JUDGMENT : His Honour Judge Gray. QBD. 2nd July 2004.

1 This is my ruling on the question whether the slanders of which the claimant complains in this action were uttered by the defendant on occasions protected by qualified privilege. With the consent of the parties I am making the ruling at the end of the case and after the jury have given their answers to the questions asked of them.

2 The facts, so far as material for the purpose of this ruling, are these: towards the end of 2000 a young married orthodox Jewish woman named Nathalie Attar approached her Rabbi in Jerusalem, Rabbi David Daniel Cohen, for advice, firstly in relation to an employment dispute arising out of her employment at a nursery school founded by the claimant and, later, about what she alleged was sexual harassment of her by the claimant. Since Mrs Attar was living in England at the time, Rabbi David Daniel Cohen referred her to the defendant for advice and assistance. The defendant, who is an orthodox Ashkenazi Jew and a Dayan (Judge) of the Beth Din of the Federation of Synagogues, agreed to try to help.

3 According to the evidence of the defendant and the evidence of Mrs Attar and her husband, in December 2000 the Attars gave the defendant a full account of what they alleged had been the conduct of the claimant towards Mrs Attar, and towards her younger sister, Daniella. According to the Attars, the account which they gave to the defendant included reference to sexual advances which the claimant had made towards Mrs Attar, and to a proposition of marriage thereafter to Daniella. They told the defendant about two indecent assaults or attempted indecent assaults by the claimant upon Mrs Attar and about numerous highly emotional letters and poems written by the claimant to Mrs Attar. Mention was also made by Mr Attar of their concern that the claimant might turn his attentions to a young recently married Jewish woman named Rachel Shababo, the daughter of Alfred Magnus. The Attars also told the defendant that the claimant had confided to Mrs Attar that he had a sexual relationship with a Jewish woman living in Germany named Larissa.

4 The claimant, a married man and member of the orthodox Sephardi Jewish community, admits to an inappropriate relationship with Mrs Attar but firmly denies that it was a physical relationship or that he made sexual advances towards her or assaulted her. He also denies that he made any improper advances to Daniella. He says that he did tell Mrs Attar about a woman he had met in Germany named Larissa but denies that he told Mrs Attar that he had had a sexual relationship with Larissa: nothing of a sexual nature had ever taken place between them.

5 The defendant's case is that he agreed to attempt privately to mediate the dispute between the claimant and Mrs Attar about his alleged harassment (but not the employment dispute). His case is that this was to be a private mediation, although the defendant says he undertook it in his capacity as a Rabbi. To this end meetings took place between the claimant and the defendant in February 2001 and thereafter there was a further meeting between the claimant, the defendant and Mrs Attar on February 13, 2001. By the end of that meeting it was apparent that the attempt to mediate was not succeeding.

6 The claimant's case is that at or about the time when these meetings were taking place, the defendant slandered him to a number of individuals in the orthodox Jewish community. The defendant agrees that he did speak to these individuals. But there was a hotly contested issue as to the words spoken by him. The nub of that issue is whether in the course of some, and if so, which of the conversations the defendant said that the claimant had committed adultery with married Jewish women. The Hebrew words allegedly used by the defendant include *niuf* and *noef*. It is accepted that the former means adultery but there was a dispute amongst the Hebrew language experts as to whether the latter in modern Hebrew has a more watered down meaning.

7 The jury was directed to find what were the words used in each of the conversations sued on. No specific questions were put to them as to the words used. It would have been impractical to pose such questions and no-one suggested they should be asked. The jury were, however, asked whether the words used on each occasion were (as the defendant had contended) substantially justified. The jury answered that question in the affirmative. The inference to be drawn from that answer is that the jury did not accept that the defendant had said that the claimant had committed adultery.

8 With that lengthy preamble, I turn to the grounds upon which the defendant contends that the words which he spoke were protected by qualified privilege. His case is set out in some detail at para.10 of the defence. The essence of the case advanced by the defendant is that at the material times he was seeking in his Rabbinical capacity to carry out a private, informal mediation between Mrs Attar and the claimant. His case is that in the particular circumstances of each of the conversations sued on, he was under a religious and/or moral and/or social duty to say what he did or alternatively had a legitimate interest in saying what he did and the persons to whom he spoke had a corresponding duty or interest to receive his words.

