CHAPTER TWO
MEDIA AND TORT LAW

DEFAMATION

Defamation is a two-in-one choice available to every citizen to protect his reputation against defamous publication made by newspapers. One can either sue for damages or prosecute defamer. Defamation is a constitutional limitation on the right to freedom of the expression, as mentioned Article 19(2)

The expression "Defamation" has been given constitutional status. This word includes expressions like libel and slander covering many other species of libel, such as obscene libels, seditious libels, blasphemous libels and so on. The law of defamation does not infringe the right of freedom of speech guaranteed by article 19(1) (a). It is saved by Article 19(2) as it was included as one of the specific purposes for which a reasonable restriction can be imposed.

Defamation is both a crime as well as civil wrongs. Criminal Law on the subject is codified in India. On the subject of civil liability for defamation there is no codified law in India and the rule that are applied by our courts are mostly those borrowed from the common law.

The law of defamation pertaining to civil liability is uncodified in India. On a Large number of matters such as the ingredients of the tort, the principles of liability, the defence available in civil actions for defamation and the burden of proof of various defences, courts broadly follow the rules of the common law. Hence extensive reference to English Law is necessary to know the principles of defamation.

Definition of Defamation

Salmond defines the wrong of defamation as the publication of a false and defamatory statement about another person without lawful justification[1]. According to Underhills, such a statement become defamation if it is made about another without just cause or excuse, whereby he surfers injury to his reputation (not to his self-esteem)[2] He considers defamatory statement as one which imputes conduct or qualifies tending to disparage or degrade any person, or to expose him to contempt, ridicule or public hatred or to prejudice him in the way of is office, profession or trade. Blackburn and George[3] define defamation as the tort of publishing a statement which tends to bring a person into hatred, contempt or ridicule, or to lower his reputation in the eyes of right thinking members of society generally". The words "to lower his reputation in the eyes of right thinking members of society generally" are taken from the test suggested by Lord Atkin in Sim v.Stretch. Namely "would the words tend to lower the plaintiff in the estimation of right thinking members of the society generally".

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[1] Salmond on Torts, 13th 1961 edition. P361
[2] Law Torts, Underhills, 18th 1946 edition p 23
[3] Elements of the law of Torts by Blackstone and George, 2nd 1949 edition p. 167

Fraser thinks that a statement becomes defamatory if it exposes on to hatred, ridicule or contempt or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or trade.[4] .

But Winfield does not agree with this definition. According to him defamation is the publication of a statement which tends to lower a person in the estimation of the right thinking members of society generally or which tends to made them shun or avoid that person. He thinks that a statement may possibly be defamatory even if it does not excite in reasonable people feelings quite so strong as hatred contempt or ridicule".[5] The phrase "right thinking members of society" excludes a lay or morally blunt men or hypersensitive and conscious persons.

It should further be noticed that the definition speaks of "right thinking members of society *generally"*. The use of the word generally shows that in order to succeed in suit for defamation the plaintiff must prove that the statement in question tends to discredit him with reasonable people in general and it would not suffice if all he can show is that the statement tends to discredit him only with a particular class of people.

Distrinction between Slander and Libel:

The Form:

The wrong of defamation is of two kinds. Namely libel and the slander. The form in which a defamatory imputation is conveyed determines whether the resulting wrong is a libel or slander If the form is permanent and so capable of conveying repetition of the imputation it is a libel; if it is only transitory it is a slander. The very first distinction between libel and slander is in form only.

Lopes, J., in ***Monson V. Tussauds*** [6] points out that libels need not always be in writing or printing. The defamatory matter may be conveyed in some other permanent form as a statue, a caricature, an effigy, chalk mark on a wall, sign or pictures. Conversely, the spoken work is the most obvious example of a form of expression which is slander; other examples are gestures, and perhaps, inarticulate expressions of disapproval such as hissing or booing, or cat calls and significant gestures, such as winking etc.,

In *Manson V. Tussauds* case in the defendants, who kept a wax works exhibition, had exhibited a wax model of the plaintiff with a gun, in a room adjoining the 'Chamber of Horrors' (a room in the basement, in which the wax models of notorious criminals were kept). The plaintiff has been tried for murder in scotland and released on a verdict of 'Not proven' and a representation of the scene of the alleged murder was displayed in the chamber of horrors. The Court of Appeal held that the exhibition was libel.

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[4] Scott V. Samson 1882 e.Q.B.D. 491
[5] Winfield, Tort, 7th edition 1963, P.574
[6] 1895 1 Q..B. 671)

Libel is a written defamation while slander is a spoken defamation. Similarly, it has been said that while libel is addressed to the 'eye stander is addressed to 'ear' Salmond questioned this and suggests that the libel is defamation crystalised into some permanent form, while slander is conveyed by some transient method of expression. The Court of Appeal in ***Yourssoiupoff V. Metro-Goldwyn-Mayer Picture***'[7] did not have much difficulty in holding that defamation in a "taking" film was libel. But there is no authority as to whether defamatory matter recorded in a gramophone disc unaccompanied by any pictorial or other matter is libel or slander. It is addressed to the ear, not to the eye, but it is in permanent, not in transient form. The correct answer is that to utter defamatory words with the intention that they shall be recorded is slander only, but that when the record has been made, if it is published, the manufacturer is responsible for libel. The Defamation Act 1952 apparently settles a dispute of point by providing that the broadcasting of words, by means of wireless telegraphy shall be recorded is slander only, but that when the record has been made, if it is published, the manufacturer is responsible for libel. The Defamation Act 1952 apparently settles a dispute of point by providing that the broadcasting of words, by means of wireless telegraphy shall treated as publication in permanent form. The Theaters Act 1968, S4, makes a similar provision for words published during the public performance of a play. A talking cinematography film must now be added to the List. Defamatory gramophone records are libels because of their permanency in form. On the other hand, broadcasting is held to be slander for there is want of permanency about them. The case might be different if the defamatory statements were broadcast from a record, in which case the defamation becomes a libel.

Action:-

Another important factor of differentiation is the actionability of the wrong. While libel is actionable per se without proof of special damage, the slander is actionable only on proof of special damage.

Special damage signifies that no damages are recoverable merely for loss of reputation by reason of the slander, and that the plaintiff must prove loss of money or of some temporal or material advantage estimable in money. If there is only loss of the society or consortium of one's friends, that is not enough.

Where there is no need to prove special damage in defamation, the plaintiff can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed, for the English law presumes that some damage will arise in the ordinary course of things. It is enough that the immediate tendency of the words is to impair his reputation. If the plaintiff contends that special damage has been suffered in addition to general damages, he must allege it in his pleadings and prove it at the trial but even if he breaks down on this point, he can still recover general damages.

In India the between libel and slander on the point whether it is actionable without proof of special damage has not been recognised. In this country, both libel and slander are criminal offences under the Penal Code and both of them are actionable in civil without proof of special

[7] 1934 50 T.L.R. 581

damage *Ms. Ramdhara v.Phulwatibai*[8] slander may be the result of a sudden provocation uttered in the heat of the moment, while the libel implies grater deliberation and raises a suggestion of malice. Libel is likely to cause more harm to the person defamed than slander because there is a strong tendency everywhere on the part of most people to believe anything they see in print.

Exceptions to "Slander not actionable per se"

In general slander is actionable only on proof of special damage, but in the following exceptional cases Slander is actionable per se or without proof or special damage.

a) **Imputation of Criminal Offence:-**
When the slander imputes that the plaintiff has committed a crime punishable with imprisonment, there must be direct imputation of the offence, not merely suspicion of it and it is not enough if the offence imputed is punishable with fine. The words imputing a suspicion of a crime, even though the offence be punishable corporal, are not actionable without proof of special damage. But the words "you are a rogue and I will prove you are a rouge, for you forbged my name" are not mere imputation of a suspicion and are actionable per se. Again the words "you are guilty (innuendo) of the murder of D" have been held to amount to a charge of murder and are actionable without proof of actual damage. The crime imputed need not be indictable; it is sufficient if it is punishable corporal. Nor it is necessary that the words should specify any particular offence.

