

ALLES
v.
WEERASINGHE

COURT OF APPEAL.
EDUSSURIYA, J.
C.A. 459/85(F).
D.C. COLOMBO 83672/M.
JUNE 21, 1996.

Defamation – Publication of material defamatory – Defence of truth and justification; fair comment and privilege – Damages.

The plaintiff-appellant instituted action to recover damages from the defendant-respondent on the ground that the respondent caused the publication of material defamatory of him by printing and disseminating pamphlets (P10, P11 and P14). The respondents filed answer denying these publications and pleading that they are not defamatory took up the defences of truth and justification, fair comment and privilege.

The Learned District Judge held that the statements P10, P11 and P14 referred to the plaintiff-appellant, that they were defamatory of the plaintiff-appellant and held against the defendant-respondent on the defences of truth and justification and fair comment, but held with the defendant-respondent on the defence of privilege except with regard to item 3 on the reverse of P11 and awarded the plaintiff-appellant damages in a sum of Rs. 15,000/- in respect of same.

The plaintiff appealed against the judgment. On appeal,

Held:

(1) When the occasion is privileged a communication made on that occasion is *prima facie* protected. However if the communication is not germane to the occasion, that is, has no relevance to the occasion or is made to the defendant being actuated by an improper motive such as malice, it is not protected.

(2) The moment the learned District Judge (2) decided that the occasion was privileged there was an end to the case unless express malice is proved. It is then left to the plaintiff to prove that the communications complained of were made from an indirect motive, such as anger or with a knowledge that they were true or without caring whether they were true or false and not for the reason which would otherwise render them privileged.

If the defendant made the statements believing them to be true, he would not lose the protection arising from the privileged occasion, although he had no reasonable grounds for such belief.

(3) The fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Where the statements are relevant but unnecessary, the fact that unnecessary statements had been introduced might be evidence of express malice but that the mere fact that the statements were unnecessary did not establish malice.

Per Edussuriya, J.

"Where a defamatory statement which is not relevant to the privileged occasion is the only evidence of malice, Courts will be slow to draw the inference that the malice attaching to the irrelevant statement extends to the entire communication including the privileged portion in the absence of other evidence of malice either before or after the publication.

(4) Another instance of malice and motive on the part of the defendant is the conduct of the defendant in persisting with the plea of truth and justification, but made no endeavour to establish same.

(5) There was no duty to be discharged because those persons who were entitled to receive communication in the performance of the duty were already aware of the communication prior to the publications of P10, P11, P14 on the defendants own showing.

However, it is proved to the satisfaction of Court that the defendant used a privileged occasion for an improper motive viz. to maliciously injure the plaintiff.

APPEAL from judgment of the District Court of Colombo.

Cases referred to:

1. *Pullman v. Hill* 1891 – 1QB524.
2. *Clark v. Molyneux* – 1877 – 1878 3 Q.B.D. 237.
3. *Middler v. Hamilton* – 1923 TPD – 79.
4. *Horrocks v. Lowe* 1975 AC at 138 and 150.
5. *Yates v. Macrae* 1929 T.P.D. at 493.
6. *Chandrasena v. Phillips* 49 N.L.R. 271.
7. *Adam v. Ward* (1917) AC 309 at 320.
8. *Turner v. M.G.M. Pictures* 1950 1 All ER 449 at 455.
9. *Simpson v. Robinson* 1848 – 12 QB 511.

Faiz Musthapa, P.C. with *A. A. M. Illiyas* for plaintiff-appellant.

R. K. W. Gunasekara for respondent.

November 12, 1996.

EDUSSURIYA, J.

This is an appeal from the judgment of the learned District Judge of Colombo in an action instituted by the plaintiff-appellant (appellant) to recover damages from the defendant-respondent (respondent) on the ground that the respondent caused the publication of material defamatory of him by printing and disseminating pamphlets 'P10', 'P11' and 'P14' which were produced marked A, B and C with the plaint. 'P10' and 'P11' were dated 9th November 1979, whilst 'P14' was dated 24th November, 1979.