9 In paras 60-88 of the reply, the claimant sets out detailed reasons why he denies that the words were spoken on occasions of qualified privilege. One of the reasons relied on is that it was not ***"proper"*** for the defendant to act in a pastoral capacity or as a mediator; that he was disqualified from doing so and that he acted in a manner inconsistent with Jewish law. (There is also an allegation of malice but nothing turns on that for present purposes).

10 Before turning to the individual conversations when the slanders were allegedly uttered, I should summarise the law relating to qualified privilege. I start with propositions which are, I believe, common ground. They can be listed as follows:

i) English law recognises that, in certain circumstances, words which are both defamatory and untrue may nonetheless be defensible. One such circumstance is where the defence of qualified privilege is available. The issue whether such privilege is available is ultimately one of public interest. As Baron Parke put it in ***Toogood v Spyring*** [1834] 1 C.M.&R. 181 at 191 publications which are *"fairly warranted by any reasonable occasion or exigency ... such communications are protected for the common convenience and welfare of society".*

ii) There have subsequently evolved a number of situations where the publication of words will be held to be protected at common law. Of these situations the relevant one for the purposes of this case is where the publisher has a duty or a legitimate interest in publishing the words and those to whom the words are published have a corresponding and/or common interest in receiving them.

iii) The duty may be a legal or social or moral one. In deciding whether there was a social or moral duty to publish the court will consider by whom it was published, to whom, when, why and in what circumstances: see ***Stuart v Bell*** [1891] 2 Q.B. 341 at 350.

iv) A material consideration is whether there existed at the time of publication an existing relationship between the publisher and the publishee(s): see the judgment of Simon Brown L.J. in ***Kearns v General Council of the Bar*** [2003] 1 W.L.R. 1457. It is, however, doubtful if this is a necessary condition for the existence of the privilege.

v) The protection of the privilege attaches to the occasion of the publication.

11 So much is agreed between the parties. There are, however, two areas of disagreement as to the approach which ought to be taken to the issue of privilege or no. The first is whether the actual words used are material to the determination of the question whether privilege is available. This has been a thorny question ever since ***Adam v Ward*** [1917] A.C. 309. Mr Freedman for the claimant submits that there will be cases, of which this is one, where it will be necessary to look at the words themselves in order to determine whether their publication is privileged. He cites ***Kearns v General Council of the Bar*** [*op. cit.*]; ***Downtex v Flatley*** [2003] EWCA Civ 1282; ***Komarek v Ramco Energy Co*** [2002] EWHC 2510 (QB) and ***De Buse v Macarthy*** [1942] 1 K.B. 156, 165. In the first of these cases Simon Brown L.J. cited with approval the approach of Eady J. in ***Komarek v Ramco Energy*** which was as follows: *"This again was a case which turned upon duty rather than upon an established personal or business relationship. This, submits [counsel for the defendant], in my judgment correctly, is why the court was concerned to evaluate the quality of the information. It was relevant to go into the specific information, rather than confining the enquiry to the broad subject of the conversation, in order to decide whether a specific duty had arisen."*

12 I accept that there will indeed be cases where it will be necessary to have regard to the words used at least in cases where there was no existing relationship. In the present case there was an existing relationship between the defendant and most, if not all, of those to whom he spoke the words complained of. Besides, I think Mr Price for the defendant is right when he says that the essential question is whether the occasion of the publication is privileged and that the actual words used are relevant to the extent only that it can be shown that they were not in any reasonable sense germane to the subject matter of the occasion so that the protection of privilege is unavailable: see ***Adam v Ward*** per Lord Loreburn at 321. The warning of Lord Diplock in ***Horrocks v Lowe*** [1975] A.C. 135 at 151E is in point, namely that the court should be wary of applying an objective test of relevance to every part of the defamatory words spoken on a privileged occasion, otherwise the protection afforded by the privilege would be illusory.

