CHAPTER 7

Liability for Defamation : Joint Responsibility and Multiple Publication

I. Joint Responsibility

ASSUMING THAT a statement is defamatory, certain questions arise as to who are the persons to be held liable for it. Publication, as already stated, is one of the essential ingredients of defamation. Since the process of "publication" involves a number of stages and a number of individuals, it becomes necessary to determine who is legally liable. This raises several issues. One such issue concerns joint responsibility for a defamatory statement.

Every person who takes part in the publication of a libel is *prima facie* liable for it[1]. Thus, for example, where an article containing a libel is published in a newspaper, the following persons are *prima facie* liable (in a civil action) :

(*i*) The writer of the article.

(*ii*) The proprietors[2] of the newspaper. They will be liable as participants in the publication and are also likely to be vicariously liable as the employers of editor and the journalist concerned.

(*iii*) The editor.

(*iv*) The printers; and

(*v*) subject to an important qualification,[3] to be discussed below,[4] persons such as newspaper vendors, who sell the newspaper to the public.

The Second Press Commission stated the existing position regarding joint responsibility for the publication of a defamatory statement, as under :

> Under the existing law, where an action for defamation is brought in respect of a joint publication of a libel, malice on the part of any one of the persons jointly responsible for such publication is sufficient to defeat the plea of 'fair comment' or 'qualified privilege' so as to render all the defendants jointly liable to the plaintiff. The presence of malice on the part of

1. *Halsbury's, Laws of England* 17, 19, 35, paras 32, 38, 65 (4th ed., 1979), see also Duncan & Neill, *Defamation* 41, para 8, 12 and f.n. 1 (1978).

2. *Munshi Ram* v. *Melaram*, A.I.R. 1936 Lah. 23, 26 (knowledge of publication not required).

3. Innocent dissemination.

4. See *infra* pp. 28, 29.

one defendant renders the whole of the damage recoverable from a co-defendant who may himself be wholly innocent of malice. We think the following statement of law on the point by Gatley is most appropriate :

> Where a person has published defamatory words on an occasion of qualified privilege the privilege will only be defeated so far as he is concerned if he himself is malicious, or if he is liable on the basis of respondent-superior for the malice of a servant or agent.[5]

The Second Press Commission analysed the impact "of this principle in our law" as under :

(1) A publisher of a newspaper will continue to be vicariously responsible for the malice of his agent;

(2) A publisher of a newspaper will not be vicariously responsible for the malice of an independent contractor; and

(3) A publisher of a newspaper will not be vicariously liable for the malice of an unsolicited correspondent, whether anonymous or otherwise.[6]

In this context, the Second Press Commission also referred to the recommendations made by the Faulks Committee in the United Kingdom[7] on the question of the liability of distributors, printers and translators of written publications. The Faulks Committee had noted that distributors of written publications (for example, booksellers, news agents and news vendors) enjoy the special defence of "innocent dissemination" which is not available to the first or main publishers of a work. It recommended the extension of the defence of innocent dissemination to printers, subject to the same or similar conditions and safeguards as in the case of distributors. It may be mentioned that under the defence of innocent dissemination[8] (which is non-statutory in character) distributors are protected[9] if they can prove that :

(a) They did not know that the book or paper contained the libel complained of; and

(b) they did not know that the book or paper was of a character likely to contain a libel; and

(c) such want of knowledge was not due to any negligence on their part.[10]

5. *Second Press Commission*, *Report*, vol. 1, p. 48, para 82 (1982).
6. *Ibid*
7. *Faulks Committee Report*, Cmd. 5909, pp. 81-85, paras 293-315 (1975).
8. See *infra* p. 29.
9. *Emmens* v. *Pottle*, (1885) 16 Q.B D. 354; *Vizetelly* v. *Mudie's Select Library*, (1900) 2 Q.B. 170.
10. *Supra* note 7 at 81, para 294.

The Faulks Committee noted that the effect of this recommendation would be that printers who print, in the normal course of their business of everyday printing, will have a defence. But where they are put on enquiry as to the potentially defamatory character of the work complained of, or are in any way negligent in failing to enquire (about the defamatory character) in relation to any given work they would continue to be liable. In fact, the Faulks Committee added that if the experience of distributors is any guide, the recommendation, if accepted, would ensure that printers are normally not joined as defendants. As regards translators,[11] it recommended the enactment of the following clause, providing for a defence which "would be equivalent in nature to qualified privilege" :

> Publication by any person of a translation made by him (whether oral or written) shall be protected by qualified privilege provided that the words complained of have been translated in accordance with the sense and substance of the original.

