BALTHAZAR

v.

HULANGAMUWA AND ANOTHER

SUPREME COURT.
WANASUNDERA, J., RANASINGHE, J. AND L. H. DE ALWIS, J.
S.C. APPEAL No. 32/85.
C.A. No. 61/76(F).
D.C. COLOMBO No. 79169/M.
MARCH 24, 26, 27 AND 31, 1986.

Delict – Defamation – Military Law – Exclusive jurisdiction – Absolute privilege – Malice.

The 1st defendant an Army Major complained to the Army Commander that the plaintiff who was the Commanding Officer of the Gemunu Watch had on 6.7.1973 committed an indecent assault on the 2nd defendant who was the wife of the 1st defendant and attempted to rape her. This complaint was made to the Army Commander at Colombo on or about 14.7.1973 and he convened a Court of Inquiry under the provisions of the Army Act to investigate the complaint. The Court of Inquiry reported to the Army Commander adversely against the plaintiff. As a result His Excellency called upon the plaintiff to retire from service and the plaintiff acceded to this request.

The plaintiff sued the two defendants for defamation alleging that the complaint made by the 1st defendant was false and malicious and without reasonable and probable cause and that the complaint was made in pursuance of a conspiracy between the two defendants. The defendants pleaded inter alia the defence of absolute privilege.

Held –

The 1st defendant had a sufficient interest to make the charge against the plaintiff and the Army Commander had a reciprocal duty to receive it. The oral complaint relied on by the plaintiff constitutes an initiation of proceedings before the Court of Inquiry and is a part and parcel of the proceedings. It would therefore be entitled to absolute privilege. The question of malice is therefore irrelevant and all the evidence extraneous to this issue should be struck out.

The defence of absolute privilege is available even where the statement is voluntary.

"The general principle of law is that no action will lie for defamatory statements made by a party and used in the course of any proceedings before a Court of Justice or tribunal recognised by law. Such statements include pleadings, interrogatories, affidavits, evidence and the judgment on the record, even though such statements are false and malicious and irrelevant. No action will also lie for defamatory statements contained in any document which is incidental to the proper initiation of judicial or quasi judicial proceedings, namely, an information, complaint, writ by which proceedings are set in action. The privilege will attach even if the document contained something which was irrelevant or which should not have been contained in it."

Cases referred to:

(1) *Dawkins v. Lord Rokeby – (1873) L.R. 8 Q.B. 255, 263; (1875) 7 H.L. 744.*

(2) *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson – [1892] 1 Q.B. 431.*

(3) *Co-partnership Farms v. Harvey Smith – [1918] 2 K.B. 405.*

(4) *Marks v. Frogley – [1898] 1 Q.B. 888.*

(5) *Frazer v. Hamilton – 33 T.L.R. 431.*

(6) *Fraser v. Balfon – 34 T.L.R. 502 (H.L.).*

(7) *Lincoln v. Daniels – [1962] 1 Q.B. 259; [1961] 3 All E.R. 740.*

(8) *Trapp v. Mackie – [1979] 1 All E.R. 489.*

(9) *Nell's Court of Request Cases – 1845 p. 87.*

(10) *Attennaike v. Don Juanis – (1857) 2 Lorenz 122.*

(11) *Marshalls Judgments – 402.*

(12) *Silva v. Balasuriya – (1911) 14 N.L.R. 452.*

(13) *Wijegunatileke v. Joni Appu – (1920) 22 N.L.R. 231.*

(14) *Poulier v. Alles – (1924) 27 N.L.R. 219.*

(15) *Abdul Cader v. H. P. Kaufmann and L. D. Parsons – (1928) 29 N.L.R. 453.*

(16) *Harrison v. Bush – (1855) 5 E. & B. 348.*

(17) *Hunt v. Great Northern Railway – [1891] 2 Q.B. 189.*

(18) *R. v. Rule – [1937] 2 K.B. 375.*

(19) *Adam v. Ward – [1917] A.C. 309.*

(20) *Watson v. M'Evan – [1905] A.C. 480.*

(21) *Bersford v. White – (1914) 30 T.L.R. 591.*

(22) *Lilley v. Roney – (1892) 61 L.J.Q.B. 727.*

(23) *Gerhold v. Baker – (1918) W.N. 368.*

(24) *Rippon v. Shapcott – C.A. – 1951 – unreported but referred to in Lincoln v. Daniels (7).*

