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DePaul Law Review

Volume 17
Issue 1 *Fall 1967*

Article 12

Torts - Defamation and the Privileged Speech Hierarchy - How Low Can You Go

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electronic eavesdrop evidence within the purview of the fourth amendment, physical trespass or no, so that it must satisfy rigidly applied fourth amendment standards as to its origin or be excluded at both federal and state trials. Further, permissive eavesdrop legislation seems now to face virtual "presumptive invalidity" so that the burden is upon the legislature, propounding it to embody full fourth amendment safeguards, Justice Black's *Berger* dissent notwithstanding: "From the deficiencies the Court finds in the New York statute, it seems that the Court would be compelled to strike down a state statute which merely tracked verbatim the language of the Fourth Amendment itself."[90]

William Hurst

expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions."

[90] *Supra* note 63, at 1897. *But cf.* Ker v. California, 374 U.S. 23, 34 (1963), Justice Clark: "The states are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

TORTS—DEFAMATION AND THE PRIVILEGED SPEECH HIERARCHY—HOW LOW CAN YOU GO

The president of Queens College, acting under the authorization and approval of the chairman of the New York City Board of Higher Education, issued a public statement in answer to charges of anti-Catholic discrimination in the promotional policies of the College. The statement was intended and understood to refer to the plaintiffs, two associate professors at Queens College. In a libel action brought by these professors alleging that they were defamed by the statement, the New York Court of Appeals affirmed the appellate division of the supreme court and held that the public expression of the position of the Board was an appropriate exercise of discretion and was absolutely privileged. Consequently, any teachers allegedly defamed by the public statement were not entitled to recover. *Lombardo v. Stoke*, 18 N.Y.2d 394, 222 N.E.2d 721 (1966).

The significance of the decision lies in the extension of the doctrine of absolute privilege to defame to members of a public school board. Although a number of courts have granted such an official a qualified privilege,[1] never, in the absence of a statute, has a court given a school board member absolute

[1] Branaman v. Hinkle, 137 Ind. 496, 37 N.E. 546 (1894); Ebaught v. Miller, 127 Kan. 464, 274 P. 251 (1929); Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910); Hett v. Ploetz, 20 Wis. 2d 55, 121 N.W.2d 270 (1963).

immunity from a civil suit. The distinction between granting an absolute privilege rather than a qualified privilege is that the former provides immunity regardless of the purpose or motive of the defendants, or the reasonableness of his conduct, while the latter is conditioned on absence of malice and is forfeited if it is abused.[2] In view of this extension, the purpose of this note is to trace the development and rationale of the doctrine of absolute privilege as applied by the state and federal courts to public school officials and other government executives, and to discuss a possible alternative to the privilege to defame.

The underlying principle upon which the doctrine of privileged communication rests is public policy.[3] Thus it has been held that on a balancing of interests, democratic government is best served when public officials may speak freely on questions of public concern, even if thereby some individual be wrongly calumniated.[4] Consequently, because the public's right to know must take precedence over the individual's right to defend his reputation in court, an absolute privilege is extended to public officials when they speak on matters of public concern, in the exercise of, and within the scope of, their duties. The defense is lost, however, if the alleged defamatory statements are made by an official when not acting within the scope of his official duties,[5] or if the publication of the defamatory material is totally unwarranted.[6] Although the courts have applied similar reasoning in granting a privilege in the opposite situation, as when an individual criticizes a public official, the privilege granted is only qualified, and the question of malice remains paramount.[7] But in neither case is the threat of a damage suit permitted to inhibit or curtail the freedom of expression of either the citizen or the public servant.[8]

The basis for the *Lombardo* holding is found in an earlier New York decision, *Sheridan v. Crisona*,[9] wherein the Borough President of Queens County made a report to the Mayor of New York City concerning the incompetence of a city appraiser. The report was later released to the press, whereupon the appraiser sued for libel. The court held that any statement by a public official which is "made in the course of the performance of some

[2] PROSSER, TORTS 795-96 (3rd ed. 1964).

[3] NEWELL, SLANDER AND LIBEL, 380 (4th ed. 1924).

[4] Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (2d Dept. 1964) *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620 (1965).

[5] James v. Powell, 14 N.Y.2d 881, 200 N.E.2d 772 (1964).

[6] Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166 (1959).

[7] New York Times, Co. v. Sullivan, 376 U.S. 254, 282 (1964).

