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Master's Defamation of His Servant

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WHILE THE UNITED STATES CONSTITUTION ostensibly permits an unadulterated freedom of speech by prohibiting the Congress from making any law which would abridge "freedom of speech," [1] the right of one man to speak indiscriminately concerning another has been curtailed by sources other than the Constitution.[2] The law of defamation has evolved through the years as a protection of one's interest in acquiring, retaining, and enjoying a wholesome reputation, or at least as good a reputation as one's conduct and character warrant his enjoying.[3] The question now arises, as it does so frequently when one right must be held in balance against another, is one's right to unconditionally utter any statement he so wishes subservient to another's right to a reputation free from the impairments of defamation? The question has lost its youth along with the First Amendment of the United States Constitution; yet the decisions and authority, as to which right is the more fundamental and which should be subrogated to which, are still widely divided.

To demonstrate the divergent opinions in the area, one need look only to a recent comment made by Mr. Justice Black during a public interview. In response to a direct question, Justice Black said:

> I have no doubt myself that the provision, as written and adopted, intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned.[4]

From a contrary point of view, Judge Learned Hand, in reversing the dismissal of a complaint in libel, upheld the right of a man to protect his reputation in the course of his opinion concerning the defamation of an attorney's reputation.

> A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons.[5]

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* B.B.A., Ohio University; Second-year student at Cleveland-Marshall Law School.

1 U. S. Const., Amend. I.

2 Donnelly, History of Defamation, 1949 Wis. L. R. 99, 125 (1949).

3 I Harper & James, Law of Torts 349 (1956).

4 Statement of Justice Black in reference to the First Amendment of the Constitution taken from: Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 557 (1962).

5 Grant v. Reader's Digest Ass'n, Inc., 151 F. 2d 733, 734 (2d Cir. 1945).

Thus, while the tort of defamation has been recognized since the middle ages,[6] it remains as an area of the law replete with anomalies and absurdities.[7] The greatest anomaly concerning defamation in the American Courts would appear to be the violent collision which occurs when the Constitutional guarantee of freedom of expression clashes with our sympathy for the injury reputation.[8]

As there are far too many areas in which injury to reputation rears its head, this paper will concern itself with those torts which occur as between the master and servant. While at first blush the topic area may appear to be narrow and rather academic, it should be remembered that approximately ninety per cent of the working force in America is composed of salaried employees,[9] i.e. servants. Thus, the opportunities for the occurrence of torts of defamation between master and servant are many and the case law multitudinous. This master-servant relationship is a breeding ground not only for the tort itself, but for many variations in the manner in which it is committed. It will be the purpose of this paper to identify the manner in which the tort is committed, the steps that have been taken to alleviate the wrong which so frequently occurs under the master-servant relationship and to discuss those steps which have not been taken towards a remedy.

The Conditional Privilege—A Remedy?

American law early recognized the need for a freedom of speech so as to allow a degree of fair comment and healthy criticism.[10] However, as this objective was severely restricted due to the common-law doctrine concerning defamation, the Courts devised a defense referred to as the conditional privilege.[11] The conditional privilege is said to extend to those communications which are exercised in a reasonable manner and for a proper purpose.[12] It has been more specifically defined in regard to communications stemming from the master-servant relationship.

A master, when communicating a statement which is defamatory to the reputation of his servant, must make such a statement in the furtherance of his own business concerns[13] or in the interests of an-

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[6] Donnelly, *op. cit. supra* note 2, p. 100.

[7] Prosser, Torts, 754 (3d ed. 1964).

[8] *Ibid.*

[9] U. S. Bureau of the Census, Statistical Abstract of the United States: pp. 216, 234 (85th ed. 1964).

[10] Baynes, Torts—Libel and Slander—Defenses of Qualified Privilege and Fair Comment, 41 No. Car. L. Rev. 153 (1962-63).

[11] *Ibid.*

[12] Prosser, *op. cit. supra* note 7, at 819.

