Supreme Court tightens discrimination and strengthens freedom of expression

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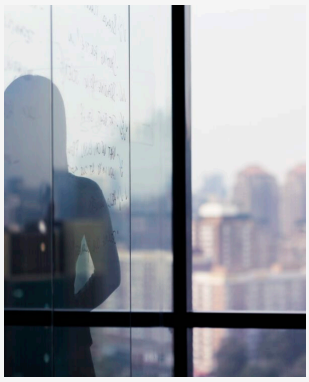

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Offensive comments may give rise to civil liability for the person who makes them if the victim suffers harm as a result. This liability is generally governed by the law of defamation, under which the author must compensate the victim for the damage he or she causes to the victim's reputation. What if the comments are not only offensive, but are based on a ground of discrimination, such as the victim's disability? Is the perpetrator guilty of discrimination under the Quebec Charter of Human Rights and Freedoms (the Charter)?

In *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, the Supreme Court of Canada gave a nuanced answer to this question. According to the majority,[1] not all offensive comments are discriminatory, even if they are based on a ground of discrimination and cause personal harm to the victim. There must be an infringement of the victim's right to safeguard his or her dignity, which must be reconciled with the author's freedom of expression.

Context

The case involves remarks made by comedian Mike Ward at the expense of Jeremy Gabriel. At the time of the incidents, Mr. Gabriel was a minor and had a singing career. He was also born with Treachers Collins Syndrome. This syndrome caused him to have head deformities and severe hearing loss. At the time, Mr. Ward presented a show and posted videos in which he mocked Mr. Gabriel by referring to his disability. Mr. Gabriel's parents filed a complaint on his behalf with the Commission des droits de la personne et des droits de la jeunesse. The complaint of discrimination on the basis of disability was deferred to the Human Rights Tribunal, which ordered Mr. Ward to pay moral and punitive damages. This award was later upheld by a majority of the Court of Appeal.

Reasons and Conclusions

The Court reiterated the criteria for discrimination. To establish discrimination, the complainant must demonstrate three elements:

- he or she is subject to differential treatment, which is a distinction, exclusion or preference

in relation to others;

- the differential treatment is based on a ground of discrimination listed in s. 10 of the Charter (e.g. sex, race, religion, disability); and
- the differential treatment has the effect of nullifying or impairing the equal recognition or exercise of his or her right or freedom under the Charter (e.g. the complainant's right to the safeguard of his or her dignity).

The majority's analysis focuses on the third criterion, on which it makes two clarifications.

First, the majority identifies the scope of the right to dignity that Mr. Gabriel claims was[2] compromised by Mr. Ward's jokes. For the majority, this right does not protect any particular individual from emotional harm. Rather, it protects "the *humanity* of each person in its most fundamental attributes" (para. 57). According to the majority, this humanity that belongs to each person is what distinguishes civilization from barbarism. A comment that is disrespectful or offensive to the victim is not sufficient to violate his or her dignity, even if he or she suffers emotional harm as a result. The conduct complained of must be assessed objectively and of such gravity as to "outrage the conscience of society" (para. 58).

Second, the third criterion requires a reconciliation between the complainant's right to dignity and the respondent's freedom of expression under s. 9.1 of the Charter. Freedom of expression is fundamental to a democratic society and protects even unpopular, derogatory, or repugnant expression. Thus, freedom of expression requires a certain amount of tolerance from the audience. The required tolerance stops only when it is necessary to prevent a specific and serious harm. The harm in question must go beyond the mere suffering of the victim. Rather, it must be a threat to the social acceptance of the victim or the group to which he or she belongs. In this sense, the harm that justifies limiting freedom of expression is social rather than personal in nature.

Based on these observations, the majority developed a test to balance the right to dignity with freedom of expression. Under the third criterion of discrimination, to establish that his or her right to dignity has been compromised, the complainant must demonstrate two things:

- a reasonable person, aware of the circumstances, must view the comments targeting an individual or group as inciting others to vilify them or to detest their humanity on the basis of a prohibited ground of discrimination; and
- a reasonable person must view the comments, considered in its context, as likely to lead to discriminatory treatment of the person targeted.

In the case of Mr. Gabriel, the majority readily acknowledged that the first criterion of discrimination had been met. Mr. Ward's show and videos treated Mr. Gabriel distinctly. However, the majority found that the other two criteria were not met. First, Mr. Ward's decision to mock Mr. Gabriel was motivated by Mr. Gabriel's notoriety rather than his disability. It follows that the differential treatment was not based on a ground of discrimination[3]. Second, a reasonable person informed of the humorous context of the remarks, and Mr. Ward's style of humour, would conclude that the remarks do not incite others to vilify or detest Mr. Gabriel's humanity, nor are they likely to lead to discriminatory treatment of Mr. Gabriel[4].

Commentary

The Supreme Court's decision represents a narrowing of the right to equality in the context of offensive remarks based on a ground of discrimination. In an obvious effort to preserve

freedom of expression, the majority distinguished the right to dignity from the victim's mere personal harm and linked it to a social harm that goes beyond the victim's well-being. Some will argue that this conception of the right to equality is tantamount to belittling the suffering of victims when others use a ground of discrimination to shock or make fun of them. Others will be concerned that this view reinforces a sense of impunity for those who use a ground of discrimination to provoke or entertain. The majority view was that some impunity for perpetrators and some suffering for victims is the price of living in a democratic society in which freedom of expression is also a fundamental value.

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[1] *2021 SCC 43. The majority consists of Chief Justice Wagner and Justices Côté, Moldaver, Brown and Rowe. The majority's reasons were written jointly by the Chief Justice and Justice Côté*.

[2] Demonstrating these three criteria allows the victim to establish a prima facie case of discrimination. The burden then shifts to the defendant to establish a defense.

[3] In their dissent, Justices Abella and Kasirer disagreed with this conclusion. They criticized the majority's approach, which focused on the author's intent rather than the effect of his words. According to the dissenting justices, it is undeniable that Mr. Ward's jokes, in their effect, set Gabriel apart from others not only because of his notoriety, but also his disability.

[4] The dissenting justices also criticized the majority's conclusions on the third criterion. In particular, they criticized the majority's propensity to ignore, in its assessment of the injury to dignity, the personal harm suffered by the victim. The dissenting justices preferred the test of the reasonable person who, in the victim's shoes, would suffer serious personal consequences as a result of the remarks in question.