[8] *Id.*

[9] 14 N.Y.2d 108, 198 N.E.2d 359 (1964).

function connected with [his] office" is absolutely privileged,[10] regardless of whether the publication was motivated by malice or that the matter so published was false and defamatory.[11]

A case with a similar set of facts occurring in another state would likely result in a different decision because of a strong conflict among the various state courts in determining at what level in the executive hierarchy an absolute privilege should be granted. Although the states have accorded absolute immunity to statements of their highest officers, a summary of the cases show that the majority of states have refused to extend the doctrine to lower echelon officers,[12] and some earlier decisions have specifically denied it to public school officials.[13] However, all states grant public officials a qualified privilege.[14]

There have been only two relatively recent state court decisions directly involving absolute privilege as applied to school officials, and opposite results were reached. The Wisconsin Supreme Court refused to extend the doctrine to school board members, stating that an absolute privilege is only granted to officeholders of high level positions.[15] However, in Oklahoma, where statutes provide that a privileged communication is one made in the "proper discharge of an official duty,"[16] the supreme court held that when the president of the Colored Agricultural and Normal University reported to the Board of Regents about the immoral activities of an employee of the school, he was clothed with absolute immunity, as he was operating in the "proper discharge of an official duty."[17]

In Illinois, although there have been no supreme court decisions, the appellate court has extended the privilege considerably. Beginning by denying it to a county superintendent,[18] the privilege was firmly declared in *Donner*

[10] *Id.* at 113, 198 N.E.2d at 361.

[11] *Id.* at 114, 198 N.E.2d at 362.

[12] Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954); Bonham v. Dotson, 216 Ky. 660, 288 S.W. 297 (1926); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Howland v. Flood, 160 Mass. 509, 36 N.E. 482 (1894); Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693 (1955); *contra,* Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957); DeBolt v. McBrien, 96 Neb. 237, 147 N.W. 462 (1914); Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961); Montgomery v. Philadelphia, 392 Pa. 178, 140 A.2d 100 (1958).

[13] Kenney v. Gurley, 208 Ala. 623, 95 So. 34 (1923); Henry v. Moberly, 6 Ind. App. 490, 33 N.E. 981 (1892); Barton v. Rogers, 21 Idaho 609, 123 P. 478 (1912); Tanner v. Stevenson, *supra* note 1; Samuelson v. Vinyard, 120 Ore. 197, 251 P. 719 (1926).

[14] *Supra* note 7.

[15] Ranous v. Hughes, 30 Wis. 2d 452, 141 N.W.2d 251 (1966).

[16] OKLA. STAT. ANN. tit. 12, § 1443 (1961).

[17] Sanford v. Howard, 185 Okla. 660, 95 P.2d 644 (1939). The same result was reached when the president of the University of Oklahoma commented upon the fitness of one of its librarians, Hughes v. Bizzell, 189 Okla. 472, 117 P.2d 763 (1941).

[18] Rausch v. Anderson, 75 Ill. App. 526 (1898).

v. Francis,[19] where a civil service employee at a government hospital sued his superior for allegedly defamatory remarks made against him. The court said:

> All communications, either verbal or written, passing between public officers pertaining to their duties and in the conduct of public business are of necessity absolutely privileged and such matters cannot be made the basis of recovery in a suit of law.[20]

Thus the position in Illinois is that if the acts complained of are made by a person in the exercise of his lawful authority and duty, he cannot be held responsible for such acts in a civil suit regardless of how erroneous the act may have been and however injurious in consequence it may have proved to the plaintiff.[21] But despite this extension, the class of occasions where publication of defamatory matter is absolutely privileged necessarily remains narrow since the communication complained of in *Donner* was between public officials. Therefore, for all practical purposes, the absolute privilege is limited to legislative and judicial proceedings and to acts of state, including communications made in discharge of a duty under express authority of law.[22]

The federal courts have never applied the doctrine of absolute privilege directly to public school officials, but they have demonstrated a very strong tendency to give an absolute privilege to many officials of even lower rank. Beginning with the landmark case of *Spalding v. Villas*,[23] the Supreme Court held that the official conduct of the Attorney General of the United States could not be the subject of a civil suit, because to do so would cripple the proper and effective administration of public affairs as entrusted to the executive branch of government.[24] Once spawned by this decision, the doctrine was carefully nurtured by a long series of lower federal court decisions and was extended to the Chairman of the United States Tariff Commission,[25] various members in the Comptroller General's office,[26] the Secretary of the Interior,[27] members of a local draft board,[28] and immigration officers.[29]

[19] 255 Ill. App. 409 (1930).

[20] *Id.* at 412.

