Case Comment

A Matter of Opinion

Scholz v. Delp, 473 Mass. 242 (2015), cert. denied, 136 S. Ct. 2411 (2016)

Scholz v. Delp[1] is worthy of comment — not because it makes groundbreaking defamation law, but because it is a useful judicial explication of what, for purposes of measuring statements as defamatory, is a statement of fact or a statement of opinion. The oscillating conclusions that emerged as the case progressed through the Superior Court, the Appeals Court and the Supreme Judicial Court (SJC) illustrate that the fact/opinion dichotomy is more easily stated than sorted out in a particular case.

Brad Delp (Brad), the lead singer in a rock band led by Donald Scholz (Scholz), committed suicide on March 9, 2007.[2] During interviews with two reporters from the *Boston Herald* (*Herald*), Brad's former wife, Micki, said, in effect, that Scholz had caused Brad's suicide.[3] On March 16, 2007, the *Herald* ran a front page story headlined, "Pal's snub made Delp do it: Boston rocker's ex-wife speaks."[4] What followed in the article was this text: "'Boston lead singer Brad Delp was driven to despair after his longtime friend Fran Cosmo was dropped [by Scholz] from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman's suicide,' Delp's ex-wife said."[5]

Scholz brought two separate defamation actions in Superior Court. The first was against Micki, complaining that the statements by her as reported in the newspaper articles insinuated, falsely, that Scholz was responsible for Brad Delp's suicide.[6] Scholz later brought a second action against the *Herald* for defamation and intentional infliction of emotional distress.[7]

The Superior Court judge who heard the action against Micki entered summary judgment in her favor on various grounds.[8] On review of that judgment, the Appeals Court reversed.[9] It decided that the reported statements raised a "genuine dispute [of fact] between Micki and the *Herald* writers as to precisely what Micki said that resulted in the publication of the article in question, a dispute that cannot be resolved as a matter of law."[10] The opinion proceeded on the assumption that if Micki had been correctly quoted, her statements were defamatory, i.e., they were statements of fact.[11] The SJC granted further appellate review.[12]

In the action against the *Herald*, a different Superior Court judge entered summary judgment in favor of the *Herald* because he concluded that what it had reported were statements of nonactionable opinion.[13] The SJC took that case on direct appellate review, paired it for argument with Micki's case, and disposed of both cases in a single opinion.[14] It came to a distinctly different conclusion than the Appeals Court, and affirmed the summary judgments entered in the Superior Court, holding that the Micki Delp/*Herald* statements were not of fact, but of nonactionable opinion.[15.]

The distinction between fact and opinion has significance as a matter of the common law of Massachusetts, as well as state and federal constitutional law.[16] "Statements of pure opinion are constitutionally protected."[17] As to false statements of fact, however, there is no constitutional protection.[18]

In sorting out the fact/opinion puzzle, a court "must consider all the words used, not merely a particular phrase or sentence."[19] Factors to be considered include "the specific language used; whether the statement is verifiable; the general context of the statement; and the broader context in which the statement appeared."[20]

