The Catholic Lawyer

Volume 14
Number 1 *Volume 14, Winter 1968, Number 1*

Article 6

Defamation in Student Publications

DEFAMATION IN STUDENT PUBLICATIONS*

STUDENTS WHO WRITE for college and high school publications are typically unaware of the danger of legal liability for libel. This situation presents a dilemma to the administrative officers of various educational institutions who must minimize the possibility of extensive liability for defamation. The problem demands a degree of supervision sufficient to protect against such liability, yet mild enough to preserve the academic freedom of the student writer. This note represents an attempt to evaluate the legal problems involved and to arrive at some conclusions upon which to base an approach to the organization and operation of such student publications.

For purposes of the discussion of the question of a qualified privilege, the concept of "student publication" used is that of a publication written and edited by students and intended primarily for circulation to students, such as student newspapers, literary magazines, yearbooks and circulars. Excluded from this concept are publications such as law reviews which, though primarily written and edited by students, are intended to have a broad student and non-student readership. Furthermore, the discussion of the qualified privilege assumes that the matter published is, in fact, libelous under ordinary common-law standards. The discussion will center on matters peculiar to student publications but will include a brief presentation of the developments in the law of libel which apply generally to all publications.

The Conditional or Qualified Privilege

The law has long recognized that there are certain circumstances in which conduct which would otherwise be actionable will not be

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* Prepared by the St. Thomas More Institute for Legal Research.

treated as such because, as a matter of social policy, it is found that some interest or relation outweighs in importance the harm which flows from that conduct. In such a case, the actor who would otherwise be held liable in damages is accorded a privilege which will operate as a defense to an action based on that conduct. In the area of defamation, there are three general situations in which a person who publishes otherwise actionable defamatory matter is accorded a conditional or qualified privilege: (1) where the publisher believes that facts exist which affect a sufficiently important interest of the publisher and the recipient's knowledge of the defamatory matter will be of service in the protection of that interest; (2) where the publisher believes that a sufficiently important interest of the recipient or of a third person will be affected by the existence of certain facts and the publisher is under a legal or moral duty to disclose those facts; and, (3) where any one of several persons having a common interest in a particular subject matter correctly or reasonably believes that facts exist which should be disclosed to another sharing that common interest.[1] The third situation is particularly relevant to the present discussion:

> The common interest of members of religious, fraternal, charitable or other non-profit associations . . . is recognized as sufficient to support a privilege for communications among themselves concerning the qualifications of the officers and members and their participation in the activities of the society.[2]

The privilege recognized in regard to such organizations is "qualified" in the sense that it applies only if the use of the privilege is not abused. The privilege can be "lost" if the defamatory matter in question bears no relation to the community of interest which the privilege is designed to protect, if the publisher's primary motivation is malice rather than furtherance of that common interest, if the publication is unnecessarily extensive in that it was made to persons not sharing the common interest or if the publisher has no honest belief or no reasonable grounds for belief in the truth of the matter which he communicates.

In the courts, this qualified privilege based on a community of interest has been clearly recognized, especially in cases involving labor unions and communications between the officers and membership of such unions concerning union affairs. In *Garriga v. Townsend*,[3] the plaintiff was an organizer and vice-president of the Hotel Employees Union and defendants were officers of the Bartenders Union. Defendants published an article in their official union newspaper alleging that the plaintiff was guilty of malfeasance in office. In plaintiff's ensuing libel action, the trial court dismissed the complaint on the defendants' claim of qualified privilege, but the appellate division reversed this dismissal on the ground that plaintiff's complaint alleged malice, which if proven at the trial, would overcome the privilege asserted by the defendants. In its opinion, the court gave explicit recognition to the defense of qualified privilege

[1] RESTATEMENT OF TORTS §§ 594-96 (1934).

[2] RESTATEMENT OF TORTS § 596, comment *d* at 257 (1934).

