

Publication and Re-publication

PUBLICATION IS an essential ingredient of defamation. In the leading English case, Lord Esher observed that publication is the "making known the defamatory matter, after it has been written to some person other than the person of whom it is written".¹

Thus, publication must be to a third party. In India, this is the position in civil and criminal law. Section 499 of the Indian Penal Code punishes a person who "makes or publishes any imputation".² The word "makes" in this section does not render the mere making of a statement an offence—*i.e.* the mere composing of a libel is not punishable. This is clear from explanation 4 to section 499, which provides that an imputation harms the reputation of a person only when it lowers him in the estimation of others. Gour³ has pointed out that in section 499, the word "makes" supplements the sense of "publishes" and that the latter is derived from Latin *publicus*, standing for *poplicus*, derived from *populus* (people). Thus, sending a notice of suit to a policeman who made a search of the plaintiff's premises without a warrant is not an offence of defamation of the policeman.⁴ This was an Allahabad Full Bench (majority) view. Same is the Bombay view.⁵ The only significance of the word "makes" in section 499 is to render the maker *liable*, provided the statement is *published*. The question whether the statement is communicated to a third party is, therefore, still material for the purposes of section 499 of the Indian Penal Code as was pointed out in a Madhya Pradesh case.⁶ Publication, therefore, implies communication to a third person, for the purposes of criminal liability also.⁷

The principle that publication must be to a third person has raised an interesting question as to whether publication to one's spouse constitutes publication for purposes of the law of defamation. The question arose in a Kerala case,⁸ but the facts of the case were rather peculiar. A person wrote to his wife a letter containing defamatory statements about the wife's father. The father unauthorisedly opened the letter and brought a complaint of defamation against the husband. The Kerala High Court held that the husband had

1. *Pullman v. Water Hill & Co.*, (1891) 1 Q.B. 524, 527.

2. See Appendix 3 for the text of s. 499, I.P.C.

3. Gour, *Penal Law of India* 2617 (7th ed., 1962).

4. *Queen-Empress v. Taki Hussain*, I.L.R. 7 All. 205 (1885) (F.B.) (majority 4 : 1).

5. *Queen-Empress v. Sadashiv Atmaram*, I.L.R. 18 Bom. 205.

6. *In re Bhulliram Jalum*, A.I.R. 1962 M.P. 382 : (1962) 2 Cr. L.J. 760.

7. *Amar Singh v. Badalia*, (1965) 2 Cr. L.J. 693.

8. *T.J. Ponnen v. M.C. Varghese*, A.I.R. 1967 Ker. 228.

committed no offence and that the father's prying into the letters addressed to his daughter was unlawful and violative of the principle underlying section 122 of the Evidence Act. The father could not take advantage of a wrong to which he was a party and then base a complaint of defamation thereon. In fact, there is an English authority⁹ holding that intention to publish will not be presumed where a third party writes defamatory matter and keeps it locked.

The judgment of the Kerala High Court was reversed on certain other grounds¹⁰ (not material to the present discussion) by the Supreme Court.

How far a statement made by a spouse to another spouse enjoys absolute privilege¹¹ has become a matter of some debate in India. So far as criminal liability is concerned, it can be taken as reasonably certain that the exceptions to criminal liability are only those mentioned in section 499 of the Indian Penal Code, and what does not fall within the language of those exceptions cannot be immune from liability for defamation.¹²

A defamatory statement made by one spouse to the other, as distinct from a statement made to the spouse of the plaintiff, cannot in the United Kingdom be the subject of an action.¹³ The older authorities put this upon the ground that there has been no publication; but it seems preferable today, when the fiction of the unity of husband and wife has been discarded, to say that it is an instance of absolute privilege, the reason for which is the highly confidential character of the relationship.¹⁴

According to the Madras High Court the doctrine of "unity of the spouses", is, of course, not recognised in India and cannot be made the basis of an immunity from liability for defamation.¹⁵ This was noticed by the Supreme Court in a case relating to criminal liability, though it did not express any final opinion on the point.¹⁶

However, it is possible to reason that statements made to spouses should enjoy absolute privilege on the basis of the need to protect marital confidences with the greatest sanctity. The real reason for recognising such a privilege is not the supposed identity of personality of the spouses, but the valid postulate that such confidences should be protected. As Salmond has pointed out, a defamatory statement made by one spouse to the other (as distinct from a statement made to the *spouse of the plaintiff*) cannot be the subject of an action

9. *Supra* note 1 at 527. See also *supra* p. 24.

10. *M.C. Verghese v. T.J. Poonan*, (1969) 1 S.C.C. 37, 40.

11. As to absolute privilege, see *infra*.

12. See *T. Mudali v. T. Annal*, I.L.R. 49 Mad. 728 (1926). (S. 499 I.P.C. held to be exhaustive).

13. Salmond and Heuston, *Law of Torts* 154, para 56 (6) (1981).

14. Prosser, *Law of Torts* 785.

15. *Abdul Khadar v. Taib Begum*, A.I.R. 1957 Mad. 339.

16. *M.C. Verghese v. T.J. Poonan*, *supra* note 10 at 40.

and that today, when the fiction of unity of the husband and wife has been discarded, it seems preferable to state "that it is an instance of absolute privilege, the reason for which is the highly confidential character of the relationship".¹⁷ There is, therefore, need to amplify section 499 of the Indian Penal Code, by inserting an additional exception on the subject.¹⁸ Of course, the point is valid for civil liability also.

Questions of publication also arise, but in a slightly different form, when a communication is made on a privileged occasion to a person in regard to whom the occasion is privileged and the question arises whether the privilege is lost by publication to another person. Broadly, the position, both in the United Kingdom¹⁹ and in India,²⁰ is that where a communication to the third person is made in the ordinary course of business, the privilege is not exceeded.

The offence of defamation may be committed even if the matter is contained in a plaint filed in the court. Such filing amounts to enough "publication" for the purpose of the law of defamation.²¹

Re-publication of a libel is actionable even though the statement containing the republication mentions that the information is derived from a particular named source.²² The same rule applies to slander; every repetition of a slander heard from others is actionable, unless the occasion be privileged.²³ The person repeating a slanderous statement cannot take the defence that he was merely repeating what had been uttered by others.²⁴

17. Salmond and Heuston, *supra* note 13 at 154-155, para 56(6), citing Prosser, *supra* note 14.

18. Point for law reform (s. 499, I.P.C.).

19. *Osborn v. Thomas Boulter & Son*, (1930) 2 K.B. 226.

20. *Keshab Lal v. Provat Chandra*, A.I.R. 1938 Cal. 667; *Ajit Singh v. Radha Kishen*, A.I.R. 1931 Lah. 246.

21. *Thangavelu Chettiar v. Ponnammal*, A.I.R. 1966 Mad. 363 (criminal case).

22. *G. Chandrasekhar Pillai v. G. Raman Pillai*, (1964) Ker. L.T. 317.

23. *Mi Ngwe v. Mi Pwa Su*, 27 I.C. 979; 7 Burma Law Times 253, cited by Mitter, *Law of Defamation and Malicious Prosecutions* 74 (1978).

24. *Raghunath Singh v. Mukandi Lal*, A.I.R. 1936 All. 780.