13 In my judgment, even if the defendant told some of the publishees that the claimant had committed adultery, that would not in my judgment of itself suffice to destroy the privilege, assuming privilege to be otherwise established. The fact that the defendant said that the claimant had committed adultery would be evidence of malice but does not in my view remove the privilege. It seems likely from the answer given by the jury to the question whether the words were substantially justified that the defendant did not say that the claimant had committed adultery.

14 The next area of dispute relates to the relevance of Jewish law to the existence of the privilege. The position adopted by the claimant on this question can be summarised in this way: Mr Freedman argues that, far from being under a duty to say what he did, the defendant was as a matter of Jewish law under a duty *not* to say what he did. He bases that proposition on a lengthy report from Professor Ben-Menahem, which for reasons of case management was not included as part of the evidence considered by the jury but which I have accepted should be treated as part of the evidence for the purpose of my consideration of this issue of privilege. It would overload this judgment to set out the detailed reasons why the Professor arrives at his conclusion; it is sufficient to say that his opinion is that Jewish law prohibited the defendant from speaking the allegedly slanderous words. How, asks Mr Freedman, can this court, albeit applying English law, conclude that the defendant was under a duty to do that which under Jewish law he (a Rabbi) was under a duty not to do. Mr Freedman suggests that Jewish law is determinative of the privilege issue in favour of his client.

15 The defendant also retained an expert, Rabbi Lewis (who is also a Dayan). He too prepared a lengthy report which disagrees in large measure with the opinions expressed by Professor Ben-Menahem. According to Rabbi Lewis many of the propositions advanced by the Professor may be valid in relation to conduct by a Dayan of proceedings in the Beth Din but do not apply to the conduct of a private mediation. Rabbi Lewis accepts that there is what is described as "Forbidden Talk" but expresses the opinion that in the particular circumstances which obtained here, the defendant was not subject to any prohibition.

16 I have not found the question what bearing Jewish law has on the issue of privilege to be an easy one; far from it. The conclusion I have arrived at is that Jewish law is a factor to be borne in mind but it is not the determinative factor the claimant maintains it to be. I say that for a number of reasons. In the first place the proper forum for the determination of Jewish law appears to me to be the Beth Din and not an English civil court. Of course English judges are frequently called upon to decide, as a question of fact, what foreign law is on a particular issue. But the position here is rather out of the ordinary: it is agreed on both sides that the appropriate forum in which to resolve issues between Jews, not least orthodox Jews, is the Beth Din. It is the claimant who has chosen to proceed in these courts. Moreover I would be particularly reluctant, sitting as a civil judge in a lay English court, to determine the question whether a judge of the Beth Din was guilty of disobeying Jewish law, which is at root a religious law.

17 Apart from these considerations, I believe that the correct approach in the present case is to ask myself whether in all the circumstances (including what the relevant Jewish law as it is said by Professor Ben-Menahem to be) whether the defendant has established the requisite duty and/or interest as those concepts have been defined in English law. I reject the implicit submission by Mr Freedman that Jewish law is a trump card. In a secular English court it seems to me that question is ultimately one of public policy and public interest as identified in the English authorities. The answer to that question may be affected by some other system of law but it cannot and in my view should not be determined by a system of law other than English law.

18 Adopting that approach, I turn to the individual slanders and ask myself in each case whether the defendant has established his case that the occasion was a privileged one.

19 **Alfred Magnus**: in my summing up I summarised the circumstances under which the defendant came to speak to Alfred Magnus (see Day 35 pp.9-12) and I see no need to repeat what I then said. The points to note are that, according to both the Attars and the defendant, Alain Attar told the defendant that he thought that Rachel Shababo was at risk from the claimant. Mr Price, citing para.14.40 of *Gatley*, contends that the defendant thereby came under a duty to give a warning to Mr Magnus about the risk to his daughter. I accept that. I do not accept that the defendant was just passing on gossip. The fact that the warning was not passed on sooner does not appear to me to negate the existence of a duty. Nor do I think that the fact that Alain Attar did not have any concrete reason for his concern mean that the defendant was not under a duty to voice that concern. There were facts known to the defendant about the past conduct of the claimant which would have given credence to