Where the imputation of crime is accompanied by an express reference to a transaction which merely amounts to a civil wrong, slander is not actionable per se. Where the crime imputed is impossible and has not been committed with the knowledge of all parties etc., where the defendant said to the plaintiff" Thou has killed by wife and she was then alive within the knowledge of all, there is no such imputation as can be made the basis of a suit without proof of special damage.

b) **Imputation of disease:**
Imputation that the plaintiff is suffering from an unpleasant, contagious or infectious disease tending likely to exclude the plaintiff from society is actionable per se.

c) **Imputation of unfitness or incompetence:** An imputation of unfitness, dishonesty or incompetence in any office, profession, calling, trade or business held or carried on by the plaintiff at the time when slander is published is actionable per se.

On the other hand an imputation of want or skill or knowledge necessary to carry on a profession is actionable per se. Thus to impute to a barrister or a solicitor that he knows no law, or to a doctor want of skill is actionable per se.

d) **Imputation of Unchastity:** Imputation of unchastity or adultery to a woman or girls is also actionable per se. It has been held that imputation of unchastity includes that of lesbiarison or homosexual vice. Formerly imputation of unchastely to woman or girls

[8] 1969 Jab.L.J.582

was not actionable per se except in the city of London, Slander of women Act 1891 extended its purview to all over the Country. It has been held that imputation of unchastity includes that of lesbianism or homosexual vice.

e) **In Parvathi V. Manner**[9] the defendant abused the plaintiff and said that she was not the legally married wife of her husband, but a woman who had been ejected from several places for unchastely. It was held that the defendant was liable.

The Common Law rule that slander is not actionable per se has not been followed in India. The reason given is that the rule is not founded in any obvious reason or principle and that it is not in consonance with "Justice, equity and good conscience" English law itself underwent a change by the Slander of Women Act.

Nature of Wrong:

Libel, if it tends to provoke the breach of the peace is a crime as well as tort; Slander as such is never criminal although spoken words may be punishable as being reasonable, seditious, blasphemous or the like.

This distinction between libel and slander is not recognised in India. In England while libel is both a crime and civil wrong, slander is only a civil wrong. In India, However both are criminal offences. Indian decisions relating to slander may be classified under three heads; I) Vulgar abuse; (ii) Imputation of unchastity to a woman, (iii) Aspersion of caste.

(a) **Vulgar abuse:** The words '*sala,' 'haramjada,' 'soor and 'bapar beta* ' were held to be mere abuse. Where however, a abusive language is not only insulting but amounts to defamation as well as action will lie even without proof of special damage.

(b) **Aspersion on caste:** It has been held by the Oudh Chief Court that to say of a high caste woman that she belongs to a low caste is a slander which is actionable per se not only at the instance of the woman herself, but also at the instance of her husband[10].

Kinds of Defamatory Statements

(i) *Prima facie* Defamatory

There are plenty of cases in India and England which explain the scope of defamation as a civil wrong In fact, the law on protection of reputation has been developed very exhaustively by the judges only. The jury and judicial system have played an important role in checking the abuse of the freedom of speech and expression. The various cases in which the press is put to defend itself from the charge of defamation will enable us to understand the law of defamation more thoroughly as an effective limitation on freedom of the press or its misuse.

Tolley V. J.S. Fry

[9] **1926 I.L.R. 8**

[10] Gaya Din Singh v Mahabir Singh, 1. Luck 386

In this case[11] Tolley is a champion amateur golfer and member of a sports club. The rules of the club prohibit members from associating themselves with any advertisement media. The defendants, Fry, who were manufacturers of chocolates – caused to appear in certain newspapers an advertisement of their chocolate, and a caricature (a distorted appearance) of the plaintiff playing a stroke at golf with defendant's chocolate protruding from his pocket.

The innuendo may be derived from the circumstance of the case as a whole. It may not depend on the words used; In this case the plaintiff brought an action for libel and alleged as an innuendo that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendant's chocolate, that he did so far gain and reward, that he had prostituted his reputation as an amateur golf player for advertising purposes.

It was held by the House of Lords that the innuendo was proved in view of the circumstances and therefore, the defendants were liable.

Innuendo is accepted as a kind of defamation. Defamation is of two kinds that which is pima facie defamatory i.e., openly and in terms makes an allegation defamatory to the plaintiff and that which is not openly and in terms makes an allegation defamatory to the plaintiff and that which is not openly defamatory but contains some latent, hidden or secondary meaning which would lower the plaintiff's reputation in the eyes of those who know the facts. This secondary meaning is known as an 'innuendo.'

Freedom of speech will not extend to lower the reputation of a golf player Mr. Tolley. The caricature of the golf player has affected the reputation of Mr. Tolley,. It is an innuendo. On the face of it the caricature will not convey any bad manning but it can be inferred that Mr. Tolley has violated the club rules and involved in cheap publicity by voluntary consent – which resulted in lowering his reputation. Here innuendo is derived from the circumstances as a whole.

The plea of innuendo failed in ***Capital and County Bank Ltd., V. Henry and Sons.***[12] Henty and sons, firm of breweries were in the habit of receiving in payment from their customers cheques on various branches of the Capital and Counties Bank, which the bank cashed for the convenience of Hentys at a particular branch of which he was the manager. In consequences of a squabble with new manager he refused to continue this practice. "Henty and sons hereby give notice that it will not receive in payment cheques drawn on any of the branches of the Capital & Counties Bank". The circular became known to other persons and there was a run on the bank i.e. people started withdrawing their money from the Bank. The bank sued Hentys for libel on the ground that the circular imported insolvency. It was held that 1. The words were not libellous in their natural meaning and 2. There were no facts proved which made them capable of bearing the meaning alleged in the innuendo to the effect that the plaintiffs were insolvent. Accordingly the circular was not actionable although its affect had been to cause run on the bank and loss to the plaintiffs.

The words used must be construed in the sense in which they would be understood by ordinary person. If they are not capable of a defamatory meaning in that sence they may

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[11]

[12] 1882, 7Th April.741

nevertheless be actionable if it is proved that would be understood as defamatory by the persons to whom they were published.

Blackburn says: "It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words used were calculated to convey a disparaging imputation."

In the case of words prima facie defamatory, the plaintiff need prove nothing more than publication and the Court will presume damage in his favour. Thus it is libelous to write and publish of a man that he is a rogue or a rascal, a swindler, a crook, a coward, a liar, a hypocrite, a villain, a blackguard, a blackleg, a libeller, a scandalmonger or a habitual drunkard, or that he is dishonest or immoral or wanting ingratitude. It is libelous to write that man has been guilty of oppressive insulting, intolerant or unbrotherly conduct. In such cases the onus lies on the defendant to prove from the context in which the words were used or from the manner of their publication, e.g., in slander the tone in which the words were uttered or other facts known to those to whom the words were published, that words could not be understood by reasonable men to convey the imputation suggested by the mere consideration of the words themselves i.e., they were understood merely as a joke or (in an action for slander) a mere abuse or as in no sense defamatory of the plaintiff. In the second class of cases the language is ambiguous as where it is equally capable on the face of it of two meanings, the one defamatory and the other innocent.

Innuendo:

Words which are not defamatory in their ordinary sense, may nevertheless, convey a defamatory meaning owing to the circumstances in which they are spoken.

If I say of a man ' he is no better than his father ' these words are not in their ordinary sense capable of a defamatory meaning. But if the father is known by the person to whom the words are used, to have been a scoundrel, the words used would convey to them the meaning that the son also is a scoundrel. The words when would be defamatory in the sense in which they were understood by the persons to whom they were addressed.