It is in evidence that 'P10' and 'P11' had been distributed at the entrance to D. S. Senanayake Vidyalaya on 13th November, 1979 and 14th November, 1979 respectively. The appellant was the principal of the said school at that time. It is also in evidence that 'P14' was distributed to those attending the Royal College Prize Giving.

'P10' purports to be a publication of a society called the Children's Rights Protection Society under the heading "Your Child's Basic Rights. Education State of Affairs at D. S. Senanayake Vidyalaya" and opens with the words "Even if you stay close to D. S. Senanayake Vidyalaya you will not be able to admit your child to this school. Only gem mudalalis, fish mudalalis and other outstation mudalalis' children are admitted to this school because they are paying the highest bribes. Now let us give you facts and figures".

Then 'P10' goes on to give certain figures regarding admissions for the year 1980 and states that for 200 vacancies only 51 have been selected and out of that 20 names have been copied from the Royal College list of selectees, and that therefore only about 30 students have been selected for admission to D. S. Senanayake Vidyalaya and that the balance 170 students will be admitted through the back channel for the "highest bidding bribes". 'P10' concludes by calling for ideas and opinions and to forward them to the respondent who is designated the Co-ordinating Secretary of the Children's Rights Protection Society. 'P10' also sets out that it is publication No. 005 of the Children's Rights Protection Society.

'P11' is a similar pamphlet, alleged to be, publication No. 004 of the Children's Rights Protection Society and is similar to 'P10' but with

certain additional statements such as "This same procedure (obviously a reference to students being admitted on payment of illegal gratifications) happened during the past few years. As a result his personal wealth has increased rapidly. Estates, Luxury Cars, Residences with princely comforts, fixed deposits and bank accounts are only few amongst these".

Then 'P14' states that although it is said that children in the vicinity have been admitted to this school it had become necessary to arrange for a large number of buses to transport children to school, thus implying that they are not from the vicinity. 'P11' also concludes by calling for comments and gives the name and address of the respondent as Co-ordinating Secretary of the Children's Rights Protection Society.

The reverse of 'P11' states, to expect publication No. 006 and sets out 4 items, namely,

- 1) properties purchased, details of bank accounts, amounts paid for Scotch Whiskey and French Brandy.
- 2) a list of names of mudalalis residing in Ratnapura, Negombo, Marawila, Kurunegala who are complacent after paying a part of the bribes to admit their children.
- 3) reasons for young lady teachers applying for transfer.
- 4) acts against public welfare that take place behind the upstairs door with a round glass.

Both 'P10' and 'P11' carry the legend that they were printed by the defendant at the Samantha Press.

'P14' is an open petition to the Bribery Commissioner which had been, according to the plaintiff, distributed on 24th November, 1979 at Royal College on the Prize day.

'P14' sets out that the plaintiff,

- 1) holds a bank account with a credit balance exceeding Rs. 200,000/-,

- 2) owns a car worth more than Rs. 300,000/-,
- 3) has a partly constructed house and the conservative estimate of the cost of construction being Rs. 200,000/-,
- 4) maintains his son at a foreign educational institution and remits £300/- per month.
- 5) has household effects acquired during the preceding two years including stereo sets, three refrigerators, televisions and luxury furniture valued at over Rs. 100,000/- which have all been acquired with illegal gratification collected by the plaintiff on the admission of children to the school.

'P14' has been signed by the respondent and is referred to as publication No. 009 of the Children's Rights Protection Society.

The respondent filed answer denying these publications and then pleading that they are not defamatory of the appellant took up the defences of truth and justification, fair comment and privilege.