1. Scholz v. Delp, 473 Mass. 242 (2015), cert. denied, 136 S. Ct. 2411 (2016).
2. *Id.* at 245.
3. *Id.* at 246-47.
4. *Id.* at 247.
5. *Id.*
6. *Id.* at 243.
7. Scholz v. Delp, 473 Mass. 242, 243 (2015), cert. denied, 136 S. Ct. 2411 (2016). That the *Herald* and its reporters did not originate the words claimed to have been defamatory but only published what Micki Delp had said, does not get them off the libel hook. "[One] who republishes a [defamatory statement] is subject to liability just as if he had published it originally." Cianci v. New Times Pub. Co., 639 F.2d 54, 60-61 (2d. Cir. 1980); *see* Restatement (Second) of Torts § 578 (1977).
8. Scholz v. Delp, 83 Mass. App. Ct. 590 (2013).
9. *Id.*
10. *Id.* at 594
11. *Id.* at 597-98.
12. *Id.*
13. Scholz v. Delp, 473 Mass. 242, 244 (2015), cert. denied, 136 S. Ct. 2411 (2016).
14. *Id.*
15. *Id.* at 254. In balancing on the fact-opinion trapeze, the courts favor disposition on summary judgment, because the costs of trial and discovery are so high, and the consequence would be to induce undesirable self-censorship. *See* Cole v. Westinghouse Broadcasting Co., 386 Mass. 308, cert. denied, 459 U.S. 1037 (1982); King v. Globe Newspaper Co., 400 Mass. 400, 706 (1987), cert. denied, 485 U.S. 940 and 485 U.S. 962 (1988), *Scholz* reaffirms that "[u]se of motions for summary judgment is favored in defamation cases." 473 Mass. at 249.
16. S*ee, e.g.,* Lyons v. Globe Newspaper Co., 415 Mass. 258 (1993).
17. King v. Boston Globe Co., 400 Mass. 705, 708 (1987), cert denied, 485 U.S. 940 and 485 U.S. 962 (1988).
18. National Ass'n of Gov't Employees Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979), cert. denied, 446 U.S. 935 (1980), quoting Gertz v. Robert Welch, Inc., 323 Mass. 339-40 (1974).
19. Scholz v. Delp, 473 Mass. 242, 250 (2015), cert. denied, 136 S. Ct. 2411 (2016).
20. *Id., citing* Milkovich v. Lorain Journal Co., 497 U.S. 1, 9 (1990).

The court's application of those principles in *Scholz* begins with the observation that, ordinarily, ascertaining the reason or reasons a person has committed suicide would require speculation; although a view might be expressed as to the cause, rarely will it be the case that even those who were close to the individual will know what he or she was thinking and feeling when the final decision was made. While we can imagine rare circumstances in which the motivations for suicide would be manifestly clear and unambiguous, this is not such a case.[21]

"The statements at issue could not have been understood by a reasonable reader to have been anything but opinions regarding the reasons Brad [Delp] committed suicide."[22] The Delp stories "did not express objectively verifiable facts, but, rather, were defendant's 'theory' or 'surmise' as to decedent's motives in taking his own life."[23] Factors to consider in making the fact/opinion distinction include "the specific language used; whether the statement is verifiable; the general context of the statement; and the broader context in which the statement appeared."[24] Cautionary terms in an article, such as "may have" and "reportedly," relay to the reader that the authors were "indulging in speculation."[25]

As to context, the court thought it significant that "[t]he most extreme language appeared in the headline, which a reasonable reader would not expect to include nuanced phrasing."[26] The court also took into account that the *Herald* article "appeared in an entertainment news column."[27]

The articles in *Scholz* are only one example of what may constitute nonactionable opinion. Criticism also enjoys the opinion umbrella. For example, the following are all opinions: "[M]y partner is robbing me blind,"[28] "This city is a jungle,"[29] and "[T]he food is fine, the people who run it are PIGS."[30] It is the employment of a critic to express an opinion — of a musical performance, the merit of a painting, or the quality of the writing, for example. However, the criticism as opinion defense is not impenetrable.[31] In a case involving the magazine *Consumer Reports*, the magazine had reviewed new loudspeaker systems.[32] It wrote of a Bose system: "[W]orse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander around the room."[33] That comment was disparaging but are not critiques often so? Yet, the court concluded the comment "tended to wander" masqueraded as a fact and provided the basis for a libel action.[34]

Satire also falls in the opinion category. Toward the end of a calendar year, *Boston Magazine* designates the "best and worst" in various categories. In its September 1976 issue, the magazine chose James D. Myers Jr. as the worst sports announcer in Boston and added that he was "enrolled in a course for remedial speaking." Myers argued that the quoted material bore the sting of illegality: It wasn't so (Myers was enrolled in no such course) and writing that he was held Myers up to scorn and ridicule. At face value, the statement was defamatory. The SJC, however, wrote that, "The reasonable reader could only approach the article with a measure of skepticism and an expectation of amusement."[35]

Introducing a statement with "in my opinion" does not automatically qualify the statement for the "opinion" defense if the statement creates a reasonable inference that the "opinion" is justified by knowledge of existing facts.[36] That would be the case with "in my opinion Jones is a liar."[37] As Justice Kaplan wrote, "if I write, without more, that a person is an alcoholic, I may well have committed a libel, prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic."[38] The *Scholz* opinion has a detailed discussion of this category of statement that while "[c]ast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based and thus may be actionable," but holds that the statements at issue in Scholz did not run afoul of the principle.[39]