[3] 285 App. Div. 199, 136 N.Y.S.2d 295 (3d Dep't 1954).

in a situation where the communication is made in " 'good faith . . . limited in its scope to . . . [a proper purpose], a proper occasion and publication in a proper manner and to proper parties only.' " [4] In *Lubliner v. Reinlib*,[5] the court stated that a union official is *prima facie* privileged to address communications to the officers and members on matters of union welfare and common interest. Similarly, the court in *Meyers v. Huschle Bros., Inc.*[6] held that an *employer* is privileged to communicate with his employees on the subject of their joining a union whose leaders he alleges are "un-American," particularly so where the circular was exclusively for employees and "relevant to a proper discharge of the employer's duty concerning a matter in which they had a mutual interest." [7]

In two more recent cases, the key factor in determining the availability of the defense of qualified privilege was the extent of the circulation of the publications containing the defamatory matter. In *Aacon Contracting Co. v. Herrman*,[8] the plaintiff corporation was involved in a labor dispute with the Teamsters Union and a strike resulted. Defendants were the Association of Catholic Trade Unionists and several of its officers. The Association had published an article in *The Labor Leader* in which it charged the plaintiff with unfair and illegal labor practices. In plaintiff's resulting libel action, the defendants interposed a multipronged defense of truth, fair comment, justification and qualified privilege. In rejecting the qualified privilege defense, the court stated that such a privilege extends to anyone who has a legal, social or moral obligation to others which obligation is fulfilled by the communication of facts bearing on an interest which they share but does not extend to communications to the public generally. The court found that *The Labor Leader* had a "wide and varied" circulation including many who were not members of the Association and that anyone could become a subscriber by merely submitting his name and address.

> In light of these facts [excessive publication] the allegations . . . to the effect that the publishers have long 'had a deep interest in promoting just, moral and equitable relations between management and labor,' that its readers have a similar interest, cannot support, either legally or logically, the defense of qualified privilege.[9]

Two years later, the extent of circulation was again determinative of the question of the availability of the defense of qualified privilege in *DeLury v. Wurf*.[10] Plaintiff was the president of the Sanitation Workers Union and defendant was president of a rival municipal employees union which published *The Public Employees Press*. Plaintiff brought a libel

[4] *Id.* at 201, 136 N.Y.S.2d at 297.
[5] 62 N.Y.S.2d 212 (Sup. Ct. 1946).
[6] 274 App. Div. 80, 80 N.Y.S.2d 173 (1st Dep't 1948).
[7] *Id.* at 82, 80 N.Y.S.2d at 174.
[8] 27 Misc. 2d 197, 208 N.Y.S.2d 659 (Sup. Ct. 1960).
[9] *Id.* at 205, 208 N.Y.S.2d at 672.
[10] 35 Misc. 2d 593, 230 N.Y.S.2d 848 (Sup. Ct.), *aff'd mem.*, 17 App. Div. 2d 917, 233 N.Y.S.2d 238 (1st Dep't 1962).

action based on statements made in that publication and defendant asserted the defense of qualified privilege. On a motion to strike the defense, the court recognized the common interest of the union official and the members of a union as a sufficient basis for the assertion of the qualified privilege defense and specifically stated that,

> where as in the instant case, the answer pleads that the pertinent publication went only to the membership of the labor organizations involved, it *prima facie* sets up a proper defense. . . .[11]

The court distinguished *Aacon* because in that case there had been wide and varied circulation beyond the group affected with the common interest, while in the instant case the publication had been circulated only to members of the two unions involved. It should also be noted that the same principles have been applied to the publications of religious organizations in *Moyle v. Franz* [12] where a qualified privilege defense was rejected because the publication was available to anyone willing to pay the subscription price.[13]

As can be seen, the defense of qualified privilege is available where a communication is made in good faith, in relation to a matter in which the publisher and the recipient share a common interest, published only to those sharing that common interest, and published with a reasonable belief in the truth of the matters stated.

