IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Associated Newspapers of Ceylon Ltd.,
No. 35,
D.R. Wijewardhane Mawatha,
Colombo 10.

Defendant-Appellant

Case No. : CA/0593/2000 F

Vs

DC Colombo, Case No. 124222/MR

Colonel. M. Dissanayake,
No. 87, Pepiliyana,
Borelesgamuwa.

Plaintiff-Respondent

Before: Hon. D.N. Samarakoon, J.

Hon. Pradeep Kirtisinghe, J.

Counsel: Kushan De Alwis P.C., with Nivantha Thilakaratne for Defendant Appellant.

Rohan Sahabandu P.C., with Chaturika Elwitigala for Plaintiff Respondent.

Argued on: on 03.02.2021 both parties agreed to file written submissions.

Written submissions tendered on: tendered prior to the argument
Defendant-Appellant on 02.03.2015

Plaintiff- Respondent on 29.07.2019

Decided on: 14.10.2022

D.N. Samarakoon, J.

Judgment

In regard to the applicable law, the defendant appellant has cited, the cases, **The Independent Newspapers Ltd. vs. Devadasa** (1983) 2 SLR 505, **Sim vs. Stretch** [1936] 2 All E R 1237, **M'Pherson vs. Daniels** (1829) 10 B & C 263, **Edwards vs. Bell** (1824) 1 Bing 403, **Hunt vs. Great Northern Railway Company** [1891] 2 Q.B. 189, **Piyadasa de Silva vs. Gunasekera** (1980) 2 SLR 196, **Saravanamuththu vs. Saravanamutthu** 61 NLR 1, **A.K.J.M. Edwin et al. vs. Saravanamuththu** 62 NLR 44 and **Kulatunga vs. Samarasinghe** 1990 (2) SLR 244.

From the works of Learned Authors, it has been cited, **Carter – Ruck, on Libel and Privacy,** 6th Edition page 177 and 188, **Gately on Libel & Slander** 9th Edition page 325 and **McKerron, The Law of Delict,** Platinum Edition page 171.

In regard to the same question, the plaintiff respondent has cited, **Associated Newspapers of Ceylon Limited vs. Gunasekara** 53 NLR 481, **M.G. Perera vs.**

A.P. Pieris 50 NLR 145, **Independent News Papers vs. De Mel** 1979 (2) NLR 58,

From the works of Learned Authors, it has been cited, **R.G. McKerron, Law of Delict,** 7th Edition page 188, the same work, page 171, 172, **Wille's Principles of South African Law,** 8th Edition edited by Dale Hutchinson, Belinda Van Heerden, D.P. Visser and C.G. Van der Merwe, page 687, **Defamation and other aspects of the actio Injuriarum** by Chittharanjan Felix Amerasinghe, page 19 and page 65.

The Privy Council decided, in, **N W. DE COSTA, Appellant, and THE TIMES OF CEYLON LTD. and another, Respondents,** (1963) that,

> "A large number of issues were framed at the trial. The learned District Judge found numerous issues of fact in favour of the respondents and dismissed the action. The appeal in the Supreme Court was heard by Basnayake C.J., Pulle J. and Sinnetamby J. By a majority judgment (Basnayake C.J. dissenting) the appeal was dismissed and the judgment of the learned District Judge was affirmed. The learned Chief Justice considered that the appellant was entitled to succeed in his claim and would have awarded him Rs. 5,000 damages.
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> **The law which must be applied in approaching the issues which arise in this appeal is the law of defamation in Roman-Dutch law as applied in Ceylon. The existence of animus injuriandi is therefore an essential basis of the cause of action.** As Basnayake C.J. pointed out in his judgment defamation is a species of injuria and injuria litteris is committed when a person has assailed the reputation of another by publishing to a third person matter intended to bring him into contempt ridicule or hatred animo injuriandi: and animus injuriandi being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used. If the existence of animus injuriandi is shown or can be presumed to exist the defence may seek to negative it by raising a plea of justification. In order to establish that plea it is not enough to show that the words complained of are true: it must be shown that their

> publication was in the public interest or for the public benefit. A further defence that may be raised is that of fair comment. This necessitates establishing that the facts upon which the comment is based are true, that the comment is in reality comment and is fair and bona fide, and that the comment is made on a matter of public interest".

The aforesaid case, came up, as an appeal of a case decided in the Supreme Court of Ceylon (as the aforesaid quoted paragraph also refer). Three Judges were appointed to hear the plaintiff's (Mr. N.W. de Costa's) appeal from the dismissal of his action by the learned District Judge, since two Judges heard the appeal at first could not agree. The learned Chief Justice, Hema Henry Basnayake, who (in his lordship's dissenting judgment) allowed the appeal and proposed to award Rs. 5000/- damages, said as produced below, of the applicable law,

> "It is well settled that questions relating to defamation fall to be determined in this country according to the principles of Roman-Dutch law. When approaching questions of Roman-Dutch law, especially in a branch of law like defamation it is well to bear in mind the words of Lord Tomlin in the case of Pearl Assurance Company Ltd. v. Government of the Union of South Africa 1—
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> > "In the first place, the questions to be resolved are questions of Roman Dutch law. That law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modem organized society. That those principles are capable of such adaptation cannot be doubted, and, while it would be idle to assert that the development of the Roman Dutch law in the territories now constituting the Union has not been affected appreciably by the English law, yet in their Lordships' judgment, approach should be made to any question governed by Roman Dutch law without any fetter imposed by recollections of other systems, and through the principles of Roman Dutch law alone.

> "The fact that the solution of a particular problem reached by the Roman Dutch law bears a similarity to the solution provided by another system does not necessarily indicate any imposition of the rules of one system upon the other, but. May be cogent evidence of a resemblance between the relevant basic principles of the two systems."

The existence of well-annotated standard treatises on the law of defamation in England and America is a great inducement for lawyers and judges almost instinctively to resort to them for the solution of problems which should be solved according to the principles of Roman-Dutch law. **At the same time, I do not wish to be understood as saying that under no circumstances should we examine the decisions of courts of other jurisdictions when called upon to solve an intricate question of law in our system. But the tendency to resort to English and American treatises and decisions without first endeavouring to solve the problems that arise according to Roman-Dutch, law should be resisted.** Melius De Villiers's Treatise on the Law of Injuries and Manfred Nathan's Treatise on the Law of Defamation in South Africa afford considerable assistance in ascertaining the Roman-Dutch law as developed in South Africa". [Emphasis added in this judgment]

Mr. N. W. de Costa was a student, later a teacher and even later the Acting Principal of the school called "Ananda Shasthralaya", of Kotte. It is referred to in Chief Justice Basnayake's judgment, that, Mr. Costa said he has exhausted all his means at the litigation before the District Court and hence he appears in person. Basnayake C.J., also says that Mr. Costa when presenting his case (against a battery of lawyers consisted of H. W. Jayewardene Q. C. and N. D. M. Samarakoon, etc.) did justice to his case. No wonder, for although he lost before the Supreme Court of Ceylon (Judgment of Pulle J. and Sinnethamby J.) he won before the Privy Council, which allowed his appeal and granted him the same amount of damages as allowed by Basnayake C.J., where he appeared in person. Thus, in a way, the Privy Council has approved the judgment of Basnayake C. J.

