

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 12 OF 2000 (CIVIL)
(ON APPEAL FROM CACV NO. 170 OF 1998)**

Between:

ALBERT CHENG

1st Appellant

LAM YUK WAH

2nd Appellant

- and -

TSE WAI CHUN PAUL

Respondent

Court:

Chief Justice Li, Mr Justice Bokhary PJ,
Mr Justice Ribeiro PJ, Sir Denys Roberts NPJ
and Lord Nicholls of Birkenhead NPJ

Dates of Hearing:

24, 25, 26, and 27 October 2000

Date of Judgment:

13 November 2000

J U D G M E N T

Chief Justice Li :

I am in complete agreement with the judgment of Lord Nicholls of Birkenhead NPJ.

The freedom of speech

The freedom of speech (or the freedom of expression) is a freedom that is essential to Hong Kong's civil society. It is constitutionally guaranteed by the Basic Law (Article 27). The right of fair comment is a most important element in the freedom of speech.

In a society which greatly values the freedom of speech and safeguards it by a constitutional guarantee, it is right that the courts when considering and developing the common law should not adopt a narrow approach to the defence of fair comment. See *Eastern Express Publisher Ltd v. Mo Man Ching* (1999) 2 HKCFAR 264 at 278. The courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour.

Written directions to the jury

The question of the use of written directions to the jury arose in this appeal. This matter is relevant to both civil and criminal trials with a jury. It may assist trial judges if some guidance is given on this question.

In this case, the judge gave the jury a handout of over 10 pages. The judge did so with the best of intentions to try to assist the jury in a case where the issues were of some complexity. The handout consisted of notes on the law and the burden of proof relating to the various issues the jury had to decide. When the judge came to the issues

in question during the summing up, the jury was given the relevant pages. The judge then dealt and elaborated on the matters covered by the handout. Counsel had not been consulted on the contents on the handout. In fact, the judge had not informed them that a handout would be given to the jury. They learnt of this and were given the handout at the same time as the jury. In my view, it was not satisfactory that counsel were not given prior notice of the contents of the note.

In both civil and criminal trials, where the case is complicated, the judge may consider it appropriate to give a note to the jury relating to matters covered by the summing up in order to assist the jury. It would of course be entirely a matter for the judge to decide whether to have such a note, having regard to the circumstances of the case. The note should be part of the summing up. The judge should explain to the jury the purpose of the note and how it forms part of the summing up. This was done in the present case.

Where the judge decides to use such a note, it should normally be given to counsel for their consideration a reasonable time before they begin their closing speeches. This was not done in the present case. As was pointed out in the context of a criminal case in *R v. McKechnie* (1992) 94 Cr. App. R. 51 at 63, this would serve two purposes.

First, this would give counsel the opportunity to make submissions to the judge concerning the note and possible changes to its contents. It would of course be a matter entirely for the judge whether to accede to their submissions. But he should inform counsel of his view on those submissions before they begin their closing addresses.

Secondly, counsel would know how the judge proposes to approach the matters dealt with in the note in the summing up so that they can take this into account when delivering their closing addresses.

Costs

As Lord Nicholls of Birkenhead NPJ pointed out, the legal arguments on the issue of malice raised before the Court of Appeal and this Court were not raised before the judge. No argument was advanced before the judge that the motives particularised under head (3) and (4) would not in law defeat the defence of fair comment.

In the circumstances, I would make the following order nisi on costs: (1) There be no order as to costs before the judge. (2) The respondent should pay the appellants' costs in the appeal to the Court of Appeal and this Court.

Any party challenging this order nisi should send in written submissions (copied to the other parties) within 21 days from today. The Court will decide on the basis of the written submissions received within this period. If no written submissions are received by the expiry of this period, the above order nisi will become absolute.

Mr Justice Bokhary PJ :

I agree with the judgment of Lord Nicholls of Birkenhead NPJ. So complete is my agreement therewith that I do not propose to offer anything of my own even though we are differing from the Court of Appeal on a point of law of profound and, indeed, constitutional importance. I agree also with everything which the Chief Justice says.

Mr Justice Ribeiro PJ :

I agree with the judgment of Lord Nicholls of Birkenhead NPJ and the judgment of the Chief Justice.

Sir Denys Roberts NPJ:

I agree with the judgment of Lord Nicholls of Birkenhead NPJ and the judgment of the Chief Justice.

Lord Nicholls of Birkenhead NPJ:

This is an appeal in a defamation action. It raises an important point on the defence of fair comment. The title of this defence is misleading. Comment, or honest comment, would be a more satisfactory name. In this judgment I adhere, reluctantly, to the traditional terminology.

Fair comment: the objective limits

In order to identify the point in issue I must first set out some non-controversial matters about the ingredients of this defence. These are well established. They are fivefold. First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in *London Artists Ltd v. Littler* [1969] 2 QB 375, 391.

Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson

J gave a simple example in the New South Wales case of *Myerson v. Smith's Weekly* (1923) 24 SR (NSW) 20, 26:

“To say that a man’s conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment”.

Third, the comment must be based on facts which are true or protected by privilege : see, for instance, *London Artists Ltd v. Littler* [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.

Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.

Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in *Turner v. Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 AER 449, 461, commenting on an observation of Lord Esher MR in *Merivale v. Carson* (1888) 20 QBD 275, 281. It must be germane to the subject matter criticised. Dislike of an artist’s style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v. Fairfax* (1942) 42 SR (NSW) 171, 174.

These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence.

Malice

That is not the end of the matter. Even when a defendant has brought his case within these limits, he will not necessarily succeed. The plaintiff may still defeat ('rebut') the defence by proving that when he made his comment the defendant was, in the time-hallowed expression, 'actuated by malice'.

It is here that the storm clouds begin to appear. In ordinary usage malice carries connotations of spite and ill-will. This is not always so in legal usage. In legal usage malice sometimes bears its popular meaning, sometimes not. It is an imprecise term. Historically, even within the bounds of the law of defamation, malice has borne more than one meaning. Historically, defamation lay in publishing the words complained of 'falsely and maliciously'. In this context malice meant merely that publication had been a wrongful act, done intentionally and without lawful excuse: see Bayley J in *Bromage v. Prosser* (1825) 4 B&C 247, 255. This was sometimes called malice in law, as distinct from malice in fact. But even malice 'in fact', otherwise known as express malice or actual malice, may cover states of mind which are not malicious in the ordinary sense of the word. This is so in the context of the defence of qualified privilege. It is no wonder that Lord Bramwell described malice as 'that unfortunate word': see *Abrath v. North Eastern Railway Co* (1886) 11 App Cas 247, 253.

The question raised by this appeal concerns the meaning of malice in the context of the defence of fair comment. On this, two matters are clear. First, unlike the outer limits (as I have called them) of the defence of fair comment, which are objective, malice is subjective. It looks to the defendant's state of mind. Second, malice covers the case of the defendant who does not genuinely hold the view he expressed. In other words, when making the defamatory comment the defendant acted dishonestly. He put forward as his view something which, in truth, was not his view. It was a pretence. The law does not protect such statements. Within the objective limits mentioned above, the law protects the freedom to express opinions, not vituperative make-believe.

The legal issue on this appeal

The point of principle raised by this appeal, crucial to the outcome of the action, is whether, in contemplation of law, malice may exist in this context even when the defendant positively believed in the soundness of his comment. More specifically, the issue is whether the *purpose* for which a defendant stated an honestly held opinion may deprive him of the protection of the defence of fair comment; for instance, if his purpose was to inflict injury, as when a politician seeks to damage his political opponent, or if he was simply acting out of spite.

One would have expected that this basic issue in respect of the much-used defence of fair comment would have been settled long ago. This is not so. The meaning of malice has been comprehensively analysed in relation to the defence of qualified privilege, most notably in the speech of Lord Diplock in *Horrocks v. Lowe* [1975] AC 135. But no similar exposition has been undertaken regarding fair comment. Indeed, there has been surprisingly little judicial discussion of this subject over

the last 150 years. Most textbooks incline to the view that, as with qualified privilege, so with fair comment, the defence of an honest defendant may be vitiated by the motive with which the words were published. The (English) Report of the Committee on Defamation, published in 1975, stated that under the present state of the law a person was acting maliciously where he was dishonest or reckless 'or actuated by spite, ill-will, or any other indirect or improper motive': see para. 153. On this appeal the defendants challenged this view of the law.

Mr Au's arrest and release

Before proceeding further I must say what the present case is about and how this legal issue has arisen. The case arose from an incident which was something of a cause celebre at the time. In September 1991 Mr Au Wing Cheung was employed as a tour escort by Select Tours International Co Ltd. After just a few weeks of work he was instructed to lead a tour group to the Philippines. On 7 September 1991, when the tour group was going through the customs in Manila airport, Mr Au and a member of the tour group, Mr Wong Chuen Ming, were arrested together with a number of other members of the group, for trafficking in a drug colloquially known as 'ice'. Mr Au and Mr Wong were prosecuted, convicted and sentenced to life imprisonment by the court in the Philippines.

These happenings attracted much publicity in Hong Kong. Some people believed Mr Au and Mr Wong were innocent. They formed various groups organising campaigns seeking their release. One of these groups was the Tourist Industry Rescue Group, of which Select Tours was a member and the plaintiff, Mr Tse Wai Chun Paul, its honorary legal adviser. Mr Tse is a solicitor. The first defendant, Mr

Albert Cheng, had organised another group. Various other activities were aimed at the same objective.