(25) *Szalatnay-Stacho v. Fink – [1946] 2 All E.R. 231.*

(26) *Roy v. Prior – [1970] 2 All E.R. 729.*

(27) *Rasselblad (GB) Ltd. v. Orbincon – [1985] 1 All E.R. 173.*

APPEAL from judgment of the Court of Appeal reported in [1984] 2 S.L.R. 29.

H. L. de Silva, P.C. with *K. Kanag-Iswaran* and *S. Mandaleswaran* for the plaintiff-respondent-appellant.

Dr. H. W. Jayewardene, Q.C. with *Ronald Perera* and *Miss T. Keenewinne* for the defendant-appellants-respondents.

Cur. adv. vult.

May 16, 1986.

WANASUNDERA, J. read the following Order of Court.

ORDER OF THE COURT

This is an action for defamation filed by the plaintiff (appellant) against the 1st and 2nd defendants (respondents), husband and wife, jointly and severally, claiming damages in a sum of Rs. 150,000 against them. The plaintiff was at all material times holding the rank of Lieutenant Colonel in the Sri Lanka Army and was the Commanding Officer of the 1st Battalion, Gemunu Watch. The 1st defendant was also an officer of the Sri Lanka Army and held the rank of Major in the C.L.I. and was attached to the South-East Area Command. The defendants lived in quarters in the Gemunu Watch Camp Area, Diyatalawa, which came within the authority of and was allotted to the Commander of the Gemunu Watch. He had moved into those quarters with the permission of Mr. Madawala the then Commanding Officer of the Gemunu Watch. At that time the plaintiff was second in command and lived in the mess and continued to do so even after he became the Commanding Officer of the Gemunu Watch, with the defendants also continuing to occupy the quarters to which they had moved in earlier.

The plaintiff states that on or about the 14th July 1973 the 1st defendant had maliciously and falsely complained to Major-General Attygalle at Colombo that the plaintiff had on 6th July 1973 at about 8.30 p.m. committed criminal force on the 2nd defendant, with intent to outrage her modesty, and had attempted to commit the offence of rape on her. The plaintiff averred that the said complaint was made in pursuance of a conspiracy between the 1st and 2nd defendants to have the plaintiff removed from the office of Commanding Officer and thereafter to secure for the 1st defendant a higher position in the Army. It is not quite clear whether the cause of action is based on this conspiracy or defamation simpliciter, although it had proceeded for all purposes as one for defamation.

The defendants in their answer stated that on the 14th July 1973 the 1st defendant complained to the Army Commander that on the night of 6th July the plaintiff was guilty of an indecent assault on the 2nd defendant during the absence of the 1st defendant from the house. Further answering the defendants stated that consequent on the complaint the Army Commander convened a Court of Inquiry

under the provisions of the Army Act to investigate the complaint and the Court of Inquiry, after inquiry, had reported to the Army Commander adversely against the plaintiff. As a result of this finding His Excellency the President had called upon the plaintiff to retire from service and the plaintiff acceded to this request.

The defendants also took up two legal defences, namely, that the complaint was made by the 1st defendant, in the discharge of his duties as an army officer, to the Army Commander and that it was a privileged communication and was made on a privileged occasion. The second legal objection was that the plaintiff had failed to give notice of the action as required by section 80 of the Army Act.

The plaintiff obtained judgment in the District Court. The District Court held that the complaint made by the 1st defendant was false and made maliciously and without reasonable and probable cause; that the complaint had been made in pursuance of a conspiracy between the two defendants; that the plaintiff suffered humiliation and disrepute; that in consequence of the complaint the plaintiff was removed from office of Commanding Officer; and that the plaintiff was therefore entitled to damages in a sum of Rs. 150,000.

