The Catholic Lawyer

Volume 9
Number 2 *Volume 9, Spring 1963, Number 2*

Article 12

October 2016

Recent Decision: Complaint to Bar Association Held Privileged Communication

mous materials will somewhat hinder civil and criminal action against those responsible for libelous, fraudulent or obscene literature. Yet, in balancing the conflicting interests in this area, it is important not to overlook the nature of the individual who desires to speak his mind on a controversial subject.

Recent Decision: Complaint to Bar Association Held Privileged Communication

The right of members of the Bar to protect themselves from baseless and malicious complaints . . . must be protected.[1]

In a recent decision, a New York attorney sued his former clients for defamatory statements they had made to the Grievance Committee of the Bar Association. The plaintiff-attorney asked that the Court award him compensatory and punitive damages in the amount of $93,000 and the defendants answered by claiming as a defense against the libel and slander charges that the statements were *absolutely* privileged communications. The New York Supreme Court denied the validity of this defense, stating that it would leave an attorney completely vulnerable to baseless and malicious complaints, and *held* that such a communication merited only a *qualified* privilege, which in this instance could be successfully invoked by the defendants since they had made the statements "in good faith, without malice, and in the belief that they were justified." *Sassower v. Himwich,* (Sup. Ct.), 148 N.Y.L.J., Dec. 19, 1962, p. 10, col. 1.

The concept underlying privileged communication is by no means a product of modern jurisprudence. As far back as the reign of Edward III, there is to be found a reference to what would now be called an absolute privilege which constituted a complete bar against any defamation action based on a false statement alleged in court pleadings.[2] Subsequently, during the reign of Edward IV, this privilege was extended to prohibit "suits for defamation where a person had been a witness on an inquisition."[3] From this limited beginning, the theory and the application of privilege has been greatly amplified and extended.

The concept of privileged communication, as it is known today, proceeds from the general conviction that although sound policy requires that certain types of conduct be made the basis for legal liability, there are exceptional circumstances where persons engaging in such conduct should be protected. Thus, on certain occasions, the public good demands that an individual speak his mind freely and fearlessly, and hence, his statements should be absolutely or at least qualifiedly privileged.[4]

Although the differences between the absolute and the qualified privilege are relatively simple to comprehend, the consequences resulting from their application

[1] Sassower v. Himwich, (Sup. Ct.), 148 N.Y.L.J., Dec. 19, 1962, p. 10, col. 1.

[2] 4 REEVES, HISTORY OF THE ENGLISH LAW 102 (2d ed. 1787). See generally 3 WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 444-46 (9th ed. 1763).

[3] 4 REEVES, *op. cit. supra* note 2, at 101.

[4] 1 HARPER & JAMES, TORTS § 5.21 (1956).

are diverse and profound. One of the earliest New York cases dealing with privileged communication is *Thorn v. Blanchard*,[5] wherein the plaintiff sought damages for an alleged libel. The defendant had written a defamatory petition to the Council of Appointment, charging the district attorney with improper activity and requesting his removal from office. In denying recovery to the plaintiff, the court held that such a communication was absolutely privileged, since it comprised an integral part of a quasi-judicial proceeding (an investigation of a district attorney), and that therefore it was not actionable, even if done maliciously.[6]

The fundamental rationale used by the courts in decisions granting an absolute privilege must be understood in order to appreciate the occasions meriting such a privilege. Most jurisdictions agree that statements made during a judicial proceeding and material thereto are absolutely privileged.[7] The reason for this is based on an important public policy theory which states that it is far better to suffer some slight injustices due to malicious remarks rather than to subject our judges, legislators, and government officials to suspicion and inquiry regarding their every official pronouncement.[8] For the same reason, this privilege is extended by analogy to quasi-judicial proceedings, (*e.g.*, committee investigations, and the inquiries of professional, religious, and semi-official civic associations).[9] Therefore, whether or not there is actual malice on the part of a defendant is of no concern. If a communication is held to be absolutely privileged, it cannot by any means prove to be actionable in libel.[10]

A similar example of this is *City of Chicago v. Tribune Co.*,[11] wherein the defendant was sued for defaming city officials regarding their conduct in office. In finding an absolute privilege, the Illinois court declared that except in the case where one is seeking to overthrow the government by unlawful means, or is persuading others to violate the law, all utterances against the government, whether federal, state, or local, should be absolutely privileged. It is advantageous for the public interest, the court said, that a citizen should be in no way fettered in his statements, however critical, about the government and that this is especially true where the public service and due administration of justice are concerned.[12]

However, due to the general tendency of most courts to limit strictly the application of the absolute privilege, more often than not the privilege granted by the courts is a qualified privilege which, as a general rule, the presence of malice will always defeat.[13]

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[5] 5 JOHNS. R. 508 (N.Y. Ct. Err. 1809).

