

# FAIR COMMENT, JUDGES AND POLITICS IN HONG KONG

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*[Until recently, the Hong Kong courts assumed that the defamation defence of fair comment may be defeated by proof of malice — meaning improper motive. The Court of Final Appeal, through Lord Nicholls, recently held that only proof that the defendant did not genuinely hold the opinion expressed can defeat this defence. This article places this decision in the context of debates about the role and rule of law, and the judiciary in Hong Kong. More specifically, it defends the Court in the face of criticism that the decision is an unheralded and unwarranted imposition on the common law of Hong Kong. This article therefore analyses the development of the defence of fair comment, in the common law world as well as in Hong Kong, especially as it concerns the notions of 'fairness' and 'malice'.]*

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## I INTRODUCTION

The common law of England and Hong Kong recognises a ‘fair comment’ defence to defamation actions. The accepted core of this defence is the right of any person to comment on matters of public concern, provided that the comment is based on identifiable and true (or privileged) statements of fact. It perhaps single-handedly justifies the strictures which have been placed upon the complexities of the law of defamation, especially if one takes account of variations between jurisdictions. The main focus of this article is malice. English and Hong Kong textbooks, as well as judges, have assumed until recently that (like the defence of qualified privilege) fair comment may be defeated by proof of malice on the part of the defendant, and that malice in this context means an improper motive.<sup>1</sup> The Hong Kong Court of Final Appeal, through Lord Nicholls, has rewritten at least the Hong Kong textbooks, significantly rational-

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<sup>1</sup> See, eg, Patrick Milmo and W V H Rogers, *Gatley on Libel and Slander* (9<sup>th</sup> ed, 1998) [16.2].

ising the law, and, as it happens, bringing it closer to that of some Australasian regimes.

In *Albert Cheng v Tse Wai Chun Paul*,<sup>2</sup> Nicholls NPJ made essentially three important point about malice in fair comment.<sup>3</sup> Firstly, provided the basic requirements of the defence of fair comment are satisfied, the only way in which the defence can fail is if the defendant is shown to have had no honest belief in the truth of what was said. Secondly, this is not best described as ‘malice’ — which usually requires an improper motive — for motive is now irrelevant. Rather, juries should be directed that the issue is simply whether the defendant honestly believed the opinion expressed. Thirdly, in the case of qualified privilege, the use of the expression ‘malice’ is unnecessary and direction should be in terms of whether the defendant used the occasion for some purpose other than that for which the privilege is recognised. Any such remarks are of course obiter, qualified privilege not being at issue in the case.

Nicholls NPJ had the concurrence of Li CJ, Bokhary and Ribeiro PJJ and Sir Denys Roberts NPJ (the last expatriate Chief Justice of the colony). The Chief Justice spoke briefly, relying on the specific constitutional guarantee of free speech in art 27 of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (‘Basic Law’), rather than on the *International Covenant on Civil and Political Rights*<sup>4</sup> (‘ICCPR’) incorporated into the *Basic Law* by art 39.<sup>5</sup> His Lordship was expanding slightly on the almost throwaway line of Mason NPJ in *Eastern Express Publisher Ltd v Mo Man Ching Claudia* that ‘in a society in which there is a constitutional guarantee of freedom of expression, no narrow approach should be taken to the scope of fair comment on a matter of public interest as a defence to an action of defamation’.<sup>6</sup>

The *Cheng* decision has a particular significance for Hong Kong, faced with a minor epidemic of defamation litigation, and a wider importance for the common law world. The only courts bound by this decision are those in Hong Kong below the Court of Final Appeal (which is assumed not to be bound by its own decisions). But Lord Nicholls is, of course, a serving member of the House of Lords, and if this point should come before that House one assumes that he would pursue the same line.<sup>7</sup> His views may also represent the current trend of judicial

<sup>2</sup> [2000] 3 HKLRD 418 (‘*Cheng*’). Judgments from the CFA, CA and the lower courts are available online at Hong Kong Legal Information Institute <[www.hklii.org](http://www.hklii.org)> and Legal Reference System, Hong Kong Judiciary <<http://legalref.judiciary.gov.hk>>. Electronic versions of the HKC and HKPLR are available from Lexis and of the HKLRD from Westlaw.

<sup>3</sup> PJ: Permanent Judge, NPJ: Non-Permanent Judge.

<sup>4</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>5</sup> Article 39 of the *Basic Law* states that the *ICCPR*, as applied in Hong Kong, shall continue to apply. It was applied (after the *Basic Law* was promulgated but before it came into force) in a very specific way in the *Bill of Rights Ordinance*, part of which actually reproduces the language of the *ICCPR*. The *Hong Kong Bill of Rights Ordinance 1991* (HK) (cap 383) (the actual Bill of Rights appears in s 8). See generally Johannes Chan and Yash Ghai, *The Hong Kong Bill of Rights: A Comparative Approach* (1993).

<sup>6</sup> [1999] 4 HKC 425, 461 (‘*Claudia Mo*’).

<sup>7</sup> See, eg, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 193 (‘*Reynolds*’) in which he seems to have implied in obiter a similar approach to that in *Cheng*. See below n 115 and accompanying text.

views in common law courts more widely or, at the very least, may be influential.

This article places *Cheng* in the context of debates about the role and rule of law in Hong Kong and the position of the judiciary there. More specifically, it is something of a defence of the Court in the face of criticism which it, and especially Lord Nicholls, has received in Hong Kong. This involves an analysis of the development of the defence of fair comment, in the common law world more broadly as well as in Hong Kong, especially as it concerns the notions of 'fairness' and 'malice'. This wider discussion is necessary because part of the attack on the decision involved the allegation that it is an unheralded imposition on the common law of Hong Kong.

## II POLITICS OF TRANSITION AND THE HONG KONG COURTS

Political, and to some extent legal, debate in the early 1990s, in the run-up to the reversion of Hong Kong to the practical sovereignty of China in 1997, was characterised by labelling, and sometimes name-calling. Those who had faith in the leadership in Beijing, and who enjoyed its confidence, were termed 'pro-China' or 'pro-Beijing'. Those who took the view that the autonomy which Hong Kong is supposed to enjoy, and the political and human rights of its residents, required more protection — within the law, in the political system and from the international community — were termed 'pro-democracy'. In some quarters, the latter were accused, expressly or implicitly, of being 'anti-China' and even 'foreign lackeys'. These divisions are still discernible.<sup>8</sup>

On the whole, the legal system of Hong Kong since the restoration of sovereignty to China differs little from the colonial system. The Supreme Court, which consisted of the High Court and the Court of Appeal on the English model, became the High Court, comprising the Court of First Instance (terminology which is not entirely accurate since there are other courts of first instance, though no others of unlimited jurisdiction) and the Court of Appeal. The Judicial Committee of the Privy Council was replaced by a local body, but one intended to have some special legitimacy derived from a non-local element, the Court of Final Appeal ('CFA'). The bench of the CFA comprises a number of permanent judges, including the Chief Justice, a panel of non-permanent judges who have held high judicial office or practised in Hong Kong,<sup>9</sup> and a panel of 'foreign

<sup>8</sup> Particularly over the question of implementing the obligation under art 23 of the *Basic Law* to legislate on 'treason, secession, sedition, [or] subversion against the Central People's Government'. See the government's current proposals in *Consultation Document on Proposals to Implement Article 23 of the Basic Law* (2002) Hong Kong Security Bureau <<http://www.info.gov.hk/sb/eng/report/index.html>>. It was reported that Martin Lee, former leader of the Democratic Party, was accused by the Secretary for Justice, Elsie Leung, of inviting foreign interference by campaigning in Europe on the issue. Lee retorted that the effectiveness of campaigning within Hong Kong is limited because of the absence of a fully democratic political system: Angela Li, 'Martin Lee Accused of Inviting Foreign Interference', *South China Sunday Morning Post* (Hong Kong), 17 November 2002, 2.

<sup>9</sup> *Hong Kong Court of Final Appeal Ordinance 1997* (HK) (cap 484) s 12(3) which specifies that the non-permanent judges must have held office as judges of the High Court or above, or have practised as barristers or solicitors in Hong Kong for at least ten years.

judges' who have neither held office nor lived in Hong Kong, but who sit or have sat on courts of unlimited jurisdiction in other common law jurisdictions.<sup>10</sup>

The composition of the CFA was the only aspect of the judicial set-up that caused any controversy in negotiations over the future of Hong Kong. The text of the 1984 *Joint Declaration* between Britain and China was interpreted by some as stating that more than one foreign judge could be invited to sit in any given case.<sup>11</sup> The Chinese side in the discussions concerned with translating this treaty into law took the view that the agreement was for one foreign judge in any given case. This disagreement was so intense that it proved impossible to set up the new court for a period before the transition, as had been hoped. It was actually set up in the early hours of 1 July 1997, as soon as the Chief Executive had been sworn in.<sup>12</sup> The importance attached by some, notably the British side in those negotiations and the members of the 'democratic camp' — including sections of the legal profession, especially the Bar — to the presence of a foreign judge or judges, was bitterly resented by the 'pro-China' sections of the community.<sup>13</sup> Thus, perhaps the latter may be somewhat inclined to view the statements of those foreign members of the CFA suspiciously.

The fears of the 'pro-China' group seemed to be realised in 1999 when the CFA took a determinedly independent line in the first of a series of cases about the right of abode in Hong Kong of people born in mainland China.<sup>14</sup> The judgments were viewed variously as a blow to Hong Kong's autonomy ('two

<sup>10</sup> *Hong Kong Court of Final Appeal Ordinance 1997* (HK) (cap 484) s 12(4). The current 'foreign' panel consists of Sir Anthony Mason, Lord Cooke of Thorndon, Sir Daryl Dawson, Lord Nicholls, Lord Hoffmann, Sir Gerard Brennan, Sir Thomas Eichelbaum and Lord Millett. The Ordinance uses the language of the *Basic Law* and (at least in English) says that judges in each of the non-permanent categories may be invited to sit on a case. The judiciary's website, on the other hand, limits the number of judges from the non-permanent category to 'one non-permanent Hong Kong judge or one judge from another common law jurisdiction': <<http://www.info.gov.hk/jud/guide2cs/html/cfa/intro.htm>> (emphasis added). This is not what happened in the *Cheng* case, where there were several foreign judges, nor in a recent case (see below n 116) when only two Permanent Judges sat, with one retired CFA Judge, one judge from the list of non-permanent Hong Kong judges, and one *foreign* judge, namely Lord Cooke. The Ordinance actually says (s 5)

- (1) The following shall be the judges of the Court—
  - (a) the Chief Justice; and
  - (b) the permanent judges.
- (2) The Court may as required invite non-permanent Hong Kong judges to sit on the Court.
- (3) The Court may as required invite judges from other common law jurisdictions to sit on the Court.

<sup>11</sup> *Joint Declaration of the Government of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, opened for signature 19 December 1984, 1399 UNTS 33 (entered into force 27 May 1985).

<sup>12</sup> See Yash Ghai and Jill Cottrell, 'Between Two Systems of Law: The Judiciary in Hong Kong' in Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (2001) 207.

<sup>13</sup> See Johannes Chan, 'To Change or Not to Change: The Crumpling Legal System' in Nyaw Mee-Kau and Li Si-Ming (eds), *The Other Hong Kong Report 1996* (1996) 13.