[13] *Id.* at 805.

other who has an equal "right to know" of the servant's conduct.[14] For example, in an early English case, *Watt v. Langsdon*,[15] which is parallel to American decisions, a director of the company learned of an employee's escapades with his house maid and communicated the information to the chairman of the board of his company. While the court failed to clearly demonstrate the substantive relationship this information had to the employee's work, it did state that the communication was privileged as the chairman was a party in interest.[16] Thus, it would appear that a prerequisite to a master's conditional privilege is his valid (defensive) interest in the substance of that which he freely communicates.

Still another essential of the conditional privilege is a lack of malice on the part of the employer who makes the communication.[17] Where there is a circumstance which indicates the existence of a conditional privilege, the demonstration of malice on the part of the speaker will eradicate the privilege and render him liable as though the privilege never existed.[18] The existence of malice, therefore, is fatally destructive to the defense of conditional privilege.

Yet another necessary ingredient to the defense of conditional privilege lies in the employer's belief that what he is communicating is true.[19] In order to avail himself of the privilege, the master must not only believe his statements to be true, but must equate the value of disclosing his ideas against the benefit such a disclosure would produce.[20] This element would appear to be more of an indication of the presence of malice than an independent factor in establishing the privilege.[21]

Destruction of the Conditional Privilege

Although the conditional privilege was designed to protect the defendant-master in the making of statements which would further his interests, it appears that in a great many instances the privilege

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[14] *Id.* at 807.

[15] I. K. B. 130, 69 Amer. L. Reports, 1005, 1017 (1929).

[16] See Ranous v. Hughes, 30 Wis. 2d 452, 141 N. W. 2d 251 (1966). Here a board member published a letter which was defamatory to a teacher's reputation. However, as the publication was made during a board meeting attended by principals and other parties in interest, it was considered privileged.

[17] Wittenberg, Dangerous Words 62 (1947). See also Colatan v. New York World Telegram Corp., 16 New York Supp. 2d 706 (1940).

[18] Shepard, Libel: Publication to a stenographer: Excess of Privilege, 6 Cornell L. Q. 430 (1921).

[19] Prosser, *op. cit. supra* note 7; at 822.

[20] *Ibid.*

[21] *Id.*

has worked an undue hardship on the plaintiff-servant. For example, in the recent case, *Burris v. Morton F. Plant Hospital,*[22] the doctrine was succinctly stated concerning the destruction of an employer's conditional privilege. The defendant hospital through its head nurse and hospital director made statements concerning a nurse who was their employee, which showed the nurse to be incompetent and careless in her professional capacity. The statements concerning the nurse's abilities were made between the hospital director and the head nurse in the hospital during business hours. Concerning the element of malice, the Court stated that since these communications were made in the conduct of business, a *presumption* of *a lack of malice* rests with the defendant.[23] This presumption, once established, due to the existence of a privileged occasion, remains in effect until rebutted by evidence of malice sufficient to overcome a rebuttable presumption.[24] It appears that such a "privileged occasion" arises whenever the master-servant relationship exists.[25]

The employee who believes he has been wronged by the statements of his employer may penetrate the employer's "privileged occasion" shield by demonstrating that the statements were not made in the conduct of the employer's business or in the furtherance of the interests of another to whom the employer owes a duty.[26] This situation most often occurs where the master has made statements to one who has no right to the information. Thus in a case, *Stefania v. McNiff,*[27] where the plaintiff's employer posted statements in the employer's recreation room which tended to hold the employee up to ridicule and embarrassment, it was held that as the other employees had no right or interest in the information posted, the defense of conditional privilege was not available to the employer. The fact that those to whom the statements were published were also employees did not save the employer's privilege. The party or parties to whom the statements are directed must have a *legitimate*[28] interest in the contents of the statement.

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[22] 204 So. 2d 521 (D. Ct. App. Fla., 2d Dist. 1967); See also Appell v. Dickinson, 73 So. 2d 824 (Fla. 1954).

[23] It is interesting to note that this is the general rule and also enunciated in many Ohio cases. See, 34 Ohio Jur. 2d 312-13 (1958).