The application of these principles to student publications requires an analysis of the "interest" which the student writer and his student readers share. The argument can be made that students, as students, share a common interest in everything and everyone that can be the subject of learning and, therefore, the applicable range of "interest" is as broad as the world itself. Though this position has a degree of plausibility, the legal status of the student publication must be resolved in terms of the law as stated by the courts in the analogous situations of union, fraternal and religious publications of limited circulation. An objective legal evaluation of the legal status of such publications compels the conclusion that, because the courts have been unwilling to extend the qualified privilege, student publications will be recognized as having a qualified privilege as to otherwise defamatory matters only in those areas of easily identifiable "academic" interest. In other words, it is likely that matters published about wholly non-academic questions or persons would be held to be without the scope of the privilege, and that matters published about issues and persons with only a tenuous connection with academic affairs would present close questions as to the applicability of the privilege. Particularly relevant to the question of "common interest" is the *Aacon* case in which the court rejected a broad claim of common interest between an organization of trade unionists and its non-member readers. Though not precisely parallel to the student publication situation (since the assumption is that the circulation will

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[11] *Id.* at 595-96, 230 N.Y.S.2d at 851.

[12] 267 App. Div. 423, 46 N.Y.S.2d 667 (2d Dep't 1944).

[13] *See also* Kaplan v. Gawron, 66 N.Y.S.2d 63 (Sup. Ct. 1946), where a motion for summary judgment on qualified privilege was denied for failure to plead circulation limited to persons having a common interest.

be limited to students), the case does indicate a judicial reluctance to liberally apply the privilege since it is, as a privilege, an exception to the general rule. Accordingly, the conclusion drawn here is that student publications, within the case law presented above, would be entitled to the defense of qualified privilege, but only as to those publications concerning what would generally be considered "academic matters," *i.e.*, those matters closely related to the curriculum, faculty, administration and students of the institution involved. This position is based upon the language used in the cases dealing with other situations of common interest emphasizing that the matter must pertain to the particular interests of the organizational structure within which the defamatory statements are made. In the cases discussed above, the statements pertained to peculiarly union matters. In comparison to the argument that students have an almost infinitely broad common interest, it can also be argued that, especially in a democratic society, each individual has an interest, however remote, in everything that occurs in the world around him since everything that happens will ultimately affect him, however remotely or minutely. Were this argument accepted, it would amount to an abolition of the law of defamation without any protection for those defamed other than the good faith of those who choose to speak or write about them. Clearly, the argument goes too far and will not be accepted by the courts. Having drawn this conclusion as to the scope and applicability of the qualified privilege, the various aspects of the privilege and the ways in which it can be defeated will now be discussed.

Qualified Privilege-Defeasibility

This qualified privilege based on a community of interest is subject to defeat by the plaintiff's showing an abuse of the privilege. The abuse may take various forms: (1) a lack of an honest belief in the truth of the statements made; (2) lack of reasonable grounds for any such belief; (3) publication made to persons who have no interest in the matter published and whose knowledge cannot reasonably be expected to further the protection of a legitimate interest; or (4) publication of the false and defamatory matter for an improper, malicious purpose and not to further the interest for the protection of which the privilege is extended.[14] The first basis for defeat of the privilege is the fact that "the policy upon which all conditional privileges are based is the desirability of communicating information which, if true, is important to the protection or promotion of some interest which, because of its importance, the law protects." [15] Thus, where the defendant has no good faith belief in the truth of the statements which he publishes, he can in no sense be said to be furthering the protected interest. In such a case, the defendant's plea of qualified privilege will be defeated by a showing of a lack of good faith belief.[16] So too, even if the defendant claims a good faith belief in the truth of the defamatory statements, his plea of qualified privilege will be overcome if the

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[14] F. HARPER, TORTS § 252 (1933); RESTATEMENT OF TORTS §§ 599-604 (1934).

[15] RESTATEMENT OF TORTS § 600, comment *a* at 264 (1934).

[16] Teichner v. Bellan, 7 App. Div. 2d 247, 181 N.Y.S.2d 842 (4th Dep't 1959); Nunan v. Bullman, 256 App. Div. 741, 12 N.Y.S.2d 51 (3d Dep't 1939).

