COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Simpson v. Mair and WIC Radio Ltd.,***
2006 BCCA 287

Date: 20060613

Docket: CA032074

Between:

Kari Simpson

Appellant
(Plaintiff)

And

Rafe Mair and
WIC Radio Ltd.

Respondents
(Defendants)

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Thackray

L. W. Potter — Counsel for the Appellant

D. W. Burnett — Counsel for the Respondents

Place and Dates of Hearing: Vancouver, British Columbia
15th and 16th December, 2005
and 14th February, 2006

Place and Date of Judgment: Vancouver, British Columbia
13th June, 2006

Written Reasons by:
The Honourable Madam Justice Southin

Concurred in by:
The Honourable Mr. Justice Thackray

Concurring Reasons by:
The Honourable Madam Justice Prowse (P. 29, para. 49)

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] When there is a sea change in the accepted wisdom of a society, those who have adhered to the attitudes of the past, what I call the "old wisdom", in a very short space of time may find themselves denigrated by adherents of the new wisdom.

[2] In the case at bar, the old wisdom, represented by the plaintiff, was that homosexuality was a sin – see the Book of *Genesis*, King James version, 13:13, 18:20, 19:24 and 19:25 – and a criminal offence – see the ***Criminal Code of Canada***, which came into force on the 1st July, 1893, ss. 174 and 178, and the Taschereau edition of the ***Code*** of 1893 (Toronto: Carswell, 1980 reprint) at pp. 116-117, and see also ***R. v. Lupien***, [1970] S.C.R. 263.

[3] The new wisdom, represented by the defendant, Mair, is that homosexual conduct is not only not a sin (it has ceased to be a crime), but also that no distinction should be drawn in any aspect of society between homosexual and heterosexual relationships.

[4] There are reasonable arguments, by which I mean arguments founded in reason, on both sides. Which side is right (if, in such a contention, there is a right side) is a judgment best left to history.

[5] The issue for the learned judge below and for this Court is whether the denigration of the plaintiff, here the appellant, by the defendant, Mair, here a respondent, a denigration which the learned judge found to be defamatory, is protected, as the learned judge also found, by the defence of fair comment, a defence which brings into play a clash between the right of a citizen to his or her reputation and the right of free speech.

The Publication in Issue

[6] On 25th October, 1999, the respondent, Mair, and hereafter when I speak of the respondent, I mean Mr. Mair unless the context requires otherwise, broadcast on the radio station of the respondent, WIC Radio Ltd., which had a substantial listening audience in and about the Lower Mainland of British Columbia, these words:

> RAFE MAIR: And a very pleasant Monday, the 25th of October [1999]. Around the province of British Columbia on the WIC network I'm Rafe Mair broadcasting from the Pacific Centre in downtown Vancouver.
>
> I really hate to give Kari Simpson any more publicity, something she soaks up like a blotter, but she's become such a menace I really think something must be said. When I first knew Kari some 8 or 9 years ago she was involved in helping families whose children had been wrongfully taken by the authorities. She and I did a number of programmes on this, and this programme was nominated for a Michener Award as a consequence. Even more importantly the Ombudsman looked into the matter and changes were made. I felt very good about what Kari had done -- she'd done excellent work -- and what I'd been able to do by way of giving it some publicity. We worked together on other matters until it gradually became apparent to me that Kari was starting to become a little too uncritical of the causes she was taking. We both went overboard in the case of a lawyer's complaints against authorities. Although there was something in what he said, he went too far and he had to apologize. Then Kari got involved in a case where a Langley family didn't want their daughter to be forced to take essential medical treatment and the child died. There were other

cases, one involving Munchausen's Syndrome, where Kari not only defied authority -- nothing wrong with that -- but she began to quarrel with experts, not based on another expert's opinion but on her own, offering as her qualifications that she was a mom. I began to wonder what had happened. Instead of well researched opinions Kari was now proceeding from a semi-religious base, and it was not long before the gay community was in her sights. The next thing I knew an editorial of mine stating my belief in the civil liberties of all including gays brought a letter from her claiming that I was in favour of grown men molesting young boys. To say the least I was taken aback, and after demanding an apology and not getting one told my producers that I no longer wish to have anything to do with her. Now, part of that I admit was personal. Who wouldn't be mortified of being accused of supporting paedophilia but most of it was that I could no longer trust her judgment, and I certainly couldn't judge what she presented as fact.

Then Kari got involved in the recall effort against Paul Ramsey in Prince George -- Kari lives in Langley -- on the basis that he was soft on the gay issue in the Surrey school system, those two harmless or three harmless books that the School Board and some of the parents had set their hair on fire all about. By this time in my view Kari had become unbalanced on the subject. I could only conclude and it's still my opinion that once her organization got a little bigger and got some funds it went to Kari's head, but that's just what I think. Whatever, she's become more than just a little hung up on gays in the school system and more than just a little disingenuous when she claims that she doesn't really have anything against homosexuals. [1] This latest business in Surrey is a disgrace. That parents would start taking children out of school because the teacher is a gay is beyond my comprehension. [2] Everyone that I know had a gay teacher somewhere along the line. I had two that I know of. One was a man and he was a good teacher, no more nor less than that, but his sexual preferences had no impact whatever on either of us. The other, even though she is long dead, I will simply call Miss L. Miss L. was my music teacher in grades 3 and 4 and she was superb. I learned to read music at that young age thanks to her. What is fascinating about Miss L. was that in those days, the early 40's, she was living in an open lesbian relationship, unheard of and more than just a bit courageous and was bringing up a young boy who eventually became a distinguished professional having a happy married life and family. I didn’t know Miss L. was a lesbian then although I did by the time I was in junior high school, and I can tell you she's one of three or four teachers I've had who had a profoundly positive effect on my learning. I tell you this because I don’t think there are very many of you listening who didn’t have a gay teacher somewhere, whether you knew it or not.

