

**IN THE DISTRICT COURT OF COLOMBO**

Dilith Susantha Jayaweera  
No. 53/3 Greogary's Road,  
Colombo 07.

Presently of No. 45/06,  
Alvis Place  
Colombo 03.

**Plaintiff**

Case No : DMR 00216/12  
Nature : Damages  
Procedure : Regular  
Value : £10,000,000/-  
: [Rs. 189,000,000/-] VS.

1. British Broadcasting Corporation [BBC]  
Room 417; NE Bush House  
The Strand, London WC 2B4PH  
UK
2. Charles Havilland  
Bureau Chief  
BBC Sri Lanka  
10A, Cambridge Terrace  
Colombo 07.

**Defendants**

**WRITTEN SUBMISSIONS OF THE DEFENDANTS**

**1. WRITTEN SUBMISSIONS IN OUTLINE**

**1.1 BACKGROUND FACTS**

- 1.1.1 The impugned broadcast is not defamatory of the plaintiff
- 1.1.2 There is no animus; the Plaintiff has failed to show animus
- 1.1.3 The Defendant is entitled to defence of qualified privilege.
- 1.1.4 The Defendant is entitled to defence of fair comment
- 1.1.5 The Plaintiff has not shown that he has suffered a loss of reputation

**1.2 Without prejudice**

- 1.2.1 The Damages are excessive [the Plaintiff has not given any assessment of how he arrived at damages
- 1.2.2 The Plaintiff has not sought to minimize the damages.
- 1.2.3 The 2<sup>nd</sup> Defendant has to be discharged in any event.

**BACKGROUND**

2.
  - I. The Defendant is the BBC.
  - II. Mr. Shan Wickremasinghe informed the BBC of death threats received by him as a result of running an impartial/unbiased/free media.
  - III. The Shan Wickremasinghe is
    - (i) The brother of Hon. Ranil Wickremasinghe.
    - (ii) The Chairman of TNL - a leading TV Channel and Isira- a radio broadcasting channel.
    - (iii) Leading Buddhist Philosopher who gives frequent interviews/talks on TV on Buddhism.
  - IV. The BBC interviewed Mr. Shan Wickremasinghe on the death threats and broadcast verbatim the radio interview [ the Plaintiff admits that the radio interview was broadcast verbatim].
  - V. The Plaintiff sues the Defendant [in the case] for defamation in relation to the interview.
  - VI. The BBC has not even heard of the Plaintiff.
  - VII. The Plaintiff admits that the BBC had no reason to malign the Plaintiff.
  - VIII. The Defendant merely broadcast the radio interview given by Mr. Shan Wickremasinghe in respect of the death threats.
  - IX. The Defendant had no animus against the Plaintiff whom the BBC had not even heard of.
  - X. The Plaintiff filed action against TNL and Mr. Wickremasinghe, but settled it without any damages/money from TNL .
    - (i) Terms of Settlement - 81
    - (ii) Plaint- 37
  - XI. In the circumstances, the Defendant states that Plaintiff cannot maintain this action because the Defendant had no animus injuriandi.
  - XII. The Plaintiff's case is that :-
    - i. The Defendant defamed the plaintiff; and
    - ii. The Plaintiff suffered loss of reputation
3. Main defences :-
  - i. No defamation
  - ii. No ***animus injuriandi***;
  - iii. Qualified privilege;
  - iv. fair comment;
  - v. No loss of reputation.
4. It is common ground that the defendant did broadcast in verbatim [without abridging ] an interview given by Mr. Shan Wickremasinghe to the BBC.

**NO DEFAMATION**

5.

- 5.1 It is common ground that the Defendant broadcast verbatim a statement made by Mr. Shan Wickremasinghe.
- 5.2 It is submitted that the statement is before court.
- 5.3 It is submitted that the broad cast is in no way defamatory of the plaintiff
- 5.4 The Plaintiff has not called any evidence to show how the broadcast was defamatory of the Plaintiff
- 5.5 However, since the question of ex facie defamation is purely a question for court it is not proposed to deal with this matter any further
- 5.6 However, it is submitted that when the court peruses the transcript of the broad cast, it would be clear that it is not ex facie defamatory.

**NO ANIMUS INJURIANDI.**

6. It is common ground that-

- a. BBC did not publish the news with any anger or animus against the plaintiff;
- b. The BBC 's only interest was to broadcast a radio interview with a leading "journalist" head of a TV/Radio station who had received death threats consequent to independent journalism.**

7. Attention of court is drawn to page 7 of the proceedings of 7.6.2017.

ප්‍ර: කෙසේ වෙතත් ශාන් වික්‍රමසිංහ මහතා කිසිම ප්‍රශ්නයක් නැතුව මේ පළවෙති ප්‍රකාශය කරලා තිබෙනවා. එය 18වෙනි ඡේදයේ තිබෙනවා?

උ: එහෙමයි.

.....

ප්‍ර: කෙසේ වෙතත් 2011.10.26 දිනට පෙර හෝ 2011.10 වෙනි මාසෙන් පසුව බී.බී.සී. ආයතනය විසින් තමා ගැන පක්ෂව හෝ අපක්ෂපාතීව තමා ගැන කිසිම දෙයක් කියලා නැහැ.

උ: නැහැ

8. Attention of court is also drawn to page 3 and 4 of proceedings of 16.6.2016.

ප්‍ර: බිබිසි එකට විරුද්ධව තමා කවදාවත් කතා කරලා තියෙනවද මේ නඩුවේ කරුණුවලට ඇර?

උ: බී.බී.සීයට විරුද්ධව මම කිසිම දෙයක් කතා කරල නෑ.

ප්‍ර: බීබීසී එකට තමාට විරුද්ධව කරන විමට කිසිම හේතුවක් තියෙනවාද?

උ: බීබීසී ආයතනයට මාත් එක්ක තරහ විමට හේතුවක් මම දන්න තරමින් නෑ ස්වාමිනි. නමුත් බී.බී.සී. ආයතනයේ දේශීය නායකත්වයට පටහැනිව කටයුතු කළ පුද්ගලයෙක් හැටියට සහ එවැනි මතයක් දැරූ පුද්ගලයෙක් හැටියට මා හඳුනා ගන්නා යැයි මා විශ්වාස කරනවා.

9. The Court will note that the second part of the above answer is of a Lawyer (plaintiff) trying to make amends.

10. The Plaintiff has not given any evidence (even in reexamination) of how he acted against the local leaders/representatives of the BBC.

11. The Plaintiff has not even said who these "පුද්ගලයෝ" were.

12. In the circumstances the Plaintiff has failed to prove ***animus injuriandi***.

### **LAW**

#### **Proof of animus injuriandi is essential to maintain the case for defamation**

13. The following authorities show that *animus injuriandi* is essential-

- a) DeCosta Vs. Times of Ceylon (1963) 65 NLR 217 at 224.
- b) Perera vs Peiris (1948) 50 NLR 145 at 158.

14. A R B Amerasinghe at page 218 states as follows-

" what is *animus injuriandi* in the law South Africa and Ceylon? According to many writers ,*animus injuriandi* means an intention to injure. It seems clear that in the modern law, a person who participates in an act of defamation for the sake of injuring the reputation of the person of and concerning whom the statement complained of was published , will be held guilty of having acted with *dolus*. As De Villiers says-" when an act is done by a person with the definite object of hurting another in regard to his person , dignity or reputation , there is *animus injuriandi*"

15. In the circumstances, there is no intention to injure the Plaintiff.

16. The name of the Plaintiff is only incidental to the intention of the BBC namely to broadcast an interview given by the owner of a broadcasting station and a broadcasting station with regard to the threats to independent journalism/free media.

### **QUALIFIED PRIVILEGE**

17. The detailed authorities on qualified privilege is in Annexure 1.

18. However, McKerron 7<sup>th</sup> Edition at page 189 has very succinctly stated qualified privilege as follows.

*"The defence of qualified privilege like the defence of fair comment is an essential part of the greater right of free speech. The basis in law of the defence is that it is for the common good that in certain circumstances a person should be free to speak out even if another is thereby defamed. The chief instances of qualified privilege are-*

*i. statements made in the discharge of duty .....*

19. McKerron goes on to state thus

*A communication made in the discharge of duty is provisionally protected, provided the person to whom it is made has a duty or interest to receive it. It is not necessary that the defendant should be under a legal duty to make a communication; it is sufficient that he is under moral or social duty to make it. The person to whom the communication is made must have a similar duty or a legitimate interest to receive it.*

20. Halsbury Laws of England 4<sup>th</sup> Edition, Volume 28, paragraph 111 sets out the English law which is almost identical .

