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the trial and given explanation in certain matters, the costs of the two appeals would have been avoided.

Appeal dismissed.

W. E. Bentley K.C. and *J. J. Johnston K.C.* for the appellant.

T. A. Campbell K.C. and *J. O. C. Campbell* for the respondents.

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*Oct. 19.
*Oct. 26.

ANDREW R. McNICHOL (DEFENDANT) APPELLANT;

AND

DELVINA GRANDY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Slander—Publication—Words spoken by defendant to plaintiff overheard by third person—Liability—Matters to be considered—Onus of proof —Negligence—Questions for jury.

In an interview between defendant and plaintiff in the dispensary of plaintiff's drug store, defendant, in a loud angry tone (according to evidence given), used words which, plaintiff alleged, slandered her. The conversation was overhead by W. (an employee of plaintiff) who was in an adjoining dressing room and was able to hear because of a small hole (covered over) which firemen had cut in the wall. Neither defendant nor plaintiff knew that W. was in the dressing room or that a person there could overhear what was said in the dispensary. At the trial of the action (for slander), on motion at close of plaintiff's case, Adamson J. held that there was no evidence of publication, withdrew the case from the jury, and dismissed the action. The Court of Appeal for Manitoba (39 Man. R. 442) ordered a new trial. Defendant appealed.

Held, affirming judgment of the Court of Appeal, that there should be a new trial.

What may amount to actionable publication, proof thereof, matters to be considered and onus of proof with regard to them, discussed at length and authorities reviewed.

Per Anglin C.J.C., Rinfret and Cannon JJ.: Assuming, but not deciding, that a defendant is not liable for a purely accidental communication to a third person who hears him utter a slander, the defendant not knowing, nor having any reason to suppose, that any person other than the plaintiff is within earshot, and being free from any fault leading to the communication to the third person; yet, in this case, there was explicit affirmative evidence of negligence of defendant, which was proper for submission to the jury, in the fact that defendant, being angry, raised his voice; and it must be for the jury to say

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*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

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whether, under all the circumstances of time and place, etc., such raising of his voice amounted to fault on his part so as to make him responsible for W. overhearing what he said.

Per Duff J.: When the defamatory matter is intended only for the plaintiff but is unintentionally communicated to another person, the responsibility must, generally speaking, depend upon whether communication to that other person, or to somebody in a similar situation, ought to have been anticipated. Where the communication is the direct result of the defendant's act, the burden is upon him to show that the communication was not the result of his negligence. As regards proof of publication, the law recognizes no distinction between cases in which express malice in uttering the defamatory words is proved and those in which it is not.

Per Lamont J.: Defendant must be taken to have intended the natural and probable consequence of his utterance, which was that all persons of normal hearing who were within the carrying distance of his voice would hear what he said. When, therefore, it was established that W. did hear what he said, a *prima facie* case of publication was made out, and, to displace that *prima facie* case, the onus was on defendant to satisfy the jury, not only that he did not intend that anyone other than plaintiff should hear him, but also that he did not know and had no reason to expect that any of the staff or any other person might be within hearing distance, and that he was not guilty of any want of care in not foreseeing the probability of the presence of someone within hearing range of the speaking tones which he used.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) allowing the plaintiff's appeal from the judgment of Adamson J., who, on motion made on behalf of the defendant at the close of the plaintiff's case in the trial of an action for damages for alleged slander, non-suited the plaintiff, discharged the jury, and dismissed the action, on the ground that there was no evidence of publication of the slander complained of. The Court of Appeal (1) ordered a new trial.

The material facts of the case are sufficiently stated in the judgment of Anglin, C.J.C., now reported. The appeal to this Court was dismissed with costs.

H. A. Bergman, K.C., for the appellant.

Ward Hollands, K.C., for the respondent.

The judgment of Anglin, C.J.C., and Rinfret and Cannon, JJ. was delivered by

ANGLIN, C.J.C.—I take the following statement of facts from the Appellant's factum in this case:

" The plaintiff (respondent) had leased a store on Portage avenue, in the City of Winnipeg, from A. R. McNichol

(1) 39 Man. R. 442; [1931] 1 W.W.R. 814.

