# CHAPTER 10

# BREACH OF STATUTORY DUTIES



Although statutes sometimes create causes of action directly, by providing a civil remedy based upon the substance of the legislative provision itself (*a*), rights of action in *tort* are in many circumstances maintainable at the suit of persons injured as the result of the breach by others of duties imposed upon them by statute. This form of action has sometimes been called "statutory negligence"; but the name is misleading because lack of care on the part of the defendant is by no means always a necessary element of liability under it: indeed, as will be seen, such liability is often strict, or "absolute" (*b*).

Since in modern times legislation—whether by Parliament or by other persons or bodies to which Parliament delegates the power of legislating—covers almost every aspect of social life, it will be appreciated that it is beyond the scope of an elementary work to attempt a thorough survey of this kind of action; and it is only possible to outline certain main principles.

It is proposed to discuss two aspects of the matter; the general principles which determine the circumstances in which a right of action in tort may arise as the result of the breach of a statutory duty, and the rules which govern actions based upon breach of "absolute" statutory duties.

## 1. WHEN A BREACH OF STATUTORY DUTY IS ACTIONABLE AS A TORT

For the plaintiff to sustain an action in tort for breach of statutory duty it is in the first place essential that he should establish that

(*a*) *E.g.*, Crown Proceedings Act, 1947, s. 9 (1) (6 Halsbury's Statutes (2nd Edn.) 53)—loss or damage to inland postal packets: see *Building and Civil Engineering Holidays Scheme Management, Ltd.* v. *Post Office*, [1965] 1 All E. R. 163; [1966] 1 Q. B. 247—Misrepresentation Act, 1967 (47 Halsbury's Statutes (2nd Edn.) 1076), s. 2 (1) (above, p. 178).

(*b*) The term "statutory negligence" received Lord WRIGHT's approval in *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A. C. 1, 23 (see also *per* Lord MACMILLAN, at p. 18); but it is, as indicated in the text, clearly distinguishable from common law negligence: see *Murfin* v. *United Steel Cos., Ltd.* (*Power Gas Co., Ltd., Third Party*), [1957] 1 All E. R. 23.

he has been injured as the result (*c*) of the defendant's breach of such duty. But by no means all breaches of statutory duty will give rise to such rights, even though they do result in injury to the plaintiff. The cardinal principle is that the right is created not by the courts, but by the enactment of the Legislature which creates the duty; and the fact is that although such duties must be, and are, explicitly defined in enactments, the corresponding rights are seldom explicitly set out (*d*), and it usually rests with the courts to determine as a matter of *construction* whether or no the Legislature intended to create them. The courts have, however, adopted (*e*) certain rules which assist them in determining the true intention of the Legislature in the face of this legislative reticence. These rules will now be considered, but it must first be stressed that they are no more than guides or presumptions, and that they are not intended to be infallible rules of universal application, for

> "The only rule which in all circumstances is valid is that the answer (*f*) must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted" (*g*).

In the first place,

> "If a statutory duty is prescribed but *no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues* to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration" (*h*).

But it must again be stressed that this is no more than a presumption, and although it is a general rule that a breach of a statutory obligation imposed for the public benefit will in the

(*c*) Here, as in other torts, the facts must warrant a reasonable inference that the defendant's act or omission *caused* the plaintiff's injury; and the onus of showing this lies upon the plaintiff. See *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E. R. 615; [1956] A. C. 613; *Grant* v. *National Coal Board*, [1956] 1 All E. R. 682; [1956] A. C. 649; *Quinn* v. *Cameron and Robertson, Ltd.*, [1957] 1 All E. R. 760, 764–765; [1958] A. C. 9, 23–25: *Cummings* (or *McWilliams*) v. *Sir William Arrol & Co., Ltd.*, [1962] 1 All E. R. 623: *Wigley* v. *British Vinegars, Ltd.*, [1962] 3 All E. R. 161; [1964] A. C. 307: *Braham* v. *J. Lyons & Co., Ltd.*, [1962] 3 All E. R. 281.

(*d*) This is perhaps unfortunate: see *Cutler* v. *Wandsworth Stadium, Ltd.*, [1949] 1 All E. R. 544, 550; [1949] A. C. 398, 410; *per* Lord DU PARCQ.

(*e*) Lord GREENE, M.R., remarked in *Cutler's Case*, ([1947] 2 All E. R. 815, 816; [1948] 1 K. B. 291, 298) that these rules have fallen into "disfavour": but this is far from apparent from the opinions expressed in the House of Lords in that case.

(*f*) *I.e.* to the question whether an action lies or not.

(*g*) *Cutler's Case* (*supra*), at pp. 548, 407, respectively; *per* Lord SIMONDS.

(*h*) *Ibid.* (italics ours). See also *Reffell* v. *Surrey County Council*, [1964] 1 All E. R. 743.

absence of express penalty, be treated as an *offence* (*i*), the question whether an individual who sustains special injury as a result of the breach will be entitled to a right of civil action must ultimately depend upon the true construction (*k*) of the particular enactment.

In the second place, in the words of an oft-cited *dictum*

> "Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner" (*l*).

Thus where a particular penalty (*m*), as for example a fine of £10, is prescribed by the relevant enactment for the breach of a particular obligation the court may presume *primâ facie* that there was no intention to confer in addition a right of action in tort (*n*). But again, this is no more than a general presumption; and it may be displaced if the general tenor of the enactment indicates that it was not intended to apply (*o*). Further, where the plaintiff claims an *injunction* as opposed to damages the presumption does *not* apply; for it is to be presumed that *in the absence of express words or necessary implication to the contrary* the legislature did not intend to deprive the plaintiff of this kind of protection (*p*).

In the third place, it is often material for the courts, in order to discover the presumed intention of the Legislature, to consider the general purpose and object of the enactment concerned. And this

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(*i*) See Maxwell, *Interpretation of Statutes* (11th Edn.) 381, and authorities there cited. "Offence" has been substituted for "misdemeanour" in the text on account of the provisions of the Criminal Law Act, 1967, s. 1 (47 Halsbury's Statutes (2nd Edn.) 338) which abolishes the distinction between felonies and misdemeanours.

(*k*) Thus, for example, in *Brown* v. *Roberts*, [1963] 2 All E. R. 263, it was held that since the word "user" of a vehicle in the Road Traffic Act, 1930, s. 35 (1) meant someone controlling the vehicle (not a mere passenger) there was no duty in the owner to insure against third party risks created by a passenger. And therefore the plaintiff, struck by the opening of the door of defendant's van by a *passenger*, could not claim against the defendant owner for breach of statutory duty in failing to insure against passenger liability.

(*l*) *Doe d. Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847, 859; *per* Lord TENTERDEN, C.J.

(*m*) If the penalty takes the form not, as usually, of a fine but of a sum of money payable to individuals injured, this fact argues even more strongly against an intention to create a right of action in tort. This proposition is accepted by Lord CAIRNS in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441, 447.

(*n*) *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832, 841; *per* ATKIN, L.J.; *Monk* v. *Warbey*, [1934] All E. R. Rep. 373, 378; [1935] 1 K. B. 75, 84; *per* MAUGHAM, L.J. And see *Bollinger* v. *Costa Brava Wine Co., Ltd.*, [1959] 3 All E. R. 800; [1960] Ch. 262.

(*o*) *Monk* v. *Warbey*, [1935] 1 K. B. 75. Contrast *Gregory* v. *Ford*, [1951] 1 All E. R. 121; *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E. R. 206.

(*p*) *Stevens* v. *Chown*, [1901] 1 Ch. 894, 904; *per* FARWELL, J. But see *Thorne* v. *British Broadcasting Corpn.*, [1967] 2 All E. R. 1225.

may help them to reach a proper conclusion in at least two ways. On the one hand if the obligation imposed by the Act is one which was *clearly designed for the benefit of the plaintiff himself, or of a particular class of persons of whom the plaintiff is one*, it is more reasonable to suppose that it was intended that he should be entitled to a private right of action than will usually (*q*) be the case where the obligation is imposed for the benefit of the public generally or for that of a section of it of which he is not one (*r*). For instance, it is more reasonable to assume that such private rights were intended to be created in favour of employees by factory and other legislation which imposes duties upon employers for their protection and benefit, than it is to assume that statutes imposing obligations upon public authorities and public utilities intend to create private rights of action in favour of all members of the public (*s*). On the other hand it may also be material to consider the purpose of the enactment in the sense of considering the *mischief which it was designed to prevent*. For if, for example, a statute imposes a duty with a view to preventing injury of a *particular* kind (*t*) or in a particular manner (*u*), it is not to be presumed that a private right of action was intended to be conferred where a breach (*a*) of this duty gives rise to injury of a *different* kind or injury caused in a different manner. Yet, since the matter is one of interpretation, even this proposition must not be taken literally: for the general purpose of the enactment has to be considered. Thus if that purpose is the

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(*q*) Not *always*; because "the duty may be of such paramount importance that it is owed to *all* the public": *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832, 841; *per* ATKIN, L.J. *Monk* v. *Warbey*, [1934] All E. R. Rep. 373; [1935] 1 K. B. 75, appears to have been decided upon this ground.

(*r*) *Keating* v. *Elvan Reinforced Concrete Co., Ltd.*, [1968] 2 All E. R. 139.

(*s*) In the case of enactments imposing obligations upon undertakers of public utilities there is also room for the further presumption that whether the duty be assumed (*Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441) or imposed (*Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64), the undertaker having been burdened with a special duty to the public, it is not lightly to be presumed that the Legislature intended to impose any greater obligations than those expressly created by the Act.

(*t*) See *Gorris* v. *Scott* (Illustration 87 (a)).

(*u*) *Bailey* v. *Ayr Engineering and Constructional Co., Ltd.*, [1958] 2 All E. R. 222; [1959] 1 Q. B. 183. But see comments of Lord REID in *Donaghey* v. *Boulton & Paul, Ltd.*, [1967] 2 All E. R. 1014; 1026; [1968] A. C. I. 27.

(*a*) Different considerations arise where the fact that the injury was not of a kind that the statute was designed to prevent leads to the conclusion that there has been *no* breach of duty: *Nicholls* v. *F. Austin (Leyton), Ltd.*, [1946] 2 All E. R. 92; [1946] A. C. 493; *Carroll* v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E. R. 386; [1948] A. C. 477: *Close* v. *Steel Co. of Wales, Ltd.*, [1961] 2 All E. R. 953; [1962] A. C. 367: *Eaves* v. *Morris Motors, Ltd.*, [1961] 3 All E. R. 233; [1961] 2 Q. B. 385: *Sparrow* v. *Fairey Aviation Co., Ltd.*, [1962] 3 All E. R. 706.

prevention of disease, and the injury suffered is loss by drowning, the case falls outside the "mischief" of the enactment and there can be no liability (*b*). But if, for instance, the "object of the enactment is to promote safety, there can be no implication that liability for a breach is limited to one which causes injury in a particular way" (*c*).

ILLUSTRATION 86

(a) *Where an enactment imposes an obligation for the benefit of an individual, or of a particular class of persons, of which the plaintiff is a member, it is reasonable to presume that it was intended that he should have a right of action if he is injured by the breach of it.*

Groves *v.* Lord Wimborne, [1898] 2 Q. B. 402.

Appellant, a boy employed at respondent's iron works, lost an arm when it became entangled in certain unfenced machinery. This lack of fencing was a contravention of the Factory and Workshop Act, 1878, s. 5; and although this Act by later sections imposed a penalty for such contravention, no statutory remedy was provided for injured individuals. *Held:* Since that Act "was clearly passed in favour of workers employed in factories and workshops, and to compel their employers to perform certain statutory duties for their protection and benefit" (*d*), despite the fact that a special *penalty* was imposed the plaintiff had a right of action in tort (*e*).

(b) *No such presumption arises where the Act is passed for the benefit of the public in general* (*f*), *or for the benefit of a class of which the plaintiff is not a member* (*g*).

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(*b*) *Gorris* v. *Scott* (above, n. (*t*)).

(*c*) *Grant* v. *National Coal Board*, [1956] 1 All E. R. 682, 689; [1956] A. C. 649, 664; *per* Lord TUCKER. See also *Littler* v. *G. I. Moore* (*Contractors*), *Ltd.*, [1967] 3 All E. R. 801. In *Grant's Case* recovery was allowed where, in breach of a regulation requiring the roof of a travelling tunnel in a mine to be secure, injury was caused by *derailment of a bogie* brought about by a fall of rock, rather than by a direct fall of rock. See also *Donaghey's Case* (above, n. (*u*)).

(*d*) [1898] 2 Q. B. at pp. 407–8; *per* A. L. SMITH, L.J.

(*e*) Recent examples of the application of this principle are:—*Canadian Pacific Steamships, Ltd.* v. *Bryers*, [1957] 3 All E. R. 572: *A.-G.* v. *St. Ives Rural District Council*, [1959] 3 All E. R. 371; [1960] 1 Q. B. 312. (Affirmed on other grounds), [1961] 1 All E. R. 265; [1961] 1 Q. B. 366.

(*f*) *Phillips* v. *Britannia Hygienic Laundry Co., Ltd.*, [1923] 2 K. B. 832; *Badham* v. *Lambs, Ltd.*, [1945] 2 All E. R. 295; [1946] 1 K. B. 45; *Clark* v. *Brims*, [1947] 1 All E. R. 242; [1947] K. B. 497.

(*g*) *Hartley* v. *Mayoh & Co.*, [1954] 1 All E. R. 375; [1954] 1 Q. B. 383; *Wingrove* v. *Prestige & Co., Ltd.*, [1954] 1 All E. R. 576; *Keating* v. *Elvan Reinforced Concrete Co., Ltd.*, [1968] 2 All E. R. 139.

Cutler *v.* Wandsworth Stadium, Ltd., [1949] 1 All E. R. 544; [1949] A. C. 398.

The Betting and Lotteries Act, 1934, authorized occupiers of dog-racing tracks to operate totalisators upon them. Section 11 (2) (b) of the Act provides that the occupier "shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available a bookmakers space on the track". The appellant, a bookmaker, having been unable to find space upon the respondent's track at such a time, claimed *inter alia* damages for breach of statutory duty. *Held:* The claim failed. The intention of the Act was to regulate the conduct of betting operations, and to protect the rights of race-going members of the public; since it was not primarily intended for the benefit of *bookmakers* there was no reason to presume an intention to confer a right of action upon appellant.

ILLUSTRATION 87

(a) *The plaintiff's injury must come within the "mischief" of the Act.*

Gorris *v.* Scott (1874), L. R. 9 Exch. 125.

By Order in Council made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75 it was provided, *with the object of preventing the spread of contagious disease*, that any ship bringing sheep or cattle from abroad should have the space provided for such animals divided into pens containing secure foot-holds. Defendant shipowner neglected this duty, and in consequence some of plaintiff's sheep, which defendant was in the course of transporting from Hamburg to Newcastle, *were washed overboard and lost.* Plaintiff founded his action upon defendant's breach of the Order. *Held:* Since the purpose of the Order was to prevent the spread of contagious disease, and not to guard against the danger of property being washed overboard, the claim failed. It might have been otherwise had defendant's default caused overcrowding resulting in plaintiff's sheep arriving in England diseased.

(b) *But where the injury comes within the "mischief" it is immaterial that it is not precisely of the kind which the enactment was designed to prevent.*

Donaghey *v.* Boulton & Paul, Ltd., [1967] 2 All E. R. 1014; [1968] A.C.I.

Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3) provides that "where work is being done on . . . roofs . . . covered with fragile materials through which a person is liable to fall . . . (a) where workmen have to pass over or work above such fragile material . . . crawling boards . . . shall be provided." Appellant was working on a fragile asbestos roof and respondents, in breach of duty, had failed to supply crawling boards. He fell not through the asbestos but through a

hole in the roof adjacent to it and was injured. *Held:* He could recover because although the regulation clearly contemplated a fall through *the fragile material* the fact that the appellant fell through a hole did not take the case out of the mischief intended to be guarded against, namely falling through a roof. "It is one thing to say that, if the damage suffered is of a kind totally different from that which it is the object of the regulation to prevent, there is no civil liability (*h*). It is quite a different thing, however, to say that civil liability is excluded because the damage, though precisely of the *kind* which the regulation was designed to prevent, happened in a *way* not contemplated by the maker of the regulation. The decision is comparable with that which caused the decision in *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.*, (*h*) *The Wagon Mound (No.* 1) (*i*) to go one way and *Hughes* v. *Lord Advocate* (*k*) to go the other way (*l*)."

Finally it is important to appreciate that unless the statute expressly or by implication excludes resort to common law remedies, where on the facts the defendant's act or omission, besides constituting a breach of statutory duty, is also a tort it is open to the plaintiff to claim alternatively upon either head of liability. Thus where the defendant does not merely omit to perform a statutory duty but performs it carelessly and injury results, he may be (and in practice usually will be) sued alternatively for common law negligence (*m*) *and* breach of statutory duty; and this is equally true where he does negligently something which he is only *empowered* (*n*) by the Legislature to do (*o*).

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(*h*) As, *e.g.*, in *Gorris* v. *Scott* (last Illustration).

(*i*) Above, p. 211.

(*k*) Above, p. 191. It has been pointed out (above, p. 212), that this distinction turning upon "kind" of injury is logically suspect and here, as in relation to remoteness of damage, it leaves a very wide discretion in the court where it is adopted. There was perhaps something to be said for the view of the Court of Appeal in the decision appealed from in the instant Illustration (*Donaghey* v. *P. O. Brien & Co.*, [1966] 2 All E. R. 822) that the risk which reg. 31 (3)—clearly misprinted in [1966] 2 All E. R. 830 at letter D as "31 (1)"—was aimed at was a collapse of the fragile material, and not, as the House of Lords ruled, the risk of *any* fall.

(*l*) [1967] 2 All E. R. at p. 1025; [1968] A. C. at p. 26; *per* Lord REID.

(*m*) See, *e.g. Manchester Corporation* v. *Markland*, [1936] A. C. 360. Whether the negligence proved is "common law" or "statutory" may be a relevant question; for example in *Dawson* v. *Bingley U.D.C.*, [1911] 2 K. B. 149 (a case of "*statutory*" negligence) the respondents were held liable for negligent *misstatement*, which the court admitted could not at that time have formed a ground of liability in a claim for negligence at common law ([1911] 2 K. B. at p. 157; *per* FARWELL, L.J.).

(*n*) See *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, 455–6; *per* Lord BLACKBURN.

(*o*) Where the Crown is bound by a statutory duty it is now on the same footing, in respect of liability for breach of it, as a private individual: Crown Proceedings Act, 1947, s. 2 (2) (6 Halsbury's Statutes (2nd Edn.) 48).

## 2. ABSOLUTE STATUTORY DUTIES

Another way in which actions for breach of statutory duty differ from actions in negligence is that the nature of the obligation imposed depends not upon the common law concept of the standard of care, but—like the question whether a civil right of action is conferred at all—upon the intention of the Legislature, to be gathered from a proper interpretation of the particular enactment concerned. Hence the actual nature of statutory duties depends upon this interpretation: in some cases it may be proper to infer that the intention was that the obligation is *only* to be held to be broken if the defendant was guilty of such lack of care as was appropriate to the implementation of the policy of the particular statute (*p*), while in other cases it may be proper to infer that the intention was that the duty should, according to the particular wording of the statute concerned, be to a greater or lesser extent "absolute" (*q*). In the latter event if a breach of duty with resulting injury occurs it will often not be relevant to prove that the defendant did everything he reasonably could to avoid it. This subject is more appropriate to a work on statutory interpretation than to one of this kind. But Lord ATKIN has given some guidance about the difference between the absolute statutory duty and the common law duty of care in the following words.

> "It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another (*r*)."

Where the duty is found by interpretation of the enactment to be thus "*absolute*" certain defences which might otherwise be open to the defendant are by the very nature of the obligation excluded. Thus *he cannot escape liability by establishing that he delegated the performance of the duty to a person of reasonable competence*, and that

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(*p*) See, *e.g. Edwards* v. *National Coal Board*, [1949] 1 All E. R. 743; [1949] 1 K. B. 704: *Marshall* v. *Gotham Co., Ltd.*, [1954] 1 All E. R. 937; [1954] A. C. 360: *Brown* v. *National Coal Board*, [1962] 1 All E. R. 81; [1962] A. C. 574. In the last century there used to be a presumption against the inference that statutory duties were intended to be "absolute" (see *Hammond* v. *Vestry of St. Pancras* (1874), L. R. 9 C. P. 316, 322; *per* BRETT, J.); but this presumption would appear now to have been abandoned, at least in respect of legislation involving protection of industrial workers.

(*q*) *Hamilton* v. *National Coal Board*, [1960] 1 All E. R. 76; [1960] A. C. 633: *Sanderson* v. *National Coal Board*, [1961] 2 All E. R. 796; [1961] 2 Q. B. 244: *Jayne* v. *National Coal Board*, [1963] 2 All E. R. 220: *Reffell* v. *Surrey County Council*, [1964] 1 All E. R. 743.

(*r*) *Smith* v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E. R. 381, 390; [1940] A. C. 242, 258.

the injury resulting from the breach was attributable to this person's fault (*s*), though where the plaintiff is himself in default in not conforming to the duty imposed this factor may either extinguish his right of action altogether, on the ground that he is the author of his own mishap (*t*), or it may be a reason for apportioning liability between him and the defendant (*u*). Further *"volenti non fit injuria"*—proof that the plaintiff knew of the risk arising from the breach and freely accepted it—will afford no defence (*a*). On the other hand the defendant *may* set up the plaintiff's *contributory negligence* (*b*): this is by no means always easy for the defendant to establish in these cases, for it has been said that

> "It is not for every risky thing that a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence" (*c*).

In cases of breach of statutory duty, as in the case of claims for negligence at common law (*d*) the onus of establishing the breach

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(*s*) See *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E. R. 278; [1941] 1 K. B. 154, and *Lochgelly Iron and Coal Co., Ltd.* v. *McMullan*, [1934] A. C. 1 13; *per* Lord WRIGHT.

(*t*) *Ginty* v. *Belmont Building Supplies, Ltd.*, [1959] 1 All E. R. 414 (where PEARSON, J., states the principle at pp. 423–424): approved by the House of Lords in *Ross* v. *Associated Portland Cement Manufacturers, Ltd.*, [1964] 2 All E. R. 452. See also *Smith* v. *A. Baveystock & Co., Ltd.*, [1945 1 All E. R. 531: *Manwaring* v. *Billington*, [1952] 2 All E. R. 747: *Horne* v. *Lec Refrigeration, Ltd.*, [1965] 2 All E. R. 898. The plaintiff's inability to recover in such a case is sometimes based upon the maxim *"ex turpi causa non oritur actio"*: see *Johnson* v. *Croggan & Co., Ltd.*, [1954] 1 All E. R. 121 and *Ginty' Case* at pp. 424–425 where PEARSON, J. relies upon *Goulandris, Brothers, Ltd.* v. *B. Goldman & Sons, Ltd.*, [1957] 3 All E. R. 100; [1958] 1 Q. B. 74.

(*u*) *Davison* v. *Apex Scaffolds, Ltd.*, [1956] 1 All E. R. 473; [1956] 1 Q. B. 551: *Ross's Case* (last note): *Quinn* v. *J. W. Green (Painters), Ltd.*, [1965] 3 All E. R. 785; [1966] 1 Q. B. 509; *Leach* v. *Standard Telephones & Cables, Ltd.*, [1966] 2 All E. R. 523; *Lovelidge* v. *Anselm Olding & Sons, Ltd.*, [1967] 1 All E. R. 459; [1967] 2 Q. B. 351: *Keaney* v. *British Railways Board*, [1968] 2 All E. R. 532.