It would appear that on appeal to the Court of Appeal the defendants had submitted the following principal questions for adjudication, namely–

(*a*) That the cause of action set out in paragraph 4 of the plaint was not borne out by the evidence.

(*b*) That the complaint and the proceedings consequent thereon by the Military Court of Inquiry were absolutely privileged.

(*c*) That the complaint related to military discipline and was a military matter cognizable by the Military Authorities which had exclusive jurisdiction to deal with the matter and a civil court was precluded from questioning or inquiring into those proceedings.

(*d*) That the plaintiff had failed to comply with the provisions of section 80 of the Army Act (Cap. 357), which required the giving of notice of action.

The Court of Appeal after hearing submissions of counsel allowed the defendants' appeal and dismissed the plaintiff's action. In disposing of the appeal the Court of Appeal had dealt with ground (c) alone and held that the complaint being by one Army Officer against another, relating to a matter concerning discipline in the Army, it was cognizable only by a military tribunal and the plaintiff could not maintain any action in a civil court based on such a complaint.

Mr. H. L. de Silva for the plaintiff-appellant submitted to us that the plaintiff, though an Army Officer, does not cease to be a citizen of Sri Lanka so as to be deprived of his ordinary civil rights and the protection of the civil courts. He also stated that the Court of Appeal had wrongly applied the principle of exclusive jurisdiction which related only to matters concerning military discipline and in any event submitted that it would not apply to a malicious civil wrong which was the finding of the District Court.

Expanding on this Mr. H. L. de Silva submitted that military law was only a part of the law of the land. It is applicable on a statutory basis and was subject to the common law. A man who enlisted as a soldier did not cease to be a citizen and did not forego his civil rights except to the extent expressly covered by the military law. It was his submission that an Army Officer who inflicts a civil wrong on another officer could be held accountable in the civil courts and in this particular case, which was an action for defamation, the defendant enjoyed only a qualified privilege which has been negatived by proof of malice.

Counsel on both sides cited a number of authorities relevant to this precise question which seems to be the main issue before us. Some of them are similar to the issue before us though not identical and it may be possible to glean from them some general principles that may be applicable to the facts of this case. But before we turn to them there are certain other submissions that can be conveniently disposed of at this stage.

Mr. Jayewardene for the respondents has contended that the plaintiff's case has to be dismissed because the precise cause of action pleaded in the plaint has not been established by the evidence. This is apart from his main submission that in view of the absolute privilege applicable in respect of the cause of action pleaded by the plaintiff, the cause of action should be struck off and the action dismissed.

Mr. Jayewardene has drawn our attention to paragraph 4 of the plaint where the plaintiff has alleged that on or about 14th July 1973 the defendants had maliciously and falsely complained to Major-General Attygalle at Colombo that the plaintiff had on 6th July 1973 at about 8.30 p.m. committed criminal force on the 2nd defendant with intent to outrage her modesty and had attempted to commit the offence of rape on her. Mr. Jayewardene has referred to the written complaint made by the 1st defendant to the Army Commander on 14th July 1973. The content of this document does not identify the plaintiff nor has it referred to any offence committed by anyone. It is only the caption which gives some indication of the nature of the complaint and the officer who was involved. But it is conceded by plaintiff's counsel that this caption was inserted at the request of the Army Commander and Mr. H. L. de Silva said that he was not relying on it. If the matter rested there, we would have had to uphold Mr. Jayewardene's submission.

