1952 *Present :* **Nagalingam A.C.J. and Pulle J.**

ASSOCIATED NEWSPAPERS OF CEYLON LTD. *et al.*, Appellants, *and* DR. C. H. GUNASEKERA, Respondent

S. C. 441—D. C. Colombo, 18,022

Defamation—Animus injuriandi—*Plea of absence thereof—Scope of such defence.*

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editor respectively of a newspaper, published certain defamatory excerpts concerning the plaintiff from an inchoate and unpublished report of a special committee which had been appointed by the Colombo Municipal Council to investigate and report upon the administration of certain activities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 pleas 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.

Held, that *animus injuriandi* could not be negatived in the absence of circumstances shewing privilege.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *C. E. S. Perera, N. M. de Silva* and *L. C. Gooneratne*, for the defendants appellants.

E. G. Wikramanayake, Q.C., with *L. G. Weeramantry*, for the plaintiff respondent.

Cur. adv. vult.

May 26, 1952. NAGALINGAM A.C.J.—

This is an appeal by the two defendants, who are respectively the proprietor and editor of the newspaper called " The Ceylon Daily News ", from a decree of the District Court of Colombo condemning them to pay a sum of Rs. 5,000 by way of damages to the plaintiff respondent who claimed from them a sum of Rs. 50,000 on the ground that the defendants had maliciously and falsely published certain defamatory statements concerning him in the issue of their newspaper of 29th March, 1947.

The plaintiff was at all material dates the Chief Medical Officer of Health of the Colombo Municipality and as such was the head of its Public Health Department, within the activities of which were comprised Municipal free dispensaries, child welfare centres, maternity homes and laundries. Pursuant to a resolution of the Council a special committee of it was appointed " to investigate and report comprehensively upon the administration of (*a*) Municipal free dispensaries, (*b*) child welfare centres. (*c*) maternity homes, and (*d*) laundries ". The committee which was appointed towards the end of 1944 commenced its investigations and concluded its final sittings by November, 1946; but its report, as

found by the learned District Judge, was not presented to the Council at any time but would appear to have been handed to the Mayor on 28th March, 1947. On the following day the Mayor noticing that all the members of the committee had not signed the report returned it to the Chairman of the committee who after obtaining the signature of the one member who had not signed the report forwarded it to the Secretary of the Council in April, 1947.

The term of office of the Councillors who constituted the Council that appointed the special committee from among its members expired in December, 1946. At the commencement of January, 1947, a new Council came into existence, and some of the earlier Councillors did not find places in the new Council. When the report was handed in 1947 to the new Mayor, he took the view that the report should have been presented to the old Council and further that the report that was then handed to him was not one signed by members of the then Council as three of those who had signed the report were no more Councillors. He therefore expressly directed that the report should not be placed on the agenda of the Council and that no action should be taken in regard to it. According to the Mayor and the Secretary of the Council, the report was treated as a confidential document and placed in the iron safe and not even circulated among the members of the Council. It is therefore apparent that the Council at no time published the report either among its members or to the public and that it never discussed the report or adopted any resolution in respect of it.

The " Ceylon Daily News " in its issue of 29th March, 1947, carried a news item under the caption in bold headlines:

" STARTLING DISCLOSURES " OF CITY HEALTH PROBE, in which the following paragraphs appeared which, so far as the matters complained of are concerned, were taken verbatim from the inchoate report:

" OBSTRUCTION INSTEAD OF CO-OPERATION

It states that the appointment of a special qualified officer to tackle the tuberculosis menace should have provided him with an excellent opportunity for his closest collaboration, in order to bring credit to his own department.

' The developments that followed, however, were unexpectedly disappointing, if not tragic, ' continues the report. ' Instead of confining himself to his business of giving the Special Officer, Chest Diseases, all possible assistance and carrying out the policy adumbrated by the Council, the Chief Medical Officer of Health is found to have, according to evidence placed before the Committee, attempted at every turn to oppose the Special Officer, Chest Diseases, and obstructed the latter's efforts to carry out the Council's decisions.'

The result of this interference, the report states, was that the hands of the Special Officer, Chest Diseases, were tied, his requests for material and staff were turned down, and his efforts to proceed on the lines recommended by him and approved by the Council were not successful.

PARTIALITY SHOWN

The Committee further states that in the course of investigation ' certain startling disclosures ' were made, which went to prove that in the administration of the Department there was a deplorable disregard for order and discipline and partiality was shown to some of the subordinate officers, which made it extremely difficult for those in control of certain sections to exercise their authority."

It is to be noted that the publication was made even prior to all the members of the Special Committee signing the report. The plaintiff avers that these paragraphs referred to him and that taken in conjunction with the heading were intended to convey to the reading public that in the discharge of his duties as a public medical officer he " was remiss, incompetent and partial, and that he deliberately obstructed his subordinate officer in the attempt to tackle the menace of tuberculosis in the City of Colombo."

The learned District Judge has found that the words were defamatory *per se* and that they also bear the innuendo put upon them by the plaintiff and that the report at the date of publication by the defendants was inchoate and invalid.

None of the findings of fact has been challenged on appeal. The position, therefore, is that defamatory words relating to the plaintiff have been published and *animus injuriandi* would be presumed in their publication. It was conceded on behalf of the plaintiff that there was no affirmative proof of *animus injuriandi* or, to use the English expression, express malice. The burden, in these circumstances, of negativing the presumption of *animus injuriandi* rests upon the defendants. The truth of the statements complained of has not been established by the defendants, and therefore the well known pleas of justification and fair comment have not been relied upon; at the argument in appeal it has also been contended that the defendants do not even depend upon a plea of privilege for it is urged that it would be sufficient for the appellants to prove the absence of *animus injuriandi* simpliciter without reference to any such plea.

