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Torts—Libel—Absolute Privilege of Municipal Officials

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have been adopted. Nevertheless, it represents a major improvment over the strict doctrine of contributory negligence.

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TORTS—LIBEL—ABSOLUTE PRIVILEGE OF MUNICIPAL OFFICIALS

Plaintiffs, two teachers at Queens College, had repeatedly charged they were denied promotion because of religious discrimination. The President of Queens College, defendant Stoke, with the approval of the New York City Board of Higher Education, issued a press release denying anti-Catholic discrimination at the college and attributing plaintiffs' inability to obtain promotions to their lack of suitable qualifications for advancement. Plaintiffs sued for libel alleging they were defamed by the press release. Defendants' motion for summary judgment based on absolute privilege was denied by the trial court. The appellate division reversed the ruling on the motion and dismissed the case. The New York Court of Appeals, one judge dissenting, *held*, the New York City Board of Higher Education is an important agency of municipal government with substantial duties and responsibilities affecting a large number of people, and issuance of the press release was a proper exercise of discretion because of the widespread publicity which the charges of bias at Queens College had received. Therefore the Board and President Stoke were entitled to invoke absolute privilege as a complete bar to the suit. Lombardo v. Stoke, 18 N.Y.2d 394, 222 N.E.2d 721, 276 N.Y.S.2d 97 (1966).

The law of defamation recognizes truth and privilege as its two principal defenses. The establishment of either acts as a complete bar to a suit for libel.[1] The defense of privilege is further divisible into absolute privilege[2] and qualified privilege.[3] If an individual's statements are absolutely privileged, he is protected from liability for defamation even though his statements were made maliciously.[4] By contrast, if a person possesses only a qualified privilege, the immunity can be defeated by proof that his statements contain an element of malice.[5] Proof of actual malice requires the plaintiff to show personal spite or ill will, or culpable recklessness or negligence on the part of defendant.[6] The doctrine of absolute privilege was first extended by constitutional mandate and judicial decision to the legislative[7] and judicial[8] branches of government. Executive immunity developed

1. *See generally* W. Prosser, Torts § 109, at 795 (3d ed. 1964).
2. *See, e.g.*, Spalding v. Vilas, 161 U.S. 483 (1896).
3. Ashcroft v. Hammond, 197 N.Y. 488, 90 N.E. 1117 (1910).
4. *See* 1 Fowler Harper & Fleming James Jr., Torts § 5.21, at 420 (1956).
5. For the distinction between absolute privilege and qualified privilege in defamation *see id.*
6. Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56, 61, 163 N.E.2d 333, 336, 194 N.Y.S.2d 509, 513 (1959).
7. U.S. Const. art. I, § 6; for a discussion of absolute privilege in defamation suits concerning the legislative branch *see* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131 (1910).

later and was based on the same general policy considerations as those invoked for legislative and judicial absolute privilege.[9]

The origin of absolute privilege for governmental executives was a United States Supreme Court decision which held that a cabinet officer acting within the scope of his duty was absolutely privileged in issuing allegedly defamatory statements.[10] Mr. Justice Harlan enunciated the policy reasons underlying the Court's decision:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.[11]

The subsequent extension of executive immunity to heads of bureaus and divisions of executive departments[12] was based on the theory that cabinet officers must delegate a portion of their work to subordinates,[13] and therefore the restriction of absolute privilege to cabinet rank officials only was too limited. A later development extended absolute privilege to a press release of an internal communication made by a cabinet ranking official.[14] Further broading of the doctrine occurred when the Court of Appeals for the District of Columbia held that a press release issued directly to the public by a cabinet official was absolutely privileged.[15] The test of executive immunity was "whether the executive was within his official preprogative or duty in issuing"[16] the press release.

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8. Bradly v. Fisher, 80 U.S. (13 Wall.) 335 (1871); for a discussion of absolute privilege in defamation suits concerning the judicial branch *see* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463 (1909).

9. Spalding v. Vilas, 161 U.S. 483, 498 (1896).

10. *Id.* The defendant, Postmaster General, was held absolutely privileged in informing the plaintiff's clients by letter that the plaintiff was attempting to defraud them. Congress had enacted legislation through which certain postmasters were entitled to have their compensation reviewed and readjusted. Plaintiff claimed he had worked for such legislation and he had prior to the enactment represented a number of claimants in their demand for a salary adjustment. After passage of the act, defendant sent checks to the claimants enclosed in a letter which stated that Congress intended all the proceeds of such salary adjustment go directly to the claimants and therefore no attorney's services were needed to obtain the money. Plaintiff claimed that this communication induced the claimants to repudiate their contracts with him and that it injured his name and reputation.

11. *Id.* at 498.

