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Extension of Absolute Privilege to Defamation in Arbitration Proceedings - Sturdivant v. Seaboard Service System, LTD.

William J. Andrle Jr.

SURVEY

EXTENSION OF ABSOLUTE PRIVILEGE TO DEFAMATION IN ARBITRATION PROCEEDINGS—*STURDIVANT V. SEABOARD SERVICE SYSTEM, LTD.*

In bringing an action for defamation, a plaintiff makes out a prima facie case by demonstrating that there has been an actionable communication,[1] that the defendant was responsible for publication of that communication

1. In determining whether a plaintiff has made a showing of an actionable communication, distinctions must be made between categories of defamation. The tort of libel involves a defamatory communication of a permanent sort such as printed matter, films, and art work. Slander encompasses transitory, ephemeral communications such as speech, gestures and sign language.

At common law, a plaintiff in a libel suit was not required to plead or prove actual pecuniary damage resulting from the communication. A plaintiff could seek "general damages," allowing recovery for harms such as emotional and physical stress or general disgrace in the eyes of society without proving a nexus between the harm and monetary loss. Sowder v. Nolan, 125 A.2d 52, 55 (D.C. 1956) (general damages presumed where jury finds libelous communication not privileged); Norfolk & Washington Steamboat Co. v. Davis, 12 App. D.C. 306 (1898) (libel award of both general and future damages for mental suffering, disgrace, and disrepute allowed). *See also* Washington Times Co. v. Downey, 26 App. D.C. 258 (1905) (broad scope allowed in proof of damages for mental suffering).

In order to recover in a slander action, however, a plaintiff must prove "special damages." This requires a plaintiff to prove specific economic harm. Shipe v. Schenk, 158 A.2d 910 (D.C. 1960) (phrases not slanderous per se do not support action if no special damages proven); Friedlander v. Rapley, 38 App. D.C. 208 (1912) (spoken accusation that theater patron failed to pay admission price not actionable without proof of special damages); Cain v. Chesapeake & Potomac Tel. Co., 3 App. D.C. 546 (1894) (phone operators telling callers that party refuses to answer his business phone not actionable without proof of special damages). As a practical matter, proving specific out-of-pocket damages caused by a slanderous remark is difficult, barring recovery in most instances. W. PROSSER, THE LAW OF TORTS 765 (4th ed. 1971).

There is an exception to the special damages requirement for slanderous statements imputing criminal conduct, infection with serious or contagious disease, unchastity on the part of a woman, or misconduct or inept handling of one's profession, trade, office, or business. Oral communications of this type, when false, are slanderous per se and no pecuniary loss need be proven in order for a plaintiff to maintain a successful action. Meyerson v. Hurlbut, 98 F.2d 232 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 610 (1938) (unethical trade practices—selling goods at below cost); Farnum v. Colbert, 293 A.2d 279 (D.C. 1972) (crime involving

to a third party,[2] and that the third party understood the defamatory meaning of that communication as it applied to the plaintiff.[3] A statement is defamatory if it tends to subject a person to public shame and ridicule, or if it tends to injure the plaintiff in his trade or profession or lower him in the estimation of his community.[4] Once a plaintiff has proven a prima

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moral turptitude—theft); Brice v. Curtis, 38 App. D.C. 304, 306 (1912) (citing Act of March 3, 1901, ch. 854, 31 Stat. 1189, 1323) (unchastity).

Much confusion (and conflict between jurisdictions) has resulted from courts making delineations between libel, libel *per quod*, slander, and slander per se. A defamation per se is a communication which has an obvious and plainly defamatory meaning. In contrast, a defamation *per quod* is a communication that does not have a clear, defamatory meaning on its face. Surrounding circumstances or extrinsic facts must be noted in order to impute a defamatory meaning to the statement.

The confusion and conflict has arisen because some jurisdictions have held, in derogation of the common law, that libel *per quod* should be treated the same as slander and subject to the special damages requirement. *See* Note, *Libel Per Se and Special Damages*, 13 VAND. L. REV. 730 (1960). *See generally* W. PROSSER, THE LAW OF TORTS 762-64 (4th ed. 1971). One rationale for the stricter standard may be that the courts which have adopted the proof of damages requirement have deemed libel *per quod* a somewhat less complete showing of defamation, thereby necessitating a greater burden of proof for recovery. *Id.* at 763. The majority of jurisdictions have not adopted the special damages requirement in actions involving libel *per quod*. Nonetheless, the inconsistent use of the terms per se and *per quod* has created uncertainty in many jurisdictions as to whether this new libel *per quod* standard has been adopted. For a series of articles on libel per quod, see Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); Eldredge, *Variation On Libel Per Quod*, 25 VAND. L. REV. 79 (1972).

