

Weighing up fair reviews – Article by Jane Phillips – Stage Magazine 9th August 2007

Edinburgh festival veterans and hopefuls alike are now awaiting the response to their work. Reading a negative reaction is never pleasant, but at what point has the critic gone to far?

You have just read the worst review ever. Poisonous, wounding and death to ticket sales, let alone your own career. Can critics really say that? Can they say, as Baudelaire famously said of Wagner's music, "I love Wagner; but the music I prefer is that of a cat hung up by its tail outside a window and trying to stick to the panes of glass with its claws"? Or, as Ken Tynan said of Orson Wells playing Othello, "No doubt about it, he has the courage of his restrictions"? Or, as Dorothy Parker said of Katharine Hepburn at a Broadway first night: "She ran the whole gamut of emotions from A to B"?

The answer to all three is, of course, yes. 'Fair comment', as the law rather confusingly describes it – it need not be 'fair' in the sense of 'just' – is an important foundation stone of freedom of speech.

It is a fundamental right which allows people to express their honestly held views, however exaggerated or even prejudiced the language of their criticism is.

And it is alive and well and thriving in England – not for us the reports coming from Ireland and Australia that restaurant reviewers must look to their insurers rather than their palates when criticising meals they have had – the courts here have reiterated the importance of allowing value judgments, such as reviews, to be made without fear of being sued for libel.

A recent case in point is the one brought by Keith Burstein, the composer, against the Evening Standard. Burstein's claim arose out of a review of Burstein's new opera, *Manifest Destiny*, a play about suicide bombers. The review concluded by saying: "But I found the tone depressingly anti-American, and the idea that there is anything heroic about suicide bombers is, frankly, a grievous insult." Burstein claimed that the article meant that he was a sympathiser with terrorist causes, and that he applauded the actions of suicide bombers, raising them to the level of heroism.

The Court of Appeal dismissed Burstein's case. In deciding that the article was clearly covered by the defence of 'fair comment', it quoted with approval a passage from a well known early 19th-century libel case: "it is not libellous to ridicule a literary composition, or the author of it, insofar as he has embodied himself with his work...Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right."

So when does 'fair comment' apply to a review? First, the words must clearly be identifiable as comment, as opposed to statements of fact. As stated in the Burstein case, the words must carry "the unmistakable badge of comment".

Identifying comment is sometimes harder than it sounds, although you tend to recognise it when you see it. Legally, it has been defined as "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc". Thus, to give a well known example, to say "A is a disgrace to human nature" is clearly an allegation of fact, but if the words were "A murdered his father and is therefore a disgrace to human nature", the latter words are plainly a comment on the former. In the context of a review of a play or a programme, it will be much easier for the reader to appreciate that the review is likely to contain the subjective commentary of the critic.

Second, if the review strays into personal territory, it may well lose the protection of the defence. It must be focused on the author, actor or director's work and not on any other aspect of their personal lives. Again, 19th century rules apply: "We really must not cramp observations on authors and their works. They should be liable to criticism, to exposure, and even to ridicule if their composition be ridiculous...Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him."

Third, the comment must be based on true facts. It goes without saying that if the review misstates what the play is about or, worse, reveals that the critic did not attend the performance under review, the comment is plainly not based on true facts.

However, not all the facts must be set out in the review itself – reviewers are now entitled to rely on facts which they had in mind, at least in general terms, when they made the comment.

Fourth, the comment must be objectively fair, that is to say it must be an opinion which an honest man can hold. In this respect, it must be remembered that a comment may be 'fair' even if it is expressed in pungent and offensive terms: "A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord."

Just because you (and indeed many others) may not agree with the sentiments expressed, does not mean that the comment is not 'fair'.

Finally, however much you may dislike the review, it must be remembered that a critic's job is, after all, to criticise. Tynan pinned to his desk the slogan: "Rouse tempers, goad and lacerate, raise whirlwinds."

And that freedom to comment is precisely what the English courts seek to protect. Liberace's successful 1959 case arising out of the Daily Mirror's description of him as, "This deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit flavoured, mincing, ice-covered heap of mother-love...". may have been decided differently today.

Jane Phillips

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