*"An occasion is privileged where the person who makes the communication has an interest or a duty legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it."*

21. C.F. Amerasinghe sets it out at page 116 of his treatise as follows

- (a) There must be a duty or interest on the part of the defendant to communicate.
- (b) There must also be a duty or interest on the part of the person who hears or reads the communication to receive
- (c) The duty or interest, in either case, may be legal, moral or social.
- (d) Whether there is a duty or interest on either side is to be determined by an objective test, namely whether a reasonable man would think that the defendant had the duty or interest and the recipient had a corresponding duty or interest.
- (e) It follows that in the case of moral or social duties or interests the law tries to ascertain the views of the community as a whole as objectively as possible , although the question is one for the judge.
- (f) A special relationship is not essential.
- (g) No particular distinction has been made between a statement that is volunteered and one made in answer to a question, though in the latter case the evidence of privilege may be stronger.

22. In this case it is admitted that-

- i. Mr. Shan Wickremasinghe is the chairman/alter ego of the leading TV Channel TNL/Isira Radio;

- ii. Mr. Shan Wickremasinghe is the brother of the former Prime Minister Mr. Ranil.Wickremasinghe;
- iii. Mr. Shan Wickremasinghe is a leading light of the Buddhist society and is engaged in several Buddhist discussions over a long period of time;
- iv. Mr. Shan Wickremasinghe holds several important positions in Sri Lankan Society

23. The BBC, the 1<sup>st</sup> Defendant for its Sinhala audience has a channel called BBC Sinhala Sevaya.

24. The 1<sup>st</sup> Defendant carries a news programme called " Sandeshaya" in BBC Sinhala Sevaya.

25. The Defendant, [the BBC] has a duty to bring to its listeners matters of public interest and importance.

26. It is submitted that the purpose of a Television Channel such as the BBC is to keep the public properly informed.

27. In the circumstances the BBC states that it has a duty to bring to the notice of the public of Sri Lanka interviews given by Mr. Wickremasinghe and the public of Sri Lanka have a legitimate interest in receiving it.

**PLAINTIFF ADMITS QUALIFIED PRIVILEGE**

28. Attention of court is drawn to the following evidence at page 12 of the proceedings of 2.9.2016.

ප්‍ර: ඔහු ටී.එන්.එල් සමාගමේ අයිතිකරු?

උ: එහෙමයි ස්වාමිනි.

ප්‍ර: ටී.එන්.එල් සමාගම කියන්නේ මේ රටේ රූපවාහිනී විකාශණය කරන විශේෂ සමාගමක්?

උ: එහෙමයි ස්වාමිනි.

ප්‍ර: ඊට අමතරව ශාන් වික්‍රමසිංහ මහත්මයා බුද්ධාගමේ ප්‍රසිද්ධ මහත්මයෙක් ඒ වගේ හුඟක් රූපවාහිනීවල බුද්ධාගම සම්බන්ධයෙන් කතා පවත්වනවා දන්නවද?

උ: චෙනත් වැඩසටහන් අතර.

ප්‍ර: ඊටත් අමතරව දැනට සිටින අගමැතිතුමාගේ සහෝදරයෙක් ?

උ: එහෙමයි ස්වාමිනි.

ප්‍ර: තමාගේ මේ නඩුව දාන දුරකතන සාකච්ඡාව කරන අවස්ථාවේදී ඔහු එවකට හිටපු විපක්ෂ නායක මහත්මයාගේ සහෝදරයෙක් ?

උ: එහෙමයි ස්වාමීනි.

ප්‍ර: ඔහු සාමාන්‍යයෙන් මේ රටේ ප්‍රසිද්ධ පුද්ගලයෙක්?

උ: එහෙමයි.

ප්‍ර: එවැනි පුද්ගලයන් ගැන මතයක් තියෙනවා නම් ඒක මහජනතාව දැන ගැනීමට අයිතියක් තියෙනවා ?

උ: එහෙමයි ස්වාමීනි.

ප්‍ර: එතකොට බිබිසි ආයතනය කලේ ඒ දුරකතන සාකච්ඡාව ප්‍රචාරව කිරීම පමණයි?

උ: එහෙමයි ස්වාමීනි.

ප්‍ර: ඒ නිසා ප්‍රචාරයෙන් ලංකාවේ සිටින අය ඒ ප්‍රකාශය ලබා ගැනීමට අයිතියක් තියෙනවා?

උ: එහෙමයි ස්වාමීනි.

29. In the circumstances it is submitted that there is nothing more to this case.

30. The plaintiff has admitted qualified privilege and thus on this ground alone this action must be dismissed.

**PUBLICATION - A VERBATIM REPRODUCTION OF SHAN WICKREMASINGHE'S INTERVIEW.**

31. Attention of court is drawn to page 8 of the proceedings of 2.9.2016

ප්‍ර: ඉතින් තමා පිලිගන්නවා ඒ දුරකථන සාකච්ඡාව හරියට ප්‍රචාරය කරලා තිබෙන බව ඒක විකෘති කරලා නැහැ වෙනස් කරලා නැහැ ?

උ: එහෙමයි ස්වාමීනි.

ප්‍ර: තමාගේ පැමිණිල්ලේ 18 වන ඡේදයේ සඳහන් දුරකථන සාකච්ඡාව නිසිලෙස ශාන් වික්‍රමසිංහ මහතා බිබිසි ආයතනයයි අතර තිබිවිච දුරකතන සාකච්ඡාවක් හරිනේ ?

උ: එහෙමයි ස්වාමීනි.

32. Attention of court is also drawn to page 5 of proceedings of 7.6.2017-

ප්‍ර: මගේ ප්‍රශ්නය වුනේ 18 වන ඡේදයේ ශාන් වික්‍රමසිංහ මහතා කියපු දෙයක් සඳහන් වෙලා තිබෙනවාද?

උ: තිබෙනවා

ප්‍ර: ශාන් වික්‍රමසිංහ මහතා කියපු එකම වචනයක්වත් ශාන් වික්‍රමසිංහ මහතා සටහන් කරපු දෙයක් සටහන් වෙලා තිබෙනවාද ?

උ: මෙම බී.බී.සී. සමාගමේ නිවේදකයා ප්‍රශ්නය අසන තුරු එම ප්‍රකාශය නිවැරදියි.

ප්‍ර: තමා මේ 18 වන ඡේදයේ සඳහන් කරලා තිබෙනවාද ශාන් වික්‍රමසිංහ මහතා කියපු දේවල්?

උ: එහෙමයි

.....

ප්‍ර: මගේ ප්‍රශ්නය වන්නේ වචනයක්වත් ශාන් වික්‍රමසිංහ මහතා නොකියපු දෙයක් තිබෙනවාද?

උ: සමස්ත 18 වන ඡේදය සලකා බැලූකල අවසාන ඡේදයේ ශාන් වික්‍රමසිංහ මහතා ප්‍රකාශ කරපු කරුණු දක්වා බී.බී.සී. ප්‍රකාශකවරයා ප්‍රශ්න දෙකක් අසා තිබෙනවා.

ප්‍ර: මගේ ප්‍රශ්නේ වූනේ ශාන් වික්‍රමසිංහ මහතා කියපු දේවල් වචනෙන් වචනේ කිව්වාද?

උ: එහෙමයි.

**OTHER SALIENT FACTS**

- 33. The Publication was a verbatim report of Mr. Shan Wickremasinghe’s interview.
- 34. The Plaintiff instituted action against Mr. Shan Wickremasinghe on the same cause of action but settled it amicably without claiming damages.
- 35. The terms of settlement have been marked as V1.
- 36. Clearly the Plaintiff has settled the matter.
- 37. Attention of court is drawn to page 10 and 11 of the proceedings dated 2/9/2016 where he admits that the action was settled .
- 38. In the circumstances it is submitted that the Plaintiff has settled the action against TNL and thus there is no reason to pursue the action against BBC.

