

# Expression v. Defamation - The Latest from the Supreme Court

Rafe Mair is known for being an outspoken, and sometimes courageously critical radio talk show host in Vancouver. This outspokenness resulted in an eight year legal battle with Kari Simpson, a religious activist with whom Mair engaged in a debate about the purpose and usefulness of introducing homosexual education into schools. Mair submitted an editorial comparing Simpson to Hitler, members of the KKK and Skinheads. She proceeded to bring an action in defamation against Mair and WIC Radio Ltd.

At trial, the judge held that although Mair's comments were defamatory, the "fair comment" defense provided a full defense and dismissed Simpson's action. The Court of Appeal reversed the trial judge's decision on the basis that Mair's comment that implied that Simpson condoned violence were unfounded, so the fair comment defense could not be used. The case was further appealed to the Supreme Court. On June 27th, 2008, the majority of the Supreme Court held that the trial judge's decision should be restored, ending the eight year battle successfully for Mair.

In their reasons, the Supreme Court expressed that there is a public interest in limiting the availability of defamation actions in favour of freedom of expression: The availability of the claim of defamation should not act as a deterrent for people expressing themselves, particularly in the media. Whether the defamation action succeeds or not, the prospect of having to partake in a lengthy legal struggle after the defamation claim has been made acts as such a deterrent, and unduly infringes on the freedom of expression. At the same time, the tort of defamation which protects peoples' dignity and worth is also important, bearing in mind that being offensive may be insensitive, but it is not illegal. The court therefore sought the correct balance to ensure that both freedom of expression and the tort of defamation remain intact.

In doing so, they outline the four elements of the fair comment test:

(a) the comment must be on a matter of public interest

(b) the comment must be based on fact

(c) the comment, though it can include inferences of fact, must be recognizable as a comment

(d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts.

The onus is on the defendant to prove these elements. If proven, the plaintiff can still succeed if he or she can show that the comment was made out of a subjectively malicious motive. If this cannot be made out, then the tort of defamation cannot succeed.

In this case, the Supreme Court found that the elements of the fair comment test were made out, and there was no evidence to show that Mair was maliciously motivated in making his

comment.

Sources:

- [Charlie Smith, "Rafe Mair Wins Landmark Case in Supreme Court of Canada" Straight Talk \(June 28, 2008\).](#)
- CBC News, "Top Court Dismisses Libel Suit Against B.C. Radio Personality" CBC New (June 27, 2008).
- WIC Radio Ltd. v. Simpson, 2008 SCC 40.