<sup>14</sup> *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315; *Chan Kam Nga v Director of Immigration* [1999] 1 HKLRD 304. *Ng Ka Ling v Director of Immigration* [No 2] [1999] 1 HKLRD 577 is the CFA's own clarification of its decision. *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778 is the first right of abode case after the Standing Committee interpretation. The series of cases is still continuing. Article 158 provides that in certain circumstances the Standing Committee of the National People's Congress (the Chinese legislature) may be asked to interpret the *Basic Law*.

systems' under the *Basic Law*), a slap in the face for the 'one country' principle or an unnecessary provocation. What caused the offence has nothing to do with the law of defamation. In brief, the Court decided, firstly, that the Chinese government's system of exit permits for those wanting to come to Hong Kong did not prevail over the right of abode granted to the offspring of Hong Kong permanent residents, and secondly, that the decision of the Court did not require it to refer the case for interpretation of the *Basic Law* to the Standing Committee of the National People's Congress in Beijing ('SCNPC') under art 158 of the *Basic Law*.<sup>15</sup> The lead judgment was given by Mason NPJ, the 'foreign judge' on that occasion. Ultimately, the government insisted on taking the issue to the SCNPC, where the decision of the CFA was pronounced wrong.<sup>16</sup> This provides important background to some reactions to the *Cheng* case.

### III FAIR COMMENT, HONESTY AND FAIRNESS

Nicholls NPJ's exposition in *Cheng* of what the defendant must establish in order to rely on the defence of fair comment is the most recent statement of the Hong Kong law on the subject, and could be taken to be equally relevant to English law:

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.

Second, the comment must be recognisable as comment, as distinct from an imputation of fact. . . .

Third, the comment must be based on facts which are true or protected by privilege . . . .

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. 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.

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.<sup>17</sup>

<sup>15</sup> *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315.

<sup>16</sup> For the text of the original CFA decision, the text of the Standing Committee's interpretation, newspaper articles, comments by the profession, and commentary by Yash Ghai on this case, see Johannes Chan, H L Fu and Yash Ghai (eds), *Hong Kong Constitutional Debate: Conflict over Interpretation* (2000).

<sup>17</sup> *Cheng* [2000] 3 HKLRD 418, 424–5 (emphasis added) (citations omitted).

Australasian readers will discern some differences between the above test and the tests in several Australian jurisdictions and in New Zealand. Indeed, we are not all agreed on the name of the defence: New Zealand refers to it as ‘honest opinion’,<sup>18</sup> and New South Wales as ‘comment’.<sup>19</sup> Almost the only ingredient of the defence on which the Australasian jurisdictions, Canada, England and Hong Kong (and indeed other Commonwealth jurisdictions)<sup>20</sup> would agree is that it must be ‘comment’ — that is, *not* a statement of fact. Most apply the defence only where there is comment on a matter of public interest, though some Australian jurisdictions spell out in some detail what matters may be commented on,<sup>21</sup> and New Zealand has dispensed with this requirement altogether.<sup>22</sup> While most jurisdictions require that the comment must be on fact (and that the facts commented on must be either stated or adequately referred to) it is unclear whether all Australian jurisdictions have this requirement.<sup>23</sup> This leaves the questions of ‘fairness’ and of ‘malice’ — or of actual honesty — to be dealt with.

These three issues — fairness, malice and honesty — intersect in various ways. The various theoretical possibilities are:

- 1 What really matters is the honesty of the particular commentator; a comment that is honest is protected and one that is dishonest is not. The burden of establishing honest belief rests on the defendant. Here, fairness equates to honesty. If such a view is coupled with one to the effect that nothing other than proof of dishonesty can defeat the defence, there is no role for malice. This is essentially the New Zealand position.<sup>24</sup>
- 2 The criterion of ‘fairness as actual honesty’ could be coupled with the view that something other than lack of honesty — that is improper purpose — could defeat the defence. Here honesty and malice are both relevant. This would seem to be the position in Canada.<sup>25</sup>
- 3 Fairness is an objective matter, not dependent on honesty; honesty might be an additional requirement, also to be proved by the defendant. Such a view of the *prima facie* requirements of the defence might also be coupled with the view that a lack of malice (in the sense of improper purpose) defeats the defence.
- 4 The *prima facie* requirements of both fairness and honesty might accompany the possibility of malice being invoked to defeat the defence.

<sup>18</sup> *Defamation Act 1992* (NZ) s 9.

<sup>19</sup> *Defamation Act 1974* (NSW) div 7.

<sup>20</sup> With the exception of those jurisdictions which apply Roman-Dutch law, and those which apply French law, most Commonwealth jurisdictions follow fairly closely the English law. For discussion on Africa, see Jill Cottrell, *Law of Defamation in Commonwealth Africa* (1998).

<sup>21</sup> See the Code states, eg Queensland: *Defamation Act 1889* (Qld) s 14.

<sup>22</sup> *Defamation Act 1992* (NZ) s 10.

<sup>23</sup> In Tasmania it seems clear that the comment must be based on facts which are true, though not every fact need be shown to be true if enough are true to make the comment a fair one: *Defamation Act 1957* (Tas) s 14(2). In Queensland it has been held that truth of the facts is only evidence of the fairness: *Hill v Comben* [1993] 1 Qd R 603, 606 (Davies and Pincus JJA).

<sup>24</sup> *Defamation Act 1992* (NZ) s 10.

<sup>25</sup> See *Cherneskey v Armadale Publishers Ltd* [1979] 1 SCR 1067 (‘Cherneskey’). See also Raymond Brown, *The Law of Defamation in Canada* (2<sup>nd</sup> ed, 1994) 1040.

- 5 ‘Fairness’ might be an objective quality, unrelated to honesty, and might be the only one of these elements which the defence must show. But something could be invoked to defeat the defence, and that something might be malice in the sense of improper motive. This has been the general English and Hong Kong position. This still leaves the precise relationship between malice and dishonesty unclear, for some judges have spoken as though malice (in the sense of a wrongful motive) can be invoked in order to show lack of honest belief, while other judges have spoken as though lack of honest belief establishes malice.<sup>26</sup>
- 6 Finally, fairness might be objective, as in position (5), and the only way to defeat it might be to establish dishonesty. This is the New South Wales position.<sup>27</sup>

These variations do not take into account the possibility that the defendant did not actually make the comment (for example, that the comment was made in a letter to the press and the defendant is the publisher of the letter) — a situation which is briefly discussed later.

Returning to *Cheng*, we can see that Nicholls NPJ’s approach reflects the current English view. This treats ‘fairness’ as an objective issue, not dependent on the state of mind of the actual defendant. This objective element has been variously described as something a fair-minded person might say, something an honest person might say, something a person might honestly say, or possibly even something a fair person might honestly think. It is not clear that judges always mean anything very different by these expressions. There is logically some difference, however, between a ‘fair person’ and an ‘honest person’. People who are honest with themselves are not necessarily fair-minded; though it is hard to believe that fair-minded persons are not also honest with themselves. It is harder to see any practical difference between the ‘honest person’ and a ‘person behaving honestly’ in the context of the objective nature of the statement, not the state of mind of the individual.

A classic statement is Lord Esher’s formulation of the question to be put to the jury: ‘[w]ould any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that?’<sup>28</sup> If his Lordship was requiring that the defence show that the view would in fact have been held by *any* fair-minded person, this would be going too far, for it would come close to saying that there must be only one right view. However, the notion that there is only one right view would be inconsistent with his acceptance that the fair-minded person might be prejudiced or obstinate, and his own comment that the defence is defeated if ‘no fair man’ could have taken the view in question.<sup>29</sup> In

<sup>26</sup> See, eg, *Telnikoff v Matusevitch* [1992] 2 AC 343, 357 (Lord Ackner) (‘*Telnikoff*’) (see below n 114 and accompanying text); *Cherneskey* [1979] 1 SCR 1067, 1099 (Dickson J) (see below n 106 and accompanying text).

<sup>27</sup> *Defamation Act 1974* (NSW) s 32.

<sup>28</sup> *Merivale v Carson* (1887) 20 QBD 275, 281.

<sup>29</sup> This is one of those situations in which one should appreciate the ambiguity of the English language, an ambiguity which here could have been clarified by hearing Lord Esher speak this sentence. The reader might try reading the sentence in two ways: ‘[w]ould *any* fair man’ or ‘[w]ould *any fair* man’. It is assumed that Lord Esher spoke the sentence the latter way — in-

*Turner v Metro-Goldwyn-Mayer Pictures Ltd*, Lord Porter substituted ‘honest’ for Esher’s ‘fair’.<sup>30</sup> The leading English case is now *Telnikoff*, where it was held that the defendant must show that the view is one that any person, however prejudiced and obstinate, could honestly hold.<sup>31</sup> This echoes a famous direction by Diplock J where he told the jury that the question was whether a man might ‘honestly hold the views and express the comment on those facts’.<sup>32</sup> And for the moment, the authority for Hong Kong is Nicholls NPJ’s test of whether the comment ‘could have been made by an honest person’.

At the stage of deciding whether the comment was fair, the English courts are concerned, as we have just seen, with the issue of whether a person *could* have held such an opinion. This relates to the content of the comment rather than the belief of the individual defendant. The English courts therefore treat the fairness issue as an objective question; any issue of the actual honesty of the particular defendant goes to the question of malice.

There remains uncertainty in some Australian jurisdictions. One Australian judge held that the plaintiff must establish unfairness,<sup>33</sup> though it is not clear why this onus should fall on the plaintiff and the other elements on the defence. In Australian states and territories with codified defamation regimes (including Queensland, Tasmania and Western Australia)<sup>34</sup> the comment must be ‘fair’, though the relevant Codes do not indicate precisely what ‘fair’ means.<sup>35</sup> The New South Wales law says the statement must be one ‘which might reasonably be based on that material to the extent to which it is proper material for comment’,<sup>36</sup> a formulation which does not seem different from one referring to what might ‘fairly’ be made.

For the English courts, there is another stage after the fairness of the comment is established: the malice stage. Proof that malice was the motivating factor is a fatal blow to the defence. The courts have not been entirely clear as to the relationship between malice (as a state of mind) and honesty. A person might honestly believe something to be true, but be driven by malice to express this opinion in circumstances where human decency or discretion might have counselled silence. But if the actual *belief* is influenced by malice, is that belief honest? Judges have often spoken of belief distorted or warped by malice. If by this they mean the belief is not to be treated as honest, and this is the only significance of malice, this is equivalent to the actual decision in *Cheng*: that

deed the sentence would have been clearer if it had read: ‘Would a fair man’. One makes the same assumption about Lord Keith’s use of the phrase ‘any man’ in *Telnikoff* [1992] 2 AC 343, 354.

<sup>30</sup> [1950] 1 All ER 449, 461 (‘*Turner*’).

<sup>31</sup> The epithet ‘fair-minded’ qualifies ‘man’ in the Court of Appeal’s decision in the same case: *Telnikoff* [1991] 1 QB 102 (Lloyd LJ). Lord Keith approved Lloyd LJ’s judgment on appeal to the House of Lords, though his Lordship failed to add the qualifier, thereby leaving some slight doubt as to whether the element of ‘fair-mindedness’ is required: *Telnikoff* [1992] 2 AC 343, 354.

<sup>32</sup> *Silkin v Beaverbrook Newspapers* [1958] 2 All ER 516, 519.

<sup>33</sup> *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225, 235 (Hunt J) (‘*Cawley*’).

<sup>34</sup> In these states, the Criminal Code provisions are applied to civil defamation. In New South Wales, the Code was replaced by the *Defamation Act 1974* (NSW).