**FAIR COMMENT**

- 39. It is submitted that the Defendant is entitled to the defence of fair comment
- 40. It is submitted that the doctrine of fair comment has been succinctly put by McKerron in his book ‘The Law of Delict’, 7<sup>th</sup> Edition, p200.
- 41. It is submitted that nothing more could perhaps be easily added.



*"It is a good defence for the defendant to show that the statement complained of is a fair comment on a matter of public interest. Every person has a right to express an opinion honestly and fairly on matters which are of public interest, and it is upon this right that the defence is based. In the words of Birkett L.J. in Kemsley v Foot 'It [sc. The defence of fair comment] is an essential part of the greater right the free speech. It is the right of every man to comment freely, fairly and honestly on any matter of public interest, and this is not a privilege which belongs to particular persons in particular circumstances. It matters not whether the comments are made to the few or to the many. Whether they are made by a powerful newspaper or by an individual, whether they are written or spoken, the defence that the words are fair comment on a matter of public interest is open to all."*

42. It might be relevant to quote A.R. B Amerasinghe [later one of the most erudite of judges of the Supreme Court] in his book at page 514, where he states as follows.

*"Although the defendant may not be able to show that he was actuated by the circumstances described as "privilege" or "justification" yet he may escape liability for publishing a defamatory statement by establishing that his statement was a 'fair comment' on a matter of public interest."*

43. Setting the policy Mr. Amerasinghe [as he then was] at page 520 states as follows

*"...it is the policy of the courts to protect the rights of full and free discussion of matters of public interest and to uphold the "right of every person" to express his real judgment or opinion honestly and fairly upon matters of public interest. It has been said that "modern conditions demand the utmost freedom of criticism of all matters of public interest and that such discussion is deemed to be important to the welfare of the community" , "to the advantage of the community", "for the public benefit" "for the public good". Such discussion is said to be justified on the ground of "public utility" .The courts have recognized that there are "occasional abuses and aberrations", but it has been pointed out that "it would be a great misfortune if the exercise of a right so salutary as that were to be in any way hampered by any idea on the part of any member of the public that the exercise of any right is dangerous." "*

44. In the circumstances it is submitted that all statements of the anchor is fair comment.

45. It is also submitted that the Defendants are entitled to the defence of fair comment in this case

#### **NO LOSS OF REPUTATION/NO DAMAGES**

46. Attention of court is drawn to the questions of the learned Judge at page 19 of the proceedings of 13.2.2019 which reads as follows-

අධිකරණයෙන්

ප්‍ර: ඩී.බී.සී. ආයතනය මගින් කියන වැඩසටහන විකාශනය වූනාට පසුව පැමිණිලිකාරයාට ව්‍යාපාර ක්ෂේත්‍රයේ හරි නැත්නම් රටේ මොනව හරි තිබුණු තත්වයෙන් පහල වැටීම් සිදු වූනාද?

උ: මම ඒ පිලිබඳව දන්නේ නැහැ.

ප්‍ර: පැමිණිලිකාරයාට තිබුණු මොනව හරි තනතුරු එහෙම නැත්නම් නොයෙකුත් සංගම්වල තිබුණු තනතුරු හරි මොනව හරි දේවල් වලින් තොරපා දැම්මාද?

උ: එහෙම දන්නේ නැහැ. හැම තැනින්ම අපේක්ෂා අහන්න ගත්තා මේක ඇත්තද, මෙයා කුඩුවලට සම්බන්ධද, මෙයා මේ වගේ දේවල් කරනවාද, ස්ටෝක් මාර්කට් එක කඩත් වැඩුණේ මොහු නිසාද වාගේ ප්‍රශ්න හැම පැත්තෙන්මත් විදේශයේ ඉන්න මගේ පවුලේ හැම කෙනෙක්ම වගේ අහන්න ගත්තා. ඔහුව මම හඳුනන බව දන්න නිසා.

**47. It is submitted with humility that this covers the whole case.**

48. It is submitted that the Learned Judges questions arose from the principle laid down by A.R.B Amerasinghe at page 538, where he states as follows.

*"In as much as a man's reputation is generally said or believed about his character, it might be expected that the amount to awarded under this head will largely depend on the estimation in which the Plaintiff is held by his fellow men before the publication in question and whether they thought less of him after the publication concluded."*

49. Clearly the Plaintiff has not suffered damages.

50. This point is further elaborated by the fact that the Plaintiff has not shown in any way or manner how he suffered damages.

**NO DAMAGES**

51. It is submitted that the Plaintiff has failed to prove damages.

52. The Plaintiff has called the following witness-

- a) Plaintiff;
- b) The Plaintiff's Batch Mate Ms Niranga Nanayakkara Attorney-at-Law;
- c) The fellow Director of the Plaintiff namely Mr. Tharana Gangul Thoradeniya.

53. The Plaintiff has failed to call any independent witness.

54. The Plaintiff has failed to call witnesses such as-

- a) A leading person from society;
- b) A leading person from the business community;

c) A leading person from his personal background.

55. In the circumstances, there is no proper witness who can state that the plaintiff suffered loss of reputation in his personal and/or social and/or business life.
56. Furthermore the Plaintiff failed to call the other persons referred to in the interview namely, Varuni Amunugama, Reyno Silva and Duminda Silva to testify that they suffered a loss of reputation.
57. These persons could also have testified that the Plaintiff suffered loss of reputation.
58. The witnesses called by the Plaintiff testified in cross examination that their esteem of the Plaintiff did not reduce consequent to the broadcast.
59. The Plaintiff did not pursue his defamatory action against Mr Shan Wickremasinghe who was a principal actor in the matter and who gave the interview.
60. Furthermore, the Plaintiff has admitted that he has assessed damages consequent to the loss of business due to his companies
61. Vide the following evidence at page 7 of the proceedings dated 05/02/2018-

නැවත ප්‍රශ්න

විත්තියේ උගත් ජනාධිපති නීතිඥ මහත්මයා අවස්ථා ගනනාවකදී හරස් ප්‍රශ්නවලට මා භාජනය කරනු ලැබුවා. එහිදී මාගෙන් ප්‍රශ්න කර සිටියා මෙම ප්‍රකාශයට සම්බන්ධ අනෙක් පුද්ගලයෝ නඩු දාලා නැහැ කියන කරුණ පිළිබඳවන එනම් ඩී.බී.සී. ප්‍රකාශය සම්බන්ධයෙන් එම පුද්ගලයින් නඩු නොදමා තිබෙන බවට ප්‍රශ්න කර සිටියා. ස්වාමිනි අනෙක් පුද්ගලයෝ නඩු දැමීම පිළිබඳව මා හට පාලනයක් කිසිසේම නැහැ ස්වාමිනි. මා මේ නඩුව පැවරීමට හේතු වූනේ මාගේ කීර්ති නාමයට හා එමගින් මගේ සමාගම්වලට සිදු වූ අලාභයන් හේතුවෙන් ස්වාමිනි.(emphasis ours)

නැවත ප්‍රශ්න අවසන්  
සාක්ෂිකරුගේ සාක්ෂිය අවසන්

62. As the Court well knows this cannot be done as the Plaintiff and his Companies are different and distinct legal entities.
63. **In fact the evidence reveals that the Plaintiff has increased his directorate in companies and is even rose to greater heights.**
64. **Thus in any event, there had been no loss but an enhancement of reputation.**
65. Attention of Court is drawn to paragraph 31 of the affidavit containing the Plaintiffs evidence-in-chief where it is shown that as at 2011 the Plaintiff has been a Director/shareholder/Partner of 20 Companies.

66. Attention of Court is now drawn to the evidence of the Plaintiff at page 5 of the proceedings dated 16/06/2016 where the Plaintiff states that as at then (2016) the Plaintiff is a Director of 46 Companies in the following words-

ප්‍ර: අවුරුදු දෙකකට පසුව මහජන බැංකුවට තමා ප්‍රචාරක කටයුතු කරනවාද නැද්ද කියලා තමාට කියන්න බෑ?