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Limited, where she carried on a drug store and tea shop business in the name of a Limited Company. The defendant (appellant) was the Managing Director of the landlord company. On or about the 27th day of March, A.D. 1930, a fire occurred in the basement of the drug store, or of the building in which the store was, following which an interview took place, on or about the 4th day of April, A.D. 1930, between the defendant and the plaintiff in the dispensary of the drug store, at which interview the defendant is alleged to have slandered the plaintiff in the hearing of one witness, Kathleen Wilson * * * The learned trial judge at the close of the plaintiff's case, on motion to withdraw the case from the jury, held that there was no evidence of publication of the slander complained of, and accordingly withdrew the case from the jury. On appeal to the Court of Appeal for Manitoba (1), the Court of Appeal were unanimous in allowing the appeal and ordered a new trial."

To this, should be added the statement that Kathleen Wilson was assistant manager in the plaintiff's drug establishment.

Upon the occasion in question, she went into the dressing room to hang up her coat and hat immediately after defendant McNichol had come into the building. Her attention was drawn to the conversation between him and the plaintiff by the loud, angry tone in which he spoke. She was interested and then listened carefully and overheard the entire conversation, as she was able to do because of a small hole which had been cut by firemen in the wall between the dressing room and the adjoining dispensary, where the plaintiff and defendant were together, and where the hole was covered by a piece of cardboard hung over it, which effectually concealed its presence. The angry, loud tone in which the defendant made the remarks declared upon as slanderous is emphasized by both the plaintiff and Miss Wilson in testifying, and of this there is no contradiction in the evidence before us. It seems somewhat extraordinary to me, however, that neither the plaintiff's husband, nor a gentleman with him, a chemist named Dodds, who were in the front part of the store, overheard the conversation. The facts that Miss Wilson was in the dressing room, and that a person there would be in a position to

(1) 39 Man. R. 442; [1931] 1 W.W.R. 814.

overhear what was said in the dispensary, were, at the time, unknown to either the plaintiff or defendant.

The question is thus clearly presented whether or not knowledge by the defendant of the ability of the only third person claimed to have been within earshot, to hear a slander alleged to have been uttered by him, is or is not essential to its publication by him. This constituted the first ground of appeal by the defendant from the order of the Court of Appeal, reversing the trial judge and ordering a new trial.

A further ground of the appeal was that the occasion was one of qualified privilege and that the record contains no evidence of the express malice requisite to destroy such privilege.

In view of the disposition which we make of this appeal, we follow our usual practice of referring to and commenting on the evidence only so far as necessary to indicate the ground of our judgment.

Assuming that the occasion was one of qualified privilege, it is perfectly clear that the record affords evidence from which express malice might (we do not say should) be inferred by a jury.

The material part of the cause of action in dispute is not the uttering, but the publication, of the language used (*Hebditch* v. *MacIlwaine* (1), *O'Keefe* v. *Walsh* (2)). "To give a cause of action there must be a publication by the defendant. That is the foundation of the action." (per Bray J. in *Powell* v. *Gelston* (3).

How little may sometimes amount to proof of publication is illustrated in *Duke of Brunswick* v. *Harmer* (4). (But, compare *Osborn* v. *Thomas Boulter & Son* (5)). But, for the purposes of a civil action, the intent of the person uttering the slander may, under some circumstances, be material; yet, we are told that,

> publication can be effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated. (Gatley on Libel and Slander, 2nd Ed., p. 92.)

Here, communication was clearly by an "act" of the defendant. As Mr. Odgers has said, in illustrating the doctrine, that

(1) [1894] 2 Q.B. 54, at 58, 61, 64.
(2) [1903] 2 Ir. R. 681, at 706.
(3) [1916] 2 K.B. 615, at 619.
(4) (1849) 14 Q.B. 185, at 188-9.
(5) [1930] 2 K.B. 226, at 233-4.

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an accidental or inadvertent communication is a sufficient publication, if it be occasioned by any act or default of the speaker or writer,

I slander the plaintiff, believing I am alone in the room with him. But I speak so loudly that his clerk in the outer office hears what I say. This is a publication by me to the plaintiff's clerk. It is my fault that I speak so loud. (Odgers on Libel, 6th Ed., 137.)