12. De Arnaud v. Ainsworth, 24 App. D.C. 167 (1904) (A report concerning an application for a medal of honor made by the chief of the record and pension office of the War Department to the Secretary of War, pursuant to department regulations which plaintiff alleged charged him with fraud.)

13. *Id.* at 180.

14. Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927) (A letter from the Secretary of the Treasury to the President was released to the press by the Secretary to counteract adverse criticism of his department which plaintiff alleged defamed him.)

15. Glass v. Ickes, 117 F.2d 273 (1940) (The Secretary of the Interior issued a press release stating that the plaintiff, Glass, had been barred from practicing before the Department and warning oil operators to be wary of contributing money to finance Glass's one-man lobby.)

16. *Id.* at 278.

The Supreme Court in *Barr v. Matteo*[17] was confronted with a case of defamation in which the defense of absolute privilege was raised by a governmental executive. The majority of the Court approved the prior federal court's extensions of the doctrine of absolute privilege for executives below cabinet rank,[18] and indeed, expanded the doctrine in its own decision. The defendant in *Matteo* was the Acting Director of the Office of Rent Stabilization. Both he and the agency had come under bitter Congressional attack for an agency personnel practice allowing some agency employees to convert their annual leave into cash. To defend himself and the agency, the defendant issued the allegedly defamatory press release explaining the circumstances of the controversial policy and his role, as well as plaintiffs', in the matter. The Supreme Court, in a five-four decision, held that since the defendant was Acting Director of an important agency of government and the press release was within the outer limits of his duties, it was therefore absolutely privileged. The fact that wide-spread publicity was given to charges against the agency was cited by the Court as a further justification for the press release, as was the fact that press releases were standard agency procedure.[19] The Court in *Matteo* stated there was a direct relationship between the availability of the defense of absolute privilege and the range of the responsibilities and duties entrusted to the official.[20]

New York courts have recognized the existence of absolute privilege for state executives, but initially the doctrine was restricted to official reports and communications by or to the executive head of a department of government.[21] The "fearless, efficient administration of state government" has been and is the justification invoked for this rule of executive immunity based on absolute privilege.[22] A restrictive application of absolute privilege had been employed in New York[23] until the Supreme Court's decision in *Matteo*.[24]

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17. 360 U.S. 564 (1959).

18. *Id.* at 572. "We do not think that the principle announced in *Vilas* can be properly restricted to executive officers of cabinet rank, and in fact it never has been so restricted by lower federal courts."

19. *Id.* at 574.

20. *Id.* at 573.

21. Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893) (Defendant was superintendent of a state school for deaf mutes; he allegedly defamed plaintiff, an employee of the school by reporting to the executive committee that plaintiff had sent an obscene letter to his wife. The court held that the defendant was only entitled to a qualified privilege because the courts had refused to extend absolute privilege to subordinate governmental officials.)

22. *Id.* at 523, 34 N.E. at 344.

23. The courts refused absolute privilege in the following cases: Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893) (superintendent of a state school); Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341 (1918) (statement of attorney in an application for a pardon); Hyman v. Press Publ. Co., 199 App. Div. 609, 192 N.Y.S. 47 (1st Dept 1922) (newspaper printed a list of deserters on request of the War Department); Roberts v. Pratt, 174 Misc. 585, 21 N.Y.S.2d 545 (Sup. Ct. 1940).

24. Recently New York courts have been much more willing to grant absolute privilege. Duffy v. Kipers, 26 A.D.2d 127, 271 N.Y.S.2d 338 (4th Dept. 1966) (town supervisor); Kurat v. County of Nassau, 47 Misc. 2d 783, 264 N.Y.S.2d 126 (Sup. Ct. 1965) (Commissioner of Accounts' report to the County Executive); Thompson v. Union Free School District No. 1 of Huntington, 45 Misc. 2d 916, 258 N.Y.S.2d 307 (Sup. Ct. 1965) (school district).

The Court of Appeals delineated the scope of absolute privilege when it was denied to a State Commissioner of Conservation who had made allegedly defamatory statements in the course of an after-dinner speech.[25] The court based its refusal to grant absolute privilege on the fact that defendant's statements were made outside the scope of his duty. In addition, the court noted that the defendant had "ready, effective, orderly and legal means of dealing"[26] with the plaintiff, which he apparently neglected in favor of making statements to an audience which could do nothing about the situation.

Sheridan v. Crisona extended absolute privilege to certain municipal executives.[27] The defendant, a New York City Borough President, sent a report to the mayor concerning the city's condemnation of certain real property. The report was later released to the press. The plaintiff alleged that he was defamed by the report and sued for libel. The court held that a borough president was an important official of municipal government because of the substantial responsibilities entrusted to him in administering the public affairs of more than a million people,[28] and that he had acted within the scope of his duty in submitting the report to the mayor and subsequently releasing it to the public.[29] He therefore was entitled to invoke the defense of absolute privilege. The court noted that the same general considerations of public policy from which state and federal executive immunity arises also applies to certain municipal executives.