But Mr. H. L. de Silva has submitted further that he is not relying on the written complaint P9 referred to above, but he is basing his action on an oral complaint made by the 1st defendant to the Army Commander on the same day soon after the written complaint was handed over to Major-General Attygalle. It would appear that after the written complaint was handed over, there had been a conversation between the 1st defendant and the Army Commander. Major-General Attygalle has said in evidence that in the course of that conversation the 1st defendant repeated the allegations he had earlier made on the 12th July. The first intimation of this incident to the Army Commander had taken place on the 12th July when the 1st defendant at Diyatalawa telephoned the Army Commander in Colombo and informed him that an offence had been committed on his wife (without specifying the offence) and had identified the perpetrator of the offence as the plaintiff. Even if this material is inadequate, Mr. H. L. de Silva goes further and relies on an averment in the answer which, while denying the allegation in paragraph 4 of the plaint, goes on to state "that on the 14th July 1973 the first defendant complained to the Commander of the Army that on the night of the 6th July the plaintiff was guilty of an indecent assault on the second defendant during the absence of the first defendant from his home".

Mr. H. L. de Silva concedes that, although all this material is not identical with the precise cause of action pleaded in the plaint, he however submits that at least one matter stated in the plaint is

substantially the same as the averment pleaded in the plaint, though differently worded, and as such it is adequate to maintain the action. As a general principle it has been stated that in a libel you must in your pleadings declare upon the words and it is not sufficient to state their substance. The learned trial judge had not given his mind to this important discrepancy, which is of some substance. To say the least, it would have had a substantial bearing on the reckoning of damages apart from any other implications. Since it is possible to dispose of this appeal on the main issue, it is unnecessary to go into this matter at this stage.

As stated earlier, counsel for the appellant has criticised the basis of the ruling of the Court of Appeal, namely, that the subject matter of this action is a military matter not cognizable by the court, but falls within the exclusive domain of the military authorities. He also stated that there was no authoritative decision of the English courts on this matter. One of the defences taken from the outset by the defendants was that the alleged statement was absolutely privileged. In the authorities that were cited to us, we find that this was an alternative ground for decision along with the ground of exclusive jurisdiction. It seems correct that the question of the exclusive jurisdiction of a military tribunal has not been passed on by the House of Lords in England although there are decisions of the Court of Appeal, and probably it is for this reason that Mr. Jayewardene pressed before us the alternate ground of absolute privilege on which there are definitive rulings of the highest court in England. In regard to this submission Mr. H. L. de Silva submitted that this is a civil action for defamation on a voluntary statement made by the 1st defendant and not a military matter and can be litigated in the ordinary courts. He further submitted that the 1st defendant only enjoys a qualified privilege under the common law in respect of his complaint and that this has been forfeited by the finding of malice on the part of the defendants by the learned trial judge.

We are relieved to some extent by the concession made by counsel for the appellant that there would be absolute privilege for an inquiry relating to a purely military matter under law from going into the differences in the English and the Roman-Dutch law on this subject. The extension of absolute privilege to inquiries relating to military matters, even when there is malice, in analogy to the principle that absolute privilege exists in respect of statements made in the course of proceedings before courts of justice is a settled principle of English law

and decided by the highest courts. Vide *Dawkins v. Lord Rokeby* (1), *Royal Aquarium v. Parkinson* (2), *Co-partnership Farms v. Harvey Smith* (3), *Marks v. Frogley* (4), *Frazer v. Hamilton* (5), *Frazer v. Balfori* (6), *Lincoln v. Daniels* (7) and *Trapp v. Mackie* (8). Whatever be the position in Roman-Dutch law, this English principle relating to judicial proceedings has been adopted in this country and has also been the settled law of this country for almost 150 years. Vide *Nell's Court of Requests Cases 1845* (9), *Attennaike v. Don Juanis* (10), *Marshall's Judgments* (11), *Silva v. Balasuriya* (12), *Wijegunatileke v. Joni Appu* (13), *Poulier v. Alles* (14) and *Abdul Cader v. Kaufmann* (15).

As far as we understood Mr. H. L. de Silva's submission, he stated that because this is a voluntary statement not made under legal compulsion, it enjoys only qualified privilege which is forfeited by proof of malice. But counsel has conceded – and that was also the holding of the trial judge – that the Army Commander had in the circumstances of this case a duty to entertain the complaint. In the circumstances of this case can a reciprocal right in the 1st defendant also be inferred entitling him to make that complaint ?