But if the plaintiff's fault is *not* the cause of the accident there will of course be no defence: *Vyner* v. *Waldenberg Brothers, Ltd.*, [1945] 2 All E. R. 547; [1946] K. B. 50: *Byers* v. *Head Wrightson & Co., Ltd.*, [1961] 2 All E. R. 538.

(*a*) *Wheeler* v. *New Merton Board Mills, Ltd.*, [1933] All E. R. Rep. 28; [1933] 2 K. B. 669: *Imperial Chemical Industries* v. *Shatwell*, [1964] 2 All E. R. 999; [1965] A. C. 656.

(*b*) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E. R. 722; [1940] A. C. 152; *Cakebread* v. *Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E. R. 389; [1947] K. B. 641; *London Passenger Transport Board* v. *Upson*, [1949] 1 All E. R. 60; [1949] A. C. 155.

(*c*) *Flower* v. *Ebbw Vale Steel, etc., Co.*, [1934] 2 K. B. 132, 140; *per* LAWRENCE, J. (approved by Lords ATKIN and WRIGHT in *Caswell's Case*, [1939] 3 All E. R. at pp. 731, 736; [1940] A. C. at pp. 166, 174–177). And see *Kansaru* v. *Osram (G.E.C.), Ltd.*, [1967] 3 All E. R. 230.

(*d*) *Brown* v. *Rolls Royce, Ltd.*, [1960] 1 All E. R. 577; 1960 S. C. (H. L.) 69.

of duty and that the breach was the cause of the injury lies upon the plaintiff (*e*); but if the breach of duty and the resulting injury are proved this, without more, will entitle the plaintiff to succeed and it is not to the point that he was not at the time of the accident acting in the course of his employment (*f*).

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(*e*) *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E. R. 615; [1252] A. C. 613.

(*f*) See *Stimson* v. *Standard Telephones & Cables, Ltd.*, [1939] 4 All E. R. 225; [1940] 1 K. B. 342, at pp. 228–229 and 350 respectively: *per* Sir WILFRED GREENE, M.R. And see *Caswell's Case* (above, n. (*b*)); *Uddin* v. *Associated Portland Cement Manufacturers, Ltd.*, [1965] 1 All E. R. 347; *Allen* v. *Aeroplane and Motor Aluminium Castings, Ltd.*, [1965] 3 All E. R. 377.

# CHAPTER 11

# ANIMAL LIABILITY



There are special rules (*a*) governing liability for the misdeeds of animals, and in this Chapter we are concerned to examine them. But it must first be noted that these special rules do not provide the *only* grounds upon which liability may arise in respect of animals. For example there may be liability in negligence (*b*), as where a person allows his dog on a long lead to escape from his control and trip someone up upon the pavement (*c*), or there may be liability in nuisance as where a landowner keeps an excessive amount of manure on his land which encourages the undue multiplication of flies which infest the neighbourhood (*d*). This starting-point must be borne in mind; for while concentrating upon the special "animal" rules there is always a danger that the reader may forget that in a particular case there may be general as well as special grounds of liability, or possibly general without special.

The specifically "animal" rules divide into two main classes; the so-called "*scienter*" rule on the one hand, and the ancient liability for cattle trespass on the other. Mention must also be made of certain special rules governing liability for dogs, and of special rules relating to animals in relation to highways. Finally we must explain upon whom liability rests.

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(*a*) The standard monograph on animal liability is now Glanville Williams, *Liability for Animals*. See also the Report of the Committee on Civil Liability for Damage done by Animals (1953) Cmd. 8746.

(*b*) Provided of course that there is a duty of care in the particular case: *Brackenborough* v. *Spalding U.D.C.*, [1942] 1 All E. R. 34; [1942] A. C. 310.

(*c*) *Pitcher* v. *Martin*, [1937] 3 All E. R. 918. And see below, p. 242.

(*d*) *Bland* v. *Yates* (1914), 58 Sol. Jo. 612. Contrast *Stearn* v. *Prentice Bros., Ltd.*, [1919] 1 K. B. 394 (heap of bones encourages rats, but not excessive).

## 1. THE SCIENTER RULE

The essence of this rule (*e*) has recently been summarized by DEVLIN, J.:

> "A person who keeps an animal with knowledge (*scienter retinuit* (*f*)) *of its tendency to do harm* is strictly liable for damage that it does if it escapes; he *is under an absolute duty to confine or control it* so that it shall not do injury to others. All animals *ferae naturae*, that is, all animals which are not by nature harmless, such as a rabbit, or have not been tamed by man and domesticated, such as a horse, *are conclusively presumed to have such a tendency*, so that the *scienter* need not in their case be proved. All animals in the second class, *mansuetae naturae*, are *conclusively presumed to be harmless* until they have manifested a savage or vicious propensity; *proof of such a manifestation is proof of scienter* and serves to transfer the animal, so to speak, out of its natural class into the class *ferae naturae*" (*g*).

So that, in short, there is an "absolute duty to confine or control (a dangerous animal) so that it shall not do injury (*h*)". And this duty is based upon "*scienter*", *i.e.* knowledge, presumed or actual, of the animal's propensity to do harm. For this purpose animals are divided into two classes, *ferae naturae* on the one hand, and *mansuetae naturae* on the other. The former class are presumed to be dangerous, the latter class are presumed not to be.

### (i) ANIMALS FERAE NATURAE

A person who keeps an animal which is by nature dangerous to mankind cannot, if it causes injury, plead that he did not know of its tendency to cause it: *scienter* is presumed; he is *presumed* to know.

The main difficulty here is to determine what animals are thus treated by the law as dangerous as opposed to tame. This is a matter of authority (*i*), for it is one for the court to decide.

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(*e*) The Committee—(1953) Cmd. 8746—recommends the abolition of the *scienter* rule to be replaced by the ordinary rules governing liability for chattels, dangerous or otherwise.

(*f*) The Latin wording of the old writ.

(*g*) *Behrens* v. *Bertram Mills Circus, Ltd.*, [1957] 1 All E. R. 583, 587; [1957] 2 Q. B. 1, 13–14 (italics ours). To similar effect, *Buckle* v. *Holmes*, [1926] 2 K. B. 125, 127–8; *per* BANKES, L.J.

(*h*) *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471, 476; [1947] A. C. 156, 171; *per* Lord MACMILLAN.

(*i*) Most of the rules relating to animal liability have, as BLACKBURN, J., put it, been "settled by authority rather than by reason": *Smith* v. *Cook* (1875), 1 Q. B. D. 79, 82.

Examples of animals which have thus been stigmatized are elephants (*k*), bears (*l*), monkeys (*m*), and zebras (*n*).

With such animals there is no "first bite" and if they cause injury their owner is responsible for it.

All that need be noted is that it is no defence that the harm they do is not such as stems from their dangerous nature, and it is also no defence in the case of a particular member of the tribe that it was *in fact* tame. Here the law clings sternly to its own presumptions. Thus in *Behrens* v. *Bertram Mills Circus, Ltd.* (*o*) a Burmese elephant of a breed notoriously tame (and which was in fact circus-trained) out of fright occasioned by a chance meeting with a fox terrier (*p*) fell into momentary panic and knocked down a circus booth, thereby injuring the plaintiff. The rule governing animals *ferae naturae* was strictly applied against its owner; and neither the fact that it was actuated by timidity rather than vice nor the fact that, as DEVLIN J. said, it was as tame as a cow, sufficed to excuse him.

ILLUSTRATION 88

*A person who keeps an animal* ferae naturae *is bound to keep it secure, and if it causes injury he will be liable, without proof of negligence.*

May *v.* Burdett (1846), 9 Q. B. 101.

Burdett kept a monkey: it bit Mrs. May. *Held:* Burdett liable without proof of negligence in respect of the control of the monkey or otherwise.

(ii) ANIMALS MANSUETAE NATURAE

The law presumes that animals of this kind are *not* dangerous, and liability will only be imposed where *scienter* is proved. This means that it must be shown that the owner knew of the mischievous propensity which was in fact displayed by the animal when it did the damage complained of.

"An individual of this class . . may cease to be one for whose damage its owner is not responsible, *if it has given him indications of a vicious or dangerous disposition.* When the animal has been

(*k*) *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (1890), 25 Q. B. D 258; *Behrens* v. *Bertram Mills Circus, Ltd.*, [1957] 1 All E. R. 583; [1957] 2 Q. B. 1.

(*l*) *Besozzi* v. *Harris* (1858), 1 F. & F. 92.

(*m*) *May* v. *Burdett* (1846), 9 Q. B. 101 (Illustration 88).

(*n*) *Marlor* v. *Ball* (1900), 16 T. L. R. 239.

(*o*) [1957] 1 All E. R. 583; [1957] 2 Q. B. 1.

(*p*) Perhaps the argument that it was not acting according to its kind would have found even less favour with the court had it encountered a *mouse*?

found by its owner to possess such a nature it passes into the class of animals which the owner *keeps at his peril*" (*q*).

Again, in the case of animals *mansuetae naturae* as in the case of animals *ferae naturae* the composition of the classes of animals included seems to have been determined more by authority than reason; for sheep (*r*), horses (*s*), rams (*t*), camels (*u*), and even bulls (*a*) find a place in the list, as well as cats and dogs.

Although it is no defence (*b*) to prove that the propensity in question is one common to the class of animal concerned (*e.g.* the tendency of bulls to attack) the essence of the *scienter* rule lies in the establishment of knowledge of the mischievous propensity which causes the injury. So where a man complains of being bitten by a dog he will be well-placed if he can show that the dog had had its bite (*c*)—had bitten another person (or himself) to the knowledge of the owner upon some previous occasion. It may also be enough if he can establish knowledge on the part of the owner by some other means (*d*), *e.g.* that the owner kept a notice "Beware of the dog". But it will not suffice to show that the dog had previously been known to attack other *dogs* or to worry *sheep* (*e*). Moreover, it has recently been stressed that to fall within the rule the propensity concerned must be one which includes the notion of "attack" (*f*) or which is, at all events, "really likely to be dangerous" (*g*).

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(*q*) *Buckle* v. *Holmes*, [1926] 2 K. B. 125, 128; *per* BANKES, L.J. (italics ours). For accuracy he should perhaps have added that the owner only keeps the animal at his peril in respect of its propensity to do the particular kind of damage in question.

(*r*) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K. B. 370.

(*s*) *Cox* v. *Burbidge* (1863), 13 C. B. N. S. 430.

(*t*) *Jackson* v. *Smithson* (1846), 15 M. & W. 563.

(*u*) *McQuaker* v. *Goddard*, [1940] 1 All E. R. 471; [1940] 1 K. B. 687.

(*a*) *Hudson* v. *Roberts* (1851), 6 Exch. 697 (Illustration 89 (a)).

(*b*) *Fitzgerald* v. *E. D. and A. D. Cooke Bourne (Farms), Ltd.*, [1963] 3 All E. R. 36, 41, 48; [1964] 1 Q. B. 249, 258–9, 270.

(*c*) *Gould* v. *McAuliffe*, [1941] 1 All E. R. 515; affirmed [1941] 2 All E. R. 527.

(*d*) *Worth* v. *Gilling* (1866), L. R. 2 C. P. 1; *Barnes* v. *Lucille, Ltd.* (1907), 96 L. T. 680. Affirmative proof of negligence (as in respect of the keeping or control of the animal) will dispense with the need to rely upon the *scienter* rule. See, *e.g. Pinn* v. *Rew* (1916), 32 T. L. R. 451 (negligence of independent contractor on highway); *Deen* v. *Davies*, [1935] 2 K. B. 282; *Aldham* v. *United Dairies (London), Ltd.*, [1939] 4 All E. R. 522; [1940] 1 K. B. 507. But here, as always, such proof must be *affirmative*; the fact that a horse is found on a highway is in itself no proof of negligence in the owner: *Cox* v. *Burbidge* (1863), 13 C. B. N. S. 430, 436; *per* ERLE, C.J., and see *Lathall* v. *A. Joyce & Son*, [1939] 3 All E. R. 854.

(*e*) *Osborne (Osborn)* v. *Chocqueel*, [1896] 2 Q. B. 109 (dog bites man; previously goats); *Glanville* v. *Sutton*, [1928] 1 K. B. 571 (horse bites man; previously horses).

(*f*) *Fitzgerald's Case* (above, n. (*b*)) at pp. 41, 45, 48 and 259, 266, 270.

(*g*) *Fitzgerald's Case* at pp. 41 and 259; *per* WILLMER, L.J.

Further, *scienter* will not be established by proof that in doing the mischief, the animal was acting upon the normal instincts of its kind. It is therefore not enough where a cat has killed a canary, a dog chased game or a mare kicked a horse, to allege that these habits, being in the manner of the beast (*h*) concerned, must have been known to the owner. There must be proof that he knew that that particular cat was prone to chasing poultry (*i*), that that particular dog was a chaser of game (*k*), or that that particular mare was a kicker (*l*).

It remains to be added that once *scienter* is established liability is imposed without proof of negligence, just as in the case of liability for animals *ferae naturae*. But (as under *Rylands* v. *Fletcher*) there are, of course, some defences open to a defendant who is sued under either of these heads of animal liability.

First, if the defendant can establish that he has in fact kept the animal reasonably secure, as by keeping a zebra (*m*) or a bull (*n*) tied up or in a loose-box, or a dog on an effective chain, there is considerable authority (*o*) for the proposition that he will not be liable unless negligence can be established (*e.g.* by showing that a dog chain was sufficiently long to enable the animal to bite a lawful caller upon the doorstep) (*p*).

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(*h*) Anyone who has ever owned a Welsh collie dog will know that the "tameness" of dogs in the eye of the law is yet another legal fiction (Author). Though judging by *Ellis* v. *Johnstone*, [1963] 1 All E. R. 286; [1963] 2 Q. B. 8 it is a fiction which the Court of Appeal seem happy to apply.

(*i*) *Buckle* v. *Holmes*, [1926] 2 K. B. 125. An unsatisfactory case. At first sight it appears to give cats an unlimited charter of liberty to prey upon poultry without imposing any liability upon their owners. But it seems clear that what was intended was that (as stated above) the owner's immunity should last only so long as he has no *scienter*: see remarks on *Buckle* v. *Holmes*, in *Tallents* v. *Bell and Goddard*, [1944] 2 All E. R. 474, 475 (C. A.). But Glanville Williams, *Liability for Animals*, pp. 316–20, should also be consulted. *Clinton* v. *J. Lyons & Co., Ltd.*, [1912] 3 K. B. 198 (cat bites dog) suggests that a tendency to injure *mankind* must be established. It is true that this is the test which places an animal in the *ferae naturae* class, but as regards animals *mansuetae naturae* (unless it is a person who has been attacked) the suggestion seems contrary to authority.

(*k*) *Tallent's Case* (*supra*).

(*l*) *Manton* v. *Brocklebank*, [1923] 2 K. B. 212.

(*m*) *Marlor* v. *Ball* (1900), 16 T. L. R. 239. See also *Lee* v. *Walkers* (1939), 162 L. T. 89 (dog securely in room).

(*n*) *Rands* v. *McNeil*, [1954] 3 All E. R. 593; [1955] 1 Q. B. 253 (C. A.).

(*o*) *Rands* v. *McNeil*, [1954] 3 All E. R. 593; [1955] 1 Q. B. 253. And see *Marlor's Case* (1900), 16 T. L. R. 239, 240; *per* COLLINS, L.J., and *Knott* v. *London County Council*, [1933] All E. R. Rep. 172, 174; [1934] 1 K. B. 126, 138. But the pronouncements in *Rands* v. *McNeil* that there must be something in the nature of an "escape", as in *Rylands* v. *Fletcher*, seems to be based upon too literal an interpretation of Hale, *Pleas of the Crown*, Vol. 1, p. 430.

(*p*) See *Sarch* v. *Blackburn* (1830), 4 C. & P. 297.

Secondly, the plaintiff's own default is clearly a defence (*q*)—for a man who strokes a tiger or a zebra (*r*) has himself to thank for the consequences. And by the same token a *trespasser* who encounters a bull (*s*) must take his chance.

Thirdly, as under *Rylands* v. *Fletcher*, Act of God might clearly be a defence; though as will be explained this is a defence most unlikely to succeed in practice. Finally, on principle it would seem that the act of a stranger, as where a mischievous boy lets a fierce dog loose, should clearly be a defence; but on authority this is in fact uncertain (*t*).

ILLUSTRATION 89

(a) *Where an animal* mansuetae naturae *does damage,* "scienter" *must be established, and it is not enough to show that animals of the kind in question are accustomed to be dangerous* (*u*).

Hudson *v.* Roberts (1851), 6 Exch. 697.

Plaintiff was attacked by defendant's bull while he was walking along the highway wearing a red handkerchief. Defendant having subsequently remarked that he knew the bull would run at anything red. *Held:* This remark was sufficient evidence of defendant's knowledge of the mischievous propensities of the animal (*scienter*) to go to the jury.

(b) *Without proof of* "scienter" *in the sense of knowledge* (*a*) *of a propensity likely to be dangerous which is the cause of the injury there will be no liability for an animal* "mansuetae naturae" *unless it can be established under some other head such as negligence or cattle trespass.*

Fitzgerald *v.* E. D. and A. D. Cooke Bourne (Farms), Ltd., [1963] 3 All E. R. 36; [1964] 1 Q. B. 249.

Plaintiff was knocked down by a frolicsome filly while walking across defendants' field by a right of way. *Held:* A propensity to

(*q*) And it may be a ground for reducing damages under the Law Reform (Contributory Negligence) Act, 1945 (17 Halsbury's Statutes (2nd Edn.) 12).

(*r*) *Marlor's Case* (*supra*).

(*s*) *Lowery* v. *Walker*, [1911] A. C. 10. But probably not a trespasser who meets a *gorilla* roaming the premises. Therefore, one seems to remember that at one stage of his career Bulldog Drummond might have had a claim against Carl Petersen, though the gorilla of course got the worst of the chance medley.

(*t*) See *Baker* v. *Snell*, [1908] 2 K. B. 352; on appeal, *ibid.*, at p. 825. The act of a stranger (where the defendant himself is not negligent) *is* probably a defence in cattle trespass: *Sutcliffe* v. *Holmes*, [1946] 2 All E. R. 599, 602; [1947] K. B. 147, 154–155.

(*u*) Unless of course the facts justify liability under some other head, such as negligence, nuisance or cattle trespass.

(*a*) See also *McQuaker* v. *Goddard*, [1940] 1 All E. R. 471; [1940] 1 K. B. 687.

playfulness is not one which is really dangerous and the *scienter* rule could not apply. Moreover, apart from *scienter* there was no duty of care in negligence since it would be unreasonable to expect an owner to foresee and guard against the bare possibility that in such circumstances a frolicsome filly might cause injury. Defendants accordingly not liable.

## 2. CATTLE TRESPASS

Apart from the special rules relating to animal liability which have been discussed in the last section, an owner of *cattle* is (and has been from early times) held strictly responsible to the owner (*b*) or occupier of land for damage resulting from their trespasses upon that land—and neither negligence nor *scienter* need be proved.

For this purpose "cattle" include such farm stock as bulls, cows, sheep, pigs, donkeys and poultry, but *not* dogs and cats.

To the farmer whose land is invaded by his neighbour's beasts this is an important rule because the owner of the animals is held responsible for all the direct consequences of the incursion, and among these consequences the law includes damage which the animals do as the result of their *natural propensities*. Thus where cattle *trespass* their owner *will* be liable, without proof of *scienter* for damage so caused, though where there is no trespass he will not. Here *Ellis* v. *Loftus Iron Co.* (*c*) and *Manton* v. *Brocklebank* (*d*) provide a contrast. In the former case B's horse kicked A's mare through the fence which divided their two properties, and B was held liable for this damage, which was the natural consequence of the horse's trespass, without proof of negligence or of knowledge of proneness of the horse to kick mares. In *Manton's Case* where the defendant's mare was, by agreement between the parties, in the same field as the plaintiff's horse (*no* trespass) and mare kicked horse, the defendant was held *not* liable, since he was not negligent and had no knowledge of that particular tendency of that particular mare. Moreover liability for cattle trespass extends to *any* direct consequence of the trespass. Thus if my sheep are (with or without my knowledge) infected with some disease, and they trespass upon your land and infect your sheep, I shall be responsible for your loss (*e*). But there is a long established exception to this rule of

(*b*) But the fact that the cattle are trespassing cannot avail other people, who will have to rely upon "*scienter*" or negligence: *Bradley* v. *Wallaces, Ltd.*, [1913] 3 K. B. 629.

(*c*) (1874), L. R. 10 C. P. 10; following (with misgiving) *Lee* v. *Riley* (1865), 18 C. B. N. S. 722.

(*d*) [1923] 2 K. B. 212.

(*e*) *Theyer* v. *Purnell* (*Parnell*), [1918] 2 K. B. 333. And see *Wormald* v. *Cole*, [1954] 1 All E. R. 683; [1954] 1 Q. B. 614 (Illustration 90).

direct consequence and this is that if the owner of the land trespassed upon is, by agreement or otherwise, under a duty to fence his land as against (*f*) the land of the owner of the cattle, he cannot complain if their trespass is due to his own failure to maintain an effective fence (*g*).

ILLUSTRATION 90

*The owner of trespassing cattle is strictly liable for the direct consequence of their trespasses.*

Wormald *v.* Cole, [1954] 1 All E. R. 683; [1954] 1 Q. B. 614.

During darkness defendant's cattle strayed into plaintiff's garden and one of them knocked down and injured plaintiff. *Held:* Although originally the action for cattle trespass would only have lain for damage done to a plaintiff's land, crops and pasture, it will now lie for all direct consequences including personal injuries (*h*). The defendant was therefore liable.

## 3. DOGS

It has been seen that dogs and cats are favoured by the common law, since they are neither considered to be animals *ferae naturae* nor are they treated as "cattle" for the purpose of cattle trespass (*i*). Hence at common law even if they do damage which one would normally expect them to do, as by worrying sheep or chasing birds, their owner will only be responsible if *scienter* as above defined is proved (*k*).

Cats have, of course, basked in privilege since the days of the Pharaohs, and they still continue to enjoy the favour of the common law (*l*); but in the case of dogs the Legislature has intervened and by the Dogs Act, 1906 (*m*), it is enacted that

(*f*) But see *Sutcliffe* v. *Holmes*, [1946] 2 All E. R. 599; [1947] K. B. 147.

(*g*) See *Boyle* v. *Tamlyn* (1827), 6 B. & C. 329. As to the statutory duties of railway authorities, see *Cooper* v. *Railway Executive*, [1953] 1 All E. R. 477.

(*h*) But see Committee on Liability for Damage done by Animals (1953) Cmd. 8746.

(*i*) Though even apart from the Dogs Act, 1906 (1 Halsbury's Statutes (2nd Edn.) 870), the Legislature has long recognized the dangerous potentialities of dogs: *e.g.* Dogs Act, 1871 (1 Halsbury's Statutes (2nd Edn.) 863), and now Dogs (Protection of Livestock) Act, 1953 (33 Halsbury's Statutes (2nd Edn.) 11).

(*k*) Or if there is negligence or some other cause of action unconnected with "animal" liability: see *Sycamore* v. *Ley*, [1933] All E. R. Rep. 97, 101–2; (1932), 147 L. T. 342, 345.

(*l*) *Buckle* v. *Holmes*, [1926] 2 K. B. 125.

(*m*) This Act consolidated and amended earlier enactments and is here quoted as itself amended by the Dogs (Amendment) Act, 1928.

"The owner of a dog shall be liable in damages for *injury done to any cattle (or poultry)* by that dog; and it shall *not be necessary* for the person seeking such *damages to show a previous mischievous propensity in the dog*, or the owner's knowledge of any such previous propensity, *or to show that the injury was attributable to any neglect* on the part of the owner" (*n*).

