Michigan Law Review

Volume 58 | Issue 2

1959

Torts - Libel and Slander - Absolute Privilege for Press Release of Lower Federal Officer

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TORTS—LIBEL AND SLANDER—ABSOLUTE PRIVILEGE FOR PRESS RELEASE OF LOWER FEDERAL OFFICER—Respondents, former employees of the Office of Rent Stabilization, brought a libel action against petitioner, the acting director of the office. The alleged libel was contained in a press release issued by petitioner in which he announced his intention to suspend respondents because of acts for which the office had been severely criticized by the Senate and press. The district court instructed the jury to find for plaintiffs if the release was defamatory. On appeal from judgment for plaintiff, the Court of Appeals for the District of Columbia affirmed.[1] On certiorari, the United States Supreme Court remanded for consideration of the question of qualified privilege.[2] The court of appeals then held that defendant was qualifiedly privileged but remanded to the trial court jury on the question of malice.[3] On certiorari to the United States Supreme Court, *held,* reversed, four justices dissenting.[4] Petitioner was protected by an absolute privilege in issuing the press release, which was within the scope of his official duties. *Barr v. Matteo,* 360 U.S. 564 (1959).[5]

Absolute privilege is a complete defense to defamation regardless of whether the alleged defamer is actuated by malice.[6] This defense is made available as a matter of policy to certain government officials in the belief that it is in the public interest that such officials should be free from harassment and fear of law suits while performing their official functions.[7] The defense is not available for acts of these same officials done outside the performance of official functions.[8] Historically it was applied to the legislative and judicial branches of the state and national governments and to military and naval officers carrying out their military duties.[9] In the

1 244 F. (2d) 767 (1957).

2 355 U.S. 171 (1957).

3 256 F. (2d) 890 (1958).

4 Chief Justice Warren dissented in an opinion joined by Justice Douglas. Justice Stewart and Justice Brennan each dissented separately. Justice Black concurred in a separate opinion.

5 In the companion case of Howard v. Lyons, 360 U.S. 593 (1959), decided the same day, the Court ruled that a commander of a naval shipyard was absolutely privileged in sending a letter to his state's delegation to Congress explaining his action in revoking representation of a certain labor organization in his shipyard. The Court based its reasoning on the principal case. See 360 U.S. 593 at 597.

6 3 TORTS RESTATEMENT §582 (1938); PROSSER, TORTS, 2d ed., 629 (1955); 1 HARPER AND JAMES, TORTS §5.21 (1956). On the other hand, qualified privilege protects the author only as long as he acts in good faith without malice. See 3 TORTS RESTATEMENT §599 (1938).

7 ODGERS, LIBEL AND SLANDER, 6th ed., 187 (1929), quoted in 1 HARPER AND JAMES, TORTS 420, 429 (1956). See Bradley v. Fisher, 13 Wall. (80 U.S.) 335 (1871); Spalding v. Vilas, 161 U.S. 483 (1896).

8 See, e.g., Colpoys v. Gates, (D.C. Cir. 1941) 118 F. (2d) 16; National Disabled Soldiers' League v. Haan, (D.C. Cir. 1925) 4 F. (2d) 436; Nalle v. Oyster, 230 U.S. 165 (1913). See also Murray v. Brancato, 290 N.Y. 52, 48 N.E. (2d) 257 (1943).

9 On the privilege of legislative officials, see U.S. CONST., Art. I, §6; Kilbourn v. Thompson, 103 U.S. 168 (1880); Tenney v. Brandhove, 341 U.S. 367 (1951). See, generally, 3 TORTS RESTATEMENT §590 (1938). On the privilege of the judiciary, see Bradley v. Fisher, note 7 supra; Cooper v. O'Connor, (D.C. Cir. 1938) 99 F. (2d) 135; Yaselli v. Goff,

monumental case of *Spalding v. Vilas*[10] the Court extended absolute privilege to the executive branch of the federal government in order to protect the Postmaster General in a libel action arising out of letters mailed to active and retired postmasters explaining a new statute. The Court felt the same policy considerations applied with respect to executive heads of departments as to the legislature and judiciary.[11] If the rule of *Spalding* was intended only for the protection of policy-making heads of departments and Cabinet members,[12] this limitation was short-lived, for lower federal courts and probably the majority of state courts have since applied it to various inferior executive officers.[13] Extension of the availability of the defense has made even more difficult the task of determining the scope of official authority in the exercise of which a given government officer should be absolutely privileged. The cases indicate that statements made in official reports to superiors will be privileged so long as the statement is at all relevant to the report.[14] Also, communications made by officers to persons other than those receiving official reports but to whom an obligation or duty exists to communicate, by virtue of the officer's position and the person's special interest in receiving such communication, are absolutely privi-