As a result of the campaigns by these various groups, Mr Au and Mr Wong were released by the government of the Philippines in July 1996. They made a triumphal return to Hong Kong, accompanied by Mr Tse and Mr Cheng and others. Understandably, different people claimed credit for the successful return of Mr Au and Mr Wong.

The radio programme

Meanwhile, on 2 December 1991 Select Tours had ended Mr Au's employment. After his return to Hong Kong a question arose over whether Mr Au should claim compensation from his former employer for the period of his imprisonment in the Philippines, on the ground that he was arrested and incarcerated while carrying out his duties as an employee. Apparently, Mr Cheng and others urged Mr Au to make a claim, while Mr Tse advised him not to do so.

On 1 August 1996 Mr Cheng and Mr Lam Yuk Wah were co-hosts of a phone-in radio talk show broadcast on the Chinese channel of the commercial radio station run by Hong Kong Commercial Broadcasting Co Ltd. Mr Cheng and Mr Tse were already at loggerheads over the rescue operation. Mr Lam had not been involved in the rescue operation, nor had he previously dealt with Mr Tse. The programme, 'Teacup in a Storm', was a well-known weekday morning programme on political and social affairs.

Part of the programme consisted of a conversational dialogue in Cantonese between the two hosts, Mr Cheng and Mr Lam.

Mr Tse took exception to remarks made in the course of this dialogue. So he commenced this action against Mr Cheng, Mr Lam and Hong Kong Commercial Broadcasting Co Ltd.

The court proceedings

The three defendants raised identical defences: the statements did not refer to Mr Tse and were not defamatory, they were true or substantially true, and in so far as they consisted of expressions of opinion they were fair comment on a matter of public interest. In reply, Mr Tse pleaded that the defendants made the statements maliciously.

The action was tried by Yuen J sitting with a jury. The jury held in favour of the broadcasting company, but against the two individual defendants. They awarded \$80,000 damages.

Although the jury gave a general verdict against each defendant, and did not give a special verdict on particular issues, it is possible to draw certain inferences from the verdicts. The presence or absence of malice was the one respect in which a distinction could be drawn between any of the defendants. Otherwise the position of all three defendants was identical. So, having decided against the two individual defendants but in favour of the broadcasting company, the jury must have found one or more of the particulars of malice proved against the individual defendants. Had the jury found for them on the question of malice, they too would have obtained favourable verdicts. Hence, so far as the individual defendants were concerned, the presence or absence of malice became the decisive factor in the case.

The two unsuccessful defendants appealed to the Court of Appeal, principally on the ground that the judge had misdirected the jury on the issues relating to malice. The Court of Appeal, comprising Chan CJHC and Leong and Wong JJA, dismissed the appeal. Mr Cheng and Mr Lam appealed further, to this Court. They renewed their challenge to the correctness and adequacy of the judge's summing up on the issue of malice. In fairness to the trial judge, it should be noted that the issues raised before the Court of Appeal and this court were not raised before her. I should also record that Yuen J plainly took enormous trouble to make her summing up clear and simple.

The defamatory comments and the alleged malice

The thrust of Mr Tse's complaint against the defendants was that the words complained of meant, and would be understood as meaning, that Mr Tse had improperly influenced Mr Au into not pursuing a claim against Select Tours. In advising Mr Au, Mr Tse had acted unethically and unprofessionally. He had allowed himself to be put into a position of conflict of interest. He had given his advice without regard to Mr Au's interests and with a view to protecting the interests of the travel industry. Further, in deciding not to pursue a compensation claim against Select Tours Mr Au had been subject to threats and intimidation by Mr Tse and others.

In response to the defendants' reliance on the defence of fair comment, Mr Tse asserted that in making and broadcasting their defamatory comments the defendants were actuated by malice. Malice was particularised as follows:

- (1) [The individual defendants knew their comments were untrue.]

- (2) They were reckless as to whether their comments were true or false.
- (3) They made their comments with the following motives:
 - (a) to persuade Mr Au into pursuing a compensation claim against Select Tours
 - (b) to pressurize Select Tours into paying compensation to Mr Au
 - (c) to gratify their animosity [against Mr Tse and] against Select Tours
 - (d) [to belittle the efforts of Mr Tse, in contrast to those of Mr Cheng, in assisting Mr Au.]
- (4) They made their comments with a view to raising a new controversy, and thereby arousing the public's interest in continuing to listen to the 'Teacup in a Storm' programme.

The trial judge ruled that there was no evidence on malice against the corporate defendant. She made a similar ruling regarding some of the allegations against Mr Lam. For completeness, although nothing turns on this for the purposes of this appeal, I have enclosed in square brackets the particulars which applied only to Mr Cheng.