Chief Justice Basnayake, further said in his lordship's judgment,

> "The kind of defamation that arises for consideration in the instant case, viz., publication by a newspaper to all and sundry, is the type of defamation known to Roman-Dutch law as Famosis libellis and falls into the classification of Injuria litteris. (Voet 47. 10.10—7 Gane 226)—
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> > "A wrong is done by writing when a person has assailed the reputation of someone by handing a screed to the Emperor or to another; or with a view to the contemning and mockery and loss of reputation of someone has made up, published, noised abroad, made known to others or printed an information, narrative, comedy, screed or jingle; or has with evil intent brought about the happening of any of those things."
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> Now when dealing with this type of defamation it is well to bear in mind that in this country a newspaper enjoys no greater right than the individual citizen. The following words of Lord Shaw in the case of Arnold— The King Emperor of India 1, though expressed in a criminal case in relation to Burma, can with equal force be used in relation to Ceylon—
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> > "The freedom of the journalist is an ordinary part of the freedom, of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."

As stated by the learned Chief Justice, while the tendency to refer to overlapping areas in other countries, such as England and United States, because of the availability of well annonated works on those legal systems on defamation, is to be resisted, the usage of the similar concepts (especially, as to defences) in those other systems, despite having different terms to identify those concepts, could be seen.

It is pertinent to note that his lordship the Chief Justice also said,

"In dealing with the Roman-Dutch law of defamation it is advisable as suggested by De Villiers (48 S. A. L. J. 467) to avoid such expressions as "malice", "express malice", "legal malice "implied malice", and "actual malice". The expression "malice" in English law has given rise to a great deal of misunderstanding and some of the English jurists, notably Pollock, have adopted the formula of absence of "good faith", which is the expression used in section 479 of our Penal Code. In Roman-Dutch law for defamation to be actionable it is not necessary that it should have entailed special damage or actual pecuniary loss to the person defamed {Fradd v. Jacquelin),5. It is sufficient that his feelings have been injured and that the writer intends to do so. (Boyd Moss v. Ferguson) 6."

Having said so, if animus injuriandi must be present in Roman Dutch Law to constitute defamation, cannot it be said, that, the absence of animus injuriandi, simplicitur a valid defence, without seeking refuge in the accepted defences in English Law?

M. G. Perera vs. A. V. Peiris, 1948, was a decision of the Privy Council. Dr. Perera's action on defamation in respect of a news item published in the newspaper called, The Ceylon Daily News, was dismissed in the District Court. The Supreme Court of Ceylon affirmed that dismissal.

D. N. Pritt, K.C., for the respondent ("The Ceylon Daily News") in his submissions, raised the question with regard to absence of animus injuria. He said,

"In the Roman Dutch Law of defamation the existence of the animus injuriandi is an essential pre-requisite of liability…It was therefore open in the Roman Dutch Law to a defendant to negative liability by proving the absence of animus injuriandi on his part. Voet in De Injuriis (47.10.20) states " Next with regard to the person who is alleged to have occasioned an injury the fact that he had entertained no intention to injure (animus injuriandi) is a good ground for his not being held liable in an action for injury. The fact that such intention was absent is to be gathered from the

circumstances of each particular case; for an intention of this kind has its seat in the mind, and in a case of doubt its existence should not be presumed", (de Villiers' Translation, p. 189.)… In fact what are today regarded as the established defences in defamation are, in their origin, various different ways of negativing animus injuriandi. With time, however, they developed into stereotyped defences whereby a presumption of animus injuriandi could be rebutted. The scope of some of them like privilege and fair comment are fairly clearly defined, but that of the others, like rixa, compensatio, jest and mistake, is less clear. This development has been taking place over the last fifty years or more and is still taking place. The absence of animus injuriandi still exists as general category providing a substantive defence in itself. The Roman Dutch Law, under the rule of absence of animus injuriandi, still retains the capacity to extend a defence into a sphere not covered by any of the established defences.

Mr. Pritt continued,

"In Ceylon— and this is a case governed by the Roman Dutch Law as developed in Ceylon— the defence of the absence of animus injuriandi exists as a vital, living force. This defence has been uniformly and consistently adopted by the Supreme Court of Ceylon in Silva v. Raman Chetty 1 (1895) 1 NLR 225; David v. Bell2 (1913) 16 NLR 318; Cantlay v. Vanderspar 3 (1914) 17 NLR 353; Gulich v. Green i.(1918) 20 NLR 180.

In **SILVA v. RAMEN CHETTY.**, (1895) it was said, "…the above words were per se contumelious, and their publication should be presumed to have been made with a contumacious intent, in the absence of proof that the defendant wrote the words complained of sine injuriandi animo et affect".

Withers J., said, "…And even had this fact not been true, he might possibly have repelled the presumption of animus injuriandi by disclosing a state of circumstances, including his own prudence of conduct and honesty of purpose, from which the Court might have properly inferred that, though the language was contumelious, it was not written with injuriandi animo et affect".

In **DAVID v. BELL et al**, (1913) it was said, "…In a case of defamation, malice, in mode m English law, is no more than the absence of just cause or excuse ; and,

similarly, an actual intention or desire to injure is not, under the Roman-Dutch law, necessary to constitute animus injuriandi. Reckless or careless statements may be taken as proof of animus injuriandi; and while, in English law, malice can only be refuted by showing that the occasion was privileged, or that the words were no more than honest and fair expressions of opinion on matters of public interest and general concern, the Roman-Dutch law allows proof, not only of such a circumstance as that the occasion was privileged, but of any other circumstance that furnished a reasonable excuse for the use of the words complained of".

Pereira J., said, "…the Roman-Dutch law allows proof, not only of such a circumstance as that the occasion was privileged, but of any other circumstances that furnish a reasonable excuse for the use of the words complained of".

In **CANTLAY v. VANDEESPAAB**, (1914) it was said, "Under the Roman-Dutch law, injury to one's feelings, honour, dignity, or reputation is not actionable, unless the offender acted animo injuriandi. Joke or jest, if legitimate and seasonable, is sufficient to exclude the idea of an intention to injure, but when language has been used which, regarded by itself and in connection with surrounding circumstances, constitutes ex facie an injury, the allegation that the words were used merely as a joke of a legitimate nature must be made good by the defendant by sufficiently convincing evidence".

The judgment of Pereira J., said, "The words occur in a postscript to a letter written by the defendant addressed to the firm of Messrs. Julius & Creasy, and they are as follows: "Is there any truth in the report that Mr. Creasy has turned Muhammadan and married Mrs. Cantlay? We would like to send them both a present."

