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Defamation - Conditional Privilege in Louisiana (Part Two)

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Comments

DEFAMATION—CONDITIONAL PRIVILEGE IN LOUISIANA

PART TWO†

Fair Comment and Public Interest

Two rather similar privileges, accorded perhaps more by the tradition and heritage of the American people than any other factor, are those of "fair comment" and "protection of public

† This is the second of two installments on this subject. Included are the privilege of fair comment, the privilege to defame for the protection of the public, a topic entitled freedom of the press, together with the topic of abuse of the conditional privilege to defame. The first installment contained the privileges to defame for self protection, for common interest, for the protection of a third party, and for the protection of the recipient.

interest." Many situations may arise in the law of defamation where either or both of these privileges might be advantageously employed. Although founded on entirely separate and distinct bases, each one of these privileges claims for its primary purpose the ready informing of an ignorant public of any and all fraudulent practices being carried on in governmental bodies of the nation, any vice or corruption which may be found lurking in any of the public projects being currently carried out, or of suspicious or unethical actions on the part of any public officer, any candidate for public office, or any other person upon whom a versatile public eye has been cast. In general, these privileges embrace any affair of general public concern.

The privilege of fair comment, the right to express one's opinion concerning public affairs, affords a rather broad immunity to one who would make his views public. The right, however, extends only to comments upon facts which are true.[23] A false assertion of fact will not be excused under this privilege, regardless of good faith on the part of the publisher. While it is considered by the courts that the benefits gained by allowing freedom of expression in situations of this sort outweigh any damage which may be caused by the communication, yet they have refused to go so far as to say that one who bases his disparaging commentary on a fact which is untrue shall not be liable, regardless of the intrusion he thereby makes upon the equally important right of every man to live and maintain his reputation free from unwarranted suspicion.

In *Cadro v. Plaquemines Gazette*,[24] the court held that although a newspaper or other public journal has the right to comment fairly, even to criticize severely, the actions of any public officer while acting in official capacity, that that comment or criticism must be based upon true facts. In the case of *Naihaus v. Louisiana Weekly Publishing Company*,[25] the defendant newspaper had published defamatory statements concerning plaintiff's dealings with his customers. The court held that this publi-

23. Levert v. Daily States Pub. Co., 123 La. 594, 49 So. 206 (1909); Smith v. Lyons, 142 La. 975, 77 So. 896 (1917); Cadro v. Plaquemines Gazette, 202 La. 1, 11 So.(2d) 10 (1942).

24. 202 La. 1, 11 So.(2d) 10 (1942).

25. 176 La. 240, 145 So. 527 (1932). However, it would appear that this case may have been wrongfully decided. Careful examination of the case discloses no substantial misstatement of fact. Rather, the defamatory statements would seem to be merely an exaggerated comment based upon true facts. This case was, perhaps, decided more with a distinct social policy in view than under the technical laws of defamation.

cation was not privileged as a fair comment, since defendant was unable to prove the truth of his allegations.

The courts have repeatedly recognized the theory that when a man places himself before the public as a candidate for public office, or is elected to public office, or assumes any other position of general interest to the public, he also places his every word or action before the community as a proper subject for fair comment and criticism. The leading Louisiana case on this subject is *Flannagan v. Nicholson Publishing Company*.[26] The plaintiff, a national officer of a labor union, was in Washington at a time when New Orleans was bidding against San Francisco for the Pan American Exposition. Although a resident of New Orleans, plaintiff used his influence in favor of San Francisco. Defendant, a New Orleans newspaper, published an article in which plaintiff was severely criticised for his action, and in which he was impliedly accused of having accepted a bribe from the Southern Pacific Railway Company. The court held the statement to be privileged, saying that when a person takes an active part in a campaign in which public opinion is sought to be molded, he automatically becomes subject to attack and ridicule as a public character who is taking part in a matter of general public interest. The rule of law, as stated by the court, is one which has received universal recognition; however, it seems that plaintiff should have been allowed to recover for the charges of bribery which were made against him. It has since been held that when an attack is made upon the character or motives of a public officer, the truth of the statement must be shown in order to relieve the publisher of liability.[27]

In a very strong minority of jurisdictions, the privilege of defaming another in the public interest is differentiated from the privilege of fair comment. These courts maintain that defamation in the public interest is privileged regardless of the truth or falsity of the statements, whereas the privilege of fair comment extends only to comment or criticism based upon facts which are true.[28] Most writers believe this view to be the better one. The Louisiana courts, however, are in accord with the majority rule in holding that the privilege of public discussion is limited to comment or opinion, and does not extend to false assertion

26. 137 La. 588, 68 So. 964 (1915).
27. Hall v. Ewing, 140 La. 907, 74 So. 190 (1917).
28. Prosser, A Handbook of the Law of Torts (1941) 839-841. See cases cited in 110 A.L.R. 412 (1937).

of fact.[29] The reason usually given is that men in public life are not to be subjected to such attacks without redress, lest desirable candidates be thereby deterred from seeking public office. Most of the common law states are retreating gradually from this position.