<sup>35</sup> See, eg, Queensland: *Criminal Code Act 1899* (Qld) s 355; *Defamation Act 1889* (Qld) s 14.

<sup>36</sup> *Defamation Act 1974* (NSW) s 30(3)(b).

honesty is the only way to defeat fair comment. But a belief distorted by malice could surely be viewed as honest in the sense that it is genuinely held. The courts are surely setting themselves a daunting task if they require that some years after the event they must decide whether a person who held some sort of malice did or did not believe what he or she said or wrote.

In the Australian codes there is no mention of malice, nor even any use of the phrase ‘good faith’, which is used in relation to the equivalent defence of qualified privilege. This has led some to hold that malice is irrelevant.<sup>37</sup> At the opposite extreme is the view that, under the statutes, the malice rule is the same as at common law: it is a complete rebuttal of the fair comment defence.<sup>38</sup> Others have said that evidence of malice is admissible though not conclusive — in which case the function of malice is to establish lack of belief — though it is not clear whether this is viewed as establishing unfairness or as an independent factor. Hunt J in the New South Wales case of *Cawley* seemed, with respect, to veer between the view that the common law test of fairness was objective<sup>39</sup> and the notion that fairness meant honesty.<sup>40</sup> He also held that malice was relevant to deciding ‘whether the comment was or was not in fact the commentator’s real opinion and whether it has been distorted in the sense that the malice warped his judgment’;<sup>41</sup> in other words it was evidence of lack of belief.

#### IV THE HONG KONG COURTS AND FREEDOM OF EXPRESSION

Hong Kong courts cannot be said to have been notable advocates of freedom of expression. Until recent cases, there had been only one occasion on which the law of defamation presented the opportunity to minimise the scope of the law in the interests of freedom of speech, as enshrined in a fundamental rights document. The response of the Court of Appeal — as opposed to the first instance Court that it reversed — was sadly unimaginative. In *Hong Kong Polytechnic University v Next Magazine Publishing Ltd*, the Court of Appeal held that neither the common law nor the Bill of Rights operated to debar the University from bringing an action in defamation.<sup>42</sup> Members of the Court seem to have been surprised that anyone would argue that a university should be so prevented.<sup>43</sup>

Article 16 of the *Hong Kong Bill of Rights Ordinance 1991* (UK) (cap 383) (‘Bill of Rights Ordinance’) provides:

(2) Everyone shall have the right to freedom of expression ...

<sup>37</sup> See, eg, Peter Brett, ‘Civil and Criminal Defamation in Western Australia’ (1951) 2 *University of Western Australia Law Review* 43, 51. The majority of the High Court considered Sir Samuel Griffith (drafter of the Queensland Code) to have ‘regarded malice as being irrelevant to comment’: *Pervan v North Queensland Newspaper Company Ltd* (1993) 178 CLR 309, 326 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

<sup>38</sup> See, eg, *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35 (‘Renouf’).

<sup>39</sup> [1981] 1 NSWLR 225, 235.

<sup>40</sup> Ibid 237.

<sup>41</sup> Ibid.

<sup>42</sup> [1997] 1 HKPLR 286.

<sup>43</sup> Ibid 288 (Litton VP JA). See Jill Cottrell, ‘Can a University Sue in Defamation?’ (1999) 7 *Asia Pacific Law Review* 45.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary —

(a) for respect of the rights and reputations of others ...<sup>44</sup>

By virtue of s 7 of the Ordinance, art 16 affects only ‘the Government and all public authorities’ which means that it would only affect the rights of the University if it was a ‘public authority’. Keith J devoted three full pages of his judgment to discussing this question, holding that the University was indeed a public authority.<sup>45</sup> The Court of Appeal, however, did not find it necessary to decide the question.<sup>46</sup>

It is, however, only right to note the brave stand of the Court of Appeal in the *Flag Case* in which the charge involved defacing the flags of the People’s Republic of China and of the Hong Kong Special Administrative Region (‘HKSAR’) in order to make a point — in other words, as a form of expression.<sup>47</sup> The Court said:

Whilst it is no doubt true to say of most, if not all, nations that great value is placed upon the symbol of the nation in the form of the national flag, we are satisfied, as was the magistrate, that s 7 in each *Flag Ordinance* was inconsistent with Article 19 of the *ICCPR* and, by the same token, contravened s 39 of the *Basic Law*. However, we consider that the magistrate materially misdirected himself, for the reasons we have given, when he found that the legislation was ‘justified’ as being ‘necessary for the protection of public order’ under paragraph 3 of the Article.<sup>48</sup>

However, by the time the case came to the CFA, that court had been subject to what some have characterised as the humiliation of the ‘reinterpretation’ of the *Basic Law* by the SCNPC. It came as no surprise that the Court, while insisting that it was as enthusiastic for freedom of speech as the Court of Appeal, said:

it is possible — even if by no means easy — for a society to protect its flags and emblems while at the same time maintaining its freedom of expression ... if its flag and emblem protection laws are specific, do not affect the substance of expression, and touch upon the mode of expression only to the extent of keeping flags and emblems impartially beyond politics and strife. In my view, our laws protecting the national and regional flags and emblems from public and willful desecration meet such criteria. They place no restriction at all on what people may express. Even in regard to how people may express themselves, the only restriction placed is against the desecration of objects which hardly anyone would dream of desecrating even if there was no law against it.

<sup>44</sup> *Bill of Rights Ordinance* s 8, art 16.

<sup>45</sup> *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1996] 2 HKLR 260, 262–5. Keith J retired from the Hong Kong bench in 2001 to take up a judgeship on the High Court of England and Wales, where he again found himself reversed by a Court of Appeal on a human rights issue in *Matthews v Ministry of Defence* [2002] 3 All ER 513.

<sup>46</sup> *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* (1997) 7 HKPLR 286.

<sup>47</sup> *HKSAR v Ng Kung Siu* [1999] 2 HKC 10 (‘Flag Case’).

<sup>48</sup> *Ibid* 44 (Permanent Magistrate Tong Man, Power VP, Mayo JA, Stuart-Moore JA).

No idea would be suppressed by the restriction. Neither political outspokenness nor any other form of outspokenness would be inhibited.<sup>49</sup>

## V DEFAMATION LITIGATION IN HONG KONG

The law of defamation in Hong Kong is basically identical to that of the United Kingdom before the enactment of the latter's *Defamation Act 1996* (UK).<sup>50</sup> The only significant potential for difference lay in the enactment of the Bill of Rights. Now that the *European Convention on Human Rights*<sup>51</sup> is effectively part of United Kingdom law by virtue of the *Human Rights Act 1998* (UK), even this difference might be expected to disappear, except to the extent that there are significant differences between the *ICCPR* and the *Convention*.

Until recently, defamation litigation in Hong Kong was a relative rarity, film personalities being perhaps most likely to litigate.<sup>52</sup> In the 1990s, something like political parties developed,<sup>53</sup> and direct elections (albeit not to elect the executive or even, initially, a majority of the legislature) became possible, and the intensely political issue of the return to the sovereignty of mainland China dominated Hong Kong consciousness. Defamation litigation became more common, although Hong Kong has been spared the abuse of the process that has taken place in Singapore;<sup>54</sup> indeed, leaders have been restrained in their use of defamation.

In fact, in the last few years, the most striking feature of defamation law in Hong Kong has been a dog-eat-dog phenomenon: the mass media have been suing each other. Hong Kong has a very large number of newspapers and magazines, mostly in Chinese, and a fierce circulation war has been waged for several years.<sup>55</sup> However, this is not simply a matter of revenue, for the most bitter rivalry is between those publications which are 'pro-' and those which are

<sup>49</sup> *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, 993 (Bokhary PJ; Litton and Ching PJJ and Mason NPJ concurring).

<sup>50</sup> *The Defamation Ordinance* (HK) (cap 21) is very similar to the *Defamation Act 1952* (UK). See Jill Cottrell, 'The Law of Defamation' in Judith Sihombing (ed), *Law Lectures for Practitioners* (1992) 38, and the Jill Cottrell, 'Defamation' in Rick Glofcheski, *Tort Law in Hong Kong* (2002) 559.

<sup>51</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('European Convention on Human Rights').

<sup>52</sup> As with the Indian film industry, that of Hong Kong has remained largely unobserved by the English-speaking and Hollywood-watching world (at least until 'Crouching Tiger, Hidden Dragon'). Yet in 2001 the industry released 144 films, and in its heyday would release about 300 a year.

<sup>53</sup> See K K Leung, 'Fractionalization of the "Party" System in the Hong Kong Transition' in Li Pang-Kwong (ed), *Political Order and Power Transition in Hong Kong* (1997) 109.

<sup>54</sup> See, eg, Michael Hor, 'The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamín v Lee Kuan Yew*' [1992] *Singapore Journal of Legal Studies* 542. See also Amnesty International, 'Singapore: Defamation Suits Threaten Chee Soon Juan and Erode Freedom of Expression' (2002) and other articles at <<http://web.amnesty.org/ai.nsf/countries/Singapore>>.

<sup>55</sup> For a brief description of the Hong Kong press, see Richard Cullen, 'Freedom of the Press and the Rule of Law' in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (2001) 157.

'anti-Beijing'. During the 2000 election campaign for the Hong Kong Legislative Council, for example, *Asiaweek* reported that:

On Sept 5, the Chinese-language *Apple Daily*, noted for its pro-democracy, anti-Beijing stance, screamed 'Xu Simin farts' in its headline — a reference to the latest outburst by Xu, a pro-Beijing leftist known for his periodic diatribes. Meanwhile, *Apple Daily's* bitter rival, the *Oriental Daily News*, was turning up the heat on pro-democracy candidates. While its headlines were tamer than *Apple's*, its articles were no less scathing, labeling the Democrats 'devils' and 'bandits' and accusing some of them of embezzlement and extramarital affairs.<sup>56</sup>

The litigation seems to be an aspect of this political and circulation warfare. The most frequent litigant is Hong Kong's largest newspaper company, Oriental Press. It was sued, unsuccessfully, in a case involving an allegation that it had suggested that the plaintiff's magazine had encouraged the surreptitious administration of aphrodisiacs to young women to entrap them into prostitution.<sup>57</sup> On the other hand, Oriental Press sued another magazine on the basis that the magazine had alleged that Oriental Press had distorted remarks made by a Legislative Councillor, deliberately quoting him out of context in order to be able to lambast him as a way of taking revenge for his having criticised the paper in the past (apparently the paper published no fewer than 12 articles criticising the Legislative Councillor for one remark). The trial judge held that the magazine's comments were justified, and the CFA ultimately refused to order a retrial.<sup>58</sup> Oriental Press also sued the publisher of another daily paper that would be identified as 'pro-democracy' — *Ming Pao* — for statements suggesting that the *Oriental Daily* had attacked a local television station, that this behaviour was petty and amounted to overreaction, and that this made the newspaper a tool of the interests of the corporate group which owned it. It was also alleged that *Ming Pao* had presented the *Oriental Daily* as acting in a way contrary to media ethics and that it was unfair and unbalanced.<sup>59</sup>

Another action — not, I assume, instituted in any spirit of irony — involved the allegedly defamatory statement that the Oriental Group was using the law of defamation to terrorise its opponents into suppressing critical commentary.<sup>60</sup> This was brought against not another newspaper but a television presenter (Claudia Mo), and the Director of Broadcasting of the Hong Kong government, for statements made on television (the station being owned by the Hong Kong government without separate legal personality). The presenter had said that the fact that 'solicitors' letters are flying everywhere among the media — makes

<sup>56</sup> 'A Political Proxy War in the Press' *Asiaweek* (Hong Kong) 22 September 2000 36.