His lordship also said, "The burden was on the plaintiff to show that the words referred to above were by themselves defamatory of the plaintiff. This she has done by proving the following facts. That Mr. Creasy referred to in the words is Mr. Creasy, a member of the firm of Messrs. Julius & Creasy, who had at one time acted as the plaintiff's proctor in a legal proceeding; that Mr. Creasy is an elderly gentleman, married, and having children; that Mrs. Cantlay referred to in the words is the plaintiff, and that she is a widow of the age of 54 years; with several grown-up children. Looked at in the light of these facts, there is no question that the words referred to are defamatory of both the plaintiff and Mr. Creasy".

He added, "…the defendant, it has been proved, was not in such friendly terms with Mr. Creasy as to justify him in indulging at the expense of Mr. Creasy in such a course and vulgar joke, if joke it be, as that contained in the postscript; and the evidence shows that the relations between the defendant and the plaintiff were decidedly strained. In these circumstances, I cannot bring myself to think that the postscript was a legitimate or seasonable joke. It was rather a venomed dart intended to hit and hurt".

In **GULICK v. GEEEN**, (1918) "The letter contained the following passage: ' "Why on earth didn't you tell me Gulick was half a German, indeed three parts a German? I grant I should have asked you, but it never occurred to me that there would be any loose Germans about these days."

Shaw J., said, "There appears to me to be very little difference between the English and Roman-Dutch law relating to the proof of " malice " or " animus injuriandi" in actions for defamation, and such difference as there is does not affect the particular circumstances of the present case.

Although " malice " on the part. of the defendant has always nominally been an ingredient to actional defamation under the English law, it has long ceased so to be in fact, and, in the absence of privilege, the mere proof that the words are false and defamatory constitutes irrebuttable proof of malice in law, and the defendant's intention or motive in using the words is immaterial, if he has, in fact, wrongfully injured the plaintiff's reputation…"

His lordship also said, "What difference there is in the two systems of jurisprudence is thus stated by Sir Henry de Villiers in Botha v. Brink 4: "The rule of the Roman-Dutch law differs, if at all, from that of the English law in allowing greater latitude in disproving malice. Under both systems the mere use of defamatory words affords presumptive proof of malice, but under our law, as I understand it, the presumption may be rebutted, not only by the fact that the communication was a privileged one, in "which case express malice must be proved, but by such other circumstances (examples of which are given in Voet 47, 10, 20) as satisfy the Court that the ' animus injuriandi ' did not exist."

He added, “When, therefore, the occasion is a privileged one, under both' systems the presumption of malice, or " animus injuriandi " is rebutted, and it lies upon the plaintiff to prove actual malice, and this is not; done by merely proving the words to have been untrue, or even that the words used were stronger than the occasion required. **It is necessary to show that the state of mind of the defendant was malicious.** To quote the words of Coleridge J. in Harrison v. Bush 1: “As the occasion privileged the publication, the plaintiff had to give evidence of express malice. To do this he was entitled to prove that the allegations in the libel were untrue. I do not say that the mere fact of the falsehood of the allegations would prove express malice. I agree that the material question was as to the state of the defendant's mind. "

The next two passages are also quoted since they are very relevant, “The law is also very clearly laid down by Lord Esher M.R. in Nevill v. Fine Arts and General Insurance Company -; "For a very long time past Judges have over and over again directed juries that the defence that the occasion was privileged can only be rebutted by showing that the defendant in using the privileged occasion has used it with actual malice, or ' express ' malice as it has been sometimes called. Exception has been taken to the latter term; but I think that the Judges using it have always explained its meaning to the jury by telling them in substance that there must have been actual malice, which is a state of mind. " This state of mind may be proved in various ways: by showing personal animosity on the part of the defendant against the plaintiff; by showing that the defendant knew that the statements made were untrue; by showing that the statements were so reckless that the plaintiff could have had no bona fide belief in their truth, and even by the defendant persisting in the truth of the statements at the trial when he knew of their untruth, but not from the mere fact that the words used were too strong (see Lopis L.J. in Nevill v. Fine Arts and General Insurance Company, at page 170)”.

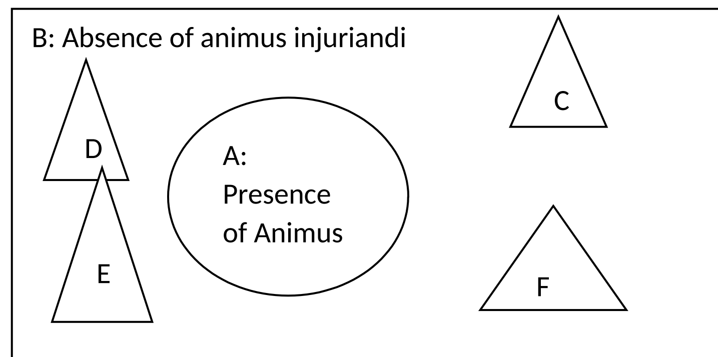
Before examining the decision, if any, the decision of the Privy Council, with regard to aforesaid submissions, it is pertinent to deduce, propositions that can be drawn from the discussion aforementioned.

(1) Although there exist similarities between the concept of “malice” in English law and “animus injuriandi” in Roman Dutch Law, it has been cautioned,

at least in certain cases, the difficulties that could have arisen because of indiscriminate confusion between the two,

(2) Unlike in English law, where defences are stereotype such as justification, fair comment, privilege, jest, rixa, compensatio and mistake, in Roman Dutch law, the absence of animus injuriandi simpliciter could be a defence; in that, there is a possibility of giving birth to a new kind of a defence which will be created in the attempt of the defendant to prove that he had no animus injuriandi (the intention to cause injury),

(3) The absence of animus injuriandi (and also its presence) could be depicted in a Venn Diagram usually used in Boolean Algebra which will be,



Set A is Presence of animus injuriandi,

Set B is Absence of animus injuriandi,

Set C can be Justification,

Set D can be Fair Comment,

Set E can be privilege,

Set F can be jest, likewise there can be

Set G ……………………………

Set H ……………………………

The "undefined" area outside set A and not within any "defined" set, represents the potential to produce new defences, or which can be used just as the absence of animus injuriandi. The ability to prove absence of animus injuriandi simpliciter, as a defence, is especially shown by the decisions in Silva vs. Raman Chetty (1895), David vs Bell (1913) and Cantlay vs. Vanderspar (1914).

The passage reproduced below, from the judgment of Lord Uthwatt, in the Privy Council shows that their Lordships accepted the argument of Mr. Pritt, that absence of animus injuriandi, without falling into any stereotype defence, can be a defence.

