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The Privilege Barring Civil Liability for Libel in Pleadings

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THE PRIVILEGE BARRING CIVIL LIABILITY FOR LIBEL IN PLEADINGS

Libel is the publication in writing of unfounded statements or charges which expose a person to hatred, distrust, contempt, ridicule or obliquy, or tend to cause such person to be avoided, or have a tendency to injure his social or business standing, and which have as their natural and proximate consequences injury to such social or business standing, so that malice and legal injury may be presumed or implied from the mere fact of publication.[1]

The inclusion of libelous matter in pleadings and in court records has long been an effective method of publishing a libel. It has been said that there are:

> "... several occasions, on which words may be spoken or written, that destroy the implication of malice, which would otherwise arise from the words themselves. Among these privileged occasions is a proceeding in due course of law."[2]

It is evident that there must be some compromise between the conflicting interests involved in such a situation. On the one hand we have the party whose reputation is injured. He has the right to be free from attack or slurs upon his reputation. The other party also has an interest to protect, either a cause of action to be satisfied or a right to defend against unfounded claims. In addition, the public has an interest in seeing that justice is done and that those who seek recourse in judicial proceedings or attempt to defend therein are not hindered in the exercise of their right. The truth is the great objective in judicial proceedings; its realization is controlled by the rules of evidence and should not be hampered by any other restrictive rules. Unless the parties are free to enforce or defend their rights in judicial proceedings without the fear of undue reprisal, free recourse to the bar of justice will be lessened.

To impose liability for libel used in judicial proceedings would unduly restrict a free search for the truth. To allow its free use would be an unwarranted license to injure the personal rights of others. Between these two points some rule must be invoked which gives consideration to the interests of all.

From a review of the cases it can be seen that the courts have universally agreed, even in early English and American laws, that there should be allowed a privilege or freedom from civil action for the use of libel in judicial proceedings. With the aid of the privilege the lawyer may discharge his duty as the administration of justice demands. Without the privilege the search for truth would be hampered, and the inquiries towards that end would not be performed with the freedom

[1] Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933).
[2] Hartsock v. Reddick, 6 Blackf. (Ind.) 255 (1842).

and aggressiveness that society demands. Of course it is not fitting that the privilege be without restrictions. If counsel goes beyond the bounds of privilege whether because of misplaced zeal or his own or his client's vindictive feelings, the privilege is lost and the protection withdrawn. The necessity of an exception to the general rule of libel being recognizd, the only question is to what extent does the privilege go?

The general principle regarding the privilege is:

> ". . . that a person is not subject to be sued for . . . libel for defamatory statements in papers filed in judicial proceedings or before bodies whose duties are quasi judicial, boards or commissions. But this rule obviously does not render one immune who has made such defamatory statement; he may be dealt with under the criminal law."[3]

The privilege operates to relieve the author from civil liability but offers no protection to the criminal responsibility.[4] The general rule is that when the libel is published in due course of a judicial proceeding it may come under the privilege against civil liability.

A judicial proceeding is not limited to trials of civil actions, but includes within its scope all proceedings in law of a judicial nature either before a court or a tribunal having judicial or quasi-judicial powers.[5]

The privilege attaches to all the pleadings including the petition, complaint, declaration at law, bill in equity and the subsequent pleadings such as the answer and cross complaint and all papers and affidavits filed in the action by either party. The privilege arises when an act required or permitted by law is performed in due course of judicial proceedings or as a preliminary thereto.[6]

The privilege not only extends to counsel who may be the author of the libel on his client's behalf, but also extends to the client, whether he be plaintiff or defendant.[7]

In England the rule on privilege is that any statement made in a pleading is absolutely privileged regardless of the fact that it may have no relevancy to the issue.[8] The danger under such a broad privilege is that it will become a license enabling one to attack and destroy the reputation of others with impunity.

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[3] Kimball v. Ryan, 283 Ill. App. 456 (1936).
[4] WIS. CONST. ART. 1, §3; WIS STATS. (1949), sec. 348.41; State v. Herman, 219 Wis. 267, 262, N.W. 718, (1935); State v. Mueller, 208 Wis. 533, 243 N.W. 478 (1932).
[5] Larkin v. Noonan, 19 Wis. 93 (1865), where a petition to the governor for the removal of a sheriff for cause was held to be in the nature of a judicial proceeding.
[6] Brown v. Central Savings Bank, 64 N.Y.S. 2d 551 (1946).
[7] Kraushaar v. Lavin, 39 N.Y.S. 2d 880 (1943).
[8] 33 AM. JUR. LIBEL AND SLANDER §149.