In the District of Columbia, two opinions have implied that the libel *per quod* special damages requirement has been adopted into the law of the District *sub silentio*. Sullivan v. Meyer, 91 F.2d 301 (D.C. Cir. 1937) (newspaper article describing person's negative opinion towards anti-patriotic and pro-communist textbooks is not libel per se; demurrer thus upheld because no showing of special damages); Washington Times Co. v. Bonner, 86 F.2d 836, 844 (D.C. Cir. 1936) (no need for alleging or proving special damages when a published article is libelous per se because damage is presumed). *See also* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 848 (1960). However, the question as to District of Columbia law seems to be resolved in Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 659-60 (D.C. Cir. 1966) (en banc) (stating explicitly that proof of special damages is not required in a libel *per quod* action). The common law doctrine of requiring special damages only in slander cases thus appears to remain in force in the District of Columbia.

2. Washington Annapolis Hotel Co. v. Riddle, 171 F.2d 732, 737 (D.C. Cir. 1948) (must be communicated to someone other than person defamed); United Cigar Stores Co. v. Young, 36 App. D.C. 390 (1911) (burden upon plaintiff to prove publication).

3. *See* RESTATEMENT (SECOND) OF TORTS § 613 (1977); Riss & Co. v. Association of Am. R.Rs., 187 F. Supp. 323 (D.D.C. 1960), *rev'd on other grounds*, Association of W. Rys. v. Riss & Co., 299 F.2d 133, *cert. denied*, 370 U.S. 916 (1962) (when group defamed, plaintiff has to show sufficient identification of himself; size of class of persons defamed is factor to be considered); Harmon v. Liss, 116 A.2d 693 (D.C. 1955) (person need not be specifically named in communication in order to recover as long as person is identifiable).

4. Hearst Radio, Inc. v. Federal Communications Comm'n, 167 F.2d 225 (D.C. Cir. 1948) (libel); Smith v. District of Columbia, 399 A.2d 213 (D.C. 1979) (slander).

facie defamation, the defendant is liable to the plaintiff unless the defendant can show that, under the circumstances in which it was made, the communication was privileged.[5]

The defense of privilege is a result of society's desire to balance the interest of the person defamed in protecting his or her reputation against the interests of the communicant and the public in having the information communicated.[6] Courts have recognized that a privilege exists when, in the balance, the interest of communicating the information is judged more important than the preservation of the defamed person's reputation.[7]

Privileged communications are divided into two general classes: absolutely privileged communications, and qualified or conditionally privileged communications. Complete protection and immunity from liability in tort is afforded to a communicator when he or she is absolutely privileged, whereas communications which are covered by a qualified or conditional privilege provide protection to a communicator only in the absence of actual malice.[8]

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5. *See* Pinn v. Lawson, 72 F.2d 742, 744 (D.C. Cir. 1934) (per curiam) (burden of proof is on defendant to show privilege as affirmative defense); Brice v. Curtis, 38 App. D.C. 304, 307 (1912) (burden on defendant to show occasion of privilege).

Two other common law defenses besides privilege that generally are recognized are fair comment and truth. Fair comment is essentially a qualified privilege to defame in commenting on matters of public interest. Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 87 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981) (fair comment a qualified privilege to defame when object of defamation is not a public official); Washington Times Co. v. Bonner, 86 F.2d 836, 841-43 (D.C. Cir. 1936) (right of fair comment recognized). *See generally* Annot., 110 A.L.R. 412 (1937); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (fair comment broadened to permit communication of erroneous facts; fair comment raised to a constitutional privilege when the communication related to conduct of public officials in performing their duties). *See also infra* note 13 and accompanying text.

6. This balancing between interests has constitutional implications. The law of defamation may impose restrictions upon those who seek to exercise their right of free expression under the first amendment. Detailed discussion of such constitutional considerations, however, is beyond the scope of this Note.

7. Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1940) (general considerations of public policy and convenience require the according of privilege). *See generally* 53 C.J.S. *Libel and Slander* § 87 (1955 & Supp. 1983).