[6] *Id.* at 532.

[7] See PROSSER, TORTS § 95 (2d ed. 1955); RESTATEMENT, TORTS §§ 585-89 (1938). See also LaPorta v. Leonard, 88 N.J.L. 663, 97 Atl. 251 (1916).

[8] Toft v. Ketchum, 18 N.J. 280, 113 A.2d 671 (1955). See also 1 HARPER & JAMES, TORTS §§ 5.22, 5.23 (1956); RESTATEMENT, TORTS §§ 585, 590, 591 (1938).

[9] Ramstead v. Morgan, 219 Ore. 383, 347 P.2d 594 (1959).

[10] *Id.* at 398, 347 P.2d at 602. See Simon v. Stim, 11 Misc. 2d 653, 176 N.Y.S.2d 475 (Sup. Ct. 1958), *aff'd mem.*, 10 App. Div. 2d 647, 199 N.Y.S.2d 405 (2d Dep't 1960).

[11] 307 Ill. 595, 139 N.E. 86 (1923).

[12] *Id.* at 601, 139 N.E. at 90.

[13] White v. Nicholls, 44 U.S. (3 How.) 266 (1844). Malice is defined as any improper motive which induces the defendant to defame the plaintiff. ODGERS, SLANDER AND LIBEL 282 (6th ed. 1929). It is also defined as some motive actuating

In *White v. Nicholls,*[14] the United States Supreme Court set down what are still today, with but a few subtle distinctions, the basic requirements for invoking successfully the defense of qualified privilege. The defendants had written a defamatory letter to President James K. Polk, requesting that he dismiss the Collector of Customs for the port of Georgetown because of his political violence, vile conduct, and underhanded methods of obtaining political favors. The Court stated that if an author or publisher of an alleged libel acts in the discharge of a public or private duty, legal or moral, he is privileged by the *occasion,* which rebuts the inference of malice and thereby casts upon the plaintiff the burden of proving malice in fact in order to defeat the privilege. Thus, it was held that a communication is qualifiedly privileged when there occurs a duty to inform, a publication of the information to the proper authority and a lack of actual malice, but only on the specific *occasion* when all three factors are simultaneously present.[15]

Unfortunately, the occasions requiring an absolute privilege and those demanding but a qualified privilege are oftentimes not so clearly distinguishable, and this difficulty has given rise to the problem confronted by the Court in the principal case. Where a former client has made defamatory statements to a bar association concerning an attorney, the courts of the various states differ radically in applying a privilege to the communication.[16]

The Missouri Supreme Court ruled in *Lee v. W. E. Fuetterer Battery & Supplies Co.,*[17] in what appears to be the first American decision handed down on this specific issue, that such statements warranted a qualified privilege only. The court reasoned that the public should be encouraged to accept its duty of reporting any harmful or injurious conduct on the part of the members of the legal profession. Unless such communications are privileged, the possibility of a libel suit will deter even a well-meaning citizen from communicating this information to his local bar association. The court went on to say that since the right and duty to inform the proper authority of any unprofessional or unethical conduct should be fostered, such a communication must be privileged, but only if made in good faith. Consequently, malice or ill-will would defeat the privilege and give rise to a cause of action.[18] The *Lee* case was an extension of the long-accepted rule set down in *White v. Nicholls* by the United States Supreme Court – an application to an essentially similar, though new, field of activity.[19] It set a sound precedent for many subsequent decisions, but as stated above, not all courts were amenable to accepting this rationale.[20]

In a recent Oregon case, *Ramstead v.*

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the defendant, different from that which prima facie rendered the communication privileged, and is a motive contrary to good morals. 1 HARPER & JAMES, TORTS § 5.27 at 452 (1956).

[14] 44 U.S. (3 How.) 266 (1844); *accord,* Toogood v. Spyring, 1 C. M. & R. 181, 149 Eng. Rep. 1044 (1834).

[15] White v. Nicholls, *supra* note 13, at 289; *accord,* Walsh v. Bertel, 187 La. 877, 175 So. 605 (1937); State *ex rel.* Zorn v. Cox, 318 Mo. 112, 298 S.W. 837 (1927); McKnight v. Hasbrouck, 17 R.I. 70, 20 Atl. 95 (1890).

[16] *Compare* Ramstead v. Morgan, 219 Ore. 383, 347 P.2d 594 (1959), *with* Lee v. W. E. Fuetterer Battery & Supplies Co., 323 Mo. 1204, 23 S.W.2d 45 (1929).

[17] 323 Mo. 1204, 23 S.W.2d 45, 61 (1929).