Discharge of a Public Duty

According to Louisiana law, apparently the only situation connected with public interest where the privilege extends to false assertion of fact is where a public official defames another while in discharge of a public duty. Legislators, special appointees in legislative investigations, judges, and witnesses in judicial proceedings are, of course, protected by this privilege.

However, the Louisiana rule concerning statements made in judicial proceedings differs from that of the common law, which grants, in such cases, an absolute privilege. There was a conflict in the earlier Louisiana cases on this point—some courts holding to the doctrine of absolute privilege, while others admitted the existence of only a qualified privilege. The court in *Lescale v. Joseph Schwartz Company,*[30] after reviewing the earlier decisions, laid down what apparently is the presently prevailing rule by saying that such allegations are not privileged unless they are founded on probable cause. This case has been subsequently followed by the Louisiana courts.[31]

The legislative privilege in Louisiana seems to be about equal in strength and extent to the privilege granted to witnesses and jurors in judicial proceedings. In the case of *Meteye v. Times Democrat Publishing Company,*[32] the court held that a physician employed by the town council was not liable for a false statement made in discharge of the duty which had been delegated to him by the investigating committee. The court explained the privilege of officials of a municipal corporation to defame others before a meeting of the town council as being analogous to that granted to a United States congressman or a state legislator. A city council has been invested with subordinate legislative functions, and its members are conditionally immune from liability for what is said by them pertinent to any official investigation which is being made, or project which is

29. Otero v. Ewing, 162 La. 453, 110 So. 648 (1926); Otero v. Ewing, 165 La. 398, 115 So. 633 (1927). See also cases cited supra note 1.
30. 116 La. 293, 40 So. 708 (1905).
31. Robinson Mercantile Co. v. Freeman, 172 So. 797 (La. App. 1937).
32. 47 La. Ann. 824, 17 So. 314 (1895).

being carried out. It would seem that while legislators are *almost* absolutely privileged, yet the privilege is not so strong as to withstand malice, excessive publication, or impertinency on the part of the publisher.

Freedom of the Press

The newspaper has been given rather extensive privileges in the reporting of both legislative and judicial proceedings. Reports of legislative bodies are held privileged regardless of the size or importance of the body. These proceedings are of the utmost interest to the public, and their contents should be made public. Newspapers have been held privileged to report proceedings before congressional committees,[33] town councils,[34] New Orleans City council,[35] and investigating committees,[36] as well as reports of public meetings.[37] The privilege to report judicial proceedings in Louisiana is relatively broad. While the privilege does not include private investigations, it certainly is not confined strictly to reports of proceedings in open court; in fact, it has been held to extend to all quasi-judicial bodies whose proceedings are likely to be of substantial interest or importance to the public. In the most extreme case found, *Rabb v. Trevelyan*,[38] it was held that defendant newspaper was privileged to report proceedings before judges of the races who were investigating certain actions of book makers. The court justified its position by stating that the matter of fraudulent racing is one in which the public has a great interest, and that the information ought, therefore, to be made public. It has been held, however, that a report of an insurance adjuster does not come within this privilege. The court did not regard that field as being of sufficient concern to the public to warrant a wide publication of its proceedings.[39]

Once it is determined that the proceeding in question is of a judicial character, there remains the inquiry as to whether the defamatory remark was made within the course of the proceedings. The test here appears to be whether the communication was made in the presence of the judicial officer during the pendency of the hearing. In one case, in which one attorney had

33. Terry v. Fellows, 21 La. Ann. 375 (1869).
34. Wallis v. Bazet, 34 La. Ann. 131 (1882).
35. Meteye v. Times Democrat Pub. Co., 47 La. Ann. 824, 17 So. 314 (1895).
36. Terry v. Fellows, 21 La. Ann. 375 (1869).
37. Meteye v. Times Democrat Pub. Co., 47 La. Ann. 824, 17 So. 314 (1895).
38. 122 La. 174, 47 So. 455 (1908).
39. Cooke v. O'Malley, 109 La. 382, 33 So. 377 (1902).

accused another of unethical conduct, the court held that defendant newspaper was not privileged to report the statement, since it was not made in the presence of a judge during process of trial.[40]

These reports must be accurately and impartially printed. Any discrepancy between the report and the actual proceedings may render the publisher liable for damages. This is true in a situation where the publisher deviates from the report of the actual proceeding, and expresses an opinion or makes implications which are obviously designed to sway public opinion one way or another. However, if a defamatory statement made in the course of the proceeding be incorrect, that fact alone will not make the publisher liable.[41] Nor will slight inaccuracies in headlines defeat the privilege—especially when the text of the article fully explains such headlines.[42]

The rule in this state in regard to reports of police proceedings seems to be the same as that of the majority of common law states. A newspaper may report the fact that a person has been arrested, but it has no right to go beyond this and assume the guilt of the person charged.[43] A newspaper is not privileged to print reports made by detectives to their superiors which do not come within the privilege of judicial proceedings.[44] Such reports are no more privileged than would be the report of a private individual.

