LORD WIDGERY C.J. I also agree and would add a few words only because I find the existing authorities somewhat confusing. It may be that the cause of the confusion is the efforts which the courts have made to produce rational and logical rules; but we have not succeeded.

The point which is new to me in the argument in this case, and I do not remember its having been brought to the court's attention in the earlier cases, is the fact that the jurisdiction of the county court under section 105 of the Rent Act 1968 is exercisable either before or after a consideration of the matter by the rent tribunal. That has this important consequence: if, when the matter comes before the rent tribunal, an issue on jurisdiction is raised, the tribunal may be perfectly entitled to say: "In view of the particular circumstances we will decide the question of jurisdiction now and leave it to any dissatisfied party to question our jurisdiction by application to the county court later, if need be."

I respectfully welcome the rationalisation of these problems which is to be found in Caulfield J.'s judgment with which I agree, and I would also dismiss this application.

Application refused.
No order as to costs.

Solicitors: *Davies, Topping & Watkins; Treasury Solicitor.*

[COURT OF APPEAL]

RIDDICK *v.* THAMES BOARD MILLS LTD.

[1974 R. No. 122]

1977 Feb. 8, 9, 10; March 11

Lord Denning M.R., Stephenson and Waller L.JJ.

Libel and Slander—Publication of libel—Company's internal memorandum—Report to staff manager on dismissed employee—Disclosure in action against company by ex-employee—Report used as basis for subsequent libel action—Jury's finding of malice in report—Whether publication—Whether use in libel action against public policy

Public Policy—Administration of justice—Discovery—Action for wrongful arrest—Disclosure of internal company report—Whether use as basis for subsequent libel action valid

In September 1967 the plaintiff began employment as a shift engineer at the defendant company's Cumberland factory. After doubts about his ability, he was dismissed on February 28, 1969, for failure to do his job satisfactorily. He was told that he would be paid two months' salary and then, as if he had been dismissed for gross misconduct, he was escorted by the chief engineer and personnel manager at the factory to a waiting car and driven, seated between them, by a security officer to where his own car was parked. The plaintiff and his solicitor complained of his dismissal, the manner of it

and its effect upon him, to the company. In consequence, R, the chief personnel manager at the company's head office in Essex, asked a colleague, F, to ascertain the facts about the dismissal. In a memorandum of April 16, 1969, made after speaking by telephone to the chief engineer and personnel manager at the factory, F reported what they had told him to R. The memorandum referred to the plaintiff not having been up to the demands of his job, to his known instability and to his being highly strung and unsure of himself. F dictated the memorandum to his secretary who typed it and handed it to R. R read it and filed it.

By writ of October 3, 1969, the plaintiff claimed damages against the company for wrongful arrest and false imprisonment. On discovery in the course of the action, the company disclosed the memorandum of April 16, 1969. The action was settled in January 1971 on terms endorsed on counsel's briefs including the payment of £251 to the plaintiff's solicitors and the withdrawal of the allegations of wrongful arrest and false imprisonment.

In February 1972 the plaintiff claimed damages against the company for defamation "flowing from the wrongful manner" of his dismissal, but that action was struck out as being a further claim for damages in respect of the same matters as in the action which had been settled: however, during the hearing in the Court of Appeal of an appeal against the order striking out the action, it was said that the plaintiff should not be prevented, if he was so advised, from bringing a fresh action based, inter alia, on the memorandum of April 16, 1969.

By writ of December 19, 1974, the plaintiff, who had been unable to obtain work after his dismissal, claimed damages for defamation based on the memorandum of April 16, 1969. At the trial no evidence was given that the memorandum had been read by anyone other than F, R and the secretary who typed it. The judge told the jury not to have regard to the plaintiff's continued unemployment but ended his summing-up by telling them that although the plaintiff had made many applications he had failed to get a job.

The jury found that the words in the memorandum of April 16 were defamatory of the plaintiff, that he had proved malice and they awarded him £15,000 damages. Judgment was entered for the plaintiff for that sum.

On appeal by the company:—

Held, allowing the appeal, that a party who disclosed a document on discovery was entitled to the protection of the court against any use of it otherwise than in the action in which it was disclosed, and, since the memorandum of April 16 had been disclosed by the company in the first action which had been settled, in the interests of public policy and justice to the company the plaintiff was not entitled to use it as the basis for the subsequent defamation action, and accordingly the action failed (post, pp. 896C–D, 897A, 901H—902A, F–G, 912C–D).

Dicta of Jenkins J. in *Alterskye* v. *Scott* [1948] 1 All E.R. 469, 471 and *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613 applied.

Per curiam. The judge misdirected the jury on the relevance of the plaintiff's failure to get jobs after his dismissal and, had it been necessary, there would have had to be a retrial on the issue of damages (post, pp. 892D, 897E–F, 906F).

Per Lord Denning M.R. Inter-departmental memoranda have a special place in the law of libel; a master should not be liable for a confidential report made by one of his servants about another, even though that servant was malicious in making it (post, pp. 893B–C, G, 894E, 895B–C).

Per Stephenson L.J. It is not open to the Court of Appeal to adopt the theory that there was no publication because the company was publishing a libel to itself (post, p. 899F–H). Where two servants are acting in the course of their employment by a company, that company cannot escape responsibility for the malice of one because the other is acting without malice, and the company could not defeat the plaintiff's claim by the plea of qualified privilege (post, p. 901D–E).

Per Waller L.J. F published the memorandum to his secretary and to R, but in the circumstances that publication was not infected by the malice (as found by the jury) of the chief engineer and personnel manager of the factory, and, accordingly, the plea of qualified privilege succeeded (post, pp. 907D–E, 910B–C).

Osborn v. *Thomas Boulter and Son* [1930] 2 K.B. 226, C.A.; *Egger* v. *Viscount Chelmsford* [1965] 1 Q.B. 248, C.A. and *Bryanston Finance Ltd.* v. *de Vries* [1975] Q.B. 703, C.A. considered.

Judgment of Caulfield J. on verdict of jury reversed.

The following cases are referred to in the judgments:

Alterskye v. *Scott* [1948] 1 All E.R. 469.

Arvey Corporation v. *Peterson* (1959) 178 F.Supp. 132.

Bartonshill Coal Co. v. *McGuire* (1858) 3 Macq. 300.

Boxsius v. *Goblet Frères* [1894] 1 Q.B. 842, C.A.

Broadway Approvals Ltd. v. *Odhams Press Ltd.* (*No.* 2) [1965] 1 W.L.R. 805; [1965] 2 All E.R. 523, C.A.

Bryanston Finance Ltd. v. *de Vries* [1975] Q.B. 703; [1975] 2 W.L.R. 718; [1975] 2 All E.R. 609, C.A.

Crompton (Alfred) Amusement Machines Ltd. v. *Customs and Excise Commissioners* (*No.* 2) [1974] A.C. 405; [1973] 3 W.L.R. 268; [1973] 2 All E.R. 1169, H.L.(E.).

D. v. *National Society for the Prevention of Cruelty to Children* [1976] 3 W.L.R. 124; [1976] 2 All E.R. 993, C.A.; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.).

Distillers Co. (Biochemicals) Ltd. v. *Times Newspapers Ltd.* [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41.

Edmondson v. *Birch & Co. Ltd.* [1907] 1 K.B. 371, C.A.

Egger v. *Viscount Chelmsford* [1965] 1 Q.B. 248; [1964] 3 W.L.R. 714; [1964] 3 All E.R. 406, C.A.

Hopkinson v. *Lord Burghley* (1867) L.R. 2 Ch.App. 447.

Hutchinson v. *York, Newcastle and Berwick Railway Co.* (1850) 5 Exch. 343.

Imperial Chemical Industries Ltd. v. *Shatwell* [1965] A.C. 656; [1964] 3 W.L.R. 329; [1964] 2 All E.R. 999, H.L.(E.).

Lloyd v. *Grace, Smith & Co.* [1912] A.C. 716, H.L.(E.).

Middleton v. *Fowler* (1699) 1 Salk. 282.

Osborn v. *Thomas Boulter and Son* [1930] 2 K.B. 226, C.A.

Priestley v. *Fowler* (1837) 3 M. & W. 1.

Pullman v. *Walter Hill & Co. Ltd.* [1891] 1 Q.B. 524, C.A.

Reynolds v. *Godlee* (1858) 4 K. & J. 88.

Richardson v. *Hastings* (1844) 7 Beav. 354.

Roff v. *British and French Chemical Manufacturing Co. and Gibson* [1918] 2 K.B. 677, C.A. A

Young v. *Edward Box and Co. Ltd.* [1951] 1 T.L.R. 789, C.A.

The following additional cases were cited in argument:

Anderson v. *Bank of British Columbia* (1876) 2 Ch.D. 644, Jessel M.R. and C.A.

Ankin v. *London and North Eastern Railway Co.* [1930] 1 K.B. 527, C.A. B

Armstrong v. *Strain* [1952] 1 K.B. 232; [1952] 1 All E.R. 139, C.A.

Brooks v. *Prescott* [1948] 1 All E.R. 903, C.A.

City of Baroda, The (1926) 134 L.T. 576.

Meekins v. *Henson* [1964] 1 Q.B. 472; [1962] 3 W.L.R. 299; [1962] 1 All E.R. 899.

Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, H.L.(E.) C

Schneider v. *Leigh* [1955] 2 Q.B. 195; [1955] 2 W.L.R. 904; [1955] 2 All E.R. 173, C.A.

Webb v. *East* (1880) 5 Ex.D. 108, C.A.

APPEAL from Caulfield J. and jury.