උ: මම සමාගම් **46ක** අධ්‍යක්ෂකවරයෙක් වශයෙන් කටයුතු කරනවා. මට දැන් කියන්න පුළුවන් ස්වෘමිනී මම පුද්ගලිකව සම්බන්ධ වී එම දැන්වීම් කටයුතු නොකරන බවට. නමුත් මගේ ආයතනය කරනවාද නැද්ද යන්න මට මේ අවස්ථාවේදී අධිකරණයට කියන්න අමාරුයි.

67. Thus it is seen that after the year 2011 where the alleged news item was broadcasted, the Companies of the Plaintiff have grown in numbers and thus the Plaintiff has been appointed to at least 26 new Companies as a Director within a short span of 5 years compares to mere growth of his companies from the year 1993 to 2011 which is only 20 for a period of 18 years.

68. Thus, from 1993 to 2011 the Plaintiff has been appointed a Director of only 20 companies over 18 years and immediately after the publication of news item within a short duration of 5 years the number of Directorates held by the Plaintiff has been increased to 46.

69. This shows that there has been no damage at all to the reputation of the Plaintiff as alleged by him. In fact and in truth his reputation has been enhanced.

70. Attention of Court is also respectfully drawn to the document annexed to the affidavit marked P 22 ( the LMD Magazine).

71. The said magazine has claimed the continuous success of the Plaintiff even after the publication of the alleged news item showing no reputational loss. This is proved by the evidence of the Plaintiff in 2016 where he states that he is a Director of 46 Companies.

72. Thus, if the alleged news item caused any damage to the Plaintiff's reputation as claimed by the Plaintiff, there could not have been a growth of business as claimed by the Plaintiff.

73. In the circumstances, the Plaintiff has failed to prove that there has been a reputational loss and in fact to the contrary what has been proved is that the reputation has been enhanced.

74. Thus, in any event , the Plaintiff cannot maintain any claim for damages based on reputational loss.

75. The allegation contained in the interview of Shan Wickremasinghe has been carried by several other leading news papers.

76. The Plaintiff took no steps.

77. Attention of court is drawn to page 8 and 9 of the proceedings of 12.6.2017.

ප්‍ර: මම අහපු ප්‍රශ්නය ඒක නෙමෙයි. ශාන් වික්‍රමසිංහ මහතාට අමතරව තව කවුරුහරි ඔය චෝදනාව ඉදිරිපත් කරලා තියෙනවාද ?

- උ: ප්‍රසිද්ධ මාධ්‍යයකින් පළවෙති වතාවට ඔහු විසින් තමයි.....
- ප්‍ර: පළවෙති එක ගැන ඇහුවේ නැහැනේ?
- උ: ඊට පසුව වෙනත් මාධ්‍යයන්ද මේ අනුසාරයෙන් දිගින් දිගටම වෙනත් මාධ්‍යවල පළකල බව මම දන්නවා.
- ප්‍ර: ඒ කියන්නේ තමා දන්නේ පුවත්පත්වල පළවුන නිසා?
- උ: ඒ ශාන් වික්‍රමසිංහ මහතා මේ ද්වේශසහගත ප්‍රකාශය ගුවන් විදුලියෙන් කළාට පස්සේ ස්වාමිනී.
- ප්‍ර: ගුවන් විදුලියෙන්, පුවත්පත්වලින්, ටී.වී.වලින් මේක පැතිරුණා එහෙමයි තමා කියන්නේ?
- උ: පුවත්පත්වල ස්වාමිනී. ටී.වී.එකෙන් රේඩියෝ එකෙන් තෙමෙයි පුවත්පත්වල ස්වාමිනී.
- ප්‍ර: පුවත්පත්වල පළවුනා කොටස් වෙළඳපොලේ තමා වැරදි සහගතව ක්‍රියා කරනවා කියලා?
- උ: එසේ හැගෙන, ව්‍යාංගයෙන් හැගෙන ප්‍රකාශ යම් යම් පුවත්පත්වල පළවෙනවා මම දැකලා තියෙනවා.
- ප්‍ර: ඒ පුවත්පත්වලට විරුද්ධව තමන් කිසිම පියවරක් අරන් තියෙනවාද. අරන් තියෙනවාද නැද්ද?
- උ: අරගෙන නැහැ ස්වාමිනී. අරගන්නේ නැත්තේ මගේ ඒ වන විට අවුරුදු 20ක කීර්තිමත් ව්‍යාපාරික දිවියේ බරපතලම හානිය, මිනිසෙකුට සඳහන් කළ හැකි සියලු වෝදනා එල්ල කරමින් කළේ ශාන් වික්‍රමසිංහ මහතා. මම හිතන්නේ අනෙක් පුවත්පත්වලට නඩු දැමීම තේරුමක් නැහැ හේතුව මේ සියලු පුවත්පත්වල සහ අනෙකුත් තැන්වල පළවුනේ මේ පටන් ගත්ත, මෙයා කරපු වැටෙන් ස්වාමිනී.
- ප්‍ර: කවුරු පටන් ගත්තත් නැතත් තමා පියවර අරගෙන නැහැ අනෙක් පුවත්පත්වලට විරුද්ධව?
- උ: ඒක මගේ පෞද්ගලික අයිතිය ගැනීම හෝ නොගැනීම
- ප්‍ර: තමුන්ගේ පෞද්ගලික අයිතියක් ගැන ඇහුවේ නැහැනේ. ඇහුවේ ගත්තාද නැද්ද කියලා?
- උ: ඔව්. මම ගරු අධිකරණයට කිව්වා ගත්තේ නැති බව.
- ප්‍ර: එව්වරයිනේ ඇහුවේ ?
- උ: මම වහා පිළිතුරු දුන්නා ස්වාමිනී කලින්.

ප්‍ර: ඒ පුවත්පත් කියන්නේ වෙන වෙන පුවත්පත්. ටයිම්ස් පත්තරේ සඳහන් වූනා හරිද ?

උ: විවිධ පුවත්පත්වල පළවුනා ස්වෘමිනී.

ප්‍ර: ටයිම්ස් ගෘෂ් එකේ, අයිලන්ඩ් ගෘෂ් එකේ හරිද ?

උ: එහෙමයි ස්වෘමිනී.

ප්‍ර: ඩේලි නිවුස් ගෘෂ් එකේ, ලේක් හවුස් ගෘෂ් එකේ ?

උ: මම දැනුවත්ව ටයිම්ස් ගෘෂ් එකේ සහ මට මතක හැටියට අයිලන්ඩ් පත්තරයේ පළ වුනා.

78. The Plaintiff has taken no steps against any of those newspapers. Vide V2,V3 and V4.

79. In the circumstances this allegation was in the public domain and all leading newspaper groups in Sri Lanka thought it fit to publish it to bring it to the notice of the public.

**OTHERS MENTIONED IN THE INTEVIEW HAVE FILED NO ACTION**

80. Mr. Shan Wickremasinghe mentioned the names of -

- i. Mr. Reno Silva -Owner of several Media Channels including Television and Radio channels and other businesses;
- ii. Mrs. Waruni Amunugama -[A leading person in the corporate world]  
- Daughter of Hon. Sarath Amunugama
- ii. Duminda Silva -A Parliamentarian and a former MP overseeing Ministries

81. The Plaintiff has admitted in proceedings dated 05/02/2018 at page 5 that none of these persons have instituted any action. Vide-

(සාක්ෂිකරුට 18 වන ඡේදය පෙන්වා සිටියි)

ප්‍ර: ඔය සටහනේ පුද්ගලයින්ගේ නම් 04 ක් සඳහන් කරලා තිබෙන බව වත් තමා පිළිගන්නවාද?

උ: එසේය ස්වෘමිනී.

ප්‍ර: ඔය වරුණි අමුණුගම කියන්නේ තමා එක්ක තවමත් වැඩ කරන කෙනෙක්?