Where the words are not prima facie defamatory but innocent; the plaintiff must expressly and explicitly set forth in his pleadings the defamatory sense which he attributes to it. Such an explanatory statement is called an 'innuendo'. In ***Boydell V. Jones***[13] a lawyer even took objection to the description of "an honest lawyer" which was applied to him in the heading of a paragraph containing some details of a case in which he was concerned; and it was held that the phrase was capable of meaning the exact opposite of what it said or light therefore be libelous. Thus a man may ironically say of another that the latter is a 'Harischandra' or ' Gandhiji' meaning exactly the reverse of what there saintly persons were. Another example is the case of ***Bishop V. Latimer*** [14] where the heading line "How lawyer B treats his clients" which appeared over a paragraph containing perfectly accurate report of certain judicial proceedings in which the lawyer B had apparently not treated one particular client well. In an action for libel against the

[13] 1838.4M&W. P.446

[14] 1861, 4 L.T.N.S. 775

newspaper it was held that the head line was capable of meaning that B habitually treated his clients badly and as this inference was not justified by the single instance reported, the newspaper proprietor had to apologise for his error.

An innuendo must be pleaded and proved. The statement of claims must set out the facts and circumstances which would have induced reasonable persons. The plaintiff cannot at the trial allege some other hidden meaning which he has not pleaded in his statement of claim.

Cassidv V., Daily Mirror Newspapers Ltd[15].,

In this case a married man living apart from his wife, posed with a young woman to a photographer in the employment of the defendants, telling him that he was engaged to her. The photographer sent the photograph to his employers who published it in their newspaper with words Mr. C, the race horse owner, and Miss.X, whose engagement has been announced; Mrs. C. was known among her acquittances as the lawful wife of C, although she and C were not living together. The information which the defendants based their statement was derived from C alone, and they had made no efforts to verify it from any other source. Mrs. C sued them for libel. The innuendo bearing that C was not her husband, but lived with here in immoral cohabitation. A majority of the court of Appeal held the innuendo was established and the Jury entitled her to damages as they held that the publication conveyed to reasonable person an aspersion on the plaintiff's moral character.

Hulton V. Jones[16]:

This case deals with the importance of the second essential ingredient is., the statement must refer to the plaintiff. The statement must have been reasonably understood by at least one person to refer to the plaintiff. If it is, of course, not necessary that the plaintiff's name should be contained in the statement, it is sufficient if the statement is such that at least one person to whom it was communicated had good and reasonable grounds for believing it to refer to the plaintiff.

"If the cap fits" Principle:

It is not necessary that the defendant should have intended to refer to the plaintiff or even have known of his existence. This is the strict rule of liability. Known as 'If the cap fits' liability. If the defamatory statement fits into the cap of the plaintiff, it will make the plaintiff entitled to have cause of action against the defendant inspite of the absence of international or deliberate reference.

In this case the defendant had invented the name, ' Artemus Jones' and did not know the existence of a person of that name. Yet the House of Lords held that the newspaper was responsible for the libel. The decision in this case shown that a man published a defamatory statement at his peril. Intention or knowledge of defendant are immaterial.

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[15] 1929, 2 K.B. 331
[16] 1910 A.C.20

Hulton and co., were newspaper proprietors published in their Sunday Chronicle'a humorousaccount of a motor festival at Diep (resort in the north of french) in which imputations were cast on the morals of one artemus Jones, a church warden at Peckham.

Paper Wrote: "There is Artemus jones with a woman who is not his wife, who must be, you know the other thing, here he is the life and sould of a gay little band betraying a most unholy delight in the society of female butterflies. "

The names 'Artemus Jones' was purely fictions and was invented by the authors of the article. Neither the author, not the proprietor printer and publisher of the newspaper were aware of any person living or dead bearing such name. But it so happened, that there was person living in England bearing that name, with the only difference that he was not a Churchwarden, but a barrister, and he was not living at Peckham and did not take part in the Dieppe festival. He sued Hulton & Co. for libel, and friends of his swore that they believed that the article referred to him. The defendants pleaded that the article was a mere fancy sketch of life abroad, the name was imaginery.

Held by the House of Lords that a man published a defamatory statement at his peril, whether there was any intention to defame or not is immaterial. Newspaper was therefore liable. 'The cap has fitted' and so 'if the cap fits liability applies. If the cap fits the plaintiff either by words prima facie defamatory or by innuendo the defendant is liable whether or not be know or ought to have known of the plaintiff's existence. Though the defendants were unaware that Mr. C was married man they were held liable as all those who know the plaintiff reasonably thought that she was not the lawfully wedded wife or Mr C but was living with him in immoral cohabitation. Lord Advestone, C.J., says"… I think beyond dispute that the intention or motive of the words which are employed is immaterial, and that if in fact the article does refer or would be deemed by reasonable people to refer to the plaintiff, the action can be maintained, and proof of express malice is wholly unnecessary. He refers to the judgement of Lord Bramwell in ***Abrath V. North Eastern Railway Co.***[17], in which, the following passage occurs.

> That unfortunate word 'malice' has got into cases of action for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary.

Fletchure Moulton, L.J. dissented to the above rule. He insisted on the proof that aim of the words refer to the plaintiff. "No matter what the libel might contain or might be alleged to mean, the action would not lie unless it was averred and proved that the words were spoken' the gift of every charge of every liberally consists in the person or matter of one concerning whom or which the words are averred to be said or written. Moulton also refers to the unanimous judgement of the House of Lords in ***Derry V. Peeck***[18] which established that nothing had changed the nature of the old common law action of deceit, and that to be guilty of fraud you

[17] 1886, 11 App. Cas.247
[18] 1889,58 L.J.Ch. 864

must have fraudulent mind, that fraudulent intention was an essential of the issue. So is the case of the action of defamation also. It is an action for speaking evil or you fellow, and to be guilty of it you must in the first place have spoken the words of him, i.e., have intended your words to refer to him. It is not an action based on some supposed negligence whereby you have said something which may mistaken by be taken by some persons to refer to a person or persons who may be unknown to you and of whom you were not speaking.

Farewell J in *Hulton and Co. v. Jones.* Opines "The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, or that which is apparent from he natural and ordinary interpretation of the writer's words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the plaintiff and the circumstances.

Scrutton J. says "It is said that this decision would seriously interfere with the reasonable conduct of newspapers. I do not agree. If newspapers who have not more rights than private persons publish statements which may be defamatory of other people, without inquiry to their truth, in order to make their paper attractive, they must take the consequences of, on subsequent inquiry, their statements are found to be untrue or capable or defamatory and unjustifiable inferences" .

Newstead V. London Express Newspapers Ltd.[19],

The defendants in their Newspaper reported the conviction for bigamy of Harold Newstead, 30 year old camberwell man. The report was correct and the description was correct. But there was another Harold Newstend in Camberwell, a hair dresser assistant, who was of course innocent of bigamy. Reasonable persons who knew the hairdresswer's assistant thought that the report related to him. It was held by the Court of appeal that innocent Harold Newsstand could recover damages for defamation, although the words were true of, and a reasonable description of, the guilty Harold Newstead.

These decisions undoubtedly stiffen the responsibility of the producers of printed matter. The rule that 'Liability for libel does not depend upon the intention of the defendant, but upon the fact of defamation's created much hue and cry among the journalists, publishers and authors .

Winfield commented that … they (Journalists) are at the mercy of coincidence in the sense that any unscrupulous person whose name happens to be identical with that of fictitious character can threaten them with an action for libel, although he has not suffered a little of damage." Salamond says "the present state of law undoubtedly provides a temptation to a speculative and 'gold digging legislation. And this is more so because of the heavy damages often awarded buy juries in libel actions.

Even when publishers wrote "If the facts tally with any other we are not responsible, they were held liable

Innocent Publishers

[19] 1940 1 K.B.377

The English Parliament, realising that the law laid down by these decisions is very hard on innocent publishers who had really no intention to defame, has passed, the defamation Act, 1952 Section 4 (1) of the act says: a person who has published words alleged to be defamatory of another persons may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section, and

a) If the offer is accepted by the party aggrieved and duly performed, no proceedings for libel or slander shall be taken against the publishers.

b) If the offer is not accepted, it shall be defence.

The publisher has to publish a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words.