8. There are two meanings to the term "actual malice," for the purpose of defeating a qualified privilege. They depend on the status of the person defamed. If the plaintiff is a public official or public figure, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny define actual malice as knowledge of falsity of the statement or reckless disregard of whether the statement was true or false. *See* Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (defines requirement for actual malice for libel with regard to public officials); Annot., 20 A.L.R.3d 988 (1968). If the plaintiff is not a public official or public figure, then the common law definition of actual malice applies. In the District of Columbia, the common law definition of where a qualified privilege applies appears to be very similar to the *New York Times* definition for public figures. For example, in Ford Motor Credit Co. v. Holland, 367 A.2d 1311 (D.C. 1977), a case involving private

Courts recognize a qualified privilege in instances in which the dissemination of the information from one party to another or to the general public is an important interest, but when balanced against the important interest of protecting a defamed individual's reputation or livelihood, should be checked against the abusiveness of a defamatory communication made recklessly or intentionally. The qualified privilege is by definition a situational privilege. It has been invoked in situations in which statements have been made defending the legitimate interests of the communicator,[9] protecting the interests of third parties,[10] or carrying out a duty to inform another party when that duty arises out of a common interest.[11] The qualified privilege has been applied to communications between public officials or others having a public interest[12] and also in situations involving fair comment on issues of public interest.[13]

In some instances, however, the interests of society in assuring free and open communication are so compelling that courts will confer an absolute privilege or immunity from defamation liability. The risk in granting a license to injure or destroy reputations is adjudged less significant than the

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persons as plaintiffs, the court defined malice as "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." *Id.* at 1314 (quoting Dun & Bradstreet v. Robinson, 233 Ark. 168, 345 S.W. 2d 34 (1961)). *See also* Smith v. District of Columbia, 399 A.2d 213, 219 (D.C. 1979). This is contrasted with the private plaintiff standard in nonprivilege cases. In those instances, the District of Columbia has adopted the negligence standard set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See* Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 90 (1980).

9. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966) (statement made in protection of own interests including one's business is qualifiedly privileged); Thomas v. Howard, 168 A.2d 908 (D.C. 1961) (employer has qualified privilege to inquire into how employees were conducting employer's affairs).

10. Blake v. Trainer, 148 F.2d 10 (D.C. Cir. 1945) (statement held qualifiedly privileged when officer of union informed union of dereliction of duty of other officers); Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284 (D.C. 1977) (communications made by architect in defense of client held qualifiedly privileged); May Dept. Stores Co. v. Devercelli, 314 A.2d 767, 773 (D.C. 1973) (store detective's questions directed to suspect were protected by qualified privilege).

11. Roland v. d'Arazien, 685 F.2d 653 (D.C. Cir. 1982) (statement to fellow employee about conduct of worker in office was qualifiedly privileged); Greenya v. George Washington Univ., 512 F.2d 556, 563 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975) (statements by college faculty members discussing qualities of colleagues held qualifiedly privileged).

12. Sowder v. Nolan, 125 A.2d 52 (D.C. 1956) (letters written out of sense of social duty to police officials about an officer's misconduct protected by qualified privilege).

13. Safe Site, Inc. v. National Rifle Ass'n of Am., 253 F. Supp. 418 (D.D.C. 1966) (comment that gun accessory performed poorly constituted fair comment and was qualifiedly privileged); Fisher v. Washington Post Co., 212 A.2d 335 (D.C. 1965) (newspaper's comments on art gallery were qualifiedly privileged as a fair comment on a matter of public interest).

assurance of communication unrestrained by the chilling effect of a qualification.[14] Absolute privilege is afforded to ensure independence and lack of fear from those participating in the public's business within the context of judicial,[15] legislative,[16] executive,[17] and administrative[18] proceedings.

Over the years, courts have steadfastly limited expansion of the breadth of privileges, particularly the absolute privilege.[19] Judicial proceedings are an area of absolute privilege, however, that continue to provide fertile ground for expansion, particularly those that serve as an alternative to our conventional court system.

In regard to traditional judicial proceedings, the common law of the District of Columbia affords parties absolute privilege in statements preliminary to or in the course of a judicial proceeding so long as the defamatory matter has some relation to the proceeding.[20] The precise limits of absolute privilege attached to judicial proceedings are not clear. Courts in the District of Columbia have held that the standard to be applied in judging the relationship between the defamatory statement and the judicial proceeding is one broader than "legal relevance."[21]

In determining the requisite level of relevance, one case suggested that the relationship between the statement and the proceeding should be con-

14. *See* Comment, *Defamation, Privilege, and the Public Interest: A Study In Priorities*, 45 BROOKLYN L. REV. 131, 139 (1978) (author suggests *qualified* privilege may be impotent as a vehicle to encourage the communication of important information).

15. Owen v. Kronheim, 304 F.2d 957, 959 (D.C. Cir. 1962) (per curiam) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)) (remarks by judge in his official capacity absolutely privileged).

16. Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930) (citing U.S. Const. art. I, § 6) (speech in U.S. Senate chamber absolutely privileged); McGovern v. Martz, 182 F. Supp. 343 (D.D.C. 1960) (absolute privilege covered speeches within congressional chamber and official publication of congressional proceedings).