Motive

The soundness of the judge's direction to the jury cannot be determined without first deciding whether the states of mind alleged in these particulars would, in law, constitute malice. There is no difficulty with items (1) and (2). Honesty required that the defendants genuinely believed the comments they made. Anything less would not do. If they knew their comments were untrue, or were recklessly indifferent to the truth or falsity of their comments, they were acting dishonestly.

Items (3) and (4) raise the question of the relevance of motive. Before turning to the authorities I shall go back to first principles. Proof of malice is the means whereby a plaintiff can defeat a defence of fair comment where a defendant is abusing the defence. Abuse consists of using the defence for a purpose other than that for which it exists. The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting on matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views on such matters, subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from statements of fact. They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree.

The public interest in freedom to make comments within these limits is of particular importance in the social and political fields. Professor Fleming stated the matter thus in his invaluable book on *The Law of Torts*, 9th edition, p 648:

“.. untrammelled discussion of public affairs and of those participating in them is a basic safeguard against irresponsible political power. The unfettered preservation of the right of fair comment is, therefore, one of the foundations supporting our standards of personal liberty.”

The purpose and importance of the defence of fair comment are inconsistent with its scope being restricted to comments made for particular reasons or particular purposes, some being regarded as proper, others not. Especially in the social and political fields, those who make public comments usually have some objective of their own in mind, even

if it is only to publicise and advance themselves. They often have what may be described as an 'ulterior' object. Frequently their object is apparent, but not always so. They may hope to achieve some result, such as promoting one cause or defeating another, elevating one person or denigrating another. In making their comments they do not act dispassionately, they do not intend merely to convey information. They have other motives.

The presence of these motives, and this is of crucial importance for present purposes, is not a reason for excluding the defence of fair comment. The existence of motives such as these when expressing an opinion does not mean that the defence of fair comment is being misused. It would make no sense, for instance, if a motive relating to the very feature which causes the matter to be one of public interest were regarded as defeating the defence.

On the contrary, this defence is intended to protect and promote comments such as these. Liberty to make such comments, genuinely held, on matters of public interest lies at the heart of the defence of fair comment. That is the very object for which the defence exists. Commentators, of all shades of opinion, are entitled to 'have their own agenda'. Politicians, social reformers, busybodies, those with political or other ambitions and those with none, all can grind their axes. The defence of fair comment envisages that everyone is at liberty to conduct social and political campaigns by expressing his own views, subject always, and I repeat the refrain, to the objective safeguards which mark the limits of the defence.

Nor is it for the courts to choose between ‘public’ and ‘private’ purposes, or between purposes they regard as morally or socially or politically desirable and those they regard as undesirable. That would be a highly dangerous course. That way lies censorship. That would defeat the purpose for which the law accords the defence of freedom to make comments on matters of public interest. The objective safeguards, coupled with the need to have a genuine belief in what is said, are adequate to keep the ambit of permissible comment within reasonable bounds.

Spiteful comments

One particular motive calls for special mention: spite or ill-will. This raises a difficult point. I confess that my first, instinctive reaction was that the defence of fair comment should not be capable of being used to protect a comment made with the intent of injuring another out of spite, even if the person who made the comment genuinely believed in the truth of what he said. Personal spite, after all, is four square within the popular meaning of malice. Elsewhere the law proscribes conduct of this character; for instance, in the field of nuisance, as exemplified by the well known case of the householder who made noises on musical instruments with the intention of annoying his neighbour (*Christie v. Davey* [1893] 1 Ch 316).

On reflection I do not think the law should attempt to ring-fence comments made with the sole or dominant motive of causing injury out of spite or, which may come to much the same, causing injury simply for the sake of doing so. In the first place it seems to me that the postulate on which this problem is based is a little unreal. The postulate poses a problem which is more academic than practical. The postulate

is that the comment in question falls within the objective limits of the defence. Thus, the comment is one which is based on fact; it is made in circumstances where those to whom the comment is addressed can form their own view on whether or not the comment was sound; and the comment is one which can be held by an honest person. This postulate supposes, further, that the maker of the comment genuinely believes in the truth of his comment. It must be questionable whether comments, made out of spite and causing injury, are at all likely to satisfy each and every of these requirements. There must be a query over whether, in practice, there is a problem here which calls for attention.

Moreover, in so far as this situation is ever likely to arise, it is by no means clear that the underlying public interest does require that the person impugned should have a remedy. Take the case of a politician or a journalist who genuinely believes that a minister is untrustworthy and not fit to hold ministerial office. Facts exist from which an honest person could form that view. The politician or journalist states his view, with the intention of injuring the minister. His reason for doing so was a private grudge, derived from a past insult, actual or supposed. I am far from persuaded that the law should give the minister a remedy. The spiteful publication of a defamatory statement of fact attracts no remedy if the statement is proved to be true. Why should the position be different for the spiteful publication of a defamatory, genuinely held comment based on true fact?

