

Absolute Privilege

Categories of Privilege

THE LAW of defamation recognises certain occasions in regard to which the public interest requires that a person should be protected from liability for a defamatory statement, even though the defamatory words cannot be proved to be true or defended as fair comment. These occasions have come to be known as privileged occasions. The protection or privilege is of two kinds—absolute and qualified.¹ Where the privilege is “absolute”, defendant’s malice does not destroy the privilege, in view of its absolute character. Where the privilege is “qualified”, malice destroys the privilege.²

Leaving aside statutory provisions of minor importance, the defence of absolute privilege applies to statements falling in the following categories :

- (a) statements made in the course of proceedings of Parliament, or published from those proceedings by authority of Parliament;
- (b) statements in the nature of publication of proceedings in Parliament by private agencies, where such publication is protected by express provision of the Constitution;
- (c) statements made in the course of judicial or quasi-judicial proceedings;
- (d) statements made by one officer of state to another in the course of duty;³
- (e) fair and accurate reports of judicial proceedings, if published contemporaneously;⁴
- (f) communications between solicitor (and presumably, counsel) and the client.⁵

The wide general principle which underlines the defence of privilege is the common convenience and welfare of society or the general interest of society.⁶

The categories of absolute privilege enumerated above will bear detailed

1. *Duncan & Neill, Defamation* 81, para 13.01 (1978).

2. *Infra*, ch. 11.

3. *Supra* note 1 at 81, para 13.02, categories (a) to (d).

4. *Ibid*, category (g), and *id.*, at 109, para 14.29.

5. *Id.* at 81, para 13.02, category (h)

6. *M.G. Perera v. A.V. Petris*, A.I.R. 1949 P.C. 108, 119, quoting *Macintosh v. Dun*, (1908) A.C. 390. As to spouses, see *supra* pp. 25, 26.

discussion. As the categories are primarily derived from English law, it may be convenient to state first the position in English law, and then to deal with the Indian law.

Parliamentary Proceedings in England

Privilege in category (a) is, in England, derived from the Bill of Rights and is regarded as a part of the wider privilege conferred by article 9 of the Bill of Rights, which provides as under :

[T]hat the freedom of speech and debates of proceedings in Parliament ought not to be impeached or questioned in any Court or suppressed out of Parliament.

The protection applies in civil, as well as in criminal, proceedings. It applies even though the statements are untrue to the knowledge of the person making them, and however injurious they may be to the interests of the third person.⁷

Parliamentary Proceedings in India

In India, article 105, clauses (1) and (2) of the Constitution, provide as under :

(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

The persons who come to be protected against legal action by article 105(2) of the Constitution are—

(i) members of Parliament who speak or vote in the House or committee thereof; and

(ii) persons who publish, under parliamentary authority, the proceedings of the House or committee thereof.

As to the first part of article 105 (2), it may be noted that the freedom of speech or vote conferred thereby is absolute. No *legal* action lies for defamation against a member for anything said in a House of Parliament or in a committee thereof. It is not necessary, for the immunity created by this clause

7. *Ex parte Wason*, (1869) 4 Q.B. 573; 576; *Church of Scientology of California v. Johnson-Smith*, (1972) 1 All E.R. 378.

to be operative, that what was said was *relevant* to the business of the House; it is enough if Parliament was sitting and if what was said was said in the course of the business of the House⁸.

As to the second part of article 105 (2), 'authority', in this context, means *express authority*⁹.

Publication of Parliamentary Proceedings by Private Agencies

As regards category (b), in the United Kingdom, protection is conferred on the publication of parliamentary proceedings by the Parliamentary Papers Act, 1840.

In India also, article 361-A of the Constitution confers protection on newspapers and some others for publishing proceedings of Parliament and state legislatures. But this is a qualified privilege, unlike the absolute privilege conferred on those who publish the *proceedings under* parliamentary authority.¹⁰ No person¹¹ shall be liable to any civil or criminal proceedings in any court in respect of the *publication in a newspaper* of a substantially true report of proceedings of Parliament or state legislatures. The defence is not available if the publication is accompanied by malice. Nor is it available where the proceedings of Parliament were held in secret.

Subject to these conditions, the protection in respect of parliamentary proceedings is available not only to reports in newspapers, but also to news agency reports containing material for publication in a newspaper, and also to reports or matters broadcast by means of wireless telegraph as part of any programme or service provided by a broadcasting station.

