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RECENT DECISIONS

Slanderous Communication to Clergyman Held Absolutely Privileged

Plaintiff brought an action for defamation of character against his former wife and two other women on the ground that they had given defamatory testimony to priests for use in proceedings before a Catholic Church tribunal. Defendant-wife alleged that the defamatory remarks were made solely for the purpose of obtaining the church's sanction of her contemplated divorce. Defendant further alleged that the two co-defendants were present in order to corroborate her testimony, such corroboration being required by the church. The Court upon these stipulated facts summarily dismissed the complaint and *held* that confidential slanderous testimony, received as part of such religious proceeding, is absolutely privileged and therefore inadmissible by virtue of an Iowa statute[1] and the free exercise clause of the first amendment. *Cimijotti v. Paulsen,* 230 F. Supp. 39 (N.D. Iowa 1964).

Prior to the Reformation confidential communications between clergyman and penitent were regarded as privileged, primarily because of the close relationship which existed between the Catholic Church and the civil authority.[2] This was exemplified by the full acceptance of the "seal of confession" by the English heads of state.[3] After the Reformation, however, confidential communications between clergyman and penitent were not regarded as privileged at common law.[4] The manifestation of the common-law rule is evident in *Dubarre v. Livette,*[5] wherein the court held that a confession made to a clergyman could be admitted into evidence. The frequent refusal of common-law courts to recognize the privilege prompted individual judges to withhold compliance in order to avoid citing clergymen in contempt of court.[6] The judge in *Broad v. Pitt,*[7] although recognizing that no privilege existed at common law, vowed that he would never compel a clergyman to testify.

[1] IOWA CODE ANN. § 622.10 (1950): "No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the right conferred."

[2] 13 CATH. ENCYC. 649, 652 (1912).

[3] *Ibid.*

[4] Broad v. Pitt, 3 Car. & P. 518, 172 Eng. Rep. 528 (Ct. C.P. 1828) (dictum); Dubarre v. Livette, Peake N.P. 108, 170 Eng. Rep. 96, 97 (K.B. 1791) (confession to a Protestant clergyman was admitted in evidence); Wheeler v. Le Marchant, 17 Ch. D. 675, 681 (C.A. 1881) (dictum). See also 13 CATH. ENCYC., *op. cit. supra* note 2, at 656.

[5] Peake N.P. 108, 170 Eng. Rep. 96, 97 (K.B. 1791).

[6] Broad v. Pitt, *supra* note 4.

[7] *Ibid.*

The influence of the English common law on the United States resulted in a refusal by our courts to recognize this privilege as one of the traditional equitable rules determining the admissibility of evidence.[8] However, the United States Court of Appeals for the District of Columbia, in *Mullen v. United States,*[9] acknowledging the lack of the privilege at common law, held that sound "reason and experience" call for the recognition of the privilege, "and the dead hand of the common law will not restrain such recognition."[10] To rectify the common-law situation a great majority of American jurisdictions have enacted statutes extending the privilege of nondisclosure to the priest-penitent relationship.[11]

In most jurisdictions the statutes establishing the privilege have been strictly construed.[12] The courts have required that the facts of each case must fall squarely within the requirements of the statutes as construed by the courts before the protection will be extended.[13] A notable exception to this interpretation is the construction of the New York statute[14] by the courts of that state.[15] In conjunction with their liberal approach, the New York courts have held that membership in the church is not a prerequisite to claiming the privilege[16] and that the communications between priest and penitent need only be confidential.[17] The courts have thus encouraged "uninhibited communications" through a broad and liberal interpretation of the statute.[18]

The extent of the privilege in the United States has, to a great degree, rested on interpretation by the courts of the various state statutes. The courts in applying the statutes to the facts of each case have held that a confession is privileged when it is penitential and made in confidence to a clergyman in his professional capacity while spiritual or religious aid is sought;[19] hence, the courts have uniformly held that communications must be penitential to fall within the protection of the privilege.[20] The statutes, although not uniform, describe statements by a penitent as being "confessions."[21] The construction of this

[8] People v. Phillips, (N.Y. Ct. of Gen. Sess. 1813), discussed in 1 CATHOLIC LAW. 199 (1955); Johnson v. Commonwealth, 310 Ky. 557, 560, 221 S.W.2d. 87, 89 (1949); State v. Morehous, 97 N.J.L. 285, 290, 117 Atl. 296, 300 (Ct. Err. & App. 1922). *Cf.* Totten v. United States, 92 U.S. 105 (1876) (dictum); McMann v. Securities & Exec. Comm'n, 87 F.2d 377, 378 (2d Cir. 1937) (dictum); United States v. Keeney, 111 F. Supp. 233, 234 (D.D.C. 1953) (dictum).

[9] 263 F.2d 275 (D.C. Cir. 1958).

[10] *Id.* at 279.