> "In Roman Dutch Law animus injuriandi is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing animus injuriandi rests upon the defendant. The course of development of Roman Dutch Law in Ceylon has, put broadly, been to recognise as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman Dutch Law as matters relevant to negativing animus injuriandi. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions under the common law are indeed of the greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman Dutch Law. The "gladsome light of Roman jurisprudence" once shone on the common law: repayment to the successor of the Roman Law should not take the form of obscuring one of its leading principles".

However, Nagalingam A.C.J., decided in **Associated Newspapers of Ceylon Ltd., et al vs. Dr. C. H. Gunasekera (1952) 53 NLR 481**, that Lord Uthwatt

has not expressly said in **M. G. Perera vs. A. V. Peiris [1948]** that absence of animus injuriandi simpliciter is a defence, but decided that case on privilege.

The summary of this case said, "The two defendants who were the proprietor and editor respectively of a newspaper published certain defamatory excerpts concerning the plaintiff from an inchoate and unpublished report of a special committee which had been appointed by the Colombo Municipal Council to investigate and report upon the administration of certain activities of the Public Health Department, the head of which was the plaintiff. In the action for defamation instituted by the plaintiff the defendants did not rely upon the please of justification, fair comment or privilege. It was contended that it would be sufficient for the defendants to prove the absence of animus injuriandi simpliciter".

The learned District Judge entered judgment against the defendants for Rs. 5,000/- and the defendants appealed. Nagalingam A. C. J., said,

> "The basis of the contention of the appellants is the Privy Council case of Perera vs. Peiris 1 [(1948) 50 NLR 145]. It is said that this case lays down the proposition that although the defence may not be co related to qualified privilege as understood prior to the delivering of that judgment, the naked establishment of the absence of an intention to cause hurt would absolve the defendants. I do not think that the judgment of Lord Uthwatt lays down any such proposition. It is true that the judgment is very much advanced of the views held previously, but nevertheless it is clear to discern that some sort of privilege, although not necessarily one of the express forms of qualified privilege as understood prior thereto, had to be made out. The noble Lord in the course of his judgment stated that their Lordships:
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> > "preferred to relate their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather

> than to debate the question whether the case falls within some specific category" and proceeded to state that the wide general principle was as stated in Macintosh vs. Dun 1[(1908) A. C. 390] to be the "common convenience and welfare of society" or "the general interest of society". The noble Lord further made the observation: "If it appears that it is to the public interest that the particular report should be published privilege will attach".

Nagalingam A. C. J., also said, "It is then said that what a defendant need now do is disprove the existence of animus injuriandi and this he could do without reference to any of the set forms of defence hitherto recognized by establishing that he had no intention to cause hurt to the plaintiff. He is no longer required, it is submitted, to prove even that the publication was in public interest... Learned Counsel for the appellant was driven to adopt this argument as it was clear that the report as shewn above was one which was not even discussed by the Council and the case of **De Buse and others vs. McCarty and Stepney Borough Council 1 [(1942) 1 All E. R. 19]**, a judgment of the Court of Appeal, was a strong authority which it was not possible for the appellant to surmount. The Report was at best that of a Committee which was only entitled to present its findings to the Council and until at least the stage was reached of the Council discussing it and passing a resolution thereon, it could not be said that members of the public had any interest in it, much less in the animadversions passed on the plaintiff: the publication, it was therefore clear, was not one made for the "common convenience and welfare of Society".

The reader may note, that in **Associated Newspapers of Ceylon Ltd., et al vs. Dr. C. H. Gunasekera (1952)** as well as **De Buse and others vs. McCarty and Stepney Borough Council [1941]** there were committees appointed by the respective Councils. The publication of the defamatory article was prior to the committees report to the Councils and the latter take a decision, nay, even discussing on it. Hence it was decided that the public has not yet an interest

on reading it. That is why in both cases the defendants failed. As this shows, another salient aspect of the delict of defamation, **the public having an interest to read**, the case of De Buse and others vs. McCarty and Stepney Borough Council [1941] will be considered.

In that case, prior to the report of the special committee appointed to inquire a theft, was considered by the Council, in giving notice of the Council meeting, the names of the appellants as involved in the alleged theft, were included and the notices were sent to the public libraries in the borough and was also affixed on or near the door of the town hall.

The town clerk and the Council were the defendants. Wrottersley J., found in favour of the defendants and the plaintiffs appealed.

Lord Greene, M.R. referred to a dictum of Lord Atkinson in **Adam vs. Ward [1917] A.C. 309** and quoted what is below,

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege an occasion where the person who makes a communication has an interest or a 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".

Goddard L.J., said,

> "It might well be, also, that highly confidential documents would be received by the Council and would have to be considered at a Council meeting. For instance, complaints in regard to the conduct of a high official might be made direct to the Minister of Health by some disgruntled ratepayer. The Ministry of Health might send off that complaint, which might be wholly libellous and which might do untold damage to the individual and ask Council's observations upon it. Can it be said that the Council would be justified in publishing that letter which

they received from the Minister of Health, or from any other government department, merely because they were going to take it into consideration at their meeting? They might come to the conclusion that it was absolutely groundless. I can see no ground whatever for saying that the occasion on which the document was published comes within the orbit of the privilege which attaches to the occasions on which documents are published have a common interest. In my opinion, there is no ground whatever for saying that this was a privileged occasion and consequently, the appeal succeeds".

By the cases of **Associated Newspapers of Ceylon Ltd., et al vs. Dr. C. H. Gunasekera (1952)** and **De Buse and others vs. McCarty and Stepney Borough Council [1941]** one more proposition could be deduced. That is,

4. To succeed in a plea of privilege, there should be a 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 should have a corresponding interest or duty to receive it; this reciprocity is essential.

The reader might wonder as to why no reference to facts of the case up to now. They will be referred to, presently.

The newspaper called "The Observer", dated 11.06.1992 stated thus,

"Welfare Fund Colonel Sacked".

"Army cleanup exposes Rs. 8 million racket".

"Lt. Gen. Cecil Waidyaratne Army Commander in Sweeping Reforms to Army, has sacked Colonel M. Dissanayake who was the Director of Welfare Fund for the Soldiers. This was after the discovery that Rs. 8 million had gone missing from the Welfare Fund of the soldiers. After the initial Army inquiry, the C. I. D. has been called in to carry out further investigations".

