1957 *Present:* **Basnayake, C.J., and Pulle, J.**

DR. S. A. WICKRAMASINGHE, Appellant, *and* MATARA MERCHANTS, LTD., Respondent

S. C. 127—D. C. Matara, 196

Defamation—Pleadings—Omission to aver in plaint the fact of publication—Maintainability of action.

Publication is of the essence of an action to recover damages for defamation and the failure to assert it as a fact in the plaint is to render it open to the objection that it does not disclose a cause of action.

If a libel appearing in a leaflet is alleged in a plaint to have been printed it does not amount to an allegation that the printer published it.

APPEAL from a judgment of the District Court, Matara.

Walter Jayawardene, with *Neville Wijeratne,* for the Plaintiff-Appellant.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *N. R. M. Daluwatte,* for the Defendant-Respondent.

Cur. adv. vult.

November 8, 1957. PULLE, J.—

The plaintiff appeals from a decree dismissing his action on a preliminary issue. That issue was whether the plaint disclosed a cause of action against the defendant. The plaintiff, in paragraph 4 of the plaint, alleged that the defendant "made and printed" a leaflet containing statements defamatory of him. A copy of the leaflet was attached to the plaint. That the leaflet is defamatory of the plaintiff admits of no doubt. The submission on behalf of the defendant which was accepted by the learned trial judge was that the plaint did not disclose a cause of action for the reason that it contained no allegation that the defamatory matter was *published* by the defendant.

It was alleged in paragraph 5 of the plaint that the leaflet was "printed and published of the plaintiff" and that it was widely distributed in a number of villages between 11th March, 1952, and 30th May, 1952. In paragraph 6 a portion of the defamatory matter taken verbatim from the leaflet is set out and is prefaced by the words,

"In the said leaflet the defendant falsely and maliciously *printed, inter alia,* the following statement, to wit: ....". Paragraph 7 stated, "The said statement was calculated to injure the plaintiff in the exercise of his profession as a Doctor and his character as a public man". In the following paragraph the plaint alleged:

"By making, printing and publication as *aforesaid* of the words referred to in paragraph 6 above the plaintiff has suffered pain of mind and has been seriously injured in his credit and reputation.". Although

the preliminary issue refers to a single cause of action, there were in fact pleaded three other causes of action said to arise from statements in the leaflet entitling the plaintiff to recover damages for the harm done to his reputation. It was submitted for the defendant, both in the trial court and at the argument in appeal, that the plaintiff had advisedly omitted to make the allegation that the defendant published the leaflet and was content to rest his claim on two facts, first that the defendant printed the leaflet, and secondly, that it was published in the sense that it reached members of the public.

Learned Counsel for the appellant contended for the validity of the following propositions :—

(i) The words in the plaint were a sufficient averment of publication of the leaflet by the defendant.

(ii) Roman-Dutch law does not require publication of defamatory matter to render a defendant liable for damages.

(iii) If under Roman-Dutch law publication is necessary, the printer is liable when what is printed is disseminated.

For the first proposition which concerns the form of pleading in an action for defamation reliance was placed on English law and special emphasis was laid on the case of *Baldwin v. Elphinston* [1]. We have been invited to hold on this authority that printing a libel is *prima facie* publishing and that, therefore, the statement in the plaint that the defendant printed the leaflet in question was equivalent to publishing it. If the judgment in that case is read in the light of its own special facts it can hardly be regarded as an authority for the wide proposition that if a libel is alleged in a plaint to have been printed it amounts to an allegation that the printer published it.

In *Baldwin v. Elphinston* [1] there were two counts in the declaration. The first was for printing and publishing in a newspaper called St. James's Chronicle a libel traducing the plaintiff in his capacity of a captain in the Navy. The second count was, " For printing and causing it to be printed, another similar libel. " The plaintiff was awarded damages and the case was taken up to the Exchequer Chamber in Error on the point that in the second count the defendant was only charged with the printing and not the publication of the libel and that that was insufficient to maintain the action. The judgment states,

" It is therefore sufficient, if there be stated in the declaration such matter as amounts to a publication (without using the formal word ' published '), and the jury are, upon the evidence, to decide whether a publication be sufficiently proved or not. Printing a libel may be an innocent act ; but unless qualified by circumstances, shall *prima facie* be understood to be a publishing. Printing in a newspaper (as laid in the declaration) admits of no doubt on the face of it .... The conclusion to the whole declaration states that by means of the printing and publishing of the said several libels the plaintiff is greatly injured. "

[1] *(1775) 96 E. R. 610.*

It seems to me that this case falls to be distinguished from the facts alleged in the plaint in the present case. The publication here was not in a newspaper and in *Elphinston's* case there was an averment at the conclusion to the whole declaration that the libels were not merely printed but published. The case of *Baldwin v. Elphinston* [1] appears not to have received unqualified support in *Watts v. Fraser* [2]. Referring to that case Patterson, J., made an observation in which I respectfully concur, namely, that the court there seems to have entered into a question of evidence which was not properly before them as a Court of Error.