The wording of this section is absolute (*o*), so that the owner of a *dog* is now strictly liable for any damage it does to *cattle* or *poultry* (*p*).

## 4. ANIMALS AND HIGHWAYS

There are three main rules concerning liability for animals and highways.

(1) (i) *Damage caused by animal on highway.* The law maintains that those who use the highway must be taken to accept the essential risks of it; so in the case of *unavoidable* injury caused by animals which are upon the highway, as in the case of *unavoidable* injury caused by vehicles (*q*), the owner of the animal will not be held responsible. Thus in *Cox* v. *Burbidge* (*r*) where there was nothing to suggest negligence (*s*) on the part of the defendant and no "*scienter*" could be proved, he was held not liable for his horse which kicked a child upon the highway. One does not put a horse upon the highway at one's peril.

(2) (ii) *Damage caused by animal straying from highway.* If an animal, being upon the highway, *through no fault* (*t*) of those who

(*n*) Dogs Act, 1906, s. 1 (1)—italics ours. For this purpose "*cattle*" includes horses, mules, asses, sheep, goats and swine (s. 7). "*Poultry*" includes domestic fowls, turkeys, geese, ducks, guinea fowls and pigeons: Dogs (Amendment) Act, 1928, s. 1 (2), referring to Poultry Act, 1911, s. 1 (3), which is itself now repealed. Other farmyard animals such as oxen come within the generic term "cattle"; but tame rabbits are *not* included, *Tallents* v. *Bell and Goddard*, [1944] 2 All E. R. 474.

(*o*) See *Grange* v. *Silcock* (1897), 77 L. T. 340. Where two dogs acting together cause the damage the owners are jointly liable: *Arneil* v. *Paterson*, [1931] A. C. 560.

(*p*) *Scienter* must still be proved where dogs injure game which is neither "cattle" nor "poultry": *Read* v. *Edwards* (1864), 17 C. B. (N. S.) 245.

(*q*) See *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261, 267.

(*r*) (1863), 13 C. B. N. S. 430.

(*s*) But see *Turner* v. *Coates*, [1917] 1 K. B. 670; *Deen* v. *Davies*, [1935] All E. R. Rep. 9; [1935] 2 K. B. 282; *Aldham* v. *United Dairies (London), Ltd.*, [1939] 4 All E. R. 522; [1940] 1 K. B. 507. Although it is an *offence* under the Highways Act, 1959, s. 135 (39 Halsbury's Statutes (2nd Edn.) 555), to allow cattle to stray upon the highway it has been held that the section will not afford a civil action to a person injured: *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K. B. 370; *Searle* v. *Wallbank*, [1947] 1 All E. R. 12, 22; [1947] A. C. 341, 362 (Illustration 91 (a)).

(*t*) *Gayler and Pope, Ltd.* v. *Davies (B.) & Son, Ltd.*, [1924] 2 K. B. 75.

have or ought to have control of it, strays from the highway and causes damage on adjoining property, the owner of the animal will not be held responsible. The reason for this rule is probably the same as the reason for the last; those who live beside the highway must accept the *unavoidable* risks of it—they can if they please protect themselves by fencing. The stock illustration of this principle is *Tillett* v. *Ward* (*u*) where a bull, through no negligence on the part of a drover, strayed into the plaintiff's shop (*a*) and did damage there.

(iii) *Damage caused by domestic animals straying onto highway.* For reasons that are practical (*b*) as well as historical

> "An owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway" (*c*).

It therefore follows that an owner or occupier will not be held responsible for injury to users of the highway solely attributable to the fact that his domestic (*d*) animal has strayed upon it. But he may be liable if there are special circumstances (*e*) arising either from the nature of the locality or from the known behaviour of the animal (*f*) which ought to put him on his guard against the likelihood of injury to a highway user. Thus, for instance in *Ellis* v. *Johnstone* (*g*) the owner of a welsh collie dog which he permitted to run out of an open gate across a road and onto a heath was held not liable for damage to the plaintiff's car caused by collision with the dog; but it was held that it might have been otherwise "had it been established that the dog frequently bounded out of this gate . . . turning itself for the moment into something more like a missile

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(*u*) (1882), 10 Q. B. D. 17. See also *Goodwyn* (*Goodwin*) v. *Cheveley* (1859), 4 H. & N. 631: the owner is allowed a reasonable time to remove the truant.

(*a*) It *might* have been a china shop. It was only the fact that it was in *Ironmonger* Lane that led to ATKIN, L.J.'s, confident denial: *Manton* v. *Brocklebank*, [1923] 2 K. B. at p. 231.

(*b*) Discussed in *Searle* v. *Wallbank*, [1947] 1 All E. R. 12; [1947] A. C. 341: the Animals Committee (1953) Cmd. 8746, would like to see a distinction between town and country. But *is* this practical? See remarks of STEPHEN, J., *Tillett* v. *Ward* (1882), 10 Q. B. D. 17, 21 and of DAVIES, L.J. in *Gomberg* v. *Smith*, [1962] 1 All E. R. 725, 733–734; [1963] 1 Q. B. 25, 40–41.

(*c*) *Hughes* v. *Williams*, [1943] 1 All E. R. 535, 539; [1943] K. B. 574, 579; *per* GODDARD, L.J.

(*d*) The immunity does not extend to animals *ferae naturae*; but since *Ellis* v. *Johnstone*, [1963] 1 All E. R. 286; [1963] 2 Q. B. 8, it is clear that it does extend to domestic animals generally and not only to cattle.

(*e*) See *Ellis* v. *Johnstone* (last note).

(*f*) *Ibid.*, and see *Brock* v. *Richards*, [1951] 1 All E. R. 261; [1951] 1 K. B. 529. Knowledge of special circumstances is not an instance of the "*scienter*" rule, but merely evidence of negligence; see *Ellis' Case* at pp. 297, 29–30; *per* PEARSON, L.J.

(*g*) Above, n. (*d*).

than a dog" (*h*), for then special circumstances would have existed "imposing on the defendant the duty of taking reasonable care to see that this propensity was either cured or frustrated" (*h*). Further, this rule of immunity only applies where the animal strays or "escapes" onto the highway; it will not apply where the animal is upon the highway under its owner's control, for then he will owe to other users of the highway the ordinary duty of care for their safety, and he may be liable in negligence if they are injured because he has not kept his animal under reasonable control (*i*).

ILLUSTRATION 91

(a) *There is no duty to fence land adjoining a highway so as to prevent domestic animals from straying upon the highway.*

Searle *v.* Wallbank, [1947] 1 All E. R. 12; [1947] A. C. 341.

Respondent's horse jumped through a gap in his fence onto the highway and there collided with and injured appellant who was riding by on his bicycle. *Held:* Respondent not liable since he was under no duty to prevent the horse from straying onto the highway (*k*).

(b) *But where the owner brings his animal onto the highway he may be liable in negligence if he fails to keep it under reasonable control.*

Gomberg *v.* Smith, [1962] 1 All E. R. 725; [1963] 1 Q. B. 25.

Defendant brought a St. Bernard dog out of his shop in a built-up area. The dog bounded across the street and defendant ran after it shouting. It ran back, evading defendant, and collided with and damaged plaintiff's van. *Held:* Defendant liable, since he had failed to keep reasonable control of the dog.

## 5. INCIDENCE OF LIABILITY

There is not much authority upon this question, and such as there is appears mostly to be concerned only with dogs. But it is clear that the test of responsibility is *possession and control* (*l*) of the animal.

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(*h*) *Ellis* v. *Johnstone* at pp. 295, 26; *per* DONOVAN, L.J.

(*i*) *Gomberg* v. *Smith* (Illustration 91 (b)). And see *Deen* v. *Davies*, [1935] All E. R. Rep. 9; [1935] 2 K. B. 282; *Pitcher* v. *Martin*, [1937] 3 All E. R. 918.

(*k*) And see *Hughes' Case* (n. (*c*), above) and *Wright* v. *Callwood*, [1950] 2 K. B. 515. As stated in the text, it might of course have been otherwise if "special circumstances" had prevailed.

(*l*) *Knott* v. *London County Council*, [1933] All E. R. Rep. 172, 176; [1934] 1 K. B. 126, 140; *per* Lord WRIGHT.

In most cases of course the person who has control will be the *owner* (*m*) who may also be liable if, having the right and duty of control, he delegates the task of keeping the animal to a servant or agent (*n*). But an employer will not be held responsible for a pet which his servant keeps, even on the employer's premises, for his own purposes unconnected with the employment (*o*).

Control and ownership are not, however, *necessarily* coincident; thus a person was once held responsible under the *scienter* rule for a dog which it seems had been left at his house by a servant who had gone elsewhere; for the defendant had become the keeper or, as it was put, "harbourer" of the dog (*p*).

ILLUSTRATION 92

*Responsibility for animals is based upon possession or control.*

North *v.* Wood, [1914] 1 K. B. 629.

Plaintiff's prize-winning Pomeranian puppy was set upon and killed by bull terrier (known by defendant to attack Pomeranians), kept at defendant's home by defendant's daughter aged seventeen who assisted defendant at a wage in his tobacconist's shop. *Held:* Defendant not liable. Daughter person in control of dog, not being defendant's servant and being of sufficient age and discretion to control it.

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(*m*) Thus in the case of statutory liability under the Dogs Act, 1906 (1 Halsbury's Statutes (2nd Edn.) 870), the "owner" is made responsible by s. 1 (1). But s. 1 (2) provides that the occupier of premises where the dog is kept is to be *presumed* to be the owner unless he proves that he is not.

(*n*) *Stiles* v. *Cardiff Navigation Co.*, (1864), 33 L. J. (Q. B.) 310; *Baldwin* v. *Cassella* (1872), L. R. 7 Exch. 325 (coachman keeps dog for master). Contrast *North* v. *Wood*, [1914] 1 K. B. 629 (Illustration 92), where keeper *not* servant of defendant.

(*o*) *Knott* v. *London County Council*, [1933] All E. R. Rep. 172; [1934] 1 K. B. 126.

(*p*) *M'Kone* v. *Wood* (1831), 5 C. & P. 1.

# CHAPTER 12

# LIABILITY UNDER THE RULE IN RYLANDS v. FLETCHER



This is a special branch of tortious liability; and the important thing to note about it at the start is that it is "strict" in the sense that it is imposed without any need for proof of negligence or lack of care on the part of the defendant. It is called *Rylands* v. *Fletcher* liability because it is a form of tortious liability which was first formulated in that case (*a*); but it in fact had historical origins (*b*). We must first examine the rule itself, then consider the limits of its operation and finally consider the exceptions to it.

## 1. THE RULE IN RYLANDS *v.* FLETCHER

The facts of this famous case were that the plaintiff and the defendant owned adjoining properties. The defendant had a mill on his land, and the plaintiff worked a coal mine beneath his. The defendant, wishing to obtain water power for his mill, caused a reservoir to be constructed on his land and had it filled with water. Due to the fact, unknown to the defendant, that there was a disused mine shaft under the site of the reservoir, the water came through this shaft and into the plaintiff's workings, flooding them and causing considerable damage.

It was found that the defendant's action was quite innocent, in the sense that there was no reason why he should know of, or even suspect the existence of, the disused shafts; so that unless he could be made liable without *proof of negligence* he could not be made liable at all.

(*a*) As will appear, the Rule was formulated by BLACKBURN, J., when the case was before the Court of Exchequer Chamber, *sub nom. Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265. This formulation was approved by the House of Lords: *sub nom. Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330.

(*b*) See (1866), L. R. 1 Exch. at p. 280–6; *per* BLACKBURN, J. (liability for escape of filth, liability for fire and liability for cattle trespass and dangerous animals). See also *Tenant* v. *Goldwin* (*or Golding*) (1704), 2 Ld. Raym. 1089.

The defendant was held liable upon the basis of the following principle propounded by BLACKBURN, J., in delivering the judgment of the Court of Exchequer Chamber in the case; and this principle was approved, on appeal, by the House of Lords. The learned judge said:—

"... the rule of law is, that the person who *for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril*, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape ..." (*c*).

So that the essence of the rule is that, *primâ facie*, and subject to limitations and exceptions to be discussed below, a person who keeps on his *land* anything *likely to do mischief if it escapes* will be answerable, without proof of any negligent lack of control of such a thing, for any damage it may do if it does escape.

Obviously there can be no closed list of things "likely to do mischief if they escape"; but the following are examples drawn from the authorities:—

A large body of water (*d*), gas (*e*), electricity (*f*), vibrations (*g*), things likely to cause damage by starting a fire (*h*), sewage (*i*), explosives (*k*), noxious smuts (*l*), heaps of spoil calculated to cause a landslide (*m*), yew trees dangerous to cattle and projecting over land (*n*), and even caravan dwellers who foul and damage nearby property (*o*).

Such things are often inelegantly termed "*Rylands* v. *Fletcher* objects" (*p*), but since, as has just been seen, even human beings have

(*c*) (1866), L. R. 1 Exch. at p. 279.

(*d*) *Rylands* v. *Fletcher* itself; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 772.

(*e*) *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1936] A. C. 108.

(*f*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186 (exempted, however, by statutory authority); *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A. C. 381.

(*g*) *Hoare & Co.* v. *McAlpine*, [1923] 1 Ch. 167.

(*h*) *Mullholland & Tedd, Ltd.* v. *Baker*, [1939] 3 All E. R. 253 (drum of paraffin); *Perry* v. *Kendricks Transport, Ltd.*, [1956] 1 All E. R. 154 (petrol tank of car).

(*i*) *Tenant* v. *Goldwin* (*or Golding*) (1704), 2 Ld. Raym. 1089; *Jones* v. *Llanrwst U.D.C.*, [1911] 1 Ch. 393.

(*k*) *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] 2 A. C. 465 (but see *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471; [1947] A. C. 156).

(*l*) *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145.

(*m*) *A.-G.* v. *Cory Bros. & Co.*, *Kennard* v. *Cory Bros. & Co.*, [1921] 1 A. C. 521.

(*n*) *Crowhurst* v. *Burial Board of Amersham* (1878), 4 Ex. D. 5.

(*o*) *A.-G.* v. *Corke*, [1933] 1 Ch. 89.

(*p*) Whether oil can be regarded as a dangerous thing within the Rule was left open in *Miller Steamship Company, Pty., Ltd.* v. *Overseas Tankship (U.K.), Ltd.* (*The "Wagon Mound"* (*No.* 2)), [1963] 1 Lloyd's Rep. 402, 426.

been included (howsoever humble) this terminology is perhaps misleading, and the more so since it appears that an *operation* such as blasting (*q*) or starting a fire (*r*) will give rise to liability under the Rule.

It must be added that it has been decided in later cases (*s*) that a person who carries something potentially dangerous such as a gas or water main through the land of another person may be held responsible; though of course the land is not in fact "*his land*".

## 2. THE LIMITS OF THE RULE

It has been said that the Rule, since liability under it is imposed without proof of negligence,

> "Is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very repressive decision" (*t*).

It is therefore most important to appreciate the limits of its operation. And the best approach to this is to cite from the speech of Viscount SIMON in *Read* v. *J. Lyons & Co. Ltd.* (*u*).

> "Now, the strict liability recognised by this House in *Rylands* v. *Fletcher* is conditioned by two elements which I may call the condition of 'escape' from the land of something likely to do mischief if it escapes, and the condition of 'non-natural use' of the land."

First as to the condition of *escape*. Liability will only be imposed if there is an "escape" of the object from *land* (*a*) of which the

(*q*) *Miles* v. *Forest Rock Granite Co.* (*Leicestershire*), *Ltd.* (1918), 34 T. L. R. 500.

(*r*) *Balfour* v. *Barty-King*, [1956] 2 All E. R. 555; affirmed C. A. on other grounds, [1957] 1 All E. R. 156; [1957] 1 Q. B. 496; *J. Doltis, Ltd.* v. *Isaac Braithwaite & Sons* (*Engineers*), *Ltd.*, [1957] 1 Lloyd's Rep. 522. Where the facts satisfy the requirements of the Rule the Fires Prevention (Metropolis) Act, 1774 (13 Halsbury's Statutes (2nd Edn.) 9), does not apply; but the merely lighting of a fire in a grate does not fall within the Rule. To fall within it the fire which is started must be likely to "escape". *Sochacki* v. *Sas*, [1947] 1 All E. R. 344 (Illustration 94).

(*s*) *Midwood & Co.* v. *Manchester Corporation*, [1905] 2 K. B. 597; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 772, 778–80; *per* Lord SUMNER; *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1936] A. C. 108, 118.

(*t*) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L. T. 547, 549; *per* LINDLEY, L.J. And see *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471, 474; [1947] A. C 156, 167; *per* Viscount SIMON.

(*u*) [1946] 2 All E. R. 471, 474; [1947] A. C. 156, 167 (Illustration 93).

(*a*) In this it seems that the Rule differs from part of its parent stock, liability for dangerous animals: *Behrens* v. *Bertram Mills Circus*, [1957] 1 All E. R. 583; [1957] 2 Q. B. 1, 21–22. In *The "Wagon Mound"* (*No.* 2) at p. 426—n. (*p*), above—it was held that the Rule does not apply to an escape from a ship.

defendant is in occupation or control.) Again the choice of epithet is not entirely happy, because there is no need for the "object" to be animate; but the essential point is that, starting on the defendant's land, the thing must do its damage *beyond the confines of it* (*b*); if the damage is done within the defendant's boundaries the Rule *cannot apply*—though of course there may be some other ground of liability, such as negligence.

Secondly, when *Rylands* v. *Fletcher* itself came before the House of Lords an important qualification was made to BLACKBURN, J.'s principle. It was held that the use of the object upon the land must be "non-natural" (*c*). Thus for example had he not made a reservoir, and had the water merely collected upon the land in its natural state, Rylands would not have been liable (*d*); and in the same way a landowner who leaves his land in its natural condition is not to be held responsible for the fall of a rock which breaks away in the natural course of things even though it "escapes" from his land and does damage (*e*).

The difficulty about this qualification of the Rule lies in the determination of what is or is not a "natural" or ordinary use of the land. Thus *Rylands* v. *Fletcher* decides that it is not "natural" to construct a reservoir for water for a mill, and it has been held not to be "natural" to collect a large heap of colliery spoil upon unstable land (*f*), nor to use a blow lamp to thaw frozen pipes in the vicinity of felt lagging (*g*), nor to accumulate gas in large quantities in pipes (*h*); but it has often been held to be "natural" to keep a domestic water supply for ordinary purposes (*i*), and it has been held to be "natural" to have electric wiring upon premises (*k*), to

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(*b*) *Read's Case* (*supra*, note (*u*)). And see *Ponting* v. *Noakes*, [1894] 2 Q. B. 281; *J. Doltis, Ltd.* v. *Isaac Braithwaite and Sons (Engineers), Ltd.*, [1957] 1 Lloyd's Rep. 522.

(*c*) "Exceptional" may be an equally appropriate word: *Read's Case*, [1946] 2 All E. R. at p. 474; [1947] A. C. at p. 167.

(*d*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, 338–9; *per* Lord CAIRNS, L.C.

(*e*) *Pontardawe R.D.C.* v. *Moore-Gwynne*, [1929] 1 Ch. 656.

(*f*) *A.-G.* v. *Cory Bros. & Co., Kennard* v. *Cory Bros. & Co*, [1921] 1 A. C. 521.

(*g*) *Balfour* v. *Barty-King*, [1956] 2 All E. R. 555; affirmed by C. A. on other grounds, [1957] 1 All E. R. 156; [1957] 1 Q. B. 496.

(*h*) *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1936] A. C. 108.

(*i*) *Rickards* v. *Lothian*, [1913] A. C. 263 (Illustration 96 (a)). But water in *mains* may fall within the rule unless the carriage of it has statutory protection: *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 772.

(*k*) *Collingwood* v. *Home and Colonial Stores, Ltd.*, [1936] 3 All E. R. 200. Unless of course it is in an obviously dangerous condition: *Spicer* v. *Smee*, [1946] 1 All E. R. 489.

light a fire in a grate (*l*), to burn paper in a chimney to test a flue (*m*), to discharge oil from a ship (*n*), and even, probably, to operate an explosives factory in time of war (*o*)

To these two conditions of liability there must now be added two more.

First, it is to be noted that the rule only applies to a person who "*collects and keeps*" the object on his land. This again must not be taken literally, for obviously no one actually collects or keeps an explosion. But the point of it is that the defendant occupier must be actively responsible for the presence of the object. Thus if it comes or is on the land not by his efforts, but in the *ordinary course of nature*, he will not be responsible for it under *Rylands* v. *Fletcher* (*p*) if it does escape. Thus if water accumulates on my land, and I have done nothing to collect it and have used no active means to direct it on to my neighbour's land, I shall not be held responsible if that land is flooded by it. Nor, indeed, shall I be liable if in preventing the flooding of my own land I incidentally divert the flood to the property of another (*q*); but if it was an *artificial* erection that caused an accumulation on my land, then, having created the cause of trouble, I shall be liable if I divert the water (*r*).

In the second place, although under *Rylands* v. *Fletcher* there is no need for the plaintiff to prove that his injury was caused by any default or lack of care on the part of the defendant, he must establish "*damage which is the natural consequence of (the) escape*" (*s*).

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(*l*) *Sochacki* v. *Sas*, [1947] 1 All E. R. 344 (Illustration 94).

(*m*) *J. Doltis, Ltd.* v. *Isaac Braithwaite & Sons (Engineers), Ltd.*, [1957] 1 Lloyd's Rep. 522.

(*n*) *The "Wagon Mound" (No. 2)*, [1963] 1 Lloyd's Rep. 402, 426.

(*o*) *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471; [1947] A. C. 156, casting doubt upon *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] 2 A. C. 465.

(*p*) It seems however that there may now be liability in *nuisance* in respect of things naturally on the land: *Davey* v. *Harrow Corporation*, [1957] 2 All E. R. 305; [1958] 1 Q. B. 60 (C. A.). This seems an inconsistent and undesirable decision, but at present it represents the law.

(*q*) *Nield* v. *London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4; *Gerrard* v. *Crowe*, [1921] 1 A. C. 395. And see *Greyvensteyn* v. *Hattingh*, [1911] A. C. 355 (chasing locusts off one's land on to that of another).

(*r*) *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131; *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949] 2 All E. R. 50; [1949] 2 K. B. 465 (affirmed C. A. on other grounds, [1949] 2 All E. R. 1021; [1950] 1 K. B. 284). *Mining* operations are, however, a natural user, so that if they cause an overflow of water there is no liability: *Smith* v. *Kenrick* (1849), 7 C. B. 515; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; *Rouse* v. *Gravel-works, Ltd.*, [1940] 1 K. B. 489. See also the somewhat disconcerting decision of the Judicial Committee in *Gibbons* v. *Lenfestey* (1915), 84 L. J. P. C. 158.

(*s*) *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. at p. 279; *per* BLACKBURN, J.

In *Rylands* v. *Fletcher* itself the damage was damage to *property*, and there is high authority (*t*) for the view that damage which takes the form of *personal injuries* does not fall within the Rule; but the Court of Appeal has ruled (*u*) that personal injuries as well as damage of property *are* within it, so that until the point comes squarely before the House of Lords (where it may well be reconsidered), as the law now stands both kinds of damage may ground an action under the Rule. It should also be added that, at least in the present context, what is to be regarded as a "natural consequence" is only such consequence as is "proximate and direct" (*a*): hence, although in *Weller & Co.* v. *Foot and Mouth Disease Research Institute* (*b*) it was argued that *Rylands* v. *Fletcher* applied, it was decided that it did not since the injury to the plaintiff's market was no more than a remote consequence of the escape (*c*).