<sup>57</sup> *Easy Finder Ltd v Oriental Daily Publisher Ltd* [1998] 1 HKLRD 567.

<sup>58</sup> *Next Magazine Publishing Ltd v Oriental Daily Publisher Ltd* [2000] 2 HKLRD 333. The same parties were involved in a case in which the paper sued the magazine, alleging that it had implied that the paper was run not by its board but by the father of the chairman who was, to boot, a fugitive from justice: *Oriental Press Group v Next Magazine Publishing Co* (Unreported, Court of Appeal, Woo JA, Chung and Kwan JJ, 17 April 2002).

<sup>59</sup> *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* [1999] 4 HKC 354.

<sup>60</sup> *Claudia Mo* [1999] 4 HKC 425. The *Eastern Express* was part of the Oriental Press Group.

people think whether there is not a trend of treading on each other<sup>61</sup> and ‘if every time other people mention about you only incidentally you then say you are not satisfied and want to sue this is akin to frightening people into keeping their mouths shut’.<sup>62</sup>

## VI FAIR COMMENT AND THE HONG KONG COURTS

There have been a small number of fair comment cases, in many of which the defence has foundered on the basis that it was not in fact ‘comment’ or was not based on facts.<sup>63</sup> But in *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd*, Yuen J held that saying that the newspaper was acting pettily and was over-reacting, and that it was not being fair and balanced or acting ethically, were statements of opinion and met the requirements of fair comment.<sup>64</sup> Her Ladyship also held that the statements which were not comments were true. In the *Claudia Mo* case, Yuen J again held that the statements, though defamatory, were fair comment. On this occasion her decision was reversed by the Court of Appeal. The CFA, however, held that the first statement was not defamatory, and restored the trial judge’s conclusion that the second was fair comment. The reasoned judgment on this point was that of Mason NPJ, who dealt briefly with the established requirements that the statement be one of comment and not of fact, and that the comment be based on facts clearly stated.<sup>65</sup> He then proceeded to the issue of whether the comment was fair, quoting leading English authorities on the issue: Lord Esher in *Merivale v Carson*,<sup>66</sup> Lord Porter in *Turner*<sup>67</sup> and Diplock J in *Silkin v Beaverbrook Newspapers Ltd*.<sup>68</sup> His analysis and decision were in line with these authorities.

Malice was not an issue in *Claudia Mo*, the most recent fair comment case in Hong Kong before *Cheng*. However, Litton PJ said in obiter that

[t]here is a public interest in the airing of views honestly held on matters of general concern even if those views be prejudiced or exaggerated. On the other hand, one cannot go too far and a defendant actuated by malice cannot rely on the defence.<sup>69</sup>

In other words, he thought honesty was something different from malice, which was in line with the mainstream approach of the English and Hong Kong courts. One might note Litton PJ’s reference to the view being ‘honestly held’. It is unclear whether he meant that fairness is a question of subjective honesty, or a view that could be honestly held, or held by an honest person.

<sup>61</sup> Ibid 434 (Litton PJ). This statement was originally in Chinese.

<sup>62</sup> Ibid 440. This statement was originally in Chinese.

<sup>63</sup> See, eg *Ting Kwing Shou Wendahl v Parke* [1987] 1 HKC 450 (full facts not presented to the public).

<sup>64</sup> [1999] 4 HKC 354, 31.

<sup>65</sup> [1999] 4 HKC 425, 31–3.

<sup>66</sup> (1887) 20 QBD 275, cited by Mason NPJ in *Claudia Mo* [1999] 4 HKC 425, 430.

<sup>67</sup> [1950] 1 All ER 449, cited by Mason NPJ in *Claudia Mo* [1999] 4 HKC 425, 431.

<sup>68</sup> [1958] 2 All ER 516 (‘Silkin’), cited by Mason NPJ in *Claudia Mo* [1999] 4 HKC 425, 459.

<sup>69</sup> *Claudia Mo* [1999] 4 HKC 425, 440.

## VII *CHENG V TSE*

In 1991, a Hong Kong tour guide, Au, was arrested in the Philippines and convicted of drug trafficking. Various groups in Hong Kong campaigned for his release, one being the Tourist Industry Rescue Group to which Au's employer belonged and to which the plaintiff, Paul Tse, was an honorary legal adviser. Another campaign group was formed by Albert Cheng. The remarks which led to the litigation were made during the radio program 'Teacup in a Storm' on the Chinese language channel of the Hong Kong Commercial Broadcasting Company Ltd radio station by Albert Cheng to his co-presenter, the third defendant Lam Yuk Wah. The actual words are not given in the law reports but the gist was that Tse had been motivated, when advising Au not to claim compensation from his employers, by concern not for Au but for the interests of the travel industry — and had thus acted unprofessionally and had been in a position of a conflict of interest.

It is for his statements on malice that Lord Nicholls has been excoriated in certain Hong Kong quarters. The plaintiff had argued successfully in the Court of Appeal that the defence of fair comment was vitiated by the motives of the defendants. These were not identical for each defendant but were, it was alleged, the following, taken from Nicholls NPJ's judgment (those in italics referring only to Cheng):

- 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 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.<sup>70</sup>

Essentially, Nicholls NPJ held that only points (1) and (2) could defeat the defence of fair comment. He said:

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.<sup>71</sup>

<sup>70</sup> *Cheng* [2000] 3 HKLRD 418, 428–9.

<sup>71</sup> *Ibid* 438 (emphasis in original).

Such motivation, he went on to say, might be strong evidence of lack of belief, and would be relevant to damages (if there was liability, of course).<sup>72</sup>

The press critiques of this judgment have centred on the assertions that (i) this is a radical departure from the law as it stood before; (ii) that it was formulated by a judge with no roots in and no understanding of Hong Kong, and no accountability to the Hong Kong people; (iii) that it is, for these reasons, inappropriate for Hong Kong; and (iv) that it tilts the balance too far, especially in non-political contexts, against private rights.

It is hard to ignore the political context of these remarks. Points (i)–(iii) are taken from the remarks of Ma Lik, a Hong Kong member of the National People's Congress (the Chinese Parliament) and firmly in the 'pro-China' camp.<sup>73</sup> Point (iv) comes from an article by Shiu Sin-Por,<sup>74</sup> Executive Director of a 'pro-China' think tank, One Country, Two Systems Research Institute. It is also significant that Cheng is a well-known 'democrat'. However, the criticisms, or at least some of them, merit evaluation, and it is not suggested that having a particular standpoint per se affects the merits of the critiques.

#### A 'Radical Change' Argument

Ma Lik wrote '[w]hat special line of reasoning did Lord Nicholls suddenly take in order to customise these innovative guidelines for Hong Kong while he never felt the need for it when presiding in British courts?'<sup>75</sup> Judges cannot, at least where the common law system is operating conventionally, make unheralded breaks with the legal past. Firstly, they should base their decisions on the arguments of the parties before them and, secondly, they should be constrained by the need to make incremental developments in the law, leaving radical departures to be made by ideally publicly elected and accountable legislatures.<sup>76</sup> So we can ask three questions about the new formulation on malice and fair comment: Whose were the arguments? Does the new approach stand up when evaluated in the light of precedent? Is there any validity in the implication that Lord Nicholls has inflicted on Hong Kong something that would not be inflicted on other common law jurisdictions?

It is true that in 19<sup>th</sup> century cases, in the early days of this defence, the courts generally spoke of malice as meaning something more than simple lack of belief. But even then the situation was far from clear. Cockburn CJ directed a jury in these terms in 1865:

<sup>72</sup> Ibid.

<sup>73</sup> Ma Lik, 'A Judgment Found Wanting', *Hong Kong iMail* (Hong Kong), 5 December 2000 <<http://www.dab.org.hk/en/info/articletemplate.asp?id=304&category=67>>. It seems he made essentially the same statements in the *Hong Kong Economic Times* (a Chinese language journal): see Albert Cheng (the first defendant in *Cheng*), 'The Power of Final Judgment', *South China Morning Post* (Hong Kong), 25 November 2000, 16.

<sup>74</sup> Shiu Sin-Por, 'Victims the Losers in Court Decision', *South China Morning Post* (Hong Kong), 28 November 2000, 16.

<sup>75</sup> Ma, above n 73.

<sup>76</sup> For this familiar proposition, see generally Patrick Devlin, *The Judge* (1979) and, for an example of a tort case, *Caparo Industries v Dickman* [1990] 2 AC 605.

if you think that there has only been an error in judgment, with an honest purpose — that the writer sat down to write a fair and honest comment upon the case and has done so, and that it is a fair comment upon the facts — you must find for the defendant.<sup>77</sup>

Most of the cases seem to have been more concerned with the notion of ‘fairness’ or defining what sorts of matters were appropriately the subject of comment, rather than with what precisely amounted to malice. And the requirement of being ‘fair’ was not distinguished from the issue of malice.<sup>78</sup> But it does seem likely that if a plaintiff had been able to establish that, although a defendant believed in the validity of what was said by way of comment, and that the motive was to harm the plaintiff or otherwise to achieve some ulterior objective, the defence would have been unsuccessful.

The argument to the effect that the only issue concerning malice is honesty was first made in the *Cheng* case in the Court of Appeal.<sup>79</sup> There might be, in the eyes of some commentators, a political undertone even here — for counsel who made this argument was not only one of Hong Kong’s most experienced counsel in defamation issues, but was Martin Lee SC, then leader of the Democratic Party and chief bête noire of the ‘pro-China’ commentators. The point, however, is that Lord Nicholls did not conjure up this argument out of thin air, but was accepting one put forward by counsel.<sup>80</sup>

Lee argued that ‘honesty is the cardinal test for malice’.<sup>81</sup> He relied on the cases of *Turner*,<sup>82</sup> *Silkin*,<sup>83</sup> *Cherneskey*<sup>84</sup> and *Telnikoff*.<sup>85</sup> Chan CJHC<sup>86</sup> (who gave the only judgment, Leong and Wong JJA concurring)<sup>87</sup> held that these cases were essentially concerned with the objective quality of the comment — the fairness issue — rather than with malice.<sup>88</sup>

Chan CJHC took the view that malice in the context of fair comment means the same as in qualified privilege, and that the leading case for both is thus *Horrocks v Lowe*.<sup>89</sup> He accepted the argument of Gerald McCoy, counsel for the plaintiff, that in the same branch of the law malice should not have two different meanings; this would make it intolerably difficult to direct a jury in a case in

<sup>77</sup> *Woodgate v Ridout* (1865) 4 F & F 202, 223; 176 ER 531, 540.

<sup>78</sup> See, eg, *Hedley v Barlow* (1865) 4 F & F 224; 176 ER 541.

<sup>79</sup> *Tse v Cheng* [2000] 1 HKC 712.

<sup>80</sup> *Ibid* 720.

<sup>81</sup> This expression was derived from Lord Denning in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 170, and gained approval in *Cherneskey* [1979] 1 SCR 1067, 1082 (Ritchie J). It was also used in argument by counsel in *Telnikoff* [1992] 2 AC 343.

<sup>82</sup> [1950] 1 All ER 449.

<sup>83</sup> [1958] 2 All ER 516.

<sup>84</sup> [1979] 1 SCR 1067.

<sup>85</sup> [1992] 2 AC 343.