The newspaper called "Janatha" of 11.06.1992 stated thus,

“Asuu Lakshayaka wanchawata hamuda Colonel dotta”

“Yuda Hamudawe Subhasadaka Aramudale siduwee etheyi kiyana rupiyal asuu lakshayaka mudal wanchawak sambandayen seka karana hamuda subhasadaka unshaye Colonel warayaku seewayen pahakara etha. Yuda Hamudawe siduwana wancha sahamulin…”

Just prior to the retirement from active service (in an administrative capacity) at the age of fifty five, in the Army, the plaintiff, Mr. Mahinda Dissanayake (referred to in aforesaid news items) was appointed in 1988 as the Director of Army Welfare Division. He has said that since he did not get monetary allocations from the government, as per his experience he started to collect Rs. 500/- each from those who volunteer (page 123,124 of the appeal brief). He has said that there was internal audit of the Welfare Division (page 125 of the appeal brief). In the first year the collection was Rs. 16 million (page 126,127 of the appeal brief). He received a transfer with effect from 31.03.1992 (page 135,136 of the appeal brief). He was transferred to the 3rd Battalion (page 136 of the appeal brief). He wrote a letter dated 08.06.1992 to the Army Commander which was marked and produced as P.08 (page 138 of the appeal brief). It is a four paged letter. He has recited, in the said letter, regarding activities he performed in the Welfare Division (page 139 of the appeal brief) and having expressed his displeasure regarding the way he was transferred, he has requested to post him in the Reserve Service. He came to know with regard to the aforesaid news items through his daughter working in Air Lanka (at page 140 of the appeal brief). The said news item reported that the Colonel in charge of the Welfare Division has been sacked (at page 141 of the appeal brief). He says he was not dismissed (at page 142 of the appeal brief). He could not work the way he used to work, after the publication of the news item because he felt that people did not have the same respect and regard towards him (at page 149 of the appeal brief). There was no disciplinary action against him (at page 152 of the appeal brief). After the transfer, he was posted as the Additional

Government Agent in Jaffna (at page 153 of the appeal brief). The aforesaid was said in examination in chief.

Under cross examination, he said that all his medals were awarded not while in service in battle front but while in service in administrative branch (page 170 of the appeal brief). From July 1988 to 31.03.1992 he functioned as the Director of Army Welfare Division (at page 171 of the appeal brief). He left Army (ayin wuna) on 16.08.1992 (at page 172 of the appeal brief). He accepted, when suggested, that being in charge of the administration of Jaffna is a higher post than the Director, Army Welfare Division (at page 173 of the appeal brief). After the transfer of the plaintiff from the Army Welfare Division, the Army Commander has given the administration of that Division to a Board (at page 180,181 of the appeal brief). The question and answer reproduced below was recorded (at page 185 of the appeal brief).

Q. Now, you have stated in page 02 of "P.08" that you were stopped from functioning as the Director of the (Army) Welfare Division from 31st March 1992?

A. Yes, correct.

He again accepted this, at the last question and answer recorded three pages later (at page 188 of the appeal brief).

The questions and answers reproduced below were recorded thereafter (at page 190,191 of the appeal brief). For clarity they are reproduced in Sinhalese, the language in which they were recorded.

Q. Dotta daanawa kiyanne eliyata daanawa needa?

A. Owe.

Q. Ehemane thamaata wune?

A. Mata ehema deyak wune nehe.

Q. Mama yojana karanawa subasadaka mandalayen elyiata daala

aapasu gaththe nehe kiyala?

A. Maawa elyiata demme nehe.

Q. Thama dotta demma?

A. Maawa dotta demme nehe. Maawa maaru kala.

When it was suggested to him that the Army Commander ordered that he shall relinquish his duties as the Director, Army Welfare Division with effect from 31.03.1992, he accepted (at page 192 of the appeal brief).

The next witness, called for the plaintiff, was Mr. Thambipillai Shiva Shanmugam, retired Major General.

Under cross examination, when he was asked whether he knows that the plaintiff was suddenly removed from the post of Director (Army) Welfare Division in March 1992, his answer was that it was a routine transfer (at page 207 of the appeal brief). Then he was asked whether P.08 could be the response of a person who received a routine transfer (page 208 of the appeal brief). He was asked the questions, reproduced below (at page 211 of the appeal brief)

Q. Not only a Board of Governance was appointed by "P.05", it has been questioned regarding the stock in hand, cash in hand and bank statements, properties, debtors and creditors, investments and newly opened books?

A. It so happens at the transition of administration, of a Welfare Fund or an Institution.

…………………………………………………………………………………

Q. Why all this was necessary? Why a single person was mot appointed in the place of Mr. Dissanayake? Why it has been directed to effect this handing over of things?

A. I cannot answer those questions. It could be the policy of the new Army Commander.

He admitted that he had heard rumors of certain irregularities took place in the (Army) Welfare Fund, during the relevant period (at page 213 of the appeal brief).

The next witness called for the plaintiff was Mr. Landage Ajith Pushpakantha Gunasekera a Major. He was a Chartered Accountant. The objective of calling him was to show that accounts in the Army Welfare Fund were properly maintained.

He too admitted that there were rumors that in 1992 irregularities have taken place in the (Army) Welfare Division (at page 224 of the appeal brief). He also said that the Board of Management (Governors) consisted of Brigadier Munasinghe, Colonel Gunathunga, Colonel Ariyarathna and Luitinent Wijesuriya (at page 225 of the appeal brief).

The next witness, called for the plaintiff was Mr. Franklin Bernard Hendricus, the Senior Manager of Shirley Ganegoda and Company, Chartered Accountants. The accounts of the (Army) Welfare Fund were kept by them.

He accepted that as a responsible accountant, there should be an assets register, but it was not there and it is an error (at page 235 of the appeal brief). He accepted that Rs. 3 million has been shown as hire purchase debtors and if it is in violation of the regulations (Constitution) of the (Army) Welfare Fund, it is an error (at page 235,236 of the appeal brief).

He accepted that the Cash Book and the Bank Account Register will not tally and it is because it has not been properly accounted and that it has been said that what became of certain moneys were not known (at page 237 of the appeal brief). He admitted that there is no Ledger on Purchases and Sales (at page 239 of the appeal brief). He admitted that the Audit Report pertaining to 1990 has not been certified by his Institution (at page 244 of the appeal brief). He

accepted that in P.03 too there is no certification by his Institution as a correct account report (at page 245 of the appeal brief).

Thus concluded the plaintiff's case.

The defence proposed to call one Mr. Segu Junaid Mohamed Nizam, but it was objected to, on the basis that he was not listed. While arguing that he can be called without being listed, since he was the agent of the defendant, the defendant however withdrew the motion to call him as a witness. The defence closed its case marking documents D.01 to D.04.

Thus concluded the trial.

It has been submitted for the plaintiff that the defence did not call witnesses to prove justification, that is to say, that what was published was true. But even the plaintiff's and his witnesses' evidence show,

(1) That there was information about irregularities or corruption in (Army) Welfare Fund and there was an investigation by the Army Commander,
(2) As a result, the plaintiff was "removed" from his post as the Director of that division,
(3) The evidence of plaintiff's witness, Mr. Thambipillai Shiva Shanmugam, that it was a routine transfer is contradicted by plaintiff's own letter P.08 which ran into 04 pages by which the plaintiff has protested against his transfer,
(4) The accounts of the (Army) Welfare Fund have not been kept properly,
(5) The official audit, Shirley Ganegoda Company has not audited certain accounts,

It was seen that in **N. W. de Costa vs. The Times of Ceylon (1963),** Basnayake C. J., said,

> "…At the same time I do not wish to be understood as saying that under no circumstances should we examine the decisions of courts of other jurisdictions

when called upon to solve an intricate question of law in our system. But the tendency to resort to English and American treatises and decisions without first endeavouring to solve the problems that arise according to Roman-Dutch, law should be resisted".