[3] Before Kari was on my colleague Bill Good’s show last Friday I listened to the tape of the parents' meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots who with increasing shrillness would harangue the crowds. For Kari’s homosexual one could easily substitute Jew. I could see Governor Wallace -- in my mind's eye I could see Governor Wallace of Alabama standing on the steps of a schoolhouse shouting to the crowds that no Negroes would get into Alabama schools as long as he was governor. It could have been blacks last Thursday night just as easily as gays. [4] Now I’m not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really -- in the speeches, when you think about it and look back -- neither did

> Hitler or Governor Wallace or [Orval Faubus], or Ross Barnett. They were simply declaring their hostility to a minority. Let the mob do as they wished.
>
> [5] As I listened to Kari Simpson I wondered about her, but I also wondered what was the matter with those parents, and my colleague Bill Good said it all on Friday when he said he'd far rather have a competent gay teacher teach his kids than a vicious gay-basher. [6] Don't make any mistake on this score. There is no distinction between condemning the rights of blacks or Jews and condemning the civil rights of homosexuals. Whether she realizes it or not, Kari has by her actions placed herself alongside skinheads and the Klu Klux Klan. I'm not talking [about] the violent aspects of those groups but the philosophical parallels to other examples of intolerance.
>
> [7] What's next on the agenda in Surrey? Will there be a 1999 version of the Scopes trial in Tennessee in the 20's where after the legal fight of the century between William Jennings Bryan and Clarence Darrow, a teacher named John Scopes was found guilty of teaching evolution? Or will it get even nastier with someone suitably impressed with the wisdom of Kari's rantings deciding to take the law into his own hands and do God's work? [8] We all live under the law, my friends, and we live under a law which guarantees everyone rights, whatever their race, creed, sex, marital status or sexual preference, and the tactics of the bigot are the same no matter what the object of their venom happens to be. Kari Simpson is not a violent person. I in no way compare her to the violent people in the past that I spoke of and alluded to. The trouble is people who don't want violence often unwittingly provoke it, and [9] Kari Simpson is thank God permitted in our society to say exactly what she wishes, but the other side of the free speech coin is a public decent enough to know a mean-spirited, power mad, rabble rousing and, yes, dangerous bigot when they see one.

[The numbers in square brackets are not in the exhibit. I have inserted them in order that the reader can follow the allegations in the amended statement of claim below.]

[7] On 17th November, 1999, the appellant brought this action, alleging in her amended statement of claim:

> 4. On Monday, October 25, 1999, commencing shortly after 8:30 a.m., the Defendants broadcast and published the Rafe Mair Program including an initial editorial segment of several minutes during which Mair made certain defamatory statements of and concerning the Plaintiff which have been transcribed and are set forth in Schedule "A" to this Statement of Claim.
>
> 5. Mair's statements in Schedule "A" were false and malicious at the time that they were made and broadcast, and they remain wholly false, and they were defamatory in that they meant and were understood to mean that:
>
> (a) In a speech to the parents of certain Surrey elementary school children and others on October 21, 1999, the Plaintiff had advocated or was generally in favour of the parents taking their children out of school because the children's teacher was gay;
> *Ref. Schedule "A", paragraph 1 and the general tenor of Schedule "A"*
>
> (b) The Plaintiff had harangued the parents in the manner of former Alabama

Governor George Wallace "standing on the steps of a schoolhouse shouting to the crowds that no nigras would get into Alabama schools as long as he was Governor", with the implication that the Plaintiff advocated keeping gay people out of Surrey's public schools;
Ref. Schedule "A", paragraph 3

(c) The Plaintiff had declared herself hostile toward gay people in the manner of Adolf Hitler and other southern U.S. Governors known to be racist – not proposing a holocaust or violence – but nevertheless declaring hostility to a minority and letting the mob do as it wished, with the implication that the Plaintiff was hostile toward gay people to the point that she would condone violence toward gay people;
Ref. Schedule "A", paragraph 4

(d) The Plaintiff had condemned the civil rights of gay people and has by her actions "placed herself along side skinheads and the Klu Klux Klan", with the implication that she preaches hatred against gay people;
Ref. Schedule "A", paragraph 6

(e) The Plaintiff rants against gay people in a way that would influence someone to take the law into his own hands and do harm to gay people;
Ref. Schedule "A", paragraph 7

(f) "And the tactics of the bigots are the same no matter what is the object of their venom", with the implication that the Plaintiff would employ tactics against gay people similar to the tactics employed by Hitler and other bigots named in Schedule "A";
Ref. Schedule "A", paragraph 8

(g) There is a "public decent enough to know a mean spirited, power-made, rabble rousing and dangerous bigot when they see one", with the implication that the Plaintiff is a dangerous bigot apt to cause harm to gay people.
Ref. Schedule "A", paragraph 9

6. Mair's statements in Schedule "A" also conveyed the defamatory message that the Plaintiff was generally intolerant of gay people and their lifestyles and opposed the teaching of tolerance of homosexual lifestyles in public schools. Although she maintains that she holds no such attitude or belief, the Plaintiff does not complain about the statements on those grounds, and she restricts her complaint to the defamatory meanings alleged in paragraph 5 hereof.