Judicial Proceedings

As regards category (c), concerned with statements in judicial proceedings, the general rule on the subject was stated in England by Lopes, L.J. in *Royal Aquarium and Summer and Winter Garden Society v Parkinson*¹² as follows:

The authorities establish beyond all question this: ... that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed.¹³

8. *Tej Kiran v. Sanjiva Reddy*, A.I.R. 1970 S.C. 1573, 1574, para 8.

9. *C.K. Daphtary v. O.P. Gupta*, (1971) 1 S.C.C. 626, 645, 646, para 68.

10. Art. 105 (2), Constitution of India.

11. *Id.*, art. 361A.

12. (1892) 1 Q.B. 431.

13. *Id.* at 451.

Statements made in the course of judicial and quasi-judicial proceedings are, in the United Kingdom absolutely privileged.

In India, it has been recognised that public policy requires that judges, counsel and witnesses should be able to make their statements in judicial proceedings without fear of being exposed to legal consequences.¹⁴ The privilege is absolute in its character.¹⁵ It is essential in all courts that the judges should be permitted to administer justice under the protection of law independently and freely without favour and fear. The provision of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest mandates the judges¹⁶ to exercise their functions with independence and without fear of consequences. Absolute privilege exists in favour of statements made in judicial proceedings by —

- (a) judges,¹⁷
- (b) witnesses,¹⁸
- (c) counsel,¹⁹ and
- (d) parties.²⁰

In an Allahabad case,²¹ even a magistrate who had used the words "dishonest, liar, foolish and pest of Aligang" was held to be absolutely protected.

It should be noted that in India, the Judicial Officers Protection Act, 1850 confers immunity on judicial officers for acts done judicially. Although not specifically designed for liability for defamation, its terms are wide enough to give immunity from such liability.²²

There is an absolute privilege to parties,²³ witnesses²⁴ and counsel also, for words spoken in the court including statements in affidavits.²⁵ The principle here is that witnesses giving evidence should not have before their eyes the fear of being harassed by a suit for damages. The only fear should be that of being prosecuted for perjury if the witnesses give false evidence.²⁶

14. *Purshottam Lal v. Prem Shanker*, A.I.R. 1966 All. 377.

15. *Satish Chandra v. Jagat Chandra*, A.I.R. 1974 Cal. 266, paras 21-22.

16. *Raman Nayar v. Subramanya Ayyan*, I.L.R. 17 Mad. 87 (1894).

17. *Ibid.*

18. *In re Alraja Naidu*, I.L.R. 30 Mad. 222 (1906).

19. *Sullivan v. Norton*, I.L.R. 10 Mad. 28, 35 (1886).

20. *Pachaiprimal Chettiar v. Dasi Thangam*, I.L.R. 31 Mad. 400 (1908).

21. *Jagannath Prasad v. Rofat Ali Khan*, A.I.R. 1934 All. 827.

22. *Teyen v. Ram Lal*, I.L.R. 12 All. 115 (1890).

23. *Brijlal Prasad v. Mahant Laldas*, A.I.R. 1940 Nag. 125 (complaint).

24. *Nannu Mal v. Ram Prasad*, A.I.R. 1926 All. 672.

25. *Ali Mohanmod v. Manna Lal*, A.I.R. 1929 All. 972, following *Soman v. Mether. elift*, 46 L.J.C.P. 128.

26. *Ganesh Dutt Singh v. Mungneeram*, 11 Bcng. L.R. 321 (P.C.) (1873).

Some controversy exists amongst²⁷ the High Courts as to how far a statement made to the police is privileged.²⁸ For the present purpose, it is not necessary to embark upon a detailed discussion. The preferable view seems to be the narrower one that there is no absolute privilege.²⁹ This is in harmony with a Privy Council decision³⁰ (not on appeal from India), that the occasions where there is absolute privilege are strictly numbered.

Tribunals

The question how far the tribunals (other than traditional courts) are entitled to absolute privilege in the context of civil liability for defamation has been debated more than once in England,³¹ Canada³² and in India.