The basis of this contention of the appellants is the Privy Council case of *Perera v. Peiris* [1]. It is said that this case lays down the proposition that though 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 in advance of the views held previously, but nevertheless it is clear to discern that some sort of privilege, though 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:

" 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 "

[1] *(1948) 50 N. L. R. 145.*

and proceeded to state that the wide general principle was as stated in *Macintosh v. Dun* [1]

> " 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."

It is therefore abundantly clear from these passages that the defence that was held entitled to prevail was not entirely one divorced from the question of privilege. It is true that in that case their Lordships did not consider it necessary to hold that the truth of the statements should be established for a foundation of the defence of privilege considered there, but that is not to say that they considered that *animus injuriandi* would be negatived in the absence of circumstances shewing at least that the wide general principles referred to by them as underlying the defence of privilege do exist for they clearly indicated their view in the following passage.

> " If malice in the publication is not present and *the public interest is served by the publication*, the publication of the report must be taken for the purposes of Roman Dutch Law as being in truth directed to *serving that interest*. *Animus injuriandi* is negatived."

The effect of this judgment therefore is to widen the class of cases in which the plea of privilege may be taken by doing away with the requirement of the establishment of the truth of the statements complained of in regard to one of the categories of qualified privilege in respect of which too it had previously been held that the proof of the truth of the statements complained of had to be established before the plea could succeed if it fell within that category, and not that in no case had circumstances to be established shewing that the case did yet fall within some broad general principle underlying the plea of privilege. It is, however, said that once when truth as an essential element in regard to the plea of qualified privilege is discarded, even though that principle may have been enunciated in a case falling within one particular category of qualified privilege, nevertheless the result is to render the term " qualified privilege " a misnomer and the notion that hitherto underlay it an exploded myth. It is then said that what a defendant need now do is to disprove the existence of *animus injuriandi* and this he could do without reference to any of the set forms of defence hitherto recognised 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 the public interest for with the jettisoning of qualified privilege it became a useless piece of jetsam and flotsam of no consequence.

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 v. McCarty*

[1] *(1908) A. C. 390.*

and Stepney Borough Council [1], 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 till 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 ".

In this predicament counsel for the appellants sought an avenue of escape by contending that if the publication, though there may be no proof that it had been made in the interests of the public, had been made honestly and without any intention to injure the plaintiff, the defence was made out, and relied upon the evidence of Fred Silva who was at the date of the publication the sub-editor of the paper. The witness stated that he had not known Dr. Gunasekera, the plaintiff, but that the news item complained of was brought in by a reporter, and he gave the headline and sub-headlines and passed the item for publication merely as a news item. He further stated that he was aware that a report like the one in question had to be considered by the Council but that he did not take the trouble to find out whether it was so considered, and that though the Council sent the agenda of every meeting to the paper, in no agenda paper did this report appear as an item for consideration by the Council, and that he took no interest in the matter of publication at all save to put down the headings and send it to the printer.

The question then is whether this contention is sound and it leads me to a consideration of the precise scope and extent of the term " *animus injuriandi* " in the Roman Dutch Law of defamation. De Villiers in his commentary on Voet [2] says that *animus injuriandi* is present:

" (*a*) When an act is done by a person with the definite object of hurting another in regard to his person, dignity or reputation;

(*b*) When an unlawful act is done as a means for effecting another object the consequence of which act such a person is aware will be to hurt another in regard to his person, dignity or reputation."

He goes on to observe:

" The motive which inspires or prompts the intention need not always be corrupt or malicious . . . . And a newspaper writer who has libelled another person cannot allege in justification merely that his object was to make his newspaper more piquant ",

or, as we might say in the present context, to provide the reading public with spicy material. The learned author makes further this observation [3] which would appear to be very apposite:—

" When a person knows that an act of his is necessarily an injury unless certain modifying circumstances exist, the existence of which he has no right to assume, but is indifferent as to whether these

[1] *(1942) 1 A. E. R. 19.* [2] *Bk. XLVII Tit. 10 Sec. I Page 27.*
[3] *Note 35, page 28.*

circumstances exist or not, if he then commits the act and these circumstances do not exist, he can hardly be heard to say in excuse that he had not knowledge of the non-existence of these modifying circumstances. A person is intentionaly ignorant who knows that his being ignorant will be the necessary consequence of his not ascertaining whether facts exist which he may not presume to exist, and yet does not ascertain the facts. If eventually his act prove an unlawful one, then in absence of such modifying circumstances, since both his act and his want of knowledge were intentional, *animus injuriandi* may very well be held to have existed."

Maasdorp [1] says:

"there is *animus injuriandi* on the part of a defendant not only whenever he is actuated by any indirect and improper motive but also whenever he states what he does not know to be true, reckless whether it is true or false."

The authorities, therefore, establish that where a man publishes words concerning another, not necessarily with an express intent to cause hurt or injury to him, but without knowledge of the truth of the statements, and reckless whether they be true or false, if the consequence of the publication be in fact to injure the person defamed in his person, dignity or reputation—*animus injuriandi* is made out.

It cannot therefore be said that in this case the appellants have established the existence of circumstances falling within the wide general principle underlying the plea of privilege as indicated in the judgment in *Perera v. Peiris* (supra) or of any other circumstances in general negativing *animus injuriandi*.

No argument was advanced to us bearing on the question of damages that have been awarded in this case.

I would therefore hold that the defence has failed and that the judgment of the learned District Judge is right.

The appeal is dismissed with costs.

PULLE J.—I agree.

Appeal dismissed.