In the instant case the New York Court of Appeals concluded that its decision in *Crisona* was authority for holding the defendants' issuance of this press release absolutely privileged.[30] The court decided, without explanation, that the members of the Board were within the group of governmental executives entitled to immunity.[31] The court noted that the press release was a valid exercise of the Board's discretionary powers, especially in a time when great emphasis is being placed on eliminating prejudice and bias in education. The public's right to know the merits of the charges leveled at the administration of Queens College was relied on heavily in the court's decision, and the court stated that the defendants were justified in commenting on the origin as well as the truth of the accusations.[32] The court employed the rationale of *Matteo* as an alternative test and found the defendants entitled to absolute privilege.

The court recognized the fact that its decision deprives the individual plaintiffs of their right to defend their reputations in court, but the majority concluded that the public interest in free communication concerning governmental activities must take precedence in this situation.[33]

25. Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166, 186 N.Y.S.2d 606 (1959).
26. *Id.* at 593, 159 N.E.2d at 171, 186 N.Y.S.2d at 612.
27. 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964).
28. *Id.* at 112, 198 N.E.2d at 361, 249 N.Y.S.2d at 163-164.
29. *Id.* at 113, 198 N.E.2d at 361, 249 N.Y.S.2d at 164.
30. Lombardo v. Stoke, 18 N.Y.2d 394, 399, 222 N.E.2d at 723, 276 N.Y.S.2d 97, 100.
31. *Id.* at 400, 222 N.E.2d at 724, 276 N.Y.S.2d at 101.
32. *Id.*, 222 N.E.2d at 724, 276 N.Y.S.2d at 101-102.
33. *Id.*, 222 N.E.2d at 724, 276 N.Y.S.2d at 102.

Judge Scilippi, dissenting, stated that the New York City Board of Higher Education had a qualified privilege to issue the statement, but not an absolute privilege. He suggested that *Crisona* was easily distinguishable on two grounds:[34] the Board is not a principal[35] agency of municipal government, and the relationship of the statement to the official duties and responsibilities of the executive charged is quite different in the two cases.[36] Judge Scileppi also argued that *Matteo* was cited in *Crisona* merely to add weight to the argument for extending absolute privilege to a high municipal executive.[37] *Matteo*, however, does not accurately depict the law in New York State, and its use was not intended to extend absolute privilege in this state as far as it has been in the federal courts.

The court's reliance on *Crisona* as authority for holding that defendants were absolutely privileged to issue the press release[38] seems misplaced. The decision in *Crisona* established immunity from defamation suits for certain municipal executives.[39] *Crisona* recognized a two-fold requirement for applying the absolute privilege doctrine: whether the office was privileged, and if so, whether the statement involved was within the scope of the official's duty. The nature of the office and the duties which the executive must perform were the criteria employed to ascertain whether the executive was entitled to absolute privilege. Considering the language of Judge Scileppi's opinion in *Crisona*,[40] it may be inferred that the court considered a borough president a principal executive of municipal government. This reading of *Crisona* is further substantiated by Judge Scileppi's dissenting opinion in the instant case, where he makes it quite clear that in writing the *Crisona* opinion, he was restricting absolute privilege to *principal* executives of municipal government[41] and not merely to *any important* executive of city government. It is submitted that under the criteria used in *Crisona*, the New York City Board of Higher Education should not qualify for absolute privilege. A borough president is the highest executive

34. Judge Scileppi wrote the majority opinion in the *Crisona* case.

35. Judge Scileppi noted that *Crisona* only extended absolute privilege to principal executives of municipal government although, in fact, his opinion written for the majority in that case nowhere mentions principal executives in so many words. Instant case at 402, 276 N.Y.S.2d at 103.

36. The defendant in *Crisona* submitted a report to the mayor which was intended to influence governmental action. He subsequently released the report to the press pursuant to the city charter which permitted the public to inspect such documents. It is submitted that the defendants in the instant case issued the press release directly to the public without any view to influencing future governmental action.

37. Instant case at 403, 222 N.E.2d at 726, 276 N.Y.S.2d at 104.

38. Id. at 399, 222 N.E.2d 723, 276 N.Y.S.2d at 100.

39. Sheridan v. Crisona, 14 N.Y.2d 108, 112, 198 N.E.2d 359, 361, 249 N.Y.S.2d 161, 163 (1964). The court stated that "the same general considerations of public policy, which demand absolute privilege for what is said or written . . ." by state executive officials applies to certain municipal executives.