Having noted the recommendations of the Faulks Committee summarised above, the Second Press Commission in India recorded the following conclusion on the subject :

> We suggest that the recommendations of the Faulks Committee with regard to the liability of distributors (*sic*) and printers be incorporated in our law. As regards translation, we are of the view that protection should be given to the translator, *but not to the publication of offending matter in translation.*[12]

The suggestion made by the Second Press Commission is worth considering,[13] but the refinement made by it not to extend the defence to *publishers* of offending matter in translation seems, with respect, to be incongruous. There is no basis for making a distinction between translator and publisher.

Innocent Dissemination

Innocent dissemination, referred to above, [14] is a common law defence applicable to distributors of defamatory matter.[15]

This defence is not to be confused with the statutory defence of "innocent publication", created in the United Kingdom by section 4 of the Defamation Act, 1952, The latter is meant for the publisher who proves that the words complained of were published by him innocently *in relation to the person*

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11. *Id* at 84-85, paras 311-313.
12. *Supra* note 5 at para 83 (emphasis added).
13. Point for Law Reform. See *infra* p. 3
14. *Supra* p. 28.
15. Salmond & Heuston, *Torts* 147 (1981) Duncan & Neill, *supra* note 1, at 116-117, paras 16.03 to 16.06.

defamed and the plea must be accompanied by an offer of amends. The former, on the other hand, is meant for a person who acts merely as the distributor of defamatory matter. It is of importance to[16] ;

(*a*) wholesalers,

(*b*) book sellers,

(*c*) news agents, and

(*d*) libraries,

who, in the absence of such a defence, might be liable in respect of the publication of libels contained in books, newspapers, magazines and other reading material which they make available to the public.

There is no Indian case directly dealing with the common law of "innocent dissemination". However, the rule of the English law on the subject will, presumably, be followed in India.

As to the English cases on the subject, they are rather numerous.[17] The precise basis on which the law regards the innocent disseminator as not liable for the libel so disseminated is, however, still, obscure. In one of the English cases dealing with the liability of distributors of newspapers and periodicals,[18] Scrutton, L.J., while agreeing with the test laid down in an earlier case[19] by Romer, L.J., also added this comment of his own :

> It was difficult to state exactly the principles on which newsvendors, circulating libraries, the British Museum, and other institutions of that kind who did not themselves write the libels, but sold or otherwise passed on to others, books and documents which in fact contained libels, were freed from responsibility.[20]

Discussing the basis of the immunity from liability enjoyed by distributors who disseminate defamatory matter innocently, Lord Esher, M.R.,[21] said that news agents (unlike authors or printers) only disseminated that which contained the libel. If the defendants did not know that the paper was likely to contain a libel and ought not to have known this even after using reasonable care, then they did not "publish" the libel. On this view, there is no "publication" in such cases. But, on another view, the disseminator does "publish" the libel, but if he can establish innocent dissemination, he is not responsible for it.[22]

16. Duncan & Neill, *supra* note 1 at 115, para 16.02.
17. *Halsbury's*, *supra* note 1 at 38, para 72.
18. *Bottomley* v. *Woolworth & Co.*, 48 T.L.R. 521 (1932).
19. *Vizetelly* v. *Mudie's Select Library Ltd.*, *supra* note 9.
20. *Supra* note 18.
21. *Emmens* v. *Pottle*, *supra* note 9.
22. Duncan & Neill, *supra* note 1 at 117, para 16.04, note 3.

The difference between the two views, noted above, has a practical importance since the question of burden of proof arises, which itself is of considerable practical value. Should the *defendant* prove that he acted innocently in disseminating the statement, or should the *plaintiff* prove that the defendant had knowledge (or an opportunity of acquiring knowledge) of likelihood of harm to the plaintiff's reputation ? In a fairly recent English case,[23] conflicting approaches to the subject were reflected in the *dicta* in the judgments of the Court of Appeal. According to Bridge, L.J., "Any disseminator of defamatory matter is liable to the party defamed, subject to the defence of innocent dissemination."[24] This *dictum* would seem to place on the defendant the burden of proving innocence in regard to knowledge of likelihood of harm to reputation. However, in the same case, Lord Denning, M.R., (in a dissenting judgment) was inclined to place to burden of proof on the plaintiff, citing in support the *Restatement*.[25] He observed :