There is a further consideration. The law of defamation is, in all conscience, sufficiently complex, even tortuous, without introducing further subtle distinctions which will be hard to explain to a jury. The concept of intent to injure is easy enough. But, as already

noted, intent to injure is not inconsistent with the purpose for which the defence of fair comment exists. So, if spite and cognate states of mind are to be outlawed for the purposes of this defence, the directions to the jury would have to be elaborate and sophisticated.

The combination of all these factors seems to me to point convincingly away from treating spiteful comments as forming a category of their own. This is, of course, very much a question of policy. I shall turn to the authorities in a moment. But I am comforted by noting that others who have considered this problem in recent years have come to the same conclusion. In England Mr Justice Faulks' Committee on Defamation, already mentioned, recommended that the defendant's genuine opinion should replace malice as the relevant test: see paragraph 159. In New South Wales the same test has been adopted, in section 32 of the Defamation Act 1974 ('the comment did not represent the opinion of the defendant'). Likewise in New Zealand, in section 10 of the Defamation Act 1992 ('the defendant's genuine opinion'), although there the defence goes even more widely, as there is now no requirement that the opinion must be on a matter of public interest.

Horrocks v. Lowe

I now turn to the authorities. As already indicated, there is no decision directly on the point now under consideration. It is no doubt for this reason that textbook writers have sought to fill the gap by resorting to the decision of the House of Lords in *Horrocks v. Lowe* [1975] AC 135, even though that case related to a different defence, the defence of qualified privilege. In the absence of any clear guidance, it is temptingly easy to assume that malice must bear the same meaning in all respects for both defences. It is essential, therefore, to consider the

reasoning which underlies Lord Diplock's authoritative analysis of malice for the purposes of the defence of qualified privilege, with a view to seeing how far it is applicable to the defence of fair comment. As will appear, I believe that misapplication of this analysis is largely responsible for the erroneous statements of the law in some of the textbooks.

In a much-quoted passage, at page 150, Lord Diplock said this:

“Even a positive belief in the truth of what is published on a privileged occasion ... may not suffice to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames.”

Lord Diplock continued by noting that there may be other improper motives which destroy the privilege. He instanced the case where a defendant's dominant motive may have been to obtain 'some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege'.

Lord Diplock's observations are in point to the extent that they enunciate the principle that express malice is to be equated with use of a privileged occasion for some purpose other than that for which the privilege is accorded by the law. The same approach is applicable to the defence of fair comment. Beyond that his observations do not assist in the present case, because the purposes for which the law has accorded the defence of qualified privilege and the defence of fair comment are not the same. So his examples of misuse of qualified privilege cannot be carried across to fair comment without more ado. Instances of misuse of qualified privilege may not be instances of misuse of fair comment.

What amounts to misuse of fair comment depends upon the purposes for which that defence exists.

I must make good my statement that the purposes for which the two defences exist are not the same. The rationale of the defence of qualified privilege is the law's recognition that there are circumstances when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source: see *Reynolds v. Times Newspapers Ltd* [1999] 3 WLR 1010, 1017. Traditionally, these occasions have been described in terms of persons having a duty to perform or an interest to protect in providing the information. If, adopting the traditional formulation for convenience, a person's dominant motive is not to perform this duty or protect this interest, he is outside the ambit of the defence. For instance, if a former employer includes defamatory statements in an employment reference with the dominant purpose of injuring the former employee, the former employer is misusing the privileged occasion and this will vitiate his defence of qualified privilege.

The rationale of the defence of fair comment is different, and is different in a material respect. It is not based on any notion of performance of a duty or protection of an interest. As already noted, its basis is the high importance of protecting and promoting the freedom of comment by everyone at all times on matters of public interest, irrespective of their particular motives. In the nature of things the instances of misuse of privilege highlighted by Lord Diplock (for example, 'some private advantage unconnected with the duty or interest which constitutes the reason for the privilege') are not necessarily applicable to fair comment. A failure to appreciate this has, I fear, led

some textbook writers into the error of suggesting that parts of Lord Diplock's observations are equally applicable to the defence of fair comment even though they lack the rationale on which the observations were founded. Halsbury's Laws of England, (4th ed, reissue), vol. 28, para.149, page 78, has succumbed in this way. Malice is defined as ill will or spite towards the plaintiff 'or any indirect or improper motive in the defendant's mind'. The authority cited for this proposition is *Horrocks v. Lowe*. The authors add: 'it seems that the same principles apply to the defence of fair comment'. Gatley on Libel and Slander (9th ed), page 426, points the reader in the same direction:

"It is submitted that the authorities on malice in the different contexts of fair comment and qualified privilege are essentially interchangeable, save for the necessary limitations imposed by the nature of each defence."

See also Carter-Ruck on Libel and Slander (5th ed), at page 116, and Winfield and Jolowicz on Tort (15th ed), at page 427.