In illustrating the doctrine that the onus lies on the plaintiff to prove publication,—"he must prove a publication by the defendant,"—at p. 134, the same learned author says:

To shout defamatory words on a deserted moor where no one can hear you, is not a publication. But if anybody chances to hear you, it is a publication, *although you thought no one was by.*

A question we might have to consider carefully is how far the limitation put upon the effect of communication to a third person, viz., that the defendant was in some manner at fault in making it, is well founded. Mr. Gatley, at p. 96, says:

The defendant is liable for an involuntary or unintentional publication of defamatory matter to a third person unless he can show that it was not due to any want of care on his part,

and, two sentences further on, he says:

Similarly, A. will be liable if he utters defamatory words in so loud a voice that B. overhears what he says, unless he can show that he did not know and had no reason to suppose that anyone was within hearing,

citing the New Zealand case of *Hill* v. *Balkind* (1).

But where the publication was neither intentional nor due to any want of care on the defendant's part, he will not be liable therefor. (p. 97.)

It will be noted that, in this New Zealand case, the burden of proof was put upon the defendant to establish that he had no reason to suppose that anyone was within hearing, communication in fact having been established. In this case the defence of privilege would seem to have been the chief matter for consideration. In the result, a new trial was ordered on the ground that there was some evidence of express malice, though of very slight value, for the consideration of a jury, and that the issue of malice should have been allowed to go to them.

While "publication" was discussed, no definite conclusion was reached upon the sufficiency of the publication in that case where

defendant's statement (alleged to be slanderous) was overheard by a witness whose presence within hearing was not proved to have been known to defendant or arranged by plaintiff.

(1) [1918] N.Z.L.R. 740.

The headnote merely says:—

Semble, that, if defendant did not know and had no reason to suppose that there was anybody within hearing when he used the words complained of, the words were not published.

For this proposition, *Huth* v. *Huth* (1) is cited by the learned judge. That, however, was entirely a different case from *Hill* v. *Balkind* (2), and also from the case now before us. There, a libellous letter had been opened by a butler in the house of the lady to whom it was addressed. It was opened merely out of curiosity. Admittedly, the butler had no right to open the letter. His wrongful act was, therefore, the cause of publication to himself,—a clear case of *novus actus interveniens*. Referring to the last-mentioned case, Gatley says (at p. 98):

A fortiori, the defendant will not be liable where the defamatory matter is made known by the act of a third person for which the defendant can in no way be held responsible.

It seems unnecessary to determine the question whether or not a defendant, who is not in any way to blame, is responsible for a purely accidental communication to a third person who hears him utter a slander, he having no knowledge of the fact, and no reason to suppose, that any person was within earshot at the time he uttered the slander to the plaintiff. The authorities on the law of libel are quite numerous to the effect that an unintentional or accidental publication of a libel to a third person may be sufficient to create liability. For instance, *Shepheard* v. *Whitaker* (3); *Stubbs* v. *Marsh* (4); *Weld-Blundell* v. *Stephens* (5); *Tompson* v. *Dashwood* (6), where a letter was sent to the wrong person by mistake, publication was held to be established (disapproved of on another ground in *Hebditch* v. *MacIlwaine* (7)).

On the other hand, in many cases it has been held that where, without any apparent fault on the part of the defendant, an accidental publication of a libel on the plaintiff to a third person is made, no responsibility rests upon him. Thus, in *Keogh* v. *Dental Hospital* (8), we find Lord O'Brien, L.C.J., saying:

As to the publication, I think there was no evidence fixing responsibil-

(1) [1915] 3 K.B. 32.
(2) [1918] N.Z.L.R. 740.
(3) (1875) L.R. 10 C.P. 502.
(4) (1866) 15 L.T.R. 312.
(5) [1920] A.C. 956, at 972.
(6) (1883) 11 Q.B.D. 43.
(7) [1894] 2 Q.B. 54.
(8) [1910] 2 Ir. R., K.B., 577, at 587.