- උ: එහෙමයි ස්වාමිනි.
- ප්‍ර: ඔය වරුණි අමුණුගම කියන්නේ මේ ආණ්ඩුවේ කර්මාන්ත ඇමති කෙනෙකුගේ දුවක් ?
- උ: එහෙමයි ස්වාමිනි.
- ප්‍ර: ඒ වරුණි අමුණුගම මහත්මිය බී.බී.සී. ආයතනයට විරුද්ධව මේ ප්‍රකාශ සම්බන්ධයෙන් කිසිම පියවරක් අරන් තියෙනවාද?
- ප්‍ර: මම දැනුවත්ව නැහැ ස්වාමිනි.
- ප්‍ර: අරන් තියෙනවා නම් තමා දන්නවාගේ. තමා ඒකවත් කියන්නේ නැද්ද?
- උ: මම කියන්නේ ස්වාමිනි මම දැනුවත්ව නැහැ. මම වගකීමෙන් යුතුව කියන්නේ.
- ප්‍ර: රේමන් සිල්වා කියන නීතිඥවරයාව දාලා තියෙනවාද?
- උ: ඒත් මම දැනුවත්ව නැහැ ස්වාමිනි.
- ප්‍ර: දුමින්ද සිල්වා දාලා තියෙනවාද?
- උ: ඒත් මම දැනුවත්ව නැහැ ස්වාමිනි.
- ප්‍ර: තමා පමණයි මේ ප්‍රකාශ ගැන නඩු දාලා තියෙන්නේ. කිසියම් පියවරක් ගෙන තියෙන්නේ?
- උ: එය නිවැරදියි ස්වාමිනි.

82. Attention of court is drawn to the proceedings of page 17 and 18 of 7.6.2017 which reads as follows-

- ප්‍ර: තමාගේ සිංහල පැමිණිල්ලේ 25 වන ඡේදය සහ ඉංග්‍රීසි පැමිණිල්ලේ 25 වන ඡේදය සඳහන් වෙලා තිබෙන කරුණු ව්‍යාංගයෙන් අදහස් කරපු හැටියට තමයි තිබෙන්නේ?
- උ: එහෙමයි
- ප්‍ර: ඉංග්‍රීසි පැමිණිල්ලේ 25(අ) ඡේදය බලන්න (එම ඡේදය කියවා සිටි) මුදල් විශුද්ධිකරණය කර ඇති බවයි කියා තිබෙන්නේ ?
- උ: ඔව්
- ප්‍ර: තමා කියන්නේ එහි ඒ වගේ අදහසක් තිබෙනවා කියලාද?
- උ: තිබෙනවා
- ප්‍ර: කොහොමද එහෙම කියන්නේ?

උ: මෙහිදී මතු වන්නේ සමස්ථ සන්ධර්භය ඇසු මට සහ අසන වෙනත් පුද්ගලයින් මට කිව්ව ප්‍රකාශවලින් මට හැඟුණේ ඔවුන්ට එලෙස වැටහී ඇති බවයි.

ප්‍ර: ඒක ලොකු චෝදනාවක් නේසද?

උ: ඔව්

ප්‍ර: ඒක සිංහල පැමිණිල්ලේ තිබෙනවාද?

උ: එලෙස සිංහල පැමිණිල්ලේ නැහැ.

ප්‍ර: ඒක තමාට කරපු ලොකු චෝදනාවක් නේස?

උ: ඔව්.

ප්‍ර: තමා එහෙම විශ්වාස කරනවා කියලා කිව්වා?

උ: එහෙමයි

ප්‍ර: ඒ වගේ ලොකු චෝදනාවක් සිංහල පැමිණිල්ලේ නැහැ?

උ: එම වචනය නැහැ.

අධිකරණයෙන්

ප්‍ර: සිංහල පැමිණිල්ලේ 18 වන ඡේදයේ නැද්ද?

උ: එම වචනය නැහැ.

### **ENGLISH PLAINT**

83. The Defendant is an entity in England

84. Thus this action was commenced and continued on the basis of the English plaint .

85. Admissions were received and issues framed based on the English Plaint/pleadings.

86. If not, the Plaintiff cannot maintain this action because as set out hereinafter the main ingredients of the Plaintiff's claim is not in the Sinhala Plaint.

87. Attention of court is drawn to paragraph 25[a] of the English Plaint which is innuendo and defamation per se and which read as follows-

25. Plaintiff pleads that the said programme and/or broadcast and/o statements and/or comments and/or contents in the said broadcast and or publication is defamatory of the Plaintiff per se and/or by innuendo in that the statements and/or comments and/or contents means and imply ,inter-alia, that-

a) The Plaintiff is involved in Money Laundering,



- b) .....
- c) .....
- d) .....
- e) .....
- f) .....

88. The Sinhala Plaintiff does not have this paragraph and what is there in the Sinhala Plaintiff is as follows-

25. පැමිණිලිකරු ප්‍රකාශ කර සිටින්නේ, ඉහත කී වැඩසටහනේ දී සිදු කරන ලද ඉහත කී ප්‍රකාශ සහ/හෝ ප්‍රවෘත්ති සහ/හෝ ඉදිරිපත් කරන ලද කරුණු සහ/හෝ අන්තර්ගතයන් සහ/හෝ විකාශනය සහ/හෝ සිදු කරන ලද ප්‍රචාරණය පැමිණිලිකරු කෙරෙහි එනයිත්ම සහ/හෝ ව්‍යාංගයෙන් අපහාසාත්මක වන බවත් ඒවා සිදුකර ඇත්තේ අනෙකුත් දේ අතර පහත සඳහන් අර්ථයන් සහ/හෝ ව්‍යාංගර්ථයෙන් බවත්ය. එනම්,

- a) පැමිණිලිකරු තවත් පුද්ගලයන් සමඟ එකතු වී නීති විරෝධී ක්‍රමවලින් උපයන මුදල් කොටස් වෙළඳ පොළේ ආයෝජනය කරන බවත්,
- b) .....
- c) .....
- d) .....
- e) .....
- f) .....

89. The Plaintiff admits this in questions 1, 2 and 3 of page 17 and question 1 of page 18 of the proceedings of 7.6.2017 in the following words-

ප්‍ර: තමාගේ සිංහල පැමිණිල්ලේ 25 වන ඡේදය සහ ඉංග්‍රීසි පැමිණිල්ලේ 25 වන ඡේදය සඳහන් වෙලා තිබෙන කරුණු ව්‍යාංගයෙන් අදහස් කරපු හැටියට තමයි තිබෙන්නේ?

උ: එහෙමයි

ප්‍ර: ඉංග්‍රීසි පැමිණිල්ලේ 25(අ) ඡේදය බලන්න (එම ඡේදය කියවා සිටි) මුදල් විගුද්ධිකරණය කර ඇති බවයි කියා තිබෙන්නේ ?

උ: ඔව්

ප්‍ර: තමා කියන්නේ එහි ඒ වගේ අදහසක් තිබෙනවා කියලාද?

උ: තිබෙනවා  
 .....

අධිකරණයෙන්

ප්‍ර: සිංහල පැමිණිල්ලේ 18 වන ඡේදයේ නැද්ද?

උ: එම වචනය නැහැ.

90. In the circumstances the Plaintiff has not averred innuendo in the Sinhala Plaintiff and thus cannot have and maintain this action.

**PLAINTIFF CLAIMING DAMAGES FOR HIS COMPANIES**

91. The Plaintiff is claiming damages not only for himself but for his company vide the following evidence at page 7 of the proceedings dated 05/02/2018-

නැවත ප්‍රශ්න

විත්තියේ උගත් ජනාධිපති නීතිඥ මහත්මයා අවස්ථා ගනනාවකදී හරස් ප්‍රශ්නවලට මා භාජනය කරනු ලැබුවා. එහිදී මාගෙන් ප්‍රශ්න කර සිටියා මෙම ප්‍රකාශයට සම්බන්ධ අනෙක් පුද්ගලයෝ නඩු දාලා නැහැ කියන කරුණ පිළිබඳවන එනම් බී.බී.සී. ප්‍රකාශය සම්බන්ධයෙන් එම පුද්ගලයින් නඩු නොදමා තිබෙන බවට ප්‍රශ්න කර සිටියා. ස්වාමිනි අනෙක් පුද්ගලයෝ නඩු දැමීම පිළිබඳව මා හට පාලනයක් කිසිසේමම නැහැ ස්වාමිනි. මා මේ නඩුව පැවරීමට හේතු වුනේ මාගේ කීර්ති නාමයට හා එමගින් මගේ සමාගම්වලට සිදු වූ අලාභයන් හේතුවෙන් ස්වාමිනි.(emphasis ours)

නැවත ප්‍රශ්න අවසන්  
සාක්ෂිකරුගේ සාක්ෂිය අවසන්

92. As the Court well knows this cannot be done as the Plaintiff and his Companies are different and distinct legal entities.