Finally a word should be said about the kinship of *Rylands* v. *Fletcher* liability and nuisance. Obviously these two torts have much in common; and this is not to be wondered at since the Rule as propounded by BLACKBURN, J., originates, at least partially, from the action on the case for nuisance. Further, the same set of facts may often give rise to liability under either head; for the provinces of the two torts overlap. But they are *not* entirely coincident. *Rylands* v. *Fletcher* liability is strict, whereas, as has been seen, in many circumstances lack of care has to be established in nuisance—though, on the other hand the notion of "non-natural" user in the former tort is paralleled by the element of "reasonableness" in the latter. Nuisance is a wider concept than *Rylands* v. *Fletcher* liability which embraces many forms of annoyance quite unconnected with escape from land. Moreover whereas inevitable accident may be a defence in nuisance, only "act of God" will excuse under *Rylands* v. *Fletcher*. Further actionable public, as

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(*t*) *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471, 475, 477, 480, 481; [1947] A. C. 156, 168–9, 173–4, 178, 180.

(*u*) *Perry* v. *Kendricks Transport, Ltd.*, [1956] 1 All E. R. 154. And see *Wing* v. *L.G.O.C.*, [1909] 2 K. B. 652, 665; *Miles* v. *Forest Rock Granite Co. (Leicestershire), Ltd.* (1918), 34 T. L. R. 500; *Shiffman* v. *Order of St. John of Jerusalem*, [1936] 1 All E. R. 557; *Hale* v. *Jennings Brothers*, [1938] 1 All E. R. 579.

(*a*) See *Lumley* v. *Gye*, [1843–1860] All E. R. Rep. 208; (1853), 2 E. & B. 216, at pp. 221, 252; *per* COLERIDGE, J.

(*b*) [1965] 3 All E. R. 560; [1966] 1 Q. B. 569 (Illustration 65).

(*c*) This was the reasoning of BLACKBURN, J., in *Cattle* v. *Stockton Water-Works Co.*, [1874–1880] All E. R. Rep. 220; (1875), L. R. 10 Q. B. 453. Unfortunately in *Weller's Case* WIDGERY, J., appears to confuse this principle with the (untenable) rule in *Simpson* v. *Thomson* to the effect that only those having an interest in the property attacked (in *Weller's Case* the cattle of neighbouring farmers) may recover: see above, (182).

opposed to private, nuisance is unconnected with the occupation of land and is something quite different from liability under the Rule—which also, incidentally, is quite unlike nuisance in the form of interference with incorporeal hereditaments (*d*).

ILLUSTRATION 93

*It is essential to liability under the Rule in Rylands* v. *Fletcher that the thing that does the mischief should "escape" from the area which the defendant occupies or controls.*

Read *v.* J. Lyons & Co. Ltd., [1946] 2 All E. R. 471; [1947] A. C. 156.

Appellant, who was employed as an inspector of munitions, was injured by the explosion of a shell while she was *on respondents' premises* in the performance of her duties. There was *no evidence of negligence* on the part of respondents. *Held:* Since the injury was caused on respondents' property, and not outside it, there was no "escape" and the respondents were not liable.

ILLUSTRATION 94

*The Rule in Rylands* v. *Fletcher does not apply where the injury complained of arises from an ordinary and natural use of the defendant's land.*

Sochacki *v.* Sas, [1947] 1 All E. R. 344.

B, who was a lodger in A's house, lit a fire in his room and went out. While he was out, for some unknown reason (possibly a spark jumped out on to the floor) his room caught fire; this fire spread, and damage was done to A's property in the rest of the house. There was *no evidence of negligence* on the part of B. *Held:* B was not liable under *Rylands* v. *Fletcher*, since his use of the fire in his grate "was an ordinary, natural, proper, everyday use of a fireplace in a room" (*e*).

## 3. THE EXCEPTIONS

When he had formulated the Rule in the well-known passage from his judgment already cited, BLACKBURN, J., was careful to state the grounds of excuse; for he continued

". . . (The defendant) can excuse himself by shewing that the escape was owing to the *plaintiff's default*; or perhaps that the escape was the consequence of vis major, or the *act of God* . . ." (*f*).

(*d*) For a useful summary of the distinctions between *Rylands* v. *Fletcher* liability and nuisance see Winfield, *Law of Torts* (8th Edn.), pp. 433–438.
(*e*) [1947] 1 All E. R. at p. 345; *per* GODDARD, L.C.J.
(*f*) *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. at pp. 279–80.

Thus though all the other elements of liability are present, if the cause of the injury was the plaintiff's default or of an act of God the defendant will be excused. And these exceptions to liability, with the addition of some others which subsequent authorities have added, may now be set out.

### (i) Plaintiff's Default

There is little direct authority on this point other than Blackburn J.'s *dictum* (*g*) but it is clear that if the plaintiff brings the injury upon himself he cannot recover. Thus for example, if in a case of escape of fire the plaintiff were to set some inflammable material in the path of the fire and thus to lead it to his own house it would be clear that the defendant would not be liable.

And by the same token, the same principle applies in *Rylands* v. *Fletcher* liability as applies in nuisance; where the damage is caused not so much by the fact of the "escape" as by some peculiar sensitivity on the part of the plaintiff's property he will not recover. Thus in *Eastern and South African Telegraph Co. Ltd.* v. *Capetown Tramways Cos.* (*h*) where the running of the defendants' tramway caused an escape of electric current which, though in no such quantity as to cause damage in other ways, disturbed the plaintiffs' submarine cable transmissions, it was held that the plaintiffs had no case, for their instruments were supersensitive and the defendants' activities were not calculated to cause damage to anyone who carried on any ordinary kind of business (*i*).

### (ii) Act of God

An "act of God" in its legal sense is necessarily a very rare event something further removed from human foresight than the legal category of "inevitable accident" which will excuse, for example a trespass to the person. "Act of God" has been judicially defined as

> "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore, are calamities which do not involve the obligation of paying for the consequences that may result from them" (*k*).

(*g*) But see *Lomax* v. *Stott* (1870), 39 L. J. Ch. 834.

(*h*) [1902] A. C. 381.

(*i*) In view of the wording of the Law Reform (Contributory Negligence) Act, 1945, s. 4 (17 Halsbury's Statutes (2nd Edn.) 14), there seems no reason too, why that Act should not be invoked to reduce the damages where the plaintiff is partly in fault.

(*k*) *Tennent* v. *Earl of Glasgow* (1864), 2 Macph. (Ct. of Sess.) (H. L.) 26–7; *per* Lord Westbury. For another definition, see *Nugent* v. *Smith* (1876), 1 C. P. D. 423, 444, *per* James, L.J.

It is therefore not surprising that this defence has succeeded in only one reported case which is recorded in the following Illustration (*l*); and even that decision has not escaped criticism (*m*).

The important point to note is that liability under *Rylands* v. *Fletcher* being "strict", the defendant is in the words of BLACKBURN, J., "*primâ facie*" liable without proof of negligence and therefore inevitable accident is no defence; though very rarely, when it occurs, that more drastic thing, an act of God, may be.

ILLUSTRATION 95

*"Act of God" is a defence to a claim under the Rule.*

Nichols *v.* Marsland (1876), 2 Ex. D. 1.

There had for many years been certain pools on respondent's land which had been constructed by damming up a natural stream. The artificial banks of the dam were well constructed and in good condition. An unusual fall of rain caused the water to break the banks, it overflowed and carried away certain bridges (in respect of the breaking of which the action was brought) lower down the stream. *Held: (On the finding of the jury* that the flood was so great that it could not have been anticipated) that respondent was excused on the ground that the flood was an act of God.

(iii) ACT OF A STRANGER

Just as the fortuitous intervention of natural elements will excuse the defendant, so will the act (*n*) of some third party (though not of course the act of the defendant's servants, agents or contractors) over whom he has *no control* and whose actions he cannot foresee (*o*) and prevent. Thus in *Box* v. *Jubb* (*p*) the defendant was held not liable when damage was caused by the overflow of his reservoir, since the overflow was due to the blocking of a drain which supplied the reservoir by people over whom the defendant had no control.

But it must be noted that if the defendant is to succeed in this

(*l*) A heavy rainfall is, after all, not beyond the bounds of human foresight in the British Isles! See *Greenock Corporation* v. *Caledonian Rail. Co.*, [1917] A. C. 556. And see *A.-G.* v. *Cory Bros. & Co.*, *Kennard* v. *Cory Bros. & Co.* (1919), 35 T. L. R. 570, 574; *per* SCRUTTON, L.J., and *Slater* v. *Worthington's Cash Stores* (1930), *Ltd.*, [1941] 3 All E. R. 28; [1941] 1 K. B. 488 (snowfall); *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789.

(*m*) See *Greenock Corporation* v. *Caledonian Rail. Co.*, *supra*.

(*n*) Before *Perry* v. *Kendricks Transport, Ltd.*, [1956] 1 All E. R. 154, there was authority for the proposition that the act must be conscious or deliberate, but that case (intermeddling of children) negatives this requirement.

(*o*) See *Perry's Case*, [1956] 1 All E. R. 154, at pp. 158, 160, 161.

(*p*) (1879), 4 Ex. D. 76.

defence he must prove affirmatively (*q*) that the damage was caused by someone whom he had no power to control; and the fact that it was caused by the act of a stranger will not excuse him if it would not have been inflicted at all if he had taken reasonable care to prevent it (*r*).

ILLUSTRATION 96

(a) *The defendant will not be liable if he can establish that the damage was caused by the act of a third party which he could not reasonably have prevented.*

Rickards *v.* Lothian, [1913] A. C. 263.

Appellant was lessee of a block of offices in Melbourne and he had sub-let the second floor to respondent. Some unknown person blocked the waste pipes of a wash basin on the fourth floor (which was in appellant's control) and turned the tap full on. Respondent's stock in trade was damaged by the ensuing overflow. *Held:* Appellant was not liable since the damage was due to the act of a stranger which appellant could not reasonably have prevented (*s*).

(b) *But the act of a stranger will not excuse where, despite such an act, the defendant ought reasonably to have prevented the damage.*

Northwestern Utilities, Ltd. *v.* London Guarantee and Accident Co., [1936] A. C. 108.

Respondents owned an hotel in Edmonton, Alberta. Appellants were a public utility company who supplied gas to consumers in the city. Due to the fact that the city authorities, while constructing a sewer, had let down the soil beneath one of appellants' mains a pipe broke and gas, percolating upwards, caused a fire which destroyed respondents' hotel. *Held:* (*inter alia*) that although appellants would not have been liable under *Rylands* v. *Fletcher* if the action of the city authorities had been such that its consequences could not have been foreseen and prevented, *nevertheless* they were liable since, knowing of the excavations beneath the pipes they did nothing to prevent the breakage, which they could have foreseen together with its consequences. ". . . They gave no thought to the matter. They left it all to chance. It is, in their Lordships' judgment, impossible now for them to protest that they could have done nothing effective to prevent the accident . . ." (*t*).

### (iv) PLAINTIFF'S CONSENT

Where the plaintiff *consents* to the creation of the source of the mischief, as for instance by giving the defendant licence to dump

(*q*) *A. Prosser & Son, Ltd.* v. *Levy*, [1955] 3 All E. R. 577.
(*r*) *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1936] A. C. 108 (Illustration 96 (b)); *Hanson* v. *Wearmouth Coal Co., Ltd., and Sunderland Gas Co.*, [1939] 3 All E. R. 47; *Prosser's Case*, *supra*.
(*s*) See *Perry's Case*, [1956] 1 All E. R. 154.
(*t*) [1936] A. C. at pp. 127–8.

a large and dangerous accumulation of spoil upon his land (*u*), by the ordinary rule of "*volenti non fit injuria*" the Rule in *Rylands* v. *Fletcher* cannot apply.

The only difficulty that arises in connexion with the application of this exception is to determine (as always where the "*volenti*" principle is invoked) when a consent express or implied must be taken to have been given.

Thus for example it is now well established (*a*) that where premises are occupied by more than one party—as where a tenant occupies a lower floor and his landlord an upper—each party must be taken to have consented to the installation of things, such as a water system (*b*), constructed for their common *benefit*; and thus neither will be liable for damage caused by escape from it in the absence of negligence or unless (*c*) the system is allowed by the person in control of it to be in a dangerously defective condition. But every case must turn upon the facts, and though where common benefit is absent (as in particular where the action is between occupiers of separate properties), an implied consent will be hard to establish (*d*), yet this may still sometimes be done. For instance in *Peters* v. *Prince of Wales Theatre (Birmingham), Ltd.* (*e*) a tenant of a shop who leased it from the proprietors of an adjoining theatre was held impliedly to have consented to the presence of a sprinkler system in the theatre which was there when he took his lease; consequently the landlords were held not liable in the absence of negligence when during a thaw the pipes of the system burst and the tenant's shop was flooded (*f*).

ILLUSTRATION 97

*Where the plaintiff has consented to the existence of the source of the mischief the Rule does not apply.*

Thomas *v.* Lewis, [1937] 1 All E. R. 137.

Plaintiff and defendant occupied adjoining lands; plaintiff was a farmer, defendant used his land for quarrying. Defendant granted

(*u*) See *A.-G.* v. *Cory Bros. & Co., Kennard* v. *Cory Bros. & Co.*, [1921] 1 A. C. 521, 539; *per* Viscount FINLAY.

(*a*) See *Riddle* v. *City Business Properties, Ltd.*, [1942] 2 All E. R. 216; [1942] 1 K. B. 269; *Peters* v. *Prince of Wales Theatre (Birmingham), Ltd.*, [1942] 2 All E. R. 533; [1943] K. B. 73, where the older authorities from *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217, are reviewed.

(*b*) Though of course such an installation is also a "natural" user of the premises (*c*) *A. Prosser & Son, Ltd.* v. *Levy*, [1955] 3 All E. R. 577.

(*d*) *Humphries* v. *Cousins* (1877), 2 C. P. D. 239.

(*e*) [1942] 2 All E. R. 533; [1943] K. B. 73.

(*f*) The tenant impliedly takes the premises as he finds them: *Cheater* v. *Cater*, [1918] 1 K. B. 247 (overhanging yew *at time of letting*). See also *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756.

plaintiff grazing rights over a part of his land. Plaintiff complained of damage, both to the rest of his farm and to the land granted, caused by stones thrown up during defendant's quarrying operations. *Held:* Plaintiff succeeded (*g*) in respect of the *farm*, but not in respect of the piece of land granted, for the grant must be taken to have implied a right on the part of defendant to continue to cast stones upon the land as before.

### (v) Statutory Authority

This exception requires no stressing; for it has already been remarked that

> "No action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone" (*h*).

And thus statutory authority is a protection even under *Rylands* v. *Fletcher* (*i*); but if there be *negligence* (*k*), or an excess of the authority accorded, the protection ceases.

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(*g*) The claim was in nuisance; but the principle would apply under *Rylands* v. *Fletcher*.

(*h*) *Geddis* v. *Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430, 455–6; *per* Lord Blackburn.

(*i*) *Green* v. *Chelsea Waterworks Co.*, [1891–1894] All E. R. Rep. 543; (1894), 70 L. T. 547: *Dunne* v. *North Western Gas Board*, [1963] 3 All E. R. 916; [1964] 2 Q. B. 806: *Pearson* v. *North Western Gas Board*, [1968] 2 All E. R. 669 where Rees, J., though forced to follow it, expresses disapproval of *Dunne's Case*.

(*k*) *Manchester Corporation* v. *Farnworth*, [1930] A. C. 171; *Markland* v. *Manchester Corporation*, [1934] 1 K. B. 566; *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1936] A. C. 108.

# CHAPTER 13

# DEFAMATION



To "defame" is to take away the fair fame of a person; to attack his reputation. Such an attack is of course usually verbal (whether oral or in writing), but disparagement by actions or gestures is also possible and not solely the prerogative of schoolboys.

For reasons which are mainly historical our law divides actions for defamation into two sorts; actions for libel on the one hand, and for slander on the other. The basis of liability in these two torts is for the most part similar; but the rule is that whereas libel is actionable *per se*, that is to say of itself, without any proof of special damage, slander is in general only actionable if some actual damage resulting from the slander can be proved.

*Libel* consists in an attack upon the plaintiff's reputation which takes some *permanent* form (*a*). The common example is a statement committed to writing or to print, but other kinds of attack may also be of a permanent nature (and are therefore capable of being libellous), such as the making of a defamatory effigy (*b*) or picture, or including something defamatory on the sound-track of a film (*c*).

*Slander* consists in an attack which is *transient* in form. The spoken word is the common example; but here again there may be

(*a*) And by s. 1 of the Defamation Act, 1952 (32 Halsbury's Statutes (2nd Edn.) 400), by the necessary but fictitious process of statute—"For the purposes of the law of libel and slander, the *broadcasting* of words by means of wireless telegraphy *shall be treated* as publication in *permanent form*." For the meaning of "broadcasting by means of wireless telegraphy" see s. 16 (3) of the Act. By a further fiction s. 16 (1) includes "visual images" (*inter alia*) as "words". The Theatres Act, 1968, by s. 3, subject to exceptions (s. 7), provides that publication of words, gestures, etc. in performance of a play "shall be treated as publication in permanent form": 'and this applies not only to defamatory statements in the strict sense but also to malicious falsehood and slander of title, etc. (Defamation Act, 1952, s. 3)—see below, p. 359.

(*b*) *Monson* v. *Tussauds, Ltd.*, [1894] 1 Q. B. 671. See especially *per* LOPES, L.J., at p. 692, and see also *Garbett* v. *Hazell, Watson and Viney, Ltd.*, [1943] 2 All E. R. 359.

(*c*) *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581.

other forms, such as the making of some derogatory gesture; for mime can do as much damage as words.

In order to be actionable defamation must refer to the person who alleges that he has been defamed, and must have been published by the defendant. Further, since the complaint is based upon loss of a good reputation, and no man can claim to lose what he has no right to have, the *truth* (*d*) of the defendant's statement or assertion is a defence to the action; and this defence is known as "justification".

There are also certain other defences, such as fair comment and privilege, and a proper apology may also draw the sting from the plaintiff's case.

The following matters must therefore be considered. (i) The general nature of defamation; (ii) slander and special damage; (iii) reference to the plaintiff; (iv) publication; (v) justification; (vi) fair comment; (vii) privilege; (viii) apology and amends.

## 1. THE GENERAL NATURE OF DEFAMATION

In this section the nature of defamatory statements, the meaning of "innuendo", and the basis of liability in defamation will be considered.

### What is Defamatory

This is a difficult subject, and the courts have been by no means consistent in their approach to it. An extended discussion would be out of place here and the reader should consult larger and more specialized works.

Whether a statement bears a defamatory meaning or not is a question for the jury to decide (*e*); but it is for the *judge* to determine whether it is *capable* of bearing such a meaning (*f*). The question is therefore one over which the courts have exercised considerable control.

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(*d*) In the case of a prosecution for *criminal* libel truth is only a defence where it is proved to be in the public interest: Libel Act, 1843, s. 6 (13 Halsbury's Statutes (2nd Edn.) 1129). It should be recalled that whereas libel is a *crime* as well as a tort, generally speaking, slander is not.

(*e*) This has been so at any rate since Fox's Libel Act, 1792 (13 Halsbury's Statutes (2nd Edn.) 1120). And where the jury *negatives* a defamatory meaning the court must seldom interfere: *Lockhart* v. *Harrison* (1928), 139 L. T. 521.

(*f*) See *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; *Morris* v. *Sandess Universal Products, Ltd.*, [1954] 1 All E. R. 47. Where a judge sits without a jury as a matter of pure theory both the "law" (capability) and the decision of "fact" are for him: but his decision as a whole is appealable. See *Slim* v. *Daily Telegraph, Ltd.*, [1968] 1 All E. R. 497, 513; [1968] 2 Q. B. 157, 187; *per* Salmon, L.J.

There have been many suggested definitions of what is defamatory. It has been said that the test should be

> ". . . Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" (*g*).

And Lord BLACKBURN pronounced the classic definition in the following words,

> "A libel for which an action will lie, is defined to be a written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, *injurious to them in their trade, or holding them up to hatred, contempt, or ridicule*" (*h*).

But so much depends upon facts and surrounding circumstances that it is dangerous to be over-precise. Perhaps the important things to notice are the following.

First, the essence of defamation is that it is an *attack on reputation*. Thus although, as Lord BLACKBURN said, it may be defamatory to make a statement which is injurious to a man in his trade or calling, it will only be so if it is his good name that is selected for attack. So if I falsely assert that you manage your business unscrupulously or even incompetently I may be defaming you and may be liable in defamation; but if I assert however falsely and however much the statement may damage you by loss of custom, that you have closed your business, this imputation is not defamatory (*i*), for it is no slur upon your reputation that you have shut up shop.

Secondly, although defamation commonly comprises some imputation of moral turpitude (*k*) or of dishonesty (*l*), this *need* not be so; for allegations of other kinds may have the probable effect of lowering the plaintiff in the estimation of ordinary people. Thus though by very definition a woman who is raped is not to blame, it has been held that it is defamatory to assert that a woman has been raped (*m*); and it is also defamatory to impute insanity (*n*),

(*g*) *Sim* v. *Stretch*, [1936] 2 All E. R. 1237, 1240, *per* Lord ATKIN.
(*h*) *Henty's Case* (1882), 7 App. Cas. 741, at p. 771 (italics ours).
(*i*) But I may be liable in malicious falsehood: See below, Part II, Chapter 14.
(*k*) See, *e.g.*, *Bell* v. *Stone* (1798), 1 Bos. & P. 331 (infernal villain); *Cox* v. *Lee* (1869), L. R. 4 Exch. 284 (ingratitude); *Angel* v. *H. H. Bushell & Co., Ltd.*, [1967] 1 All E. R. 1018; [1968] 1 Q. B. 813 (ignorance of normal business ethics).
(*l*) *Greville* v. *Chapman* (1844), 5 Q. B. 731, 744 (turf trickery).
(*m*) *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581.
(*n*) *Morgan* v. *Lingen* (1863), 8 L. T. 800.

impecuniousness or insolvency (*o*). On the other hand it seems that, however unpopular the suppression of some crimes may be, it has been held that it cannot on the face of it be defamatory to accuse a man of having put in motion the machinery for suppressing them (*p*).

Thirdly, it must be noted that it is possible to defame a *corporation*. Actions for defamation by corporations are, however, necessarily limited in scope inasmuch as, being fictitious entities, corporations cannot possess a "reputation" in quite the same sense as real people. For example to allege that a corporation suffers from a contagious disease must be mere vulgar abuse, whereas a similar allegation against a real person would be defamatory. Hence it is established that a corporation may sue for defamation if the statement made would have been defamatory of a real person *and if* it was such that it tended to cause the corporation actual damage in respect of its property or business (*q*). Thus it has been held that it is not defamatory to charge a corporation with "corrupt practices" in the management of muncipal affairs (*r*); but it certainly is defamatory to charge it with insolvency, incompetence or dishonesty in the carrying on of its business or in the management of its property (*s*). And so in *South Hetton Coal Co. Ltd.* v. *North-Eastern News Association, Ltd* (*t*) the Court of Appeal had no doubt that a statement in a newspaper to the effect that a colliery company let insanitary cottages to its miners was libellous (*u*).

It is now clear that trade unions may be competent *plaintiffs* in defamation actions (*a*).

ILLUSTRATION 98

*Defamation does not necessarily involve an imputation of dishonesty, criminality, or moral turpitude.*

(*o*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859), 4 H. & N. 87; *Cox* v. *Lee* (1869), L. R. 4 Exch. 284, 288.

(*p*) *Byrne* v. *Deane*, [1937] 2 All E. R. 204; [1937] 1 K. B. 818 (allegation of informing police about gambling machines in golf club).

(*q*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859), 4 H. & N. 87; *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133; *D. & L. Caterers, Ltd., & Jackson* v. *D'Ajou*, [1945] K. B. 364.