By writ of December 19, 1974, the plaintiff, Robert Riddick, claimed damages for defamation against the defendants, Thames Board Mills Ltd. By paragraphs 13 and 14 of the statement of claim the plaintiff alleged that on April 16, 1969, the defendants through their servants Fleming and Smith communicated by telephone with one F. G. Fathers, a senior officer employed at the defendants' London headquarters; that Fleming and Smith asserted that it was necessary carefully to plan the plaintiff's dismissal from the defendants' Workington factory because it was known that the plaintiff was inefficient, mentally unstable and subject to hysteria; that "infected with the same malice," Fathers prepared and published a document (dated April 16, 1969) to one D. D. Rixon, a senior official employed by the defendants, which contained details of the defamatory matters embodied in the telephone conversation and readily condoned the action of Fleming and Smith in their treatment of the plaintiff. D E F

By an amended defence of May 3, 1976, the defendants pleaded (paragraph 4) that it was admitted that Fathers prepared and sent to Rixon a memorandum dated April 16, 1969, referring to the plaintiff's dismissal on February 28, 1969, but it was denied that it was defamatory of the plaintiff, and further (paragraph 5) that the memorandum was sent by one servant or agent of the defendants to another of their servants or agents in the course of their employment and it was denied that there was any publication. Further or alternatively it was pleaded (paragraph 6) that if the document of April 16 was published, any such publication was on an occasion of absolute or qualified privilege and (paragraph 7) that the document had been disclosed to the plaintiff in the course of proceedings between the parties by writ issued October 3, 1969 (1969 R. No. 98), and it was an abuse of the process of the court for the plaintiff to rely on such a document so obtained. G H

On May 27, 1976, the jury answered the questions left to them as

follows: (1) Are the words in the memorandum of April 16 defamatory of the plaintiff? Answer—Yes. (2) Has the plaintiff proved malice? Answer—Yes. (3) What sum do you award by way of damages—answer £15,000. Judgment was accordingly entered for the plaintiff for £15,000.

The defendants appealed on the grounds, inter alia, that the judge erred in law (1) in not ruling that the memorandum of April 16, 1969, was published on an occasion of absolute privilege (a ground not pursued in argument); (2) in not ruling that the plaintiff's use of the memorandum in the action (having been disclosed to him on discovery in a previous action) was an abuse of the process of the court and use for a collateral or ulterior purpose which the court would not permit; (3) and (4) in not ruling that there was not sufficient evidence of malice to go to the jury; (5), (6) and (7) in his directions to the jury on damages and on the plaintiff's unemployment. It was also contended that the damages awaded were unreasonable and excessive.

The plaintiff filed a respondent's notice.

The facts are stated in the judgments.

A. T. Hoolahan Q.C. and *J. Melville Williams* for the defendant company. Important questions of law as to publication, dictation to a typist (see *Arvey Corporation* v. *Peterson* (1959) 178 F.Supp. 132, 136 on "Dictation to a stenographer" and citing the *American Restatement, Torts*) and discovery, the use of a document disclosed for a collateral purpose, arise on the appeal. £15,000 was an enormous sum to award as damages and there was misdirection. There was clearly privilege for the report of April 16, 1969: if there was any malice, there was no malice in the writer of the report. [Reference was made to the pleadings in the first action, by writ of October 3, 1969; and to R.S.C., Ord. 24, r. 5 and the note 24/5/7 in *The Supreme Court Practice 1976*, vol. 1, pp. 406–407.]

On the issue of "No Publication," see *Gatley on Libel and Slander*, 6th ed. (1967), p. 113, and the note citing the American cases beginning "It has . . . been held in America that . . . dictation . . . to a stenographer . . . does not amount to a publication . . ." which should be compared with the note at p. 104 of *Gatley*, 7th ed. (1974). In *Arvey Corporation* v. *Peterson*, 178 F.Supp. 132, the United States District Court, E.D. Pennsylvania, adopted the view (p. 136) "that a dictation by an officer of a corporation to his secretary is a publication."

A business communication to someone outside the company is a publication on an occasion of qualified privilege: *Osborn* v. *Thomas Boulter and Son* [1930] 2 K.B. 226.

The question is: what is the position of an internal memorandum which remains within the company?

[LORD DENNING M.R. Every company has to have reports on members of its staff.]

If a company sends a memorandum to itself there is no publication. The publication to the typist in *Osborn's* case was privileged because she received the communication as typist, i.e., that was her "interest." Does such an employee receive the communication both as employee and as individual?

There is an actionable publication if, and only if, a defendant has

made it to a third person; publication to the party libelled is not publication for the purposes of a civil action: see *Gatley on Libel and Slander*, 7th ed., p. 103. In the civil law one is looking for actionable publication. Where the defendant is an individual any publication to a secretary is publication to a third person; but the position of individuals may be different from that of companies. The defendants in *Osborn* v. *Thomas Boulter and Son* [1930] 2 K.B. 226 were a firm, probably a partnership (see p. 234). Neither *Osborn's* case, nor *Bryanston Finance Ltd.* v. *de Vries* [1975] Q.B. 703, nor *Egger* v. *Viscount Chelmsford* [1965] 1 Q.B. 248, was concerned with a limited company which is a concept and not an individual. Can it be argued that a company employee is not a third person vis-à-vis the company? The employee may, of course, have a double capacity. Conceding that there was publication from Fathers to Rixon for which the company was vicariously liable there can be no doubt but that it was on an occasion of qualified privilege because it was made in the course of the company's business and in its interests: *Bryanston Finance Ltd.* v. *de Vries* [1975] Q.B. 703.

A person who without malice takes part in publishing a defamatory statement on an occasion of qualified privilege is not a tortfeasor, the privilege attaches to the individual publisher and not to the publication: *Egger* v. *Viscount Chelmsford* [1965] 1 Q.B. 248. An innocent agent is not liable for the fraud or malice of his principal: *per* Lord Denning M.R. at p. 262; *Armstrong* v. *Strain* [1952] 1 K.B. 232, 244.

Many companies must have adverse reports made on their employees. If Fathers was innocent of malice, so were the defendants, the company: see *per* Sellers L.J. in *Broadway Approvals Ltd.* v. *Odhams Press Ltd. (No. 2)* [1965] 1 W.L.R. 805, 813. The defendant company cannot be liable unless Fleming and Smith caused the memorandum to be published. If the defendant company is to be held liable in damages it can only be on the basis that Fleming and Smith were parties to the publication of the memorandum and were malicious. It would be strange if the company was liable for its internal confidential reports.

[WALLER L.J. Can one attribute malice to the company?]

A company is an entity but not an individual. In *Meekins* v. *Henson* [1964] 1 Q.B. 472, the defendants were three partners in a firm and judgment was given against the only defendant who was found to have been malicious. A company can only be vicariously liable if its servant maliciously caused the publication.

On the "Discovery" issue, if a document is obtained on discovery, it must not be used for a collateral purpose: see *Richardson* v. *Hastings* (1844) 7 Beav. 354, 356; *Hopkinson* v. *Lord Burghley* (1867) L.R. 2 Ch.App. 447, 448, 449; *Reynolds* v. *Godlee* (1858) 4 K. & J. 88, 91–92. Documents obtained on an order for discovery should not be communicated to a stranger to the suit or used for any collateral object: *Bray on Discovery*, 1st ed. (1885), p. 238. There is an implied obligation not to make improper use of disclosed documents: *Alterskye* v. *Scott* [1948] 1 All E.R. 469, *per* Jenkins J. at p. 470. The general principle of *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613, 621C–F, 625C–D covers this case. *D.* v. *National Society for the Preven-*

A *tion of Cruelty to Children* [1976] 3 W.L.R. 124 deals with the competing principle of public interest: see *per* Lord Denning M.R. at pp. 131–132; and in the House of Lords [1977] 2 W.L.R. 201. See also *per* Lord Reid in *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1974] A.C. 133, 173–174; *Schneider* v. *Leigh* [1955] 2 Q.B. 195 (privilege limited to litigant); and *Webb* v. *East* (1880) 5 Ex.D. 108.

B The only competing public interest to that of the confidentiality of discovery is the right to redress. The balance of interest is all on one side. The House of Lords in *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)* [1974] A.C. 405 came down on the side of privilege. [Reference was made to *Meekins* v. *Henson* [1964] 1 Q.B. 472.] Justice and public interest do not require that the plaintiff should be allowed to use the material disclosed by the defendants

C in the first action in the later action.

As to damages, no pecuniary loss was proved. Malice only falls to be considered on the basis that the plaintiff's feelings were hurt. There might have to be a retrial on damages.

The plaintiff in person referred to *Anderson* v. *Bank of British Columbia* (1876) 2 Ch.D. 644; *Ankin* v. *London and North Eastern*

D *Railway Co.* [1930] 1 K.B. 527; *The City of Baroda* (1926) 134 L.T. 576; and *Halsbury's Laws of England*, 4th ed., vol. 13 (1975), para. 78 on discovery.

The previous proceedings were not adjudicated upon. There was no withdrawal of the claim for libel. [Reference was made to *Brooks* v. *Prescott* [1948] 1 All E.R. 907, 911 and *Schneider* v. *Leigh* [1955] 2 Q.B. 195.]

E As to the position of privilege for documents in respect of a litigant in person, see *Halsbury's Laws of England*, 4th ed., vol. 13, para. 85.

The defendants are a subsidiary of Unilever and the question of the harm that may be done to an individual in a big organisation has to be considered. Vicarious liability affects the position of the big company. As to publication, see *Fraser on Libel and Slander*, 7th ed. (1936), pp. 19–24.

F *Hoolahan Q.C.* in reply said that there was no evidence that the memorandum of April 16, 1969, had any effect.

Cur. adv. vult.

March 11. The following judgments were read.