In *Harrison v. Bush* (16), Lord Campbell, C.J., said:

> "A communication bona fide upon any subject matter in which the party communicating has an interest....is privileged, if made to a person having a corresponding interest or duty, although it contains criminating matters which, without this privilege, would be slanderous and actionable."

In *Hunt v. Great Northern Railway* (17), Lord Esher, M.R. said:

> "A privileged occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist, the occasion is a privileged one."

In *R. v. Rule* (18), the Court said:

> "The common interest may be in respect of very varied and different matters; indeed the only limitation appears to be that it should be something legitimate and proper, something which the courts will take cognizance of and not merely an interest which is due to idle curiosity or a desire for gossip."

The above principles were stated in the context of qualified privilege.

Even when there is no duty to make a statement, it is privileged if it is made in the protection of some lawful interest such as property or reputation. In *Adam v. Ward* (19), the plaintiff, a member of Parliament, had in the course of a debate defamed a General of the Army. The General complained to the Army Council, which went into the matter and found that the strictures were unjustified. The Army Council directed the defendant, who was its secretary, to publish in the newspapers a letter vindicating the General. This letter also contained some defamatory material concerning the plaintiff. The House of Lords held that the occasion of this publication was privileged. In the course of his judgment Lord Atkinson said:

> "Every subject of the Crown, whatever position of our far-flung Empire he may inhabit, has and must have an interest in the British Army, its courage, the confidence of its men in their offices, its discipline and efficiency...It would be a disgrace and injury to the Service if a man publicly accused of the shameful breach of duty...was allowed to continue in command of a brigade in the Army, unless and until he had been cleared of the accusation made against him. Every subject, therefore, who had an interest in the Army had an interest in being by a public communication informed of the General's acquittal."

Salmond on Torts (14th Ed.) p.233 states:

> "The same principle is applicable even when the interest of the defendant is merely the general interest which he possesses in common with all others in the honest and efficient exercise by public officials of the duties entrusted to them. Thus any member of the public may make charges of misconduct against any public servant and the communication will be privileged; but the charge must be made to the proper persons—that is to say, to those who have a corresponding interest."

It has been mentioned earlier that as an additional feature and reinforcing his interests the 1st defendant occupied the premises allocated to the commander of the Gemunu Watch and the plaintiff was its Commanding Officer. The plaintiff was not only an officer superior in rank to the 1st defendant in the Army, but also having some direct influence over his position. The complaint was clearly made by the 1st defendant in his capacity as an officer of the Army

relating to the conduct and discipline of an Army officer in his capacity as a superior officer. It is beyond doubt that the 1st defendant had a sufficient interest to make that charge against the plaintiff and the Army Commander had a reciprocal duty to receive it.

We will now deal with Mr. H. L. de Silva's submissions that absolute privilege would not apply to the complaint since it was in the nature of a voluntary complaint. No doubt the compulsory nature of the impugned statement has been the subject of comment in some of the reported cases. But in those cases this was stated as a fact in marshalling the evidence and not with a view to drawing a distinction between voluntary and compulsory statements. This was one ground among others which went into such decisions. Absolute privilege rests on a broader basis and is dependent on a number of factors.

The general principle of law is that no action will lie for defamatory statements made by a party and used in the course of any proceedings before a court of justice or tribunal recognised by law. Such statements include pleadings, interrogatories, affidavits, evidence, the judgment or the record, even though such statements are false and malicious and irrelevant. No action will also lie for defamatory statements contained in any document which is incidental to the proper initiation of judicial or quasi-judicial proceedings, namely, an information, complaint, writ by which proceedings are set in motion. The privilege will attach even if the document contained something which was irrelevant or which should not have been contained in it. Gatley, paragraphs 401 and 409 to 411.