7. The defamatory statements were made in the context of the whole of the Rafe Mair Program on October 25, 1999 and also previous Rafe Mair Programs, including December 8 and 11, 1997, May 8, 1998 and others, where Mair made insulting and defamatory remarks about the Plaintiff portraying her falsely as bigoted and anti-gay, and where Mair afforded time to others on his program to make similar remarks which the Defendants expressly or impliedly adopted as their own. The Plaintiff intends to rely on all such other remarks by Mair and others on his Rafe Mair Programs to prove the defamatory meaning of the words complained of in Schedule "A" hereto and the Defendants' malice in publishing those words.

8. The Defendants have republished the defamatory statements by producing transcripts of the Rafe Mair programs referred to in this Statement of Claim and circulating them to the public by means including mail, fax and internet communication.

9. In a letter dated October 28, 1999, the Plaintiff through her solicitors demanded an apology and retraction of the defamatory words set forth in Schedule "A" but the Defendants gave no retraction or apology.

10. The defamation conveyed by the words in Schedule "A" was actuated by the Defendants' express malice in that, among other things:

(a) The Defendants failed to investigate the facts underlying their defamatory allegations in spite [of] having been advised that their allegations were wrong, and, or alternatively, ignored information proving that their allegations were wrong;

(b) By his language, tone of voice and characterizations, Mair displayed personal animosity toward the Plaintiff and contempt for her character;

(c) Mair's comparisons of the Plaintiff to certain notorious and reviled persons such as Hitler, skinheads and members of the Klu Klux Klan were calculated to excite in the public mind a very strong revulsion toward the Plaintiff;

(d) Mair resented the Plaintiff personally for having spoken on another open line radio program on an occasion in March, 1997 prior to appearing on the Rafe Mair Program;

(e) Mair resented the Plaintiff for having written a letter to him on or about March 28, 1997, part of which he construed (wrongly) to allege that he was a supporter of pedophilia, and he had been seeking to punish her for that;

(f) The defamatory statements were repetitious of previous malicious and defamatory statements published by the Defendants in a similar vein about the Plaintiff, indicating an ongoing desire by the Defendants to do harm to the Plaintiff's reputation;

(g) The Defendants declined to correct, retract or apologize after receiving a demand for an apology, and instead they circulated transcripts of the programs which defamed the Plaintiff and they broadcast comments of Mair on subsequent programs in which Mair expressed no regret for the statements, and which falsely and maliciously reinforced to the public the impression that the original defamatory statements about the Plaintiff were true and justified when in fact they were not;

(h) The Defendants strive to maintain a reputation for controversy in broadcasting comments on current affairs thereby attracting the largest possible audience and improving ratings for the Rafe Mair program in

> the radio market, which in turn generates increased advertising revenue and increased profits, which both Defendants then share, directly or indirectly. The statements in Schedule "A" were calculated to create such controversy, and thereby enhance ratings and profits, even though as a matter of fact there was no foundation for any controversy in regard to integrity and good character.
>
> 11. In publishing and republishing these false, malicious and defamatory statements, the Defendants have caused irreparable harm and damage to the Plaintiff in her reputation, bringing the Plaintiff into public scandal, odium and contempt, and as a further result, the Plaintiff has suffered loss of income, a general ability to earn a living and earn future income, and special damages.
>
> 12. The Plaintiff also claims aggravated damages in that she has suffered a loss of dignity, esteem and reputation as well as humiliation and fear of reprisals resulting from the conduct of the Defendants and each of them.
>
> 13. The Plaintiff pleads the provision of the *Libel and Slander Act* R.S.B.C. 1979 Chapter 234 and amendments thereto.
>
> WHEREFORE THE PLAINTIFF CLAIMS:
>
> (a) An injunction restraining the Defendants by themselves, their agents, servants or otherwise from publishing of or concerning the Plaintiffs [sic] the alleged or any similar libel;
> (b) general damages;
> (c) special damages;
> (d) aggravated damages;
> (e) punitive damages;
> (f) interest pursuant to the *Court Order Interest Act* R.S.B.C. 1979, Chapter 76 and amendments thereto;
> (g) special costs, and
> (h) costs;
> (i) Such further and other relief as this Honourable Court shall deem meet and just.

[8] Why the appellant pleaded express malice in the statement of claim, I do not know. To do so is a classic example of leaping before one comes to the stile. See ***Pressler v. Lethbridge*** (2000), 86 B.C.L.R. (3d) 257 at 287. Express malice is better left for reply.

[9] For his part, the respondent pleaded in part:

> 1. Except where expressly admitted, the Defendants deny every allegation in the Amended Statement of Claim (the "Claim").
>
> 2. The Defendants admit Mair hosts a talk show on radio station CKNW, which is owned and operated by WIC Radio Ltd.
>
> 3. The Defendants say the excerpts from the October 25, 1999 Rafe Mair Show editorial, attached to the Claim as Schedule "A" (the "Words Complained Of")

are substantially accurate but incomplete. For context, the Defendants rely upon the entire editorial of October 25, 1999.