The learned District Judge after trial held that,

- (1) the statements 'P10', 'P11' and 'P14' referred to the appellant,
- (2) that they were defamatory of the appellant and held against the respondent on the defences of truth and justification and fair comment, but held with the respondent on the defence of privilege except with regard to item 3 on the reverse of 'P11' and awarded the appellant damages in a sum of Rs. 15,000/- in respect of the same.

The appellant has appealed from this judgment.

It is appropriate to mention at this juncture that this appeal was argued on 21st June, 1996 and oral submissions were concluded on that day. At the conclusion of the oral submissions the respondent's Counsel was granted time to tender any authorities relating to the appellant's Counsel's contention that where it is held that malice

attaches to any particular statement of a document complained of then such malice taints the entire communication and that it cannot be held that malice attaches to that statement only and that the rest of the document is privileged.

However learned Counsel for the respondent tendered written submissions wherein he had dealt with matters which were not referred to at the hearing of the appeal. Besides, learned Counsel for the respondent had also made written submissions regarding the learned District Judge's findings that 'P10' and 'P11' referred to the appellant and that they were defamatory of the appellant and also the findings against the respondent on the defences of truth and justification and fair comment. In any event there was no appeal filed by the respondent nor were any oral submissions made at the hearing of this appeal regarding those matters.

For these reasons I will not take into consideration anything in the written submissions other than the authorities I called for, in deciding this appeal.

The learned District Judge has held that the occasion was privileged and this finding was not canvassed by the appellant at the hearing of this appeal.

The learned District Judge also held that the communications contained in 'P10', 'P11' and 'P14' other than item 3 on the reverse of 'P11' are privileged and awarded damages in respect of the publication of that particular defamatory statement. Thus, it is clear that the learned District Judge was of the view that item 3 on the reverse of 'P11' was not relevant to the discharge of the duty that arose on that privileged occasion and therefore malicious.

At the hearing of this appeal, Counsel for the appellant contended, firstly, that the learned District Judge had erred in holding that malice attached to only item 3 on the reverse of 'P11' and not to the other defamatory statements in 'P11' and submitted that the finding of malice must necessarily extend to the entire communication and cannot be restricted or confined to that irrelevant defamatory communication alone.

Counsel for the plaintiff-appellant also contended that the learned District Judge has not examined the question whether the appellant has established an improper motive and submitted that the fact that the respondent took up the defence of truth and justification and unrepentantly persisted in it while not making any effort to prove it, also showed malice. Further, that the learned District Judge failed to consider the contents of the respondent's letter 'P5' in this connection and that, all that the learned District Judge had done was to see whether there was reasonable and probable cause for the publication whereas that was not necessary.

Before I proceed to examine the evidence on the question whether the plaintiff-appellant has established an improper motive or not, I wish to refer to some statements made by the learned District Judge in the course of his endeavour to ascertain whether the defendant-respondent had reasonable and probable cause to make the statements complained of. Although the learned District Judge has done this in order to see whether the defendant-respondent had acted *bona fide* or not (page 192) once it is decided that the occasion was privileged then all statements, though defamatory, made on that occasion, which are relevant to the discharge of the duty that gives rise to the privileged occasion are protected and it is presumed that such statements were made *bona fide* in the discharge of that duty, whether there be or be not reasonable or probable cause and the burden falls fairly and squarely on the shoulders of the plaintiff to prove an improper motive such as a malice, etc.

At one point of the judgment the learned District Judge has stated "Outward manifestations such as possession of luxury cars, estates, residences with royal comforts, fixed deposits and bank accounts leads one to the belief that the possessor has accepted bribes". (page 197)

The plaintiff-appellant admitted having used a Peugeot – 504 car which belonged to the Vice Principal. However there is no evidence of any outward manifestation that the plaintiff-appellant owned estates or residences with royal comforts although there was evidence that the plaintiff-appellant's wife owned two allotments of land from a land called Galawila Estate which her father had purchased for her. As far as residences were concerned, at the time

of the publication in question the plaintiff-appellant did not own any residences, except that if at all he was in the process of constructing one. In this connection the plaintiff appellant has said that he commenced construction of the said residence in January 1980, that is after the publications in question. Then again, at the time of the publications the plaintiff-appellant was residing in a house provided by the Education Department at Gregory's Road and the only outward manifestations of royal comforts if they can be so called was a Sanyo Stereo Set and two refrigerators, one of which was according to the uncontradicted evidence twenty-three years old. As far as bank accounts are concerned almost every Tom, Dick and Harry have bank accounts for the purpose of transacting their daily business like payment of electricity bills, etc.