The Porters Committee recommended (Post Committee Report, paras 61-64, and summary of Recommendation No.4) that where a statement which is, in facyt, defamatory of the plaintiffs is made by a defendant who was unaware of the facts which would make the statement defamatory of him, the plaintiff's remedy should be restricted in requising the defendant to publish an explanation and an apology and that if such explanation and apology is published, no damages should be recoverable. Section 4 of the Defamation Act 1952 has implemented this recommendation in the United Kingdom. This section is with adopting in India.

T.V. Ramasubbaiyer V. A.M.Ahmed

Dissenting opinion of Fletcher Moulan L.J., in Hulton and Jones and section 4 of English Defamation Act 1952 was accepted in ***T.V. Ramasubba Iyer and another v. A.M. Ahmed Mohideen***[20]**.** There was a news item published in Dinamalar dated 18-2-1981 stating that a person who is called King of Agarbathis had smuggled opium into Ceylone and that he was arrested by Madras Police. The respondent alleging that he said publication constituted a defamation of him since the news item was understood to refer to him, instituted suit for damages in a sum of Rs.5000. The subordinate judge found the newspaper guilty of defamation though he did not intend to defame him and published a correction stating that the news that appeared was not referred to the plaintiff. Following the decision of the House of Lords in Hulton and co. V. Jones, judge came to the conclusion that the intention was not the test of liability. First appeal was dismissed by the District Judge, and second appeal was preferred. Appellate court followed the dissenting opinion of Lord Justice Fletcher Moulton. In Hulton case. Fletcher said that a defendant is not guilty of libel unless he wrote and published the defamatory words of and concerning the plaintiffs in other words unless he intends them to refer to the plaintiff. The appellate court observed that the law of defamation as part of the law of torts as applied and enforced under the common law of England is applied to this country only on the basis of justice equity and good conscience. Lord Fletcher's opinion was much more in consonance with justice equity than the law in England, said the appellate court. Section 4 of the Defamation Act 1952 deals with unintentional defamation. It overrides the rigor of the law as laid down by the House of Lords in Hulton case.

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[20] AIR 1972 Mad 398

Knuffer V. London [21]

This case deals with group defamation. Defamation of a class is not generally actionable; when the words complained of reflection on a body of class of persons generally, such as lawyers, clergy men etc., no particular number of the body or class can maintain an action. Willer J., said in ***East Wood V. Holmes***[22] that "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual". Thus in *Knuffer V. The London Express Newspaper Ltd..,* the plaintiff was not able to get damages for alleged defamatory passage about him. The defendant published an article in a newspaper adversely commenting on the activities of an accusation of certain Russian political refugees called Mlado Ruse or young Russia in terms which it was admitted would have been defamatory if written of a named individual. The association had a very large membership in other countries but that of the branch of the united Kingdom was only about 24 members. The plaintiff who resided in London was the active head of the Association of the United Kingdom branch and it was contended that the article reflected on him personally. The defendants contended that the article was an attack on the general character and activities of the association and do not on the plaintiff. It was held by the House of Lords that when the defamatory words are written or spoken of a class of persons it is not open to a member of that class to any that the words were spoken of him unless there was something to shown that the words referred to the plaintiff an an individual and therefore the defendants were not liable.

When the words reflex impartially on either of two persons e.g., if the defendant said "Either a or B has stolen my watch" then if there was something in the defendant's tone or manner, or in the expression added, or in the surrounding circumstances which would lend these who heard the words to understand them as solely applicable to A or to B, an action clearly lies to the suit of A or B according to circumstances.

Arthur Lee V. Wilson:[23]

This interesting case also uphold the rule in *Hulton V. Jones* case. Here the statement referred to 3 persons. In fact it was intended to refer to a fourth man. Yet the publisher was held liable to all of them.

During the course of a public inquiry as to the charges of bribery against certain police officials at Melbourne, Victoria, A gave evidence that "first constable Lee on the Motor Registration Branch' had accepted a bribe. The defendant newspaper reported A as having said that 'Detective Lee' had accepted a briber. There were in the Melbourne police three officers named Lee, one in the Motor Registration branch, and two in the Detective branch. Each of the two detectives brought an action of libel against the newspaper and each called evidence of persons who understood the published matter to refer to him. The defendants tendered evidence to show that the words did not in fact refer to either of the plaintiffs but to another member of the

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[21] 1944 A.C/116
[22] 1858 I.F. and F 347
[23] 1934-51 C.L.R. 276

police force named Lee. This evidence was objected to an was rejected; and judgement was given for each of the plaintiffs. The Full Court of Victoria held that the evidence was wrongly rejected and ordered a new trial. On appeal, it was held by the High Court of Australia that if words capable of referring to more than one person, are found to defame each of them, each may recover, although the word may have been intended to refer to quite a different perso

Other ingredients of Defamation:

The other important ingredients of defamation are 1) Publication 2) falsity of statement, and 3) specialty of damage.

Even if the statement is defamatory, it is not actionable until it is published..

No civil action can be maintained in England in respect of a defamatory statement unless the plaintiff can establish that it has bee published to a third person, that is to may, to some person other than the plaintiff himself.

Communication of defamatory words to a third party is termed a publication. Publication is defined as making known the defamatory matter after it has been written to some person other than the person of whom it is written. If nobody else sees the libel or hears the slander, except the person defamed, the law gives him no cause of action, for there cannot be publication of a defamatory matter to on self.

In Nemichand V. Khemraj,[24] defendants made some wild imputations in their speeches against the plaintiff for molesting women, extracting money, by unlawful means and remaining absent from duty from the railway workshop. The extract of these speeches was published by Nemichand in a leaflet. Plaintiff suffered loss of reputation and was suspended from the service as a result of the leaflet. The district judge concluded that there was no absolute evidence to show that Nemichand published the pamphlet, and that he was not liable for payment of damages. Mere printing is not enough it must reach some more people through his publication then only there can be publication, which was essential ingredient making defamation an actionable wrong. Nemichand was not held liable in appeal.

The question was discussed in a Kerala case in ***T.J. Ponnen V. M.C. Verghes***[25] where the court, under the circumstance of the case, held that there could be no publication between husband and wife.

The privilege however, does not extend to cases where they are living apart, either divorced, or judicially separated, or under a separation order.

Again, this rule of publication between husband and wife is confined to communication made by one spouse to another. No third party will be protected if he makes the communication to one spouse about the other.

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[24] AIR 1973 Rajasthan 240
[25] AIR 1967 Ker.228 1965 Ker L.T.1010

In ***Verman V. Ash***[26] an ex-ledger complained to his landlady about some petty pilferings by her husband, during his stay with her. The court held the communication to be publication. Maule, J., remarkd; "In the eye of law, no doubt, man and wife are for many purposes one; but that is a strong figurative expression and cannot be dealt with as that all the consequences must follow which would result from its being literally true.

Sending of a defamatory article to the editor of a newspaper tantamount to publication.. The appearance of the article in the paper is a second publication and constitutes a separate cause of action.

If the libel is contained in a telegram, or be written on post card, that is publication even though it be addressed to the party libel; because the telegram must be read by the transmitting and receiving officials, and the post card will in all probability be read by some persons in the course of transmission. Dictating a libelous letter to a typist and giving it to an office boy to make a press copy, is publication.

In case of ***Huth V. Huth***[27] the alleged libel was contained in a document sent through the post by the defendant in an un-gummed envelope under a half-penny stamp addressed to his wife, which on arrival at the addressee, was opened and read by the butler out of curiosity. The court or appeal held that there was no publication.

Every repetition of defamatory words is a fresh publication and creates a fresh cause of action. It is no defence to an action for such republication that the defendant
Received the libelous statement from another whole name he disclosed at the time of the publication.

In ***Dingle V. Associated news Papers Ltd..***[28]**,** and others the Court of Appeal besides reaffirming the principles laid down in Scott V. Sampson held that even if a part of the defamatory publication is protected as absolute privilege under the parliamentary proceedings Act, it will not save the defendants-News Papers from liability for publishing the privileged matters along with other unprivileged defamatory.