[21] *Id.*

[22] Larson v. Doner 32 Ill. App. 2d 471, 473, 178 N.E.2d 399, 400 (1961); Cook v. East Shore Newspapers, Inc. 327 Ill. App. 559, 64 N.E.2d 751 (1946).

[23] 161 U.S. 483 (1896).

[24] *Id.* at 498.

[25] Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937).

[26] Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938).

[27] Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940).

[28] Gibson v. Reynolds, 172 F.2d 95 (8th Cir. 1949).

[29] Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950).

Another decisive Supreme Court case is that of *Barr v. Matteo*.[30] A scandal had developed in the Federal Office of Rent Stabilization, and when the acting director of the agency was sued for implying in a press release that the plaintiffs were responsible for the misdeeds, the Court applied the rule that the acts of employees of the federal government falling within the "outer perimeter of their line of duty" are absolutely privileged.[31] The public policy argument for the recognition of the privilege was again clearly enunciated when the Court said:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[32]

Furthermore, the Court held that the existence of the privilege was not dependent on the form of the statement involved—*i.e.*, a letter, speech, or a press release, but rather upon whether the statement was issued within the scope of the official's duty.[33] The rules stated in *Barr v. Matteo* have enjoyed consistent and wide following in the lower federal courts, and can be said to be well settled.[34]

In summary, the history of the case law relating to the doctrine of absolute privilege reveals the interesting situation of the federal courts applying it firmly and clearly, with the state courts remaining openly divided. Thus the conflict between the public's interest in information and its interest in protecting individuals from unwarranted attack by government officials remains an unsolved problem, although it has inspired suggested solutions from a number of leading authorities.[35]

Of these proposals, the best solution to the problem lies in the state assuming liability. Here the government accepts the liability of the officer, and

[30] 360 U.S. 564 (1959).

[31] Although the court has never expressly defined the term, it appears to include any function remotely related to the officer's official duty. S & S Logging Co. v. Barker, 366 F.2d 617 (9th Cir. 1966); Keiser v. Hartman, 339 F.2d 597 (3d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964); Wozencraft v. Captiva, 314 F.2d 288 (5th Cir. 1963).

[32] Barr v. Matteo, 360 U.S. 564, 571 (1959).

[33] *Id.* at 574-75.

[34] *Supra* note 31.

[35] Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1162-64 (1962); Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 232-34 (1956); Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 347-48 (1959); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960).

the individual has a remedy without subjecting the official to the inhibitory fear of personal responsibility. Certainly it is only right that the government bear the ultimate burden of injuries which result from the pursuit of a public interest. Restraint of irresponsible official conduct can then be achieved by administrative discipline. While the Federal Tort Claims Act has moved in this direction by including a broad waiver of sovereign immunity in tort,[36] it still expressly excepts certain "intentional" torts, including defamation.[37] The state legislatures, reluctant to waive sovereign immunity have done virtually nothing to improve the situation.[38] So long as government refuses to face up to its responsibility, the courts must continue to resolve the problem, and the result may not be very promising to the one innocently defamed.

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[36] 28 U.S.C. § 2674 (1958).

[37] 28 U.S.C. § 2680(h) (1958).

[38] *See generally* Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.L. REV. 1363 (1954).

TORTS—GOVERNMENTAL IMMUNITY—SPECIAL PROCEDURAL REQUIREMENTS UNCONSTITUTIONAL

Plaintiff slipped and fell upon the floor of a school building. Within a few days her son contacted a member of the school board and advised him that a claim for injuries would be brought before the board of education. Shortly thereafter an investigating agent of the defendant school district contacted plaintiff and obtained the information required by the notice provisions of Illinois Revised Statutes chapter 122, section 823. Relying upon statements by this agent that he would again contact the plaintiff relative to the claim, the plaintiff failed to secure counsel or give timely notice. Subsequently, a complaint by the plaintiff alleging negligence on the part of the school district in the composition and care of the floor was dismissed upon motion by the defendant in accord with Illinois Revised Statutes chapter 122, section 824, which gives the school district a right to bar an action if the plaintiff fails to file written notice within six months of the time of injury. Plaintiff successfully appealed, challenging the constitutionality of the notice provisions, which were alleged to be in violation of article IV, section 22 of the Illinois State Constitution prohibiting special legislation. *Lorton v. Brown County Community Unit School Dist. No. 1*, 35 Ill. 2d 362, 220 N.E.2d 161 (1966).

The present case is one of several decisions handed down by the Illinois Supreme Court in their attempt to up-date the out-moded rules concerning