4. The Defendants deny the Words Complained Of bore the meanings alleged or any meaning defamatory of the Plaintiff.

5. Further and in the alternative, the Defendants say, in respect of the alleged meanings in paragraph 5 of the Claim:

    a) As to paragraph 5(a) of the Claim, the words referred to unnamed Surrey parents only and not the plaintiff. In the alternative, even if the words implied that the plaintiff supported a parent's decision to remove a child from the classroom of a gay teacher in one highly publicized case (the "Chamberlain" case), which is the worst meaning the words could bear, such an implication was true.

    b) As to paragraph 5(b) of the Claim, it was true that the plaintiff addressed the crowd in a zealous and haranguing manner, but the words did not mean and the defendants do not say herein that the plaintiff advocated keeping gay people out of schools.

    c) As to paragraphs 5(c), (d), (e), (f) and (g) of the Claim, the words did not mean and the defendants do not say herein that the plaintiff advocated violence or hatred. In the alternative, even if the words implied that the plaintiff's advocacy of intolerance toward gay lifestyles was dangerous in the sense that it could unintentionally incite others to advocate violence or hatred against gay people, which is the worst meaning the words could bear, such meaning was true.

6. Further and in the alternative, the following particularized words are fair comment, in good faith, and without malice upon true facts and upon a matter of public interest, namely intolerance of homosexual lifestyles:

    a) Paragraph 1 of the Words Complained Of in its entirety;

    b) Paragraph 3 of the Words Complained of, from the words "Kari harangued the crowd." to the end of the paragraph; and

    c) Paragraphs 4 through 9 of the Words Complained of in their entirety.

7. Particulars of the facts and matters expressed or understood upon which the comment was based are as follows:

    a) In response to a prior editorial by Mair encouraging tolerance towards homosexual lifestyles, the Plaintiff sent Mair an angry letter making it clear she disapproved of his opinion in that regard;

    b) The Plaintiff was publicly critical of the Honourable Paul Ramsay [sic], who was then the Minister of Education, Skills and Training, for his support for teaching tolerance towards homosexual lifestyles in

schools;

c) The Plaintiff publicly supported the campaign to recall Mr. Ramsay from public office for, among other things, his support for teaching tolerance of homosexual lifestyles in school;

d) On October 21, 1999, the Plaintiff attended a protest in Surrey over a ruling that the removal of a certain child from a gay teacher's class was discriminatory (the "Chamberlain Case"), and the Plaintiff addressed the crowd in a zealous and haranguing manner, encouraging the protesters to make their voices heard;

e) It was widely understood and reported that the Plaintiff is a leader of the Citizens Research Institute ("CRI"), which opposes teaching tolerance of homosexual lifestyles in schools, and promoted a "Declaration of Family Rights", for parents to notify schools that their children must not be "exposed to and/or involved in any activity or program [which] discusses or portrays the lifestyle of gays, lesbians, bisexual and/or transgendered individuals as one which is normal, acceptable or must be tolerated."; and

f) It was widely understood and reported that the Plaintiff publicly supported the Surrey School Board's decisions in the disapproval of books depicting same sex parents and in the Chamberlain Case.

g) It was widely understood and reported that the Plaintiff publicly promoted intolerance of gay lifestyles, and that members of the gay community or those concerned about intolerance toward gays had publicly expressed concerns that such promotion of intolerance was dangerous in the sense that it could incite others toward "gay bashing", hatred or violence against gays notwithstanding the Plaintiff's peaceful intentions.

8. Further and in the alternative, the Words Complained Of are protected by the defence of qualified privilege arising from the legitimate common duty and interest between Mair and his listeners in providing and receiving information and opinions about tolerance of homosexual lifestyles and in answering and discussing public statements by the Plaintiff on the subject.

9. Further and in the alternative, the Words Complained Of are protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*, and any law imposing tort liability for them is of no force or effect unless the law requires that the Plaintiff prove that the Words Complained Of were false; that they caused damage; and that the Defendants were guilty of malice or alternatively negligence, all of which are denied and the Plaintiff is put to the strict proof thereof.

10. In the alternative, if the Plaintiff is entitled to damages, which is denied, the Defendants say such damages should be limited to contemptuous or nominal damages on the grounds that the Plaintiff, through her own public statements

> and actions, has willingly and successfully given herself a widespread general reputation for promoting intolerance of homosexual lifestyles and opposing the teaching of tolerance of homosexual lifestyles.
>
> WHEREFORE the Defendants ask that the Plaintiff's action be dismissed with costs and special costs.

[10] The appellant did not deliver a reply.

The Pleadings

[11] Because the pleadings may be critically important in an action for defamation, I propose, before coming to the learned trial judge's reasons, to comment on these pleadings. As to how critical pleadings can be, those who engage in this branch of the law might consult ***Plato Films, Ltd. v. Speidel***, [1961] 1 All E.R. 876 (H.L.), albeit an action very different from the case at bar.

[12] In this context, I am reminded of the comment of Russell L.J., later the third Lord Russell of Killowen, who had come to the Court of Appeal from the Chancery Division, in ***Broadway Approvals, Ltd. v. Odhams Press, Ltd.***, [1965] 2 All E.R. 523 at 540 (C.A.):

> To the comparative newcomer, the law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels.

[13] The statement of claim, by paragraph 5, pleads false innuendoes only.

[14] There is no plea responding to the requirement of Rule 19(12)(a), which addresses true innuendoes:

> (12) In an action for libel or slander,
>
> (a) where the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff shall give particulars of the facts and matters on which the plaintiff relies in support of that sense, ...