Hence, it is pertinent to consider the judgment in **Adam vs. Ward [1917]** which was referred to in **De Buse and others vs. McCarty and Stepney Borough Council [1941]**.

Adam vs Ward [1917] is a judgment of House of Lords, having it the speeches made by Lord Finlay L. C., Earl Loreburn, Lord Dunedin, Lord Atkinson and Lord Shaw of Dunfermline.

The facts of the case were,

"Major Adam, the plaintiff and appellant, was an officer in the 5th Lancers, in 1906, stationed at Aldershot. The commanding officer of his regiment was Colonel Graham, who in the autumn of 1906 made a confidential report with regard to Major Adam. This report was submitted to Major General Scobell and was by him transmitted, together with notes of his own upon it, to General Sir John French, who was General Officer Commanding in Chief at Aldershot. This report, with notes upon it, is in the evidence called the "combined report". It was not shown to Major Adam before being sent in, as it ought to have been by the King's Regulations, but it was shown to him some weeks later – about 6 December 1906. On 3 November 1906, Sir John French sent in a confidential report of his own with regard to Major Adam. Neither of these reports was produced at the trial, as the Secretary of State stated that it was contrary to the public interest that they should be put in evidence".

"A letter dated 1 December 1906, was sent from the Army Council to Sir John French, stating with reference to a letter of his of 3 November, reporting the unsuitability of Major Adam as a cavalry leader in the field, that after full consideration of the circumstances of the case it had been decided that he

should be called upon to forward an application to retire from the Service, failing which it would be necessary to submit for His Majesty's approval his removal from the Army and that Sir John French was requested to communicate this decision to Major Adam. Major Adam wrote begging for a reconsideration of this decision, or, failing that, for the longest possible grace before sending in his papers, in order that he might get something to do and in the result, owing to the good offices of Major General Scobell, Major Adam was given a post in the office of the Chief of the General Staff. He remained at this post until January 1910. On 18 October 1907, it was announced that he and four other officers were to be placed on half pay and on 30 November of the same year a communique appeared stating that this action was not due to any cause detrimental to the character of these officers and that, though they were not considered suitable to retain their positions as officers in the 5th Lancers, their services could be and in three cases were being, utilized in other appointments and that the regiment was not inefficient to take the field".

"In October 1909, Major Adam asked that the circumstances under which he was placed on half pay should be reconsidered with a view to his reinstatement on full pay, but he was informed by a letter of 3 November that his case had been carefully considered and that the Army Council saw no reason to reopen the question".

"In January 1910, Major Adam was returned as member of the House of Commons for Woolwich and vacated his staff appointment".

"On 27 June 1910, he made a speech in the House of Commons in which he referred to the case of Captain Bryce Wilson, one of the five officers who had been placed on half pay and read out in the house the following statement: "That Major General H. J. Scobell, Royal Irish Lancers, did render to superior authority a confidential report or confidential reports on an officer or officers under his command, which report or reports contained wilful and deliberate

misstatements of fact, thereby deceiving those in authority to whom the report or reports were rendered and causing injustice to be done to one of the regiments under his command".

"Major Adam then went on to say, according to the report in "Hansard", which was in evidence: "Major General Scobell is on his way home at the present time from South Africa. He arrives in England at the end of this week and I hope when he sees the report of this paper, as I intend he shall do, he will appreciate the meaning of the words, "willful and deliberate misstatement of facts". I have tried to make it clear and I hope he will turn up that paragraph in the King's Regulations which compels an officer in a case like this to refer the matter to his superior authority, the superior authority in this case being the Army Council. I hope sincerely that the Army Council will see that justice is done to Captain Wilson and that penalties are meted out to those officers who deserve it".

"In reference to this speech the Lord Chancellor said: "This speech must have conveyed to every one who heard it or read the report the impression that Major General Scobell was charged with conduct unworthy of an officer and a gentleman within the meaning of King's Regulations. It is impossible to suppose that Major Adam did not intend to convey this impression. At the trial, however, he stated that he did not impute such unworthy conduct to Major General Scobell and that he said what he did merely in order that Major General Scobell might demand an inquiry to clear himself, in the course of which Major Adam believed information might be obtained with regard to the attack upon him which he believed to be contained in the combined report".

"I abstain from comment upon Major Adam's conduct in making, for such an indirect purpose, an unfounded attack upon General Scobell, who had rendered Major Adam great service at the time of his removal".

His Lordship then continued: "Major General Scobell brought the matter before the Army Council, who, after investigating it, issued through the Press the letter which is complained of as a libel upon Major Adam and which forms the subject of this action. It was addressed to Major General Scobell and is as follows:-

> "In reply to your letter of 8th July 1910, asking that an inquiry should be instituted in regard to a statement made by Major W.A. Adam M. P., in the House of Commons on 27th June to the effect that while in the command of the 1st Cavalry Brigade you rendered confidential reports on certain officers which reports contained willful and deliberate misstatements of facts, I am commanded by the Army Council to inform you that a thorough investigation has been made of the reports made by you at that time on certain officers of the 5th Lancers, who were afterwards removed from the regiment and to whom it is believed that Major Adam's statement bore reference. Major Adam is himself one of these officers. The Council also thought it proper to address a letter to Major Adam on the 23rd ultimo, inquiring whether he desired to forward for their consideration any statement in amplification or substantiation of his charge against you. On the 29th idem a reply was received from Major Adam to the effect that he had written to the Secretary of State for War on the subject, but his letter of the same date to the Secretary of State is found to contain nothing pertinent to the present investigation. The Council are satisfied that not only did your reports contain the unbiased and conscientious opinion you had formed on the officers in question, but that the conclusions at which you arrived were correct, as they were afterwards borne out not only by the opinion of your successor in command of the 1st Cavalry Brigade, but also by a special report on the 5th Lancers made by H.R.H. the then Inspector General of the Forces and confirmed by the General Officer then Commanding in Chief the

Aldershot Command. Further, as showing the absence of hostile bias, the Army Council note that in the case of Major Adam, who in 1906 was called upon to retire from the service in consequence of adverse reports, which were duly communicated to him, you intervened on his behalf and urged the Council to give him another chance in an extra regimental appointment. In the result it was decided to give Major Adam this chance. I am to add that the Council are of opinion that the charge brought against you by Major Adam is without foundation".

"The action was brought on 14 November 1912, against Sir E. Ward, by whom, as secretary to the Army Council, the letter complained of had been signed and issued to the Press in obedience to the orders of the Army Council. The defendant did not dispute that the letter was defamatory of the plaintiff but pleaded privilege".