G LORD DENNING M.R. It is eight years ago now since Robert Riddick, the plaintiff, was dismissed from his employment. Yet the manner of it has reverberated through the Law Courts ever since. He was a shift engineer in a mill at Workington in Cumberland. It was run by the defendants, a subsidiary of Unilever, called Thames Board Mills Ltd. ("the company"). Tree trunks went in at one end of the mill. Card-

H board came out at the other end. Mr. Riddick had only been with the company for about 18 months. Previously, since boyhood, he had been with the Workington Steel Mills for 28 years. He had work with them which was within his capacity, but he then became redundant. At the

age of 44 he moved to this new job of shift engineer at Thames Board Mills Ltd. But after 18 months his employers thought that he was not up to it. They had nothing against him personally. He was a man of excellent character, who tried his very best. But they felt that he simply could not measure up to the responsibilities of a shift engineer. So they decided to terminate his services with them and give him two months' salary in lieu of notice. It is the manner of his dismissal which has caused all the trouble.

On February 28, 1969, he was sitting in his office at the mill. It was 2 p.m. at the end of his shift when he was not due to come on again for four days. Two senior officers came in. One was Mr. Fleming, the chief engineer. The other was Mr. Smith, the personnel manager. They told him that he had finished his last shift with the company because the company were dispensing with his services from that time onwards, but they explained that he would be paid two months' salary. He asked why he was being dismissed. They said it was because he was not up to the required standard, that he had been warned several times to improve, but he had not managed to do so. They helped him collect his few personal belongings. They took him down with them to a waiting car. The driver was a security officer in uniform. They sat him between them in the back of the car. They drove him to the security gate, where they transferred him and his belongings to his own car. He asked them whether his dismissal was connected with a recent affair in which two officers of the company had been accused of serious misconduct, and had been dismissed. Was he suspected of anything similar? They said it was not. It was only that he had been unable to fill the job of shift engineer.

The news of his dismissal spread through the works like wild-fire. Many associated it with the other two who had been guilty of grave misconduct. Outside the works, too, in the small town of Workington (where he had lived all his life), the word went round. Rumours were rife. The whole mill was shocked.

The effect on Robert Riddick was immediate and lasting. He has never got over it. He was greatly distressed. His health has been affected. He has not been able to obtain work. He has been on social security ever since.

Later that year (1969) he went to solicitors and brought an action against the company, claiming damages for "wrongful arrest and false imprisonment." The action was in the list to be heard at the Carlisle Assizes on January 17, 1971. But it was settled on these terms endorsed on counsel's briefs:

> "£251 in court to be paid out to plaintiff's solicitors and costs on party and party basis to be taxed in default of agreement; this sum having been accepted before the hearing. Allegations of wrongful arrest and false imprisonment against defendant unreservedly withdrawn."

Mr. Riddick was very discontented. He had wanted his case decided by a judge and jury: and here he had come away with virtually no

redress. Even the £251 would, no doubt, go in the costs of his own solicitors and counsel.

So on February 25, 1972, Mr. Riddick started another action against the company, followed by a statement of claim on February 5, 1973. This time he claimed damages for "defamation flowing from the wrongful manner" in which he was dismissed. He acted in person. There is no legal aid available for actions for defamation. The company applied to strike out on the ground that it covered the self-same ground as the previous action. Both the registrar and the judge struck it out. On appeal on November 5, 1973, the Court of Appeal also struck it out. But in the course of the judgment, Megaw L.J. said that there was one matter which he might raise in fresh proceedings and that was a claim for defamation in respect of a memorandum of April 16, 1969. It was an internal memorandum made by one servant of the company to another. Mr. Riddick only got to know of this memorandum because it had been disclosed on discovery in the first action.

Encouraged by this suggestion, on December 19, 1974, Mr. Riddick issued yet another writ against the company and delivered a statement of claim. This contained a lot of the old matter and that was struck out on July 21, 1975, by Faulks J. But he allowed the part to remain which was based on the memorandum of April 16, 1969.

This last action was tried before Caulfield J. and a jury at Carlisle in May 1976. Mr. Riddick again appeared in person. It lasted five days. The jury awarded Mr. Riddick £15,000 damages. The judge entered judgment against the company for that sum. They appeal to this court. I must say that £15,000 seems an extraordinarily large sum in respect of an internal memorandum. So I must tell how it came about.

Mr. Riddick's employment with the company prior to his dismissal

The mill at Workington was under a general manager, Mr. Scoble. The head office of the company was at Purfleet in Essex, 300 miles away from Workington. The officers at each end are in constant telephone communication with one another; as well as inter-departmental memoranda. The staff personnel manager at head office was Mr. Rixon, who was assisted by a colleague, Mr. Fathers.

The company have a system whereby the work of all servants in responsible positions is "appraised" regularly by a senior officer: and a confidential report is made upon him. Mr. Riddick's work was "appraised" accordingly: and he was shown the reports upon him. On September 17, 1968, after Mr. Riddick had served one year as shift-plant engineer, the chief engineer at Workington, Mr. Fleming, made this report on him:

> "His performance began promisingly, but crumbled rather suddenly in May 1968 when he was taken off shift at his own request, and having clearly lost his nerve . . . His problems appears one of constant apprehension . . . He discusses problems a lot seeking reassurance . . . He may yet do very well when his confidence builds up . . ."

This appraisal was shown to Mr. Riddick and this comment was

made: "He agrees he worries too much, but says he is now happy in the job, expects to maintain his performance." A

On November 15, 1968, Mr. Fleming, the chief engineer, felt that Mr. Riddick's performances had not improved, as had been hoped. So he saw Mr. Riddick and gave him a warning and made a report of it to the general manager at Workington, Mr. Scoble. The warning was in these words:

> "To come to the point, I am not satisfied with your performance as a shift-plant engineer . . . Unless you pull your socks up very shortly, you and T.B.M. must part company." B

On February 20, 1969, Mr. Fleming made a written report to the general manager at Workington, Mr. Scoble:

> "I have to report that he has failed to fulfil the requirements of a shift engineer and request that I be authorised to replace him. In essence Mr. Riddick lacks the confidence or ability to be a shift engineer." C

On getting the report, the general manager at Workington telephoned to the head office at Purfleet asking for authority to dispense with the services of Mr. Riddick. He spoke to the staff personnel manager, a Mr. Rixon, who made this reply in a memorandum: D

> "Since it appears that he has not been negligent in his duties, but rather that the job is too big for him, I would suggest that we be a little more generous than we need to be . . . I suggest, therefore, that we give him two months' notice . . . but that we would not expect him to report for duty during those two months." E

On February 28, 1969, Mr. Riddick was dismissed in the humiliating circumstances which I have already described. The general manager at Workington was away at the time. But, when he came back, he made this apology to Mr. Riddick, on March 5, 1969:

> "I was . . . extremely sorry to hear that you had been escorted from the works to the security gate, i.e., the car park, after this interview, and would say immediately that this was a totally wrong decision, and you can rest assured that this matter has been very fully aired in private discussions here. This type of action is only carried out by our company if people are guilty of serious misconduct of any sort within the confines of the plant and I would therefore offer an apology on behalf of my colleagues for their somewhat misguided enthusiasm in this particular instance." F G

The chief engineer gave Mr. Riddick a good reference, saying that he was extremely conscientious, kindly and personable, and was of excellent character and integrity.

The memorandum of April 16, 1969 H

Soon after his dismissal, Mr. Riddick went to see his solicitor in Workington. The solicitor took his complaint up with the people at Workington and afterwards with the head office at Purfleet. He spoke on the telephone

to Mr. Rixon, the staff personnel manager. This was on April 14, 1969. On the telephone Mr. Rixon tried to put the company's point of view, but he felt that the solicitor wished to press the case. So Mr. Rixon asked his colleague, Mr. Fathers, to find out the facts of the case. Then Mr. Fathers, in Purfleet, had a telephone conversation with the two men at Workington, Mr. Fleming and Mr. Smith, who had actually escorted Mr. Riddick away from the factory on February 28: and he made a written report to Mr. Rixon, which is the memorandum complained of in this action.

I will not read the whole of the memorandum. I will set out parts of it, underlining the words said to be a libel on Mr. Riddick:

> "After the annual shut of 1968, Riddick was told that he had been employed as a shift-plant engineer and must go back on shift, which he did, albeit unwillingly. Since that time his efficiency has been in question. He was not up to the demands of the job, he was unable to work without close supervision and was frequently failing in detail . . . Riddick asked why he was being dismissed, and was told that he was not up to the required standard, that he had been several times warned to improve, and he had failed to do so. Despite Riddick's known instability, there was no sort of scene and no argument . . . Knowing Riddick to be highly strung, unsure of himself, and likely to be hysterical, Fleming and Smith planned carefully to avoid embarrassment, and my impression is that they were intent only on kindness and consideration. . . ."

Mr. Fathers dictated that memorandum to his secretary. She was also the secretary to Mr. Rixon. She transcribed it and handed it to Mr. Rixon. He read it and put it away in the file awaiting further developments. There it remained. No one else saw it until discovery in the first action in 1970 when Mr. Riddick sued for wrongful arrest and false imprisonment. It was then included in the file handed to the solicitors for the company. They included it on August 18, 1970, among the documents to be disclosed, not claiming that it was privileged. It was very material to the claims in these actions and was in my opinion properly disclosed.

That report was obviously sent on a privileged occasion and the judge so ruled. But the jury found that the words in it were defamatory of Mr. Riddick and that he had proved malice. Not malice in Mr. Fathers in Purfleet. But in Mr. Fleming and Mr. Smith in Workington. Mr. Fathers is dead. But Mr. Fleming and Mr. Smith were both called. They denied that they told Mr. Fathers that Mr. Riddick was of "known instability . . . highly strung and likely to be hysterical." The jury must have disbelieved them. They must have come to the conclusion that Mr. Fleming and Mr. Smith did use those words on the telephone to Mr. Fathers, and that they had no belief in their truth, and were, therefore, malicious. I must confess that this seems a little hard on Mr. Fleming and Mr. Smith—giving evidence in 1976 of a conversation in 1969. But still it is the finding of the jury which this court must accept.