[15] This provision, first introduced in British Columbia by the 1961 revision of the ***Supreme Court Rules***, was borrowed from the English Rules. Its history is addressed fully in the arguments of counsel in ***Lewis v. Daily Telegraph Ltd.***, [1964] A.C. 234 (H.L.). Although the judgments in that case may be also found in [1963] 2 All E.R. 151, the arguments of counsel are not there reported.

[16] To illustrate the difference between a false innuendo and a true innuendo, I shall pick a rather fanciful illustration. If A writes in a gossip column that Bill Jones and Jane Smith were seen having a drink or two in the bar at the X Hotel, the words in their ordinary meaning convey no defamatory sting. But to those who know that Jones is an obstetrician who has Jane Smith as his patient, there is, indeed, a defamatory implication. Thus, if, in fact, Dr. Jones was having a drink not with Jane Smith but with his wife, who bears some resemblance to Jane Smith, and he sues, he must plead both that he is an obstetrician and that Jane Smith is his patient. Perhaps he should also plead that he is a married man, although it may be that today to write that a married man was having a drink with someone other than his wife is not defamatory.

[17] In the case at bar, the problem lurking beneath the surface is in the words "ordinary meaning" because particular words may convey different meanings to different people.

[18] In two respects that is so here.

[19] First, when, as here, the speaker employs historical allusions, the sting of the libel, if indeed there is a libel, is in the allusion. A young person, with a very limited knowledge of the history of the world from 1914 to 1945, may think that to refer to the appellant in the same breath as Hitler is not very nice, but to someone with an extensive knowledge of history, such an allusion may evoke, among other horrors, the events described in this passage of William Shirer's *The Rise and Fall of the Third Reich* (New York: Simon and Schuster, 1960) at 430:

> THE WEEK OF THE BROKEN GLASS
>
> In the autumn of 1938 another turning point for Nazi Germany was reached. It took place during what was later called in party circles the "Week of the Broken Glass."
>
> On November 7, a seventeen-year-old German Jewish refugee by the name of Herschel Grynszpan shot and mortally wounded the third secretary of the German Embassy in Paris, Ernst vom Rath. The youth's father had been among ten thousand Jews deported to Poland in boxcars shortly before, and it was to revenge this and the general persecution of Jews in Nazi Germany that he went to the German Embassy intending to kill the ambassador, Count Johannes von Welczeck. But the young third secretary was sent out to see what he wanted, and was shot. There was irony in Rath's death, because he had been shadowed by the Gestapo as a result of his anti-Nazi attitude; for one thing, he had never shared the anti-Semitic aberrations of the rulers of his country.
>
> On the night of November 9-10, shortly after the party bosses, led by Hitler and Goering, had concluded the annual celebration of the Beer Hall Putsch in Munich, the worst pogrom that had yet taken place in the Third Reich occurred. According to Dr. Goebbels and the German press, which he controlled, it was a "spontaneous" demonstration of the German people in reaction to the news of the murder in Paris. <u>But after the war, documents came to light which show how "spontaneous" it was. They are among the most illuminating – and gruesome – secret papers of the prewar Nazi era</u>.
>
> * * *
>
> It was a night of horror throughout Germany. Synagogues, Jewish homes and shops went up in flames and several Jews, men, women and children, were shot or otherwise slain while trying to escape burning to death. A preliminary confidential report was made by Heydrich to Goering on the following day, November 11.
>
> > The extent of the destruction of Jewish shops and houses cannot yet be verified by figures . . . 815 shops destroyed, 171 dwelling houses set on fire or destroyed only indicate a fraction of the actual damage so far as arson is concerned . . . 119 synagogues were set on fire, and another 76 completely destroyed . . . 20,000 Jews were arrested. 36 deaths were reported and those

> seriously injured were also numbered at 36. Those killed and injured are Jews. . . .
>
> The ultimate number of murders of Jews that night is believed to have been several times the preliminary figure.
>
> [Emphasis mine.]

[20] The Final Solution followed but a few years later.

[21] All was foreshadowed in *Mein Kampf*, first published in Germany in the mid-1920's, and in a complete English translation in 1939 (New York: Reynal & Hitchcock). Whatever Hitler did or did not say in his speeches, with which the respondent asserts a familiarity in [4] of the transcript of the broadcast, the virulence of his anti-Semitism, as disclosed by *Mein Kampf*, was a clear call to violence. One passage, at pp. 824-827, makes this point:

> This slickness of the Jews in diverting public attention from themselves, and involving it somewhere else, can also be studied again today.
>
> In the year 1918 there was absolutely no systematic anti-Semitism. I still recall the difficulties which one ran into the minute one used the word Jew. One met either a dumb stare or experienced the most violent opposition. Our first endeavors to show the real enemy to the public then seemed almost hopeless and only very slowly did things begin to turn for the better. As unsuccessful as the 'Guard and Ward League' was, its service in having again *broached the Jewish question* as such was, nevertheless, great. In any event, in the winter of 1918-19 something like *anti-Semitism* began slowly to take roots. Later, of course, the National Socialist movement drove the Jewish question to the fore in an entirely different way. It achieved, above all, the raising of this problem out of the narrowly restricted circles of little and big *bourgeois* strata, and its transformation into a compelling motive of a great nationalist movement. Hardly, however, had the great unifying idea of struggle on this question been given to the German people than the Jew also moved to counter-attack. He seized on his old weapon. With amazing speed he threw into the folkish movement the arsonous torch of bickering. As the situation was then, the only chance of occupying public attention with other problems and thus stemming the concentrated assault on Jewry lay in opening up the *Ultramontane question*, and in the mutual clash of *Catholicism* and *Protestantism* arising from it. Those who flung this question among our people sinned against it in a manner for which they can never make amends. The Jew, in any event, achieved the desired goal: Catholics and Protestants were merrily at war with one another, and the deadly enemy of Aryan humanity and of all Christendom laughed up his sleeve.
>
> Just as the Jew was once able to occupy public opinion with the struggle between federalism and centralization, and thus undermine it, while he sold out the national freedom and betrayed our fatherland to international high finance, so he was again able to loose a storm between the two German denominations, while the foundations of both were eaten away and undermined by international world Jewry.
>
> Let the desolation which Jewish hybridization daily visits on our nation be clearly seen, this blood-poisoning that can be removed from our body national only