Mr. H. L. de Silva has submitted with reference to this matter that the complaint of the 1st defendant is not a statement entitled to absolute privilege because it falls outside the range or the terminal points covering such privilege which is accorded by the law. The case law shows that the courts have applied this principle sparingly and have not been inclined to extend this principle of absolute privilege other than to "quasi-judicial tribunals recognised by law". Even as regards courts and such tribunals, it is confined strictly only to statements in which public policy and the public interest require that such protection should be given. A voluntary statement relating to a personal matter as in this case, Mr. de Silva submits, does not qualify for protection. To enjoy absolute privilege it must constitute a formal complaint and constitute part of the proceedings. In *Linclon v. Daniels (supra)*, Lord Justice Devlin in analysing the legal position stated:

"The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M'Ewan* (20), in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White,* (21) the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings."

It is the second and third categories that have a bearing on the matter before us. In *Watson v. M'Ewan (supra),* the Earl of Halsbury Lord Chancellor reasoned that if this absolute privilege is not granted, a plaintiff could say:

"'I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness box.' If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, 'I shall not tell you anything; I may have an action brought against me tomorrow if I do; therefore I shall not give you any inormation at all'. It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove."

An examination of the case law shows how difficult it is to delimit the second and third categories. In *Watson v. M'Ewan (supra),* the House of Lords held that a witness who makes a statement to the

client and solicitor in preparing the evidence for the trial is absolutely protected. In *Lilley v. Roney* (22), a letter of complaint to the Law Society against a solicitor's accompanied by an affidavit in terms of the rules under the Solicitor's Act was held to be absolutely privileged. Lord Devlin in *Lincoln v. Daniels (supra)* commenting on this case said:

> "*Lilley v. Roney* is no authority for the proposition that all proceedings must be regarded as initiated when first a letter of complaint is written to the body authorised to try them. The letter in that case followed the form given in the Schedule to the Solicitors Act Rules, and, as required by the rules, was accompanied by an affidavit. Cave, J. said: 'The letter with the affidavit is the form given for setting in motion what are admittedly judicial proceedings'. On such a point form is of the first importance; it is by form rather than by the substance of the complaint that a writ is to be distinguished from a letter before action. When the body to whom the letter is addressed has many other functions besides that of investigating complaints, it may not be easy to say when 'proceedings' begin."

We find the following cases falling on the other side of the line, namely, where the privilege was denied: *Gerhold v. Baker* (23), *Rippon v. Shapcott* (24), *Szalatnay-Stacho v. Fink* (25), *Lincoln v. Daniels (supra)* and *Roy v. Prior* (26).

In *Gerhold's case (supra)* the plaintiff carried on business in London and had applied to a London tribunal constituted under the Military Services Act, 1916 for exemption from military service. He claimed the exemption on the basis that he cultivated a farm in Essex, which came under the Tendering tribunal in Essex. The military member of the London tribunal wrote to the defendant, who was a member of the Tendering tribunal being its agricultural representative, stating that the chairman of the London tribunal wanted the defendant's assistance in deciding the matter. In reply the defendant, while expressing his inability to be present, included some very derogatory remarks about the plaintiff as a farmer. Bankes, J., without elaborating on the reasons, held that this case can be distinguished from *Watson v. M'Ewan (supra)*.

In *Rippon v. Shapcott (supra)*, the plaintiff was a barrister whose name was included in a list of counsel entitled to conduct defences before courts-martial in Germany. The list had been prepared by the defendant, a member of the Judge-Advocates Department in consultation with the Bar Council. The alleged libel was contained in a

letter written by the defendant to the Bar Council to the effect that the Judge-Advocate General had removed the plaintiff's name from the list and stated that this was due to misconduct on the part of the plaintiff. Although the letter was not in form a complaint as such, the Bar Council took action on it. It was held that the letter could not be accorded absolute privilege.

Szalatnay-Stacho v. Fink (supra) was a war time case relating to the Czechoslovakian Government in exile in London. The Public Prosecutor of the Czechoslovak Military Court of Appeal sent the letter complained of together with some statements to the Military Office of the President of the Republic of Czechoslovakia. Somervell, L. J., held that "the effect of the letter was that the defendant was forwarding a dossier for investigation and any action that may be thought proper" and that it was too remote from actual or contemplated proceedings.