The summing up

At one point in the summing up the judge told the jury not to have regard to the plaintiff's continued unemployment. He said: "... there is no evidence that that particular document of April 16 played any part in the plaintiff's continued unemployment." But at the very end of the case he told the jury:

> "Members of the jury, work on the basis that Mr. Riddick has made lots of applications for jobs. In fact he has got as low or as high, whichever way one looks at it—I look on high as referring only to highly skilled jobs—as to have got down to applying for a job as a labourer. He has applied for every sort of job but has not got it. There is no dispute about that. Work on that basis. Are you content with that, Mr. Riddick?
>
> *Mr. Riddick:* Yes.
>
> *Caulfield J.:* Mr. Riddick has done his utmost to restore himself to a job but so far he has failed. Very well, members of the jury, you may retire."

I am afraid those last words must have led the jury to think that they could give Mr. Riddick damages for his loss of employment for the seven years since his dismissal. Otherwise I do not see how they could arrive at the figure of £15,000. That was a misdirection; because the events of April 16, 1969, were six weeks after his dismissal and could have played no part in it.

On this point I think that there should in any case be a new trial. But there are other questions to be considered before ordering a new trial.

The responsibility of the company

The company raise a very important point about their responsibility. They say that the only persons who saw this memorandum were Mr. Fathers, the company's officer, who dictated it to the secretary, who typed it: and Mr. Rixon, the personnel manager, who received it, read it, and filed it. It contained words critical of another employee of the company, Mr. Riddick. Such a situation arises every day in every company. A confidential report is made commenting adversely on the efficiency of one of the staff. It is sent to the manager, who reads it and keeps it in the file. But it is never sent outside the company to anyone. The occasion is clearly privileged. But suppose the officer who makes the report has some grudge or spite against the other servant and makes the report maliciously. The reporting officer himself is clearly liable in damages to the servant on whom he has reported. But is the company also liable in damages to that servant on the ground that the reporting officer was acting in the course of his employment?

Such a problem is not confined to companies. It applies also to an individual who runs his own business. Suppose an individual employer asks his manager for a report on one of the assistants: and the manager makes it maliciously. He may dictate it to a typist; or he may write it out in his own hand and send it to the employer. The assistant can, of course, sue the malicious manager. But can he sue also the employer

himself on the ground that the malicious manager committed a tort in the course of his employment, for which the employer is responsible? It would be most extraordinary if he could.

Take another instance which is quite common. Two servants of the same company have a quarrel and each reports adversely on the other. Each accuses the other of some misconduct or other in the course of his employment. If both are malicious, is the company liable in damages to both of them?

I venture to suggest that in all these cases it would be quite unacceptable that the master should be held liable. A master should not be held liable for reports made to him by one of his servants about the conduct of another servant, even though it is in the course of the employment. But what is the legal basis of it?

From time to time there has been much discussion on the true basis of the master's liability for the wrongs of his servant. I will take two competing theories.

Qui facit per alium facit per se

According to one theory, the master is liable for the acts of his servants because they are regarded as being authorised by him: so that in law the acts of the servant are the acts of the master. This theory is founded on the maxim: Qui facit per alium facit per se. Thus in *Middleton* v. *Fowler* (1699) 1 Salk. 282 Holt C.J. said:

> "... no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master; ...

In *Hutchinson* v. *York, Newcastle and Berwick Railway Co.* (1850) 5 Exch. 343, 350 Alderson B. said: "whatever the servant does in order to give effect to his master's will may be treated by others as the act of his master: 'Qui facit per alium, facit per se.'" In *Bartonshill Coal Co.* v. *McGuire* (1858) 3 Macq. 300, 306, Lord Chelmsford L.C. said:

> "every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se.*"

If that theory were to be applied to inter-departmental memoranda, then it would follow that the act of the one servant in making the report would be the act of the master: and the act of the other servant in receiving it and reading it would also be the act of the master. So it would be in law the master making a publication to himself. No one can be made liable for a libel published only to himself: any more than a man is liable for writing a defamatory letter and keeping it in his desk, showing it to no one.

That is an attractive theory. I know that it will not fit in with the cases where a company has been held liable for letters dictated by a director to a typist. But in none of those cases was this point of publication properly argued. So it is still a permissible theory, and I would for myself adopt it.

Respondeat superior

According to another theory, the master is responsible for the wrongdoing of his servant—not because it is his act—but because the policy of the law is to make him responsible for wrongs done by the servant in the course of his employment, even though the master did not authorise the act, and even if he forbad it; and even though it was not done for the master's benefit but for the servant's own benefit. This theory is based on the maxim respondeat superior. It has prevailed in the law ever since *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716, and must now be accepted as the correct basis of the master's liability. On this basis the inquiry is simply this: was the servant liable? If yes, was he acting in the course of his employment? If yes, then the master is liable: see *Young* v. *Edward Box and Co. Ltd.* [1951] 1 T.L.R. 789, 793; *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656, *per* Lord Pearce, at pp. 685–686.

It is this theory which has been applied in the many cases where a director of a company or other servant has dictated a letter, which is sent to *a customer or some other person outside* the firm containing criticisms of him. It has always been assumed that there was a publication by the company, but held that the dictation by the servant to the typist is a privileged occasion. So that, if it is malicious, the employer is liable: see the long list of cases from *Pullman* v. *Walter Hill & Co. Ltd.* [1891] 1 Q.B. 524, through *Osborn* v. *Thomas Boulter and Son* [1930] 2 K.B. 226, to *Bryanston Finance Ltd.* v. *de Vries* [1975] Q.B. 703.

None of those cases, however, concerned inter-departmental memoranda. And, I must say, that to my mind these stand on a very different footing. These should form an exception to the doctrine of respondeat superior, just as the doctrine of common employment did in former times. That doctrine was introduced by the judges in 1837 in *Priestley* v. *Fowler* (1837) 3 M. & W. 1. It was at that time avowedly based on the policy of the law. The court said that to carry the principle of respondeat superior so far as to make a master liable for the negligence of a fellow-servant would "carry us to an alarming extent." It was later justified on the theory that there was an implied term in the contract of employment by which every servant took on himself the risk of injury from the negligence of a fellow-servant: see *Hutchinson* v. *York, Newcastle and Berwick Railway Co.*, 5 Exch. 343, *per* Parke B., at p. 351. This implied term was a fiction, but it served the public policy of the time. In those days no employer was insured against accidents to his workmen, so some limitation had to be placed on his liabilities. When insurance became general for personal injuries, the doctrine was seen to have outlived its usefulness in that sphere. It was abolished by Parliament in 1948 so far as personal injuries were concerned. But I would suggest that it may be still available today in cases of defamation. "Common employment" may, I think, be used in aid of the public policy of our time: so as to protect a master from being liable for inter-departmental memoranda made by his servants.

The simple solution

A Either of those two theories would afford sufficient basis for the exemption of the master. But in case neither of them satisfies those with logical minds, I would say with Holmes J., that "The life of the law has not been logic: it has been experience": *Holmes Common Law* (1882), p. 1. The experience of this very case is lesson enough. Assuming that the master is liable for confidential reports, many days and much expense B have been consumed in the court of trial and in this appeal court in investigating the evidence of malice, the infection of malice, the imputation of malice, and so forth. When you consider all these complications, you will, I hope, come to the conclusion that it would be much better to adopt the simple solution which I propose: a master should not be liable for a confidential report made by one of his servants about another, even though C that servant was malicious in making it. Let the aggrieved servant bring his action against the malicious servant who reported on him. But do not let him bring it against the master who employs both of them and has done nothing wrong.

Documents disclosed on discovery

D There is, however, another point raised by the company. This memorandum on Mr. Riddick of April 16, 1969, was disclosed to him in the course of the first action. He would not have known anything of it unless it had been disclosed—as it had to be—in the affidavit of documents ordered by the court. Now the question is: having thus obtained the document, is he entitled to sue the company on the ground that it was a libel on him?

E Discovery of documents is a most valuable aid in the doing of justice. The court orders the parties to a suit—both of them—to disclose on oath all documents in their possession or power relating to the matters in issue in the action. Many litigants feel that this is unfair. I have often known a party—faced with such an order—saying to his solicitor: "Need I disclose this document to the other side? It will damage our case greatly if F they get to know of it." The solicitor's answer is, and must be: "Yes, you must disclose it, however much it damages your case." Again I have known a party to say to his solicitor: "But these are my own confidential papers—my own personal diary—our own inter-departmental memoranda. Must I disclose them?" The answer of the solicitor again is "Yes. You must disclose them. Confidential information has no privilege from disclosure: see *Alfred Crompton Amusement Machines Ltd.* G v. *Customs and Excise Commissioners (No. 2)* [1974] A.C. 405, 433. The court insists on your producing them so as to do justice in the case."

The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential H information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e., in making full disclosure. This balancing act—of weighing the competing public interests—is what I advocated in my judgment in *D.* v. *National Society for the Prevention*

of Cruelty to Children [1976] 3 W.L.R. 124, 132–134. I did not intend in any way to diverge from the 16th Report of the Law Reform Committee (Privilege in Civil Proceedings) (1967) (Cmnd. 3472), para. 1. I went, no doubt, a little too far in suggesting a presumption in favour of confidentiality, as the House of Lords afterwards pointed out in [1977] 2 W.L.R. 201. But otherwise I find nothing in the speeches to detract from the balancing process. The thing to do in every case is to weigh the competing public interests and see which way the scales come down: and this, I gather, was the view preferred by Lord Simon of Glaisdale: see [1977] 2 W.L.R. 201, 228–229; and by Lord Edmund-Davies at p. 233 (V) and (VI).