17. Brownfield v. Landon, 307 F.2d 389 (D.C. Cir.), *cert. denied*, 371 U.S. 924 (1962) (statements made by government officers in their official capacities absolutely privileged); Glass v. Ickes, 117 F.2d 273 (D.C. Cir.), *cert. denied*, 311 U.S. 718 (1940) (absolute privilege accorded government official for statements made in connection with general matters committed by law to his control or supervision).

18. Cassel v. Overholser, 169 F.2d 683 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 939 (1949) (superintendent of mental hospital had absolute privilege when responding to patient's writ of habeas corpus); Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937) (per curiam) (statements made in connection with transaction of federal government commission's business vested with executive and quasi-judicial powers absolutely privileged).

19. *See, e.g.*, L. ELDREDGE, THE LAW OF DEFAMATION § 75(e), at 413-14 (1978) (states sharply limit scope of absolute privilege applying to state officers or officials due to perceived lack of self-restraint among those whose appointments are largely political).

20. Brown v. Collins, 402 F.2d 209, 211-12 (D.C. Cir. 1968) (claim of absolute privilege denied to statements made by one party involved in contract dispute to opposing party regarding incompetence of opposing party's attorney).

21. *Id. See infra* note 24.

strued liberally, so that the privilege embraces any potentially pertinent statement.[22] All doubt, therefore, should be resolved in favor of the relevance of the statement.[23] Still another case vaguely stated that statements made in pleadings and affidavits are absolutely privileged if they have enough appearance of connection with the case for which they are filed that a reasonable man might think them relevant; nevertheless, they need not be relevant in any strict sense.[24] Faced with the absence of clear articulation concerning the boundaries of the absolute privilege in traditional judicial proceedings, it is somewhat instructive to note instances in which it has been recognized. Besides communications within the courtroom itself, absolute privilege has been expressly recognized by District of Columbia courts in regard to statements made in pleadings, complaints, motions and affidavits,[25] and the privilege has been granted to the litigants themselves, their counsel and judges.[26]

In recent times, our judicial system has struggled to bear the heavy case loads produced by our litigious society. In the last decade, for instance, the number of civil cases filed in federal district courts has risen by eighty-eight percent.[27] An effort to mold our judicial system to changing times has resulted in increased recognition of alternative tribunals as legitimate forums for dispute resolution.[28] With this recognition, courts have begun

22. Young v. Young, 18 F.2d 807, 809 (D.C. Cir. 1927) (information in pleading about husband's previous marriage and about former wife held relevant to determining present wife's divorce settlement).

23. *Id.*

24. Brown v. Shimabukuro, 118 F.2d 17, 18 (D.C. Cir. 1941) (statements in affidavit filed in support of codefendant's motion for rehearing, which charged plaintiff's father with blackmailing defendant through threat of court action, held absolutely privileged). "A reasonable man might think that the statements of the defendants regarding the plaintiff were relevant, for they had some appearance of connection with the . . . [issues of the case]." *Id.* at 18

25. Williams v. Williams, 169 F. Supp. 860 (D.D.C. 1958) (affidavit germane to court case and filed therein stating why minister was deposed may not serve as grounds for action in defamation); Harlow v. Carroll, 6 App. D.C. 128 (1895) (absolute privilege applies only if the matter contained in pleadings is relevant).

26. Mohler v. Houston, 356 A.2d 646 (D.C. 1976) (allegations made by wife's counsel in legal brief concerning husband's conduct during deterioration of marriage held relevant and absolutely privileged in connection with divorce proceeding). *See supra* note 15.

27. *Unclogging the Courts— Chief Justice Speaks Out*, U.S. NEWS & WORLD REP., Feb. 22, 1982, at 36, 39.

28. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 276-77 (1982). In his annual report on the state of the judiciary, Chief Justice Burger advocated arbitration as one alternative to litigation. *See generally* Trotter & Cooper, *State Trial Court Delay: Efforts at Reform*, 31 AM. U.L. REV. 213 (1982) (summary of different approaches to reducing court delays, including creation of alternative criminal and civil dispute resolution mechanisms, and discussion of changes in police charging practices, prosecutorial screening, plea negotiation policies, and state court structure and organization); Weller, Ruhnka & Martin, *The*

embracing alternative "quasi-judicial" tribunals, and are affording those forums status as judicial proceedings within the scope of absolute privilege.

In *Sturdivant v. Seaboard Service System, Ltd.*,[29] the District of Columbia Court of Appeals ruled that communications in the context of an arbitration proceeding are absolutely privileged from liability in a defamation action.[30] The court likened the arbitration forum to a judicial proceeding and afforded absolute privilege to a statement made by a witness during a labor grievance arbitration proceeding. This Note will analyze the broadening scope of absolute privilege and its possible effect on adjudication through arbitration in the District of Columbia. It will conclude that granting such absolute privilege is essential to ensure free and open communications in arbitration proceedings.