> after centuries or nevermore; let it be pondered, further, how racial decay drags down, indeed often annuls, the final Aryan values of our German nation, so that our force as a culture-bearing people is visibly more and more in retreat and we run the great danger of ending up, at least in our great cities, where southern Italy already is today. This infection of our blood, which hundreds of thousands of our people overlook as though blind, is, moreover, promoted systematically by the Jews today. Systematically these black parasites of the nations ravish our innocent young, blonde girls and thus destroy something that can never again be replaced in this world. Both, yes, both Christian denominations regard with indifference this desecration and annihilation of a noble and unique race to whom the earth was given by the grace of God. What is important for the earth's future is not whether Protestants vanquish Catholics or Catholics vanquish Protestants, but whether Aryan humanity maintains itself or dies out.

[22] Secondly, the Parliament of Canada enacted in, if I recall correctly, 1985, this provision of the ***Criminal Code***:

> **319.** (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (*b*) an offence punishable on summary conviction.
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (*b*) an offence punishable on summary conviction.
>
> (3) No person shall be convicted of an offence under subsection (2)
>
> (*a*) if he establishes that the statements communicated were true;
>
> (*b*) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
>
> (*c*) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
>
> (*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

[23] The publication in issue is open to the construction in the mind of an ordinary listener who does not understand the subtleties of the criminal law on *mens rea* that the respondent was accusing the appellant of a criminal offence. But if the listener is unaware of the text of the ***Criminal Code***,

can the words be said to convey such a meaning to him?

[24] Counsel before us did not address whether the appellant ought to have observed Rule 19(12)(a) in the circumstances of this case. Therefore, I need say nothing more about it except to warn those who go into the minefield that is the law of libel that attention should be paid to this rule.

The Reasons for Judgment

[25] The learned judge found that the words were capable of a defamatory meaning, a question on a trial by judge and jury for the judge, and were defamatory, a question for the jury on a trial by judge and jury. In her reasons for judgment, 31 B.C.L.R. (4th) 285, 2004 BCSC 754, the learned judge said:

> [30] In taking the editorial as a whole and considering both the allusions and direct comparisons of the plaintiff to such figures and organizations associated in modern minds solely with violent, genocidal and irrational hatred towards others; then suggesting that such a comparison does not mean that the plaintiff is herself violent, does not take away from the reasonable meaning of all of the words that the plaintiff would condone violence. This is particularly so, when the editorial, after comparing Simpson to Hitler, Wallace, Faubus or Barnett specifically said the following: "Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence, but neither, really in the speeches when you think about it and look back were Hitler or Wallace or Orval Faubus, or Ross Barnett, they were simply declaring their hostility to a minority, let the mob do as they wished."
>
> [Emphasis mine.]

In other words, the learned judge, by necessary implication, accepted the plea of the appellant in paragraph 5(c) of the statement of claim and rejected the plea of the respondents in paragraph 5(c) of the statement of defence.

[26] I would have thought, myself, the "sting", despite the respondent's disclaimers, by his invoking Hitler and the Klu Klux Klan, was, among those listeners who had some knowledge of history, to be that the appellant was inciting, not merely condoning, violence.

[27] As the respondent does not argue that the learned trial judge erred in her finding quoted by me in paragraph 25, I need not engage in a discussion of when an appellate court may interfere with a finding, whether by a judge on a trial by judge alone or by a jury on a trial by judge and jury, that the words are, or are not, defamatory.

[28] But I think it is worth repeating, in the hope that perhaps some of those engaged in defamation actions will understand how the law came to be as it is on this point, the explanation by Diplock L.J. in ***Slim v. Daily Telegraph, Ltd.***, [1968] 1 All E.R. 497 at 505, where he addresses the problem which arises in a newspaper publication since, of course, some readers may understand the words in one sense and other readers may understand them in another sense:

> Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as

> bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is "the natural and ordinary meaning" of words in an action for libel.
>
> The adjudicator, whose opinion as to the meaning of words is decisive for the purposes of libel, used to be the judge; and he was accustomed to the techniques of construction which lawyers employ to ascertain the "right" meaning of words; but Fox's Libel Act, 1792 [32 Geo. 3 c. 60; 13 Halsbury's Statutes (2nd Edn.) 1120] was to alter that. The Act of 1792 itself dealt only with criminal libels in which the issue as to the meaning of words was less complex than in civil actions. In a criminal prosecution all that was necessary to determine was whether the words bore *any* meaning defamatory of the persons to whom they referred. It was not necessary to distinguish between one defamatory meaning and another; and so the effect of Fox's Act, which made the jury the adjudicators as to the meaning of words, could be accurately described as: "Libel or no libel is a question for the jury." A consequence of Fox's Act, however, was that the courts in course of time transferred from judge to jury the function of acting as adjudicator as to the meaning of words in civil actions for libel as well as in criminal prosecutions. In this as in other forms of civil actions, however, the jury as adjudicators were subject to judicial control. If the jury's decision as to the meaning of words could be demonstrated to be perverse, as for instance where the court was of opinion that no twelve reasonable [men] could have ascribed any defamatory meaning to the words, the court could set aside the verdict; or if a particular defamatory meaning submitted to the jury by the plaintiff as being the "right" meaning was one which, in the judge's opinion, it would be perverse of the jury to accept, he could rule that the words were not capable of bearing that meaning and direct the jury to reject it (*Lewis v. Daily Telephone, Ltd.* [[1963] 2 All E.R. 151; [1964] A.C. 234]).
>
> The exercise of this kind of control over juries in libel actions involved acknowledging that different men would not be unreasonable in ascribing different meanings to the same words. Hence the distinction between defamatory meanings which words are capable of bearing and *the* particular defamatory meaning which, for the purposes of the tort of libel, they bear. The decision as to defamatory meanings which words are capable of bearing is reserved to the judge, and for this reason, and no other, is called a question of law. The decision as to *the* particular defamatory meaning within that category which the words do bear is reserved to the jury, and for this reason, and no other, is called a question of fact.
>
> [Emphasis mine.]

[29] The learned judge then turned to the defence of fair comment asserted in paragraphs 6 and 7 of the statement of defence.

[30] In such circumstances, the first question is whether the facts said to be true by the respondent in paragraph 7 were, in fact, true. The reader will note that eight times, in paragraph 7, the draftsman has used the word "tolerance" and related words. Some definitions from *The Shorter Oxford English Dictionary*, 3d ed., are instructive as to what he meant:

> **Tolerance** ... **2.** ... the disposition to be patient with the opinions or practices of others; forbearance; catholicity of spirit....

> **Tolerate** ... **2.** To allow to exist or to be done or practised without authoritative interference or molestation; ... to allow, permit 1533. **3.** To bear without repugnance; to allow intellectually, or in taste, sentiment, or principle; to put up with 1646.

[31] On this point, the learned judge concluded:

> [61] In summary on this point then, the defence has established that every element of the factual foundation was either stated or publicly known; that Mair was aware of them all; and that they were all substantially true in the sense that they were true in so far as they go to the pith and substance of the opinion Mair expressed.

[32] The learned judge then found that the issues addressed were a matter of public interest, saying:

> [63] The scope of public interest is very broad, and the case law in this regard is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews. There can be no doubt that the question of tolerance, discrimination, and the place for discussion of homosexuality in public schools are certainly matters of public interest.

[33] The learned judge then asked herself, "Were Mair's statements honestly held?":

> [64] Certainly, Mair throughout his testimony emphasized over and over again how honestly he held beliefs consistent with what he said in the editorial.
>
> [65] Mair testified he was deeply concerned about all forms of intolerance. The issue here is what evidence could there be that Mair does not honestly believe what he stated in the editorial.
>
> [66] The plaintiff has not challenged the honesty of Mair's belief. And since honest belief does not require that the belief be reasonable nor fairly stated or right nor held by a majority or even a minority of others, there is no actual basis upon which to challenge that Mair did honestly believe what he said.

Issues on the Appeal

[34] The appellant alleges these errors in judgment:

> 34. The Learned Trial Judge failed to apply the test of honest belief in the defamatory imputation.
>
> 35. The Learned Trial Judge failed to consider evidence from Mair inconsistent with an honest belief by Mair in the words complained of in the editorial.
>
> 36. The Learned Trial Judge erred in law in holding that WIC did not have to establish its honest belief in the editorial where it relied upon the defence of fair comment.

37. The Learned Trial Judge erred in law in relying on Mair's honestly held opinion to defeat actual malice.

[35] For their part, the respondents pose the issues thus:

8. Should the Court interfere with the conclusion of the Learned Trial Judge that Mair honestly believed the views he expressed?

9. Should this Court interfere with the conclusion of the Learned Trial Judge that Mair's dominant purpose in publishing the editorial was not malice?

10. Did the Learned Trial Judge err in holding that WIC is entitled to succeed in the defence of fair comment so long as the speaker of the words establishes the elements of the defence?

[36] Thus, what is not in issue on this appeal is whether the learned judge erred in her finding in paragraph 30 of her reasons, quoted *supra*.

Analysis

[37] The first error alleged by the appellant raises this question: Is it the law that to succeed in the defence of fair comment, the defendant must honestly believe in the imputation, or technically the "false" innuendo, found by the trier of fact, or need he only have an honest belief in what he himself subjectively intended by the words which he used?

[38] As I understand the evidence, the respondent intended to convey simply that the appellant is an intolerant bigot. If that had been all he said, he would be entitled to succeed because the respondent does so believe, founded on the facts set out in paragraph 7 of the statement of defence; it is, of course, irrelevant in a plea of fair comment whether the trier of fact is or is not of the same opinion.

[39] In support of her submission on the first error alleged, counsel for the appellant cited:

Cherneskey v. Armadale Publishers Ltd., [1979] 1 S.C.R. 1067, per Martland J. (Laskin C.J. and Beetz J., concurring), at pp. 1072-1073 and per Ritchie J. (Laskin C.J. and Pigeon and Pratte JJ., concurring) at pp. 1079, 1080-1081.