Abuse of Privilege

Thus far, we have endeavored to ascertain the extent of the conditional privilege in Louisiana. What is the purpose and effect of the privilege in a defamation action? When a plaintiff is able to show that a statement which is damaging to his character or business reputation has been published by the defendant, he thereby establishes a prima facie cause of action. No malice on the part of defendant need be expressly shown, since the courts have always found the "implication" of malice in the publication of the defamatory statement itself.[45] Defendant,

40. Viosca v. Landfried, 140 La. 609, 73 So. 698 (1916).
41. Lenninger v. New Orleans Item Pub Co., 156 La. 1044, 101 So. 411 (1924).
42. Cooke v. O'Malley, 109 La. 382, 33 So. 377 (1902).
43. Tresca v. Maddox, 11 La. Ann. 206 (1856).
44. Billett v. Times Democrat Pub. Co., 107 La. 751, 32 So. 17 (1902).
45. Miller v. Holstein, 16 La. 389 (1880); Spotorno v. Fournichon, 40 La. Ann. 423, 4 So. 71 (1888); Fellman v. Dreyfous, 47 La. Ann. 907, 17 So. 422 (1895).

although admitting that the statement is defamatory in nature, may then raise the defense of privilege. It is only at this point that malice becomes important in the law of defamation. When defendant has established the existence of his privilege, the burden falls back to plaintiff to bring in further evidence, if he can, which will show that defendant, although he had the privilege, in the first place, to make the communication, yet has exceeded his right by some improper motive or action. If plaintiff does not succeed in showing malice, then the court must find for the defendant. If malice sufficient to defeat the privilege is shown, then a verdict must be rendered in favor of plaintiff.

Since a good proportion of defamation cases turn upon this point—whether or not a privilege has been exceeded—the question of what constitutes malice becomes of major importance to one who seeks to understand the nature of the action.

Malice is, in effect, a showing that defendant made the statement for some purpose other than that which the privilege was designed to protect. Plaintiff may be able to do this in any one of several different ways. He may succeed in proving that the defendant made use of language more abusive than was warranted by the occasion, or that he was protecting an interest so trivial as to be of no importance in comparison with the damage caused to plaintiff. He may attempt to prove that defendant exhibited a lack of social discretion in making the statement at that particular time and under those particular circumstances, or he may show that the statement made would be of no particular value in the protection of the interest. An establishment of any one of these five situations should defeat the privilege.

In Louisiana, in most of the cases in which the privilege has been held to have been exceeded, the excess has consisted of the use of unnecessarily abusive language. In *Cass v. New Orleans Times*,[46] defendant had reiterated in an article published in its newspaper charges made against plaintiff in an affidavit which was made before the justice of the peace. The court held that the privilege had been defeated, since defendant had, in the course of the article, abused the occasion by asserting that the charges were actually true. In *Bernstein v. Commercial National Bank*[47] the privilege of common interest was held defeated for the same reason, the court finding that the defendant acted in "bad faith" in making the statement. Another case in which the

46. 27 La. Ann 214 (1875).
47. 161 La. 38, 108, So. 117 (1926).

language was held unnecessarily abusive was *Tresca v. Maddox*,[48] in which defendant called the plaintiff in a newspaper article "as mild a man as ever scuttled a ship or cut a throat." The court also held that the defendant's subsequent retraction of the statement should be considered only in mitigation of damages. In another case,[49] the court allowed recovery upon a general showing of personal enmity between the parties involved. The language used, however, was extreme, charging plaintiff with being of "an ungovernable temper, feeble minded, and unfit to teach." That accusation, coupled with the factor of previous ill feeling between the two parties, was enough to justify the court's position.

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THE EFFECT OF DISCHARGES IN BANKRUPTCY ON TORTS JUDGMENTS WITH RESPECT TO KEEPING OF ANIMALS

Section 17(a) of the National Bankruptcy Act provides, "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, *except* such as . . . (2) are liabilities . . . for wilful and malicious injuries to person or property of another. . . ."[1]

Undoubtedly the purpose and intention of Congress in enacting this measure was to allow the honest debtor to clean the slate of his financial burden. But an exception was provided so that the intentional tortfeasor would be unable to escape liability through the expediency of a discharge in bankruptcy. This exception is quite applicable, and certainly appropriate, to cases involving intentional wrongs or when the defendant's conduct is grossly shocking to moral sensibilities. However, in those cases where the rule of absolute liability obtains, a person may be held in

48. 11 La. Ann. 206 (1856).
49. Sims v. Clark, 194 So. 123 (La. App. 1940).
* A substantial part of the research work which led to the preparation of this comment was done by Mr. Rosenthal as a research project in the Torts course at Louisiana State University. Mr. Rosenthal served as a member of the armed forces and has been missing in action since December 13, 1944.
1. 52 Stat. 851, 11 U.S.C.A. § 35 (Supp. 1944).