I proceed to hold the balance in the present case. On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum of April 16, 1969, to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party—or anyone else—to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J., *Bray on Discovery*, 1st ed. (1885), p. 238:

> "A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: . . . nor to use them or copies of them for any collateral object . . . If necessary an undertaking to that effect will be made a condition of granting an order: . . ."

Since that time such an undertaking has always been implied, as Jenkins J. said in *Alterskye* v. *Scott* [1948] 1 All E.R. 469, 471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. The modern authorities are well discussed by Talbot J. in *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613, 621; and I would accept all he says, particularly as to the weighing of the public interests involved: see p. 625.

A In my opinion, therefore, Mr. Riddick was not entitled to use the memorandum of April 16, 1969, as the basis of an action for defamation.

Conclusion

Mr. Riddick put his case before us with courtesy and moderation. We wish that he could have had legal aid so as to deal with the points raised by Mr. Hoolahan. But that is not available in libel cases. So Mr. Riddick B has had to conduct the case on his own. Whilst one feels much sympathy for him in being out of work for so long, nevertheless the fact remains that this memorandum of April 16, 1969, had nothing to do with it. It did not affect his reputation in the least. It did not damage him in the slightest. His cause of action, even if it existed, was of the most technical description. But in my opinion it did not exist at all. I would allow the C appeal and enter judgment for the defendant company.

STEPHENSON L.J. The jury have awarded the plaintiff £15,000 for the injury caused to his feelings and reputation by the memorandum of April 16, 1969. That memorandum was composed by Mr. Fathers from information partly if not mainly derived from what Mr. Fleming and Mr. Smith had told him on the telephone. It was typed by a secretary, read D by Mr. Rixon and filed. No one else was proved to have seen it until it was disclosed in the plaintiff's earlier action against the defendant company. That means that the slanders of Mr. Fleming and Mr. Smith were published only to Mr. Fathers and through him to the typist and Mr. Rixon, and that very limited publication took place over six weeks after the company had dismissed the plaintiff and, according to his own evidence, E grievously wounded his feelings and irreparably damaged his health and reputation on February 28, 1969.

It follows from those few undisputed facts that the jury's award is so grossly excessive that it must have taken into account other matters than the consequences of the publication of the memorandum. That means that the company is entitled to a new trial and a re-assessment of damages F at a very modest figure—if the plaintiff is entitled to any damages at all.

I have no doubt that in spite of the judge's direction on damages the jury must have included in that amount damages for the conduct of Mr. Fleming and Mr. Smith on February 28, 1969, perhaps damages for a wider publication than was proved in evidence and possibly a punitive element as well. [His Lordship examined the summing up on the issue of damages and of the evidence given on that issue, and continued:] G Furthermore the plaintiff made it clear in his intelligent, courteous and candid address to us that he suspected or believed that what Mr. Fleming and Mr. Smith had said about him on the telephone had been overheard by servants of the General Post Office and that the memorandum of April 16 had reached the outside world and contributed to his continuous unemployment. But he did not cross-examine Mr. Rixon to suggest that he H had shown the memorandum to anyone else, even a filing clerk. There was no proof of these suspicions and the jury may have acted wrongly on them also.

Only by considering "the industrial exercise of February 28, 1969"

[the manner of dismissal] to be relevant to damages as well as to malice could the jury have arrived at a figure of £15,000 to compensate the plaintiff for such a restricted publication as that of April 16, 1969. It was natural that they should have fallen into the same error as the plaintiff [who in his final speech claimed to have lost £21,000 by reason of the defendants' conduct], but it was unjust to the company.

But is the plaintiff entitled even to minimal damages for what Mr. Fleming and Mr. Smith maliciously said about him and Mr. Fathers wrote about him? Mr. Hoolahan concedes that he cannot claim absolute privilege for the memorandum, as had been contended before this court in the 1972 action, and pleaded in paragraph 6 of the defence in this action, but only qualified privilege. That the judge rightly accepted, and Mr. Hoolahan does not challenge the jury's finding of malice, if that is limited to malice on the part of Mr. Fleming and Mr. Smith only. But he maintains that Mr. Fathers was not " infected with " that malice, as the plaintiff alleged, and that the company's privilege was not destroyed by that malice. Mr. Hoolahan claims also that the company is not liable to pay the plaintiff any damages on two other grounds: (1) no publication, (2) no right of the plaintiff to use the memorandum for a collateral and ulterior purpose to that for which it was disclosed in the earlier action.

I consider first the defence of no publication. By paragraph 5 of the company's defence it was pleaded that

> " . . . the said documents of March 5 and/or April 16, 1969, were each sent by one servant or agent of the defendants to another servant or agent of the defendants acting in the course of their employment and in the premises the defendants deny that there was any publication by the defendants of the said documents or either of them."

No issue now arises on the document of March 5 because the judge's ruling that it was written on an occasion of qualified privilege without any evidence of malice is not challenged in this appeal.

Publication is not actionable unless it is publication to a third party. A cannot sue B for defaming him to A himself, or to B himself; that is to say where B reads to himself his libel on A and then locks it away. A must prove that B defamed him to C. Here it is said that the defendant company acting by its servant or agent Fleming or Smith or Fathers published defamatory words to its servants or agents Fathers, his typist and Rixon, each and all acting on behalf of itself so that there was no publication except by the company to itself.

This would be arguable were it not concluded against Mr. Hoolahan, in my judgment, by decisions of this court. In *Pullman* v. *Walter Hill & Co. Ltd.* [1891] 1 Q.B. 524 the defendants were Walter Hill & Co. Ltd., a limited company, whose managing director dictated a defamatory letter to a " typewriter "; the letter was copied by a boy and sent to the plaintiff's office where it was read by two clerks. Day J. ruled that there was no publication to the typewriter and the boy, who were both employed by the defendant company, or to the clerks employed by the plaintiff. On appeal it was argued for the plaintiff that there was publication to both pairs of servants or agents and for the company that a corporation cannot write a letter except through an agent (pp. 525–526). The Court of Appeal

held that there was publication of the letter and no protection by privilege: see *per* Lord Esher M.R. at p. 527, *per* Lopes L.J. at p. 529 and *per* Kay L.J. at p. 530. Later decisions of this court have distinguished and not followed the decision on privilege but have never questioned the decision on publication.

In *Boxsius* v. *Goblet Frères* [1894] 1 Q.B. 842, judgment was entered by Lawrence J. against both defendants, one of whom was a firm of solicitors, for a libel in a letter dictated by one of the firm to one clerk and copied by another. It was then sent to the plaintiff and was not published to anyone but the plaintiff herself and the defendants' own typewriting and copying clerks. The first ground of appeal was that there was no evidence of publication; but this court held that there was, Lord Esher M.R. and Davey L.J. not referring to the question, Lopes L.J. at p. 846 expressly stating that there was evidence of publication by communicating the letter to the clerks.

Edmondson v. *Birch & Co. Ltd.* [1907] 1 K.B. 371 was another case in which a limited company was sued for libel, as in *Pullman's* case [1891] 1 Q.B. 524, in a letter (and also in a telegram) dictated by its managing director. Lawrence J. ruled at p. 374 (presumably as in *Boxsius'* case [1894] 1 Q.B. 842 following *Pullman's* case) that there was publication to the defendant company's clerks but that the company was protected by privilege. There appears to have been no argument on publication in either court, but in both courts the defendant company was protected by privilege.

In *Roff* v. *British and French Chemical Manufacturing Co. and Gibson* [1918] 2 K.B. 677 the first defendants appear to have been a firm, not a limited company, but as Scrutton L.J. at p. 683 pointed out the appeal raised no question:

> "under what circumstances the fact that a letter is read by a clerk, shorthand writer or typist of the sender, or by a clerk, shorthand writer or copyist of the receiver, constitutes a separate publication to those servants."

It is not then surprising that when *Osborn* v. *Thomas Boulter and Son* [1930] 2 K.B. 226 was argued and decided the defence admitted publication to the servants of the defendant firm, and when this court had recently to consider a letter dictated to a secretary by an individual, many questions relating to privilege and its extent were canvassed but nobody questioned the fact of publication to the secretary or suggested that the individual was by dictating the letter to his servant or agent merely communicating the letter to himself: *Bryanston Finance Ltd.* v. *de Vries* [1975] Q.B. 703.

I therefore feel bound to reject the submission that there was no publication and respectfully to dissent from the opinion of Lord Denning M.R. that the point of publication was not properly argued in any of these cases and it is permissible for this court to adopt the theory that the company was publishing a libel to itself.

The next defence of qualified privilege must rest on the company's not being responsible for the malice which the jury found against the company's servants who published the libel. That malice was proved against Mr. Fleming and Mr. Smith. It was not, in my judgment, proved against

Mr. Fathers. He would not be "infected by" their malice as alleged in the plaintiff's statement of claim borrowing from the language of Lord Denning M.R. in *Egger* v. *Viscount Chelmsford* [1965] 1 Q.B. 248, 261, where it was held that even in a joint publication some publishers may be privileged because not malicious and some not privileged because malicious. So the company can only be responsible for the libel published by Mr. Fathers if the libel is Mr. Fleming's or Mr. Smith's because they caused its publication. They themselves would be responsible for their slanders to Mr. Fathers, but they would only be responsible for the publication of his slander or libel to the typist (the lords justices differed in *Osborn's* case [1930] 2 K.B. 226 on which such a communication would be) if they contemplated or must have contemplated that he would communicate it to the typist, and they would only be responsible for the publication of the libel to Mr. Rixon if they contemplated or must have contemplated its further communication to him. This matter was not explored in evidence as it should have been, and would have been if Mr. Riddick had been represented by counsel. I appreciate the force of what Waller L.J. is going to say on this point in the judgment which I have had the privilege of reading in draft. I agree with him that there is no proof of any particular words having been spoken by Mr. Fleming or Mr. Smith—except by inference from Mr. Fathers's memorandum itself. But I have reached the same conclusion as Lord Denning M.R. that the jury disbelieved their denials, and were entitled to find that they or one of them spoke some at least of the defamatory words recorded in the memorandum and must have expected Mr. Fathers to write down and pass on to someone in authority the detailed account requested of them. At any rate I would not like to decide against a plaintiff appearing in person a point covered somewhat imperfectly by his pleading and supported to a limited extent by the evidence, after the judge had assumed that the jury could decide it in his favour. On the whole I would regard the evidence as justifying the inference that Mr. Smith, if not Mr. Fleming, had the necessary knowledge to impute to him responsibility for the publications to the typist and Mr. Rixon.