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ity upon the defendants. No doubt they may have known that the plaintiff practised dentistry work, but they did not know, nor might they have known, nor was there any presumption that they knew, that the plaintiff had a clerk who, in his absence, was authorized to open letters addressed to him.

Smith v. *Wood* (1), a decision of Lord Ellenborough, cited by Dodd J. in *Keogh* v. *Dental Hospital* (2), seems to be much in point. See, too, *Jackson* v. *Staley* (3), and *Emmens* v. *Pottle et al.* (4), though in this latter case the burden would seem to have been thrown upon the defendant to prove that it was not due to any negligence on his part that he was ignorant that the newspaper contained a libel, and that he had no knowledge, and had no ground for supposing, that the newspaper was likely to contain libellous matter. (*Reg.* v. *Lovett* (5)).

In *Gomersall* v. *Davies* (6), the facts that a letter was opened in the ordinary course of business by a clerk in the plaintiff's employment, and that

to the defendant's knowledge letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment,

were held to afford sufficient evidence that there had been publication by the defendant. See, too, *Delacroix* v. *Thevenot* (7), and *Weld-Blundell* v. *Stephens* (8).

In *Powell* v. *Gelston* (9), on the other hand, the fact that a letter addressed to the son of H.W.P. was opened by his father, at whose request the son had written—a fact unknown to the defendant—asking for information, which proved to be libellous, to be communicated to him confidentially, the defendant also being unaware that his letter would be opened by any other than the person to whom it was addressed, was held not to constitute proof of publication by the defendant.

In *Sharp* v. *Skues* (10), it was said by the Master of Rolls that

it would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk,

and, because these facts had been explicitly negatived by the jury, it was held that there had been no publication.

(1) (1813) 3 Camp. 323.
(2) [1910] 2 Ir.R., K.B., 577.
(3) (1885) 9 O.R. 334.
(4) (1885) 16 Q.B.D. 354.
(5) (1839) 9 Car. & P. 462.
(6) (1898) 14 T.L.R. 430.
(7) (1817) 2 Starkie 63.
(8) [1920] A.C. 956, at 963-4.
(9) [1916] 2 K.B. 615.
(10) (1909) 25 T.L.R. 336, at 337.

Bray J. said, at the conclusion of his judgment in *Powell* v. *Gelston* (1):

The son was asking for an answer that he and he alone would see. The answer of the defendant was intended for the son alone.

(See, too, *McLeod* v. *St. Aubyn* (2).)

The result of all these cases, it may be, is that the weight of authority favours the view that (although, under some circumstances, merely accidental communication to a third person, not intended by the defendant, may suffice to hold him responsible for publication) where communication was not intended by him, and he neither had reason to know or to suspect that any other person was within hearing, when he addressed his slanderous statement to the plaintiff, with whom he thought he was alone at the time, he should not be held to have published to a third person who accidentally overhears, unless he can be charged with some fault leading to the communication to such third person. (Salmond on Torts, 7th Ed., pp. 531-2). But, the cases also would rather seem to support the view that, upon proof of communication in fact, whether consciously or unconsciously, to a third person, by the act of the defendant, the burden is cast upon him to establish innocence of any fault on his part leading thereto; and, in *Emmens* v. *Pottle* (3), the headnote ends with the following *quaere:*

But whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter?

indicating some lingering doubt in the minds of the court,—possibly as to the question of burden of proof. Lord Esher, in the course of his judgment, said:

I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. * * * Upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. * * * The case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. (pp. 356-7.)

Bowen L.J. adds:

A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. * * * But I by no means intend to say that the vendor of a newspaper will not be respon-

(1) [1916] 2 K.B. 615, at 620. (2) [1899] A.C. 549.
(3) (1885) 16 Q.B.D. 354.

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sible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel. (p. 358.)