> Commonsense and fairness require that *no subordinate* distributor, from top to bottom, should be held liable for a libel contained in it unless he knew or ought to have known that the newspaper or periodical contained a libel on the plaintiff himself; that is to say, it contained a libel on the plaintiff which could not be justified or excused : *and I should have thought that it was for the plaintiff to prove this.*[26]

There is, thus, some obscurity in the United Kingdom as to the burden of proof. However, if an amendment is to be made in the Indian law on the subject, it could be framed on the following lines :

> A person shall not be liable in tort for defamation on the ground that he has distributed a publication containing defamatory matter if, at the time of distribution, having taken all reasonable care, he did not know that it contained any such matter as aforesaid and had no reason to suspect that it was likely to do so.[27]
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> A similar protection should be extended (with same safeguards) to—
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> (*a*) the translator, and
>
> (*b*) the publisher of offending matter in translation.

In India, the criminal liability of the owner of a newspaper (or, for that matter, any other person) for a defamatory statement published in the newspaper is governed by the terms of section 499 of the Indian Penal Code. The section contains the crucial words "makes or publishers any imputation con-

23. *Goldsmith* v. *Sperrings Ltd.*, (1977) 2 All E.R. 566.
24. *Id.* at 587.
25. *Restatement, Torts* (1965 Supplement), s. 581, comment.
26. *Supra* note 23 at 572 (emphasis added).
27. Point for Law reform.

cerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person...." Obviously, section 499 requires a mental element, which must be proved by the prosecution. At the same time, section 7 of the Press and Registration of Books Act, 1867 provides certain rules of evidence[28] or presumptions as to who is to be deemed to be the printer, *etc.*, of a newspaper. These presumption do not alter or dilute the ingredients of criminal liability for defamation (or any other offence committed by printed words), as provided in section 499 of the Indian Penal Code, but they may render the task of the accused more onerous as regards proof.

II. Multiple publication

Another feature of the law of defamation that often provokes debate is multiple publication. The Second Press Commission endorsed the following recommendation of the Australian Law Reform Commission on the subject :

> The rule as to separate publication should be abrogated and a single publication rule adopted. The multiple publication of particular material should give rise to one cause of action only but, in such an action, the plaintiff should have relief appropriate to all publications. This rule could, however, give rise to unsatisfactory results where a plaintiff was unaware of the extent of the multiple publications and, therefore, did not seek appropriate remedies. The suggestion of allowing the court a discretion to permit the plaintiff to bring further proceedings in respect of the same matter is a flexible approach, but it may result in uncertainty. Even after an action is determined, a defendant may be in doubt whether further proceedings may be brought against him. The position of a plaintiff who discovers that a publication received wider coverage than was first apparent is not entirely clear. Certainty is important to the parties. Moreover, it is desirable that the courts have full information as to the extent of publication in determining relief in the first action. The defendant is likely to know the extent of publication; he should be encouraged to disclose it. Accordingly, the plaintiff should be limited to a single action in respect of a multiple publication but only to the extent disclosed in the action. The plaintiff will have a separate right of action in respect of any additional publication. This will automatically cover any further publication after the first trial as well as any publications which the defendant failed to admit. The provision will leave no doubt as to the rights of the parties. A defendant who makes full disclosure will be liable, if at all, for the multiple publication once for all. A plaintiff who dis-

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28. *Sardar Bhagat Singh Akali* v. *Lachman Singh Akali*, 73 C.W.N. 1, 3, para 6 (1968-69) following *State of Maharashtra* v. *Dr. R.B. Chowdhuri*, (1968) 1 S.C.A. 49.

covers undisclosed material is certain that the court will entertain his action.[29]

Such a reform of the law is eminently sensible and is worth adopting in India also. The recommendation of the Faulks Committee on the subject was as under :

> [W] here proceedings by a person in respect of a defamation have been concluded either by settlement, judgment or final order at a trial or by discontinuance, the plaintiff should not be permitted to bring or continue any proceedings against the defendant in that action in respect of the same or any other publication of the same matter except with the leave of the court and on notice to defendant.[30]

29. *Supra* note 5 at 47-48.
30. *Supra* note 7 at 80, para 291.