If that is right, the company must answer for the malice of Mr. Smith and possibly of Mr. Fleming, because although they were not employed to render a malicious account of the plaintiff to fellow servants or the company, they were doing with malice what it was in the course of their employment to do without malice and so their activities were within the ordinary principles on which the law declares "respondeat superior": compare what Lord Denning M.R. said in *Egger's* case [1965] 1 Q.B. 248, 261.

I regret that I cannot agree with Lord Denning M.R. in extricating the company from the application of respondeat superior by reintroducing the doctrine of common employment. For I am uncertain whether public policy requires the reintroduction and whether freedom to make and receive internal reports and memoranda is not adequately safeguarded by the need to prove malice without in effect conferring on their publication an absolute privilege for the employer himself.

It may seem unfair to an employer, particularly a corporation which

must act and speak through servants and agents, to be responsible to a third party, whether or not he is, or has been, its servant, for charges and counter charges in reports which it is its duty to all its servants as well as its shareholders and customers to obtain. Yet it is perhaps no more unfair than a company's responsibility for the fraud of its servants, including in some circumstances fraud which causes loss not only to third parties but to the company itself.

It may also be thought to be in the public interest of efficiency and economy that companies should be free to obtain candid reports on their employees, perhaps even after they have left their employment, and that in performing this task companies and their servants should be unhampered by fear of losing privilege for such reports; third parties being sufficiently protected against the danger of such reports being made with malice by their right to sue those individual servants of the company who actually make and publish the reports. But on the other hand it may be thought as important for the public that companies should control the abuse of such privilege as that the privilege itself should be maintained.

Some support for the proposition that a company should not be responsible for a publication by one servant with malice on the part of another may be found in the observation of Sellers L.J. in *Broadway Approvals Ltd.* v. *Odhams Press Ltd. (No. 2)* [1965] 1 W.L.R. 805, 813G; but where both servants are acting in the course of their employment by the company (as here) I cannot see that the company can escape responsibility for the malice of one simply because the other is without malice.

I therefore reject the submission that the company can defeat the plaintiff's claim by the plea of qualified privilege.

That leaves only the plea in paragraph 7 of the defence:

> "the said document of April 16 was disclosed to the plaintiff in the course of proceedings between the plaintiff and the defendants by writ issued October 3, 1969, . . . and not otherwise and the defendants contend that it is an abuse of the process of the court for the plaintiff to rely on such a document so obtained herein."

The authorities cited by Mr. Hoolahan on legal professional privilege go at least as far as to show that the company may well have been right not to claim privilege from discovery for the memorandum of April 16, 1969, in the 1969 action in which it was in fact produced for inspection and thereby came for the first time to the knowledge of the plaintiff. But the authorities cited by Mr. Hoolahan on the use of such a document otherwise than in the proceedings in which it is disclosed establish that the party so using it is in breach of an implied obligation not to use it so, which will sometimes be enforced by an undertaking to the court as a condition of its production: *Richardson* v. *Hastings* (1844) 7 Beav. 354; *Hopkinson* v. *Lord Burghley* (1867) L.R. 2 Ch.App. 447; *Alterskye* v. *Scott* [1948] 1 All E.R. 469 and *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613. Those authorities, particularly the admirable statement of the principle by Talbot J. in the last case at p. 621, indicate that the obligation is owed to the party who produces the document on discovery and to the court; that party is entitled to the protection of the court against the use of the document otherwise than in the action

in which it is disclosed; and that protection is necessary for the proper administration of justice; it is important to the public and in the public interest that the protection should be enforced against anybody who makes improper use of it.

Did the plaintiff make such an improper use of the memorandum by suing the company on it for defamation? If so, can he recover damages from the company? In my judgment, the answer to the first question is "Yes," and to the second "No."

At first sight he might appear to be suing on the memorandum with the leave of the Court of Appeal in the 1972 action. But there is no indication in the judgments of the Court of Appeal that the court knew that the plaintiff first learnt of the memorandum after it had been obtained by his then solicitors on discovery in that action. The company's objections to the plaintiff suing on it were, in effect, pleas of res judicata and absolute privilege. There is no hint of the objection now taken that to sue on it in a fresh action is an abuse of the process of the court. And Megaw L.J. made it clear that the court was giving the plaintiff leave to sue on it, though striking out paragraph 10 of the statement of claim which raised it in an objectionable form, subject to any objections which the defendant company might take. It would, I think, have been open to the company to take this third objection to paragraph 10, but the plaintiff would have had then, as he has now, an arguable case on it and the court would not, on this ground of objection, have made any different order or denied him the right to bring a fresh action on the memorandum. Now that the point has been argued—and I could wish the plaintiff had been legally represented and we had had the benefit of argument by counsel on both sides, though Mr. Hoolahan has done his best to put both sides of the case—I have come to the conclusion that the plaintiff is manifestly using the memorandum in a way which is contrary to the public interest and unjust to the company.

As he has obtained the memorandum in this way and decided to sue on it, can he be prevented from using it to get damages from the company? Or is it like evidence unlawfully obtained in a criminal case which the prosecution is nevertheless entitled to adduce against the defendant? The books do not appear to provide a case which answers these questions directly; but in my judgment the court has and should generally use the power to protect parties who make full and frank disclosure of documents, and the public interest in such disclosure, by discouraging the use by a plaintiff in a later action of a document obtained on discovery in an earlier action. If the court can require an undertaking from a plaintiff not to misuse a document before it is produced to him, it should have the power to restrain him from misusing it after it has been produced. And if he misuses it before the court restrains him why should the court allow itself to be used to countenance his misuse of it? I think it is entitled and indeed bound to refuse him help and to regard his attempt to get it as an abuse of its process.

I would therefore allow the appeal on this ground. There may be cases in which a plaintiff would be justified in bringing an action on a document disclosed in an earlier action. I do not say that it could never

be done without abusing the process of the court. But generally speaking it would be an abuse of its process and in the circumstances of this case the plaintiff's use of this memorandum is an improper use which the court should not countenance. I see no reason why he could not have done justice to himself—and to the company—by amending his writ in the 1969 action to add the claim which he delayed making until he pleaded paragraph 10 of his statement of claim in the 1972 action and is making in this action. Perhaps he was then advised that it added so little to his existing claim as to be not worth making.

I hope that the plaintiff will appreciate that if the appeal is allowed on this point of law he is not thereby deprived of the chance of obtaining any sum of money which he would regard as adequate compensation for the injury which he understandably believes that some of the company's servants have done him. He would not in any case be entitled to receive in this action more than a very small sum.

WALLER L.J. The plaintiff Robert Riddick joined the defendant company at their factory at Workington in 1967. Prior to that he had been employed by another Workington company for some 30 years. On September 4, 1967, he started employment with the defendant company on the night shift responsible for the day to day running of the engineering division on that shift. He continued on the night shift until May 1968, when there was a change. There is a dispute between the parties as to precisely what happened then but which is unnecessary in this case to consider. Suffice it to say that after a fortnight's holiday he returned to work on the day shift. The plaintiff remained on the day shift until the autumn when he returned to work on the night shift where he had started. By this time the plaintiff's employers, the company, were beginning to have doubts about his ability to do the job. At the end of one year, namely, in September 1968, having been with the company 12 months there was an appraisal, strictly confidential, made, which was seen by the plaintiff and which showed the company's view of his capabilities. At that stage it was reported that he had lost his nerve in May and that one of his problems was one of constant apprehension and constant search for reassurance and that he was always seeking reassurance when discussing problems. He saw his report at that time and commented that he agreed he worried too much.

Thereafter the company arranged to keep a constant check on his work and the time came when it was decided that he was not up to the job he was doing and on February 28, 1969, he was dismissed.

The manner of his dismissal was unfortunate. It was decided to tell him at the end of his shift and arrangements were made to accompany him to his car and it was said, though denied by the company, that instructions were given that he was not to be admitted to the company's premises again. When he was being taken to his car it was in a company car driven, as it happened, by a security officer and the plaintiff was seated in the middle between Mr. Fleming and Mr. Smith. It gave the appearance to anybody who saw it that he was being dismissed for something disgraceful.

The plaintiff was extremely upset about the manner of his dismissal and of course about the dismissal itself. He was given a reference by the defendants but I need not refer to it.

On April 2, Mr. Bacon, a solicitor acting on the plaintiff's behalf, visited the company's premises at Workington and saw Mr. Johnson. Mr. Johnson informed Mr. Rixon at head office at Purfleet, Essex, of the meeting with Mr. Bacon. On April 16 Mr. Rixon requested Mr. Fathers to investigate the circumstances of the dismissal. Mr. Fathers was another of the company's servants at headquarters at Purfleet. On April 16, having spoken by telephone to Mr. Fleming and Mr. Smith at Workington, Mr. Fathers prepared a report. This report went to Mr. Rixon who read it and filed it. It is to be noted that there is no evidence that anybody saw the report except Mr. Rixon and the typist who typed it.

In 1969 the plaintiff, through his solicitors, started proceedings against the company for false imprisonment and as part of the statement of claim as originally drafted it was alleged that the manner of his arrest was such as to bring him into public odium and contempt. In due course that action was set down for trial before Bristow J. at Carlisle but before the trial the parties came to terms. The action was withdrawn on terms endorsed on counsel's brief which included the payment of £251 to the plaintiff and the withdrawal of the allegations of wrongful arrest and false imprisonment.