<sup>86</sup> Chief Judge, High Court, a title which is retained although now the High Court comprises the Court of First Instance and the Court of Appeal, and there is also a President of the Court of Appeal.

<sup>87</sup> *Tse v Cheng* [2000] 1 HKC 712, 715.

<sup>88</sup> *Ibid* 734.

<sup>89</sup> [1975] AC 135.

which a defendant relied on both qualified privilege and fair comment and the plaintiff in both instances on malice.<sup>90</sup> He said:

Although the conditions which give rise to the defence of qualified privilege and those which give rise to fair comment are different, these two defences are similar in nature. They are essentially protection available to those who are genuinely exercising their freedom of speech. Whether it is qualified privilege or fair comment, the person relying on such defences must not abuse the protection which the law provides him for a good purpose. If he does he is abusing his freedom of speech.<sup>91</sup>

Nicholls NPJ took issue with the assumption that the functions of the two defences are the same, thus rejecting the cornerstone of Chan CJHC's reasoning. He said:

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. 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.

...

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.<sup>92</sup>

Nicholls NPJ conceded that the defence of fair comment grew out of the defence of qualified privilege, but this did not detract from his view that they are now distinct defences serving different purposes. His Lordship suggested that the history did, however, explain the error into which so many judges and writers had fallen of assuming that malice has the same meaning in both defences.<sup>93</sup>

Having thus dismissed from consideration cases decided at a time when the distinct nature of the two defences had not emerged, Nicholls NPJ proceeded to dispose of more modern cases — where assumptions of identity of malice in the two instances had been made — by the use of various techniques of precedent handling. In *Thomas v Bradbury, Agnew & Co Ltd*, Collins MR stated that '[c]omment distorted by malice cannot ... be fair' and by malice he clearly

<sup>90</sup> *Tse v Cheng* [2000] 1 HKC 712, 732.

<sup>91</sup> *Ibid* 730–1.

<sup>92</sup> *Cheng* [2000] 3 HKLRD 418, 433 (citations omitted).

<sup>93</sup> *Ibid* 420.

included spite.<sup>94</sup> Nicholls NPJ sought to deal with this by saying ‘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’.<sup>95</sup> Is Lord Nicholls right? Could this judgment have been ‘warped’, not as to the content of the statement, but as to the appropriateness of making it? Nor, as mentioned earlier, is it entirely clear what ‘judgment distorted by malice’ means. There was no real discussion of whether malice not having the effect that the statement was not the genuine opinion of the defendant could defeat the defence. Rather, the issue to be decided on appeal was whether the judge should have submitted the case to the jury. And, if one goes back to the report of *Thomas v Bradbury*,<sup>96</sup> Collins MR was emphatic in his insistence that malice in qualified privilege and fair comment are the same. The only *difficult* question was that raised in argument by the distinguished team of Scruton and Atkin, summarised by Collins MR:

The defendants … raised a contention which alone, as it seems to me, gives any importance to this case. Their point was that if the article itself, apart from the extrinsic evidence, did not raise a case for the jury that the bounds of fair comment had been overstepped, proof of actual malice on the part of the writer could not affect the question or disturb his immunity. This is a formidable contention. It involves the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticized.<sup>97</sup>

Clearly, Collins MR was rejecting this as too extreme; in fact it goes further even than Lord Nicholls in *Cheng*.

Lord Nicholls could dispose easily of *Vogel v Canadian Broadcasting Corporation*<sup>98</sup> where the real motive of the defendants to enhance their reputation by sensational programming led to recklessness as to the truth of what they were saying.<sup>99</sup> It was a little more difficult to dispose of *Christie v Westcom Radio Group Ltd*<sup>100</sup> where the Court rejected the proposition that honesty negates malice,<sup>101</sup> but he was able to do so on the basis that the judgment was ‘brief’ and relied on a qualified privilege case, thus falling into the common trap of conflating the two defences on this point. Nicholls NPJ also confronted a case of the Supreme Court of the Australian Capital Territory where Blackburn J clearly stated that malice did defeat the defence of fair comment in a situation in which the defendant sincerely believed that his or her comment was justified, but where that belief was induced by ‘personal hostility, or some such irrelevant motive’, so that the comment did not represent the ‘disinterested judgment’ of the defen-

<sup>94</sup> [1906] 2 KB 627, 642 (*‘Thomas v Bradbury’*), quoted by Lord Nicholls in *Cheng* [2000] 3 HKLRD 418, 435.

<sup>95</sup> *Cheng* [2000] 3 HKLRD 418, 437.

<sup>96</sup> [1906] 2 KB 627.

<sup>97</sup> *Ibid* 637.

<sup>98</sup> (1981) 26 BCLR 340.

<sup>99</sup> *Cheng* [2000] 3 HKLRD 418, 436.

<sup>100</sup> (1990) 75 DLR (4<sup>th</sup>) 546.

<sup>101</sup> *Ibid* 554.

dant.<sup>102</sup> Thus, one assumes, belief based on some such motive was to be treated differently from belief induced by stupidity or excessive rush to judgment. Basically, Nicholls NPJ held that this was incorrect: 'Disinterestedness cannot always be expected in political life. Its presence should not be a prerequisite of the freedom to make comments on matters of public interest.'<sup>103</sup>

*Cherneskey*<sup>104</sup> is a decision of the Canadian Supreme Court and cannot therefore be dismissed as bluntly as a first instance decision like *Renouf*.<sup>105</sup> Nicholls NPJ characterised *Cherneskey* as 'controversial', and observed that it involved a newspaper which published a letter (a very different situation from *Cheng*) and suggested that the remark of Dickson J quoted, which assumed that dishonesty is not the only form of malice, was merely a 'familiar mantra' uttered 'in passing': '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.'<sup>106</sup>

Dickson J seems to have been assuming that the function of proving dishonesty was to show malice (with perhaps the implication that it could be established by other means). More importantly, the crux of this case was whether it was necessary for the defendant to establish positively that the statement made represented the honest opinion of the defendant. This has never been the position in English law, and was not argued before the Hong Kong courts in the *Cheng* case. Any remark made by a judge about malice which the plaintiff was to establish was therefore obiter; and, though this point was not made by Lord Nicholls, Dickson J was actually dissenting in *Cherneskey*.<sup>107</sup>

There was thus nothing that compelled Nicholls NPJ to take the view he did (indeed there was nothing that could *compel* him to anything since the CFA is not bound by any previous authority) and he himself said that '[t]he issue now being considered seems not to have been examined directly and in depth by any court'.<sup>108</sup> He undoubtedly exercised a choice not to uphold the decision of the Court of Appeal.

But it was not a totally unheralded choice. Interestingly, Nicholls NPJ chose not to rely on the House of Lords in *Turner*,<sup>109</sup> although Lord Oaksey said there: 'In the absence of any evidence that the respondents did not honestly hold the opinions expressed in their letter, I see no grounds on which they could be held to have exceeded the limits of fair comment.'<sup>110</sup> This was relied on by Ritchie J, part of the majority in *Cherneskey*, in general support of his view that the

<sup>102</sup> *Renouf* (1977) 17 ACTR 35, 54.

<sup>103</sup> *Cheng* [2000] 3 HKLRD 418, 438.

<sup>104</sup> [1979] 1 SCR 1067.

<sup>105</sup> (1977) 17 ACTR 35.

<sup>106</sup> *Cherneskey* [1979] 1 SCR 1067, 1099, cited in *Cheng* [2000] 3 HKLRD 418, 426 (Nicholls NPJ).

<sup>107</sup> Lord Keith noted in *Telnikoff* that he preferred the approach of the minority (of which Dickson J was a part) in *Cherneskey*: [1992] 2 AC 343, 355. This remark perhaps also explains Lord Nicholls' observation that *Cherneskey* was controversial.

<sup>108</sup> *Cheng* [2000] 3 HKLRD 418, 436.

<sup>109</sup> [1950] 1 All ER 449.

<sup>110</sup> *Ibid* 475.

defendant must establish honesty.<sup>111</sup> It is, it seems, more clearly authority for the view of Nicholls NPJ than for that of Ritchie J. Nicholls NPJ did mention Lord Porter in *Turner*,<sup>112</sup> albeit only to dismiss the relevance of what his Lordship said on the basis that its thrust was to reject the relevance of reasonableness. Similarly, Lord Denning's statement in *Slim v Daily Telegraph Ltd* that as long as the writer honestly expresses his real view 'he has nothing to fear'<sup>113</sup> was mentioned but not relied on.

Another previous straw in the wind, *Telnikoff*, was not relied on in *Cheng*. In that case, Lord Ackner said:

I entirely agree ... that there was no evidence of malice fit to go to the jury and that accordingly the plaintiff ... failed to discharge the burden of proof which lay upon him that the defendant, the respondent to this appeal, did not honestly hold the belief which he expressed in his letter to *The Daily Telegraph*.<sup>114</sup>

In other words, Lord Ackner clearly considered that the function of malice was to establish lack of honesty, unlike previous cases where the purpose of showing lack of honesty was to establish presence of malice, as with Dickson J in *Cherneskey*.

Nor was the *Cheng* decision unheralded in Nicholls NPJ's own previously expressed views. In *Reynolds v Times*, fair comment was abandoned as a defence, but Lord Nicholls did review it briefly, saying that '[o]ne 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'.<sup>115</sup> This is slightly ambiguous, but it seems that Lord Nicholls is saying that the necessity for the comment to represent the honest opinion of the defendant is the same as the malice issue since there is only *one* constraint. In other words, he is saying in obiter precisely what was to be his ratio in *Cheng*.<sup>116</sup> So there is no question of Lord Nicholls inflicting an approach on Hong Kong that he would not apply to other jurisdictions.

Other jurisdictions, at least legislatively, have had a similar idea to that embraced in *Cheng*. In New Zealand, by virtue of statute, the only issue is now whether the opinion was honest.<sup>117</sup> In New South Wales, fair comment as a defence is defeated by proof that the defendant did not genuinely hold the opinion and no other sort of 'malice' is relevant.<sup>118</sup> In the Republic of Ireland, the Law Reform Commission recommended that the sole criterion of malice should be whether the opinion was in fact genuinely that of the author, which

<sup>111</sup> *Cherneskey* [1979] 1 SCR 1067, 1082.

<sup>112</sup> [1950] 1 All ER 449, 461–3.

<sup>113</sup> [1968] 2 QB 157, 170.

<sup>114</sup> [1992] AC 343, 357. Lord Ackner dissented in part, but on this issue he assumed he was in agreement with his colleagues.

<sup>115</sup> [2001] 2 AC 127, 193.

<sup>116</sup> In a recent fair comment case before the CFA, Cooke NPJ quoted the same passage from *Reynolds* and observed 'Lord Nicholls was to develop in Hong Kong the thinking stemming from those observations in *Reynolds*': *Next Magazine Publishing Ltd v Ma Ching Fat* (Unreported, Bokhary and Chan PJ, Litton, Mortimer and Cooke NPJJ, 5 March 2003) [114].

<sup>117</sup> *Defamation Act 1992* (NZ) ss 10–11.