A similar failure to recognise the difference in the rationale of the two defences may have influenced the language of judicial observations in the earlier cases. This would hardly be surprising, because the defence of fair comment grew from the defence of qualified privilege in the latter half of the nineteenth century. Too much weight should not be attached to the precise phrasing of observations made at a time when the defence of fair comment had not emerged fully from the shadow of its parent. These observations have to be read in their historical context, as part of the gradual evolution of a defence whose width and importance have grown considerably and whose rationale is more broadly based than perhaps was once the case.

As late as 1872, in *Henwood v. Harrison* (1871-72) LR 7 CP 606, 621, the Court of Common Pleas regarded fair comment as part of the defence of qualified privilege. Willes J and the majority of the court treated the right of every man to discuss freely any subject in which the public are generally interested, so long as he does it ‘honestly and without malice’, as a privilege ‘of the same character’ as employment references. In 1887 this exposition attracted criticism from Bowen LJ in *Merivale v. Carson* (1888) 20 QBD 275, 282-283.

Despite this, uncertainty persisted. In 1906, in *Thomas v. Bradbury, Agnew & Co Ltd* [1906] 2 KB 627 counsel submitted to the Court of Appeal that the views of Willes J in *Henwood v. Harrison* were to be preferred, as resting ‘upon principle.’ Collins MR said, at page 640:

“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 ... the two rights, whatever name they are called by, are governed by precisely the same rules”.

So the parallel was still regarded as close and helpful.

The fair comment cases

I turn to the very few cases where the question of malice has been touched upon in relation to the defence of fair comment. *Merivale v. Carson* (1888) 20 QBD 275 concerned a newspaper review of a theatre production. The issue of malice was withdrawn from the jury, but Lord Esher MR, at pages 281-282, made a passing observation to the effect that a dishonest intention to injure the author would make the criticism a libel, because the comment would not then really be a criticism of the work: ‘the mind of the writer would not be that of a critic’. Bowen LJ, at page 285, described a malicious motive as ‘some motive other than that of a pure expression of a critic’s real opinion’.

The case of *Thomas v. Bradbury, Agnew & Co Ltd* [1906] 2 KB 627 concerned a book review in the magazine ‘Punch’. The defendants contended that the case should not have been left to the jury. Evidence of malice, unless it appears on the face of the criticism, is irrelevant to the question of fair comment. The Court of Appeal rejected this submission. Collins MR noted that the contention involved the assertion that fair comment must be measured by an abstract standard, as ‘a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticised’.

In rejecting this submission, the Master of the Rolls said that the commentator was liable if the comment was malicious ‘if, indeed, it can then be described as comment at all’. Comment coloured by malice cannot, from the standpoint of the writer, be deemed fair. He said, at pages 638 and 642 :

“... if he, the person sued, is proved to have allowed his view to be distorted by malice, it is quite immaterial that somebody else might without malice have written an equally damnatory criticism. ... It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot ... be fair on the part of the person who makes it”.

He distinguished *Merivale v. Carson*, on the ground that the comment there fell outside the objective limits, as I have described them: ‘proof of bona fide belief was therefore irrelevant’.

The same approach was adopted by the Full Court in the New South Wales case of *Gardiner v. Fairfax* (1942) 42 SR (NSW) 171, another book review case. The court equated malice with a commentator’s failure to express his ‘real opinion’. Jordan CJ, at page

174, stated :

“To establish malice, it is necessary to produce evidence that the comment was designed to serve some other purpose than that of expressing the commentator’s real opinion, for example, that of satisfying a private grudge against the person attacked.”

In several later cases distinguished judges emphasised the crucial importance of honesty, but these remarks were not dealing directly with the question of motivation. *Turner v. Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 AER 449 is an example of this. The case concerned a letter which criticised a film critic’s review of the week’s films. Lord Porter, at pages 461-463, contrasted the honest expression of the commentator’s ‘real view’ and ‘mere abuse or invective under the guise of criticism’. He approved the trial judge’s direction that if the defendants honestly held the opinion expressed they were not abusing the occasion. In saying this, however, he was rejecting the erroneous idea that reasonableness is required. Irrationality, stupidity, or obstinacy do not constitute malice, although in an extreme case they may be evidence of it: ‘the defendant must honestly hold the opinion he expresses, but no more is required of him.’

The position was similar in *Slim v. Daily Telegraph Ltd* [1968] 2 QB 157, a decision of the Court of Appeal. The action arose from the publication in a newspaper of a letter which commented adversely on the conduct of a former town clerk. Lord Denning MR, at page 170, said that the writer must honestly express his real view: ‘so long as he does this, he has nothing to fear’.