Of course the position would have been different if the plaintiff-appellant had a bank account with a credit balance in a large sum of money. The plaintiff produced his bank statement for the month of October 1979 (P10) which showed a bank balance of Rs. 2312.09 cts. and he stated that at the most he would have had a bank balance of Rs. 10,000/-. There is no evidence of the plaintiff-appellant having any money in Fixed Deposit Accounts.

Then again the learned District Judge's statement "I concede that the amount in the plaintiff's bank account has not been shown **to exceed Rs. 300,000/-**" (This should actually be Rs. 200,000/- as that is the sum mentioned in 'P11') is to say the least ridiculous, because, the bank balance was at the most Rs. 10,000/- according to the uncontradicted evidence of the plaintiff-appellant.

Then again the learned District Judge has stated at page 199 that "In the state of mind in which the defendant was after his child was rejected, and in the light of the plaintiff running about in a Peugeot car, constructing a house spending over Rs. 600,000/- owning an estate, and assets revealed in 'P20' and having a son following a course abroad, I cannot blame the defendant and it is not a surprise if he raised his eye brows and felt that something untoward had happened".

Here again, the construction of the house was completed in September 1981 long after the publications in question. Besides, the

figure mentioned in the publication was Rs. 200,000/- and it was the plaintiff-appellant who said in evidence that cost Rs. 600,000/- and he explained how he obtained the money. Then again as stated hereinbefore there was no evidence that the plaintiff-appellant owned an estate.

The learned District Judge has also made reference to the plaintiff-appellant's conduct regarding admissions to the school being questioned in Parliament.

The plaintiff-appellant was questioned about his disregarding verbal instructions given by the Minister of Education (page 98 and 99) and the plaintiff-appellant explained that those verbal instructions related to leaving room for special admissions and this must be so, because instructions regarding regular admissions are contained in a circular as disclosed by the evidence in this case. Besides there is no evidence to the contrary. In any event this question had arisen in Parliament after the publication of 'P10', 'P11' and 'P14'.

I have referred to the above mentioned comments of the learned District Judge because the learned District Judge appears to have been influenced by them in arriving at his decision.

I will next proceed to deal with the submissions of the plaintiff-appellant's Counsel, and the law relating to the defence of privilege and improper motive.

The learned District Judge has held that the occasion was privileged. When the occasion is privileged a communication made on that occasion is *prima facie* protected. However, if the communication is not germane to the occasion, that is, has no relevance to the occasion or is made due to the defendant being actuated by an improper motive such as malice, it is not protected.

In the present case before me the learned District Judge has held that the communications contained in 'P10', 'P11' and 'P14' other than item 3 on the reverse of 'P11' are privileged. Thus it is clear that the learned District Judge considered item 3 on the reverse of 'P11' was not relevant to the occasion and therefore had been made with an improper motive (malice) and not relevant to the discharge of the duty relevant to the privileged occasion.

The moment the learned District Judge decided that the occasion was privileged there was an end to the case unless express malice is proved *Lopes L.J. in Pullman v. Hill*⁽¹⁾. It is then left to the plaintiff to prove that the communications complained of were made from an indirect motive, such as anger or with a knowledge that they were untrue, or without caring whether they were true or false and not for the reason which would otherwise render them privileged. On the other hand if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for such belief *Clark v. Molyneux*⁽²⁾. However in the present case that *prima facie* privilege will not extend to item 3 on the reverse of 'P11' according to the learned District Judge's finding.