In the course of the proceedings for that action the report of April 16, 1969, by Mr. Fathers was disclosed to Mr. Riddick. The action having been settled Mr. Riddick commenced new proceedings against the company. By a writ issued on February 25, 1972, Mr. Riddick claimed damages for defamation

> "flowing from the wrongful manner in which the plaintiff was dismissed from his employment as shift plant engineer at the defendants' factory on February 28, 1969."

There was a statement of claim served, drafted by Mr. Riddick personally, the details of which I do not need to repeat save this, the company applied to have it struck out and the whole of the statement of claim was struck out but with observations in the Court of Appeal in November 1973 that there was just a possibility of proceedings being conducted in relation to the report of April 16, 1969, and of two letters dated March 5, 1969.

Thereupon Mr. Riddick started these proceedings which are based on the report of April 16, 1969, and also of the other two letters to which I need not refer again because the judge ruled that there was no evidence of malice in relation to those two letters.

This action therefore related in the end solely to the report of April 16, 1969. The action came on for trial before Caulfield J. at Carlisle on May 21, 1976, and after a hearing lasting five days the jury returned a verdict in favour of the plaintiff for £15,000. The company now appeal against that decision.

It is to be observed that the sole question before the jury was whether or not the report of April 16 was defamatory and if it was, bearing in mind that it was only published to Mr. Rixon who immediately put it in a file, what if any were the damages. Pausing there, the plaintiff's main

A concern was about the manner of his dismissal but by April 16 he had been dismissed and the damage, if any, caused by the defamatory nature of the report of April 16 must in my view be small. It was only sent to Mr. Rixon and he immediately filed it.

The company's defence to the claim was threefold: (1) no publication (2) qualified privilege (3) an abuse of the process of the court to found a claim on a document disclosed on discovery. They say that Mr. Fathers B was reporting to a fellow employee and was doing his duty making a report as requested by his employers. Mr. Fathers is dead. The plaintiff's answer to the plea of qualified privilege is that the company was actuated by malice. The plaintiff does not rely on malice on the part of Mr. Fathers. The burden of proof being upon the plaintiff it would be impossible for him to prove any malice on the part of Mr. Fathers who is C now dead more especially as Mr. Fathers was simply an officer of the company in Purfleet who did not know the plaintiff personally. What the plaintiff suggests is that there was malice on the part of Mr. Fleming and Mr. Smith who were the two people that Mr. Fathers consulted in order to obtain the information. He submits that the document prepared by Mr. Fathers was "infected" by the malice of Fleming and Smith.

I do not here set out the whole of the report of April 16 but quote D certain paragraphs. Paragraph 1:

> "The following report arises from a conversation, at your request, with John Fleming and Jim Smith at Workington by telephone on April 16 concerning the Riddick case."

The report then goes on to describe one or two movements made by Mr. E Riddick and then says:

> "Since that time his efficiency has been in question. He was not up to the demands of the job, he was unable to work without close supervision, and was frequently failing in detail."

That sentence is one of which complaint is made by the plaintiff. Then F later on in the same report, having described the manner in which Mr. Riddick was dismissed there follows this sentence: "Despite Riddick's known instability, there was no sort of scene and no argument." That is another sentence of which complaint is made. And then, towards the end of the report there occur these words:

> "Knowing Riddick to be a highly strung, unsure of himself, and G likely to be hysterical, Fleming and Smith planned carefully to avoid embarrassment, and my impression is that they were intent only on kindness and consideration."

That sentence also is one on which Mr. Riddick relies as being defamatory.

I have already mentioned that the sole question for the jury was the defamatory nature of the report of April 16. The Court of Appeal in H dealing with the second action started by Mr. Riddick made it absolutely clear that the manner of his dismissal and the circumstances arising from that manner were not matters which could be litigated again. The compromise of the original action disposed of those questions.

Mr. Riddick was appearing at Carlisle personally and was not represented and clearly that provides difficulties for the court, particularly in a case of defamation where there are technical rules which the litigant in person cannot understand. Nevertheless it is most unfortunate that Mr. Riddick's case consisted very largely of evidence about the original dismissal. He called 14 witnesses besides himself and those 14 gave evidence before Mr. Riddick gave his evidence. Some of those witnesses gave evidence about the facts of his dismissal, the manner of it and the conclusions which they drew from it. Others were giving evidence about his quality and behaviour and by implication giving the lie to the reasons for his dismissal. All of them were however dealing with the events around the time of the dismissal and in my opinion were irrelevant to the question of damage for this libel. The only relevance of those witnesses was to show whether or not the witnesses for the company, in particular Fleming and Smith, were truthful. The undoubted effect of all those witnesses was to lead the jury to do the very thing which they were not supposed to do. The judge did warn them that they must give damages only for the libel and not for the earlier dismissal but, in my opinion, the weight of the evidence was such as to make it almost impossible to prevent the jury from taking it into account. Unfortunately, while the judge had warned the jury not to take account of the earlier dismissal, there was a passage at the end of the summing up which would undo those earlier warnings. Mr. Hoolahan, for the company, asked the judge to direct the jury that the fact that the plaintiff had applied for a very large number of jobs without success was irrelevant. The judge did not do so. He said:

> "Members of the jury, work on the basis that Mr. Riddick has made lots of applications for jobs . . . He has applied for every sort of job but has not got it. There is no dispute about that. Work on that basis."

That clearly left in the minds of the jury the relevance of the failure to get jobs whereas the failure to get jobs had got nothing to do with this particular memorandum. Were it necessary I would certainly have said that there should be a new trial on the issue of damage because in my view the only damage which could result from this libel was the effect on the mind of Mr. Rixon and that would be very small. However, for reasons which I shall now set out, I am of opinion that this appeal should be allowed and that judgment should be entered for the defendants.

The first submission of the company is that there was no publication of this libel. The claim is made against the employers and not against Mr. Fathers personally or against Mr. Fleming or Mr. Smith. Mr. Riddick is suing his employer for defamatory words either spoken or written by fellow employees. At first sight it seems strange if an employer is liable in such circumstances; for example one can visualise a case put by Lord Denning M.R. in the course of argument where two employees are each defaming the other maliciously and then each suing the employer for his fellow employee's tort—this is a surprising result.

The question of whether or not there has been a publication may depend upon the capacity in which the company are being sued. The

company may be liable under the maxim respondeat superior for the tort of a servant. In such a case it would be solely on the basis of the employer's vicarious liability for his servant's tort and the master would only be liable if the servant would have been liable if sued. The question then would be was there an actionable publication by Mr. Fathers when he dictated the memorandum or indeed when he passed it to Mr. Rixon. Doubt has been expressed in legal textbooks as to whether this is a publication or not. It does seem however that since *Pullman* v. *Walter Hill & Co. Ltd.* [1891] 1 Q.B. 524, considered in *Boxsius* v. *Goblet Frères* [1894] 1 Q.B. 842; *Edmondson* v. *Birch & Co. Ltd.* [1907] 1 K.B. 371; *Roff* v. *British and French Chemical Manufacturing Co. and Gibson* [1918] 2 K.B. 677 and *Osborn* v. *Thomas Boulter and Son* [1932] K.B. 226 communication to a typist is publication by the person who dictates. There is a difference of view among American authorities but the *American Restatement, Torts* quoted in *Arvey Corporation* v. *Peterson* (1959) 178 F.Supp. 132, 136 states that such a dictation would be publication. I should add that all these authorities agree however that if the subject of the dictation was privileged the dictation itself would be privileged. See also *Bryanston Finance Ltd.* v. *de Vries* [1975] Q.B. 703 where the question of qualified privilege, when a letter is dictated to a typist, was considered. There the court, although differing as to the precise nature of the privilege, was of the opinion that if the communication ultimately was the subject of qualified privilege then the dictation also was the subject of qualified privilege. In my view it is not possible to distinguish the communication made by Mr. Fathers to the typist or to Mr. Rixon from these other cases. I conclude therefore that Mr. Fathers published the document.

If one is considering the responsibility of the company as a corporation and not merely as an employer responsible vicariously for Mr. Fathers its servant then a strong argument could be put forward for saying that there has been no publication. In such a case if there was publication outside the corporation then clearly the corporation would be responsible for all its servants concerned in making that communication. But if it is simply a question of vicarious liability it may not follow that the conduct of more than one servant can be considered. And if he has a defence of qualified privilege and is not malicious, the malice of others will be irrelevant.

Support for the view which I have expressed is to be found in *Egger* v. *Viscount Chelmsford* [1965] 1 Q.B. 248 where the plaintiff had brought an action against the assistant secretary and ten members of an unincorporated body. The libel was contained in a letter signed by the assistant secretary and the jury acquitted the assistant secretary of malice. Qualified privilege attached to the occasion and it was held by this court that only those particular members of the body who were themselves guilty of malice were liable and that the assistant secretary and some other members whom the jury said had not been guilty of malice were not liable. In the instant case Mr. Fathers would be very much in the position of the assistant secretary in *Egger* v. *Chelmsford* and there Lord Denning M.R. said, at p. 264:

"The only difficulty is the case of the assistant secretary, Binney. If

the matter were free from authority I should have thought it plain that he was not liable. If the three members of the committee, who were innocent of malice, are to go free, surely the innocent secretary should go free too. During the course of the argument I put this to Mr. Colin Duncan: suppose the plaintiff had sued Binney alone, as she might well have done, as he was the man who signed the letter. Binney pleads that the occasion was privileged. She replies express malice. Surely she can only defeat the privilege by proof of express malice on the part of him, Binney, the one defendant she has sued. She could not set up against him the malice of the committee members, none of whom is party to the action. All the more so, she could not set up the malice of only five out of 10 of them. Indeed, if the malice of one is to be treated as the malice of all, she could set up the malice of one only and hold all the rest liable, including the secretary. That cannot be right."