<sup>118</sup> *Defamation Act 1974* (NSW) s 32(2).

they described as the criterion ‘favoured by a number of other law reform bodies’,<sup>119</sup> one of those being the Faulks Committee in England.<sup>120</sup> In fact, the Irish Law Reform Commission had flirted, in its consultation document, with the notion of doing away entirely with malice as defeating the defence, but decided that this was ‘somewhat extreme’.<sup>121</sup>

#### B ‘The New Rule Goes Too Far’ Argument

Although he could not (or at least did not) adduce previous authority squarely on point, Lord Nicholls did have a reasoned argument in favour of his view. The basic principle is that ‘everyone should be free to express his own, honestly held views on [matters of public interest], subject to the safeguards provided by the objective limits’<sup>122</sup>. By the last expression he refers to the five non-controversial matters quoted earlier.<sup>123</sup> The defence is of particular importance in the social and political fields.<sup>124</sup> Yet, it is precisely in those fields that commentators may have motives other than that of conveying their views. But these motives are not a reason for defeating the defence. His Lordship said that ‘[i]t would make no sense, for instance, if a motive relating to the very feature which causes a matter to be of public interest were regarded as defeating the defence’.<sup>125</sup> By this, one imagines that he means that, for example, if the issue is political and is of public interest because the person commented on is seeking public office, it would be rather curious if the one person who could not comment was a rival for the same office, whose main motive would presumably relate to his own desire for that office. He goes further to say that it is the purpose of the defence to protect people with agendas of their own: ‘Politicians, social reformers, busybodies, those with political or other ambitions and those with none, all can grind their axes’;<sup>126</sup> the safeguards are the five objective requirements. If ‘the wrong motive’ can vitiate the defence, then the courts would be faced with the necessity — a ‘dangerous’ task — of differentiating between the desirable and the undesirable motive. ‘That way lies censorship.’<sup>127</sup>

Lord Nicholls carries his view through to the extent of saying that even spite — the desire to injure — should not defeat the defence.<sup>128</sup> This is a question of policy, as he admits (though pointing to the Faulks Committee and the policy adopted in New South Wales and New Zealand).<sup>129</sup> But he is undaunted. He also points out that if the motive is spite, the statements must still satisfy the other requirements of the defence, including being objectively fair, and being honestly

<sup>119</sup> Irish Law Reform Commission, *Report on the Civil Law of Defamation*, Report No 38 (1991) [6.12].

<sup>120</sup> United Kingdom, *Report of the Committee on Defamation*, Cmnd 5909 (1975) [251].

<sup>121</sup> Irish Law Reform Commission, above n 119, [6.12].

<sup>122</sup> *Cheng* [2000] 3 HKLRD 418, 429.

<sup>123</sup> See above Part III, especially, above n 17 and accompanying text.

<sup>124</sup> *Cheng* [2000] 3 HKLRD 418, 419.

<sup>125</sup> *Ibid* 430.

<sup>126</sup> *Ibid* 430.

<sup>127</sup> *Ibid* 430.

<sup>128</sup> *Ibid* 431.

<sup>129</sup> *Ibid* 431–2.

believed by the defendant. One might add that spite is at least likely to make a defendant reckless as to whether the statement is true, which Nicholls NPJ seems to treat as being equivalent to lack of genuine belief in truth.<sup>130</sup> If a journalist or politician genuinely believes that a minister is unfit to hold office, and has the facts to make this a statement that an honest person might make, but in fact is motivated by private grudge, Nicholls NPJ suggests that the defence ought to be available. Just as a statement of fact is not actionable if true, even if motivated by spite, why should an opinion, based on fact, be actionable simply because it is motivated by spite?<sup>131</sup> Finally, any ‘ring-fencing’ of spiteful comments away from all other possible ‘wrongful’ motives would produce a rule too subtle to be explained satisfactorily to a jury. The law of defamation is already ‘sufficiently complex, even tortuous’.<sup>132</sup>

This is Lord Nicholls’ view: does it hold water? In particular, is it appropriate to subject all fair comment to rules most appropriately devised for political and social comment? This was one of the criticisms made of Lord Nicholls by Ma.<sup>133</sup> The flaw in the argument that Lord Nicholls goes too far is that it ignores the five ‘uncontroversial’ requirements. Most importantly, it ignores the requirements that the comment must be on a matter of public interest and the ‘fairness’ requirement (the ‘could be made by an honest person’ requirement). English and Hong Kong law significantly restricts what is of ‘public interest’. It has not followed US law in taking the view that virtually anything said of a person in the public eye is not actionable.<sup>134</sup> It is not in the public interest to know about the private life of even a clearly public figure unless it impinges on the person’s public persona. Nicholls NPJ referred to the ‘social and political’;<sup>135</sup> evidently, he did not mean to refer only to the governmental or the party political. Cases establish that religion, education, politics, sport, the law, the conduct of members of professions in their professional lives are matters of ‘public interest’;<sup>136</sup> can these really be distinguished from the ‘social and political’? The truly private lives of people are not in issue here: the defence of fair comment does not get to first base in that context. Secondly, the judge will direct him or herself or the jury that if the statement could not be made by an honest person it is not ‘fair’ comment; it does not meet the objective criterion. Finally, the plaintiff is not precluded from showing that the defendant was spiteful or had some curious motive — provided that this is being used to show that there was no genuine expression of opinion.

When one considers the requirements that have survived — and that were repeatedly re-emphasised by Nicholls NPJ — the decision in *Cheng* cannot, it is suggested, reasonably be viewed as reducing the protection accorded to the

<sup>130</sup> *Ibid* 440.

<sup>131</sup> Interestingly, this argument by analogy with the defence of justification (truth) was made by Scrutton and Atkin in arguing for the defence in *Thomas v Bradbury* [1906] 2 KB 627, 633.

<sup>132</sup> *Cheng* [2000] 3 HKLRD 418, 431.

<sup>133</sup> See above n 73 and accompanying text.

<sup>134</sup> In the series of cases beginning with *New York Times v Sullivan*, 376 US 254 (1964) (US Supreme Court).

<sup>135</sup> *Cheng* [2000] 3 HKLRD 418, 419.

<sup>136</sup> See generally Milmo and Rogers, above n 1, 269–79.

ordinary citizen. To take the facts of that case, it is hard to accept that there was an invasion of private life. The plaintiff did thrust himself into a very public affair. He is a very public person — a particularly flamboyant, attention-seeking member of the legal profession, one might say.<sup>137</sup> If the statement in question had not concerned events of public interest, the defence of fair comment would not have been applicable and the issue of malice irrelevant.

### C Is the New Rule Unsuitable for Hong Kong?

Some commentators have tried to argue that the common law ought to be the same in every country, notably Albert Cheng, who obviously has some self-interest in defending the CFA decision. There is no reason to suppose that the motive for having foreign judges was to ensure that the decisions of the Hong Kong courts remained in line with those of the rest of the common law world, regardless of whether this is appropriate. Appeals to the Judicial Committee of the Privy Council did not have this effect, at least not recently. The law of defamation is in a curious position, especially in the electronic age. A reputation is something that one cares about generally in relation to one's community. But modern communications mean that defamatory comments may be disseminated worldwide and by almost anyone. This is an argument for the principle that the law should be similar worldwide, but it does not mean that the results would be the same. The defence of fair comment requires that the matter be 'of public interest' — but this means of interest in the place where it is published. So the mere fact that Paul Tse may have behaved in a way that smacked of conflict of interest (which has not been established by any court) and that this is a matter of legitimate public interest in Hong Kong, does not mean that the same outcome would arise somewhere else. If, for example, a statement was published on the Internet, as so many are, but downloaded somewhere else, the court might well hold, as the Australian courts have in *Dow Jones & Co Inc v Gutnick*,<sup>138</sup> that the statement was published in the latter jurisdiction. But the statement, even if it had the defence of fair comment at home, as it were, might well not be so in the new place of publication.

To return to Hong Kong, it seems that certain sections of the popular press of Hong Kong are probably violating some of the basic tenets of responsible journalism.<sup>139</sup> Sensationalism will rarely be compatible with the basic require-

<sup>137</sup> In order to give this sentence the protection of the fair comment defence, it is wise to give further and better particulars: Tse stood for election to the Legislative Council campaigning in a pink Superman outfit; he posed for a magazine cover in the nude and, when the Law Society instituted disciplinary proceedings for this, he protested in the street wearing only loud swimming trunks. See Yulanda Chung, 'Lawyer with a Difference: A Colorful Character Challenges the Establishment', *Asiaweek* (Hong Kong), 13 March 2001 <<http://www.asiaweek.com/asiaweek/daily/foc/0,8773,101798,00.html>>

<sup>138</sup> (2002) 194 ALR 433.

<sup>139</sup> 'Probably' because this author is linguistically deprived of the chance to judge. Incidentally, in the context of qualified privilege, the New Zealand Court of Appeal in *Lange v Atkinson* [2000] 3 NZLR 385 distinguished the situation in New Zealand from that in the United Kingdom in a number of respects, including the more restrained nature of the popular press in the former, while insisting on the appropriateness of a more generous approach than that of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. For one articulation of the tenets of responsible journalism see United Nations Education, Social and Cultural Organisation,

ments of the fair comment defence, especially that of 'fairness'. In other words, the decision about malice is unlikely to significantly affect the likelihood of the press succeeding in this defence in the type of situation which causes some of the greatest distress.

Nor, it is suggested, is the picture of the unfortunate ordinary citizen being deprived of a remedy reflective of reality. Unfortunately perhaps, defamation litigation is not something that can effectively protect the reputation of the private citizen. This is at least as true in Hong Kong as elsewhere. Litigation in Hong Kong is prohibitively expensive and there is no legal aid for defamation.<sup>140</sup> There is no provision, as in the *Defamation Act 1996* (UK) as well as in some other jurisdictions,<sup>141</sup> for a summary remedy designed to provide a quick correction.<sup>142</sup> Defamation is not a booming area of legal practice in Hong Kong. In a survey of the Hong Kong Bar carried out in late 1997 by the author with others, 93.7 per cent of the respondents did not mention defamation as an area of practice (which means that it represented less than 10 per cent of their work), while half of the 10 who did mention it reported it only constituted 10 per cent of their work.<sup>143</sup>

Hong Kong has one of the world's highest literacy rates at 92 per cent<sup>144</sup> and one of the world's highest newspaper readerships, standing in fourth place with 81 per cent penetration of the market.<sup>145</sup> The fundamental principle of the fair comment defence in the modern world (regardless of its genesis) is to treat the audience as having a modicum of intelligence. They are supposed to be capable of looking at evidence, looking at a comment and deciding whether the former supports the latter. If this is not possible on the part of at least most of the citizenry, democracy rests perhaps on shaky grounds.

It may be true that there should be greater protection for privacy.<sup>146</sup> But the courts cannot realistically argue that we must wait before changing the law in one context because the government is yet to take legislative action in another. In fact, the Hong Kong Law Reform Commission is actively considering greater protection of privacy with particular reference to the press.<sup>147</sup>

*International Principles of Professional Ethics in Journalism* (1983) International Journalists' Network <[http://www.ijnet.org/Code\\_of\\_Ethics2/Intl\\_UNESCO.html](http://www.ijnet.org/Code_of_Ethics2/Intl_UNESCO.html)> especially Principle VI 'Respect for Privacy and Human Dignity'.

<sup>140</sup> Legal Aid Ordinance (HK) (cap 91) sch 2.

<sup>141</sup> See, eg, *Defamation Act 1992* (NZ) s 25.

<sup>142</sup> See *Defamation Act 1996* (UK) ss 8–9.

<sup>143</sup> This survey was carried out with Yash Ghai and Berry Hsu (supported by a grant from the Hong Kong Research Grants Council) and the results are currently being processed and an article written for publication in 2003.