The learned District Judge has however in an effort to ascertain whether the communications were made *bona fide*, considered whether the contents of the pamphlets 'P10', 'P11' and 'P14' were "palpably false or whether the defendant had reasonable or probable cause for his belief as to the contents of the pamphlets".

As mentioned hereinbefore if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief, and it has been held in *Middler v. Hamilton*⁽³⁾ that "absence of reasonable grounds for a defendant's belief in the truth of a defamatory charge is no doubt not sufficient proof of honesty in that belief but is strong evidence in that direction".

However even if there was reasonable and probable cause and the defendant had a genuine belief in the statement, it is quite consistent with the existence of malice if he used the occasion for an improper motive. In order to avoid liability the defendant must have said it for the purpose for which the law allows such statements to be made (*Horrocks v. Lowe*⁽⁴⁾).

Learned Counsel for the appellant submitted that the learned District Judge had not considered the effect of the finding that item 3 on the reverse of 'P11' was irrelevant to the occasion with regard to improper motive in publishing the communications complained of.

In *Yates v. Macrae*⁽⁵⁾ where the statements were relevant but unnecessary **Tindall, J.** had stated that, the fact that unnecessary statements had been introduced might be evidence of express malice but that the mere fact that the statements were unnecessary did not establish malice. In the present instance item 3 on the reverse of 'P11' cannot be considered to be relevant to the allegation of irregular admissions to the school and bribery, as it refers to reasons for young lady teachers applying for transfers.

Learned Counsel for the respondent referred the Court to the decision in the case of *Chandrasena v. Phillips*⁽⁶⁾ where it was held that where there was one statement to which the privilege attaching to the occasion did not apply as it had been made recklessly, not caring whether it was true or false, the Defendant was liable only in respect of that statement.

In that case the statements complained of had been made in reply to a pamphlet published by a supporter of the plaintiff (who was standing for election) which had stated that the plaintiff had during the war, when schools became disorganised, found other accommodation for teachers and pupils at his expense.

Soertsz S. P. J. had in the course of his judgment referred to and relied on an observation of **Earl Loreburn in the case of Adam v. Ward**⁽⁷⁾ that "the fact that an occasion is privileged does not necessarily protect all that is said or is written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or safeguarding the interest which creates the privilege will not be protected" and then come to the conclusion that, a particular statement had been made with cruel recklessness, not caring whether it was true or false and held that, that statement was in excess of the privileged occasion and that even if it were not, the first respondent made it with malice. So that the question whether, malice attaching to that particular statement extended to the other parts of the publication and was evidence of an improper motive had not been considered by Their Lordships in that case.

In the case of *Adam v. Ward* (*supra*) the question arose whether certain defamatory statements contained in the libel were irrelevant to the discharge of the duty which gave rise to the privileged occasion and **Lord Finlay** in the course of his judgment said (page 318) "The privilege extends only to a communication upon the subject with

respect to which privilege exists, and it does not extend to a communication upon any other extraneous matter which the defendant may have made at the same time. The introduction of such extraneous matter may afford evidence of malice which will take away the protection on the subject to which privilege attaches, and the communication on the extraneous matter is not made upon a privileged occasion at all, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication". At page 321 **Lord Finlay** went on to say "I will only add that when one part of a libel is held to be protected by privilege and the other part not protected, the jury ought to be told that they cannot give damages in respect of the first part at all, unless they are satisfied that it was malicious, **which may be proved by the character of the unprotected part or by other evidence**".

In the course of his judgment in the same case **Lord Dunedin** stated (page 329) "It might thus occur, though, the case will probably be rare, that, as above imagined, defamatory words in the non privileged paragraph 2 could afford evidence of express malice in connection with the expressions used in the privileged paragraph 1".