Bains v. Indo-Canadian Times Inc., [1995] B.C.J. No. 541 (Q.L.) (B.C.C.A., per Donald J.A. for the Court, at paras. 25-26).

and

Vander Zalm v. Times Publishers Ltd., [1980] B.C.J. No. 1391 (Q.L.) [109 D.L.R. (3d) 531] (B.C.C.A., per Nemetz C.J.B.C., at paras. 10 and 12 and per Hinkson J.A. at para. 46).

[40] I do not find these authorities particularly helpful on the question as I have posed it. But, in ***Reynolds v. Times Newspapers Ltd.***, [1999] 4 All E.R. 609, the point was mentioned, albeit *in dicta*, by Lord Nicholls, at 615:

> Traditionally one of the ingredients of this defence is that the comment must be fair, fairness being judged by the objective standard of whether any fair-minded person could honestly express the opinion in question. Judges have emphasised the latitude to be applied in interpreting this standard. So much so, that the time has come to recognise that in this context the epithet 'fair' is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 2 All ER 516 at 518, [1958] 1 WLR 743 at 747.
>
> It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere. Further, to be within this defence the comment must be recognisable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made: see the discussion in *Duncan and Neill on Defamation* (2nd edn, 1983) pp. 58-62.
>
> One constraint does exist upon this defence. The comment must represent the honest belief of its author. If the plaintiff proves he was actuated by malice, this ground of defence will fail.
>
> [Emphasis mine.]

[41] In the context of this case, I do not find it necessary to address whether Lord Nicholls went too far in saying that fairness has nothing to do with it.

[42] In ***Jones v. Skelton***, [1963] 1 W.L.R. 1362 at 1379-80, Lord Morris of Borth-y-Gest, for the Privy Council, said:

> If a plaintiff complains that words published of him are defamatory it may well be that the defendant will assert that some of his words constitute comments which are fair and which are based on facts which are truly stated and which are of public interest but that the plaintiff does not accept that any of the words complained of constitute or contain comment. It is then for the jury to decide as to what is fact and what is comment. Here again is the qualification that it is always for the judge to decide whether there is a case or an issue to go to the jury. Thus in *Turner v. M.G.M. Pictures Ltd.* [[1950] W.N. 83; 66 T.L.R. (Pt. 1) 342; [1950] 1 All E.R. 449, H.L.(E.)) Lord Porter said [[1950] 1 All E.R. 449, 461]: "if the communication were a statement of facts, and the facts were untrue, a plea of fair comment would not avail and it is for the jury in a proper case to determine what is comment and what is fact, but a pre-requisite to their right is that the words are capable of being a statement of a fact or facts. It is for the judge alone to decide whether they are so capable, and whether his ruling is right or wrong is a matter of law for the decision of an appellate tribunal." If, therefore, words are reasonably capable of being regarded as statements of fact or of being regarded as expressions of opinion it is for a jury to decide which they are. If words which are expressions of opinion or comment are capable of being regarded as

> unfair it is for a jury to say whether or not they are unfair. Accordingly, 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 plaintiff's overall burden of proving his case does not involve a duty of proving that comment (the existence of which he denies) is unfair.
>
> In practice these matters do not in their Lordships' view present difficulties. The pleadings in an action reveal the respective positive contentions which those who affirm them must establish even though the ultimate onus of establishing his case rests upon the plaintiff who brings the action. As to those questions which if they arise are for a jury to decide it is always for the court to rule as to whether a particular conclusion would be open to a jury. Accordingly, as has already been stated, the court rules as to whether words are or are not capable of bearing defamatory meanings: the court rules as to whether words are capable of being regarded as statements of fact or capable of being regarded as comments: in regard to comments the court rules as to whether it would be open to a jury to say that they were unfair or whether there is evidence of malice.

[43] Applying these authorities, I come to the conclusion that the learned judge's conclusion, both as judge and jury, as to the defamatory meaning of these words, excludes any further consideration of fair comment because there is no evidentiary foundation for a finding that the appellant would condone violence.

[44] It follows, therefore, that I would allow the appeal as against the respondent, Mair.

[45] The next question is whether the respondent, WIC Radio Ltd., is also liable.

[46] No argument was made to us that if the appeal was allowed against the respondent, Mair, it need not necessarily be allowed as against the respondent, WIC Radio Ltd. That being so, the appeal must also be allowed against it.

[47] The appellant did not seek, if this Court determined that the appeal should be allowed, an order from this Court fixing the damages. The appellant has asked, if the appeal be allowed, the matter be directed back to the learned trial judge for "an assessment of damages all with costs."

[48] I would therefore so order, although if upon reflection the parties determine that, for the saving of expense, this Court should fix the damages, I would not be averse to our doing so.

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Mr. Justice Thackray"

Reasons for Judgment of the Honourable Madam Justice Prowse:

[49] I have had the privilege of reading, in draft form, the reasons for judgment of Madam Justice Southin. I agree with her that the appeal in relation to Mr. Mair can be disposed of by reference to the issue raised in the first ground of appeal, as reframed by Madam Justice Southin at para. 37 of her reasons for judgment. I agree with Madam Justice Southin's analysis of this issue set forth at paras. 38-43 of her reasons for judgment and with her conclusion that the appeal should be allowed against both Mr. Mair and WIC Radio Ltd.

[50] I would, therefore, allow the appeal, set aside the order of the trial judge and remit the issues of damages and costs to the trial court, unless counsel agree to have those issues resolved by this Court by way of further submissions. I would award the appellant her costs of the appeal.

"The Honourable Madam Justice Prowse"