Interesting, however, as the questions above discussed undoubtedly are, we do not find it necessary to decide them; and we expressly refrain from doing so. Assuming that they should be determined in the defendant's favour, nevertheless, in our opinion, there is here explicit, affirmative evidence of negligence of the defendant, which was proper for submission to the jury, in the fact that the defendant, being angry, raised his voice,—it may be in the belief that no one could hear him, or it may be that he was reckless whether anyone could hear him or not. In this connection, the circumstances of time and place must be borne in mind,—the time being a comparatively busy hour of the day, and the place being alleged to have been one where others were not unlikely to be within hearing. At all events, it must be for the jury to say whether, under the circumstances, such raising of his voice amounted to fault on the part of the defendant so as to make him responsible for Miss Wilson overhearing what was said, as she did.

For this reason alone, we affirm the judgment of the Court of Appeal, which set aside the dismissal of the action by the learned trial judge and directed that it must go back to the jury for a new trial. The appeal will, accordingly, be dismissed with costs.

DUFF, J.—I agree that there must be a new trial. Publication takes place where the defamatory matter is brought by the defendant or his agent to the knowledge and understanding of some person other than the plaintiff; but when the communication is intended only for one person, and in fact, the defamatory matter is, without any intention on the part of the defendant, communicated to another, the responsibility must, generally speaking, depend upon the answer to the question whether communication to the last-mentioned person or to somebody in a similar situation ought to have been anticipated. Where the communication is the direct result of the defendant's act, it seems reasonable, as well as in consonance with the general principles of liability, that the burden should be upon the defendant to show that the communication which is the subject of complaint was not the result of his negligence; and that, I think, is the rule.

A question may possibly arise whether, where the act of the defendant in uttering the defamatory words is malicious in the sense of the law of defamation, the defendant is to be taken to have acted at his peril, and is responsible for communication in fact, even in the absence of negligence.

There is no authority establishing a distinction, as regards proof of publication, between cases in which express malice is proved and those in which it is not. Such a distinction might tend to confuse a jury, the tribunal prescribed by law, in most of the provinces, for actions of defamation. I think the law recognizes no such distinction.

LAMONT, J.—I concur in the conclusion reached by my Lord the Chief Justice that this appeal should be dismissed, and will state shortly my reasons for thinking there was evidence to go to the jury on the question of publication.

In an action of slander the onus is upon the plaintiff to prove publication in fact by the defendant, in this sense, that it is publication for which the defendant is responsible. Where statements defamatory of a plaintiff have been uttered by a defendant and overheard by a third person the first inquiry in determining the defendant's responsibility is: Did he intend that anyone but the plaintiff should hear his defamatory utterances? In ascertaining his intention we must proceed in accordance with the fundamental principle referred to by Swinfen Eady, L.J., in the case of *Huth* v. *Huth* (1), that a man must be taken to intend the natural and probable consequences of his act in the circumstances. In that case the defendant sent through the post in an unclosed envelope a written communication which the plaintiffs alleged was defamatory of them. The communication was taken out of the envelope and read by a butler who was a servant in the house at which the plaintiffs were staying. The butler did this out of curiosity and in breach of his duty. It was held that there was no publication by the defendant and that the case was properly withdrawn from the jury by the trial judge. The basis of the decision was that, although there had been publication to the butler, it was not publication for which the defendant was responsible, because there was no evidence that he knew or had reason to suspect or should have contemplated

(1) [1915] 3 K.B. 32.

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that a letter addressed to the plaintiffs and enclosed in an envelope "but unsealed and unstuck down" would, in the ordinary course, be likely to be opened by the butler or any other servant before being delivered to the defendant's wife. In his judgment Bray J., at page 46, said:—

> In my opinion it is quite clear that, in the absence of some special circumstances, a defendant cannot be responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated it. It was not the natural consequence of his sending the letter, or writing, in the way in which he did.

To the same effect was the decision in *Powell* v. *Gelston* (1). There a communication containing libellous matter was addressed by the defendant to F.W.P. in answer to inquiries made by him. It was opened by F.W.P.'s father on whose behalf the inquiries had been made but of this the defendant was unaware. The communication was not seen by F.W.P. It was held that there was no publication by the defendant to the father because the jury found that the defendant did not "know or expect that the letter might probably be opened or seen by a third person other than the person to whom it was addressed."