A B C

And later the court comes to the conclusion that the assistant secretary would not be liable because he was not malicious. The importance of only finding the person liable who was in fact guilty of malice supports the view that I have expressed above because if the company is responsible it is as the employer of Mr. Fathers and that would mean that if sued personally Mr. Fathers would have to have been liable.

D

This brings me to the question of qualified privilege. Quite clearly this was a case of qualified privilege because there was a duty on the part of Fleming and Smith on the one hand and Mr. Fathers on the other to make the communication. There was a duty on Mr. Fathers to receive it from Fleming and Smith and on Mr. Rixon to receive it from Mr. Fathers, so that the occasion (a) of the telephone call to Mr. Fathers and (b) of the passing of the paper to Mr. Rixon were both occasions of qualified privilege and on the authority of the cases mentioned above the privilege would apply also to the dictation to the typist.

E

There can be no question of malice on the part of Mr. Fathers. He was dead and the onus of proving malice was on Mr. Riddick and no attempt was made to prove malice against Mr. Fathers personally. Further it was clear as a matter of evidence that he did not even know Mr. Riddick, he being at Purfleet and Mr. Riddick being at Workington. Accordingly, if the case depends solely upon Mr. Fathers then the plea of qualified privilege would succeed. In other words, if it is a question solely of the vicarious liability of the company for the words spoken or typed as a result of Mr. Fathers's dictation then the company would not be liable.

F G

The plaintiff's pleading however alleges that Mr. Fathers was "infected" by the malice of Fleming and Smith. If this were an action against the company for publishing a libel to someone outside the company, it may well be that it would be possible to examine the conduct of all its servants and if any of them were malicious to say that that would defeat the question of qualified privilege. But that is not the case here because there was no publication outside the company. Indeed it may well be that if it were coming from the company the question of qualified privilege would be more difficult to establish.

H

That being so there are two possibilities. One that the company is directly responsible for the words spoken by Messrs. Fleming and Smith if those words could be proved. In my view there are grave difficulties about that as the proof of slander would require accurate proof of the words spoken and would in the particular circumstances of this case require proof of special damage because Mr. Riddick was no longer employed by the company at this time.

The only other way in which the company's plea of qualified privilege could be defeated would be by making Messrs. Fleming and Smith the authors of the libel. The judge in his summing up did not deal with these particular problems, he simply directed the jury:

> "What the plaintiff has to prove here, assuming you find he was defamed in the April 16 document, is malice. So in this case although the occasion of the publication was privileged, if the plaintiff has satisfied you that either Fleming or Smith or both were to their knowledge speaking dishonestly of the plaintiff, the plaintiff will have proved malice."

The judge is assuming in that direction that Fleming or Smith, or both, were responsible for that typewritten document. To consider whether or not there is evidence on which that could properly be said it is necessary to look at the evidence which was given. It consists first of the first paragraph of the document itself which reads:

> "The following report arises from a conversation at your request with John Fleming and Jim Smith at Workington by telephone on April 16 concerning the Riddick case."

It then depends on the evidence actually given by Messrs. Fleming and Smith. Smith said:

> "(Q) When you were asked from head office to give some information about the way and manner in which I had been dismissed, what did you say to Mr. Fathers, Mr. Smith? (A) He asked for details of the way you were dismissed, the action which we carried out from the shift engineer's office to the car park. Obviously I was going to give the information because I was there."

In his evidence in chief he had said that Fathers did ring him on April 16 from Purfleet and requested:

> "that I go over step by step the action we took from informing Mr. Riddick in the shift engineer's office to his departure at the car park by the security block. This I did step by step."

Mr. Fleming's recollection was that he heard part of the conversation between Smith and Fathers and then spoke to Mr. Fathers about another matter and Mr. Fathers then said "Would you do the same, or go through the same procedure again on that particular incident and feel that you did the right thing" and I said "Yes." Bearing in mind that for slander special damage would have to be proved one has to ask oneself if there is sufficient evidence there to make either Smith or Fleming responsible for the libel that was published. In my opinion there was not. There is

no suggestion anywhere that Mr. Fathers was going to make a written report, he simply said he wanted them to go through step by step what happened and no suggestion that it would be included in a written report. Even if the step by step was to be in the written report there is no reason for them to believe that any comment which they might have made, and the jury must have come to the conclusion that they did make it, would in fact be incorporated in a written document. I have come to the conclusion therefore that it is not possible to say that Fathers's publication to the typist or to Mr. Rixon can be said to have been "infected" by the malice of Fleming or Smith. Mr. Fathers's communication had qualified privilege and unless it was a libel published by Fleming and Smith that privilege would not be defeated. In my opinion it is not possible to say on the evidence here that that was a libel published by Fleming or Smith. No doubt it would have been possible to say that there was evidence that they had slandered Riddick but there is no proof of any particular words having been spoken. I have come to the conclusion therefore that the plea of qualified privilege is a good one.

If I were wrong in saying that there was no evidence on which it could be said that Fleming and Smith were knowingly responsible for the libel, then I am of opinion that at the very least there should have been a careful direction to the jury on this particular matter.

The final argument put forward on behalf of the company is that to allow this claim is an abuse of the process of the court. It is said that it is of fundamental importance that discovery should not be interfered with. In the earlier action between the plaintiff and the company the document of April 16 was disclosed. It was disclosed as part of the compulsory process whereby any relevant information has to be made available to the opposite side unless there is some ground of privilege to protect it. The argument is that to allow such a document to form the basis of another claim is an abuse of the process of the court.

There is a useful statement of principle in a passage from the speech of Lord Hailsham of St. Marylebone in the recent case of *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 2 W.L.R. 201, 212, in the House of Lords on a rather different matter:

> "I start with the assumption that every court of law must begin with a determination not as a general rule to permit either party deliberately to withhold relevant and admissible evidence about the matters in dispute. Every exception to this rule must run the risk that because of the withholding of relevant facts justice between the parties may not be achieved. Any attempt to withhold relevant evidence therefore must be justified and requires to be jealously scrutinised."

These words show the importance of not interfering with the disclosure.

The early authorities, e.g., *Richardson* v. *Hastings* (1844) 7 Beav. 354; *Hopkinson* v. *Lord Burghley* (1867) L.R. 2 Ch.App. 447 and *Reynolds* v. *Godlee* (1858) 4 K. & J. 88 show that discovery may be refused in an action unless the opposite party gives an undertaking that the document will not be used for any purpose other than the action then proceeding.

In *Alterskye* v. *Scott* [1948] 1 All E.R. 469 when the plaintiff applied

for a further and better affidavit of documents and the defendant contended that he should not be required to file a further affidavit except on an undertaking by the plaintiff not to use the documents for any collateral or ulterior purpose, Jenkins J. held that the implied obligation which each party was under to make no improper use of disclosed documents gave sufficient protection and he refused to order the undertaking asked for. He said, at p. 471:

> "Therefore, I do not propose to include any such undertaking in the order for a further and better affidavit of documents. The defendant must rely on the implied obligation not to make an improper use of the documents. If he can substantiate improper use in any particular case, he has his remedy. He can bring that instance of alleged improper use before the court either on proceedings for contempt, if he considers that it amounts to contempt of court, or on proceedings to restrain the conduct complained of."

In *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613 Distillers were seeking to prevent the publication of documents disclosed in previous legal proceedings. Talbot J. in the course of a careful judgment considered the relevant authorities including *Alterskye* v. *Scott*. He said, at p. 621:

> "The plaintiffs claim an overriding protection from publication and use of their documents which they were compelled to disclose in the action against them. They claim that this protection involves those into whose hands the documents come, particularly where the possession was unlawfully obtained. I do not doubt the correctness of this proposition; I do not think that, on the authorities and for the proper administration of justice, it can be argued to the contrary. Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed. I also consider that this protection can be extended to prevent the use of the documents by any person into whose hands they come unless it be directly connected with the action in which they are produced. I am further of the opinion that it is a matter of importance to the public, and therefore of public interest, that documents disclosed on discovery should not be permitted to be put to improper use and that the court should give its protection in the right case."

In *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 2 W.L.R. 201 Lord Simon of Glaisdale sets out a number of examples of evidence which as a matter of public policy should be excluded from forensic scrutiny. He instances legal professional privilege, "without prejudice" communications and others and says, at p. 221:

> ". . . without attempting to be exhaustive I have tried to show that there is a continuum of relevant evidence which may be excluded from the forensic scrutiny. This extends from that excluded in the interest of the forensic process itself as an instrument of justice (for example, evidence of propensity to commit crime), through that excluded for such and also for cognate interests (for example, legal

professional privilege), through again that excluded in order to facilitate the avoidance of forensic contestation (for example, 'without prejudice' communications), to evidence excluded because its adduction might imperil the security of that civil society which the administration of justice itself also subserves (for example, sources of police information or state secrets)."

I would add the present case to this number. The interests of the proper administration of justice require that there should be no disincentive to full and frank discovery.

Although this court indicated that a claim might arise based on this document dated April 16, 1969, the court was not called upon to consider whether or not such action would be an abuse of the process of the court. Indeed the fact that it was disclosed on discovery is not mentioned in the judgments. In my opinion it is highly desirable that there should be no discouragement to full and frank disclosure on discovery. If there be a risk that disclosures may produce new causes of action parties may be deterred from disclosing the document.

I am of the opinion that to use this document, which had been compulsorily disclosed in other proceedings, is an abuse of the process of the court and it would be contrary to public policy to allow it to be used in these proceedings.

For all the above reasons I would allow this appeal and give judgment for the company.

Appeal allowed.
No order for costs in Court of Appeal or below.
Leave to appeal refused.

Solicitors: *Stanleys & Simpson North.*

A. H. B.