40. *Id.* at 112, 198 N.E.2d at 361, 249 N.Y.S.2d at 163. "Borough President who is charged with substantial responsibilities, not only in administering the public affairs of more than a million people (see New York City Charter, 81-83, 196, as in effect in 1958) but also in performing quasi-legislative functions as a member of the Board of Estimate . . ."

41. Instant case at 402, 222 N.E.2d at 725, 276 N.Y.S.2d at 103.

official in a borough, directly responsible to the mayor for the administration of government within his borough. His responsibilities and duties include the whole range of municipal government. It is possible to analogize his position in the borough with that of the President in relation to the federal government, the Governor in relation to New York State and the Mayor in relation to New York City. A borough president is a policy-making official with wide discretionary powers.

The Board of Higher Education of New York City is certainly an important agency of municipal government, but its duties are restricted solely to one facet of the administrative scheme. While it may have weighty responsibilities within this single area, nevertheless its scope of power is narrow and confined. The Board's policies directly affect a large number of persons, yet these individuals are all within a restricted group consisting of those who teach or are students in a municipal institution of higher learning. Hence, under the criterion announced in *Crisona*, the Board of Higher Education should not be considered an agency which qualifies for absolute privilege.

The court in the instant case held that the press release was within the scope of defendants' duties. This communication is quite different from that in *Crisona*, where the allegedly defamatory statement was made in an internal governmental report to defendant's superior. This was later released to the press pursuant to the city charter, which allowed public access to such documents. Also, in *Crisona* the original report was issued to the mayor to affect governmental action. In the instant case, the court was confronted by a press release which was not intended to affect governmental action, but was issued merely for informational purposes. The public's right to know whether discrimination was being practiced justified the Board's issuance of the press release according to the court. While it is clear that free communication between government and governed in such situations is warranted and in fact essential, it does not necessarily follow that this press release was within the defendants' line of duty. In addition, the statement not only emphatically disclaimed discrimination, but also commented on the professional abilities of those who had made the charges. This served no educational goals and was not essential to quiet public concern over the charges of prejudice. It is difficult to ascertain how such action could be considered within even the outer scope of the duties of the Board of Education. The court's conclusion that the statement was a valid exercise of defendants' power does not seem warranted simply because the press release involved some educational policies.

The *Matteo* case was cited as persuasive authority by the court in the instant case. While the federal approach to the doctrine of executive absolute privilege has not been adopted in New York, *Crisona* suggests that New York is approaching[42] the federal rule. The instant case might easily be interpreted as

42. It is submitted that the extension in *Crisona* of absolute privilege to municipal executives broadens the application of executive immunity in New York, thereby making it similar to the federal development.

an adoption of the federal line of thinking, because it extends absolute privilege to comparatively minor officials. But reliance on the *Matteo* case appears ill-advised due to the great difference in the scope and power of the federal government as compared with that of municipal government.

In addition, as Mr. Chief Justice Warren pointed out in a dissenting opinion in *Matteo*, the majority did not set clear guidelines as to who will be privileged, and therefore governmental officials still cannot predict whether their statements will be absolutely privileged.[43] He also noted that in *Matteo* the majority established a presumption that the challenged action is within the scope of the officer's duty, thereby shifting the burden of proof to the plaintiff. The instant case is susceptible to both of these criticisms. The Chief Justice's most telling criticism of *Matteo*, which is particularly applicable to the instant case, is that the wrong interests were balanced by the majority.

> This is not a case where the only interest is in plaintiff's obtaining redress of a wrong. The public interest in limiting libel suits against officers in order that the public might be adequately informed is paralleled by another interest of equal importance: that of preserving the opportunity to criticize the administration of our Government and the action of its officials without being subjected to unfair—and absolutely privileged—retorts. If it is important to permit government officials absolute freedom to say anything they wish in the name of public information, it is at least as important to preserve and foster public discussion concerning our Government and its operation.[44]

Finally, the doctrine of executive absolute privilege stands on policy reasons[45] which have never been tested and proven. It is impossible to determine whether governmental efficiency would be impaired if only a qualified privilege were granted.[46]

While absolute privilege may be justified in relation to some high ranking state and federal executives, its application to municipal executives is totally unwarranted. Government today is progressing further and further away from sovereign immunity, yet absolute privilege runs completely counter to this trend.

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43. Barr v. Matteo, 360 U.S. 564, 578 (1958).
44. *Id.* at 584-585.
45. *See* text accompanying *supra* note 8.
46. *See* Mr. Justice Brennan's dissent in Barr v. Matteo, 360 U.S. 564, 589-590 (1958).