<sup>144</sup> See education indicators from the Education and Manpower Bureau of the Hong Kong Government: <[http://www.emb.gov.hk/ednewhp/resource/edu\\_indicator/english/download/10.PDF](http://www.emb.gov.hk/ednewhp/resource/edu_indicator/english/download/10.PDF)>.

<sup>145</sup> See World Association of Newspapers <<http://www.wan-press.org>>.

<sup>146</sup> This is apparently the view of Shiu, above n 74.

<sup>147</sup> See Hong Kong Law Reform Commission (Subcommittee on Privacy), *Civil Liability for Invasion of Privacy*, Consultation Paper (1999).

There are many who believe that at least as great a threat to Hong Kong's public life are the restrictions on press freedom and press self-censorship.<sup>148</sup> The *Cheng* case, it is submitted, basically reinforces press freedom (and the freedom of others, for fair comment is not a press defence only), without significantly diminishing the protection of private citizens.

As mentioned earlier, one of the features of Hong Kong defamation litigation has been the unedifying sight of the media taking each other to court. Why should the media be so eager to capitalise on a feature of the law traditionally deplored by the press? It is, one might think, a regrettable sign of commercial (or political) interest prevailing over journalistic ideal. What impact, if any, is the revised law of fair comment likely to have on this phenomenon? It means that a media organisation that attacks another with the motive simply of expanding its own circulation does not, by virtue of that motive alone, lose the defence of fair comment. It does offer some potential for reducing the use of litigation itself as a weapon in the circulation war. It can only be beneficial if readers' choice is not restricted because publications are being driven out of business or made very expensive by the use of litigation. The CFA ruling retains the idea that suit can be brought if the views stated are not genuinely held.

### VIII LOOSE ENDS ON FAIR COMMENT?

Where does this case leave the defence of fair comment generally? Professor Francis Trindade has pointed out that there are a few issues to be resolved. The first is a dilemma: in many cases there is more than one meaning in issue. The defence may actually deny that the words complained of can bear certain meaning. But if the meaning argued for by the plaintiff is accepted by the court, the defence will have to tackle this meaning. Trindade asks whether:

in order to avail themselves of the defence of fair comment, [the defendants] must not only show that they had an honest belief in the actual words published or whether they must go further and show an honest belief in the imputations which the plaintiff argues, and the jury finds, are conveyed by the actual words published.<sup>149</sup>

In fact Lord Nicholls does not require that the defence show such a belief. His argument is structured on the basis that lack of honest belief must be proved by the plaintiff, in a way similar to the 'malice' that he says is an inappropriate word. This interpretation is supported by his lack of enthusiasm for the *Cherneskey* case which decided the opposite. So the dilemma raised by Trindade does not really arise in that stark form, and in this sense the answer to his question is 'no'. This may be unrealistic. The defendant may find it difficult not to give evidence. Technically this may not be essential if all that must be proved is that this was the sort of statement an honest person could have made. But if the

<sup>148</sup> In the survey of the Bar conducted by the author and others, mentioned in above n 143, 56.6 per cent of the respondents considered that self-censorship posed a considerable or something of a threat to the future of Hong Kong.

<sup>149</sup> Francis Trindade, 'Malice and the Defence of Fair Comment' (2001) 117 *Law Quarterly Review* 169, 173.

defendant does not expose him or herself to cross-examination, counsel for the plaintiff may be able to point to this reluctance when arguing that the defendant did not believe the statement. And a defendant who does expose him or herself to cross-examination may indeed find him or herself in the position of the defendant in *Meskenas v Capon*.<sup>150</sup> There, the defendant said that he did not mean to suggest that the plaintiff was a bad artist, merely that a particular painting was bad, and since he did not believe that the plaintiff was a bad artist, the plea failed. This is logical, but unsatisfactory. Words have no, or limited, meaning just by themselves. It is the context which gives them meaning, and the only meaning that is ultimately in issue in a defamation case is that which the ‘reasonable’ or the ‘ordinary’ reader or listener would have given them.<sup>151</sup> A defendant who pleads justification must show that the words were true *in the sense in which the court finds they were understood*. If the defence cannot persuade the court that the meaning was true (in the case of justification) or was such that an honest person could have meant it (in the case of fair comment) then the defence must fail. But the latter outcome is unsatisfactory because the defendant was not really being dishonest, which is the gist of malice as redefined by Nicholls NPJ.

However, in *Loveless v Earl*, Hirst LJ said:

in a case where words are ultimately held objectively to bear meaning A, if the defendant subjectively intended not meaning A but meaning B, and honestly believed meaning B to be true, then the plaintiff’s case on malice would be likely to fail.<sup>152</sup>

This was said about qualified privilege, but would be equally true of fair comment. If the statement satisfies the objective test of fairness, and the plaintiff is unable to show — either in cross-examination of the defendant or by other evidence — that the defendant was positively being dishonest, then the defence would stand.

Trindade raises another issue: what about the situation in which the defendant is not the author of the comment? Quite clearly, Lord Nicholls had the distinction between the two situations in mind, as it formed the basis for distinguishing *Cherneskey*. Had the jury found for the plaintiff against the radio station as well, the point would have arisen squarely in this case.<sup>153</sup> In *Cherneskey*, the majority view was that the defence failed because there was ‘no evidence to show that the material published, which the jury found to be defamatory, represented the honest opinion of the writers of the letter, or that of the officers of the newspaper

<sup>150</sup> (Unreported, District Court of New South Wales, Christie DCJ, 28 September 1993.)

<sup>151</sup> In *Anderson v Nationwide News Pty Ltd* [2002] 3 VR 639 the Court held that the fair comment must relate to the meaning on which the plaintiff relies.

<sup>152</sup> (1999) 7 EMLR 530, 538–9, cited with approval in *Alexander v Arts Council of Wales* [2001] 4 All ER 205, 215 (May LJ).

<sup>153</sup> It is not at all clear why they did not so find. There is no decision in the common law of England, nor in Hong Kong law, in which a radio station has been given a let-out even for a live broadcast, and Hong Kong has not adopted the exception introduced in the *Defamation Act 1996* (UK) s 1. However, possibly the jury had decided that malice was the crucial issue, and that the station was not ‘infected’ with it, to use the traditional phrase.

which published it.<sup>154</sup> In *Telnikoff*, the House of Lords expressed a dislike for the *Cherneskey* approach of placing the burden of showing actual knowledge on the defendant. Furthermore, legislation has reversed *Cherneskey* in various Canadian provinces, and the effect is that the defence is not defeated if a person could honestly hold the opinion.<sup>155</sup> Sections 9–10 of the *Defamation Act 1992* (NZ) provide that the defence can still avail a defendant who was not the author of the comment provided, firstly, that the comment did not purport to be that of the defendant and, secondly, that the defence shows that there was no reason to believe that the comment was *not* the honest opinion of the author. The Irish proposal was slightly different, namely that the defendant ought to show that it believed that the opinion was that of the author.<sup>156</sup>

It would be possible for English or Hong Kong law to develop to require the plaintiff to show, on the balance of probabilities, that either the opinion was not genuinely that of the author, to the knowledge of the defendant, or that the particular defendant positively disagreed with the opinion. An alternative rule might permit the plaintiff to show that the particular defendant was *neutral* as to the validity of the opinion, but this would be contrary to the forceful argument of the minority (with which the House of Lord agreed)<sup>157</sup> in *Cherneskey*:

An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press.<sup>158</sup>

A fortiori, in Hong Kong, so long as Internet service providers, broadcasters and printers can be sued, the defence would be severely restricted if it was possible to establish 'malice' by simply showing their absence of belief. To make it possible to defeat the defence of the editor, printer, broadcaster or Internet service provider by showing that, unknown to the defendant, the author did not hold the views would be too restrictive, bearing in mind that the objective test of fairness must be satisfied. It would also be possible for the courts to adopt something resembling the New South Wales statutory approach to the 'other author' problem — the defence is defeated if the publication complained of was not 'in good faith for public information or the advancement of education',<sup>159</sup> but this comes rather close to traditional malice or 'improper motive'.

Finally, Trindade starts another hare: the tyro art critic who expresses an opinion which is not entirely her own under the influence of a more experienced

<sup>154</sup> [1979] 1 SCR 1067, 1074 (Martland J, Laskin CJ and Beetz J concurring). The authors of the letter were not sued, therefore the implication is that proof of belief on the part of either the author or the newspaper would have sufficed.

<sup>155</sup> See, eg, *Libel and Slander Act*, RSO 1990, c L 12, s 24; *Defamation Act*, RSA 2000 c D-7, s 9(1). See also Brown, above n 25, 166.

<sup>156</sup> Irish Law Reform Commission, above n 119, [6.12].

<sup>157</sup> *Telnikoff* [1992] 2 AC 343, 355 (Lord Keith).

<sup>158</sup> *Cherneskey* [1979] 1 SCR 1067, 1096 (Dickson J).

<sup>159</sup> *Defamation Act 1974* (NSW) s 34(2).

colleague.<sup>160</sup> Is this something we should worry about? As the law stands after *Cheng*, the burden of proof is on the plaintiff to establish lack of belief. If the art critic has no belief in the position she has set out in her review, maybe she should have declined to go into print. The really interesting position would perhaps arise with a sort of sitting on the fence: the person who puts two points of view ‘on the one hand one might say this, on the other hand one might say that’. It is perfectly clear that these views are nothing more than possible opinions. It is also presumably the case that such a person could not maintain that both were his or her genuine firmly-held views. But what is wrong with putting forward more than one view if each is one that could be held on the facts by an honest person?

It seems likely that the defence of fair comment has not reached the end of its development in Hong Kong or in England. Perhaps if the law did develop in the direction of holding that the burden of proof of honesty should rest on the defendant, this might attract commentators like Ma to the new rule. However, the argument here was presented in the form of the requirements of ‘malice’ and to go further would have gone beyond the scope of the case. This would be to accept the New Zealand rule, to some extent, and that in *Cherneskey*. This is also what the Irish Law Reform Commission proposed, ‘first, because if a defendant pleads comment, he should be prepared to testify as to his honest belief and, secondly, because it is preferable that a statutory provision should be drafted in a positive rather than a negative form’.<sup>161</sup> But earlier in this article it was pointed out that *Cherneskey* was rejected by the House of Lords, and it was suggested that there is good reason for this.<sup>162</sup>

Another direction would be to accept simply that something that is clearly an opinion, is on a matter of public interest and for which the supporting facts are indicated or available, should not be actionable at all, regardless of ‘fairness’. But this would be to ignore the fact that sometimes the facts are only briefly indicated, and, in the case of well-established fair comment situations like dramatic and literary reviews, only referred to and not, in the nature of things, reproduced. Those who read a book review are unable to judge for themselves at that stage whether the review is fair, and it may well deter them from reading the book (after all, this is the purpose of reviews). And certain people (especially in the context of reviews) are so influential that what they say carries more weight than the supporting evidence would justify, even if that evidence is stated.

A less extreme development would be to do away with any element other than the five pillars — in other words, a judicial holding or provision by statute that, if the statement is a fair comment, the opinion of the defendant is irrelevant. A barrister wrote in 1912: ‘If a comment is founded on facts which are not misstated, and is fair as a reasonable inference from those facts, what has the malice of the writer got to do with it?’<sup>163</sup> There is a difference here from the modern

<sup>160</sup> Trindade, above n 149. I am not sure why Trindade’s experienced art critic is a man and the inexperienced one a woman!

<sup>161</sup> Irish Law Reform Commission, above n 119, [6.12].

<sup>162</sup> See above n 157 and accompanying text.