[11] 8 WIGMORE, EVIDENCE § 2395 n.1 (rev. ed. 1961).

[12] Johnson v. Commonwealth, *supra* note 8; Note, 12 S.C.L.Q. 440, 446 (1960); 58 AM. JUR. *Witnesses* § 532 (1938). *Contra,* People v. Shapiro, 308 N.Y. 453, 126 N.E.2d 559 (1955) (dictum).

[13] Johnson v. Commonwealth, *supra* note 8.

[14] CPLR 4505: "Unless the person confessing waives the privilege, a clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him in his professional character as spiritual advisor."

[15] People v. Shapiro, *supra* note 12.

[16] Kohloff v. Savings Bank, 233 N.Y.S.2d. 849, 850 (Civ. Ct. 1962).

[17] *Compare* Westover v. Aetna Life Ins. Co., 99 N.Y. 56, 1 N.E. 104, 105 (1885) (dictum), *with* People v. Shapiro, *supra* note 12.

[18] People v. Shapiro, *supra* note 12.

[19] Cimijotti v. Paulsen, 219 F. Supp. 621, 624 (N.D. Iowa 1963); *In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931).

[20] Johnson v. Commonwealth, *supra* note 8; *In re* Swenson, *supra* note 19; MODEL CODE OF EVIDENCE R. 219 (1942).

[21] CAL. CODE CIV. PROC. § 1881 (1959); CPLR 4505.

term as applied by the courts is aptly stated in *In re Swenson*:[22] "the confession contemplated by the statute has reference to a *penitential* acknowledgement to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort."[23] Thus, "penitentiality," implied by the statutes through the term "confession," must be present before the privilege will be granted. However, "penitentiality" is elusive of definition and application. The American Law Institute's *Model Code of Evidence* requires "penitentiality" in the application of the privilege and describes it as the essential ingredient of "a confession of culpable conduct made secretly and in confidence by a penitent to a priest. . . ."[24] The necessity of "penitentiality" implies repentance on the part of the communicant, without which the statutory privilege cannot be granted. For example, the court in *Johnson v. Commonwealth*[25] admitted the testimony of a Methodist minister concerning defendant's admission of guilt to a murder. The court found that there had been no indication that the alleged confession was penitential, implying, therefore, that defendant exhibited no repentance or feeling of guilt.[26]

Besides "penitentiality," clergymen or penitents seeking the protection of the privilege must show that the statements were made within the usual course of church discipline or practice.[27] In *Sherman v. State*[28] the defendant was convicted of rape on the testimony of his victim, corroborated by a letter from the defendant in which he confessed his sins to a clergyman. In admitting the letter into evidence, the court stated that there was no indication that the church enjoined upon its members the duty to make confessions of sins.[29] In essence, the court held that in order for communications to be considered within the discipline of the church, they must be made pursuant to a duty enjoined by the rules and practices of the church.[30] A contrary view was espoused in *Reutkemeier v. Nolte*,[31] wherein a young unwed mother confessed her sin before the Presbyterian Church. The penitent's father attempted to elicit testimony from the clergyman in an action for damages for loss of services.[32] The court, in refusing to admit the testimony, held that "discipline of the church" encompassed confidential communications made by a penitent or by one simply seeking spiritual relief.[33]

In the previous disposition of the instant case the Court granted an interlocutory judgment and found that the alleged defamatory testimony by the defendant-wife was penitential, within the discipline of the church and, therefore, privileged.[34] The

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[22] *Supra* note 19.

[23] *Id.* at 603, 237 N.W. at 590. (Emphasis added.)

[24] MODEL CODE OF EVIDENCE R. 219 (1942).

[25] 310 Ky. 557, 221 S.W.2d 87 (1949).

[26] *Id.* at 558, 221 S.W.2d at 89.

[27] Kollen v. Wille, 162 Kan. 395, 400, 176 P.2d 544, 551 (1883) (the statement made to the priest was not part of a confession; therefore, he was not an incompetent witness); *In re* Swenson, *supra* note 19 (the court took judicial notice of the fact that such discipline is traditionally enjoined upon clergymen by the practice of their respective churches).

[28] 170 Ark. 148, 279 S.W. 353 (1926).

[29] *Ibid.*

[30] *Ibid.*

[31] 179 Iowa 342, 161 N.W. 290 (1914).

[32] *Ibid.*

[33] *Id.* at 345, 161 N.W. at 293.