Where the statement is in a language which the recipient does not understand, or if the recipient is too blind to read, or too deaf to hear it or if he does not realise that it refers to the plaintiff, there is no publication.

Repeater: An action will lie for libel or slander against a defendant who is merely a repeater, printer, or publisher of it, unless the defendant can show (I) that he did not know that he was publishing a libel or slander, (ii) that his ignorance was not due to negligence on his part, (iii) that in the case or libel he did not know and had not grounds to think that the document was likely to contain libelous matter.

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[26] 1835 15 C.B. 836 L.J.C.P.190
[27] 1915, 3.K.B.C.A
[28] 1961 1 All Eng. R.897

But in slander, if the special damage arises simply from the repetition, the originator will not be liable except, a) when the originator has authorised the repetition or b) when the words are originally spoken to a person who is under a duty legal, moral., or social to communicate them to a third person.

Innocent dissemination: All these who authorise, control, or assists in the actual printing or production of printer matter are clearly liable as having published it; and ignorance of the defamatory nature of the contents is no defence, even though they behaved in a reasonable and careful manner. But those who merely disseminate or distribute the printed matter are not regarded as responsible for publication if the can prove that the did not know the contents.

Emmens V. Pottle*[29]*:

In this case the defendants, who were news-vendors, in the ordinary course of their business sold several copies of a newspaper which contained a libel on the plaintiff. The jury found (1) that the defendants did not know that the newspaper at the time they sold them contained a libel on the plaintiff; (2) that it was not by negligence on the defendant's part that he did not know that the newspaper was of such a character that it was likely to contain libelous matter. On these findings both the trial Court of Appeal held the defendants not liable.

On the other hand in ***Vidtelly V. Mudie's library***[30] case, (1900-2 Q.B. 170) case, the defendants, the proprietors of a circulating library were held liable for circulating the copies of a book without the knowledge that it contained a libel on the plaintiff. The defendants were considered to have failed to satisfy the test mentioned there in the above case. In ***Martin V. Trustees of British Museum***[31] the defendants were held not liable for allowing readers in the British Museum to see books containing libellous matter holding that there was no negligence on the part of the defendants. This is right conclusion for otherwise even a Railway company might be liable for transporting bundles of newspapers containing defamatory matter in it vans. Bowen, J – in Emmens V. Pottle says " A newspaper is not like a fire, a man may carry about without being bound to suppose that it is likely to do as injury". The Court of Appeal in ***Byrne V. Deane***[32] expressed that if a typed copy containing defamatory statement is found on the walls of the defendant, he should remove it, otherwise, he will be deemed to be a party to a publication.

The Principle of *Violenti non fit injuria* can also be raised as a defence if there is clear and unequivocal evidence of express or implied consent to the publication. In ***Cook V. ward*** [33] the plaintiff brought an action against a newspaper proprietor for publishing in his newspaper a ludicrous story which the plaintiff had told of himself. It was contended by the defendant that the plaintiff himself was the author of the story, his claim should be dismissed. " But", Tindal, J., said; "it did not appear that he even authorised the publication by the defendant" and the contention of the defendant was rejected.

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[29] (1885) 16 Q.B. D.354
[30] (1900-2 Q.B.170
[31] (1894 10 T.L.R. 338)
[32] (1937-1,K.B.818)
[33] (1830 4 Moon & P 99)

In ***Nemichand V. Khemraj***[34] the Rajasthan High Court held that the printer of a defamatory matter is not liable if there is no evidence of any distribution by him, The mere handing back of a bundle of printed defamatory matter by the printer in the usual course of business to the author who handed it over to the printer for printing does not amount to publication.

False Statement:

To be actionable the defamatory statement must be false. No doubt civil action lies for the publication of a defamatory statement which is true. It is customary to allege, therefore, that the statement is false. But the plaintiff need not prove that it is false; falsity of a defamatory statement is presumed in favour of the plaintiff, and the burden is cast on the defendant to prove that it is true. Truth is the best defence, whereas in Criminal Law, mere truth is not defence, truth must be spoken in public interest.

Special Damage: Libel, is actionable per se, i.e., plaintiff need not prove the special damage. But the slander is not so. Special damage must be proved. However slander is actionable per se in four cases. 1. Imputation of a criminal offence, 2. Of a disease, 3 . of unfitness or incompetence, 4. Of unchastity on women.

Defenses: In a civil action for defamation, a media person can plead the defenses of truth as complete justification of making the defamous comment, or that he made a fair comment, or that he was protected by privilege to make such comment.

First Defence : Truth

Truth brings back the level of fame of the defendant in a defamation case. The extent of the liability and the role of truth in expiating that liability is discussed in the following case.

Miss Simi Garewal V. T.N. Ramachandran & Another[35]

In Miss Simi case the Bombay High Court dismissed the suit for injunction filed by from publishing her nude photograph ina film magazine on the ground of justification by truth. The plaintiff, Miss Simi a reputed film artiste, played the female role ina picture entitled ' Siddartha"' which was shot in India but not released here, though shown in united States. One of the scenes consisted of the plaintiff playing the role of a courtesan standing nude wearing only certain jewellery before the principal male action kneeling in front of her with folded hands and bowing. A coloured photograph of this scene was proposed to be published by the defendant, in film magazine he owned. It is against this proposed publication that the plaintiff sought for the issue of an injuncton restraining the defendant from doing that. Her contention was that although she had to stand nude in taking the film in the context of the original German novel out of which the story of the picture was taken, still there was an agreement between her and producer that the particular nude scene would not be exhibited or screened in India without her permission as it would not be found acceptable to the Indian Society. She alleged in the plaint that with a view to

[34] A.I.R.1973 Raj. 240
[35] C.A. 397774 decided on 28th Feb.1974

defame her in Indian Society, film goers, producers, distributors, and exhibitors of Indian pictures, the defendant was publishing the above scene in his magazine in India. The defendant in his written statement, explained the circumstances in which the photographs were taken with her consent which had already been published in the American Magazines as also in an Indian weekly magazine, He contended that the impugned photograph was a true photograph of a scene in the film depicting the plaintiff and her made lead and it was in no was defamatory of the plaintiff.

The Bombay High Court accepted the defendant's plea holding that once it is proved that a representation or statement in question is true in substance and in fact, it is utterly irrelevant to consider whether it is defamatory or not. Further the Court said that a person has no right to the protection of reputation to which that person is not entitled. As the photograph was a correct one and in no way showed the plaintiff less attractive or beautiful, or unfair, she has no reason to complain. The picture was also not torn out of context so as to make it misleading or to amount any misrepresentation.

Truth is absolute justification to a civil action for defamation. The defendant will succeed if he knows that what he has spoken of the plaintiff is substantially true. The law has recognised this defence since defamation is essentially an injury to man's reputation and when it is shown that what is spoken of a person is true, it means only that his reputation has been brought down to its proper level and there is no reason for him to complain.

All defamatory words are presumed to be false, and the plaintiff is not required to give evidence show that they are false, but the defendant rebut his presumption by giving evidence in support of his plea that the words are substantially true.

The true of any defamatory words if pleaded is a complete defence in civil proceedings and for the reason even though the words were published spitefully and maliciously. The law takes the view that it should no allow a plaintiff to recover damages for an injury to his character or reputation which he either does not or ought not to possess.

In criminal law, truth is not an absolute justification. Truth is a justification only when it is given out for public good. The reason for the distinction lies in the fact that in civil action the benefit or detriment to the public is not in issue while it is paramount that the public should have a concern in criminal matters.

The succeed in a plea of justification, the defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation is true, even though it was published as belief only. "If I say of a man that I believe he committed murder, I cannot justify by saying and proving that I did believe it. I can only justify by proving the fact of murder". So also if the defendant has written,," A said that B (the plaintiff, had been convicted of theft." It will be no defence for the defendant to prove that A did tell him so, that he honestly believed that A said and he only repeated it. He must prove as a fact that B was convicted of theft. If you repeat a rumour you cannot say it is true by proving that the rumour existed; you have to prove that the subject matter of the rumour is true. A person who has a libelous statement about another, is at least bound to take the ordinary precaution of keeping it to

himself till he is convinced of its truth. He has no right to take it for granted that if it true and thus give a wider publicity to a calumny which, but for his publication, might have died with its originator.