I. Extension of Absolute Privilege to Quasi-Judicial Proceedings

The dispute-solving mechanisms contained in collective bargaining agreements were the first alternatives to conventional court litigation to be included within the scope of absolute privilege.[31] In the seminal case of *General Motors Corp. v. Mendicki*,[32] the United States Court of Appeals for the Tenth Circuit reasoned that without an absolute privilege covering participants in a collective bargaining settlement process, the likelihood of peaceable resolution of conflicts between the parties would be greatly decreased.[33] Mendicki, who was employed by General Motors, was accused of converting company property to his own use and was subsequently discharged.[34] He filed a grievance with his union representative. At a meeting of union and company officials held for the purpose of settling the grievance, one General Motors representative made a sweeping accusation of Mendicki.[35] Mendicki's efforts to redress his grievance through union-

Rochester Answer to Court Backlogs, JUDGES J., Summer 1981, at 36 (outlining the use of compulsory civil arbitration).

29. 459 A.2d 1058 (D.C. 1983).

30. *Id.* at 1060.

31. *See generally* Annot., 60 A.L.R.3d 1041 (1974) (scope of privilege regarding communications made in the course of grievance or arbitration proceedings held pursuant to collective bargaining agreements).

32. 367 F.2d 66 (10th Cir. 1966).

33. *Id.* at 71.

34. *Id.* at 67. The company had an established policy that employees would be suspended for theft of company property.

35. *Id.* at 70. A personnel director for General Motors stated that he knew Mendicki had been taking company property for some time, but had not been able to prove it. The

company procedures failed.[36] He brought an action in slander in the United States District Court for the District of Kansas against General Motors for the accusatory statement made by its representative.[37] The court rendered judgment on a jury verdict in favor of Mendicki.[38]

On appeal to the Tenth Circuit, General Motors argued that the statements made during the union-company meeting were absolutely privileged.[39] The court agreed, and held that prompt settlements of labor grievances were in the public interest and that absolute privilege would preserve the quasi-judicial, dispute-resolving nature of labor contract proceedings.[40] The lack of such a privilege, the *Mendicki* court reasoned, would interfere with the national labor policy of prompt settlement of labor disputes.[41] Congressional intent, the court said, was "that full, frank, uninhibited, robust and wide-open debate between the representatives of the employer and employee in such conferences and bargaining sessions should be encouraged."[42]

Other courts that have broadened the absolute privilege placed less emphasis on the labor policy implications stressed by the Tenth Circuit in *Mendicki.* In *Neece v. Kantu*,[43] the New Mexico Court of Appeals rejected the contention that slanderous statements made by a company manager to an employee in the presence of fellow employees were an indispensable part of the grievance-settling procedure of a labor contract, and held that such statements were not absolutely privileged.[44] However, the court held that a written report of an investigatory hearing was absolutely privileged.[45]

A supervisor for Trans World Airlines, Inc. (TWA) allegedly observed David Neece, one of the company's airport employees, assisting two other men in taking some of TWA's beverage service supplies.[46] The supervisor reported the incident to the manager of operations. In the course of inves-

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conference was held pursuant to the collective bargaining agreement to adjust the grievance prior to moving to the next step—arbitration. *Id.* at 69-70.

36. *Id.*

37. *Id.* at 67.

38. *Id.*

39. *Id.* at 67, 71-72.

40. *Id.* at 71.

41. *Id.* at 70-71 (citing Linn v. United Plant Guard Workers of Am., 383 U.S. 53, 62 (1966)). *See* Comment, *The Availability of Defamation Remedies for Statements Made During the Course of Labor Grievance Arbitration Proceedings*, 15 U. KAN. L. REV. 553 (1967).

42. 367 F.2d at 71 (citing *Linn*, 383 U.S. at 62).

43. 84 N.M. 700, 507 P.2d 447 (Ct. App.), *cert. denied*, 84 N.M. 696, 507 P.2d 443 (1973).

44. 84 N.M. at 707, 507 P.2d at 454.

45. *Id.* at 706, 507 P.2d at 453.