the existence of a risk. It was suggested for the claimant that the defendant should have gone direct to the Shababos. But the defendant and Alfred Magnus are old friends and in my view the defendant was entitled to treat Alfred Magnus as a suitable conduit for passing the information to Rachel Shababo if he so thought fit. I do not accept that Jewish law, as it is said by Prof. Ben-Menahem to be, can displace my conclusion that the defendant had a duty to speak to Alfred Magnus about his daughter. Nor do I accept that the fact that the defendant used the word adultery or *niuf* (if he did) would destroy the privilege which I find otherwise existed in relation to this occasion.

20 **Mr and Mrs Dray**: the evidence adduced on behalf of the claimant in relation to the words alleged to have been spoken by the defendant to the Drays came from Rabbi Moshe Cohen. It was therefore third hand. The Drays' account of their conversation with the defendant was entirely different. For the purpose of this ruling I shall assume that the account given by Rabbi Moshe Cohen is the correct one. The words said by him to have been spoken by the defendant are summarised in my summing up (Day 35 pp.12-13). I am in no doubt that the occasions of that conversation (or those conversations, if there was more than one) was protected by privilege. The Drays are the elderly parents of Nathalie Attar and Daniella Smadja. There is no reason to doubt the Drays' evidence that they had previously been informed by Rabbi David Daniel Cohen of the claimant's conduct towards their daughters. Nor is there any reason to doubt the evidence of the defendant that he had been asked by Nathalie Attar to speak to her parents in order to reassure them; they were naturally anxious and upset. Nathalie Attar had turned to the defendant for guidance. In all these circumstances the defendant was in my judgment under a duty to speak to the Drays and they had a legitimate interest in hearing what he had to say, even if (as Rabbi Moshe Cohen claimed) the defendant used words such as *niuf* and *noef* and mentioned Rachel Shababo. I am not dissuaded from that conclusion by the assertion of Professor Ben-Menahem that in the circumstances which had arisen the defendant was under a duty not to say what he did to Nathalie Attar's parents.

21 **David Kohali**: the circumstances under which David Kohali went to the defendant's home on 25.2.01 (and again on 27.2.01) are summarised in the summing up: see Day 35 pp.13-16. I accept that it is a material factor, for the purpose of determining the issue of privilege, that whilst it was Mr Kohali who introduced the claimant into the conversation, he did not ask the defendant about the allegations against the claimant. The defendant told Mr Kohali of those allegations after Mr Kohali had brought him into the conversation. It is also material that by February 25, 2001 the defendant had abandoned his attempt at mediation. The complaint against the claimant was at that time pending in the Beth Din. I have to decide whether Mr Price is correct in his contention that, in the above circumstances, the defendant was under a duty to tell Mr Kohali of the allegations against the claimant or at least had a legitimate interest in doing so. Again for present purposes I shall (notwithstanding what may have been the view of the jury on the point) accept Mr Kohali's account of what was said. It appears to me that the defendant's claim to privilege rests solely upon Mr Kohali's position as the President of the synagogue which the claimant attends and supports financially. I am not persuaded that this factor, when set against the countervailing considerations relied on by Mr Freedman, justifies me in concluding that the defendant had a duty or legitimate interest to volunteer the information about the claimant's alleged sexual misconduct to Mr Kohali. In my judgment the occasion was not protected by privilege. I recognise that it may be perceived that there is a tension between this conclusion and my ruling that the defendant had just cause for disclosing allegedly private information to Mr Kohali. But in conjunction with privilege the test is a different one and the issue is whether the occasion was protected by privilege.