1. The Absolute Privilege in America

The American Rule grants an absolute privilege with some restrictions on its application. These restrictions are: (1) The court in which the pleading is filed must have jurisdiction of the subject matter of the action.[9] (2) The pleading so filed must be material, relevant or pertinent to the issues in the judicial proceeding:[10]

> "The rule is that if what is said or written be pertinent and material to the cause or subject matter of inquiry, the speaker or writer is not liable to an action; however much he may be actuated by hatred or ill will."[11]

Where slanderous or libelous words employed in a legal proceeding are irrelevant they may nevertheless fall within the rule of conditional privilege.[12]

Relevancy is a question of law which is determined by the court.[13] Strict legal relevancy or materiality is not necessary to confer the privilege.[14] The test to determine whether the pleadings are privileged is not concerned with legal relevancy of the statement, but rather with its reference and relation to the subject matter of the action.[15] The test appears to be: Are the statements so plainly lacking any relation to the subject matter of the controversy that a reasonable man could not doubt that they are not relevant or pertinent?[16] In deciding this question the whole proceeding is examined and particularly the papers in which the statements complained of appear.[17] In their determinations of relevancy the courts have generally been of the opinion that:

> ". . . there seems to be a good reason for a liberal interpretation of pleadings in actions of this kind, when the question of relevancy is involved and such a course is based on good authority."[18]

The courts' view that all doubts should be resolved in favor of relevancy is revealed in decisions which hold that the fact that the matters complained of as libelous were stricken from the pleading as irrelevant and immaterial by the trial judge, is not determinative as to relevancy.[19]

The liberal attitude of the courts is again asserted in the situation where the pleadings containing the libelous matter are set aside as not

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[9] Johnson v. Brown, 13 W.Va. 71 (1878).
[10] Lisanby v. Illinois Cent. R. Co. et al. 209 Ky. 325, 272 S.W. 753 (1925).
[11] Calkins v. Sumner, 13 Wis. 215 (1860).
[12] Keeley v. Great Northern Railway Company, 156 Wis. 181, 145 N.W. 664 (1914).
[13] Simon v. London Guarantee & Accident Co., 104 Neb. 524, 177 N.W. 824 (1914).
[14] Bigelow v. Brumley et al., 138 Ohio St. 574, 37 N.E. 2d 584 (1941).
[15] Johnston v. Schlarb, 7 Wash. 2nd 528, 110 P. 2d 190 (1941).
[16] Burgess v. Turle & Co., 155 Minn. 479, 193 N.W. 945 (1923).
[17] *Ibid.*
[18] Bussewitz v. Wisconsin Teachers' Association, 188 Wis. 121, 205 N.W. 808 (1925).
[19] *Supra,* note 16.

setting forth a cause of action. A New York case expresses that attitude in this manner:

> "But it by no means follows that she had no cause of action. The pleading may have been defective, and essential facts may have been omitted. It does not, therefore, follow that the facts stated were not pertinent or material to a cause of action and hence malicious. Nor can it be inferred that a defective complaint is evidence of malice on the part of the pleader."[20]

As long as the court had jurisdiction of the parties and of the subject matter, the dismissal of the complaint was merely an incident in the action which did not take away its character as a judicial proceeding. Unless facts other than mere publication are shown, the presumption that the complaint was a privileged communication must be extended to the defendant.[21]

2. The Conditional Privilege in America

A conditional privilege may be granted where the facts prevent the application of the absolute privilege.

> "A conditionally privileged publication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown, which so alters the occasion as to prevent its furnishing a legal excuse. The additional fact which in the majority of cases is required to destroy this conditional privilege is malice, meaning bad intent, in the publisher. . . ."[22]

Normally, by the mere fact of publication, a presumption of malice arises. But in the case of conditional privileged publications:

> ". . . the presumption of malice does not prevail, the burden of proof is changed, and in order for plaintiff to recover he is called on affirmatively and expressly to show malice in the publication."[23]

The conditional privilege embraces those cases where the author acts in discharge of a duty, and the words are used in good faith, and in the belief that it comes within the performance of that duty. It also comprehends the case where the statements were made to those interested in the communication and having a right to know and act upon the facts given to them,[24] as for instance, judges sitting on a trial.