Subsantial justification sufficient:

In ***Sutherland V. Stopes***[36] Lord Shaw indicated the nature of this defence thus. "The plea must not be considered in a meticulous sense. It is that the words were true in substance and in fact….. There may be mistake here and there….. which would make no substantial difference to the quality of the alleged libel or in the justification pleaded for it.. and sold in the next day and pocketed the money, all without notice to me and that in my opinion he stole the saddle and if the facts truly are found to be that the defendant did not take the saddle from the stable, but from the harness room and that he did not sell in the next day but a week afterwards, but nevertheless he did, without my knowledge or consent, sell my saddle so taken and pocketed the proceeds, then whole sting of the libel may be justifiably affirmed by a jury not with standing these errors in detail."

The defence of justification in India:

In India also truth is a complete defence to a civil action for libel. The Burden of proof of the defence of justification lies on the defendant. Some eminent jurists feel the need to change this concept of making the truth he whole defence in civil cases. They say that the law should require that publication of the statement must be proved to be for the public to good if it is to be immune for liability. In four Australian states, truth, in itself, is not a complete defence in a civil action, and the defendant must establish public good also. P.M. Bakshi says:

> ….If the law seriously wants to protect reputation, truth in itself should not be a defence to a civil action for defamation. The fact that A, a woman, is unchaste does not for example, morally justify B in publicising 's unchastity No social interest is served by allowing B to circulate such statements.[37] In the absence of any social interest (Public good) As legal interest in her own reputation ought to continue to receive legal protection. As between as right to reputation and B's supposed "liberty" of expression, the balance ought to tilt in A's favour, in the absence of any element of public good. A has everything to gain by getting legal protection for her reputation. B has nothing to lose, if a receives such legal protection. He gets nothing accepts a malicious self-satisfaction in making others unhappy. Society also gains nothing by such statements.
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> The Second Press Commission in India expressed itself on the point:
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> The Austrialian Law Reform Commission was of the view that truth, by itself should be the complete defence in civil actions, as "Public benefit" is a vague term and publishers are entitled to a clear guidance as to the rules bending them. The requirement of public benefit would be adding too much of a burden on journalists.. We see no reason for any

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[36] 1925 A.C. 79

[37] P.M. Bakshi, Law of Defamation, Some Aspects: 1986,p 38

departure from the present position. Truth alone should continue to be a complete to defence[38].

At common law the defence of justification suffered from one drawback, in that, person taking this defence had to prove the truth of the whole libel tie of every defamatory statement contained in the words complained of. Where the words complained of contained more than one change or are otherwise severable the defendant may justify only part of the words (partial justification) He remains liable to pay damages in respect of the part not justified if it is defamatory and materially injures the plaintiff's reputation if no other defence is established.

The porter committee recommended that the defendant should be entitled to succeed in a defence of justification, if he proved that so substantial a position of the defamatory allegations was true as to lead the court to the views that any remaining allegations which had not been proved to be true did not add appreciably to the injury to the plaintiff's reputation.

After the Porter Committee report in the United Kingdom the defence of partial justification has been extended by statute. In certain circumstances, a partial justification now provides a complete defence. Section 5 of the Defamation Act provides the same.

Honest belief in truth as a Defence:

The defence of justification (truth) is not satisfied by merely proving that the defendant honestly believed the statement to be true. He must prove objectively that the statement was in fact true. This suggestion has been particularly pressed in the United Kingdom so as to make the position of newspapers more favourable. A report published by Justice, (Joint working party of Justice and British committee of International Press Institute)[39], proposed that the press should be given a new qualified privilege for statements based upon information which might reasonably believed to be true, provided that the defendant published a reasonable statement from the plaintiff by way of explanation if so requested and, if necessary, an apology. This suggestion was opposed in parliament, academic writings and by the Faulks Committee. They said that it would create another form of qualified privilege and that it would mean that the press would now be entitled to put out untrue statements about matters of public concern or half-truths which could be justified in subsequent legal proceedings merely on the footing that they were based upon evidence which might reasonably be believed to be true.

Subash Chandra Bose V. Knight & Sons [40]

In this case the Statesman published in its issue of 26th November,1924, passage commenting on the speech of Lord Lytton, the then Governor of Bengal, where-in it was stated that the Governor said Mr.Subash Chandra Bose was arrested under Regulation 3 and alleged that he was the brain behind the terrorist conspiracy. The plaintiff's complaint was that the writer stated a fact that he was a member and a directing brain of a terrorist movement. The Court held that although the defendants were entitled to refer to the fact that the viceroy and the

[38] Second Press Commission Report vol 1 PP 46-47 1982
[39] Justice, The Law and the Press 1965
[40] 1929 Cal.69 113 l.C.34

Governor, had caused the arrest of the plaintiff because they were satisfied that he was a terrorist, but in a matter of so great importance to the plaintiff it was very necessary that they should refrain from conveying to the ordinary reader an opinion of their own which was in effect the reiteration of a charge of criminal conspiracy. In such a matter a journalist who does not excise a reasonable degree of care and skill to make plain the limits of his intention may quickly drift into a repetition of this accusation – into a suggestion that it must be true—into an opinion to that effect. If he has done so and if the fair meaning to the ordinary reader, as put by a jury upon his words, is to present the reader with or commend to him a conclusion that the plaintiff has been guilty of a crime, it would be erroneous to say that he has been merely commenting upon the statement of another. It will be a defamatory comment only.

Second Defence: Fair Comment:

A comment is a statement of opinion on facts[41] and the defendant in an action for defamation may raise the defence that the matter alleged to be defamatory is nothing but a fair comment on a matter of public interest, and this plea if made out is a complete defence to an action for defamation.

Any person whether he is a private individual or a public journalist, has a right to hold any views he pleases on a matter of public concern and to express the same. But that expression of opinion should be fair. Thus the rule is that if a statement is a fair comment on a matter of public interest, it is not actionable. Right of criticism and free expression of opinion are considered essential for the progress society and for inducing efficiency in the services of private and governmental establishments in the land.

It is immaterial whether the opinion of comment is correct or not whether it is just or unjust, or whether it is couched in a language which may not error the side of moderation; what is material and important is that the comment must not be beyond the limits which the law calls 'fair'.[42] The doctrine of fair comment is based on the hypothesis that the publication in question is one which, broadly speaking is true in fact, and is not made to satisfy the personal vendetta and further that the facts stated therein are such as would go to serve the public interest.[43] It is said that nothing is libel which is a fair comment on a subject fairly open to public discussion [44] Fair comment on matters of public interest is a right and it is the duty of the Courts carefully to guide and liberally to interpret[45].

The onus is upon the defendant to show that the subject commented upon is a matter of public interest, that the statements of fact ralating there to are true and that the comment based upon the facts is a fair and bonafied comment. It is the expression of criticism that has to be fair. It is not necessary to prove malice on the part of the defendant, though malice may sometimes be proved to show that the comment is not fair. Nor is it statements were true[46].

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[41] *Christle V. Robertson* **(1889) 10 New South Wales L.R. 161**

[42] Mitha Rusthomji V. Nusserwanji) Nowroji 66 1941 Bom. 278

[43] Vishan Sarup V. Nardeo Shastri, 1965, All .439

[44] W.S. Iwin V. D.F. Reid, 1921 Cal. 282

[45] Subramania V. Ritchoock. 1925, Mad.950

[46] Mitha rusthomji V. Nasserwanji Nowroji.)21 I.C. 625: 25 M.L.J. 476.

In other words, to be a defence the comment must be an expression of opinion of the writer and must not be assertions of facts; must be fair, must be on a matter which is of public interest and must not be malicious.