More in point are observations of Diplock J in *Silkin v. Beaverbrook Newspapers Ltd* [1958] 1 WLR 743. This case arose out of a newspaper columnist’s trenchant criticisms of Lord Silkin, an active

politician and former government minister. In his direction to the jury Diplock J noted that honesty is the ‘cardinal test’. He said, at page 747 :

“It is because honesty is the cardinal test that very often in cases of this kind you find it alleged that the person who made the comment was actuated by personal spite or by some other ulterior motive *so that the comment he made did not express his honest opinion...*”.
(Emphasis added)

Diplock J seems there to have regarded intention to injure or other ulterior motive as antithetical to honesty, on the footing that when a person is actuated by such a motive the view which he expresses will not be his genuine view. It is to be noted, however, that malice was not suggested in that case.

The Canadian authorities drawn to the attention of the Court seem to take the matter no further forward. The issue now being considered seems not to have been examined directly and in depth by any court. The controversial decision of the Supreme Court in *Cherneskey v. Armadale Publishers Ltd* (1979) 90 DLR 321 concerned the position of a newspaper which publishes a letter. In passing, Dickson J repeated the familiar mantra:

“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.”

In *Vogel v. Canadian Broadcasting Corporation* [1982] 3 WWR 97, a decision of the British Columbia Supreme Court, malice was in issue. The plaintiff was the Deputy Attorney General of British Columbia. He complained about a television programme which suggested he had abused his office by interfering with the conduct of criminal cases in order to benefit friends. One of the grounds on which the defence of fair comment failed was recklessness. In putting out the programme the defendants had no concern for the truth or falsity of the

allegations. Their real motive was to enhance their own reputations by producing a sensational programme. Their concern was to give allegations of scandal the appearance of truth to the extent necessary to succeed in achieving their goal.

More difficult is the brief judgment of the British Columbia Court of Appeal in *Christie v. Westcom Radio Group Ltd* (1990) 75 DLR (4th) 546, concerning a defamatory radio broadcast. The court rejected the proposition that honesty negates malice, in reliance on a passage in the judgment of Greer LJ in *Watt v. Longsdon* [1930] 1 KB 130, 154-155, a case of qualified privilege.

In these cases judges used phrases such as bona fide belief, real view, and honest opinion. These expressions appear to be different ways of saying the same thing. They are all descriptive of a state of mind; the test is subjective. I doubt whether Collins MR intended to depart from this subjective test when he spoke of a person's judgment being 'coloured' or 'distorted' or 'warped' by malice: see *Thomas v. Bradbury, Agnew & Co Ltd* [1906] 2 KB 627, 638, 642.

This point was highlighted by Blackburn J, sitting in the Supreme Court of the Australian Capital Territory, in *Renouf v. Federal Capital Press of Australia Pty Ltd* (1977) ACTR 35. The plaintiff was a distinguished civil servant. He sued a newspaper in respect of a defamatory article. Blackburn J noted that, unlike with the defence of qualified privilege, malice in the context of fair comment cannot simply be characterised as the abuse of a special legal relationship. Everything must turn on the state of mind of the person making the comment. Proof that the comment was motivated by a desire to embarrass or prejudice the

plaintiff is not sufficient to constitute malice. It must be shown to have distorted the judgment of the defendant before it can avail the plaintiff.

What, then, of the case where intention to embarrass or injure does warp the defendant's judgment but, nevertheless, the defendant sincerely believes the opinion he expresses? Blackburn J answered this question as follows, at page 54:

“If the plaintiff can show that the opinion represented by the comment was affected by personal hostility, or some such irrelevant motive in such a way that it does not represent a disinterested judgment upon the matter which is the subject of the comment, then the reply of malice succeeds notwithstanding that it is not proved that the comment was insincere – ie did not represent the defendant's real opinion. It seems to me that unless this is so, the law ignores the common human experience that personal animosity may perfectly consort with sincerity to produce a comment which is harmful and unfair”.

Although I have some sympathy with Blackburn J's difficulty, I am unable to agree with his conclusion. The root cause of the difficulty here is that the defence of fair comment is bedevilled by its name and by the continuing use of the anachronistic and confusing term 'malice'. In layman's terms, a view which is warped by a dominant intent to injure does not rank as a fair comment. Blackburn J's solution is to curtail the scope of the subjective test of genuineness, or 'sincerity', of belief. Sincerity of belief will be efficacious only so long as it is disinterested. I can see no sufficient warrant for thus cutting down the scope of the defence of fair comment. Disinterestedness cannot always be expected in political life. Its presence should not be a pre-requisite of the freedom to make comments on matters of public interest.

Conclusion on the law

My conclusion on the authorities is that, for the most part, the relevant judicial statements are consistent with the views which I have

expressed as a matter of principle. To summarise, in my view a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not *of itself* defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred. Proof of motivation may also be relevant on other issues in the action, such as damages.