[34] Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963), was decided by the court on interlocutory appeal concerning the same parties. This prior decision held that the priest's testimony was not available on deposition.

regulations of the church specified that in certain matrimonial matters tribunals must be held and that there must be two corroborating witnesses in attendance.[35] The Court, therefore, found no difficulty in characterizing the communications as being within the discipline of the church as to *all* the defendants. The "penitentiality" of the communications of these witnesses was open to question. The corroborating witnesses, although appearing pursuant to church procedure, were *not* penitents. The Court referred to a split in authority concerning the requirement of "penitentiality" in allowing the privilege. However, no such hiatus exists and *Boyles v. Cora,*[36] cited as authority for this proposition, dealt only with the physician-patient relationship.[37] In reliance upon this erroneous assumption, the Court adopted the view that anyone seeking religious or spiritual advice, aid or comfort should be afforded the protection of the privilege.[38] It thereby construed the applicable statute[39] and prior decisions[40] as requiring only that the communications be made to the clergyman in his professional capacity and within the discipline of the church.[41]

Throughout the development of the priest-penitent privilege in the United States, statutes have so pre-empted the field that the reliance by the Court in the principal case on the free exercise clause of the first amendment must be considered novel. In considering the free exercise clause the Court concluded that "a person must be free to say anything and everything to his church."[42] Even as guaranteed by the first amendment, certain requirements must be met as conditions to the application of the privilege. The Court suggested that the communications must be made within a recognized proceeding of the church, to a recognized official of the church, and within a sanctioned religious activity.[43] The crux of the decision resides in the Court's conviction that no one should be discouraged through fear of civil or criminal sanctions from making a communication to a clergyman.[44]

The applicability of the first amendment granting this privilege via the free exercise clause will register a great impact on the area of protected penitential communications. It would appear from this decision that the only conditions limiting the recognition of the privilege under the guarantee of the first amendment are that the communications be confidential and within the sphere of recognized religious activity. In effect, this decision eliminates the need for "penitentiality" and broadens the privilege to include all advice, aid and comfort rendered by a clergyman. Furthermore, all jurisdictions, regardless of statutory enactment, might now allow the protection of the privilege based upon the free exercise clause of the first amendment.

Under our constitution, the supposition that religious toleration was meant to be a fundamental principle of government is hardly disputable. The oppression attendant in compelling a clergyman to testify

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[35] *Id.* at 625.
[36] 232 Iowa 822, 6 N.W.2d 401 (1942).
[37] *Id.* at ——, 6 N.W.2d at 411.
[38] Cimijotti v. Paulsen, *supra* note 34, at 625.
[39] IOWA CODE ANN. § 622.10 (1950).
[40] Cimijotti v. Paulsen, *supra* note 34, at 624-25.
[41] *Ibid.*
[42] Cimijotti v. Paulsen, 230 F. Supp. 39, 41-42 (N.D. Iowa 1964).
[43] *Id.* at 41.
[44] *Ibid.* See Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958); Note, 12 S.C.L.Q. 440, 453 (1960).

is diametrical to this view, especially to Catholic priests who are sworn to the "seal of confession." Condemnation of such oppression was espoused by a great opponent of privileges, Jeremy Bentham:[45]

> In the character, of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion. . . . The advantage gained by the coercion—gained in the shape of assistance to justice—would be casual, and even rare; the mischief produced by it, constant and all extensive.[46]

Throughout our heritage, the principle of free exercise of religion has been a basic tenet of the American philosophy, protecting the rights and practices of churches, clergymen and parishioners. No practice could be more inhibitive of this free exercise of religion than the compulsion to testify to a confidential communication made within the scope of religious practice.

45 8 WIGMORE, EVIDENCE § 2285 (rev. ed. 1961).

46 *Ibid.*

Defendant Compelled to Testify as a Medical Expert

Plaintiff sued a hospital and several doctors for malpractice. While attempting to establish her prima facie case she sought to question one of the defendant-doctors as to the propriety of the operation which he had performed. The trial court refused to allow such testimony and dismissed the action at the close of plaintiff's case; the appellate division affirmed holding that the plaintiff could not compel the defendant-doctor to testify as an "expert." The Court of Appeals, in a unanimous decision, reversed and *held* that a defendant-physician in a malpractice action could be questioned as an expert to establish the generally accepted medical practice in the community in order to determine whether he had deviated from such a standard. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

In order for a plaintiff to be successful in a malpractice action, it is essential for him to establish the standard of care exercised by the doctors practicing in the defendant's locale and to prove a specific deviation from that standard by the defendant. In the words of Judge Fuld in the instant case:

> The issue whether the defendant-doctor deviated from the proper and approved practice customarily adopted by physicians practicing in the community is assuredly "pertinent and relevant" to a malpractice action. Indeed, absent such proof, the plaintiff's case would have to be dismissed.[1]

Similarly, where the matters relevant to the case are not within the experience and observation of the ordinary jurymen and the facts are of such a nature as to require special knowledge or skill, the opinion of an expert is necessary.[2]

Two facts, of which the Court of Appeals took judicial notice, should be rec-

1 McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 27, 203 N.E.2d 469, 473, 255 N.Y.S.2d 65, 71 (1964).

2 Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 396, 34 N.E.2d 367, 370 (1941). See also Annot., 81 A.L.R.2d 597 (1962).