It is open to the defendant to raise different and inconsistent pleas in defence. He can plead that the matter complained of if not defamatory and the other plea in the alternative that if the matter be considered defamatory, it was an honest expression of opinion me in good faith and for the good of the public[47]. As a matter of fact, all kinds of inconsistent pleas can generally be taken up by the defendant and it is laid down by codgers that the usual form in which defence of fair comment is pleaded is: "In so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consists of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest[48].

The statement must be expression of opinion and not assertion of facts. To write of a man that he is " a disgrace to human nature", is a defamatory allegation of fact, but if the words were " the latter words would certainly be a comment on the former fact. Comment based on admitted facts is altogether a different things from assertions of facts. As stated in ***Davis & Sons V. Shepstone***[49] there is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism not only by the press but by all the members of the public. But the distinction cannot be too clearly borne in mind between comment and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved facts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

It happens sometimes that comment is mixed up with assertion of facts and the reader or listener is unable to distinguish between one and the other. But that is always a pitfall for the writer. Comment should always appear as comment if it is to be called fair. Comment is a criticism or a statement of an opinion; it is an inference that the writer draws from a certain set of facts. If the facts are rapped up with comment, that is the fault of the writer, thereby he does not place before his renders facts from which he has drawn his inference; so that the reader cannot judge for himself whether the inference drawn is well-founded or not. If the writer has made it fairly plain the facts and his comment, however strong the opinion expressed, that would not be liable to creates any harm because the readers would be able to form his own opinion on it.

The defence of fair comment is of more use to journalists. Expressions of opinion contained in editorials, critical articles, letters to the editor and news items of an analytical nature are covered chiefly by the defence of the right of fair comment is applied to a defamatory publication[50]. The defence is based on public policy – the right of all persons and publications to comment and criticise without malicious intent the work of those who draws public attention.

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[47] Balasubramnia V. Rajagopala Chariear, 1944, Mad, 484
[48] Odgrers: Libel and Slander, p.169
[49] 11 APP Cas 186 p 190
[50] Hohenberg, Professional Journalist, 1980, Indian Reprint, 376

Here newspapers do not stand in any special position. Where the facts supporting the comments are not stated atleast with substantial correctness, the defence is not available.

The law on this point is too technical and it envisages a strict compartmentalisation between "facts" and "opinions". Normally defamatory matter would not consist solely of expressions of opinion. Facts and expressions of opinions would cause injustice. The Porter Committee noted this defect and recommended that the basis of the defence of fair comment should be broadened in a manner similar to that recommended by that committee in relation to the defence of justification. This recommendation of the porter Committee has been substantially carried out by section 6 of the Defamation Act of 1952. This changed principle has to be adopted in Indian cases also.

Rolled – Up Plea

This is a highly technical plea of the English law of defamation which the defendants can usefully resort to when the fact and comments are so inextricably bound together that it is impossible to separate them. Hence in this plea the defendant alleges that they are true in substance and in fact; and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest. Originally, an impression gained around that and fair comment are rolled up together but the House of Lords in ***Sutherland V., Stopes***[51] Clearly stated that this is essentially a plea of fair comment and nothing more. No comment can be fair unless it is based on certain fact and to that extent defendant is bound to prove the truth of every imputation cost on the plaintiff as he should do in the plea of justification by truth. In the rolled-up plea too the defendant need prove only those basic facts which are essential for the plea of fair comment and nothing more, Recently it is laid down be the rules of the Supreme Court in England that particulars of facts in which the defendant relies for fair comment should also be given.

The standard that is to be applied in the case of criticism of literary and art work is not that of the ordinary man in the street but that of an average art critic. An imputation of corrupt or corrupt or dishonourable motives will render the comment unfair, unless such imputation is warranted by the facts truly stated or referred to i.e., it is an inference which a fair minded man might reasonable draw from such fact and represent the honest opinion of the writer.

Subba Ramier V. Hitchock [52]

In this case the defendants published in the newspaper 'Hindu' a report under the heading 'Police Crimes in Ottapalem' on the events which occurred at a students conference there. The report charged the plaintiff, Superintendent of Police with having deliberately conspired with subordinate police officers to assault innocent people, when as a matter of fact he was not proved to have been aware of them. The Madras High Court held the defendants liable on the ground that the facts in the case did not justify the report which was deemed unfair and the defendants belief of its truthness was held to be bad plea. The true test to decide whether a particular

[51] 1925 A./C. 47
[52] 1924 I.L.W. 26

criticism is unfair or not is not the correctness of the inference drawn by the critic but the following; "Is the inference the honest expression of the opinion which the defendant held upon the facts truly stated, and warranted by the facts in the sense that a fair minded man might reasonably draw from them that inference[53].

Fair comment must be on a matter of public interest. Matters of public interest cover a wide range of subjects and individuals. In modern times it includes everything relating to national or local government, the administration of public institutions whether of State or Private aided, or charitable or educational institutions; the public conduct not only of all public officials but of all persons as priests, clergyent, judges, barristers, political candidates, and agitation's who take part in public affairs, in short it includes the conduct of every man and institution of public concern. The private life of such persons is however only of legitimate public interest in so far as it affects their public activities and functions. The conduct of all civil and criminal actions in Courts, the decision of judges, and the evidence of witnesses can properly be commented upon when the trial is over.

A newspaper is not entitled to invade the private life of an individual in order to discuss questions of character with which the public is not concerned. The private life and character of an author or artiste unconnected with the work he has given to the public is not a matter of public interest.

It may be well to state here that newspapers, since they have generally to defend themselves on the plea of fair comment, are subject to the same rules as other critics, and have no special right or privilege. (Mitha Rushomji Case) The range of their criticism or comments is as wide as and no wider than that of any other subject, and therefore in spite of the latitude allowed to them, it does not mean that they have any special right to take unfair comments, or to make imputations upon the character of a person, or imputations upon or in respect of person's profession or calling ***Arnold V. Emperor***[54] As a matter of fact they have greater responsibilities and should be more cautious in making scandalous imputations.

Malice would make the comment unfair., This is an exception to the general principle that the motive of the defendant is irrelevant in the law of tort. Lord Easher's remark in "Marivals v. Carson that where the critic is actuated by malice, the comment could not then be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

Third Defence Privilege:

R.K. Karanjoia V. K.M.D. Thackersey[55]

It is not sufficient to attract the protection of qualified privilege that the subject matter is one of general public interest. The person or the newspaper who wants to communicate the to

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[53] Peter Walker Ltd. V. Hodgson 1909 1 K.B. P. 253
[54] 1914 P.C.116
[55] A.I.R. 1970 Bom. 424

the general public must also have a duty to communicate and the person to whom the communication is made must a have a corresponding duty or interest to receive it. The privilege is based on the principle that such communications are protected for the common convenience and welfare of the society.

Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion, in such case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff. Malice in that sense mans making use of a privileged occasion for an indirect or improper motive.

In the issue of 24th September 1960 of Blitz English weekly an article was published. It was an attract directed against the ' House of Thackeraey' a business organisation, which constituted of the plaintiff's close friends and relations. The aim of the article was to suggest as to how the plaintiff, who was also the Chairman of the Textile Control Board, had exploited his position in amassing enormous wealth having recourse to unlawful and questionable means, involving tax-evasion on a colossal scale, financial jugglery, import, export rackets by obtaining foreign exchange violations. Reference was also made in the article to the inaction of the Government in tax evasion and that investigations into the operations of the' house' and been bogged down for years enabling it to amass great wealth.

The plaintiff brought an action against R.K. Karanjia, the editor, and the owners of the newspaper, its printers and the person who furnished the material for the said article. The printer tendered an apology and the plaintiff withdraw the suit against him. At the trial Court the defence of justification, fair comment on a matter of public interest and qualified privilege were pleaded. All those defences were rejected. Holding that the plaintiff had been grossly defamed, it passed a decree for the full claim of Rs. 3,00,000/- with costs and also issued an injunction forbidding the publication of series of similar articles intended to be published.