(2d Cir. 1926) 12 F. (2d) 396, affd. per curiam 275 U.S. 503 (1927). See, generally, PROSSER, TORTS, 2d ed., §95 (1955). With regard to the privilege of military and naval officers, see Dawkins v. Lord Paulet, [1869] 5 Q.B. 94; Miles v. McGrath, (D.C. Md. 1933) 4 F. Supp. 603. But see Maurice v. Worden, 54 Md. 233 (1880); 3 TORTS RESTATEMENT §591, comment *d*, caveat, where the ALI takes no position on "military and naval officers of the States or Nation who perform important governmental functions."

[10] 161 U.S. 483 (1896).

[11] Spalding v. Vilas, note 7 supra, at 498. The Court approved the English rule and cited the leading English decisions.

[12] See 3 TORTS RESTATEMENT §591, comment *d* (1938); Veeder, "Absolute Immunity in Defamation: Legislative and Executive Proceedings," 10 COL. L. REV. 131 at 141 (1910).

[13] DeArnaud v. Ainsworth, 24 App. D.C. 167 (1904) (colonel in army); Newbury v. Love, (D.C. Cir. 1957) 242 F. (2d) 372 (federal personnel officer); Taylor v. Glotfelty, (6th Cir. 1952) 201 F. (2d) 51 (psychiatrist at federal prison); Papagianakis v. The Samos, (4th Cir. 1950) 186 F. (2d) 257 (immigration officials); Harwood v. McMurtry, (W.D. Ky. 1938) 22 F. Supp. 572 (internal revenue agent); Smith v. O'Brien, (D.C. Cir. 1937) 88 F. (2d) 769 (chairman of federal tariff commission); U.S. to Use of Parravicino v. Brunswick, (D.C. Cir. 1934) 69 F. (2d) 383 (Consul); Brown v. Rudolph, (D.C. Cir. 1928) 25 F. (2d) 540 (District of Columbia commissioners); Yaselli v. Goff, note 9 supra (assistant attorney general); Farr v. Valentine, 38 App. D.C. 413 (1912) (Commissioner of Indian Affairs). But see Nalle v. Oyster, note 8 supra; National Disabled Soldiers' League v. Haan, note 8 supra. Supporting state court decisions are Matson v. Margiotti, 371 Pa. 188, 88 A. (2d) 892 (1952); Catron v. Jasper, 303 Ky. 598, 198 S.W. (2d) 322 (1946); Powers v. Vaughn, 312 Mich. 297, 20 N.W. (2d) 196 (1945); Bigelow v. Brumley, 138 Ohio 574, 37 N.E. (2d) 584 (1941); Layne v. Kirby, 208 Cal. 694, 284 P. 441 (1930). *Contra:* Barry v. McCollum, 81 Conn. 293, 70 A. 1035 (1908); In re Investigating Comm., 16 R.I. 751, 11 A. 429 (1887).

[14] DeArnaud v. Ainsworth, note 13 supra; Taylor v. Glotfelty, note 13 supra; U.S. to Use of Parravicino v. Brunswick, note 13 supra; Farr v. Valentine, note 13 supra. Courts have varied in their opinions as to how relevant the statement must be to the report, some requiring only a remote connection between the two. See, generally, comment, 20 UNIV. CHI. L. REV. 677 (1953); note, 51 MICH. L. REV. 457 (1953).

