

Qualified Privilege

ON CERTAIN occasions, the privilege enjoyed in relation to liability for defamation is not absolute, but qualified, in the sense that the defence, though available by reason of certain special circumstances, can be defeated if the plaintiff proves that the defendant was actuated by malice in publishing the words of which complaint is made as their being defamatory. An English work on defamation¹ states that the statements to which the defence of qualified privilege applies can be conveniently grouped by reference to the following categories :

- (a) statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them;
- (b) statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them;
- (c) statements made in the protection of a common interest to a person sharing the same interest;
- (d) fair and accurate reports of judicial proceedings, whether or not published contemporaneously with the proceedings;
- (e) fair and accurate reports of parliamentary proceedings, and parliamentary sketches;
- (f) extracts from parliamentary papers and public registers;
- (g) certain reports published in newspapers or by broadcasting which are protected by virtue of the provisions of the Defamation Act, 1952,

The last three categories are statutory.

By and large, the above categories of qualified privilege, except those that are purely the creation of statutes enacted in the United Kingdom have been recognised in India also. Some of the important Indian rulings² on the subject do not reveal the existence of any serious problems in this regard.

1. Duncan & Neill, *Defamation* 98, para 14.01 (1978).

2. *R.K. Karanjia v. K.M.D. Thackersey*, A.I.R. 1970 Bom. 424, 430, paras 8, 20, 21, *Ellappa Goundan v. Ellappa Goundan*, A.I.R. 1950 Mad. 409; *Sadasiba v. Bansidhar*, A.I.R. 1962 Orissa 115; *Khirod Ranjan v. Syed Mohammad*, A.I.R. 1939 Pat. 190; *Ramdas v. Raja*, A.I.R. 1958 Raj. 257.

The statements to which the defence of qualified privilege applies so far as the common law rules are concerned are usually grouped by reference to the following categories :

- (a) statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them;
- (b) statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them;
- (c) statements made for the protection of a common interest to a person sharing the same interest;
- (d) fair and accurate reports of judicial proceedings, however, published, and whether or not published contemporaneously with the proceedings.

In *R.K. Karanjia v. K.M.D. Thackersey*,³ which is of particular interest to the press, it was pointed out that in order to make the occasion one of qualified privilege the existence of a duty is more important than the existence of a matter of public interest. The formulation of the principle in one of the leading English cases⁴ has been generally followed in India, namely, that

a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made, has a corresponding interest or duty to receive it. This reciprocity is essential.⁵

Judicial Proceedings

On the question whether the protection conferred on fair and accurate report of judicial proceedings is absolute or qualified, an elaborate discussion is necessary.⁶ The privilege is qualified at common law but absolute, where section 3 of the Law of Libel Amendment Act, 1888 applies, that is to say, where the report is published contemporaneously in newspapers. The position has been thus expounded :

Where the privilege is conferred by statute on newspaper reports it will extend to protect all those taking part in the publication, subject of course to the question of malice where the privilege is a qualified one. 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

3. *Ibid.*

4. *Adam v. Ward*, (1917) A.C. 309 (H.L.).

5. *Id.* at 334, per Lord Alkinson.

6. See also *supra* p. 55.

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. It is submitted that short reports of this kind, or reports in the nature of sketches, will be protected provided they are neither inaccurate nor unfair to the plaintiff.⁷

Proof of Malice

Both the defence of fair comment and the defence of qualified privilege can be defeated if the plaintiff proves that when the defendant published the words complained of, he was actuated by express malice.⁸ The expression "express malice" in this context does not necessarily mean vindictiveness, but is wide enough to cover any improper motive. Lord Diplock, in a fairly recent decision⁹ of the House of Lords relating to qualified privilege, contrasted the situation where the person publishing the defamatory statement does so to protect his interest or to discharge his duties (on the one hand) and the situation where he uses the occasion for some other reason (on the other hand). The contrast is brought out in the following passage :

[I]n all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason, he loses the protection of the privilege.

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial.¹⁰

Some of the principles relating to malice have been dealt with in *Janardan's* case.¹¹ The litigation arose out of certain statements and counter-statements relating to the affairs of a trust created by the late Lokmanya Tilak and to the policies pursued by two newspapers (the *Maratha* in English and the *Kesari* in Marathi) which were started by him and later handed over to the trust. The plaintiffs were the two sons of Lokmanya Tilak who had attacked the defendant and his co-trustees in a document called "Public Declaration", whose publication was followed by the plaintiff's undertaking a fast unto death. It was in reply to the "Public Declaration" issued by the

7. *Supra* note 1 at 109, para 14.29.

8. *Id.* at 120-123 paras. 17.03 to 17.06.

9. *Horrocks v. Lowe*, (1974) 1 All E.R. 662.

10. *Id.* at 669.

11. *Janardan Karandikar v. Ramchandra Tilak*, A.I.R. 1947 Bom. 209.

plaintiff, and in avoidance of responsibility for the plaintiff's fast unto death, that the article of the defendant was published in the *Kesari*. It was this article which was the basis of the plaintiff's claim for damages for libel. Blagden, J., who tried the suit on the original side, held the statement of the plaintiff defamatory, but on appeal a Division Bench of the Bombay High Court held that the article was written on a privileged occasion and was protected, there being no proof of malice. It was held that where, in an action for libel, it is found that the alleged article was published on a privileged occasion, two questions arise for consideration:

(1) [W] hether any portion of the offending article was outside the privileged occasion and was, therefore, not protected; and (2) if the privileged occasion covered the whole article, was there evidence of express malice.¹²

"Malice", in such cases, means any indirect motive. Motive to defend oneself is no evidence of malice. Honest belief is protected. Falsity of facts is also not necessarily evidence of malice. So also, negligence in publishing is no evidence of malice. Mere want of sound judgment is also no evidence of malice.

The Bombay judgment referred to above points to the several interesting questions that arise when a statement made on a privileged occasion is challenged as made with malice, and the proceedings also involve a dispute as to the truth or falsity of the statement. These aspects have been considered at some length by Lord Diplock in the judgment of the House of Lords.¹³ The following propositions can be culled from the judgment,¹⁴ on the question of truth and falsity of the statement :

(i) If the defendant did not believe that what he published was true, this fact is generally conclusive evidence of express malice. The reason is that no sense of duty or desire to protect one's own legitimate interest can justify a man in telling deliberate and injurious falsehood about another.

(ii) If the defendant made the publication recklessly, being indifferent as to its truth, he will be treated as if he knew it to be false. But carelessness or impulsiveness or irrationality in arriving at a positive belief in the truth of the matter published does not amount to indifference to truth in this context.

(iii) Even a positive belief in the truth of what is published may not be sufficient to negative express malice. The plaintiff may still be able to prove that the publication was actuated by improper motive. But in such a case where the defendant believed the words to be true, the court should be very slow to draw the inference that the sole or dominant motive was the improper one.

12. *Id.* at 215.

13. *Supra* note 9.

14. *See id.* at 669-70.