The current of authority is against the view that Roman-Dutch law does not require publication of defamatory matter as the basis of an action for damages. Nathan in the *Law of Defamation in South Africa* (1933 edition) deals in Chapter VIII with the question from the historical aspect, whether publication is of the essence of the action for defamation and expresses the view,

> " In other words, the Roman law and in Roman-Dutch law *contumelia* is the gist of the action for defamation. "

The learned author then proceeds to add,

> " The point, however, is only of academic importance today.
>
> " It is necessary to allege in a civil action for defamation, *and* to prove, that the statement complained of was published to a third party. If such an allegation is lacking in the plaintiff's......declaration it may be successfully excepted to, on the ground that the declaration ...... discloses no cause of action. In other words, in the absence of proof of publication, the action must fail. "

Maasdorp in Chapter XIII of Book III (Vide Vol. IV, 4th edition p. 167) says, " Accurate pleading in cases of defamation is of the utmost importance " and adds at p. 169, " Publication will also have to be both alleged and proved. It will not, for instance, be sufficient to state that the libel was contained in a letter *addressed* to a third party ; it will be necessary to aver that it was actually sent to such person ." In Chapter XI Maasdorp (4th edition p. 128) states one of the essentials of the action for damages is " that there shall have been publication ".

McKerron on the Law of Delict (4th edition) p. 202 says, " The wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification." At p. 219 the learned author states, " Publication must be alleged and, as a general rule, affirmatively established."

The third proposition for which the appellant contended was that the twofold allegation of facts that the defendant was the printer of the offending leaflet and that the contents were disseminated constituted a cause of action for tort against the defendant. This proposition was sought to be supported on passages in Chapter X of Nathan's *Law of Defamation in South Africa* (vide pages 164 *et seq.*). Under the sub-heading " Joint Tort-Feasors. Newspapers " the learned author deals

[1] *(1775) 96 E. R. 610.*　　[2] *(1835) 112 E. R. 455.*

principally with the position of editors, publishers and printers of a libel contained in a book, newspaper, periodical, leaflet or pamphlet. Of a publisher he says that he is "liable for defamation equally with the editor" and at p. 165 "The printer of libel, i.e., no matter in what form of publication, is equally liable with the author, editor or publisher." He quotes as authority Voet Book 47, Title 10, section 10. Before dealing with this citation I wish to observe that there is no allegation in the plaint that the defendant was a joint tort-feasor along with those responsible for the dissemination of the leaflet. Secondly, the distinction ought to be kept in mind between a fact which constitutes the cause of action and the mode of proving it according to the law of evidence. A presumption in regard to publication does not absolve a plaintiff of having to allege that fact in order to conform to the rules of pleading. After stating in the passage already quoted from McKerron p. 219, that publication must be alleged, and, as a general rule, affirmatively established, he continues,

> "In certain cases, however, publication will be presumed, and in such cases the burden of disproving it rests on the defendant. Thus publication will be presumed where the defamatory matter is contained in a book or newspaper."

Voet says in Book 47, Title 10, section 10 (Selective Voet, Percival Gane, Vol. 7, p. 226),

> "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 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 happenings of any of those things." A footnote to this passage reads, "Cited as showing that composition is here treated as a separate form of wrong, and that there is no need for publication."

Apparently there is a division of opinion on this point judging by the comment of Morice in English and Roman-Dutch Law (Chapter III of Part IV on Torts) that Huber expressly states that publication is necessary in *injuria verbalis et literalis*. In this connection the case often referred to is *De Lettre v. Kiener* [1]. It was an action for recovery of damages for a libel in a letter admittedly written by the defendant and which appeared in a newspaper called the South African Commercial Adviser published on the 11th January, 1834. After the plaintiff had closed his case it was submitted for the defendant that there was no proof of the publication by him of the letter. Counsel for the plaintiff maintained that the proof of the writing and composing of the letter by the defendant was sufficient to support the action, without any further proof of the publication by the defendant and quoted Voet 47, 10, 10. Wylde, C.J., doubted whether the facts of the case did not afford sufficient circumstantial evidence to bring the publication home to the defendant, but

[1] *(1835) Menzies Reports 12.*

apparently the two judges associated with him thought there was no proof of publication and the action was dismissed. The report adds, " But none of the Judges had any doubt that an action for damages could not be supported for writing or composing a libel which had not been published. "

In my opinion the authorities establish that publication is of the essence of an action to recover damages for defamation and the failure to assert it as a fact in a plaint is to render it open to the objection that it does not disclose a cause of action.

The appeal fails and should be dismissed with costs.

BASNAYAKE, C.J.—I agree.

Appeal dismissed.