22 **Dayan Toledano**: the evidence was unclear whether there was more than one conversation between the defendant and Dayan Toledano when the defendant spoke of the claimant's sexual misconduct. For the purpose of the present ruling it matters not. Again I assume that the defendant did use the words which Rabbi Moshe Cohen claimed Dayan Toledano had told him had been used (in particular the word *zanai* which is said to mean fornicator or adulterer). The evidence in the case of this slander, as opposed to the Kohali slander, was that the defendant was answering an enquiry from Dayan Toledano as to what was happening in relation to the claimant. The question which I therefore have to ask myself is whether Dayan Toledano appeared to the defendant to have a legitimate interest in knowing the answer: see *Gatley* at Ch.4.21. The position which Dayan Toledano occupied was that he was the head judge of the Spanish and Portuguese Beth Din and a very senior figure in the Sephardi community in London. There was also evidence that Dayan Toledano and the defendant used to exchange views about communal matters. But the synagogue attended by the claimant was not a member of nor was it affiliated to the Spanish and Portuguese synagogues. In these circumstances I do not accept that Dayan Toledano had a legitimate interest in being informed of the allegations against the claimant or that he would have appeared to the defendant to have such an interest. The occasion was not therefore privileged.

23 **Rabbi David Daniel Cohen**: he was the Rabbi to whom, according to the evidence, Mrs Attar turned for advice. He continued to be her rabbinical adviser at all material times. He was also the rabbinical adviser to other members of the Dray family. It was he who referred the Attars to the defendant. I reminded the jury in the summing up (Day 35 pp.17-18 and 19) of the evidence given by Rabbi Moshe Cohen as to what he said Rabbi David Daniel Cohen had told him of his conversation with the defendant. I also reminded the jury of the evidence of Rabbi David Daniel Cohen and the defendant about that conversation. Whichever version of the conversation is correct, it seems to me to be plain that Rabbi David Daniel Cohen continued to have a legitimate interest in the progress of Nathalie Attar's complaint against the claimant. Indeed Rabbi David Daniel Cohen made his own enquiries about it. I cannot accept that, once the matter had been referred to the defendant, Rabbi David Daniel Cohen ceased to have any legitimate interest in it. I take the view that the claim to privilege is made out.

24 **Abraham Suissa**: there were curious features about his evidence but I shall nevertheless assume that Mr Suissa's version of what the defendant said to him is correct. I dealt with this alleged slander in my summing up at Day 35 pp.18- 19. It appears to me that, so far as the availability of privilege is concerned, the conversation with Mr Suissa comes into the same category as the conversations with Mr Kohali and Dayan Toledano. Like Mr Kohali, Mr Suissa was the President of a synagogue but it was not the synagogue which the claimant attended regularly. Such prior relationship as existed between Mr Suissa and the defendant related primarily to his kosher food business. Even assuming that the words were spoken by the defendant as a result of an enquiry by Mr Suissa, I do not accept that the occasion was privileged. Mr Suissa had no legitimate interest in knowing the answer to his enquiry.

25 **Charles Gabbay**: Mr Gabbay stands in a different position from the other publishees. The reason why it is submitted for the defendant that the occasion of the defendant speaking to Mr Gabbay is privileged is that, according to the evidence of the defendant, he considered Mr Gabbay (with whom he had an established and trusting relationship) to be a suitable intermediary through whom to approach the claimant. I can well imagine that there will be circumstances where A will be able to claim privilege in respect of defamatory words about C spoken by him to B in circumstances where it was necessary to say

the words in order for A to be able to communicate with C. But the evidence falls some way short of establishing that such was the position in relation to Mr Gabbay. In the first place it was the evidence of Mr Gabbay that he was not asked by the defendant to act as an intermediary. If he had been, he said he would have approached the claimant. I also see some force in the submission made by Mr Freedman that the defendant's taped reference to *"sending a message to Brian Maccaba through the community"* does not sit well with the notion that the defendant selected Mr Gabbay to be the intermediary. Moreover it is unclear why the defendant needed an intermediary. He had had dealings with the claimant in the past and could easily have contacted him direct. Finally, I cannot accept that, even if the defendant spoke to Mr Gabbay because he wanted him to act as intermediary, there was a need to inform Mr Gabbay what the allegations against the claimant were. I reject the claim to privilege in regard to this conversation.

Clive Freedman Q.C. and David Sherborne, instructed by Addleshaw Goddard, for the Claimant.
David Price and Justin Rushbrooke, instructed by David Price Solicitors & Advocates, and John Samson of David Price Solicitors & Advocates, for the Defendant.