46. *Id.* at 704, 507 P.2d at 451.

tigating, the manager interrogated Neece in the company parking lot in the presence of several of Neece's fellow employees, and then dismissed him.[47] Neece filed a grievance, upon which an investigatory hearing was held to determine its validity.[48] The presiding company official subsequently wrote a letter to Neece denying the grievance allegations and upholding his discharge.[49] Neece brought an action for slander in the District Court of Bernalillo County, New Mexico, for the remarks made by the manager during Neece's parking lot interrogation, and libel for the written statements contained in the company official's post-hearing letter.[50] The trial court granted summary judgment for the defendants, ruling that in both instances, the company officials were following procedures expressly provided for in the collective bargaining contract and were thus absolutely privileged in their communications.[51]

Neece appealed to the New Mexico Court of Appeals, which placed less emphasis on the collective bargaining contract rationale than the trial court had in finding absolute privilege.[52] It reversed the summary judgment on the slander count, reasoning that the statements made in the parking lot were merely part of one man's independent investigation, and as such, should not be absolutely privileged.[53] The court held, however, that the written hearing report was absolutely privileged.[54] Noting that the investigative proceeding was held before a hearing officer with both parties present, and that testimony and evidence were presented during the course of the proceeding, the court reasoned that the grievance procedure was merely an agreed-upon substitute for legal action and was quasi-judicial in nature.[55] Thus, the court held that the communications within the proceeding and the hearing officer's report of the proceeding were absolutely privileged from liability for defamation.[56]

Neece's recognition of proceedings as "quasi-judicial" substitutes for court action was significant. The impetus for according absolute privilege appears to have shifted from that of protecting labor policy and proce-

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 702, 507 P.2d at 449. Neece also included a count of wrongful discharge, which was dismissed by the trial court as having already been adjudicated through the procedures of the collective bargaining contract. *Id.* at 706-07, 507 P.2d at 454-55.
51. *Id.* at 703, 507 P.2d at 450.
52. *Id.* at 705-07, 507 P.2d at 452-54.
53. *Id.* at 707, 507 P.2d at 454.
54. *Id.* at 705, 507 P.2d at 452.
55. *Id.* at 706, 507 P.2d at 453.
56. *Id.* at 706, 507 P.2d at 453.

dures, to protecting persons making communications within dispute-settling tribunals from defamation liability. The court focused on whether the proceeding was "quasi-judicial," that is, whether it had the characteristics of a judicial proceeding.[57]

II. Absolute Privilege Extended to Quasi-Judicial Proceedings in the District of Columbia

Sturdivant v. Seaboard Service System, Ltd. arose as a suit in both libel and slander as a result of a written violation report on employee dishonesty and statements made during a subsequent arbitration hearing.[58] Wayne Sturdivant, a member of the United Food and Commercial Workers union, was a cashier at a Safeway grocery store.[59] Safeway had hired defendant Seaboard Service System, Ltd. (Seaboard) to conduct surveillance and security investigations and to provide Safeway with reports of employee dishonesty.[60] Seaboard deployed a three-person undercover investigative team to the store where Sturdivant worked. One investigator made a small purchase from Sturdivant. Rather than placing the money inside the cash register, Sturdivant allegedly placed it on the cash register ledge. He then failed to enter the purchase on the cash register.[61] Based upon the investigator's written report to Safeway, Sturdivant was suspended immediately and was later terminated for cause.[62]

The union filed a grievance on Sturdivant's behalf.[63] At a resulting pre-arbitration hearing conference and later during testimony at the arbitration hearing, the investigator described what she had observed during the incident.[64] Sturdivant brought a libel action against Seaboard for the writ-

57. A quasi-judicial proceeding has been described as any hearing which performs a judicial function, *ex parte* or otherwise, whether the proceeding is public or not, but which is not conducted by a state or federal court. W. Prosser, The Law of Torts, *supra* note 1, at 779-80. *See* Lambdin Funeral Serv. v. Griffith, 559 S.W.2d 791 (Tenn. 1978) (absolute privilege afforded to statements made during judicial proceeding of Tennessee Board of Funeral Directors and Embalmers). The American Law Institute recognized, in the final draft of the Restatement (Second) of Torts, that quasi-judicial proceedings may be covered by an absolute privilege by noting that an arbitration proceeding may be included within the ambit of absolute privilege in judicial proceedings. Restatement (Second) of Torts §§ 585 comment c, 586 comment d, 587 comment f, 588 comment d (1977).

58. 459 A.2d 1058 (D.C. 1983).

59. *Id.* at 1058-59.

60. *Id.* at 1059.

61. *Id.* The purchase did not appear on the cash register's record tape.