It is said that this view of the law would have the undesirable consequence that malice would bear different meanings in the defences of fair comment and qualified privilege, and that this would inevitably cause difficulty for juries. I agree that if the term ‘malice’ were used, there might be a risk of confusion. The answer lies in shunning that word altogether. Juries can be instructed, regarding fair comment, that the defence is defeated by proof that the defendant did not genuinely believe the opinion he expressed. Regarding qualified privilege, juries can be directed that the defence is defeated by proof that the defendant used the occasion for some purpose other than that for which the occasion was privileged. This direction can be elaborated in a manner appropriate to the facts and issues in the case.

The judge’s summing up and the decision of the Court of Appeal

On this basis the trial judge’s summing up on malice was fundamentally and fatally flawed. She drew a distinction between acceptable and unacceptable motives. Speaking ‘as a critic or

commentator' was proper and acceptable; other motives, 'however noble', were not. She said :

"The law of malice can actually be stated quite simply ... a defendant cannot abuse his position as a critic or a commentator ... by making use of that position for some improper or indirect purpose or motive. ... The question is, were the speakers' motives other than just speaking as critics or commentators?"

Yuen J made the same distinction when commenting on the allegations under heads (3) and (4) of the particulars of malice. For instance, with regard to item (3)(a) (persuading Mr Au to pursue a claim for compensation), she said :

"Were they [the individual defendants] pursuing their own political agenda? Was that the dominant motive when they were saying all this? Was it just fair comment on a matter of public interest? ... Did they step from just being a critic or a commentator into using that position, into using that time on the air, to pursue their own private agenda, however noble the cause may be?"

Her final comment was :

"Did all these motives add up to being the dominant motive such that mere comment or criticism on a matter of public interest became no longer the real purpose of this programme?"

In her desire to help the jury, Yuen J handed some written directions to the jury during her summing up. The jury took these with them when they retired to consider their verdict. These hand-outs were to the same effect as the oral directions. She defined 'malicious motive' as 'some motive other than that of a pure expression of critic/commentator's real opinion'. Had the direction rested there, all might have been well. But the hand-out later stated that 'the question is were the speakers' motives other than just speaking as critics/commentators?' Thus, the defendants' motives supplanted genuineness of belief as the governing factor.

In the Court of Appeal Chan CJHC gave the only reasoned judgment. He rejected counsel's submission that the sole test for malice in fair comment is whether the defendant has an honest belief in the truth of what he says. Chan CJHC applied Lord Diplock's analysis in *Horrocks v. Lowe*. It cannot be right, he said, that in the same branch of the law malice has two different meanings. He relied on, among other matters, the statement in *Gatley on Libel and Slander* set out above. He said :

“Honesty or honest belief is clearly a necessary consideration. But the matter does not end there. In some cases, the presence of honesty or honest belief is not sufficient to absolve the defendant from liability if it can be shown that he makes his comment about the plaintiff for some other motive and that such motive is the dominant motive behind what he says. ... It is open to the plaintiff to prove that although the defendant may honestly believe in the truth of what he says, his desire is to use his comment not for the purpose of expressing an opinion but to further his own purpose.”

The Chief Judge concluded that the summing up was in line with the rationale behind the defence and in accordance with the law as stated in *Horrocks v. Lowe*.

My reasons for respectfully differing from Chan CJHC appear from what I have stated above. The motives particularised under heads (3) and (4) would not in law defeat the defence of fair comment. Evidence of the existence of these motives or any of them would be relevant to the issues raised by heads (1) and (2), and the question of damages.

In my view this appeal succeeds. The jury's verdicts regarding Mr Cheng and Mr Lam must be quashed, and the orders made against them by Yuen J and the Court of Appeal set aside. There will be a direction for a new trial. The new trial will have to extend to all the issues in the action, as against the individual defendants. Should the

jury at the re-trial reach the stage of assessing damages they will need to know which of the comments made in the programme were defamatory and which, if any, were true. That does not appear from the verdicts at the trial before Yuen J, nor can it be inferred.

Since preparing the above I have had the advantage of reading a draft of the judgment of the Chief Justice. I agree with what he says regarding freedom of speech and the other matters he mentions.

Chief Justice Li :

The Court unanimously allows the appeal and makes the following orders: (1) The jury's verdicts regarding Mr Cheng and Mr Lam are quashed; (2) The orders made against them by Yuen J and the Court of Appeal are set aside; (3) A new trial extending to all issues is ordered as against Mr Cheng and Mr Lam. As to costs, the Court unanimously makes an order nisi in the terms set out in my judgment.

(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Sir Denys Roberts)
Non-Permanent Judge

(Lord Nicholls of Birkenhead)
Non-Permanent Judge

Mr Martin Lee SC and Mr Erik Shum (instructed by Messrs Ho, Tse, Wai & Partners) for the appellants

Mr Gerard McCoy SC and Mr Paul Shieh (instructed by Messrs Paul W. Tse) for the respondent