It is also appropriate to mention that **Lord Atkinson** in the course of his judgment in the same case in discussing the "effect of embodying separable foreign and irrelevant defamatory matter in a libel" **posed the question whether it would make the occasion of the publication of the libel no longer privileged to any extent, or whether those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice, and reached the conclusion that in the absence of all guiding authority the latter, namely, that the irrelevant matter not being privileged at all furnished possible evidence that the relevant portion was published with actual malice. Finally Lord Shaw of Dunfermline** said in this connection, in the course of his judgment (page 348) **the introduction of such matter which is not in any reasonable sense germane to the subject matter of the occasion into a communication otherwise protected by the occasion may sometimes (this is conceivable) have a bearing upon the issue of whether the other and unprotected matter was published with express malice.**

However as **Lord Diplock observed** (*Harrocks v. Lowe (supra)*) there may be evidence of the defendant's conduct upon occasions other than that protected by the privilege, which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even though he believed it to be true. **Lord Diplock** then went on to observe at page 151 of his judgment in *Harrocks v. Lowe (supra)* that "**Logically it might be said that such irrelevant matter falls outside the privilege altogether whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few apart from lawyers, have had the training which qualifies them to do so**". So that **Lord Diplock** has drawn a distinction between lawyers and non-lawyers who publish material which fall outside the privilege and therefore not relevant to the discharge of the duty, arising on the privileged occasion, and the defendant in this case happens to be a lawyer.

In this connection **Lord Diplock** also said that, "as regards irrelevant matter the test is not whether it is logically relevant but whether, in all circumstances, it can be inferred that the defendant either did not believe it to be true or though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here too, judges and juries should be slow to draw this inference".

In *Turner v. M. G. M. Pictures*⁽⁶⁾ **Lord Porter** observed that "If however, the plaintiff can show any example of spite, or indirect motive, whether before or after the publication, he would establish his case provided the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date the libel was published; each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff. Nevertheless, each particular instance of alleged malice must be carefully analysed, and if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances.

In this connection it is appropriate to refer to the learned District Judge's findings on item 3 on the reverse of 'P11' wherein he says that the main theme in 'P10', 'P11' and 'P14' is the irregular admissions of children by accepting bribes and that item 3 on the reverse of 'P11' has no connection with that theme.

There is no appeal filed from that finding. Further, there is no evidence from which it can be inferred that the defendant believed that item 3 on the reverse of 'P11' was relevant.

The position therefore is that where a defamatory statement which is not relevant to the privileged occasion is the only evidence of malice, the Courts will be slow to draw the inference that the malice attaching to the irrelevant statement extends to the entire communication including the privileged portion, in the absence of other evidence of malice, either before or after the publication.

Bearing the above in mind I will next proceed to examine the evidence.

The pamphlets in question have been published in the name of a society, by the defendant-respondent, but there is no evidence of the existence of such a society. Pamphlets 'P10', 'P11' and 'P14' are referred to therein as publication numbers 005, 004 and 009 respectively. There is also reference to a future publication number 006 in 'P11'. However there is no evidence of publications 001, 002, 003, 007 and 008 nor is there evidence of number 006 being published. The only inference that Court can draw is that there was no such society because, 'P10', 'P11' and 'P14' do not set out the names of the President and the other office holders, nor were there any publications under numbers 001 to 003, 006 to 008 and that 'P10', 'P11' and 'P14' were referred to as numbers 005, 004 and 009 with the intention of giving the readers of pamphlets 'P10', 'P11' and 'P14' the impression that there was such a society in existence and that it was active and was responsible for publications 001 to 003 before 'P10' was published. Why was this done? Was it because the defendant himself did not honestly believe the contents of 'P10', 'P11' and 'P14' and was therefore attempting to palm the responsibility for those publications to a non-existent society? If not did the defendant think that, publication in the name of a society rather than in the name of a single individual would give added weight. Be that, as it may,

these pamphlets 'P10' and 'P11' were distributed at the entrances to the school of which the plaintiff appellant was the principal, whereas 'P14' was distributed at the Royal College Prize Day and it is in evidence that the residents of a particular area are entitled to have their children admitted, to either D. S. Senanayake College or Royal College.