In *Roy v. Prior (supra)* the Court held that the immunity did not extend to evidence contained in an affidavit given by a solicitor in support of a bench warrant which was given *ex parte* and in circumstances in which the person against whom the warrant was sought had no means and no other party had any interest in challenging the evidence.

Some of these cases were reviewed in *Lincoln v. Daniels (supra)*. In this case the defendant wrote two letters to the Secretary of the Bar Council containing defamatory matter concerning the plaintiff, who was a Queen's Counsel. The Court of Appeal, while stating that the position was not entirely satisfactory, held that the Bar Council was a distinct body from the Inns of Court and derived its powers from the general meeting of the Bar and did not exercise judicial functions. The letters therefore did not initiate proceedings and were too remote from possible subsequent proceedings before the Benchers to which absolute privilege would have been accorded. Devlin, L. J., said–

> "It is a question how far the principle in *Watson v. M'Evan (supra)* is to be taken. The other authorities in which the case has been considered show that the connection between the two things–the evidence and the precognition, the document and the draft, the actuality that is undeniably privileged and the foreshadowing of it–must be reasonably close."

His exact reasoning appears to be contained in the following passage:-

> "I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for him to do so, as it is practically necessary for a litigant to engage a solicitor. The sense of LORD HALSBURY'S speech is that the extension of the privilege to proofs and precognition is practically necessary for the administration of justice; without it, in his view, no witness could be called. I do not think that the same degree of necessity can be said to attach to the functions of the Bar Council in relation to the Inns of Court. It is a convenience to the public to have a central body to deal with, but that is as high as it can be put. In my judgment the defence of absolute privilege fails."

Turning to the facts of the present case, if the plaintiff had based his arguments on the written complaint P9, then this may well have been a border-line case and the plaintiff could have pressed the argument that the letter being vague and unspecific in form was in the nature of a general intimation and not a charge and was too remote to be considered as an actual initiation of proceedings. But unfortunately for the plaintiff a reliance on P9 would at the same time imperil his case having regard to the first objection taken by Mr. Jayewardene that there was nothing defamatory of the plaintiff in P9. Now, when we come to the so-called complaint of the 14th July relied on by Mr. H. L. de Silva, we find that it is closer in proximity to the proceedings than P9. It would also appear that this oral complaint constituted a discussion between the Army Commander and the 1st defendant after P9 was handed over, whereby the Army Commander made inquiries and elicited the details and circumstances relating to the vague statements contained in P9. There is no doubt that it is upon this material that Major-General Attygalle, the Army Commander, then proceeded to take definitive action to convene a court of inquiry. This statement therefore determines the starting point or the point of initiation of the proceedings and falls within class two referred to by Lord Devlin and is not a matter of precognition or remoteness. The statement relied on by plaintiff's counsel is not just a vague request for investigation—that could have been said of P9—but contained specific

charges and constituted a specific request for investigation and relief The very fact that counsel for the plaintiff relies on the oral statement also shows that the complaint did not require a specific form – in fact the applicable statutory provisions do not prescribe a form.

In *Hasselblad (GB) Ltd. v. Orbinson* (27) a written complaint was sent to European Economic Community which had power to hold inquiries. The U.K. Court of Appeal held that, since the Commission's proceedings relied heavily on written communications to provide the foundation for its decision, the letter was regarded as having been sufficiently closely connected to the process of giving evidence for it to be covered by absolute privilege.

In all the circumstances of this case we would hold that the oral complaint relied on by the plaintiff constituted an initiation of proceedings before the court of inquiry and constitutes a part and parcel of the proceedings It would therefore be entitled to absolute privilege. If so, the question of malice is irrelevant to the decision and all the evidence extraneous to this issue should be struck out We therefore make no pronouncement either way on the other factual matters referred to by the learned trial judge.

We therefore affirm the judgment of the Court of Appeal on this ground and dismiss the appeal with costs. The defendants would be entitled to costs in all three courts.

Appeal dismissed.