plaintiff can show that no reasonable grounds for such belief existed. But, the plaintiff, to do so, must show more than mere negligence or a want of sound judgment; rather, he must show facts indicating something approaching a "wanton and reckless disregard" for the plaintiff's rights which would be equivalent to actual malice.[17] The more frequent basis for the defeat of the privilege is found in excessive publication of the defamatory matter, *i.e.*, publication to persons who do not share the common interest upon which the privilege is based and whose knowledge of the defamatory matter will be of no value in protecting that interest. A good example of such a situation can be found in the *Aacon*[18] case in which the qualified privilege of the Trade Union Association publication was defeated because it was available to anyone who wished to subscribe and was not limited to persons sharing a common interest in matters directly pertinent to the affairs of the organization itself. Similarly, in *Moyle v. Franz*,[19] the defendant's plea of qualified privilege was defeated because its publication, *The Watchtower*, was available to anyone willing to pay the subscription price. In contrast, the *DeLury*[20] case indicates that publication must be limited to those persons sharing the common interest involved if the privilege is to be upheld. It is important to note, however, that there is *some* room for flexibility in the application of this requirement. *Incidental* or *unavoidable* publication to persons other than those sharing the relevant common interest will not be sufficient to defeat the privilege:

> Often the only practicable means of communicating defamatory matter involves a probability or even a certainty that it will reach many persons whose knowledge of it is of no value in accomplishing the purpose for which the privilege is given. In such a case, the publication is not excessive. . . .[21]

Finally, the catch-all method of defeating the privilege is publication for an improper, malicious purpose. Initially, it must be pointed out that falsity alone will not be a sufficient basis for inferring malice.[22] But, the language of the defamatory statement may be so intemperate, violent or exaggerated as to allow an inference of a malicious purpose inconsistent with the reputed purpose of protecting or furthering a common interest.[23] However, if the publication was made for the *primary* purpose of protecting a common interest, the fact that there is some indication of resentment or indignation at the supposed misconduct of the person defamed will not constitute an abuse of the occasion.[24] Procedurally,

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[17] Loewinthan v. Le Vine, 270 App. Div. 512, 60 N.Y.S.2d 433 (1st Dep't 1946).

[18] Aacon Contracting Co. v. Herrman, 27 Misc. 2d 197, 208 N.Y.S.2d 659 (Sup. Ct. 1960).

[19] 267 App. Div. 423, 46 N.Y.S.2d 667 (2d Dep't 1944).

[20] DeLury v. Wurf, 35 Misc. 2d 593, 230 N.Y.S.2d 848 (Sup. Ct.), *aff'd mem.*, 17 App. Div. 2d 917, 233 N.Y.S.2d 238 (1st Dep't 1962).

[21] RESTATEMENT OF TORTS § 604, comment *a* at 269 (1934). *See also* F. HARPER, TORTS § 252 (1933).

[22] Davis v. Dun & Bradstreet, Inc., 9 App. Div. 2d 796, 92 N.Y.S.2d 674 (3d Dep't 1959).

[23] Hinrichs v. Butts, 149 App. Div. 236, 133 N.Y.S. 769 (2d Dep't 1912).

[24] RESTATEMENT OF TORTS § 603, comment *a* at 269 (1934).

the defendant must establish facts sufficient to indicate a privileged communication; when he does, the burden is on the plaintiff to prove both the falsity of the statements and abuse of the privilege by the defendant.[25]

As applied to student publications, the above grounds for defeat of the qualified privilege are rather clear and unambiguous. Responsibility would seem to be the key to the maintenance of the privilege and, though responsibility can be said to be a sure preventive for liability of any kind, it would seem that students can and should be expected to meet higher than ordinary standards in this regard. It would also seem that student "idealism" and commitment to "causes" would be important evidentiary factors in an attempt to defeat a defense of qualified privilege on the ground of malice. In addition, maintenance of the publication as one of *limited* circulation, intended primarily for students, is essential. In this regard, incidental or unavoidable distribution to persons other than students would not seem to be enough to defeat the privilege, especially in light of the language in the *DeLury*, *Aacon* and *Moyle* cases which centered on the *intended* availability of the publications involved in those cases. In both *Aacon* and *Moyle,* the privilege was defeated by proof of excessive publication, *i.e.*, the publications were available to anyone willing to pay the subscription price, whereas, in *DeLury*, the defense was established *prima facie* by a showing that the publication was intended to be available only to members of the unions involved. The conclusion to be drawn from these cases is that a showing of an intended availability to students and academic personnel only will be sufficient to overcome any claim of excessive publication, even though there was incidental or unavoidable publication to persons other than those for whom it was primarily intended. Thus, control and sharp delineation of the degree of circulation is a key element to be established in order to ensure the application of the qualified privilege.

