(b), in the opinion of our majority, simply adopts the limitation to the fair comment defence as expressed by the minority in the Cherneskey case. Furthermore, they believe that this limitation to the protection available under the fair comment defence is adequate and that it will not be abused. A publisher is not likely to publish an opinion which neither he nor its author believes, simply because the publisher believes that someone

could honestly hold that opinion, and a publisher who did publish such an opinion would probably be motivated by malice, and hence could not invoke the protection of the fair comment defence anyway.

For the foregoing reasons, and because we wish to maintain uniformity of law in this important area, our majority are of the view that the adopted amendment to the Uniform Defamation Act is the preferable solution to the problem raised by the Cherneskey decision.

One member of our Board, however, believes that both the amendment proposed by the Alberta and Ontario Commissioners and that adopted by the Uniform Law Conference are defective, for two reasons.

First, he thinks that permitting a publisher to satisfy the third requirement of the fair comment defence by establishing that someone could hold the opinion constitutes a license to a publisher to publish a defamatory opinion so long as one obstinate and prejudiced, but honest, person in the community could be found to agree with it. This objection could be satisfied if a publisher were required to establish that the opinion was one which "an honest, fair-minded and unprejudiced person" could hold. The view of the majority of our Board is that this requirement would prevent the publication of almost any vigorous expression of opinion and would fail to meet the objective sought by all of us.

Alternatively, the first minority objection could be satisfied by omitting the last eight words of the amendment proposed by the Alberta and Ontario Commissioners, and by adding a specific provision that malice would deprive the publisher of the fair comment defence. The amendment first proposed would then read as follows:

> (1) Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion.

(2) Nothing in this section protects the defendant if he or a person for whose conduct he is responsible and who decided to publish the opinion is actuated by malice.

This proposed section, in the minority view, would leave the court free to apply to the case of publication by one person of the views of another the general legal criteria of fair comment.

Second, our minority member is of the opinion that both the proposed and adopted amendments would put joint tortfeasors in different legal positions and might thus be held to deny the right to equality before the law under the Alberta Bill of Rights.

In summary, our unanimous view is that a publisher should not be in greater jeopardy for the publication of opinions which he does not share than for the publication of opinions which he does share, and our majority view is that the section approved by the Uniform Law Conference should be adopted.

Recommendation No. 2

That the Defamation Act be amended by inserting the following section after sec. 9:

9(1) Where the defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant did not hold the opinion if,

(a) the defendant did not know that the person expressing the opinion did not hold the opinion; and

(b) a person could honestly hold the opinion.

9(2) For the purposes of this subsection, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

(Note. Section 9 of the Alberta Defamation Act corresponds with section 8 of the Uniform Defamation Act, and for this reason the section 8.1 added to the Uniform Act would properly be section 9.1. of the Alberta Act.)

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