A decision of the question seems to depend on the facts of each case. The important Indian rulings³³ on the subject, show that much depends on the status, composition and functions of the tribunal and other factors concerning it. There is a Privy Council decision³⁴ on appeal from Canada holding that the doctrine of absolute privilege extends to "tribunals exercising functions equivalent to those of an established court of justice."^{34a}

It is believed that in this context, inquiries which are merely administrative may not enjoy absolute protection,³⁵ and this would be so even if there is a duty to act judicially.³⁶ Where the inquiry is merely for the purpose of judging the conduct of a police *patel*, a *mahalkari* holding a preliminary inquiry in order to report to the collector about the conduct of the police *patel* is not a tribunal enjoying the privilege of a court of justice in relation to the law of defamation.³⁷ In contrast, a tribunal constituted under the Bar Council Act was held to be entitled to absolute privilege.³⁸ Similarly, an officer acting under section 75 of the Madras Estates Land Act (1 of 1908), empowered to carry out the division or appraisalment was held to be entitled to the protection. It was held :

27. See the case law reviewed in *V. Narayana Bhat v. E. Subbanna Bhat*, A.I.R. 1975 Knt. 162.

28. Also see *Surendra Nath v. Bageshwari Prasad*, A.I.R. 1961 Pat. 164.

29. *Gangappagouda v. Basayya*, A.I.R. 1943 Bom. 167.

30. *William Francis v. Gordon*, A.I.R. 1935 P.C. 3, 4.

31. *Supra* note 12.

32. *Supra* note 30.

33. *Gangappagouda v. Basayya*, *supra* note 29; *Govind v. Gangadhar*, A.I.R. 1944 Bom. 246; *Surendranath v. Bageshwari*, *supra* note 28; *Purshottam Lal v. Prem Shanker*, *supra* note 14.

34. *O'Connor v. Waldron*, (1935) A.C. 76.

34a. *Id.* at 81. See further *Addis v. Crocker*, (1960) 2 All E.R. 629.

35. *Supra* note 28 (complaint to S.P.).

36. *Supra* note 14 (inquiry by bank manager).

37. *Supra* note 29, following *William Francis v. Gordon*, *supra* note 30.

38. *Govind v. Gangadhar*, *supra* note 33.

In a certain event, in regard to matters which are within the province of the officer, formality attaches to his decision and it is futile to contend that his duty is merely ministerial.³⁹

Official Statement

As regards category (d) of absolute privilege (official statements), the rule in the United Kingdom has been stated by the Court of Appeal in a leading case⁴⁰ in which the plaintiff was a captain in the Indian Staff Corps. He had sued for damages for libel in respect of a statement made by the Secretary of State for India to the Parliamentary Under Secretary for India to enable a question to be answered by the latter in the House of Commons. It was observed :

If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of state. Therefore the law confers upon him an absolute privilege in such a case.⁴¹

This principle has generally been followed in India. A resolution of the government on an official matter is absolutely privileged. If *prime facie* an official communication is privileged no allegation of malice would be allowed and no proof of malice will take away the privilege.⁴²

A Bombay decision on the subject of official communications seems to treat the situation as one of qualified privilege.⁴³ It holds that the report of a subordinate officer to his superior on a matter within his official duty is protected in the absence of malice. The fact that the report was made in order to get a licence for possession of arms (issued in favour of a particular person) is immaterial and the fact that the report was made by the subordinate officer of his own is also immaterial provided no malice is proved. Such communication made in the discharge of public duties, it was held, was not actionable in the absence of malice.

One point of detail which has been discussed in the United Kingdom and also in Australia might some day become relevant in India also. At what level

39. *Duraiswami v. Lukshmunan*, A.I.R. 1933 Mad 537 at 539.

40. *Chatterton v. Secretary of State for India in Council*, (1895) 2 Q.B. 189.

41. *Id.* at 191 (per Lord Esher, M.R.).

42. *J.M. Cursetji v. Secretary of State*, I.L.R. 27 Bom. 189, 216 (1903).

43. *Narasimma v. Balwant*, I.L.R. 27 Bom. 585, 588, 589 (1903).

does the protection apply? There is a decision of the High Court of Australia⁴⁴ in which Evatt, J., held that absolute privilege is not attached to a report from an inspector of police to his superior officer concerning a subordinate. It has been stated:

Absolute immunity from the consequences of defamation is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civil protection, and any extension of the area of immunity must be viewed with the most jealous suspicion and resisted unless its necessity is demonstrated.⁴⁵

Report of Judicial Proceedings in Newspapers

Category (c) (reports of judicial proceedings in newspapers) enjoys in the United Kingdom absolute privilege by statute. Section 3 of the Law of Libel Amendment Act, 1888 read with section 8 of the Defamation Act, 1952 provides that a fair and accurate report, *in any newspaper*, of proceedings of cases publicly heard before any court exercising judicial authority within the United Kingdom shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter. The statutory privilege in the United Kingdom will obviously extend to all who take part in the publication.