The caution required to assure the availability of the qualified privilege to student publications will, unfortunately, not always be met. The interests of student journalists may extend to *matters* well beyond the academic world. They may intend their words regarding these matters to be *circulated* among the general community. In view of such a situation, it is necessary to consider the rules of liability applicable to *all* types of publications.

"Public Officials" and "Public Figures"

Traditional common-law rules of liability for defamation in publications[26] concerning public affairs and persons underwent a radical change with the decision of the United States Supreme Court in *New York Times Co. v. Sullivan.*[27] There the Court held that a state cannot, under the first and fourteenth amendments,

[25] Collier v. Postum Cereal Co., 150 App. Div. 169, 134 N.Y.S. 847 (1st Dep't 1912); Hinrichs v. Butts, 149 App. Div. 236, 133 N.Y.S. 769 (2d Dep't 1912).

[26] For purposes of the following discussion no distinction is made as to the character of the publication involved.

[27] 376 U.S. 254 (1964).

award damages to a "public official" for a defamatory statement concerning his official conduct unless he can establish actual malice, *i.e.*, that the statement was made with knowledge of its falsity or with reckless disregard as to its truth or falsity. Under this standard, mere negligence in regard to the determination of truth or falsity is insufficient to establish the required malice. The Court expressly disavowed any attempt to decide how far down into the ranks of officialdom the category of "public official" would go. It should also be noted that three Justices (Black, Goldberg and Douglas), while concurring in the result, contended that the fourteenth amendment did not merely delimit the states' power to award damages for defamation to public officials but, rather, prohibited them from doing so since they regarded the privilege to comment on public officials as absolute. Two years later, the public official category was explained by the Court in *Rosenblatt v. Baer*.[28] The Court did not delineate precisely the scope of the term "public official" but generally described him as one who is an employee of the government having, or appearing to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[29] Furthermore, the Court rejected a contention that status as a public official should be determined according to state law, recognizing that the acceptance of such a guideline would impose confusion and uncertainty on the exercise of the first amendment freedom sought to be protected by the *Times* standard. A further extension of the right to publish in areas of public concern was made in the cases of *Curtis Publishing Co. v. Butts* [30] and *Associated Press v. Walker*.[31] Neither case involved a public official as defined by *Rosenblatt*, but the Court found that both plaintiffs were "public figures." Butts qualified because of his position as athletic director of the University of Georgia (he was deemed not employed by the state even though the university was a public institution) and Walker because of his former status as an Army General and because of his political prominence at the time of the events upon which the allegedly defamatory remarks were based. The Court stated a new standard to govern such situations: a "public figure" who is not a "public official" may recover damages for a defamatory falsehood, the substance of which makes damage to reputation apparent, if he can show *highly unreasonable conduct* constituting an *extreme departure* from the standards of investigating and reporting *ordinarily adhered to by responsible publishers.* In applying this new standard, the Court made a distinction between the types of "news" involved and the resulting difference in responsible publishing standards. *Walker* involved an Associated Press reporter covering the riots at the University of Mississippi precipitated by the admission of James Meredith. The report sent by the reporter to the Associated Press office stated that Walker had taken charge of a group of rioters and led them in a charge against

[28] 383 U.S. 75 (1966).
[29] *Id.* at 85.
[30] 388 U.S. 130 (1967).
[31] Decided together with Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

federal marshals. The Court held that since the incident could be considered "hot" news, requiring immediate dissemination without any opportunity to pursue a thorough investigation, there was no severe departure from accepted publishing standards. In *Butts*, however, the story was an exposé published in a *weekly* magazine and it was based, in large part, on the report of a person who claimed that he had overheard a telephone conversation between the plaintiff and a rival school's football coach in which plaintiff had reputedly given information which would assure his team's losing an impending game. The Court found that there was ample time and opportunity in which to investigate the truth of the charge but that defendant had failed to take even the most fundamental precautions to assure the accuracy of the story. The Court concluded that there was sufficient evidence to support a finding of highly unreasonable conduct constituting a severe departure from ordinary publishing standards and, therefore, upheld an award of damages to the plaintiff.