**WITHOUT PREJUDICE – DAMAGES EXCESSIVE**

93. Plaintiff has not given any basis for the assessment of damages.

**WITHOUT PREJUDICE – PLAINTIFF HAS NOT SOUGHT TO MINIMIZE PURPORTED DAMAGES.**

94. Without prejudice to the aforesaid , it is submitted that the Plaintiff has not in any way sought to minimize the purported damages

95. It is submitted that the Plaintiff could well written to the BBC and asked for a correction. Or the Plaintiff could have written to the BBC and given his own version

96. If the BBC published this, then the purported damages to the Plaintiff would have been reduced.

97. The Plaintiff at page 5 of the proceedings dated 05/20/2018 admits his as follows-

ප්‍ර: තමා මේ නඩුවේ එව්වා නේද එන්තර්වාසි ?  
උ: එහෙමයි ස්වාමිනි

ප්‍ර: ඒ එන්තර්වාසිය යවන්නට පෙර තමා බී.බී.සී. ආයතනයට කියලා තිබුනාද මේ සටහන් කරලා තියෙන ප්‍රකාශය වැරදියි. මේක ඉල්ලා අස්කර ගන්න එහෙම නැතිනම් තමා කියන දේ ප්‍රකාශ කරන්න කියලා තමා ඉල්ලා සිටියාද?

උ: එහෙම ඉල්ලා සිටියේ නැහැ ස්වාමිනි.

98. Thus since the Plaintiff did not do so then in any event the Plaintiff could not claim the quantum asked for.

**2<sup>ND</sup> DEFENDANT HAS NOTHING TO DO WITH THE BROADCAST**

99. The question at issue is whether the 2<sup>nd</sup> Defendant is in any way liable for the defamation alleged in the Plaintiff.
100. It is the contention of the Defendants that there is no cause of action disclosed against the 2<sup>nd</sup> Defendant on the face of the Plaintiff. In other words, on the pleadings in the Plaintiff the 2<sup>nd</sup> Defendant cannot be liable.

**BACKGROUND FACTS IN RELATION TO THE 2<sup>ND</sup> DEFENDANT**

101. The defamation complained of is in respect of an over the telephone interview given by the Chairman of TNL, direct to the BBC Sinhala Service which was [aired] broadcast.
102. The Attention of court is drawn to paragraph 17 of the Plaintiff which reads as follows

*"Plaintiff pleads that Defendants **in an over the phone interview with Mr. Shan Wickramasinghe** the Chairman of Telshan Network [Pvt] Limited who had been carrying out a campaign to tarnish the reputation and/or goodwill of the Plaintiff had aired and/or broadcast and/or made comments and/or published and/or caused to publish several comments referring to the Plaintiff by his name and /or his business entities during Sandeshaya BBC Sinhala Service on the 26<sup>th</sup> October 2011 which are per se defamatory of the Plaintiff."*

103. In the circumstances it is clear that the alleged defamation is a statement made by Mr. Wickramasinghe over the phone to a person in London which was broadcast by the Sandeshaya BBC Sinhala service.
104. The BBC Sinhala service is a department within the BBC World Service, which is in turn operated by the BBC. The BBC World Service has its own editorial staff.
105. Thus it is not even alleged that the 2<sup>nd</sup> Defendant-
- a. Had any part to play in the broadcast;
  - b. Was aware of the broadcast;
  - c. At the relevant time was employed by or connected with the BBC World Service or the Sandeshaya BBC Sinhala Service in any capacity whatsoever
  - d. is vicariously liable for the alleged defamatory publication

**2<sup>ND</sup> DEFENDANT'S ROLE IN THE BBC**

106. The 2<sup>nd</sup> Defendant is an Englishman who does not understand Sinhala
107. **The 2<sup>nd</sup> Defendant has no connection whatever with Sandeshaya BBC Sinhala service the Plaintiff does not even allege that the Plaintiff has such a connection.**
108. At the relevant time the 2<sup>nd</sup> Defendant was the English language BBC News gathering sponsored reporter for Sri Lanka and Maldives.

109. At the relevant time the 2<sup>nd</sup> Defendant did not work for or was not employed by the BBC world service which includes the Sandeshaya BBC Sinhala service
110. The 2<sup>nd</sup> Defendant only gathered news for the BBC
111. The 2<sup>nd</sup> Defendant has and had no managerial or organizational role in the BBC's Sinhala operations whether in Sri Lanka or London
112. The BBC world service [inclusive of the BBC Sinhala service] does not maintain an office in Sri Lanka their relevant office is maintained in London, United Kingdom

**ALLEGATIONS AGAINST THE 2<sup>ND</sup> DEFENDANT**

113. The Plaintiff has not even alleged [in the Plaintiff] and the **evidence does not disclose** that-
  - a. The 2<sup>nd</sup> Defendant was in any way connected with the alleged defamatory statement.
  - b. That the 2<sup>nd</sup> Defendant was even aware that the alleged defamatory statement was broadcast in the Sinhala service
  - c. That the 2<sup>nd</sup> Defendant had any connection with the BBC World Service.
  - d. That the 2<sup>nd</sup> Defendant had any connection with the BBC Sinhala Sandeshaya Service
  - e. That the 2<sup>nd</sup> Defendant is employed by the BBC Worlds Service or does any work for it.
  - f. That the 2<sup>nd</sup> Defendant does any reporting for the BBC Sinhala Service.
114. The Plaintiff does not even allege that-
  - a. The 2<sup>nd</sup> Defendant was aware of the Broadcast.
  - b. The 2<sup>nd</sup> Defendant had anything to do with the broadcast such as arranging the interview.
115. The broadcast was made directly **from London- that is a Journalist from BBC Sandeshaya interviewed Mr Wickremasinghe and the interview was broadcast from London.**
116. **There was n input whatever from Sri Lanka or anybody from Sri Lanka.**
117. The 2<sup>nd</sup> Defendant has been brought in on the allegation that the 2<sup>nd</sup> Defendant is responsible for the contents of news items aired through Sri Lanka via BBC Sandeshaya and/or BBC Sinhala.com

118. It is submitted that factually the 2<sup>nd</sup> Defendant cannot be held responsible for broadcasts [through] to Sri Lanka via BBC Sandeshaya and/or bbcsinhala.com in that he has no connection whatever with BBC Sandeshaya and/or bbcsinhala.com
119. Without prejudice to the aforesaid, it is submitted that even if the allegations are true the 2<sup>nd</sup> Defendant cannot be held liable for the broadcast for the reasons stated hereunder.

**SUBMISSIONS ON THE BASIS THE PLAINTIFF'S ALLEGATIONS ARE TRUE**

120. As stated above the Plaintiff does not even allege or gave any evidence that the 2<sup>nd</sup> Defendant : -
- a. Had any connection whatever with the broadcast and/or
  - b. was aware of the broadcast; and/or
  - c. is liable for the broadcast as editor/broadcaster/composer.
121. The 2<sup>nd</sup> Defendant is joined merely on the allegation that he is the Bureau Chief of Sri Lanka and is liable for the contents of news items aired in Sri Lanka. It is totally incorrect to say that the 2<sup>nd</sup> Defendant is the Bureau Chief.