The learned Counsel for the defendant-respondent submitted that 'P14' was distributed at the Royal College Prize Day because some parents had children in both schools. If that be so, then distribution at the D. S. Senanayake Vidyalaya would have served the purpose. However, it could be that some of the parents who attended the Royal College Prize Day may in future have to seek admission of their children to the Senanayake School, as they reside within that particular common area, to which I have referred earlier.

In any event, by the distribution of 'P10', 'P11' and 'P14' at the places referred to, it is clear that these pamphlets were meant to reach the parents of the children who were attending D. S. Senanayake Vidyalaya and those parents residing within the area relevant to admissions to the D. S. Senanayake Vidyalaya. Besides 'P1' and 'P11' are titled "Your Child's Basic Rights – State of Affairs of Education at D. S. Senanayake Vidyalaya".

Thus, the duty which the defendant sought to discharge on this privileged occasion was a duty owed to the parents of children attending the D. S. Senanayake Vidyalaya and those persons residing within the area relevant to the admission of children to D. S. Senanayake Vidyalaya, and whose children may seek admission on a future date. According to 'P10', 'P11' and 'P14', the plaintiff admits to the school only a few children of residents living within the area which qualifies them for admission and the majority are admitted from outside that "qualifying area" on the acceptance of illegal gratification, and this procedure has been followed by the plaintiff for some years.

If that be so, then the majority of the parents were aware that the plaintiff admitted children on taking illegal gratification as they, themselves had given bribes and got their children admitted. So that the defendant clearly had no duty to discharge as far as such parents are concerned. As far as the parents of the other children are

concerned, namely the parents of children who have been admitted because of their residential qualification also, there was no duty to be discharged in view of the contents of the defendant-respondent's letter 'P5' of 5th November, 1979 wherein he has stated that **“Therefore the balance number is to be recruited through questionable channels which are well known to the residents.** By “residents” the defendant obviously refers to those persons residing within the area which entitles them to get their children admitted to the school. Further, 'P5' sets out that a copy of 'P5' was sent to the Bribery Commissioner. Therefore it is clear that the reference to admission through “questionable channels” is a reference to admission on taking bribes. Thus, it is clear that the defendant by printing and publishing 'P10', 'P11' and 'P14' amongst the parents of children attending the school was not conveying something which the parents of all children attending the school and also the residents of the area did not know, that is, that the plaintiff was admitting children on acceptance of illegal gratification, according to the contents of 'P5'.

The defendant being a lawyer surely knew this. Therefore the motive behind the publishing of 'P10', 'P11' and 'P14' could not have been the discharging of a duty. It is therefore clear that the defendant was using a privileged occasion for an improper motive, with a desire to injure the plaintiff.

Whilst I am on 'P5' the letter by which the defendant appealed against the refusal to admit his son, I will refer to another matter that arises from the contents of 'P5'.

In 'P5' the defendant has mentioned the names of eight children whose names appear in the Royal School admission list as well and the names of twelve children who according to the defendant have given addresses which are non-existent and goes on to say that therefore these twelve cannot have authentic documents to prove their residence.

However at the hearing of the defendant's appeal he admitted that the addresses of ten out of the twelve were authentic (*vide* 'P6'). It is also significant that the appeal was heard and rejected by the plaintiff, the Chief Education Officer, Colombo referred to in 'P14' and the principal of another school. According to the uncontradicted evidence of the plaintiff the parents of the other two children had

written saying that they could not attend the meeting on 22nd November, 1979 which dealt with the defendant's appeal. Therefore that proves that the addresses of those two children were also authentic since the letters sent to those addresses requesting them to appear at the school on 22nd November had reached them. This shows that the defendant is prone to making reckless statements not caring whether they are true or false.