> "Because they were uttered in the course of judicial proceedings, the law does not draw the inference of malice from their injurious character, but requires from the complaining party proof of actual malice."[25]

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[20] George S. Dada v. Giles S. Piper, 41 (Hun.) N.Y. 254 (1886).
[21] *Ibid.*
[22] Noonan v. Orton, 32 Wis. 106 (1873).
[23] Coolger v. Rhodes, 38 Fla. 240, 21 So. 109 (1897).
[24] *Ibid.*
[25] Lawson v. Hicks, 38 Ala. 279 (1862).

The question of malice is a question of fact for the jury. They must take all the pertinent evidence and give to the words such weight relevant to the issues as they feel they merit.[26] Until the fact that defendant acted with express malice and was using the judicial forms in bad faith to attack plaintiff's character is shown, the privilege must be given to the defendant. Plaintiff must show that what defendant alleged was false, actuated by malice or that he made use of the judicial proceedings in bad faith as a shield for his libelous charges.[27]

Therefore, where the words are used in a judicial proceeding and are found irrelevant, if the author believed that they were relevant and have reasonable and probable cause to believe so, he is not subject to an action for damages. The party claiming irrelevancy must also affirmately prove that there is malice and no reasonable and probable cause to believe that the statements were relevant.

3. INCIDENTAL COMMUNICATION OF PRIVILEGED MATTER

One who is privileged to publish injurious matter for lawful purposes may find that this necessarily involves incidental communication of the matter to persons to whom he is otherwise not privileged to publish it. These instances may arise, for example, when dictating matters to a secretary preparatory for legal action. Under the application of the two privileges, the privilege extends to the incidental publication, if the method is customary and sanctioned by business or other necessity.[28] Furthermore it may be said that whatever the lawyer or client as author might be privileged to do in preparing for trial, he could employ others to do for him.

> "The privilege that protected him also protected his agents and employees in whatever they did at his request that he could have lawfully done himself."[29]

In this instance as in every other, when the injurious matter goes beyond either privilege the immunity is lost and civil liability attaches.

4. APPLICATION OF RULE TO PERSONS NOT PARTIES

The privileges, absolute and conditional, are available against any party in the judicial proceeding. But it is evident that in many judicial proceedings the reputation of persons not parties becomes, of necessity, a collateral subject of inquiry. Certainly, in such instances, it might be supposed that their very nature requires that such exposures should not be as free of restrictions or responsibility as in other cases. Yet such is not the case, although a Tennessee court once held that:

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[26] *Ibid.*
[27] *Supra,* note 20.
[28] RESTATEMENT, TORTS §604, comment b (1938).
[29] Youmans v. Smith, 153 N.Y. 214, 47 N.E. 265 (1897).

> ". . . the protection of private character, as well as the peace of society, require that imputation against persons having no connection with judicial proceedings should, even when properly relating to such proceedings, be considered as falling within the class of conditionally privileged publications."[30]

Under that privilege it is for the jury to determine if the injurious matter was presented in good faith with probable cause (meaning pertaining to the proceeding) and that the author reasonably believed that the statements were true.[31] Although this decision appears well reasoned and convincing, it is a minority view and although not expressly overruled, is no longer applied in Tennessee or elsewhere. The true rule appears to be that libelous matter in the pleadings, which are pertinent to the issues in the suit, are absolutely privileged even though they concern a stranger to the judicial proceeding.[32]

5. The Minority American View

The greater majority of the jurisdictions have adopted the liberal rules as to the privilege as discussed above. However, one jurisdiction, at least, has applied a more restrictive privilege. The rule obtains in Louisiana that allegations do not obtain the privilege unless they are founded on probable cause. In addition, when the allegations are libelous, they are actionable, though material to the facts in issue, if they are false and maliciously made.[33] The liberal rule, which is generally applied, disregards the falsity, maliciousness and lack of probable cause when material and relevant to the issue and applies the conditional privilege when not material or pertinent.