(*r*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94. But see *Willis* v. *Brooks*, [1947] 1 All E. R. 191, 192.

(*s*) *English and Scottish Co-operative Properties, Mortgage and Investment Society, Ltd.* v. *Odhams Press, Ltd.*, [1940] 1 All E. R. 1; [1940] 1 K. B. 440.

(*t*) [1894] 1 Q. B. 133.

(*u*) During the first world war it was held actionable to describe a company as "German": *Slazengers, Ltd.* v. *Gibbs* (1916), 33 T. L. R. 35.

(*a*) *National Union of General and Municipal Workers* v. *Gillian*, [1945] 2 All E. R. 593; [1946] K. B. 81; *Willis* v. *Brooks*, [1947] 1 All E. R. 191.

Ridge *v.* The "English Illustrated Magazine", Ltd. (1913), 29 T. L. R. 592.

Defendants published a story which purported to be written by plaintiff, a well-known writer. In fact the story had been written by one Gubbins, a grocer's assistant. It was a badly written story and people who read it would infer that plaintiff's work had badly deteriorated. *Held:* That if the jury came to the conclusion that anyone reading the story would think plaintiff a mere commonplace scribbler they could *award* damages for libel. (As to Gubbins' conduct, see remarks of DARLING, J.)

*Innuendo.*

There is no such thing as a statement that is defamatory in the abstract (*b*). To take a simple example, suppose B says to X, "A is a Viper"; this, one would think, *must* not only at first sight, but in all circumstances, and in the abstract be defamatory. But reflexion will show that even this statement is not inevitably so: for instance it might well be that B was referring to the fact that A is a member of a cricket team who call themselves the "Vipers". Conversely, a statement which is on the face of it commendation, may become defamation when its context is known. Even "Y is a Saint" might be slander if the statement was understood to refer to a criminal gang known as "the Saints".

Thus although some statements are clearly *primâ facie* defamatory, while others are *primâ facie* not defamatory, their real quality (*c*) can only be tested in the light of the surrounding circumstances.

> "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances" (*d*).

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(*b*) This is particularly so since word usage changes: for instance, to call a person a "pansy" may now be *primâ facie* defamatory—see *Thaarup* v. *Hulton Press, Ltd.* (1943), 169 L. T. 309—but at one time it might not have been.

(*c*) Though the "real quality" is no more than a legal abstraction. "Libel is concerned with the meaning of words. Everyone outside a court of law recognizes that words are imprecise instruments for communicating . . . thoughts . . . and yet the law has to attribute to them . . . a single meaning as the 'right' meaning": *Slim* v. *Daily Telegraph, Ltd.*, [1968] 1 All E. R. 497, 504; [1968] 2 Q. B. 157, 172; *per* DIPLOCK, L.J. This is one of the cardinal difficulties of this part of the law. This judgment contains a classic review of these difficulties and ends with words which can only be heartily endorsed: "I venture to recommend . . . the law of defamation . . . for the attention of the Law Commission. It has passed beyond redemption by the courts."

(*d*) *Capital and Counties Bank, Ltd.* v. *Henty & Sons* (1882), 7 App. Cas. 741, 771; *per* Lord BLACKBURN (Illustration 99 (b)).

"George is a fine man" is praise, not calumny; but it all depends how you say it and how you look when you say it—"George is a *fine* man" may convey just the opposite of what it purports to express.

It follows that evidence may be given to show that a statement which is *primâ facie* defamatory is really innocent in the circumstances, and conversely that a statement *primâ facie* innocent is defamatory. The latter will be a case of *innuendo*.

Thus, as was explained in *Lewis* v. *Daily Telegraph, Ltd.* (*e*), upon which the ensuing paragraphs are based, there are three possibilities. Words may be plainly defamatory in their ordinary and natural meaning, requiring no further explanation to render them defamatory: *e.g.* "X is a thief" speaks for itself (*f*). On the other hand in order to bear a defamatory meaning the statement in question may require a gloss or explanation by way of *innuendo*; and where this is the case the *innuendo* may take one of two forms. It may take the form of a particular interpretation of the natural and ordinary meaning of the words as they stand (*g*) which, though they *could* bear a perfectly innocent meaning, attaches to them a defamatory sense. On the other hand this kind of explanation may sometimes not be enough to render that defamatory which is *prima facie* innocent; it may be necessary, in order to ascribe a defamatory meaning to the words used to go farther and produce extrinsic evidence outside the actual wording of the statement itself which shows it *in the particular* circumstances to be derogatory. Let us take an example suggested by Lord DEVLIN (*h*). Suppose B says of A "I saw him enter a brothel". Is this necessarily defamatory? It may seem so, but after all A might have entered the house not knowing what it was, or he might have been forced to go there on business. Hence, as Lord DEVLIN points out it would not be ridiculous to add in the plaintiff's pleading in such a case an *innuendo* to the effect that the words were understood to mean and did mean

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(*e*) [1963] 2 All E. R. 151; [1964] A. C. 234. And see *Loughans* v. *Odhams Press, Ltd.*, [1962] 1 All E. R. 404 and *Grubb* v. *Bristol United Press*, [1962] 2 All E. R. 380; [1963] 1 Q. B. 309. Both these decisions are discussed and explained in *Lewis' Case*.

(*f*) Though such is the difficulty of this subject that this statement is not categorical. Like "George is a fine man" tone and context may make all the difference (see *Lewis' Case*—last note—at pp. 165 and 271 respectively: *per* Lord HODSON). "X" might be being praised as a stealer of souls from the Devil. It is this protean quality of words that makes it so essential in a modern civil trial that the meaning and quality of the statement should be left to the jury as a question of fact.

(*g*) See *Jones* v. *Skelton*, [1963] 3 All E. R. 952, 958.

(*h*) *Lewis' Case* at pp. 169–170 and 278 respectively: Lord DEVLIN'S illustration is slightly enlarged upon.

that A entered the brothel for an immoral purpose. Such an *innuendo* is by way of explanation of the words actually used, no more. Now suppose that B says of A "I saw A enter No. 6 Purity Street". Here there is nothing in the words themselves which could conceivably be explained as being defamatory (*i*); but by *innuendo* they may become defamatory if it be explained that the house in question was well-known in the vicinity as a house of ill-fame. Here, be it noted, the evidence is extrinsic to the words actually used.

In other words, a "true" innuendo is "a meaning which is different from the ordinary and natural meaning of the words, and defamatory because of special facts and circumstances known to those to whom the words were published (*k*)". And these special facts have to be pleaded (*l*) and proved. In this connexion, however, it has recently been made clear that in general (*m*) an innuendo cannot be supported by evidence of defamatory statements made about the plaintiff by people other than the defendant (*n*) nor by the defendant about other people (*o*).

There are thus two kinds of *innuendo*. The one a mere special explanation of the words used, the other an explanation supported by surrounding facts. The first kind of *innuendo* is sometimes termed a "false" *innuendo*, the second kind a "true" *innuendo* (*i*). The difference is one of great practical significance for two reasons: first a "true" *innuendo* must, as we have seen, by a rule of court (*p*) be pleaded specifically and particulars of the facts and matters relied upon must be set out in the statement of claim, whereas a "false" *innuendo need* not be specifically pleaded (*r*); secondly a "true", as

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(*i*) Again, *should* this be affirmed categorically? Suppose Purity Street to be a Puritan enclave in a Roman Catholic community: what then? Though of course the evidence would have to be extrinsic.

(*k*) *Slim* v. *Daily Telegraph, Ltd.*, [1968] 1 All E. R. 497, 511; *per* SALMON, L.J.

(*l*) R. S. C. Ord. 82, r. 3. (1).

(*m*) Though there may be exceptions: *e.g.* where statements about the plaintiff are included as a part of a series of statements derogatory of others, as in a "crime column": see *Wheeler* v. *Somerfield*, [1966] 2 Q. B. 94; [1966] 2 All E. R. 305.

(*n*) *Astaire* v. *Campling*, [1965] 3 All E. R. 666.

(*o*) *Wheeler's Case* (above, n. (*m*)).

(*p*) Lord DEVLIN (*Lewis' Case* at pp. 170 and 279–280 respectively) prefers "popular" *innuendo* to "false" and "legal" *innuendo* to "true".

(*q*) R. S. C. Ord. 82, r. 3 (1).

(*r*) If it is the effect is doubtful: in *Slim* v. *Daily Telegraph, Ltd.*, [1968] 1 All E. R. 497; [1968] 2 Q. B. 157, SALMON, L.J., inclined to the view that the plaintiff is tied at the trial to the meaning he alleges in his pleadings, whereas DIPLOCK, L.J., would permit him also to allege at the trial other meanings as well, provided that they are less "injurious" than the meaning

opposed to a "false", *innuendo* forms a separate cause of action (*s*) from the cause of action based upon the natural and ordinary meaning of the words used.

It should be added that the pleader must clearly exercise a discretion in deciding to plead or omit to plead a "false" *innuendo*; where the words used are obviously defamatory the pleading of a "rhetorical" (*t*) *innuendo* should clearly be discouraged. But Lord DEVLIN (*u*) made it plain that "false" *innuendos* should in his opinion be pleaded wherever the derogatory meaning is not reasonably clear since it is for the judge (though the jury decide whether the words were in *fact* defamatory) to rule whether or not the meaning alleged is *capable* of being defamatory and he must rule on each distinct meaning alleged—hence definition of the special meaning or meanings alleged in the pleadings aids clarity of decision at the trial.

Where a special and defamatory meaning is established by means of an *innuendo* it will be sufficient to show that there are people who know the special facts which render the statement defamatory; it is not necessary to prove that any particular person actually did draw an inference adverse to the plaintiff's reputation. Thus if a statement is made which only happens to be defamatory to the plaintiff *because she is a married woman* it will be necessary to call evidence from people who know of the statement and know her to be married, but not *essential* to prove that any of these people actually drew a defamatory inference from the statement (*a*).

ILLUSTRATION 99

(a) *Words may be defamatory in their ordinary sense.*

Wakley *v.* Cooke (1849), 4 Exch. 511.

Defendants published an article containing the words "There can be no court of justice unpolluted which this libellous journalist (meaning the plaintiff) . . . is allowed to disgrace with his presidentship". Plaintiff was a coroner. *Held:* The words "libellous journalist" taken in the whole context of the article were necessarily defamatory (*b*).

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pleaded. But, as SALMON, L.J., points out (pp. 185, 512), what is "more" or "less" injurious is by no means easy to determine.

(*s*) *Sim* v. *Stretch*, [1936] 2 All E. R. 1237.

(*t*) Lord DEVLIN's word. The example of the man accused of entering a brothel given in the text probably is "rhetorical"—that is to say unnecessary.

(*u*) *Lewis' Case* at pp. 174–175 and 286–287 respectively.

(*a*) See *Hough* v. *London Express Newspaper, Ltd.*, [1940] 3 All E. R. 31; [1940] 2 K. B. 507.

(*b*) But, as has been explained, the context must always be considered. Thus "Ananias" is not necessarily a defamatory epithet: *Australian Newspaper Co., Ltd.* v. *Bennett*, [1894] A. C. 284.

(b) *Words not defamatory in their ordinary sense will only become so if an innuendo can be established.*

Capital and Counties Bank Ltd. *v.* Henty & Sons (1882), 7 App. Cas. 741.

Respondent firm had adopted practice of receiving payment from customers in form of cheques drawn on various branches of appellant bank, which appellants cashed for respondent's convenience at their Chichester branch. A new manager of this branch refused to continue the practice. Respondents sent circular to customers "H & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches" of appellant bank. The result was that there was a run on the bank which suffered loss. In an action by respondents for libel; *innuendo that the circular imputed insolvency. Held:* The words used were *not* libellous in their natural sense, and the innuendo suggested was *not* the inference which reasonable people would draw (*c*). There was therefore no *primâ facie* libel and no innuendo had been established in the form put forward. *No case to go to the jury* and the claim failed (*d*).

(c) *Words not defamatory in their ordinary sense may become so if an innuendo is pleaded and proved.*

Tolley *v.* J. S. Fry & Sons, Ltd., [1931] All E. R. Rep. 131; [1931] A. C. 333.

Appellant was a famous amateur golfer. Respondents issued an advertisement depicting appellant driving with a packet of their chocolate protruding from his pocket. Beside picture of appellant was picture of caddie, also with protruding packet. The caddie was represented as comparing excellence of respondent's goods to excellence of appellant's drive in the following words

> "The caddie to Tolley said, 'Oh, sir.
> Good shot, sir; that ball see it go, sir.
> My word how it flies,
> Like a Cartet of Fry's.
> They're handy, they're good and priced low, sir.'"

Appellant had not been consulted, and had received nothing in respect of the advertisement. In action for libel. *Held:* these facts supported the innuendo that appellant had prostituted his amateur status for advertising purposes, and that the advertisement was therefore defamatory of a man in his position (*e*).

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(*c*) A surprising conclusion. In *Slim* v. *Daily Telegraph, Ltd.*, [1968] 1 All E. R. 497, 513; [1968] 2 Q. B. 157, 183, SALMON, L.J., remarks of the *Capital and Counties Case* that it is one in which principles were never better formulated . . . "nor perhaps ever worse applied".

(*d*) See also *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68; *Stubbs, Ltd.* v. *Russell*, [1913] A. C. 386.

(*e*) See also *Shepheard* v. *Whitaker* (1875), L. R. 10 C. P. 502; *Stubbs, Ltd.* v. *Mazure*, [1920] A. C. 66.

### The Basis of Liability

Liability for defamation is strict in the sense that it will be imposed without proof of knowledge on the part of the defendant of the defamatory nature of the statement, or even of lack of due care in failing to acquaint himself of its defamatoriness (*f*). And it is no excuse where the statement is in fact defamatory that he made it in a mood of levity, rather than out of spite, for

> "As was said in the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill . . . no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport" (*g*).

But it must be carefully noted that the strict rule of the common law has now been mitigated in the case of "unintentional" defamation by the provisions of the Defamation Act, 1952, as to offer of amends; this will be discussed below.

#### ILLUSTRATION 100

*"Liability for libel does not depend on the intention of the defamer; but on the fact of defamation"* (*h*).

Cassidy *v.* Daily Mirror Newspapers, Ltd., [1929] 2 K. B. 331.

Respondents published in a newspaper a photograph of appellant's husband with a Miss X which carried the caption "Mr. C . . . and Miss X, whose engagement has been announced". The husband himself had authorized both the photograph and the caption, and the respondents' reporter had no reason to know of the fact that husband was other than single. *Held:* Appellant succeeded in libel. The photograph and caption were capable of bearing the meaning that appellant was her husband's mistress, and the jury had so found. Respondents' obvious innocence was no defence.

## 2. SLANDER AND SPECIAL DAMAGE

### Special Damage

It has already been noticed that the *general* rule is that libel is actionable *per se*, *i.e.* without need for proof of special (that is actual) damage, but that slander is only actionable upon proof of such damage. And it has also been noted that slander is defamation

(*f*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20; *Cassidy* v. *Daily Mirror Newspapers, Ltd.*, [1929] 2 K. B. 331 (Illustration 100).
(*g*) *Capital and Counties Bank, Ltd.* v. *Henty & Sons* (1882), 7 App. Cas. 741, 772; *per* Lord Blackburn.
(*h*) *Cassidy's Case*, [1929] 2 K. B. 331, 354; *per* Russell, L.J.

in a *transient* form (such as spoken as opposed to written words), whereas libel is defamation which takes a *permanent* form.

The kind of special damage necessary to support an action for slander is some *definite temporal loss* (*i*) which flows directly from the use by the defendant of the words complained of.

The loss must be one which is capable of being estimated in money (*k*), and it must be an actual not merely an apprehended loss (*l*). Thus loss of trade (*m*) or employment is enough, and so is actual loss of even gratuitous hospitality (*n*), since for example a meal has pecuniary value. But loss of society, or the infliction of suffering are not enough (*o*); though it may be that once an actual pecuniary loss is established the damages awarded are not necessarily to be restricted to it, but may also include some compensation for loss of reputation generally (*p*).

In slander as in other torts the damage alleged must also be a *direct* consequence of the slander, and must not be too remote. Thus, for instance, it must spring from the use by the defendant of the words complained of and not from the independent act of another person (*q*). It is for this reason that, as will be seen, a defendant cannot generally be held responsible for damage caused by the unauthorized repetition of a slander; and this is of course doubly true where it is the plaintiff himself who repeats it, as in *Speight* v. *Gosnay* (*r*) where an engaged woman repeated a slander of herself to her fiancé who thereupon refused to marry her.

ILLUSTRATION 101

*In a slander action, the general rule is that an actual temporal loss directly resulting from the slander must be proved.*

Chamberlain *v.* Boyd (1883), 11 Q. B. D. 407.

Plaintiff failed, upon a ballot, to be elected to the Reform Club. Later, at a meeting to change the rules of the Club defendant said of

(*i*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 532; *per* BOWEN, L.J. "The necessity of alleging and proving actual temporal loss with certainty and precision has been insisted upon for centuries".

(*k*) *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407, 412 (Illustration 101).

(*l*) *Ibid.*, at p. 416.

(*m*) *Evans* v. *Harries* (1856), 1 H. & N. 251. Contrast *Roberts* v. *Roberts* (1864), 5 B. & S. 384 (expulsion from religious sect).

(*n*) *Moore* v. *Meagher* (1807), 1 Taunt. 39; *Davies* v. *Solomon* (1871), L. R 7 Q. B. 112.

(*o*) *Allsop* v. *Allsop* (1860), 5 H. & N. 534.

(*k*) *Dixon* v. *Smith* (1860), 5 H. & N. 450.

(*q*) *Weld-Blundell* v. *Stephens*, [1920] A. C. 956, 983.

(*r*) (1891), 60 L. J. Q. B. 231. See also *Parkins* v. *Scott* (1862), 1 H. & C. 153.

plaintiff that his conduct at the Melbourne Club had been so bad that his expulsion had been called for. At this meeting the rules were not changed. Plaintiff claimed in slander, alleging that the failure to change them was due to an intention to keep him from the Club, induced by defendant's statement. *Held:* Plaintiff failed. (i) There was no proof of pecuniary loss, (ii) even if failure to be elected were a temporal loss, in the circumstances it was hypothetical; there was no proof that a change of rules would have resulted in election. "The risk of temporal loss is not the same as temporal loss; the risk of suffering injury is not the same as to suffer injury" (*s*).

### SLANDERS ACTIONABLE *per se*

As an exception to the general rule that actual damage is needed to support a claim in slander, there are certain kinds of slanders that are actionable *per se*. They are the following:—

(i) *Slanders imputing a criminal offence punishable by death or imprisonment.* These include, for instance, an imputation that the plaintiff is a murderer (*t*), a forger (*u*) or a blackmailer (*a*), or that he has committed an unspecified crime punishable with imprisonment (*b*). And, since the reason for making these slanders actionable *per se* is not their tendency to bring the plaintiff to unjust punishment, but their tendency to ostracise him, it is enough if the imputation is that he has a *past* conviction (*c*).

But an imputation that the plaintiff has inflicted a civil injury (*d*) or that he has achieved the impossible by murdering his wife, who is known to be alive, is not enough (*e*). And special damage must be proved where a crime punishable by *fine only* is imputed (*f*).

(ii) *Slanders imputing a contagious disease which tends to exclude the sufferer from society.* The diseases include such diseases as venereal disease, leprosy or plague. But it must be noted that an imputation of a *past* infection will only be actionable upon proof of special damage, since the fact that the plaintiff has had a past infection should not render him unfit for society (*g*).

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(*s*) (1883), 11 Q. B. D. at p. 416; *per* BOWEN, L.J.
(*t*) *Oldham* v. *Peake* (1774), 2 Wm. Bl. 959.
(*u*) *Jones* v. *Herne* (1759), 2 Wils. 87.
(*a*) *Marks* v. *Samuel*, [1904] 2 K. B. 287.
(*b*) *Webb* v. *Beavan* (1883), 11 Q. B. D. 609.
(*c*) *Gray* v. *Jones*, [1939] 1 All E. R. 798. But words indicating mere suspicion of a crime are not enough: *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156.
(*d*) See *Thompson* v. *Bernard* (1807), 1 Camp. 48.
(*e*) *Snag* v. *Gee* (1597), 4 Co. Rep. 16a.
(*f*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.
(*g*) See *Carslake* v. *Mapledoram* (1788), 2 Term. Rep. 473; *Bloodworth* v. *Gray* (1844), 7 Man. & G. 334.

(iii) *Slanders imputing unchastity in a woman.* Such slanders were not actionable *per se* at common law. But they are made so by the Slander of Women Act, 1891 (*h*). "Unchastity" includes adultery and it has also been held to include lesbianism (*i*). The Act, however, provides that a successful plaintiff shall not recover more costs than damages unless the judge certifies that she had reasonable cause for bringing the action (*k*).

(iv) *Slanders within the Defamation Act*, 1952, s. 2. This section provides that

> "In any action for slander in respect of words *calculated to disparage the plaintiff in any office, profession, calling, trade or business* held or carried on by him *at the time of the publication*, it shall *not* be necessary to allege or prove *special damage*, whether *or not the words are spoken of the plaintiff by way of his office, profession, calling, trade or business.*"

This confirms the common law and at the same time removes an anomaly that had been thought to give rise to injustice. Slanders of this kind have always be actionable *per se* because they are peculiarly likely to cause financial loss to the plaintiff; but before the Act the authorities had made a distinction. This distinction was that in order to be actionable *per se* such slanders had not merely to have the effect of disparaging the plaintiff in his office, etc., but they had also to be such as to touch him in the way of it—*i.e.* to be directly connected with it. For example, to say of a master mariner that he was drunk whilst in command of his ship would be a direct reflexion on his conduct as a master mariner (*l*), and would be actionable *per se*; but to charge a schoolmaster with *adultery* (though it might clearly affect his reputation as a schoolmaster) was not a charge directly connected with his work (as for instance a charge of inability to *teach* would be), and at common law such a charge would not be actionable *per se* (*m*). The section clearly intends to remove this distinction; so that slanders of the kinds enumerated are actionable *per se* whether or no they *directly* touch upon the office, trade or calling. But it must be noted that under the section—as at common law—the office, etc. must be one which the plaintiff holds *at the time of the publication.*

The wording of the section suggests that the legislature intended

(*h*) 13 Halsbury's Statutes (2nd Edn.) 1147.
(*i*) *Kerr* v. *Kennedy*, [1942] 1 All E. R. 412; [1942] 1 K. B. 409.
(*k*) See *Russo* v. *Cole*, [1965] 3 All E. R. 822.
(*l*) *Irwin* v. *Brandwood* (1864), 2 H. & C. 960. See also *Phillips* v. *Jansen* (1798), 2 Esp. 623 (an attorney "deserves to be struck off the roll"); *Bull* v. *Vasquez*, [1947] 1 All E. R. 334.
(*m*) *Jones* v. *Jones*, [1916] 2 A. C. 481. See also *Dauncey* v. *Holloway*, [1901] 2 K. B. 441; *De Stempel* v. *Dunkels*, [1937] 2 All E. R. 215; *Hopwood* v. *Muirson*, [1945] 1 All E. R. 453; [1945] K. B. 313.

to make no greater change than this; so that a further common law anomaly probably still remains. This is that a distinction is made between offices of "profit" and offices of *honour* or *credit* (such as the office of alderman) (*n*). In the case of the latter *unless* the slander imputes *dishonesty* in the office (*o*) it will only be actionable *per se* if its nature is such that, were it true, it would form a ground for *removal from the office*. Thus where the defendant said of a town councillor "Alexander is never sober, and is not a fit man for the council" this was held not to be actionable *per se* because insobriety is not a ground for removing a councillor (*p*).