It seems clear from these cases that there is a wide latitude within which publications concerning "public officials" and "public figures" can be made without fear of liability for defamation. What must be avoided if liability is to be precluded are the extremes of "reckless," "wanton," "highly unreasonable" and "severe" departures from ordinary publishing standards. The *Butts* case, however, indicates that the area is not without danger in that a failure to investigate the facts upon which the statements are based, when there is an opportunity to do so according to ordinary standards, can constitute a sufficient basis upon which to predicate liability. In summary, the key elements of this area are:

(1) "public figure" — Is the person about whom the statements are made one who is reasonably well-known to the public either because of the position he holds or because of his own activities and self-exposure?

(2) "public official" — Is the person about whom the statements are made a government employee who has, or appears to have, substantial responsibility for, or control over, the conduct of governmental affairs?

(3) "official conduct" — Is the content of the statements concerned with his official conduct and only those personal characteristics having a *direct* bearing on his qualification to carry on that conduct?

(4) "actual malice" — Are the statements made with a reasonable belief in their truth and have steps been taken which a reasonable person would take to determine their truth or falsity? If not, was the failure to do so merely negligent or were the circumstances such that the failure to use available opportunities to investigate is indicative of a reckless disregard for the truth?

(5) "highly unreasonable conduct" — In light of all the circumstances, including the immediacy of the need for publication, have the ordinary standards of investigation and reporting, adhered to by responsible publishers, been followed?

Affirmative answers to the above questions would seem very clearly to indicate that the particular publication in question would be insulated from liability under the standards announced in *Times, Rosenblatt, Butts* and *Walker.*

Many cases have come down following the *Times* decision. Some of the holdings can be summarized as follows:

(1) *Times* is not limited to elected public officials.[32] It applies to candidates for public office.[33] "Public official" includes a police lieutenant [34] and an attorney in the office of the Corporation Counsel of the City of New York.[35]

(2) Comments must pertain to "official conduct" and personal facts bearing directly on qualifications for public office.[36]

(3) Rewording of an official report so that what was called an "allegation" in the report is stated as a "fact" in the defamatory publication constitutes a severe departure from ordinary publishing standards.[37] Where an editorial writer relied on a news story in the *New York Times*, the reputations of that paper and of the writer of the story were sufficient to refute a claim of reckless disregard for the truth.[38] An attempt to interview plaintiff to get his side of the story, coupled with lack of any awareness of the probable falsity of the information given by sources, was found sufficient to indicate adherence to high publishing standards.[39]

(4) A person may become a "public figure" by thrusting himself into the public eye through statements concerning questions of national interest.[40] A mayor's law partner is within the *Times* standard since he chose to enter public controversy over a municipal code of ethics.[41]

The *Times* and *Butts-Walker* Standards

The extension of the protection of the first amendment freedoms in the above cases greatly expands the area in which comment on public officials and matters of public interest can be made. But, because the extension has occurred so re-

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[32] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966).

[33] Block v. Benton, 44 Misc. 2d 212, 255 N.Y.S.2d 767 (Sup. Ct. 1964).

[34] Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965).

[35] Schneph v. New York Post Corp., 16 N.Y.2d 1011, 213 N.E.2d 309, 265 N.Y.S.2d 897 (1965).

[36] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966); Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (Sup. Ct. 1965).

[37] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966).

[38] Schneph v. New York Post Corp., 16 N.Y. 2d 1011, 213 N.E.2d 309, 265 N.Y.S.2d 897 (1965).

[39] New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).

[40] Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 903, 281 N.Y.S. 2d 716 (1st Dep't 1967).