'P5' was dated 5th November, 1979, and 'P10' and 'P11' were dated 14th November, 1979 and the defendant's appeal was dealt with on 22nd November, 1979.

I will now move onto 'P11'. Item 3 on the reverse of 'P11' has been dealt with by the learned District Judge as a communication which is not privileged and damages have been awarded regarding the same on the basis that it had been made maliciously. Item 1 on the other hand has not been discussed by the learned District Judge at all. It refers to the publication of the properties purchased by the plaintiff, bank accounts and amounts paid on the purchase of Scotch Whisky and French Brandy by the plaintiff, in a future publication No. 006. However there is no evidence that publication No. 006 was ever published or even printed. Nor has the defendant produced at the trial a list of such properties, such bank accounts and evidence of amounts paid for liquor or confronted the plaintiff with them in cross-examination. This is clear evidence of malice as those statements have been made recklessly not knowing or caring whether they were true or false. In fact the only inference one can draw in these circumstances is that those communications were made knowing very well that they were false because he did not have such documents or information. There is also the plaintiff's uncontradicted and unchallenged evidence that he is a teetotaler. If in fact the defendant had such Bank Statements and particulars of such amounts paid on the purchase of liquor, he undoubtedly would have confronted the plaintiff with them at the trial, and further would have also annexed them to 'P14' which was printed and published later. The position is the same with regard to item 2 on the reverse of 'P11'.

Another instance of malice and improper motive on the part of the defendant is the conduct of the defendant in persisting with the plea of truth and justification. The defendant put in issue the defence of truth and justification, at the trial, but made no endeavour to establish the same.

In this connection I would like to refer to the decision in the case of *Simpson v. Robinson*⁽³⁾ where it was held that malice may be inferred from the relation between parties before or after the publication or the conduct of the defendant in the course of the proceedings themselves, as for eg., where the defendant persisted in a plea of justification while nevertheless making no attempt to prove it.

For the above mentioned reasons I hold that the plaintiff has proved to the satisfaction of the Court that the defendant used a privileged occasion for an improper motive namely to maliciously injure the plaintiff, on the pretext of discharging the duty that related to the privileged occasion. At this juncture, I must repeat that in any event I have already held that there was no duty to be discharged because those persons who were entitled to receive the communication in the performance of the duty were already aware of the communication, prior to the publication of 'P10', 'P11' and 'P14' on the defendant's own showing.

In the circumstances mentioned above, and taking into consideration the status that the plaintiff held in society and the nature of the defamatory statements, I am of the view that the plaintiff is entitled to damages in a sum of Rs. 250,000/- which is reasonable in all the circumstances.

Next I will deal with the appellant's Counsel's contention that in any event that the damages awarded in respect of item 3 on 'P11' even when taken in isolation as the only malicious statement is inadequate. In any event the sum of Rs. 15,000/- awarded as damages in respect of item 3 on the reverse of 'P11' is in my view inadequate as that item suggests that **young lady teachers** were applying for transfers from the school because of the plaintiff's conduct. I repeat that item 3 in 'P11' refers to **young lady teachers** and not teacher. So that it implies that the plaintiff's conduct was morally obnoxious to all young lady teachers.

Today, when the openly immoral behaviour of married persons holding high positions in life, which has given scandal throughout the length and breadth of this country, is common, some people may not think much of allegations of such conduct, but way back in 1979 we lived in a more civilized and God fearing society and the plaintiff was a married man with children and was the principal of a well known school.

Taking all these factors into consideration, in respect of item 3 on the reverse of 'P11' alone, I hold that the plaintiff-appellant is entitled to damages in a sum of Rs. 100,000/-.

However for the reasons mentioned earlier by me, I vary the judgment of the learned District Judge and award damages as prayed for in the plaint with costs. The appeal is therefore allowed with costs fixed at Rs. 4,200/-.

Appeal allowed.