Sir Hugh Fraser, for the appellant (plaintiff) said,

> ""There is no duty to publish to the world at large untrue defamatory statements unless they are protected by statue or are contained in a report of parliamentary or judicial proceedings, or proceedings in the nature of a judicial inquiry: Purcell v. Sowler (1) ; Brown v. Croome (2) ; Lay v. Lawson. (3)".

Lord Finlay L.C. in his judgment said,

> "" **Malice is a necessary element in action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion. If the communication was made in pursuance of a duty or on a matter in which there was a common interest on the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified and may be rebutted by proof of express malice"**.

Earl Loreburn said,

> ""But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected".

His Lordship further said,

> "I will only add that when one part of a liable 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".

Lord Dunedin said,

> **""I only venture to add some remarks of my own, because some of the leading principles of the law of libel and privilege have been freely discussed, and this case will take rank in the future as an authoritative pronouncement on these matters".**

His Lordship added,

> "Strictly speaking, it is the occasion on which a statement is made that is privileged, and the phrase that such and such a statement is privileged would be more accurately, though perhaps, more clumsily, expressed by saying that, the statement having been made on a privileged occasion, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called "express malice" to distinguish it from the malice which is implied from the defamatory words themselves".

Lord Atkinson, referring to the learned Judge who tried the case said,

> "He did not leave the question of privilege or no privilege to the jury, but he did leave to the jury the question as to the presence or absence of the elements which go to create privilege. For instance, the question "Was the subject matter of the publication by the defendant matter about which it was proper for the public to know?" And the question "Was the matter contained in the letter proper for the public to know?" It is to be regretted that the remarks of Willes J., in Henwood vs. Harrison (1) were not brought to Darling J.'s notice. Willes J., a most learned, laborious and accurate Judge, after stating that since the Declaratory Act of 1792 (32 Geo. 3, c. 60) the jury are the proper tribunal in civil as in criminal cases to decide the question of libel or no libel, said: "But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made bona fide without malice are libellous". He then proceeds: It would be abolishing the law of privileged discussion and asserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. **A jury, according to their individual views of religion or policy, might hold the Church, the Army, the Navy, Parliament itself, to be of no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant."** It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a 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".

The aforesaid passage shows that the question whether there is privilege or not is a question of law. It was having referred to the quotation from Willes J., Lord Atkinson said his oft quoted passage which is,

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a 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".

Lord Atkinson also said,

> "**It was however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law. This point is of such importance that one may be excused for referring at length to three authorities to show what the law on the subject really is , and in what light the language used in privileged communications is in a Court of law to be regarded".**

Lord Atkinson then referred to, Spill vs. Maule, L. R. 4 Ex.232, Laughton vs. Bishop of Sodor and Man, L. R. 4 P. C. 495 and Jenoure vs. Delmage, [1891] A. C. 73. In Spill vs. Maule, it was argued, "…that though the communication was privileged, yet the violent and abusive terms used in the letter were evidence of actual malice. The judgment of Lord Atkinson then said,

> "The judgement of the Exchequer Chamber was delivered by Cockburn C.J., Keating, Lush, Hannen, Hayes, and Brett JJ. Concurring. The case

is therefore one of high authority. After stating the facts the Chief Justice said (2) : " **The question then arises, whether the language is too strong for the occasion** ; the terms applied to the plaintiff's conduct being 'most disgraceful and dishonest'. **Now, the communication being privileged, the presumption is in favor of the absence of malice in the defendant, and in order to rebut this presumption, the plaintiff must show actual malice, and he may no doubt show this by reference to the terms of the libel as being utterly beyond and disproportionate to the facts."** He then proceeds to refer to the plaintiff's act in taking away the bills, and says "This act was capable of a twofold construction; it might have taken place under such circumstances that the plaintiff could not properly be exposed to any moral censure, as for instance, if he only intended to keep the assets in security for the benefit of creditors: or the circumstances might have been such that in taking the bills he acted dishonestly and disgracefully. Now, the presumption of the law being in favor of the absence of malice in the defendant and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a twofold construction. That presumption of innocence which attaches to the writer must also, while his act is capable of a double aspect, still attend him.

We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully: all we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe; if he stated no more than this, he is not liable, and, unless proof to the contrary is produced, we must take it that he did state no more". The direction of Martin B. was accordingly upheld".

Having referred to the other two cases too, Lord Atkinson said,

"These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language ,merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected , <u>even though his language should be violent or excessively strong</u>, if , having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication though in fact it was not so".

What Lord Atkinson said in His Lordship's judgment, which is reproduced below, will be applicable to the "**facts**" of the present case too.

"It must be remembered that every subject of the Crown, whatever portion 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 officers, its discipline and efficiency amongst other reasons, that he never can be sure whether the day may not come when the lives of himself and his family, the safety of his property or his liberty may not depend on its success in the field against the Empire's enemies, or the efficiency of its aid of the civil power in suppressing tumult and crime in the locality where he lives. <u>The efficiency and discipline of troops must depend on the character, training, and acquirements of the officers who lead them</u>".

The last judgment in the case being that of Lord Shaw of Dunfermline, it is apt to reproduce a sentimental expression of His Lordship, just to show that the Member of Parliament, Adam brought the action on defamation, after the death of Major General Scobell.

> "On investigation the charge was found to be baseless. The result was a complete acquittal of Major-General Scobell. In February, 1912, that gallant officer died. After his death, namely, in November, 1912, this action was brought".

Lord Shaw also added,

> "Privilege is a term which is applied in two senses. There is a privileged occasion and there is also said to be a privileged communication. The former expression is correct; the latter, strictly viewed, tends to error".

Lord Shaw further said,

> "The leading place in authority is still held by Toogood vs. Sprying. The most valuable judgment of Willes J., in Henwood vs. Harrison gathers the decisions together, including, especially Toogood and Harrisson vs. Bush and Whiteley vs. Adams and sums them up in these terms: "The principle upon which these cases are founded is a universal one, **that the public convenience is to be preferred to private interests** and that communications which the interest of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals".

In regard to "public convenience", one has to consider the case of ***Reynolds v Times Newspapers Ltd and Others*** decided in 1998.

The English Court of Appeal said in ***Reynolds v Times Newspapers Ltd and Others*** delivered on 8 July 1998 as follows:

> "**We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of matters of public interest to the community**. By that we mean matters relating

> to the public life of the community and those who take part in it, including within the expression "public life" activities such as the conduct of government and political life, elections . . . and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure. Recognition that the common convenience and welfare of society are best served in this way is a modern democratic imperative which the law must accept. In differing ways and to somewhat differing extents the law has recognised this imperative, in the United States, Australia, New Zealand and elsewhere, as also in the jurisprudence of the European Court of Human Rights. . . . As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large. . . . We have no doubt that the public also have an interest to receive information on matters of public interest to the community. . . ."