It is possible that the wide wording of the section is designed to remove this second distinction between offices of profit (where no such restriction was ever imposed) and offices of honour, but it is thought to be unlikely since, considered as a whole, the section seems to be aimed at the first anomaly rather than the second (*q*).

### 3. REFERENCE TO THE PLAINTIFF

In an action for defamation the plaintiff must establish that the statement of which he complains might reasonably be understood by the persons to whom they were published to refer to him, and that they were in fact understood to refer to him (*r*). The first question—whether the statement is capable of being understood to refer to the plaintiff—is one for the *court*; the second question—whether it was in fact understood by reasonable people to refer to him—is a question of fact for the *jury* (*s*).

It is not necessary that the reference should be made by name provided that a reasonable person may reasonably infer that it does refer to the plaintiff. Thus a defamer cannot hide behind the generality of expressions such as "*Some* people are brutal" if, as may easily happen, it is clear from the context who is aimed at (*t*).

(*n*) See *Cleghorn* v. *Sadler*, [1945] 1 All E. R. 544; [1945] K. B. 325 (fire-watching in the late war was not an office of honour or credit!).

(*o*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571.

(*p*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797.

(*q*) This view appears to be supported by *Robinson* v. *Ward* (1958), 108 L. J. 491.

(*r*) See *Shaw* v. *London Express Newspaper Co.* (1925), 41 T. L. R. 475; *Knupffer* v. *London Express Newspaper, Ltd.*, [1944] 1 All E. R. 495; [1944] A. C. 116 (Illustration 102); *Braddock* v. *Bevins*, [1948] 1 All E. R. 450; 1 K. B. 580.

(*s*) *Knupffer* v. *London Express Newspaper, Ltd.*, [1944] 1 All E. R. 495, 497; [1944] A. C. 116, 121: for an extreme case see *Boston* v. *W. S. Bagshaw & Sons*, [1966] 2 All E. R. 906.

(*t*) See *Le Fanu* v. *Malcolmson* (1848), 1 H. L. Cas. 637 ("The cruelties of the slave-trade or the Bastille are not equal to those practised in *some* of the Irish factories . . .").

On the other hand where a statement is made about a class or group of people sufficiently large to leave the reputation of each unsullied, one of them cannot, without more, come forward and single himself out as the victim (*u*); obviously

> "If a man wrote that all lawyers were thieves, no particular lawyer could sue him *unless there is something to point to the particular individual*" (*a*).

But the last part of this *dictum* is important, for if the class is sufficiently small for *each* individual to be injured by the statement (*b*)—*e.g.* "The lawyers in Little Trickery are frauds" (and Little Trickery is a village with two solicitors)—or if there is something in the statement to point to one or a small number of a group rather than the rest, then those injured may sue. In determining this kind of issue commonsense has to be applied to the facts of every case.

After much doubt it is now clear (*c*) that the *state of the defendant's knowledge* or the amount of circumspection he has used is *not* relevant in determining his liability. If his statement is held to be capable of referring to the plaintiff, and if it was understood to refer to him, he may be liable though he had no intention of defaming him. Indeed, in an extreme case the defendant may be liable even if he makes a statement which is true about A, but is taken to refer to B of whom he never even heard. So in *Newstead* v. *London Express Newspaper, Ltd.* (*d*) the defendants were held liable (though only in a nominal sum) to Harold Newstead, a Camberwell *barber* when they published an article about the trial of "Harold Newstead, a Camberwell man" for bigamy. The story of the trial was true, but the man really concerned was another Harold Newstead, a Camberwell *barman*.

The above rule is a harsh one (*e*), and its effects have now been somewhat mitigated by the provisions of the Defamation Act, 1952, concerning unintentional defamation and offer of amends; these will be discussed below.

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(*u*) See *Knupffer's Case*, [1944] 1 All E. R. 495; [1944] A. C. 116.

(*a*) *Eastwood* v. *Holmes* (1858), 1 F. & F. 347, 349; *per* WILLES, J. Indeed, class libel is usually just vulgar abuse: *e.g.* "The English are idle", "The Scots are mean". See *Knupffer's Case*, [1944] 1 All E. R. 495; [1944] A. C. 116, at p. 122.

(*b*) See *Booth* v. *Briscoe* (1877), 2 Q. B. D. 496, and *Knupffer's Case*, [1944] 1 All E. R. 495; [1944] A. C. 116, where the authorities are reviewed.

(*c*) Since *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20 (Illustration 103).

(*d*) [1939] 4 All E. R. 319; [1940] 1 K. B. 377.

(*e*) Though on balance not, perhaps, unjust; for all moral codes give warning against the dangers of idle talk.

ILLUSTRATION 102

*In order to be actionable as defamatory a statement must be capable of being understood to refer to the plaintiff.*

Knupffer *v.* London Express Newspaper, Ltd., [1944] 1 All E. R. 495; [1944] A. C. 116.

Appellant was English representative of the "young Russia Party", a group having twenty-four members in England, and two thousand members in all; the rest being abroad. Respondents published an article defamatory of the Party as a whole and friends of appellant read it and took it as referring to him. *Held:* Despite the inference drawn by appellant's friends, an article which referred to a group of this size (mostly resident abroad) was not reasonably capable of having reference to appellant, since there was nothing to point to him in particular.

ILLUSTRATION 103

*A defamatory statement may be held to refer to the plaintiff even though the defendant had no intention of referring to him.*

E. Hulton & Co. *v.* Jones, [1910] A. C. 20.

Their Paris correspondent wrote a satirical article in appellants' newspaper. It described the Dieppe motor races and contained the following—"'Whist! There is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' Whispers a fair neighbour of mine. . . . Here, in the atmosphere of Dieppe . . . (Jones) is the life and soul of a gay little band that haunts the Casino. . . ." This character was imaginary and was drawn to exemplify the naughtiness of respectable Englishmen on holiday abroad. *Unknown to appellants or the author* there was a barrister by the name of Artemus Jones, whose friends testified that they thought the article referred to him; he sued, and at the trial the jury found a verdict of £1,750 damages in his favour. On appeal. *Held:* The verdict was justified and the state of appellants' knowledge irrelevant.

## 4. PUBLICATION AND REPETITION

### Publication

In law "publication" does not necessarily mean making the defamatory matter known to the public generally, but making it known to *any other person than the one defamed* (*f*).

The publishing of defamatory matter may be intentional, as where X writes to Y and tells him falsely that Z is a liar; obviously this is a publication (in the legal sense) of a libel by X to Y. But of

(*f*) In the *criminal* law of libel even publication to the person defamed may suffice.

necessity there are some kinds of publication less deliberate than this. Matter contained in telegrams and postcards forms a good example. The law presumes that documents such as these, openly transmitted, will probably be read by others (such as post office officials) and therefore the sending of them will amount to a publication, even if they are addressed only to the person defamed (*g*). But this presumption does not apply in the case of letters, even though the envelope is unsealed (*h*).

Similarly it is "publication" by the sender of a letter to his secretary if he dictates it to her for transmission to the intended recipient (*i*); and it is also publication to the secretary, clerks, servants or agents of the intended recipient if the sender knows that it is likely that such people will open the letter (*k*). But if the occasion happens to be *privileged* (*l*) the privilege will protect the whole course of ordinary and necessary office routine, so that here disclosure to clerks, typists or other office staff of either sender or recipient will not give rise to a cause of action (*m*).

Due to the legal unity of husband and wife disclosure by a man to his wife of something defamatory of some other person is not a "publication" (*n*); but disclosure to the wife *of the person defamed* is a "publication" (*o*).

Each time the originator of a defamatory statement repeats it he publishes it anew and a fresh cause of action arises (*p*).

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(*g*) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393. "It was never meant by the legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels"; p. 395, *per* BRETT, J.

(*h*) *Huth* v. *Huth*, [1915] 3 K. B. 32. And it does not apply to telegrams or postcards where the defamatory nature of the statement would not be easily understood by anyone other than the recipient: *Sadgrove* v. *Hole*, [1901] 2 K. B. 1.

(*i*) It is not settled whether publication to the secretary is a libel or a slander: see *Osborn* v. *Thomas Boulter & Son*, [1930] 2 K. B. 226.

(*k*) *Delacroix* v. *Thevenot* (1817), 2 Stark. 63. But it is not publication where people open the letter whom the sender neither intends shall open it, nor has any reason to suppose will do so: *Sharp* v. *Skues* (1909), 25 T. L. R. 336; *Powell* v. *Gelston*, [1916] 2 K. B. 615. And see *Theaker* v. *Richardson*, [1962] 1 All E. R. 229 (Illustration 104).

(*l*) As to the meaning of "privilege" see below.

(*m*) *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842; *Roff* v. *British and French Chemical Manufacturing Co. & Gibson*, [1918] 2 K. B. 677; *Edmondson* v. *Birch & Co., Ltd., & Horner*, [1907] 1 K. B. 371; *Osborn* v. *Thomas Boulter & Son*, [1930] 2 K. B. 226, where *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, was not followed on the ground that modern business conditions necessitate some incidental publications.

(*n*) *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635.

(*o*) *Wenman* v. *Ash* (1853), 13 C. B. 836.

(*p*) See *Duke of Brunswick* v. *Harmer* (1849), 14 Q. B. 185, which is also authority for the proposition that disclosure to an agent of the person defamed is a sufficient publication.

ILLUSTRATION 104

*Where publication is not intentional it is proper for the jury to determine whether the effect of sending a letter is likely to be that someone other than the plaintiff will open it.*

Theaker *v.* Richardson, [1962] 1 All E. R. 229.

Plaintiff and defendants' wife were on bad terms. Defendant wrote a letter to plaintiff falsely accusing her of, *inter alia*, being a prostitute and a brothel-keeper. Defendant typed the name and address on a cheap manilla envelope and, having sealed the back with Sellotape, put it in plaintiff's letter box. Plaintiff's husband saw it on the mat and opened and read it; the evidence suggested that this was natural enough since it looked like an election address and there was nothing in its appearance to suggest that it was confidential. *Held:* (on the facts) Taking the appearance of the envelope (unstamped, etc.) into account it was proper for the jury to infer that someone other than the plaintiff would be likely to open it. Defendant therefore liable (*q*).

REPETITION

The general principle is that he who knowingly (*r*) publishes defamatory matter will be held strictly responsible, whether he be the originator of it or not. Thus the author, the printer and the publisher (*s*) of a defamatory novel will all be held responsible, and it will not avail them that they acted from ignorance or mistake (*t*). Moreover printers or publishers cannot exonerate *themselves* by naming the author, for

> ". . . of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (*u*).

So that the principle in respect of publication is, like the rest of the law of defamation, that liability is strict (*a*).

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(*q*) Contrast *Huth* v. *Huth* (n. (*h*), above).

(*r*) It seems clear that there must be some element of knowledge; *e.g.* if a person says something aloud to himself, and someone whose presence he has no reason to suspect overhears it, he will not be responsible. See *White* v. *J. & F. Stone, Ltd.*, [1939] 3 All E. R. 507, 512; [1939] 2 K. B. 827, 836.

(*s*) These categories are not exhaustive: for instance a person who allows another to use his premises for displaying a libel will be treated as a publisher of it: *Byrne* v. *Deane*, [1937] 2 All E. R. 204; [1937] 1 K. B. 818.

(*t*) Though cases of hardship may now be mitigated by resort to the provisions of the Defamation Act, 1952, as to unintentional defamation see below, p. 293.

(*u*) *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392, 403; *per* BEST, J.

(*a*) Where the plaintiff brings actions against several defendants in respect of several different publications they may claim to have the actions consolidated into one: Law of Libel Amendment Act, 1888, s. 5 (13 Halsbury's Statutes (2nd Edn.) 1145); Defamation Act, 1952, s. 13 (32 Halsbury's Statutes (2nd Edn.) 406).

But if this rule were universally applied great injustice would be occasioned; for whereas printers, publishers and the like play a major part in the creation and distribution of matter which often tends to be defamatory and therefore the law treats ignorance of the nature of the material they handle as no excuse, there are many others constantly concerned in the circulation of defamatory material who, since they play only an incidental part, cannot reasonably be expected to know the exact nature of their wares. Such people, for instance, as newsvendors, booksellers and librarians, or for that matter, a man who sells a paper in the street (*b*). Although people such as these are, at least in theory, *primâ facie* liable just like the others for libels they circulate they are permitted to plead "*innocent dissemination*" as a defence. And this will succeed *if they can establish that they did not know and could not reasonably be expected to know that they were circulating defamatory matter* (*c*).

It must be added that in cases of *slander* (where the defamation is necessarily transient as in the case of oral falsehood) the originator will usually not be held responsible for repetitions of the slander by others. The reason for this is that since liability for slander usually depends upon the infliction of special damage, where others repeat the story the damage is generally attributable not to the originator but to those others, and is therefore too remote in law to give a ground of action against the originator (*d*).

But this rule will not apply, and the damage will be considered direct and actionable against the *originator* where (a) he has authorized the repetition, or (b) the repeater is someone to whom he tells the tale and who is under some duty, whether legal or only moral, to communicate it to some other person to whom he does communicate it (*e*).

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(*b*) So a person who buys a book is not bound to read it at his peril before he lends it to a friend and this applies even to cases of contempt where the reader's obligation is stricter than it is in defamation. See *McLeod* v. *St. Aubyn*, [1899] A. C. 549, and remarks of Lord GODDARD, C.J., in *R.* v. *Griffiths, Ex parte A.-G.*, [1957] 2 All E. R. 379; [1957] 2 Q. B. 105.

(*c*) *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354 (Illustration 105). And for a detailed formulation of the rule *Vizetelly* v. *Mudies Select Library, Ltd.*, [1900] 2 Q. B. 170, 180; *per* ROMER, L.J.

(*d*) *Ward* v. *Weeks* (1830), 4 Moo. & P. 796; *Ward* v. *Lewis*, [1955] 1 All E. R. 55. Obviously where oral slander is taken down by another without the originator's authority the person who takes it down may be liable in *libel*, whereas, if no special damage can be proved, the original slanderer will not be liable: *M'Gregor* v. *Thwaites* (1824), 3 B. & C. 23.

(*e*) *Derry* v. *Handley* (1867), 16 L. T. 263 (Illustration 106), and see *Ward* v. *Lewis* (last note). And see *Cutler* v. *McPhail*, [1962] 2 All E. R. 474; [1962] 2 Q. B. 292—where a defamatory letter is written to a newspaper and the proprietors of the paper are released by the plaintiff this release will not exonerate the original writer of the letter from liability in respect of the newspaper publication.

ILLUSTRATION 105

*Innocent dissemination is not publication of a libel.*

Emmens *v.* Pottle (1885), 16 Q. B. D. 354.

Defendants were large-scale newsvendors who sold copies of a publication called *Money* which contained matter libellous of the plaintiff. On a finding of the jury that defendants did not know of the libel and were not negligent in failing to know. *Held:* Defendants were not liable, since these findings made it clear that they did not publish the libel.

To whom and in what circumstances this defence will be available is a question of degree. Compare *Weldon* v. *Times Book Co.* (1911), 28 T. L. R. 143; *Bottomley* v. *Woolworth & Co.* (1932), 48 T. L. R. 521, and contrast *Vizetelly* v. *Mudie's Select Library Co.*, [1900] 2 Q. B. 170 (lending library), *Sun Life Assurance Co. of Canada* v. *W. H. Smith & Sons*, [1933] All E.R. Rep. 432 (newsvendors); in both these cases insufficient care was found and there was therefore held to *be* a publication, though had there been sufficient care the defence would have availed defendants of this kind.

ILLUSTRATION 106

*The originator of a slander will be liable for its repetition if the person to whom he has told it is under a legal or moral duty to repeat it.*

Derry *v.* Handley (1867), 16 L. T. 263.

Defendant said of plaintiff "She is a d—— whore" in the presence of X. X and his wife employed plaintiff in their millinery business; but on X repeating this to his wife, plaintiff was dismissed. *Held:* X's repetition was privileged in the sense that in the circumstances he was under a duty to repeat it to his wife. Having established special damage (*f*) in the form of dismissal, plaintiff could therefore recover from defendant.

## 5. JUSTIFICATION

A plea of "justification" is a plea that the allegations of which the plaintiff complains are true, and if this plea succeeds it forms an absolute defence (*g*) to the action

> "For the law will not permit a man to recover damages in respect of any injury to a character which he either does not or ought not to possess" (*h*).

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(*f*) This was of course before the Slander of Women Act, 1891 (13 Halsbury's Statutes (2nd Edn.) 1147).

(*g*) Contrast *criminal* libel where, except as provided by the Libel Act, 1843, s. 6 (13 Halsbury's Statutes (2nd Edn.) 1129), the truth of the libel is no defence.

(*h*) *M'Pherson* v. *Daniels* (1829), 10 B. & C. 263, 272; *per* LITTLEDALE, J.

This defence must be pleaded specifically and the facts relied upon must be set out (*i*) so that the plaintiff may be prepared to meet the case, but the onus of establishing the truth of the allegations lies upon the defendant (*k*).

Things which arose within a reasonable time after publication may be given in evidence in support of justification, as well as facts which were established before (*l*). And further, it has always been sufficient to prove that the libel was *substantially* true (*m*); but the Defamation Act, 1952 (*n*), now also makes it clear that the defence will not fail solely because the truth of *one out of several charges* is not established provided that, having regard to the truth of the remaining charges, the charge not proved does not materially injure the plaintiff's reputation.

## 6. FAIR COMMENT

*Comment* upon a man's character, conduct or work can harm his reputation quite as much as making a false accusation against him; it may be just as damaging to say of an artist that his pictures are lewd as to accuse him of fraud. Hence comments or statements of opinion may, subject to the limits about to be discussed, form the basis for an action of defamation just as much as false allegations of fact (*o*).

But in the case of comments, as opposed to allegations of fact, there is a special defence of "fair comment", and this defence is that the statement complained of was *a fair comment made in good faith upon a matter of public interest.* The scope and limitations of this rule should at once be grasped. First, justification and fair comment are different defences; in justification the defendant relies upon the truth of his assertion as negativing a claim to reputation which the plaintiff does not deserve; in fair comment, as will be

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(*i*) *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183; *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151.

(*k*) See on the whole of this matter *Beevis* v. *Dawson*, [1956] 3 All E. R. 837; [1957] 1 Q. B. 195.

(*l*) *Maisel* v. *Financial Times, Ltd.*, [1915] 3 K. B. 336.

(*m*) *Alexander* v. *North-Eastern Rail. Co.* (1865), 6 B. & S. 340. Plaintiff sentenced to fine or *fourteen days*: reported as fine or *three weeks*. Judgment for defendants on finding of *substantial* accuracy. "The case resolves itself into a question of degree of accuracy, which is for the *jury*": at p. 343; *per* COCKBURN, C.J.

(*n*) Section 5 (32 Halsbury's Statutes (2nd Edn.) 403).

(*o*) It is often hard to distinguish between assertions of opinion and statements of fact: see *e.g. Grech* v. *Odham's Press, Ltd.*, *Addis* v. *Odham's Press, Ltd.*, [1958] 2 All E. R. 462.

seen, he relies upon the honesty of his statement of opinion, whether in an objective sense it be "true" or not. But of course it may sometimes (where it is verifiable) be possible to justify a comment as well as a statement of fact on the ground that it is a reasonable inference from facts truly stated; justification may then be pleaded, and "fair comment" need not be called in aid (*p*). The difference between the two defences was well explained by SELLERS, L.J., in *Broadway Approvals, Ltd.* v. *Odhams Press, Ltd.* (*q*)

> "The comments, as well as the facts and the inferences from both fact and comment, in defamatory statements have to be proved *to be true* for the defence of justification to succeed, but if the facts are established and the comment is *fair* the defence of fair comment can succeed."

Secondly, fair comment can only be used as a defence where what is commented on is a matter of public interest.

The two principal matters to be discussed are, therefore, the meaning of "*fair comment*" and the meaning of "*public interest*".

To come within the ambit of the defence of fair comment the defendant must establish that the view which he expressed of the plaintiff or of his conduct was one which he *honestly held*: this is the essence of the matter. And it must be understood that the *defendant's* belief is the important thing, not the views of judge or jury as to the reasonableness of it,

> "The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: *was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held* by the writer?" (*r*).

Given the further requirement as to public interest this is really the *whole* substance of the matter; but there are certain refinements.

In the first place, *malice* (*i.e.* spite, ill-will or some other indirect or improper motive) on the part of the defendant may (*s*) destroy

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(*p*) See *Campbell* v. *Spottiswoode* (1863), 3 B & S. 769, 777; *Dakhyl* v. *Labouchere*, [1908] 2 K. B. 325 n; *Sutheriand* v. *Stopes*, [1925] A. C. 47.

(*q*) [1965] 2 All E. R. 523, 535 (italics ours).

(*r*) *Silkin* v. *Beaverbrook Newspapers, Ltd.*, [1958] 2 All E. R. 516, 518; *per* DIPLOCK, J (italics ours). The point is that "the jury have no right to substitute their own opinion . . . for that of the critic": *McQuire* v. *Western Morning News Co., Ltd.*, [1903] 2 K. B. 100, 109; *per* COLLINS, M.R. Similar *dicta* abound, *e.g. Merivale* v. *Carson* (1887), 20 Q. B. D. 275, 281; *Turner* (*otherwise Robertson*) v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E. R. 449, 461.

(*s*) "Will" might be a more appropriate word. But as was pointed out in *Broadway Approvals, Ltd.* v. *Odhams Press, Ltd.*, [1965] 2 All E. R. 523 (533, 534, 538), the question has never yet reached the House of Lords.

the defence (*t*); though of course it need not necessarily do so, for the jury may consider that though spitefully disposed towards the plaintiff, the defendant exercised an unbiased judgment in making his comment. Yet it must be realized that it is not the validity of the comment that is in issue so much as the defendant's state of mind: hence exactly similar comments by A (who is prompted by malice and therefore biased) and B (who is not) may be respectively "unfair" and "fair" (*u*).

> "It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it *has* warped his judgment. Comment *distorted* by malice cannot in my opinion be fair on the part of the person who makes it" (*a*).

In the second place, an imputation of corrupt or dishonest motive cannot be fair comment—though if substantiated it might be the subject of justification—unless such imputation is fairly and reasonably to be inferred from the facts truly stated. And this is so however sincerely the commentator may believe in his own opinion. Thus, as COCKBURN, C.J., said in *Campbell* v. *Spottiswoods* (*b*):—

> "... a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may *fairly* be open to ridicule or disapprobation, *base, sordid and wicked motives, unless* there is so much ground for the imputation that a jury shall find, *not only* that he had an honest belief in the truth of his statements, *but that* his belief was not without foundation...."

In that case it was therefore held that the defendant had overstepped the limits of fair comment when, in an article, he charged the plaintiff with seeking to increase the sales of a newspaper which the plaintiff owned by a false pretence that he was seeking to propagate the Gospel to the Chinese. If the defendant wished to escape liability for such an accusation he had either to justify it in

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(*t*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 275; *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627 (Illustration 107). It is an open question whether a newspaper which publishes a letter that is inspired by malice and thereby exceeds the bounds of fair comment will be held responsible for the malice of the writer: moreover, the mere fact that a letter contributed to a paper is anonymous is no evidence of malice.: *Lyon* v. *Daily Telegraph, Ltd.*, [1943] 2 All E. R. 316; [1943] K. B. 746.

(*u*) *Thomas' Case* (above, last note) at p. 638.

(*a*) *Thomas' Case*, [1906] 2 K. B. 627, at p. 642; *per* COLLINS, M.R. (italics ours).