In India, the Press Commission, after referring to section 8 of the Defamation Act, 1952, recorded the following conclusion on the subject :

The privilege spoken of here is absolute privilege. We recommend that this provision be enacted in India, but dropping the proviso regarding "any blasphemous or indecent matter."⁴⁶

The common law seems to have recognised only a qualified privilege for fair and accurate reports of judicial proceedings.⁴⁷ Where the privilege exists at common law, it seems clear that it extends to reports *other than those in newspapers*—for example, to reports in letters or in conversation. At the present day, the defence has to be considered in the light of the fact that most reports which are published (in the media) of proceedings in Parliament, or in the courts or elsewhere, do not purport to be a full account, or even a precis, of the whole proceedings, but are selective and concentrate on those aspects of the proceedings which are thought to be of particular interest to the public. According to Duncan and Neill, short reports of this kind, or reports in the

44. *Gibbons v. Duffell*, 47 C.L.R. 520. (1932)

45. *E.E. Williams*, 25 L.Q.R. 200 quoted by Evatt, J., in *Id* at 534.

46. *Second Press Commission Report*, vol. 1, p. 44, para 72 (1982).

47. See *Webb v. Times Publishing Co. Ltd.*, (1960) 2 All E.R. 789; *McCarey v. Associated Newspapers Ltd*, (1964) 2 All E.R. 335.

name of sketches, will be protected provided they are neither inaccurate nor unfair to the plaintiff.⁴⁸

Legal Adviser

Category (f) relating to communications between a legal adviser and his client does not seem to require much discussion.

Privileges of Newspapers

The next point to be examined concerns the privileges of newspapers. In the United Kingdom, before 1952, publication in newspapers enjoyed certain privileges under the statutory provisions then in force. But those provisions were found to be insufficient, in two respects—

- (i) the provisions were limited to "newspapers" as defined in the statutory provisions, whereunder the *maximum interval* that could intervene between the publication of any two issues of a newspapers should not exceed 26 days;
- (ii) while reports of certain proceedings, *i.e.*, proceedings of certain bodies, were privileged if published in newspapers, it was felt that the list of these proceedings had become out of date.⁴⁹

It was further considered that changes in social and administrative conditions, and the increasing interest in foreign affairs, had rendered some of the categories of privileged proceedings inadequate.

Porter Committee Report

The Porter Committee took note of both the aspects mentioned above, and recommended suitable changes in the law.

As to the first, it recommended an enlargement of the definition of "newspaper", so as to increase the interval of 26 days; and as to the second, it recommended enlargement of the categories of reports of proceedings that were to be privileged if published in newspapers.⁵⁰

Both these recommendations have, in substance, been carried out by the Defamation Act of 1952. Section 7 (5) of the Act contains a changed definition of "newspapers". Sections 7 (1) to 7 (4), read with the Schedule to the Act, enlarge the categories of reports in newspapers and confer upon them

48. Duncan & Neill, *supra* note 1 at 109, para 14.29.

49. *Porter Committee Report*, para 106.

50. *Ibid.* Summary of Recommendations No. 7; see also body of the report, paras 95-103 (definition of newspapers) and paras 104-111 (categories of reports.).

a qualified privilege. The qualified privilege is a wide one in respect of reports listed in part I of the Schedule to the Act, in the sense that these reports are privileged without the need for explanation or contradiction. The qualified privilege, however, is subject to an explanation or contradiction in the case of reports enumerated in part II of the Schedule to the Act.

These matters require consideration in India also. It would, however, appear that if the English provision is to be adopted the retention of the word "indecent" is desirable, (if at all there is need for a legal provision on the subject). Any privilege to be conferred in the realm of defamation should not be construed as conferring also a privilege to publish the publication *indecent* matter. There is also need to exclude, from such protection, matter which might constitute an offence against religion under the Indian Penal Code. (This would correspond to "blasphemous" matter excluded from the English provision).⁶¹

51. S. 3, Law of Libel Amendment Act 1888.