[18] *Id.* at 1239, 23 S.W.2d at 63. *Cf.* Smith v. Kerr, 1 Edm. Sel. Cas. 190 (N.Y. Cir. 1845).

[19] See 15 ST. LOUIS L. REV. 301, 302 (1930).

[20] See Ramstead v. Morgan, 219 Ore. 383, 347 P.2d 594 (1959). The court stated in its opinion that the *Lee* doctrine was "too narrow."

Morgan,[21] the doctrine of absolute privilege was emphatically asserted. With a factual situation similar to that of the *Lee* case, the state supreme court affirmed the lower court's decision which construed a statute in favor of an absolute privilege. The court declared the statute to be unconstitutional, amountng to a blatant interference by the legislature with the court's powers in regard to disbarrment proceedings.[22] Considering the client's statements to be a part of a quasi-judicial proceeding, the court held that there was an absolute privilege based on principles of public policy. The court left unanswered the question of whether there existed an action for malicious prosecution.

In *Toft v. Ketchum*,[23] a much criticized opinion,[24] the New Jersey Supreme Court held that a defamatory letter to a bar association merited an absolute privilege, and as such was a complete bar to *any* subsequent court action by the attorney, whether it be in libel, slander or malicious prosecution. It therefore not only affirmed the use of absolute privilege in such an instance but actually extended the doctrine to thwart completely the attorney's cause.[25]

And so two divergent and apparently irreconcilable views have taken root and flourished in this area of law. One advocates a stricter interpretation of the absolute privilege and a concurrent greater use of the qualified privilege; the other proposes a more widespread application of the absolute privilege.

Sassower v. Himwich,[26] the instant case, therefore provides an excellent and most recent indication of the law regarding privileged communications in today's legal atmosphere. In initiating what appears to be the first suit of its kind in New York,[27] the plaintiff-attorney brought a libel suit seeking compensatory and punitive damages for defamation, and directed the Court's attention to the allegedly defamatory statements made by the defendants to the New York Bar Association Grievance Committee. The statements in question were based on the defendants' dissatisfaction with the attorney's conduct in the settling of their affairs. The New York Supreme Court found it unnecessary to decide the truthfulness of the statements since it ruled that they were made in good faith, and hence were at least qualifiedly privileged. Defendants had claimed an absolute privilege, *i.e.*, a privilege which even actual malice could not defeat. The Court, however, denied the validity of this defense, stating that to grant such a privilege would be to deprive attorneys of their most effective defense against baseless and malicious complaints made to the Bar Association. In upholding the attor-

[21] *Ibid.; accord,* Lilley v. Rooney, 61 L.J.Q.B. (n.s.) 727, 8 T.L.R. 642 (1892).

[22] Ramstead v. Morgan, *supra* note 20, at 399, 347 P.2d at 601.

[23] 18 N. J. 280, 113 A.2d 671 (1955).

[24] See Cowan, *Torts,* 10 RUTGERS L. REV. 115, 129-30 (1955); 34 CHI.-KENT L. REV. 324 (1956).

[25] Toft v. Ketchum, *supra* note 23, at 283, 113 A.2d at 675. See Cowan, *supra* note 24, at 129.

[26] (Sup. Ct.), 148 N.Y.L.J., Dec. 19, 1962, p. 10, col. 1.

[27] See Pecue v. West, 233 N.Y. 316, 135 N.E. 515 (1922), which is cited as authority in the instant case. There, the defendant had sent a defamatory letter to the district attorney charging the plaintiff with keeping girls for immoral purposes. In explicitly limiting the application of absolute privilege, the court granted a qualified privilege only, based on the same three requirements set down in White v. Nicholls, 44 U.S. (3 How.) 266 (1844), *i.e.*, the simultaneous presence of a duty to inform, the publication to the proper authority, and good faith.

ney's right to protect himself from defamatory statements, the Court declared that:

> Although the individual attorney, in this respect, is entitled to no greater judicial protection than the law affords to others, he is, in all justice, certainly entitled to no less protection.[28]

The Court, therefore, has endorsed the view which favors strict limitation on the use of absolute privilege. *Sassower v. Himwich* is thus in direct accord with the *Lee* case, but is patently contrary to the result reached by the *Toft* case in 1955, and the *Ramstead* case in 1959.

The *Sassower* case represents an apparently logical and prudent approach to the issue, with a result that appears to protect the rights of both parties as equally and as ethically as possible. On the other hand, the *Toft* and *Ramstead* decisions represent a severe and somewhat inequitable approach, and result not only in an unjust deprivation of the attorney's rights, but also cause a wall of mistrust to arise between the respectable attorney and his client.[29]

[28] Sassower v. Himwich, *supra* note 26.

[29] 34 CHI.-KENT L. REV. 328, 329 (1956).