62. *Id.*

63. *Id.*

64. *Id.* The arbitrator denied the union's grievance and concluded that Sturdivant had taken the money for his own use.

ten violation report[65] combined with a slander action for the statements made at the prehearing conference and the formal arbitration hearing.[66] The trial court recognized the existence of an absolute privilege for the oral statements, and therefore granted summary judgment in favor of Seaboard.[67]

The District of Columbia Court of Appeals affirmed, rejecting Sturdivant's argument that the "hearing was less than 'judicial.' "[68] It held that an absolute privilege existed for statements made during an arbitration hearing.[69] Citing *Mendicki* and *Neece*, Judge Pryor reasoned that an absolute privilege would enable participants to state and support their positions without fear of a retributive defamation action.[70]

III. Breadth of the Court's Application of Absolute Privilege

While the *Sturdivant* court granted absolute privilege to statements made in connection with arbitration proceedings, its opinion contained no express language as to the boundaries of the privilege. It is not clear what statements might be considered to be within the frame of an arbitration proceeding, and thus protected, or even what type of proceedings are protected.

A. Which Arbitration Proceedings Are Protected

Mendicki extended absolute privilege to a grievance proceeding with

65. *Id.* at 1058. Sturdivant's count for libel concerning the written violation report was filed beyond the one year statute of limitations period and was disposed of by the trial court through summary judgment. *Id.* at n.1.

66. *Id.* at 1058.

67. *Id.* at 1059-60.

68. *Id.* at 1059. Sturdivant had argued that only a *qualified* privilege should be applied. A finding of qualified privilege would have possibly allowed the plaintiff to rebuke the privilege and prevail by demonstrating actual malice on the part of the investigator. Because the court found that an absolute privilege existed, the court determined that it need not reach the question of the existence of actual malice. *Id.* at 1060. *See supra* note 8.

69. 459 A.2d at 1060. The court noted that some jurisdictions favor a qualified rather than an absolute privilege, but it found the more reasoned view to be that an absolute privilege was applicable. *Id.* The court cited no jurisdictions that grant merely a qualified privilege to communicants in arbitration proceedings. For a listing of such jurisdictions, see Annot., 60 A.L.R.3d 1041, 1051-52 (1974).

70. 459 A.2d at 1060. The *Sturdivant* court cited Barnes v. Avis Rent A Car, 466 F. Supp. 907 (D.D.C. 1979), in which absolute immunity was afforded to the same statement made in both a trial and a subsequent union arbitration proceeding. The *Barnes* court relied on Brown v. Collins, 402 F.2d 209, 212 (D.C. Cir. 1928) (judicial proceeding) and Joftes v. Kaufman, 324 F. Supp 660, 664 (D.D.C. 1971) (union arbitration proceeding). The issue of granting absolute privilege to statements made during such proceedings was one of first impression for the District of Columbia Court of Appeals.

emphasis on the fact that the proceeding arose from a labor dispute.[71] *Neece* also involved labor grievance procedures arising from a collective bargaining contract.[72] Since *Sturdivant* also fits this fact pattern, the scope of the opinion arguably could be limited to a recognition of absolute privilege in arbitration proceedings involving labor disputes arising from a collective bargaining contract. Unlike *Mendicki* and *Neece*, however, *Sturdivant* made no mention of concern for labor policy or for protection of labor grievance procedures. Instead, the court adopted the broad "quasi-judicial proceeding" rationale announced in *Neece* by using the word "arbitration" in a general sense, thereby suggesting that the court's recognition of absolute privilege was not narrowly limited to the facts in *Sturdivant*.

The possibility that the court intended to extend absolute privilege to arbitration proceedings in general is further supported by the court's citing of the District of Columbia's new voluntary arbitration rules.[73] The rules, which have been in effect since 1982, give litigants the choice of a speedier and less expensive procedure than the traditional courtroom for resolving their civil disputes. This is accomplished through court-supervised, binding or non-binding arbitration proceedings.[74] The *Sturdivant* court was intent on preserving this dispute-settling alternative to the court system. It reasoned that the denial of an absolute privilege to witnesses, parties, arbitrators and counsel who participate in arbitration proceedings would "chill" the effect of the new rules.[75] The court noted that if parties in arbitration hearings were given less protection than those in purely judicial proceedings, there would be a built-in disincentive against using the arbitration system.[76] Since the rules permit voluntary arbitration of nearly all civil disputes,[77] *Sturdivant* implies that absolute privilege applies to all ar-

71. *See supra* notes 39-42 and accompanying text.

72. *See supra* notes 43-56 and accompanying text.

73. 459 A.2d at 1060 (citing SUPER. CT. R. CIV. ARB.). *See* 110 Daily Wash. L. Rep. at 109 (Jan. 19, 1982).

74. SUPER. CT. R. CIV. ARB. 1-11. *See generally* Note, *Voluntary Arbitration Program*, 31 CATH. U.L. REV. 865 (1982).

75. 459 A.2d at 1060.