The same principle was applied in *Keogh* v. *Dental Hospital* (2), where, at page 587, Lord O'Brien, L.C.J., stated the ground for determining the defendant's responsibility in the following words:—

> I think there was no evidence fixing responsibility upon the defendants. No doubt they may have known that the plaintiff practised dentistry work, but they did not know, nor might they have known, nor was there any presumption that they knew, that the plaintiff had a clerk who, in his absence, was authorized to open letters addressed to him.

On the other hand, there is a long line of authorities represented by *Delacroix* v. *Thevenot* (3) and *Gomersall* v. *Davies* (4), in which it has been held that, where a defendant, knowing that the plaintiff's letters were usually opened by his clerk, sent a libellous letter addressed to the plaintiff which was opened and read by the clerk lawfully and in the usual course of business, there was publication by the defendant to the plaintiff's clerk. In *Powell* v. *Gelston* (5), Bray J. said:—

(1) [1916] 2 K.B. 615.
(2) [1910] 2 I.R., K.B., 577.
(3) (1817) 2 Starkie, 63.
(4) (1898) 14 Times L.R. 430.
(5) [1916] 2 K.B. 615, at 619-620.

Several cases were cited—*Delacroix* v. *Thevenot* (1), *Gomersall* v. *Davies* (2) and *Sharp* v. *Skues* (3). They show that where to the defendant's knowledge a letter is likely to be opened by a clerk of the person to whom it is addressed the defendant is responsible for the publication to that clerk. As Lord Ellenborough said in *Delacroix* v. *Thevenot* (4), it must be taken that such a publication was intended by the defendant. On the other hand, in *Sharp* v. *Skues* (5) Cozens-Hardy M.R., said: "It would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk; but the jury had negatived this in the clearest terms, and under these circumstances it was impossible to hold that some act done by a partner or a clerk of the plaintiff by his direction and for his own convenience when absent from the office could be a publication."

Then we have the further line of cases which shew that where a letter containing defamatory matter concerning the plaintiff has been negligently dropped by the defendant and picked up and read by a third person, the defendant will be held responsible for publication to the person picking it up and reading it. *Weld-Blundell* v. *Stephens* (6). Also where a letter intended for one person was by mistake sent to another. *Tompson* v. *Dashwood* (7). The defendant in these cases was held responsible because the publication was directly due to his want of care.

The facts in the case at bar clearly distinguish it from the case of *Huth* v. *Huth* (8) upon which the appellant relied. There the publication to the butler resulted from a breach of duty on his part which the defendant could not reasonably be called upon to foresee; while in the case before us the publication to Kathleen Wilson took place while she was performing her duties in the usual course of business, and was not brought about by any improper act of hers.

Then can it be said that the defendant's ignorance (if he was ignorant, for he did not testify) of the presence of Miss Wilson in the dressing room, affords any answer to the plaintiff's claim? Applying the principles set out in the above authorities, we must take it that he intended the natural and probable consequences of his act. The natural and probable consequence of uttering the words used was that all persons of normal hearing who were within the

(1) (1817) 2 Starkie, 63.
(2) (1898) 14 Times L.R. 430.
(3) (1909) 25 Times L.R. 336, at 337.
(4) (1817) 2 Starkie, 63.
(5) (1909) 25 Times L.R. 336, at 337.
(6) [1920] A.C. 956.
(7) (1883) 11 Q.B.D. 43.
(8) [1915] 3 K.B. 32.

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carrying distance of his voice would hear what he said. When, therefore, it was established as a fact that Miss Wilson did overhear him utter the slanderous statements charged against him, a *prima facie* case of publication by him was made out and, in order to displace that *prima facie* case the onus was on him to satisfy the jury, not only that he did not intend that anyone other than the plaintiff should hear him, but also that he did not know and had no reason to expect that any of the staff or any other person might be within hearing distance, and that he was not guilty of any want of care in not foreseeing the probability of the presence of someone within hearing range of the speaking tones which he used.

Appeal dismissed with costs.

Solicitors for the appellant: *Aikins, Loftus, Aikins, Williams & MacAulay.*

Solicitors for the respondent: *Bonnar, Hollands & Philp.*