<sup>163</sup> W Valentine Ball, *The Law of Libel as Affecting Newspapers and Journalists* (first published 1912, 1986 ed) 64. This was also essentially the argument raised and rejected in *Thomas v Bradbury* [1906] 2 KB 627: see above n 96 and accompanying text.

position, for it is now clear that reasonableness is not required, but the general point is surely valid.

It could be argued that to go as far as holding that an opinion as such is not actionable as defamation might lead to a collateral attack rather like that in *Spring v Guardian Assurance plc*.<sup>164</sup> In that case, the tactic of using the tort of negligence to avoid the rules of qualified privilege was endorsed. If even the dishonest expression of opinion was not actionable in defamation, plaintiffs might resort to the tort of deceit. If someone puts forward as their opinion something that is not, and this is relied upon by another to their detriment, it may be actionable as deceit.

New Zealand law has gone further in another respect and abolished the public interest requirement, thus actually removing one of Lord Nicholls' five pillars of the tort. It has, however, retained the honesty requirement, elevating it, one might say, to a *prima facie* ingredient of the defence and doing away with express malice.<sup>165</sup> This has the advantage that the defendant has to establish all elements of the defence. The public interest requirement is thoroughly entrenched in the common law, as Lord Nicholls has shown, and it is unlikely that it would be judicially abolished. Nor is it clear that people not otherwise in the public eye ought to be compelled to endure defamatory statements simply because those statements take the form of comments rather than statements of fact.

## IX SHOULD LORD NICHOLLS KEEP HIS MOUTH SHUT?

This is a deliberately provocative way of raising the point: what role should 'foreign judges' play on the CFA? The question is raised by a remarkable attack on the foreign CFA judges by Ma Lik. He wrote:

A flaw in Hong Kong's laws surfaces here; judges sitting in the Final Court of Appeal do not fully appreciate the social situation of this land and therefore making decisions that are unrealistic and unbeneficial to society. The right-of-abode issue is a good example of this.

The SAR [Special Administrative Region] has inherited from the former colonial regime a tradition of employing senior and experienced judges from Britain as non-permanent judges sitting in the Court of Final Appeal.

Unfortunately, the SAR government fails to recognise that these 'parachute judges' do not have any real idea what Hong Kong society is like. [<sup>166</sup>]

They not only do they not know the Chinese language and are unable to listen to the local radio programmes, they have no real understanding of the issues and events surrounding Hong Kong society.

<sup>164</sup> [1993] 2 All ER 273. See also *Lai Hing-Tong v A-G (HK)* [1990] 1 HKLR 56.

<sup>165</sup> The defence as it is under the statute is discussed by the New Zealand Court of Appeal in *Mitchell v Sprott* [2002] 1 NZLR 766. New South Wales retains the public interest requirement: *Defamation Act 1974* (NSW) s 31.

<sup>166</sup> Hong Kong popular speech is fond of parachutes, which refers to people dropped into a situation with no previous connection to it. Families who emigrated, usually to Australia or Canada, often for passport purposes prior to the transfer of sovereignty, usually leaving the father of the family in Hong Kong, were referred to as 'parachute families'.

They have neglected to include the welfare of the society into their considerations, which leads to judgments too naive and unrealistic to be effective or feasible.

As a result, the Hong Kong judicial system is undermined and pays a high price for these decisions made by these foreign judges.

This misconception — that all House of Lords judges make good Hong Kong judges — needs to be banished.

Instead, judges who hold a vision and commitment to serve the interest and welfare of the people of Hong Kong should be appointed.<sup>167</sup>

He was also reported as having written that ‘only those [judges] who are genuinely accountable to the people of Hong Kong should be appointed’.<sup>168</sup> The concept of a judge accountable to any people — still more perhaps to any government — must ring alarm bells, unless one is talking about accountability for improper behaviour, not for the content of their decisions. The only entities to which a judge is supposed to be accountable are his or her judicial conscience and the law — and the most august manifestation of the latter is the relevant constitution. For this reason, the insistence of the judges in *Cheng* that their decision was consistent with the *Basic Law* is significant. It is particularly ironic for a ‘pro-China’ commentator like Ma Lik to urge accountability to the Hong Kong people — for the *Basic Law* does not assure the accountability of even the executive to the Hong Kong people, who cannot elect any member of the executive.<sup>169</sup>

The foreign members of the CFA include some of the most distinguished members, or retired members, of the bench in the common law world — though so far not including the US and exclusively consisting of white males. These are not the sort of people to accept their first class airfares and accommodation in the Mandarin Hotel and sit quietly in the background. Indeed, some of them had sat as final appeal judges for Hong Kong before the handover, as members of the Judicial Committee of the Privy Council. Even if they sat quietly, no doubt CFA watchers would look for their invisible hands in judgments of the Court. We do not know precisely how the CFA reaches its decisions, but we do know that Nicholls NPJ had read the Chief Justice’s judgment before it was delivered,<sup>170</sup> and obviously Bokhary and Ribeiro PJ and Roberts NPJ had read both. It would be interesting to know whether there was a strategic agreement that Li CJ should emphasise the potentially more controversial constitutional point and Nicholls NPJ the common law point, or whether this simply reflects their personal predilections. Perhaps the latter since Lord Nicholls was following an approach which is characteristic of the House of Lords, in the tradition of cases like *Derbyshire County Council v Times Newspapers Ltd*<sup>171</sup> and similar to his

<sup>167</sup> Ma, above n 73.

<sup>168</sup> Cheng, above n 73.

<sup>169</sup> From 2007 they may be able to elect their Chief Executive directly, if the *Basic Law* is amended to permit this: ‘Method for the Selection of the Chief Executive of the HKSAR Region’, *BasicLaw* annex 1.

<sup>170</sup> *Cheng* [2000] 3 HKLRD 418, 440.

<sup>171</sup> [1993] AC 534.

own in *Reynolds v Times*,<sup>172</sup> namely that it is unnecessary to rely on constitutional provisions where a decision can be made on the basis of the common law alone. He did note in passing that he endorsed the Chief Justice's view on constitutional principle.<sup>173</sup>

If there was some tactical agreement, it does not seem to have been successful in deflecting criticism as we have seen, as some have chosen to see Lord Nicholls as the sole begetter of the new rule. The fact is that Lord Nicholls is a distinguished judicial defamation scholar, and it is quite natural that he should give the lead judgment. But there is no reason to suppose that Li CJ and Bokhary and Ribeiro NPJJ are any sort of 'judicial poodles'. Bokhary NPJ, especially, indicated his 'complete agreement' with Nicholls NPJ.<sup>174</sup> He has dissented on occasions, and is emerging as the most outspoken member of the Court.<sup>175</sup> He is certainly no less radical than the 'foreign judges'. Indeed, the Ma Lik position is at least as offensive about the Hong Kong members of the CFA as it is about Lord Nicholls.

It is submitted that commentators like Ma Lik have a conception of the role of the judiciary quite at odds with that of the common law tradition. One also doubts whether Cantonese-speaking judges<sup>176</sup> are much more likely than the foreign judges to spend their time listening to radio phone-in programs. While it is not irrational to take the view that the judiciary and the law ought to reflect popular mores, this is not the way higher courts operate in virtually any system.<sup>177</sup>

Until recently, Hong Kong courts have shown little sign of creativity and innovation. Perhaps this has been as much as anything a reflection of the Bar.<sup>178</sup> Judgments have been short and analysis generally far less detailed than one would find in the courts of other common law jurisdictions. The repatriation of final appeals through the creation of the CFA has had a significant, though not enormous, effect on the volume of appeals. This may be because it is now less expensive to go beyond the Court of Appeal. In the early 1990s, no more than

<sup>172</sup> [2001] 2 AC 127.

<sup>173</sup> *Cheng* [2000] 3 HKLRD 418, 440. Nor is there any reason to suppose that Lord Nicholls is hostile to statutory human rights provisions: see his remarks in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 200.

<sup>174</sup> *Cheng* [2000] 3 HKLRD 418, 424.

<sup>175</sup> See, eg., *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778; *Ng Siu Tung v Director of Immigration* [2002] HKLRD 561; *Thang Thieu Quyen v Director of Immigration* (1998) 1 HKCFAR 167; *Tang Siu Man v HKSAR* [No 2] (1997) 1 HKCFAR 107.

<sup>176</sup> It will not have escaped the notice of the reader that the only judge with a Chinese name is the Chief Justice. Bokhary and Ribeiro PJ, however, were both born in Hong Kong. I do not know whether either of these judges speaks Cantonese.

<sup>177</sup> It is always a little worrying when governments or their supporters call on the judiciary to reflect the aspirations of the people. A recent example from a different continent is Uganda where President Yoweri Museveni has said that the government respects the independence of the judiciary but 'advised them to administer justice according to the values, norms and aspirations of the people of Uganda': Okello Jabweli and Solomon Muyita, 'Museveni for Independent Judiciary', *The New Vision* (Kampala, Uganda), 6 February 2002 <<http://www.newvision.co.ug/detail.php?mainNewsCategoryId=8&newsCategoryId=12&newsId=114084.2>>

<sup>178</sup> The Hong Kong judiciary does not conduct its own research and is dependent on what counsel brings before it.

about 12 cases from Hong Kong were heard by the Judicial Committee of the Privy Council annually, while 20 appeals were heard by the CFA in 2001 — though perhaps fewer in 2002. Whatever the dynamics of the situation, which must also reflect the quality of the individual members of the Court, it has shown signs of taking its place among the courts of final appeal, and of being less reluctant to break new ground. There seems to be little reason to share Ma Lik's apparent regret about this.

## X CONCLUSION

This article makes no pretence of being an impartial analysis of the approach in *Cheng* to malice in fair comment. I favour that decision and hope that it will be adopted in other common law jurisdictions. I recognise that the price may be that the feelings of some individuals will be hurt. It is not a pleasant experience to have one's actions, motives and morals publicly commented on, even if it is clear that the statement is a comment.

However, it is argued that, in modern literate societies, freedom of speech on matters of public interest is something which can only enhance the informed involvement of citizens in public affairs. Democracy assumes the ability of those citizens to make their own judgments and not to be unduly swayed by the rhetoric of others, provided that they are given access to the material on which the opinions are based. Though Hong Kong is not a democracy in some senses, it is a well-educated society with citizens who are capable of evaluating the validity of an opinion.

The critique which has been made by some in Hong Kong of *Cheng* ignores the tough requirements of the five basic principles which must be satisfied before a defendant gets to 'first base' with the defence, and on which most pleas of fair comment actually founder.

It is argued that this ruling almost certainly reflects what Lord Nicholls himself would decide if faced with this issue in another tribunal, and that it is by no means without precedent in at least the statutes of other countries, and within the contemplation of law reformers elsewhere, as well as broadly in line with a powerful argument submitted to the English Court of Appeal nearly 100 years ago in *Thomas v Bradbury*.<sup>179</sup> It represents a natural development of the law, not a radical departure. Had the CFA reached any other decision, the law of Hong Kong would have been saddled with a decision, binding on all courts below the CFA itself, which was out of line with the law in many other common law jurisdictions, including, perhaps in the near future, that of England.<sup>180</sup>

<sup>179</sup> [1906] 2 KB 627.

<sup>180</sup> Indeed at least one English judge has accepted Lord Nicholls' approach, despite the technicalities of precedent, as reflecting his own understanding of 'the rationale and the logic of a fair comment defence': *Branson v Bower* [2002] QB 737, 742–3 (Eady J).