**LAW IN BRIEF**

122. It is clear law that in defamation the author is liable.
123. It is equally clear law that the **only** others liable for defamation are the editor, publisher and proprietor
124. There is clear authority to support the proposition that in the law of defamation the only persons responsible for defamation **apart** from the author is the editor publisher or proprietor.
125. **There is no authority [as far as we are aware] that permits anyone other than the author, publisher, editor or proprietor to be liable**

**AUTHORITIES**

126. Attention of court is drawn to the following authorities
127. C.F. Amerasinghe – *Defamation and other aspects of injuriarum in Roman Dutch Law*, pg 70 and 71 .
128. At page 71 after setting out the law C.F. Amerasinghe states
- “this would mean that the liability of the publisher, printer, editor or proprietor would depend on the liability of the original author of the liable and they could always be entitled among other things, to take advantage of all the same defences as the latter. It is not clear, however, that this is what was intended by the cases which lay down the rules in this field, the suggestion has, therefore, yet to be tested **IN ANY EVENT THE**

**VICARIOUS LIABILITY WOULD BE ENTIRELY LIMITED TO THE PERSONS MENTIONED ABOVE."**

129. The same principle is laid down by Dr. A.R.B. Amerasinghe in his book *Defamation in the law of South Africa and Ceylon* at pages 291 to 295 .
130. In these pages it is clear that C.F. Amarasinghe who takes the view that it is only the editor, publisher or proprietor who is liable apart from the author.
131. Wijegoonewardane in his book *The Law of Defamation* takes the same view at page 5 .
132. In the circumstances the law in Sri Lanka is clear that only the author proprietor and editor and publisher are liable.

**AUTHORITIES OUTSIDE SRI LANKA**

133. In the United Kingdom, the Defamation Act 1996 brought in and/or recognized the Common Law.
134. In section 1 it is stated that in defamation proceedings a person has a defence if he shows that he was not the author, editor or publisher of the statement complained of.
135. For this purpose: author, editor and publisher have the following meanings.
136. Section 1[2] :

"author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

"editor" means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

"publisher" means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.
137. 1[3] A person shall not be considered the author editor, or publisher of a statement if he is only involved
  - (a)in printing, producing, distributing or selling printed material containing the statement;
  - (b)in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the M1Copyright, Designs and Patents Act 1988) containing the statement;
  - (c)in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
  - (d)as the broadcaster of a live programme containing the statement in

circumstances in which he has no effective control over the maker of  
the statement;.....

138. Attention of court is particularly drawn to 3[d] in which the act specifically states that a person shall not be considered the author, editor or publisher of a statement if he is only involved as the broadcaster of a live programme containing the statement in circumstances over which he has no effective control over the maker of the statement.
139. Thus, even a broadcaster of a programme is not liable if he has no effective control over the maker of the statement.
140. However, in this case, the 2<sup>nd</sup> Defendant was not even the broadcaster of the live programme.
141. Thus, it is clear that the 2<sup>nd</sup> Defendant cannot in any way be liable.

### **UNITED STATES**

142. Section 230 - Communications Decency Act

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

143. In analyzing the availability of the immunity offered by this provision, courts generally apply a three-prong test. A Defendant must satisfy each of the three prongs to gain the benefit of the immunity:
144. The Defendant must be a "provider or user" of an "interactive computer service."  
The cause of action asserted by the Plaintiff must "treat" the Defendant "as the publisher or speaker" of the harmful information at issue.
145. The information must be "provided by another information content provider," i.e., the Defendant must not be the "information content provider" of the harmful information at issue.

### **AUSTRALIA**

146. Clause 91(1) of Schedule 5 to the BSA provides that a law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:
- 147.

(i) subjects, or would have the effect (whether direct or indirect) of subjecting, an internet content host/internet service provider to liability (whether criminal or civil) in respect of hosting/carrying particular internet content in a case where the host/provider was not aware of the nature of the internet content; or

(ii) requires, or would have the effect (whether direct or indirect) of requiring, an internet content host/internet service provider to monitor, make inquiries about, or keep records of, internet content hosted/carried by the host/provider.

148. In the circumstances the jurisdiction of all countries limit defamation whether it be in printed form or broadcasting to author editor proprietor and publisher.

**Terms OF ART**

149. It is submitted that the words editor , proprietor and publisher are words termed "terms of art" in law
150. Phrases or terms which are terms of art have specific legal meaning and cannot be expanded in any way.
151. In these circumstances it is submitted with respect that the 2<sup>nd</sup>Defendant is not the editor proprietor or publisher

Eg. There are subeditors and sports editors of papers. For instance articles dealing with sports are in fact published under the supervision of the Sports Editor. However subeditors and sports editors are not liable for defamation

**No defamation ex facie**

152. It is submitted that there is no proper averment in the Plaint that establishes the liability of the 2<sup>nd</sup> Defendant.
153. Ex facie, no cause of action is disclosed against the 2<sup>nd</sup> Defendant.
154. In these circumstances, the action must be dismissed against the 2<sup>nd</sup> Defendant.

**NO PREJUDICE TO THE PLAINTIFF**

155. No prejudice would be caused to the Plaintiff if the case is dismissed against the 2<sup>nd</sup> Defendant because if the Court finds that there is liability then, the 1<sup>st</sup> Defendant the BBC remains party in the action and any order Judgment has to be against the BBC the 1<sup>st</sup> Defendant.
156. In the circumstances, it is submitted that there is no cause of action against the 2<sup>nd</sup>Defendant and thus the action against the 2<sup>nd</sup>Defendant must be dismissed with costs

**Conclusion**

**In the circumstances, it is submitted with respect that the action of the Plaintiff be dismissed with costs as prayed for in the prayer to the Answer.**



**Attorneys-at-Law for the Defendants**

**ANNEXURE A**

**QUALIFIED PRIVILEGE**

1. As set out earlier McKerron has set out qualified privilege in the following terms.

*A defence of qualified privilege , like the defence of fair comment is an essential part of the greater right of free speech. The basis in law of the defence is that it is for the common weal that in certain circumstances a person will be free to speak out even if another is thereby defamed.*

[McKerron – Law of Delict- 7<sup>th</sup> Edition, p189]

2. Having said that McKerron set out that the chief circumstances of qualified privilege are
  - i. Statements made in the discharge of a duty.

3. McKerron sets out that

*A communication made in the discharge of a duty is provisionally protected provided that the person to whom it is made has a duty or interest to receive. It is not necessary that the defendant should be under a legal duty to make the communication. It is sufficient that he is under a moral or social duty to make it. The person to whom the communication is made must have a similar duty or legitimate interest to receive it.*

[p189-190]

4. It is clear that when there is qualified privilege no action for defamation can be maintained.
5. This principle has been accepted in Sri Lanka for years
6. Attention of court is drawn to the case of **Gulick v Green** [20 NLR p 176].
  - i. In this case, the court admittedly held that a publication was defamatory .
  - ii. However, Justice Shaw held that the occasion of the letter was privileged and cited with approval the English law as contained in the judgment of Lord Cambell CJ in **Harrison v Bush**. Justice Shaw set out qualified privilege in the
  - iii. following terms.

*"A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding a corresponding interest or duty though it contains criminatory matter, which without the privilege would be slanderous and actionable. This statement of the law has been accepted ever since"*

- iv. In this case the Defendant was the superintendent of St. Andrew's Estate Talawakele and the manager of Ferham estate. The Defendant employed a gentlemen by the name of Mr. Gulick as the Assistant Superintendent. However later it transpired later that Mr. Gulick was of German origin and thus the Defendant terminated the engagement . The Defendant at about the same time wrote to a gentlemen called Curtois in which he made the defamatory statements. Cutis was the person who recommended Mr. Gulick. The Defendant wrote letter to Mr. Curtois alleging that his recommendation was bad because Mr. Gulick was three parts a German, the innuendo being that Germans were

persons unreliable and against the interests of the British and thus unreliable and should not be employed.