(*b*) (1863), 3 B. & S. 769; 776 (italics ours).

the technical sense of the word or to show that it was a comment which could fairly be inferred from the actual conduct of the plaintiff; and the latter in the circumstances he could not do, for the accusation was no more than a wild one. On the other hand if one supposes a case of a critic who accuses an author of plagiarism and the facts are that (unknowingly) the author has reproduced the plot of a well-known novel or, again unknowingly, reproduced whole chunks of Shakespeare, then, despite the author's innocence of dishonest attempt the comment would be warranted by the facts and therefore fair (*c*).

Thirdly, the very idea of comment or criticism denotes that the facts which form the basis of the thing commented upon are known to the audience addressed. In some cases of course the commentator makes them known, as *e.g.* where X writes a book and in his review of it Y writes "X has asserted that one plus one makes three" and comments that X is a bad mathematician (*d*). But it is possible for the defence of fair comment to succeed where it can be ***assumed*** that the facts commented upon are known, or may well be known, to the people addressed (*e*); as for example in the case of dramatic criticism where it may be taken for granted that the play commented upon is generally known to the public (*f*).

Further, it is now provided by the Defamation Act, 1952, s. 6, that

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment *shall not fail by reason only that the truth of every allegation of fact is not proved* if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved" (*g*).

This changes the law which had previously been that any but the minutest deviation from the truth in facts stated (*h*) would deprive

(*c*) See *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292; *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309; *Dakhyl* v. *Labouchere*, [1908] 2 K. B. 325 n.

(*d*) In fair comment, as opposed to justification, the facts relied upon must be in existence at or before the time of criticism: *Cohen* v. *Daily Telegraph, Ltd.*, [1968] 2 All E. R. 407.

(*e*) See *Kemsley* v. *Foot*, [1952] 1 All E. R. 501; [1952] A. C. 345 (Illustration 108). But particulars of the facts relied upon must be given if requested: *Cunningham-Howie* v. *F. W. Dimbleby & Sons, Ltd.*, [1950] 2 All E. R. 882; [1951] 1 K. B. 360. Since this now also applies where the "rolled-up" plea is resorted to (R. S. C. Ord. 82, r. 3) the purpose of using this plea has gone. For a short discussion of the plea, see Winfield, *Law of Torts* (7th Edn.), pp. 615–619, and see *Sutherland* v. *Stopes*, [1925] A. C. 47.

(*f*) The principle is that "the subject-matter upon which comment can be made is indicated to the world at large". *Kemsley's Case*, [1952] 1 All E. R. at p. 504; [1952] A. C. at p. 355; *per* Lord PORTER.

(*g*) Italics ours.

(*h*) But not if, being left unstated in the publication, they were elicited in

the defendant of the defence of fair comment (*i*). But the wording of the section still leaves it open to the jury to find for the plaintiff where there is a substantial inaccuracy; for instance a statement imputing immorality in a play by suggesting that it is founded upon adultery when in fact there is no incident of adultery in it (*k*).

The second main requirement for success of the defence is that the comment must concern a matter of *public interest*. The defence is recognized only because it is to the good of the community that matters which concern the community should be freely discussed, so that "fair comment" cannot be pleaded where it is private as opposed to public matters that are receiving comment (*l*). But the scope of what is "public" in this sense is very wide: thus the conduct of public men (*m*) and the administration of public institutions (*n*) of all kinds are included and even the affairs of businesses which affect a section of the public only (*o*), and so are publications such as books, plays, and pictures which their authors by making public submit to criticism and review (*p*), and so are the performances of theatrical and other artistes and of public lecturers.

It is for the judge to decide (i) whether the matter commented upon is a matter of public interest, (ii) whether the words used are *capable* of bearing a defamatory meaning, whether they are *capable* of being regarded as comment rather than statement of fact, whether it *would be open* to the jury to decide that particular comments are unfair, and whether there is *evidence* of malice. Apart from the decision as to public interest if the judge sees fit to leave the other questions to the jury it is for the jury to determine them (*q*).

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the form of particulars: see *Kemsley's Case*, [1952] 1 All E. R. at pp. 506–8; [1952] A. C. at pp. 357–60.

(*i*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 275; *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309.

(*k*) See *Merivale's Case*, *supra*.

(*l*) See *London Artists, Ltd.*, v. *Littler*, [1968] 1 All E. R. 1075, 1087. But the private affairs of the great may of course be of public concern and therefore the subject of lawful comment: see *Lyle-Samuel* v. *Odhams, Ltd.*, [1920] 1 K. B. 135, 146.

(*m*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.

(*n*) *Cox* v. *Feeney* (1863), 4 F. & F. 13.

(*o*) *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133.

(*p*) So too are the broadcast statements of a film critic: *Turner* (*otherwise Robertson*) v. *Metro-Goldwyn-Mayer, Ltd.*, [1950] 1 All E. R. 449. And tradesmen's advertisements: *Paris* v. *Levy* (1860), 9 C. B. N. S. 342.

(*q*) *Jones* v. *Skelton*, [1963] 3 All E. R. 952.

ILLUSTRATION 107

*A comment cannot be fair if it is distorted by malice.*

Thomas *v.* Bradbury, Agnew & Co. Ltd., [1906] 2 K. B. 627.

At the trial it was proved that one L who had reviewed plaintiff's biography of X in *Punch*, which defendants published, had headed the review "Mangled Remains" and cast aspersions upon plaintiff's literary ability, also making allegations of fact which were untrue. It was found that L had personal spite against plaintiff. The judge invited the jury to take into account the evidence of malice, which they did and found for plaintiff. On appeal. *Held:* It was proper to take malice into account, and since the jury had found that the review was *distorted* by malice the defendant could not rely upon fair comment.

ILLUSTRATION 108

*The defence of fair comment may succeed where the facts which form the basis of the comment are not stated by the commentator, provided that the nature of the facts can be reasonably inferred from the comment itself.*

Kemsley *v.* Foot, [1952] 1 All E. R. 501; [1952] A. C. 345.

Under the title "Lower than Kemsley", respondent published an attack on a newspaper with which appellant was not connected. Appellant sued for libel alleging as innuendo that effect of respondent's assertion was that newspapers owned by appellant were of a low character. Respondent pleaded fair comment. *Held:* The matter under comment could reasonably be inferred from the caption and the circumstances; the attack being upon a newspaper, and it being a matter of common knowledge that appellant also owned newspapers, it was sufficiently clear that the tone of those newspapers was under attack. It was therefore for the jury to determine whether the comment was fair.

## 7. PRIVILEGE

In some circumstances the public interest demands that the right to private reputation shall give way to the right of free speech and comment (*r*); and these circumstances the law treats as "privileged" in the sense that proof of their existence forms a defence to actions for defamation. There are two kinds of "privilege"; "absolute" privilege and "qualified" privilege. These must now be discussed in turn and mention must then be made of the privilege which attaches to certain kinds of reports.

### Absolute Privilege

Where the circumstances are such as to attract *absolute* privilege no action for defamation can be brought in respect of any state-

(*r*) See *More* v. *Weaver*, [1928] 2 K. B. 520, 521.

ment made under the cover of it even though it is untrue or even wantonly and maliciously made. Here the public interest in freedom of speech entirely overrides the individual right to reputation. The following are the principal circumstances in which absolute privilege attaches.

(i) *Parliamentary Proceedings*

It was declared by Article 9 of the Bill of Rights, 1688, to be one of the privileges of Parliament that

> ". . . the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament" (*s*).

It follows that no action for defamation will lie in respect of anything said or done during any parliamentary debate; and the privilege also extends to statements contained in petitions to Parliament (*t*) and to statements of witnesses before parliamentary committees (*u*). The position in regard to *reports* of parliamentary proceedings will be considered below (*a*).

(ii) *Publications under the Parliamentary Commissioner Act*, 1967

By s. 10 (5) of this Act the following are subject to absolute privilege: (a) Publication of any matter by the Commissioner in making a report to either House of Parliament; (b) Communications between the Commissioner or his officers and any member of the House of Commons for the purposes of the Act; (c) Reports by the Commissioner sent to a complainant by a member of Parliament; (d) Reports by the Commissioner to the principal officer of the department or authority complained of, or to any other person complained against.

(iii) *State Communications*

Any communication made by a Minister of the Crown to the Sovereign is absolutely privileged (*b*); so are communications in the

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(*s*) The privilege is not abrogated by the Parliamentary Privilege Act, 1770 (17 Halsbury's Statutes (2nd Edn.) 484). See *In re Parliamentary Privilege Act*, 1770, [1958] 2 All E. R. 329; [1958] A. C. 331. This opinion left open the question whether a letter by a Member to a Minister is protected as a "proceeding in Parliament". On October 30th, 1957, the Committee of Privileges reported that it was; but this report was later rejected by resolution of the House of Commons: see 589 H. C. Deb. 1058 (June 17th, 1958): 591 H. C. Deb. 207–346 (July 8th, 1958).

(*t*) *Lake* v. *King* (1670), 1 Mod. Rep. 58.

(*u*) *Goffin* v. *Donnelly* (1881), 6 Q. B. D. 307.

(*a*) As to similar privilege in respect of colonial legislatures see *Chenard & Co.* v. *Joachim Arissol*, [1949] A. C. 127.

(*b*) And possibly any communication to the Sovereign by anyone: *Hare and Meller's Case* (1587), 3 Leon. 163.

course of duty between one officer of State and another (*c*). Communications between very senior service officers to their superiors are similarly protected (*d*). It seems probable that other communications in the course of public business may enjoy qualified, but are not subject to absolute, privilege (*e*), (*f*).

### (iv) *Judicial Proceedings*

> ". . . no action of libel or slander lies, whether against *judges, counsel, witnesses, or parties*, for words written or spoken in the course of any proceeding before any Court recognized by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed" (*g*).

This principle is of course really part of the wider rule which accords immunity from all tortious liability in respect of judicial proceedings (*h*). The absolute privilege which it provides attaches not only to the proceedings of Courts of Justice in the narrow sense, but also to proceedings of tribunals which have similar attributes (*i*);

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(*c*) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189; *Isaacs & Sons, Ltd.* v. *Cook*, [1925] 2 K. B. 391.

(*d*) *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94.

(*e*) See *Merricks* v. *Nott-Bower*, [1965] 1 Q. B. 57; [1964] 1 All E. R. 717—whether report by Assistant Commissioner to Commissioner of Police absolutely privileged doubtful. Though not directly in point as regards defamation it should be noted that since *Conway* v. *Rimmer*, [1968] 1 All E. R. 874, a Minister's certificate that disclosure of a document would be against the public interest is no longer conclusive against disclosure.

(*f*) Communications between foreigners on matters of state are probably not subject to *absolute* privilege: see *Szalatnay-Stacho* v. *Fink*, [1947] 1 K. B. 1; [1946] 1 All E. R. 717: *Richards* v. *Naum*, [1967] 1 Q. B. 620; [1966] 3 All E. R. 812.

(*g*) *Royal Aquarium & Summer & Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q. B. 431, 451; *per* LOPES, L.J. (italics ours).

(*h*) See Part I, Chapter 2, and *Marrinan* v. *Vibart*, [1962] 3 All E. R. 380; [1963] 1 Q. B. 528.

(*i*) *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744 (military inquiry); *Haggard* v. *Pélicier Frères*, [1892] A. C. 61 (consular court); *Addis* v. *Crocker*, [1960] 2 All E. R. 629; [1961] 1 Q. B. 11 (disciplinary committee under the Solicitors Acts). And see *Hodson* v. *Pare*, [1899] 1 Q. B. 455; *Barratt* v. *Kearns*, [1905] 1 K. B. 504; *Bottomley* v. *Brougham*, [1908] 1 K. B. 584; *Burr* v. *Smith*, [1909] 2 K. B. 306; *O'Connor* v. *Waldron*, [1935] A. C. 76. But *absolute* privilege only extends to the proceedings of tribunals "acting in a manner similar to that in which . . . Courts act": *Royal Aquarium & Summer & Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q. B. 431, 442: *per* Lord ESHER, M.R. It does not extend to the activities of bodies which are mainly administrative: *Parkinson's Case* (licensing committee of L.C.C.); *Attwood* v. *Chapman*, [1914] 3 K. B. 275 (licensing justices); *Lincoln* v. *Daniels*, [1961] 3 All E. R. 740; [1962] 1 Q. B. 237 (proceedings before the Benchers of an Inn of Court—but *not* communications to the Bar Council initiating proceedings before the Benchers; though these probably attract qualified privilege).

and it attaches not only to the statements of judges (*k*) acting within their jurisdiction, but also to the statements of counsel (*l*), witnesses (*m*) and parties (*n*). And it attaches not only to what is said or done at a trial but also to statements made in preparation for trial (*o*), such as statements made to a solicitor who is preparing proofs of evidence (*p*) and affidavits, pleadings, and other documents which form part of the substance of the inquiry (*q*).

Quite apart from the special privilege which attaches to a *trial*, communications *between* a solicitor and his client on the subject on which the client has retained the solicitor are privileged so long as they are relevant to that subject (*r*), but not if they are not fairly referable to the relationship of solicitor and client. It has been held by the Court of Appeal that this privilege is *absolute* (*s*): but the House of Lords (*t*) has left it open to consider whether it is absolute or only qualified.

On the other hand communications *by* a solicitor *about* his client probably have no special protection (*u*).

## Qualified Privilege

It is a defence to an action for defamation to establish that the statement complained of was made upon an occasion when it was

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And see *Gerhold* v. *Baker* (1918), 35 T. L. R. 102; *Collins* v. *Henry Whiteway & Co., Ltd.*, [1927] 2 K. B. 378; *Veal* v. *Heard* (1930), 46 T. L. R. 448; *O'Connor* v. *Waldron*, [1934] All E. R. Rep. 281; [1935] A. C. 76; *Mason* v. *Brewis Bros., Ltd.*, [1938] 2 All E. R. 420; *Smith* v. *National Meter Co., Ltd.*, [1945] 2 All E. R. 35; [1945] K. B. 543.

(*k*) Of all kinds. *Thomas* v. *Churton* (1862), 2 B. & S. 475 (coroner); *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220 (county court judge); *Law* v. *Llewellyn*, [1906] 1 K. B. 487 (magistrate); *Co-partnership Farms, Ltd.* v. *Harvey-Smith*, [1918] 2 K. B. 405 (member of special tribunal).

(*l*) Including solicitor advocates: *Mackay* v. *Ford* (1860), 5 H. & N. 792; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

(*m*) *Seaman* v. *Netherclift* (1876), 1 C. P. D. 540; on appeal, 2 C. P. D. 53: *Marrinan* v. *Vibart*, [1962] 3 All E. R. 380; [1963] 1 Q. B. 528 (though this form of privilege covers all tortious liability, not merely defamation).

(*n*) *Astley* v. *Younge* (1759), 2 Burr. 807; *Trotman* v. *Dunn* (1815), 4 Camp. 211.

(*o*) But they must be made in relation to some judicial proceeding actual or contemplated: see *Szalatnay-Stacho* v. *Fink*, [1946] 2 All E. R. 231, 233–4; [1947] K. B. 1, 11–12.

(*p*) *Watson* v. *M'Ewan*, *Watson* v. *Jones*, [1905] A. C. 480; *Beresford* v. *White* (1914), 30 T. L. R. 591.

(*q*) *Revis* v. *Smith* (1856), 18 C. B. 126; *Henderson* v. *Broomhead* (1859), 4 H. & N. 569; *Seaman* v. *Netherclift* (1876), 1 C. P. D. 540, 544–5; *Hodson* v. *Pare*, [1899] 1 Q. B. 455.

(*r*) *More* v. *Weaver*, [1928] 2 K. B. 520.

(*s*) *Ibid.*

(*t*) *Minter* (*Pauper*) v. *Priest*, [1930] All E.R. Rep. 431; [1930] A. C. 558.

(*u*) See *Groom* v. *Crocker*, [1938] 2 All E. R. 394; [1939] 1 K. B. 194.

subject to "qualified" privilege; and the difference between this defence and the defence of "absolute" privilege is that the former will be destroyed if (the occasion having been found to be one which attracts qualified privilege) the plaintiff can establish that the defendant's statement was prompted by *malice* (*a*)—in the sense of improper motive, such as spite or ill-will—whereas, as has been seen, even proof of malice will not deprive the defendant of his right to claim absolute privilege (*b*).

It therefore now becomes necessary to explain the circumstances which will afford the defence of qualified privilege to a defamatory statement made without malice, and this is no easy matter (*c*); but in *Adam* v. *Ward* (*d*) Lord ATKINSON formulated a helpful guide to an understanding of it. He said

> ". . . 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 made* has a corresponding *interest or* duty to receive it. *This reciprocity is essential*" (*e*).

Thus where there is a common interest between the publisher of a libel and the person to whom it is published and the defamatory statement is made in protection of that interest (as in the case of a statement made by one creditor to another about their debtor's conduct of his affairs (*f*)) the statement may be subject to qualified

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(*a*) It is sometimes said that the difference between a libel published on an unprivileged occasion and one published on an occasion of qualified privilege is that where there is no such privilege malice is *presumed,* but where there is it must be proved: see *Adam* v. *Ward,* [1917] A. C. 309, 328; *per* Lord DUNEDIN. But since the presumption of malice in the latter case is no more than a fiction of dubious historical ancestry it is probably better not to put the matter in this way: see *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, 787; *per* Lord BLACKBURN.

(*b*) It seems clear that the main difference between the defence of fair comment on the one hand, and of qualified privilege on the other, is that where fair comment succeeds the libel is *negatived,* whereas where qualified privilege succeeds an admitted libel receives *protection* by reason of the occasion upon which it is published: see *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, and *Merivale* v. *Carson* (1887), 20 Q. B. D. 275. But Sir John Salmond thought the two defences were merely varieties of the same species, and this view has some judicial support: see Salmond, *Law of Torts* (14th Edn.), pp. 247–9. One cannot help agreeing with the remark of BOWEN, L.J., in *Merivale* v. *Carson* that this difference of view is rather "academical than practical" and in any event whereas proof of malice *must* destroy a defence of qualified privilege, it is only evidence upon which a comment *may* (though it usually will) be found to be unfair.

(*c*) See *Watt* v. *Longsdon,* [1930] 1 K. B. 130, 144; *per* SCRUTTON, L.J.

(*d*) [1917] A. C. 309 (Illustration 110).

(*e*) [1917] A. C. at p. 334. See also *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, 193; *per* PARKER, B.

(*f*) *Spill* v. *Maule* (1869), L. R. 4 Exch. 232.

privilege. And this will also be so where the maker of a defamatory statement has a duty (legal, social or moral) to make it, provided that his hearer has a similar interest in hearing it—as where a person who has been told that the master of a ship is dangerously incompetent warns the shipowner (*g*). And the same applies where there are corresponding duties, as opposed to interests, between the parties.' But in every case the statement must be made in protection of the interest or in performance of the duty, and must not be mere random abuse made under cover of either. Further, it must be repeated that *malice* on the part of the maker will destroy the privilege of the occasion and remove the defence.

The need for *reciprocity* of duty or interest must be stressed. It is not enough, for instance, to provide qualified privilege if the person to whom the statement is made has an interest in it or a duty to hear it if the person who makes it has no interest in making it or duty to make it (*h*). The law does not encourage the kind of person who busies himself gratuitously in other people's affairs. Thus although a wife clearly has an interest in the morals of her husband, and a husband in the morals of his wife, by no means everyone who has reason to suspect immorality in a party to a marriage is under a duty to communicate his suspicions to the unoffending spouse; and if he does he runs the risk of an action for defamation at the suit of the party slandered without proof of malice (*i*). But of course special circumstances, such as near relationship of the informant to the party informed, may alter the case by giving rise to a special moral duty in the informant (*k*).

Moreover, the interest must be a legitimate interest—legally, socially or morally a "right" sort of interest—not, for instance "an interest due to idle curiosity or a desire for gossip" (*l*), such as the newshunger of some devotees of the Sunday Press. It follows that if, in the Press or otherwise, a writer volunteers information it must be of a kind which in a broad sense he has a right or duty to publish; not just something which he thinks may titillate the public palate or even which he personally thinks the public ought to know. This

(*g*) *Coxhead* v. *Richards* (1846), 2 C. B. 509, as explained by SCRUTTON, L.J., in *Watt* v. *Longsdon*, [1930] 1 K. B. 130, 146.

(*h*) The need for reciprocity was formerly uncertain, but is now established by *Watt* v. *Longsdon*, *supra*. The fact that the plaintiff has an "interest" raises no privilege where the publication is to him and some person with no interest: *White* v. *J. & F. Stone, Ltd.*, [1939] 3 All E. R. 507; [1939] 2 K. B. 827.

(*i*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130 (Illustration 109).

(*k*) *Ibid.*, at pp. 149–50.

(*l*) See *Webb* v. *Times Publishing Co., Ltd.*, [1960] 2 All E. R. 789, 805; [1960] 2 Q. B. 535, 569; *per* PEARSON, J.

is sense; for if the law were otherwise almost everything published at large would be subject to privilege. So, for example, in *London Artists, Ltd.* v. *Littler* (*m*) the defendant who was staging a play at a London theatre received simultaneous notices from several leading artistes to terminate their engagements. He suspected a plot by the theatre owners and others to bring an end to the play so that another one could be substituted. Impetuously, perhaps, he wrote to the artistes voicing his suspicions, deploring such conduct and commenting upon the effect it might have upon the theatrical business: this letter he also released to the Press. It was held that although (on grounds of mutual interest) the publications to the artistes were privileged (*n*), the publications in the Press, though doubtless prompted by the best of motives, were not: for the public, their attention never having previously been drawn to the matter at all, were in no way involved in a purely theatrical matter, and there was thus no legitimate "interest" in them nor "duty" in the defendant. The question "What, then, is a *legitimate* interest?" can, however, receive no answer: it is one which the courts alone must face in the process of litigation and decide according to their knowledge of the law and their sense of current morality.

*Stuart* v. *Bell* (*o*) provides a good example of circumstances which may give rise to qualified privilege. The facts of the case were that Stanley, the explorer, was the guest of the Mayor of Newcastle who was the defendant in the action. The latter received information tending to suggest that Stuart (Stanley's valet) was a thief, and he passed this information to Stanley who dismissed Stuart. In an action by Stuart it was held that in the absence of malice the defendant's plea of qualified privilege succeeded. Another common example is the case of a person who supplies a testimonial or gives a "character" for a servant at the request of a prospective employer (*p*); though if the information is *volunteered* it may be difficult to establish the right to privilege (*q*).

The existence of reciprocal interests may often give rise to qualified privilege; as in the case of inquiries and reports made for members of a trade association (*r*)—provided, apparently, that the

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(*m*) [1968] 1 All E. R. 1075.
(*n*) Compare *Chapman* v. *Lord Ellesmere*, [1932] 2 K. B. 431 (below).
(*o*) [1891] 2 Q. B. 341.
(*p*) *Gardner* v. *Slade* (1849), 13 Q. B. 796.
(*q*) See *Coxhead* v. *Richards* (1846), 2 C. B. 569; *Fryer* v. *Kinnersley* (1863), 15 C. B. (N. S.) 422; *Davies* v. *Snead* (1870), L. R. 5 Q. B. 608.
(*r*) *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A. C. 15.

association is not conducted solely for the purposes of economic gain (*s*); in the case of statements made to and by joint owners of property, partners, shareholders and other people in similar relationships concerning the matters of their mutual interests (*t*); and in the case of statements concerning civic business in speeches by members of civic bodies at their meetings (*u*), or in the case of statements made by employers about employees to their fellow employees the which latter have a common interest in hearing (*a*). But the common interest must be real and not imagined; so that if a banker by his own mistake as to the state of a customer's account marks a cheque "not sufficient" (when in fact the customer is in funds) he cannot plead privilege in respect of his supposed common interest with the payee (*b*).