"It would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words "I think."[40] In *Milkovich v. Lorain Journal Co.*, a local newspaper published a column under the headline "Maple beat the law with the big lie."[41] The body of the column said, "[a]nyone who attended the [wrestling] meet . . . knows in his heart that Milkovich [the wrestling coach] and Scott [former superintendent of schools] lied at the hearing after each had given his solemn oath to tell the truth."[42] After a bow to the importance in a democracy of scope for newspapers to report about public figures (*see Gertz v. Robert Welch Inc.*),[43] the court concluded that what the newspaper published was nothing less than a statement of fact that

21. *Id.* at 251.
22. *Id.*
23. *Id.*
24. *Milkovich*, 497 U.S. at 9.
25. *See* King v. Globe Newspaper Co., 400 Mass. 705, 713 (1987), cert. denied, 485 U.S. 940 and 485 U.S. 962 (1988).
26. Scholz v. Delp , 473 Mass. 242, 252 (2015), cert. denied, 136 S. Ct. 2411 (2016).
27. *Id.*
28. R. Sacks, *Sacks on Defamation: Libel, Slander and Related Problems* § 4.1 (5th ed. 2013).
29. *Id.*
30. Pritsker v. Brudnoy, 389 Mass. 776, 779 (1983).
31. Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 503 (1984).
32. *Id.* at 487.
33. *Id.* at 488.
34. *Id.* at 490.
35. Myers v. Boston Magazine Co. Inc., 380 Mass. 336, 342 (1980).
36. Scholz v. Delp, 473 Mass. 242, 252 (2015), cert. denied, 136 S. Ct. 2411 (2016).
37. R. Sacks, *Sacks on Defamation: Libel, Slander and Related Problems*, § 4.1, n. 52 (5th ed. 2013); *see* Restatement (Second) of Torts § 566, comment c. (1977).
38. National Association of Government Employees Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227-28 (1979).
39. Scholz v. Delp, 473 Mass. 242, 252-54 (2015), cert. denied, 136 S. Ct. 2411 (2016).
40. Cianci v. New Times Pub. Co., 639 F.2d 54, 64 (2d. Cir. 1980).
41. Milkovich v. Lorain Journal Co., 497 U.S. 1, 4 (1990).
42. *Id.* at 5.
43. Gertz v. Robert Welch, 418 U.S. 323 (1974).

coach Milkovich and former superintendent Scott had committed perjury.[44] That was actionable.[45] Other examples of opinion that are surely insulting, but, because opinion, not actionable, are offered in *Sacks on Defamation: Libel, Slander and Related Problems:* The plaintiff was "a very poor lawyer," a securities trader was a "sucker, fool & frontman," and a city official who took his wife on a city business trip was "really a thief" for doing so.[46] Figurative speech also qualifies as opinion. To employ the epithet "bastard" directed at her son is in common usage an insult and not actionable as an assault on his mother's chastity.[47] What is fact or opinion may vary with the times. In *Perkins v. Taylor*, an English decision from 1607, the court held actionable, "Thou art a leprous knave," reasoning, "[t]hey are as well actionable as if he had said, 'Thou wast laid of the pox,' wherefore, without argument, it was adjudged for the plaintiff."[48] Were the words said now, those words, while insulting and meant to be so, would hardly be thought a statement of fact. The "pox" is not in contemporary vocabulary and "leprous" is an extinct adjective.

What remains constant in defamation law, however, is that the fact/opinion distinction survives as one of the most complex issues in defamation cases, and *Scholz* has not laid it to rest. In particular cases, the correct classification of a given statement as fact or opinion remains a matter of opinion on which judges may differ.

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44. *Milkovich*, 497 U.S. at 8.

45. *Id*. at 9.

46. R. Sacks, S*acks on Defamation: Libel, Slander and Related Problems*, § 4.3.5 (5th ed. 2013).

47. *Id.* at § 4.2.4.

48. Perkins v. Taylor, King's Bench, Hilary Term, (1607).