Conclusion

Perhaps no better summation of the general rule and its effect can be given than that found in the Wisconsin case of *Keeley vs. Great Northern Railway Company,* where the court stated:

> "In legal proceedings, if the matter be relevant but false in fact, the law undertakes to punish for perjury but, civil damages are not recoverable. If irrelevant, false, and uttered or published with express malice, damages may be recovered in a civil action. If irrelevant and false, but uttered or published without actual as contradistinguished from imputed malice, it usually falls within the rule of conditional privilege, depending somewhat upon the degree of irrelevancy, for if the matter is very obviously irrelevant, that circumstance may impugn the good faith of the utterer or publisher and either take the case out of the rule of conditional

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[30] Joseph Ruoks v. Catherine Backer, 6 Heiskell (Tenn.) 395, 19 Am. Rep. 598 (1871).
[31] *Ibid.*
[32] Crockett v. McLanahan, 109 Tenn. 517, 72 S.W. 950 (1895).
[33] Lescale v. Joseph Schwartz Co., Lim., et al., 116 La. 293, 40 So. 708 (1906).

> privilege or be considered evidence to support a finding of express malice."[34]

The complaining party must show that the statements were irrelevant or immaterial and that their author was actuated by ill will and malice. In addition there must be a showing by him that they were false and without justification or cause.[35]

It has been said that the objective of these privileges is to permit disclosure of those indispensable facts upon which truth and justice rest.[36]

> ". . . public interest demands that the complainants and suitors and their lawful representatives be at liberty to urge, before any legal tribunal having authority to decide all matters relevant to the questions to be decided."[37]

It is true that a party to a legal proceeding may seize upon the opportunity to gratify his malice toward his opponent or a third party. However, there is a strong presumption that parties to legal proceedings act with sufficient cause and proper motives.[38]

One reason sometimes presented to support the application of the privileges is that the pleadings and the like are addressed to the court where there is a fair trial of the facts, and are not addressed to any other readers. However, the prevailing reason for the privileges is the ground of public policy which demands the due administration of justice, necessitating that the client's rights should not be hindered by subjecting their counsel to constant suits for libel.[39] Any other rule would defeat the search for truth so necessary to the security of society. Likewise enforcing justice against those accused of crime would become difficult without the privileges, for few would be found to accuse if the institution of unsuccessful prosecutions subjected the prosecutor to an action for libel.[40] Public policy favors free and unhindered investigation. The rights of the individuals are required to be sacrificed for the public good. The overwhelming public policy justifies the application of liberal rules whether the person libeled is party or stranger to the action.

From the rules outlined above, it can be seen that the rule applied in Louisiana depends upon the relevancy, probable cause, and truth of the allegations before the privilege attaches, with the result that the greater protection is afforded the party defamed. The rule appears to restrict free investigation and search in preparation for judicial

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[34] *Supra,* note 12.
[35] *Supra,* note 13.
[36] *Supra,* note 13.
[37] *Supra,* note 12.
[38] *Supra,* note 11.
[39] *Supra,* note 29.
[40] *Supra,* note 2.

proceedings. For example, many ideas which may be expressed in depositions or interrogatories preparatory for pleading and subsequent use in the action may not be true. But to penalize for their use would not permit a pleader to investigate to the full extent of his right.

The majority American rule, termed an absolute privilege, rests its application on the relevancy of the allegations to the issues involved. With this rule the investigator has a freer scope in his search. That rule also requires him to have regard to the personal right of the injured party. It is not a free license to libel another.

It may be admitted, that to permit the use of libel, even in this restrictive sense, will result in harm to both the party defamed and the party seeking to use it in the exercise of his legal right. However, the major American rule gives a more practical balance to the three interests involved. Of course the greater advantage is to the party using the libelous matter, but the interests of justice and the objective of obtaining the truth coincide more readily with his interests. The presumption must be that he will seek the aid of judicial proceedings and the privileges therewith with good motives and not to gratify his private malice.

In the balance of the conflicting interests some injury will result, yet the balance must be struck. The rule applied in the majority of the jurisdictions appears to attain the most reasonable balance in the light of the interests involved.

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