76. *Id.*

77. The new Superior Court Arbitration Rules provide that any civil action, with the exception of small claims and landlord and tenant actions, and cases involving claims for equitable or declaratory relief, may be settled through the arbitration program. SUPER. CT. R. CIV. ARB. 1. Parties agreeing to arbitration have the opportunity to have all aspects of their dispute heard and decided by a randomly-chosen attorney-arbitrator who is knowledgeable in the particular subject matter of the suit and who has completed a court-approved arbitration training program. SUPER. CT. R. CIV. ARB. 4-6. The arbitrator has full power to issue subpoenas, decide all motions and discovery disputes, swear witnesses, and otherwise handle the action as if a superior court trial judge were hearing the matter.

bitration proceedings, not merely those involving labor disputes or collectively bargained contracts.

While the court did not clarify what types of dispute-settling proceedings fall within the ambit of arbitration, it would seem that only proceedings with orderly, quasi-judicial decisional processes should be accorded absolute immunity from the threat of defamation liability. Many of the traditional safeguards of justice associated with quasi-judicial proceedings, such as the right to an impartial decision maker, the right of both sides to be heard, and the right to refute documents and testimony, allow the potential damage of a defamatory statement to be mitigated.[78] In less formal dispute-settling proceedings without these provisions, such as informal negotiating sessions, the formal opportunity to refute defamatory statements may be limited, and the license to injure or destroy reputations that an absolute privilege may afford should not be granted.

B. Scope of Protection

Sturdivant is not clear as to what communications may be considered protected. The court maintained that the protection of absolute immunity from defamation liability has been afforded to statements made "pursuant" to an arbitration proceeding.[79] The opinion indicates that statements of witnesses, parties, arbitrators and counsel who participate in these proceedings are absolutely privileged.[80] What remains uncertain, however, is whether ancillary communications and proceedings are to be afforded absolute privilege. *Sturdivant* involved a statement made at a prehearing conference that was later repeated during the actual hearing.[81] The court has thus held that statements made at a pre-arbitration hearing conference, one form of ancillary proceeding, were absolutely privileged.

The question remains open as to what communications in connection with arbitration proceedings are afforded the privilege. For example, tele-

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SUPER. CT. R. CIV. ARB. 6. *See* Note, *Voluntary Arbitration Program*, 31 CATH. U.L. REV. 865, 866-67 (1982).

78. *See* Jenson v. Olson, 273 Minn. 390, 392-93, 141 N.W.2d 488, 490 (1965) (some attributes of a quasi-judicial proceeding include issuing of subpoenas, administering of oaths, requiring that charges be in writing, and providing an opportunity to be heard). In the most formal of arbitration proceedings, in which the arbitrator has all or nearly all the powers of a traditional trial court, the reasons for absolute privilege are exceptionally compelling. When an arbitrator has the power to compel testimony, through the powers of subpoena and recommendation for citation for contempt, witnesses in a proceeding must be given absolute privilege to prevent possible civil liability in defamation as a consequence of obeying an arbitrator's directions.

79. 459 A.2d at 1060.

80. *Id.*

81. *Id.* at 1059.

phone calls or conferences between opposing parties and counsel for the purpose of reaching some settlement prior to the arbitration hearing appear to be worthy of absolute privilege. The risk of damage to reputation as a result of private communication between the parties is limited. Further, whatever damage might be inflicted could be mitigated by the injured party exercising his or her right to be heard in the subsequent arbitration hearing.

It may be surmised that ancillary communications relating to a bona fide issue of the dispute which further the judicial integrity of the proceeding would seem to fit within the framework and rationale for granting absolute privilege in *Sturdivant*. As in the case of traditional court proceedings, the test would seem to be whether there is reasonable relevance to the determination of the dispute.[82] Communications that are reasonably relevant to the proceedings would seem to parallel the traditional court test and fall within the purview of absolute privilege.

IV. Conclusion

The *Sturdivant* court granted absolute privilege to a statement made by a witness during a grievance arbitration hearing. The court's step was a necessary one in ensuring that such proceedings are not hindered by hesitation and concern over subsequent liability for defamation. In an arbitration proceeding, as in the courtroom, it is best to fully ventilate all possibly relevant information, allowing the impartial decision maker, with help from the opposing party's refutations, to separate important information from that which is superfluous.

The District of Columbia Court of Appeals' extension of absolute privilege to arbitration proceedings is a welcomed attempt by the court to make arbitration more judicial in nature, and thus a closer substitute for the relief people seek through the courts. The court is undoubtedly hoping that arbitration, including the District of Columbia Superior Court's new voluntary arbitration program, will serve as a relief valve for the heavy case load burdening the District of Columbia courts.

William J. Andrle, Jr.

82. *See supra* notes 21-24 and accompanying text.