- v. The court held that this was defamatory of the Plaintiff Mr. Gulick. However the court held that the Defendant had an interest in communicating this matter to the person who recommended Gulick and such person [Curtois] had an interest in receiving the same.
  - vi. That is to say the Defendant [the person managing Ferham Estate] had an interest in communicating the matter to the person who recommended the Assistant Superintendent and such a person had an interest in receiving the same
  - vii. In the circumstances the Defendant was held not guilty of defamation on the ground of qualified privilege
7. It is seen then that the person having a legitimate interest in making the statement and the person receiving it having a legitimate interest in receiving has been widely construed
8. This case was followed in **Fernando v Pieris** [21 NLR p 7]
- i. In this case too, Bertram CJ set out the following identical words as the ingredients necessary for qualified privilege
  - ii. He says at page 9,  
*the principle which governs the question of privilege in actions for libel has been summarized in the case of Harrison v Bush. A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty, although it contained criminatory matter without which the privilege would be slanderous and actionable"*
  - iii. In this case the defendant who are church wardens of the Anglican Church wrote to the incumbent of the Church stating that the Plaintiff [a reader of the Anglican Church] was the father of the child by a woman [Maria Gomez] and that the Plaintiff attempted to procure abortion and that the Plaintiff bribed the witnesses in the maintenance case.
  - iv. The court held that the charge was wrong that the plaintiff was not the father of the child and that the Plaintiff had not bribed the witnesses . Thus the communication was ex facie defamatory and was of the most serious of nature, in that it alleged that the Plaintiff was the father of a child of a woman and had tried to procure abortion and had tried to bribe the woman's witnesses.
  - v. However the court dismissed the action for defamation on the ground that the defendants had qualified privilege in that the defendants had an interest in communicating such information to the incumbent of the Anglican church and that the incumbent of the Anglican church had an interest in receiving such information.
9. This principle was also recognized by the Supreme Court [Justice Wanasundera] **Balthazar v Hulangamuwa** [1986 2SLR p240 at p247]

- i. In this case the 1<sup>st</sup> Defendant complained to the Army Commander that the Plaintiff who was the commanding officer of the Gemunu Watch, committed an indecent assault on the 2<sup>nd</sup> defendant who was the wife of the 1<sup>st</sup> defendant and attempted to rape her.
- ii. The court held
  - a. That the statement was defamatory
  - b. but further held that it was made in the pursuance of qualified privilege .
  - c. The Plaintiff's action was dismissed.
- iii. Justice Wanasundera quoted Lord Esher M.R in **Hunt v Great Northern Railway** which said

*"A privileged occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist, the occasion is a privileged one. "*

- iv. He also quoted the court in **R. V Rule** which said

*"The common interest may be in respect of very varied and different matters; indeed the only limitation appears to be that it should be something legitimate and proper, something which the courts will take cognizance of and not merely an interest which is due to idle curiosity or a desire for gossip-"*

- v. Justice Wanasundera then said at p 248 that the above principles were stated in the context of qualified privilege.
- vi. In the circumstances it is submitted that it is clear that if the person receiving has an interest in receiving and the person making has an interest in making it, it is clear qualified privilege.

10. The principle of qualified privilege was also accepted as a defence in **Whitelaw v Concannon** [48 NLR 265]

- i. In this case the Plaintiff was the superintendent of a rubber estate and which belonged to a company. The Defendant was the visiting agent of the estate. That is a superior officer of the Plaintiff who was obliged to visit all estates belonging to the company and report back to company. The Defendant forwarded a report to the company [the Employer] making defamatory statements, stating that the Plaintiff's duties were not properly carried out.
- ii. The Plaintiff brought an action for defamation against the Defendant.

- iii. In this case the publication was defamatory but the defendant was held not liable on the ground of qualified privilege. The court held that the defendant had a duty to communicate to his superior about the conduct of the Plaintiff and thus qualified privilege applied.
- iv. Justice Jayatileke quoted Lord Campbell LC in **Harrison v Bush** and Lord Atkinson in **Adam v Ward** and LJ Brett in **Clark v Molyneux** and held that qualified privilege applies.
- v. Justice Jayatileke again reiterated the principle that qualified privilege is when the person who makes a communication has an interest or a duty legal social or moral to make it to the person to who it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. [page 269]

11. The principle of qualified privilege was also recognized in **Sirisena v Ginige** [1992 1SLR 320]. At page 327 Justice Gunawardana cited with approval the definition of McKerron on qualified privilege

That definition has been set out above

12. The principle of qualified privilege was also recognized in the case of Sea Consortium Lanka [Pvt] Ltd v **The Associated Newspapers of Ceylon Limited and others.**

In this case the minister and a journalist had visited the premises of the Sri Lanka Ports Authority. The minister had made a note of several irregularities in respect of the ports authority. The newspaper reported the observation of the Minister. The Plaintiff filed action against the newspaper alleging defamation . In the course of the judgment Justice Gooneratne accepted and endorsed the defence of qualified privilege and stated as follows

*The Article was published, no doubt for the benefit of the public and educate the reader of the state of affairs of an Institution like the Ports Authority. Public no doubt should be aware of what happened at the Ports Authority*

Thus the principle is that a newspaper is entitled to publish something which the public have an interest to receive, even if such is defamatory [unless it is malicious.]

13. Reference is made to **Piyadasa de Silva v Gunasekera** [1980 2SLR p 196]
- i. In this case the defendant was a patient at the Balapitiya hospital. The doctor was rude and insulting to him. The Patient was unaware as to the identity of the hospital but had inquired from dispensers at the dispensary and had then written a strong letter about the doctor , naming him, to the authorities. At the trial when the Plaintiff was present the Defendant admitted that it was a case of mistaken identity.
  - ii. However the court held that there was no animus.

- iii. The court went on to consider the question of qualified privilege. The counsel for the plaintiff submitted that there was no qualified privilege because the statement itself was not true
- iv. However the court held that even if a statement made was false, the defense of qualified privilege would arise if the maker genuinely believed it to be true
- v. At page Ratwatte J said as follows

*As regards the defence of qualified privilege the learned District Judge has held that the occasion on which P1 was published was privileged. Mr. Daluwatte submitted that he does not concede that as far as the Plaintiff was concerned P1 was published on a privileged occasion, because the allegations contained in P1 relating to the Plaintiff were not true. I do not agree with this submission of Mr. Daluwatte. I have already held that the reference to the Plaintiff was due to a bona fide mistake. I am of the view that the learned District Judge was correct in holding that P1 was published to the Honourable Minister of Health, the D. H. S. and the P. S. C. on a privileged occasion*

14. The same principle was set out in different words in the south African Case of **National Media Ltd & others v Bogoshi** 1998 (4) SA 1196 (SCA)

15. In this case the court held that the defendant news paper had the right to give to the public a free flow of information and Justice Hefer held

*The public in the press of false and defamatory allegations of fact will not be regarded as unlawful if , upon the consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time*

page 1212.

16. This principle was also upheld in the case of **National Education, Health And Allied Workers Union V. Isaac Moitheri Mathye** [South Africa , Supreme Court of Appeal, Case no. 62/05 dated 1.12.2005]

17.

- i. In this case the Plaintiff instituted an action against the defendants claiming damages in respect of a defamatory publication made by the defendant.
- ii. The publication involved a report which was distributed to the members of the trade union at a general meeting . The court set out the issues at page 12.5 as follows
  - i. whether the statements were defamatory.
  - ii. If so whether they were protected by qualified privilege
  - iii. The court held that the statements were in fact defamatory

- iv. The court then went on to examine the question of qualified privilege.
- v. And at page 12.11, stated the law as follows

*Here the second appellant , as the branch secretary as NEHAWU had the right to make allegations and impart the information concerned to the NEHAWU members and the latter had a reciprocal right to receive it .*

- vi. In other words the secretary of the trade union had the legitimate right to transmit the defamatory material to the members of the trade union and the members of the trade union had a legitimate interest in receiving it. Thus the court held that the Defendant was entitled to the defence of qualified privilege and dismissed the action even though it held that the communication was defamatory.

18. The same principle of qualified privilege has been recognized in the case of **Edward v Marcell**[South Africa][[(4104/13) [2015] ZAGPJHC 105 (4 June 2015)] where the court dismissed the Plaintiff's action because the Defendant had a right of qualified privilege.

19. CF. Amerasinghe in his book on defamation also recognized the principle of qualified privilege as a defence and at page 116 sets out the ingredients as follows

- (h) There must be a duty or interest on the part of the defendant to communicate.
- (i) There must also be a duty or interest on the part of the person who hears or reads the communication to receive
- (j) The duty or interest, in either case, may be legal, moral or social.
- (k) Whether there is a duty or interest on either side is to be determined by an objective test, namely whether a reasonable man would think that the defendant had the duty or interest and the recipient had a corresponding duty or interest.
- (l) It follows that in the case of moral or social duties or interests the law tries to ascertain the views of the community as a whole as objectively as possible , although the question is one for the judge.
- (m) A special relationship is not essential.
- (n) No particular distinction has been made between a statement that is volunteered and one made in answer to a question, though in the latter case the evidence of privilege may be stronger.