leged.[15] A third type of communication for which a few federal officers have received protection is the press release.[16] The principal case, in addition to being the first word from the Supreme Court on executive absolute privilege since *Spalding*, is the first time an executive official other than a cabinet member has been accorded this privilege in issuing a press release.[17] While the according of absolute privilege to press releases issued by the heads of executive departments perhaps can be justified because of the policy-making character of their duties and their direct responsibility to the President,[18] it is difficult to see why more than a qualified privilege[19] is needed in the case of lesser officials.[20] Since privileges of this nature rest on the demands of public policy, a balancing of interests is necessarily involved.[21] The interests to be balanced are, first, the interest of the private individual in maintaining his reputation and, second, the public interest in having government officials carry out their functions without fear of lawsuits.[22] Even if this balancing requires the complete subordination of the private interest through the use of absolute privilege where official reports are involved, the balance is not the same in the case of press releases.[23] The danger of injury to individual reputations in applying absolute privilege to internal and special government communications is minimized by the fact that the person authorized to receive it is likely to have sufficient knowledge of the matter to be able to judge its truth and reasonableness for himself. On the other hand, the press release reaches a large segment of the public which may be unfamiliar with the situation and is, therefore,

15 Smith v. O'Brien, note 13 supra; Newbury v. Love, note 13 supra; Howard v. Lyons, note 5 supra, companion to the principal case, is of this type. See, generally, 132 A.L.R. 1340 (1941).

16 Mellon v. Brewer, (D.C. Cir. 1927) 18 F. (2d) 168 (Secretary of Treasury's letter to President released to press); Glass v. Ickes, (D.C. Cir. 1940) 117 F. (2d) 273 (Secretary of Interior's statements to press about former government lawyer). See also Grant v. Secretary of State for India, [1877] 2 C.P.D. 445; Matson v. Margiotti, note 13 supra. But see Colpoys v. Gates, note 8 supra (U.S. marshal refused absolute privilege); Murray v. Brancato, note 8 supra (judge's opinion not protected by absolute privilege when voluntarily submitted for publication).

17 See Colpoys v. Gates, note 8 supra; Mellon v. Brewer, note 16 supra; Glass v. Ickes, note 16 supra. But see Matson v. Margiotti, note 13 supra, where a press release of a communication from the state attorney general to a district attorney was treated as absolutely privileged despite the fact the press release occurred prior to delivery of the actual communication.

18 See Spalding v. Vilas, note 7 supra; Mellon v. Brewer, note 16 supra; Glass v. Ickes, note 16 supra. See also the opinion of Chief Justice Warren, joined by Justice Douglas, dissenting in the principal case at 578.

19 See note 6 supra.

20 See Colpoys v. Gates, note 8 supra; dissenting opinion of Justice Brennan, principal case at 586. See also 1 HARPER AND JAMES, TORTS 420, 429 (1956).

21 See PROSSER, TORTS, 2d ed., 607 (1955).

22 Principal case at 571-572. But see the dissenting opinion of Chief Justice Warren, principal case at 578, where at 584 he states that the Court balanced the wrong interests and that the Court should have considered the public interest in criticizing government without the fear of a libelous retort.

23 See, generally, comment, 20 UNIV. CHI. L. REV. 677 (1953); note, 51 MICH. L. REV. 457 (1953).

in a poor position to judge the truth or falsity of the statements it contains. Second, the larger circulation of press releases means a greater probability of damage to individual reputation and greater actual damage to reputation when defamation occurs.[24] Third, it is doubtful that press releases are as necessary to or promote the functioning of the government to the same extent as the other two types of communications.[25] Finally, press releases provide a far more effective means by which the unscrupulous self-seeking official can effectuate his purpose than either of the other two means.[26] In light of these considerations, the private individual should be protected at least to the extent he can show malice and lack of good faith on the part of the offender. It thus appears that the Court in the principal case has extended the doctrine of absolute privilege beyond the demands of the policy it purports to effectuate.

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[24] Reputation of the individual is the interest protected in the law of defamation. See ODGERS, LIBEL AND SLANDER, 6th ed., 187 (1929); 1 HARPER AND JAMES, TORTS 429 (1956).

[25] Many of the press releases are copies of other types of intergovernmental communications which are protected in the first instance by absolute privilege anyway. See, e.g., Mellon v. Brewer, note 16 supra; Matson v. Margiotti, note 13 supra; Murray v. Brancato, note 8 supra.

[26] The fact situations in many of these cases suggest motives other than the furtherance of the public interest in the issuance of the release. See comment, 20 UNIV. CHI. L. REV. 677 (1953). See also the dissenting opinion of Justice Stewart, principal case at 592. See, generally, 1 HARPER AND JAMES, TORTS 429 (1956). In view of our ever expanding government agencies it would seem increasingly dangerous to make liberal use of an absolute privilege for press releases issued by lower federal officers.