[41] Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (2d Dep't 1964), *aff'd mem.*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S. 2d 29 (1965).

cently, a good deal of uncertainty is left as to particular applications of the principles enunciated. As with any new development in the law, certainty comes only with refinement through interpretation in subsequent cases and, until there has been sufficient time for this refinement to occur, conclusions and projections must be, at best, tentative. Particularly uncertain is the application of the *Butts-Walker* test, adhered to by only four justices, of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." [42] In *Butts*, a national publisher of a weekly magazine failed to check the accuracy of readily available sources for an expose' which presumably took some time to prepare. Its failure to do so was found to come within the above description of conduct sufficient to impose liability for comment on a "public figure." *Walker*, in contrast, involved "hot" news, reported by a reporter on the scene, which was not practicably subject to investigation according to ordinary standards in light of the immediacy of the need for publication. The Court therefore found that the defendant's conduct did not fall within the above proscription. In *Times*, the allegedly defamatory advertisement was printed even though the *Times* had not checked news accounts of the events referred to in the advertisement to corroborate the advertisement's accuracy. Reliance on the reputation of the sponsors of the advertisement and the lack of any reason to suspect the truth of its contents was deemed sufficient to indicate that there was no reckless disregard for the truth of the published matter. Thus, where a "public official" is involved, mere failure to take steps to check the accuracy of the matter to be published, when there is no reasonable basis for suspecting its falsity and no practical opportunity to do so, will not be sufficient to establish the misconduct necessary to impose liability. In specific relation to student publications of all kinds, the greatest degree of uncertainty arises as to the application of the *Butts-Walker* "responsible publisher" standard. The publishers involved in those cases both had extensive news-gathering facilities and personnel. In terms of the status and resources of the defendants in those cases, the investigating and reporting standards were justifiably high. The question arises, however, as to how this standard should be applied to publishers of lesser status with fewer and less extensive resources. It would seem illogical and contrary to the rationale of the cases to require the same standards to be adhered to by such disparate entities.

The choice is between narrowly defining the "standards adhered to by responsible publishers," by reference to the standards of such mammoths as the *New York Times* and the Associated Press, or more broadly defining them, in terms of the status and resources of the particular publisher involved. Stated differently, can responsibility be regarded as a function of the size, wealth and investigative resources of the publisher? In terms of student publications, the argument for an affirmative answer to the

[42] Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

above question is especially strong. Coupled with the apparent ordinary lack of investigative capability, there is the additional fact that student publications are almost universally staffed by non-professionals with limited access to sources of information and verification. It would certainly seem unjustifiable to judge a student newspaper's comment on a public figure by the same standard as would be applied to a similar comment by the *New York Times* or the Associated Press. Though this argument is strong, it is by no means certain that it will be accepted and, if it is not, the student publication, commenting on public officials or public figures, will necessarily have to exercise greater caution to compensate for its lack of resources. As stated above, however, this precise question will have to await resolution by the courts before definitive answers can be given.

Conclusion

It appears that a number of privileges are available to student publishers. But these may be lost in various ways.

The indiscriminate circulation to anyone desiring to obtain the publication is certain to defeat any claim of qualified privilege. It is strongly recommended that the circulation of such publications be re-examined to determine whether it is sufficiently circumscribed as to qualify for such a privilege. The question of how limited the circulation must be depends upon the extent of the common interest being asserted. It seems safe to conclude that circulation to students, faculty members, administrators, employees and alumni, all of whom share an interest in matters concerning education, would be within the boundaries of circulation limited to those sharing a common interest. It also seems clear that non-intentional, incidental or unavoidable circulation to persons outside the above groups would not be sufficient to defeat the claim of privilege, but the very vagueness of these terms indicates that caution should be exercised in favor of limiting circulation policies and practices to avoid the possibility of being defeated by an adverse interpretation of those terms. This is especially true in light of the fact that there has been, as yet, no litigation on this precise point which can be used as a practical and effective guide for the development of such policies and practices.

Perhaps the most effective safeguard is the education of all those involved in student publications. Student writers and editors, as previously mentioned, generally are unaware of and unconcerned with the possibility of liability in damages for defamation. Accordingly, information as to the very real threat of such liability should be provided to them for two reasons: to protect the students themselves from a liability which they are generally unprepared to assume and, secondly, to protect the institution under whose auspices these students publish. Furthermore, any faculty advisor should be fully aware of the legal problems involved and should be able to recognize them so that steps can be taken to prevent the publication of defamatory matter. Necessarily, such a recommendation precludes the use of an advisor who is such in name only and whose function and responsibility are considered only *after* problems have

(*Continued on page* 88)