From what has already been explained about the nature of the kind of "interest" required it will be appreciated that the scope of privileged publication may vary; legitimate interest and right or duty to publish may involve a few people or many according to circumstances. Thus if a man is publicly attacked the attacker makes the world his audience, and a reply may be privileged even if published at large (*c*): people have a right to self-defence in the arena in which they are attacked and in such a case the public has an interest in listening to fair play. So too, matters of public concern, such as the administration of justice (*d*), attract privilege for general publication. But more normally legitimate interest and right or duty to publish are confined within a narrower scope. Thus, if one dismisses a servant the matter is no one else's concern and one must not call the neighbourhood in, though one may protect oneself by having an unprejudiced witness to take note of what one

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(*s*) *Macintosh* v. *Dun*, [1908] A. C. 390. But see *Watt* v. *Longsdon*, [1930] 1 K. B. 130, 148.

(*t*) "It must have the most dangerous effects, if the communications of business are to be beset with actions of slander:" *Dunman* v. *Bigg* (1808), 1 Camp. 269, n., note to *M'Dougall* v. *Claridge* (1808), 1 Camp. 267. And see *Blackham* v. *Pugh* (1846), 2 C. B. 611; *Quartz Hill Consolidated Goldmining Co.* v. *Beall* (1882), 20 Ch. D. 501.

(*u*) *Royal Aquarium & Summer & Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q. B. 431. At common law there was also qualified privilege for election addresses distributed only to electors on the roll: *Braddock* v. *Bevins*, [1948] 1 All E. R. 450; [1948] 1 K. B. 580. But see now Defamation Act, 1952, s. 10 (32 Halsbury's Statutes (2nd Edn.) 406) and *Plummer* v. *Charman*, [1962] 3 All E. R. 823.

(*a*) *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189.

(*b*) *Davidson* v. *Barclays Bank, Ltd.*, [1940] 1 All E. R. 316.

(*c*) *Adam* v. *Ward*, [1917] A. C. 309 (Illustration 110).

(*d*) For qualified privilege in relation to judicial proceedings, see below.

says (*e*). On the other hand in *Chapman* v. *Lord Ellesmere* (*f*) where the stewards of the Jockey Club published a statement, both in the Racing Calendar and in the public Press to the effect that the plaintiff, a trainer, had been warned off Newmarket Heath on account of discreditable conduct, it was held that though the former publication was privileged (*g*) the latter was not, since although the plaintiff's misdeeds were of direct interest to the racing community, they were of no more than casual interest to the general public (*h*).

But even assuming an occasion to be privileged by reason of reciprocal interest or otherwise, and publication not to be excessive, where statements are made that are unnecessary for the protection of the interest or the performance of the duty these statements will cease to be privileged, and indeed their inclusion may form evidence from which the existence of malice may be inferred so as to destroy the privilege not merely as to the offending part, but also as to the whole of the statement made (*i*). But it must be appreciated that once privilege is established the onus of proving *malice* lies upon the plaintiff (*k*).

As to the relevance and meaning of "malice" in relation to qualified privilege no amount of explanation can improve upon the statement of BRETT L.J. in *Clark* v. *Molyneux* (*l*):—

> "If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection *if he uses the occasion for some indirect and wrong motive*. If he uses the occasion to gratify his *anger or his malice*, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. . . . Malice does not mean malice in law . . . but *actual malice*, that which is popularly called malice. If a man is proved to have *stated that which he knew to be false*, no one need inquire further. . . . So if it be proved that out of *anger*, or for some

(*e*) *Taylor* v. *Hawkins* (1851), 16 Q. B. 308. But see *White* v. *J. & F. Stone, Ltd.*, [1939] 3 All E. R. 507; [1939] 2 K. B. 827.

(*f*) [1932] 2 K. B. 431.

(*g*) See also *Russell* v. *Duke of Norfolk*, [1949] 1 All E. R. 109.

(*g*) As to the effect of the Defamation Act, 1952, upon this part of the *Chapman Case* see below, p. 318, n. (*m*). Other examples of excessive publication are *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393; *De Buse* v. *McCarty*, [1942] 1 All E. R. 19; [1942] 1 K. B. 156.

(*i*) *Adam* v. *Ward*, [1917] A. C. 309, 329; *per* Lord DUNEDIN.

(*k*) *Harrison* v. *Bush* (1855), 5 E. & B. 344; *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237; *Jenoure* v. *Delmege*, [1891] A. C. 73. Where an action for defamation is brought against partners individually and the occasion is privileged malice in one of the partners will render him liable, even though he is not the author of the libel and the provisions of the Partnership Act, 1890, s. 10, will not excuse him: *Meekins* v. *Henson*, [1962] 1 All E. R. 899; [1964] 1 Q. B. 472.

(*l*) (1877), 3 Q. B. D. at pp. 246–7 (italics ours).

*other wrong motive*, the defendant has stated as true that which he does not know to be true . . . recklessly, by reason of his anger or other motive, the jury may infer that *he used the occasion, not for the reason which justifies it*, but for gratification of his anger or other indirect motive" (*m*).

But it has been said (*n*) that malice is not to be lightly presumed; and in particular it cannot be held as proved from the mere fact of the offending expression being defamatory. Moreover in considering whether such an expression does provide evidence of malice "no nice scales should be used" (*o*).

The question whether the occasion *is* privileged is one for the *judge* (*p*) and it is also for the *judge* to decide whether there is evidence from which malice *may be inferred*. If the judge decides the first question in the affirmative and the second in the negative he must withdraw the case from the jury, for the defence must succeed. But if there is evidence (the occasion being privileged), either from the nature of the statements made or from the surrounding circumstances, which may support a finding of malice the judge must then leave it to the jury to decide whether the occasion has lost its protection by reason of the presence of such malice (*q*).

ILLUSTRATION 109

*Qualified privilege can only be founded upon reciprocal interests or duties: an interest or duty in one party is not enough.*

Watt *v.* Longsdon, [1930] 1 K. B. 130.

Appellant and respondent both being members of the same firm X (also a member of the firm) wrote to respondent making false and

(*m*) The fact that the defendant is actuated by financial considerations is not necessarily evidence of malice if he has financial interests to protect: *Turner* (*otherwise Robertson*) v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E. R. 449. But the fact that he believes his statement to be true does *not* necessarily negative malice: *Winstanley* v. *Bampton*, [1943] 1 All E. R. 661; [1943] K. B. 319.

(*n*) *Adam* v. *Ward*, [1917] A. C. 309, 330; *per* Lord DUNEDIN.

(*o*) *Ibid.* For a recent instance of malice destroying qualified privilege see *Angel* v. *H. H. Bushell & Co., Ltd.*, [1967] 1 All E. R. 1018; [1968] 1 Q. B. 813. It was ruled in *Egger* v. *Viscount Chelmsford*, [1964] 3 All E. R. 406; [1965] 1 Q. B. 248, overruling *Smith* v. *Streatfield*, [1913] 3 K. B. 764, that in the case of joint publication malice of one co-defendant will not deprive another of the right to privilege.

(*p*) Whether the judge is to base his decision upon his own ideas of what amounts to a moral or social duty or upon the view that "the great mass of right minded men" would take is an open (and, it is submitted, a highly impractical) question. See *Watt* v. *Longsdon*, [1930] 1 K. B. 130, 144, 153, and *Stuart* v. *Bell*, [1891] 2 Q. B. 341, 350.

(*q*) *Adam* v. *Ward*, [1917] A. C. 309, 329; *per* Lord DUNEDIN. As to the duties of the judge, see *Phelps* v. *Kemsley* (1943), 168 L. T. 18, 19; *per* GODDARD, L.J.

scandalous allegations about appellant's conduct and morals. Without seeking confirmation, respondent showed X's letter to Singer (chairman of the company) and to appellant's wife. *Held:* (i) In absence of malice publication to Singer was protected, since he was chairman: "There was a duty on the (respondent) to make the communication to Singer, and an interest in Singer to receive it" (*r*). (ii) Publication to the wife was not protected. Though she had an interest in her husband's behaviour, respondent had no duty, legal, social or moral, to pass on the allegations to her.

ILLUSTRATION 110

*Wide publication may sometimes be accorded privilege.*

Adam *v.* Ward, [1917] A. C. 309.

Appellant, a Member of Parliament, who had previously been discharged from the army for incompetence as an officer, made a speech in the House of Commons which in effect accused a Major-General Scobell of having made wilful misstatements about him which caused his discharge. Respondent, who was Secretary to the Army Council, caused a vindication of the General to be inserted *in the public Press*; this vindication contained statements which though relevant, could be construed as defamatory of appellant. In action by appellant, respondent pleaded qualified privilege. *Held:* There being no evidence of malice, the defence succeeded. (a) The character of those responsible for the army was a matter of *universal* concern; (b) appellant having attacked the General publicly (though under protection of privilege of Parliament) he had made the public his audience, and respondent had a reciprocal right to appeal to it.

## Privileged Reports

Both at common law and by statute certain kinds of reports are afforded privilege; and this privilege is in some instances absolute, and in others qualified.

*Reports subject to Absolute Privilege*

These include the following:—

(i) *Reports by order of Parliament.*—Formerly the privilege accorded by the law and custom of Parliament and by the Bill of Rights to proceedings *in* Parliament did not extend to *reports* of such proceedings (*s*): but now by virtue of the Parliamentary Papers Act, 1840 (*t*), ss. 1 and 2, the publication *by authority* of either House of reports, papers, votes or proceedings of that House *or* of any verified copy thereof is absolutely privileged. And upon

(*r*) [1930] 1 K. B. at p. 158; *per* Russell, L.J.
(*s*) *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1.
(*t*) 13 Halsbury's Statutes (2nd Edn.) 1125.

compliance with certain formalities laid down by the Act any proceedings in connexion therewith will be summarily stayed.

(ii) *Newspaper reports of judicial proceedings.*—It is provided by the Law of Libel Amendment Act, 1888, s. 3, as amended by the Defamation Act, 1952, ss. 8 and 9 (2) that

> "A fair and accurate report in any *newspaper* (*u*) (or) by means of *wireless telegraphy* (*a*) (as part of any programme or service provided by means of a broadcasting station *within the United Kingdom*) of proceedings *publicly* heard before any *court exercising judicial authority within the United Kingdom* shall, *if published contemporaneously* (*aa*) with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter" (*b*).

There seems little doubt that the words "shall . . . be privileged" must be taken to mean *absolutely privileged* (*c*).

*Reports subject to Qualified Privilege*

(i) *Reports of parliamentary, judicial and other proceedings.*—Fair and accurate (*d*) reports of the proceedings of either House of Parliament (*e*) or of proceedings, including the speeches of advocates, before a properly constituted judicial tribunal exercising its jurisdiction in open court (*f*), the publication of which is not

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(*u*) "Newspaper" is here defined by reference to the Newspaper Libel and Registration Act, 1881, s. 1 (13 Halsbury's Statutes (2nd Edn.) 1136). It means "any paper containing public news . . . published in England or (Northern) Ireland periodically . . . at intervals not exceeding twenty-six days. . . ."

(*a*) As defined by Defamation Act, 1952, s. 16 (3) (32 Halsbury's Statutes (2nd Edn.) 407).

(*aa*) The Criminal Justice Act 1967, s. 5, provides that reports made subsequent to decisions in committal proceedings and published by virtue of the provisions of s. 3 (3) of that Act shall be treated as having been published contemporaneously with the committal proceedings.

(*b*) Italics ours. Provided that the report is accurate it will not lose protection solely because a statement reported was itself unwarranted and was not verified by the reporter: *Burnett and Hallamshire Fuel, Ltd.* v. *Sheffield Telegraph and Star, Ltd.*, [1960] 2 All E. R. 157. The privilege extends to proceedings in coroners' courts; *McCarey* v. *Associated Newspapers, Ltd.*, [1964] 2 All E. R. 335.

(*c*) See Gatley on *Libel and Slander* (5th Edn.), p. 302, and authorities there cited.

(*d*) Whether a report is fair and accurate is a jury question: *Waters* v. *Sunday Pictorial Newspaper, Ltd.*, [1961] 2 All E. R. 758.

(*e*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.

(*f*) The privilege now extends to reports of *ex parte* proceedings and of proceedings not yet complete: *Kimber* v. *Press Association, Ltd.*, [1893] 1 Q. B. 65; *R.* v. *Evening News Ex parte Hobbs*, [1925] 2 K. B. 158. And even an unsolicited intervention may form part of the proceedings: see *Farmer* v. *Hyde*, [1937] 1 All E. R. 773; [1937] 1 K. B. 728, and contrast *Lynam* v. *Gowing* (1880), 6 L. R. Ir. 259.

prohibited by law or by the court itself, are privileged unless the plaintiff can establish that they were published maliciously (*g*).

But since the principle upon which this form of privilege is based is that all men have an interest in them and "the general advantage to the country in having these proceedings made public" (*h*), its protection also spreads more widely, though somewhat indefinitely, to cover reports of the proceedings of other bodies, such as commissions set up under statutory powers to inquire into matters of public interest (*i*) "if it appears that it is to the public interest that the particular report should be published" (*k*). And although there is no general rule of law giving protection to fair and accurate reports of foreign judicial proceedings, such reports may be subject to qualified privilege if their subject matter is such that the public has a serious interest in it and they are contemporaneous (*l*).

Whether a report is fair and accurate is a question of fact. It is clear that this privilege does not extend to reports of the proceedings of domestic (*m*) tribunals, for by very definition such tribunals are concerned with sectional rather than national matters; nor does it extend to reports of court proceedings to which the public are not admitted (*n*). Nor does the privilege extend to comment, as opposed to reported fact (*o*); care must therefore be taken in framing the headlines of reports (*p*).

(ii) *Extracts from or abstracts of parliamentary papers and public documents.*—By the Parliamentary Papers Act, 1840, s. 3, the publication (*q*) of *extracts from or abstracts of* parliamentary proceedings (as opposed to publication of such proceedings under the

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(*g*) See *e.g. Salmon* v. *Isaac* (1869), 20 L. T. 885.

(*h*) *R.* v. *Wright* (1799), 8 Term Rep. 293, 298.

(*i*) *Perera* v. *Peiris*, [1949] A. C. 1. And see *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q. B. D. 400. Contrast *Standen* v. *South Essex Recorders, Ltd.* (1934), 50 T. L. R. 365.

(*k*) *Perera* v. *Peiris*, [1949] A. C. at p. 21.

(*l*) *Webb* v. *Times Publishing Co., Ltd.*, [1960] 2 All E. R. 789; [1960] 2 Q. B. 535.

(*m*) Thus in *Chapman* v. *Lord Ellesmere*, [1932] All E.R. Rep. 221; [1932] 2 K. B. 431 (above) publication of the findings of an inquiry before the Stewards of the Jockey Club though protected as being a matter of reciprocal interest in the *Racing Calendar* under the ordinary rules of qualified privilege was not protected in the *Times* under the rule now discussed. (Though it would now be protected as a *newspaper* report under the Defamation Act, 1952, s. 7, and Schedule, Part II, 8 (c) (32 Halsbury's Statutes (2nd Edn.) 403, 408)—see p. 319, *post.*)

(*n*) *Lewis* v. *Levy* (1858), E., B. & E. 537, 538.

(*o*) *Stiles* v. *Nokes* (1806), 7 East 493; *Lewis* v. *Clement* (1820), 3 B. & Ald. 702.

(*p*) See *Bishop* v. *Latimer* (1861), 4 L. T. 775.

(*q*) "Printing" is the word used in the section: but see *Mangena* v. *Wright*, [1909] 2 K. B. 958, 976.

protection of an order of either House) is privileged provided that it is made in good faith and without malice (*r*).

Further, even at common law similar privilege attaches to the publication of extracts from public documents generally (*s*).

(iii) *Publications in newspapers protected under the provisions of the Defamation Act*, 1952 (*t*).—By virtue of sections 7 and 9 (2) of this Act two main groups of statements published in newspapers (*u*) or *broadcast* by means of wireless telegraphy (*a*) as part of any programme or service provided by means of a broadcasting station within the United Kingdom are subjected to privilege (*b*) unless proved to have been made with malice (*c*).

These groups are set out in the Schedule to the Act which *must be consulted in detail.*

The first group includes fair and accurate reports of:—

(1) Proceedings in public of legislatures in H.M. dominions outside Great Britain.
(2) Proceedings in public in certain international organizations and in international courts.
(3) Proceedings before courts (including courts martial) in any part of H.M. dominions outside Great Britain.
(4) Government inquiries in any part of H.M. dominions outside the United Kingdom.

The group also includes fair and accurate copies of, or extracts from, public registers or documents and notices published by authority of any court within the United Kingdom.

The second group includes fair and accurate reports of:—

(1) The decisions of certain kinds of associations in relation to their members. These include learned associations, trade and professional associations and sporting associations.

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(*r*) *Mangena* v. *Wright*, *supra*.

(*s*) *Fleming* v. *Newton* (1848), 1 H. L. Cas. 363; *Searles* v. *Scarlett*, [1892] 2 Q. B. 56; *John Jones & Sons, Ltd.* v. *Financial Times* (1909), 25 T. L. R. 677.

(*t*) 32 Halsbury's Statutes (2nd Edn.) 403, 405, repealing the Law of Libel Amendment Act, 1888, s. 4, which contained similar but less sweeping provisions.

(*u*) By s. 7 (5) of the Act "'newspaper' means any paper containing public news . . . which is printed for sale and is published in the *United Kingdom* either periodically or in parts or numbers at intervals not exceeding *thirty-six* days".

(*a*) As defined in s. 10 (3) of the Act.

(*b*) This privilege is in addition to, not in substitution of, any other privileges subsisting at common law or otherwise: s. 7 (4).

(*c*) Statements the publication of which is prohibited by law are not protected; nor are statements which are not *of public concern and the publication of which is not for the public benefit* (s. 7 (3)). It is for the "public benefit" for police to make announcements about suspected criminals: *Boston* v. *W. S. Bagshaw & Sons*, [1966] 2 All E. R. 906.

(2) Proceedings at lawful public meetings (*d*).
(3) Public proceedings of certain bodies, including local authorities and public inquiries.
(4) Proceedings at general meetings of companies, other than private companies.

The group also includes copies of, or fair and accurate reports of, notices issued for the information of the public by appropriate authorities (*e*).

The two groups of statements are set out separately in the Schedule to the Act because by s. 7 (2) (*f*) of the Act a special rule applies to statements in the *second* group which provides that in the case of these statements (as opposed to statements within the first group) qualified privilege shall

> "*not* be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which or in the manner in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so . . ." (*g*).

## 8. APOLOGY AND AMENDS

At common law the fact that the defendant has apologized for having defamed the plaintiff was no defence; but by the Libel Act, 1843 (*h*), he may prove *in mitigation of damages* (*i*) that he made or offered an apology as soon as he had an opportunity of doing so. Further, the fact that the plaintiff has previously brought an action for damages in respect of statements to the same effect as those now relied upon, or has received compensation in respect of such statements, may also now (*k*) be given in evidence *in mitigation of damage*.

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(*d*) For the meaning of "public meeting" in this context see the Schedule to the Act, Part II, para. 9, and *Khan* v. *Ahmed*, [1957] 2 All E. R. 385; [1957] 2 Q. B. 149.
(*e*) See *Boston's Case* (above, n. (*c*)).
(*f*) As amplified by s. 9 (2) (32 Halsbury's Statutes (2nd Edn.) 405).
(*g*) As to the form of the request, see *Kahan* v. *Ahmed*, [1957] 2 All E. R. 358; [1957] 2 Q. B. 149.
(*h*) Section 1 (13 Halsbury's Statutes (2nd Edn.) 1127).
(*i*) Damages in defamation cover loss of reputation; in no case have they been awarded in respect of injury to health caused by the defamation. Yet the possibility that they might be must not be excluded: *Wheeler* v. *Somerfield*, [1966] 2 All E. R. 305; [1966] 2 Q. B. 94.
(*k*) Defamation Act, 1952, s. 12 (repealing the narrower provisions of the Law of Libel Amendment Act 1888, s. 6). As to what evidence is admissible as to the plaintiff's reputation in mitigation of damages see *Plato Films, Ltd.* v.

By statute also in two kinds of circumstances the fact that the defendant has rendered an apology and tendered amends may be relevant in constituting a *defence*.

The first instance concerns libels contained in *newspapers* and inserted without malice and without gross negligence. The relevant statute is the Libel Act, 1843, s. 2 (*l*); but owing to its technicalities this defence is in practice seldom used and its nature need not be considered here (*m*).

The second instance is of practical as well as theoretical importance. It has been seen that liability in defamation is strict, and that it is in general no defence that the defendant neither intended to defame the plaintiff nor failed to use due care in making his statement. But the provisions of the Defamation Act, 1952, s. 4 have made an important inroad into this general principle.

This section provides for the case of *Unintentional Defamation*; that is to say, cases where the defendant claims that the statements complained of were "*published by him innocently in relation to*" (*n*) the plaintiff. And an innocent publication, for the purposes of the Act, means, and means only

> (a) that the publisher did not intend to publish the obnoxious statement of and concerning the plaintiff, and did not know of circumstances by virtue of which they might be understood to refer to him (*o*);
>
> or
>
> (b) that the statement was not defamatory on the face of it, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff;
>
> and in either case that the publisher exercised all reasonable care in relation to the publication (*p*).

Where the publication is thus "innocent" the publisher may make an "*offer of amends*". For the purposes of the section this means an offer to publish a suitable correction of the words com-

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*Speidel*, [1961] 1 All E. R. 876; [1961] A. C. at p. 1105: *Waters* v. *Sunday Pictorial Newspapers, Ltd.*, [1961] 2 All E. R. 758: *Associated Newspapers, Ltd.* v. *Dingle*, [1962] 2 All E. R. 737; [1964] A. C. 371: *Goody* v. *Odhams Press, Ltd.*, [1966] 3 All E. R. 369; [1967] 1 Q. B. 333.

(*l*) 13 Halsbury's Statutes (2nd Edn.) 1128, and see Libel Act, 1845, s. 2 (13 Halsbury's Statutes (2nd Edn.) 1131).

(*m*) The reader is referred to Gatley on *Libel and Slander* (6th Edn.), pp. 473–474.

(*n*) See s. 4 (1) of the Act.

(*o*) Thus the provisions of the section might now apply to circumstances such as those in *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.

(*p*) Section 4 (1) and (5).

plained of and a sufficient apology to the party aggrieved; also, where copies of the libel have been distributed by or with the knowledge of the publisher, to take reasonable steps to notify those to whom they have been distributed that the statements contained in them are alleged to be defamatory (*q*).

Then, if such offer is *accepted* by the party aggrieved and is duly performed no proceedings may be taken by him against the publisher (*r*).

But if the offer is *not accepted*, then it is provided (*s*) that in an action by the party aggrieved against the publisher, it shall be a *defence* for the publisher to prove that the words complained of were published by him innocently (*t*) in relation to the party aggrieved *and* that the offer was made as soon as practicable after he received notice that they were or might be defamatory and has not been withdrawn.

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(*q*) Section 4 (2). An accompanying affidavit is also required, setting out the facts relied upon as establishing "innocence"; and these facts *only* may be relied upon if innocence is subsequently pleaded as a defence (s. 4 (2)).

(*r*) Section 4 (1) (a). But this does not affect the right to proceed against others jointly responsible. By s. 4 (4) the High Court is given power to determine the steps to be taken in fulfilment of the offer and powers to award costs and expenses to the party aggrieved.

(*s*) Section 4 (1) (b).

(*t*) As above defined. But it is provided by s. 4 (6) that where the publisher is *not the author* of the statement the Defence thus provided shall not be available unless he *proves* that the words were written *without malice*. This, of course, affects the rights of printers and publishers.