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In Defence of Lawyers Who Lose

By: Alice Woolley

Case Commented On: *Engel v Edmonton Police Association*, [2017 ABQB 495 \(CanLII\)](#)

In September 2008 the Edmonton Police Association published an article on its website about cases brought to the Law Enforcement Review Board by Edmonton lawyer Tom Engel, his law firm, and the Edmonton Criminal Trial Lawyers' Association. The [Law Enforcement Review Board](#) is the independent quasi-judicial body charged with hearing appeals related to complaints from the public about police officers. The Police Association article claimed that Engel's firm before the Board was "O for 28!", that it had a "dismal record" and that in "more than a third of the cases" the firm "started something and failed to finish": "After 28 incidents of cry wolf, when does someone call B.S.?" (at para 40). The article went on to ask whether this was "incompetence", "extreme incompetence" or whether "something else was going on here" and queried, "when do these complaints and appeals become frivolous and vexatious?" (at para 41).

In a carefully reasoned judgment, Madam Justice Inglis held that the Edmonton Police Association and Bill Newton, the author of the article, had defamed Mr. Engel, and awarded \$50,000 in damages. Justice Inglis held that a sensible person reading the article in the ordinary way would understand the article to be about Mr. Engel (para 61). That reader would understand the article to "impute that Mr. Engel...is incompetent, unskilled and ineffective as a lawyer" and as claiming he may be acting for "ulterior motives" (at para 64). She rejected the suggestion that phrasing the impugning of Mr. Engel's competence as a question, and including within it members of Mr. Engel's firm, reduced its defamatory effect (para 65).

Justice Inglis rejected the defence of truth, noting that the "O for 28" claim depended on a particular definition of success that the article did not state and was, in any event, not true even on that definition (para 68). The allegations of incompetence and impugned motive were not defended as true and were "directly contrary" to evidence from Mr. Newton, the author of the article (at para 69). Justice Inglis also rejected the defence of qualified privilege since while it would be appropriate for the Edmonton Police Association to publish articles for its members about the process and "typical outcome" of a Law Enforcement Review Board hearing, this article did not do so, and none of the defamatory statements were linked to that purpose (paras 72-73). The defendants generally failed to satisfy the defence of fair comment since the factual statements were not comment (para 77), and the comments that were made were not based on fact (para 78). Justice Inglis was prepared to find that "After 28 incidents of cry wolf, when does someone call B.S.?" could be defended as fair comment since it was "based in fact, made inferences from fact and is obviously comment", but that was only one aspect of the article's defamatory content (at para 79). Malice was not relevant because the defences were not made out; however, she concluded that malice was not established (para 83).

In setting damages at \$50,000, Justice Inglis noted that the comments had the potential to harm Mr. Engel's "standing in the community" and may consequently have affected his ability to attract work; the impugning of Mr. Engel's competence and motives were particularly damaging (at paras 86-87). She also noted that the Edmonton Police Association did not apologize to Mr. Engel; their only response was "to put the responsibility on the plaintiff's shoulders by suggesting he draft a rebuttal" (at para 89) and, even there, the author of the article failed to follow up on that suggestion when he was supposed to have done so (para 89).

Comment

This case generated significant [media attention](#). In general, however, it provides little scope for academic comment. Even without Justice Inglis's careful explanation, it's easy to see why the article published by the Edmonton Police Association was found to be defamatory. As she notes, the article's 'questions' do not soften its clear accusation that Mr. Engel is incompetent at best and malicious at worst, and the defendants brought no evidence to support the truth of those accusations. Mr. Engel deserved to win, and I'm glad he did.

What interests me, however, is the amount of time spent at the trial considering the accuracy (or, as it turns out, inaccuracy) of the defendants' statement that Mr. Engel was "0 for 28" at the Law Enforcement Review Board. The argument, it seems, was that if that statement could be defended (which it couldn't be) then the rest of the article would cease to be defamatory; a lawyer with an 0 for 28 record could be fairly said to have demonstrated "extreme incompetence" or "something else" (para 41).

I do see the argument; lawyers are paid to win, not to show up. But I also think it's wrong to suggest that a 0 for 28 record on its own evidences either incompetence or ulterior motives. Lawyers do not necessarily lose cases because they have done a bad job as advocates, or because they have brought forward a case that ought not to have been argued. They sometimes lose because the case they brought was *hard*. They may be engaged in the virtuous work of defending the factually guilty where a poor success rate is inevitable (see Abbe Smith, "In Praise of the Guilty Project: A Criminal Defence Lawyer's Growing Anxiety About Innocence Projects" (2010) 13(3) [Univ of Penn Jour of Law and Social Change 315](#)). They may be advocating for their clients against systemic injustice, or against powerful interests, where the odds are stacked against them, and even a single victory amongst dozens is a triumph.

I do not know much about the law governing police misconduct, or the specific function of the Law Enforcement Review Board, but I cannot say that I would be particularly surprised if when lawyers represent people complaining of police misconduct they lose more than they win. Many of their clients will have been convicted of crimes or suspected of criminal activity. Many of their clients will be vulnerable, disempowered or racialized. And the justice system does not lightly sanction any official actors for wrongdoing, including the police.

I do not know what Mr. Engel's actual record was before the Law Enforcement Review Board (although I do know that it was much better than 0 for 28!). But my point is that his competence and motives should not have been judged by his win-loss record in any event; he argues hard cases, and even if he advocates well and thoroughly, he may not win. We should respect that hard work, not judge it on an erroneous basis.

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