Against this decision the defendants preferred an appeal to the High Court. The only defence pleaded before the High Court was 'qualified privilege'. The Council for 'Blitz' argues that the subject matter of article was of great public interest. The public are vitally interested in being assured that great concentration of wealth which is discouraged by clauses (b) and (c) of Art.39 of the Constitution does not take place, and if it does, either because of Government's inaction or because of deliberate violation of the law on the part of any business organisation. The public have a legitimate interest to know about it. If again, owing to corruption, inefficiency or neglect on the part of the State investigating machinery, offenders were not speedily brought to book, that would also be a matter of vital public interest. The council for appellants (Blitz) contends that this particular situation gave the newspaper privileged occasion that is to say an occasion giving rise to a duty on the part of the newspaper to address a communication to is readers, the citizens of India, who were interested in receiving the communication. Therefore, any defamatory matter incidental to the subject matter of the communication was protected by law unless express malice was proved by the plaintiff.

The plaintiff's council argued that a privileged occasion cannot be created by a person for himself to enable him to publish a defamatory statement which he cannot sustain or justify. The plea of qualified privilege was rejected for two reasons. Firstly, the element of duty "duty" in

communicating the statement was missing. It was held that the mere fact that the matter is of general public interest is not enough, as Lord Buddy[56] in ***Uadam V. Ward*** held the person or the newspaper who wants to communicate to the general public must also have duty to communicate, and if no such duty, apart from the fact that the matter is one of public interest, can be spelt out in the particular circumstances of the case, the publication could not be said to be upon a privileged occasion. Another reason for rejecting the defence of qualified privilege was that the article was published maliciously, not with an idea to serve public interest but with a view to expose the plaintiff because on an earlier occasion plaintiff had made the defamatory article. The High Court, however, allowed the appeal in part as it reduced the amount of compensation payable from Rs.3,00,000 to Rs. 1,50,000

In particular circumstances, a person is allowed to make defamatory statements so to incur liability even if the statement be untrue. A defence founded on a such a right is called the defence of ' privilege, and the occasions on which the immunity is conferred by law are called 'privilege, and the occasions'. These constitute further exceptions to the rule that a man attacks the reputation of another at his risk, the exigencies of the occasion, the protection of public interest, or of the rights of lawful interests of individuals amount to a lawful excuse for the defamatory statement. Privilege is of two kinds. A) absolute, and B) Qualified.

a) Absolute privilege: Absolute privilege arises when on grounds of public policy, a man should speak out his mind freedly and without fear of consequences. Hence no action lies however, false the statement may be. The existence of malice is entirely irrelevant in these cases. Absolute privilege is recognised in the following cases;

i) Parliamentary proceedings: Article 105(2) of our Constitution provides that (a) statements made by a member of either House of Parliament in Parliament, and (b) the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings, cannot be questioned in a Court of law. A similar privilege exists in respect of State Legislatures, according to Art. 194(2).

ii) Judicial Proceedings: No action for libel or slander lies whether against Judges, Counsels, Witnesses, or Parties, for words written or spoken in the course of any proceedings before any court recognised by law, even though the words written or spoken were written or spoken maliciously, without any justification of excuse, and from personal ill-will, and anger against the person, defamed. Such a privilege also extends to proceedings of the tribunals possessing similar atrtributes[57]. Protection to the judicial officers in India has been granted by the Judicial Officer's protection Act, 1850. The counsel has also been granted absolute privilege in respect of any words spoken by him in the course of pleading the case of his client. If, however the words spoken by the counsel are irrelevant not having any relevance to the matter before the Court, such a defence cannot be pleaded. ***Rahim Baksha V. Bacchalal[58].*** The privilege claimed by a witness is also subject to a similar limit.

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[56] 1915T.L.R. 299
[57] **Dawkins V. Lord Rockely** 1875 L.R.-7 H.B.744
[58] A.I.R. 1929 all 214

iii) State Communications: A statement made by one officer of the State to another in the course of official duty is absolutely privileged for reasons of public policy. Such privilege also extends to reports made in the course of military and naval duties in the publication.

The common law has recognised only a qualified privilege for fair and accurate reports of judicial proceedings. The privilege extends to reports other than those in newspapers for example, to reports in letters or in conversation. At the present day, the defence has to be considered in the light of the fact that most reports which are published in the media of proceedings in Parliament, or in the courts or elsewhere do not purport be a full account, or even a precise of the proceedings, but are selective and concentrate on those aspects of the proceedings which are thought to be of particular interest to the public.

B. **Qualified Privilege:**

In certain cases the defence of qualified privilege, in this case it is necessary that the statement must have been made without malice. For such a defence to be available it is further necessary that there must be an occasion for making the statement.

Generally such a privilege is available either when the statement is made in discharge of a duty or protection of an interest, or the publication is in the form of report of parliamentary, judicial or other public proceedings. Thus, to avail this defence the defendant has to prove following two points:

The statement was made on a privileged occasion, i.e., it was in discharge of a duty or protection of an interest; or it is a fair report of parliamentary, judicial or other public proceedings. And secondary it must have been made without notice.

2) The statement was made without any malice.

The occasion when there is a qualified privilege to make defamatory statement without malice are either when there is existence of a duty, legal, social or existence of some interest for the protection of which the statement is made.

"…. 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 do receive it. This reciprocity is essential."

Indian Penal Code contain such a privilege in its ninth exception to Section 499.

In the case of publication of libelous matter in a newspaper duty to the public has got to be proved. If such a duty is not proved the plea of qualified privilege will fail. The plea will also fail if the plaintiff proves the presence of malice or an evil motive in the publication of the defamatory matter.

C) Publication of Partliamentary Proceedings:

In India, the Parliamentary Proceedings (Protection of Publication) Act, 1977 grants qualified privilege to the publication of reports of proceedings of parliament. According to Sec. 3 (1) "no person shall be liable to any proceedings, civil or criminal, if any court in respect of the publication in a newspaper of a substantially true report of any proceedings, of either House of Parliament unless the publication is proved to have been made with malice." Article 361 A which was inserted by Amendment in 1978 provides protection of publication of proceedings of Parliament and State Legislatures. The above stated protection is not available unless he publication has been made for public good.

Thus, to claim qualified privilege in respect of parliamentary proceedings the publication should be without malice, and for public good.

REMEDIES FOR DEFAMATION

(a) Damages:

An action for defamation of the plaintiff. But reputation is a thing which is not cashable of scientific measurement. The amount of damages depends upon the assessment made by the tribunal, subject only to certain principles which have been laid down by the case-law of the guidance of the tribunal and the pleadings of the parties. The amount of damages depends upon the rank and social position of the parties and seriousness of the imputation. If Defendant is able to show that the plaintiff's reputation was of little weight, that the plaintiff has provoked the utterance of defamatory statement, and that the newspaper has poor circulation or has offered the apology, the amount of damages will be mitigated.

General or presumptive damage is a pecuniary solatium awarded to the plaintiff to the mental pain, or annoyance caused to plaintiff.

Since defamation is actionable per se and the law presumes damage, the court would ordinarily award nominal damages, in the absence aggravating circumstances, where, the award of damages will be substantial or damages equivalent to actual damage. Punitive or exemplary or vindictive punishment is to punish the wrongdoer.

Decree against Joint Wrongdoer:

The liability of joint-tort –feasors being joint, there must be one judgement and one decree against all such defendants (e.g., author, editor, printer and publisher) for the total damages awarded. The plaintiff cannot recover two decrees for the same libel.

(b) Injunction

In a suit for defamation an interlocutory injunction would be issued in the following cases: I) Where there is a danger of the defendant's reputation of the libel where e.g., the offending article itself contemplates the publication of a series of similar articles and (ii) where the offending matter is so palpably defamatory that a Court of Appeal would set aside unreasonable any contrary finding. No interim injunction would be granted where the matter is not ex facie defamatory. After the trial an injunction would be more readily granted to a plaintiff who has succeeded in as much as damages would be no solatium to him if the defendant goes on repeating the libel.