In *Lange v Australian Broadcasting Corporation, [1997] HCA 25; (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818,* 8 July 1997, Brennan C. J. in the joint judgment referring to the decision in *Theophanous* said,

> " The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech". .

In *Lingens v Austria, 1986 ECHR 07* the question before the European Court of Human Rights was whether the impugned court decisions infringed Article 10 of the Convention, which read,

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Mr. Peter Michael Lingens was an Austrian national living in Vienna and the editor of the magazine Profile. Mr. Bruno Kreisky, was the retiring Chancellor and President of the Austrian Socialist Party. There were two articles published by Lingens on 14th and 21st October 1975 after a general election when if was expected that the retiring Chancellor would have to form a coalition with the party of one Mr. Friedrich Peter, in order to stay in power. At this time revelations had been made about Mr. Peter's Nazi past. The retiring Chancellor defendant Mr. Peter and attached his detractor whose activities he described as " mafia methods". The articles of Lingens criticized the retiring Chancellor for protecting former Nazis using the expressions " basest opportunism", " immoral" and " undignified". The retiring Chancellor instituted private proceedings on defamation and the Vienna Regional Court holding that he had been criticized in his private capacity fined Lingens. In appeal the judgment was set aside on a question of law ordering the court to re-consider its decision. It then re-affirmed its decision. However in the second appeal the fine was reduced.

In Reynolds 02, Lord Hobhouse said,

> “" The law of civil defamation is directly concerned with the private law right not to be unjustly deprived of one's reputation and recognises the defence of privilege. The justification for this defence is at least in part based upon the needs of society. It can sensibly be asked why society or the law of defamation should tolerate any level of **factual inaccuracy**. The answer to this question is that any other approach

would simply be impractical. **Complete factual accuracy may not always be practically achievable** nor may it always be possible definitely to establish what is true and what is not. **Truth is not in practice an absolute criterion**. Nor are the distinctions between what is fact and innuendo and comment always capable of a delineation which leaves no room for disagreement or honest mistake. The free discussion of opinions and the freedom to comment are inevitably liable to overlap with factual assumptions and implications. **Some degree of tolerance for factual inaccuracy has to be accepted; hence the need for a law of privilege**". - at page 43 -

It should be noted that considering the question of the abuse of the privilege, that is, whether the defendant acted recklessly and irresponsibly, In Lange vs. Australian Broadcasting Corporation, the New Zealand Court referred to, it appears with some reservations, to what it identified as the restatement of what constituted malice by Lord Diplock in Horrocks vs. Lowe, 1975, A. C. 135, 149-150. It said,

" What constituted malice was restated in Horrocks v Lowe [1975] AC 135, 149-150 by Lord Diplock, in what have since been regarded as authoritative terms. His reference in that restatement to carelessness, impulsiveness or irrationality not being equated to indifference, must be read in context. The proposition does not qualify the preceding statements which cover lack of genuine belief and recklessness. Thus while carelessness will not of itself be sufficient to negate the defence, its existence may well support an assertion by the plaintiff of a lack of belief or recklessness. In this way the concept of reasonable or responsible conduct on the part of a defendant in the particular circumstances becomes a legitimate consideration". - at paragraph 44 -

However it also said,

" Indifference to truth is, of course, not the same thing conceptually as failing to take reasonable care with the truth but in practical terms they tend to shade into

each other. It is useful, when considering whether an occasion of qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required". - at paragraph 46 -

Lord Diplock in Horrocks v Lowe [1975] AC 135, 149-150 said in His Lordship's speech,

" The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. **What is published in good faith on matters of these kinds is published on a privileged occasion. <u>It is not actionable even though it be defamatory and turns out to be untrue</u>**. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused". - at page 149 -

His Lordship also said in an oft quoted passage,

" But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. **The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them**. <u>In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value</u>. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material

> which might cast doubt on the validity of the conclusions they reach. **But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more**". - at page 150 -

The following passage appears to be relevant in the context of Roman Dutch Law animus injuriandi too,

> " Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found". - at pages 150,151 -

The plaintiff in the present action has not been able to show that the defendant harbored a grudge against him or had malicious intentions towards him. Then malice is presumed on the defamatory statement. The presumption is destroyed if there was a reciprocity of duty and interest. Usually this was not for the public at large. However, there is information which the public has a right to receive. The dissemination of such information to the public at large therefore is privileged, the privilege destroying the presumption of malice.

Although the facts in the two cases, **Derbyshire County Council (Appellants) vs. Times Newspaper Limited and others (Respondents) [1993] AC 534** and **Dr. Gary Paul Duke, Appellant defendant vs. The University of Salford, Respondent claimant** are different, in the former the defendant being a local authority and in the latter a university, in both cases the freedom of expression was emphasized.

As per the aforementioned discussion, there is no “animus injuriandi” or “malice” that could be inferred from the relevant newspaper articles, although such terms as “…**hamuda Colonel dotta**”, were used. The aforementioned authorities show that the law permits such factual inaccuracies. Furthermore, it cannot be said that it is “inaccurate” too, because the plaintiff was (although it was a transfer) was actually removed from the position he held. **His protest by P.08 shows that even he considered it, as something similar to what those newspaper articles said.** It was said in Reynolds 02 by Lord Hobhouse, “…**Truth is not in practice an absolute criterion..”**

It is pertinent to note, what the author **Rolf Dobelli** says in his book “**Stop Reading the News**”. [2020] He was, on 12th April 2013 invited by the **Guardian** to talk about his book, “The Art of Thinking Clearly”. But, abruptly, the Editor in Chief Alan Rusbridger, asked him to talk about Dobelli’s new article on his website. Dobelli says, “The article Rusbridger had found on my website listed the most important arguments against consuming precisely what these internationally respected professionals spent their days producing: the news.

Dobelli had to discard, his prepared speech and speak off the cuff, so to speak.

He says, “Now, instead of standing in front of fifty people well disposed to me, I was confronted by fifty opponents. Caught in the crossfire of their stares, I tried to stay as calm as possible. After twenty minutes I’d reached the end of my argument, concluding with the words, “**Let’s be honest: what you’re doing here, ladies and gentlemen, is basically entertainment**”.
“Silence. You could have heard a pin drop. Rusbridger narrowed his eyes, glanced around and said, “I”d like us to publish Mr. Dobelli’s arguments. Today”.

He turned around and left the room without saying goodbye. The journalists followed him. Nobody looked at me. Nobody said so much as a word".

"Four hours later there was an abridged version of my article on the Guardian website. Before long it had accrued 450 comments from readers – the maximum the website would allow. My piece, "**News is bad for you**", was paradoxically one of the most read newspaper articles of the year".

In the circumstances, the appeal of the defendant is allowed. The judgment of the District Court is set aside. The action of the plaintiff is dismissed. This Court makes no order on costs.

D.N. Samarakoon

Judge of the Court of Appeal

I agree

Pradeep Kirtisinghe

Judge of the Court of Appeal