[24] See, Popke v. Hoffman, 21 Ohio App. 454, 153 N. E. 248 (1889); DeAngelo v. W. T. Grant Co., 64 Ohio L. Abs. 366, 111 N. E. 2d 773 (1952).

[25] Although this statement is dangerously broad, the explanation of qualified privilege invariably contains, as example, the master-servant relationship. See Prosser, *op. cit. supra* note 7 at 806, also 34 Ohio Jur. 2d, *op. cit. supra* note 23 at 257.

[26] See, 33 Am. Jur. 168-70 (1936); See also Prins v. Holland-North America Mortgage Co., 107 Wash. 206, 181 P. 680 (1919).

[27] 267 N. Y. Supp. 2d 854 (1966).

[28] Legitimate, in this sense, denotes an interest above that of idle curiosity. See Hocks v. Sprangens, 65 N. J. Super. 112, 87 N. W. 1101 (1901).

However, while the Court in the *Stefania* case stated that the servant's fellow employees did not have a legitimate interest in the faults of their fellow employee, other courts have seen fit to declare the same employee interests as adequate to support the employer's privilege. Thus, in *Combes v. Montgomery Ward,*[29] it was held that two employees learning of the alleged dishonesty of their fellow employee, through the statements and questions of the employer, did not deprive the master of his right to the defense of conditional privilege. The Court in this case stated that since the employer had a legitimate interest in the knowledge which the two employees might have concerning the theft, his communications and interrogatories directed to them were covered by the privilege.

Contrasted with the *Combes* and *Stefania* cases is *Sokolay v. Edlin*[30] wherein that Court arrived at a far different conclusion as to the relationship of the parties involved. The employer was the owner of a pharmacy in which he employed the plaintiff as a pharmacist. While the business was being investigated concerning an illegal trafficking in barbituates, the employer, in the presence of a part-time custodian, verbally accused the plaintiff of participating in the illegal acts. Much to the chagrin of the pharmacist, this Court held that the communication to the custodian was privileged as he was involved in the business of the pharmacy. Needless to say, the Court did not attempt to explain or clarify the extent of the custodian's involvement in the business, nor did it make any pronouncement as to the relationship of the custodian's duties to the dispensing of drugs. In *Sokolay,* the Court seemed satisfied with the mere fact that the custodian was on the payroll and was thereby a party having a sufficient interest in the communications to justify the Court's upholding of the defendant-master's privilege.[31]

This, then, is the confused state in which we find the conditional privilege. However, while the practicalities of conditional privilege may be interesting from an academic point of view, there appears to be, inherent in the concept of the conditional privilege, an element of antiquity when the concept is silhouetted against the background of modern living.

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[29] 119 Utah 407, 228 P. 2d 272 (1951).

[30] 65 N. J. Super. 112, 167 A. 2d 211 (1961).

[31] The author is well aware of the discrepancies in the fact patterns in the Stefania, Combes, and Sokolay cases. They are inserted at this point in an attempt to describe the "interest" required to uphold the qualified privilege. The distinguishing facts in each case will be discussed and analyzed at a later point in the article.

The Conditional Privilege in American Law Today

Though the courts continue to show a tendency to protect the defendant-master's conditional privilege in actions brought against him by his plaintiff-servants,[32] it is not apparent why they do so. As the law of defamation is encumbered with anomalies and contradictions,[33] so too, as the cases indicate, is the law concerning the master's conditional privilege.

As is evidenced by the drastic contrast in the *Sokolay*[34] and *Stefania*[35] cases, the courts are far from agreement in determining when the communication is made to a party with a legitimate interest and when it is made to one having no interest. While in *Stefania,* it was held that employees on the same business level as the plaintiff did not have a sufficient interest to justify the defendant's defamatory statements being communicated to them, *Sokolay* held that even a custodian had a sufficient interest in the actions of a pharmacist to justify the defense of conditional privilege. It would appear that the *Stefania* decision is logically the better decision. It is hardly reasonable that a custodian could have a *legitimate* interest, business or otherwise, in the actions of the company pharmacist.

A decision recently handed down in a case similar to those mentioned seems to indicate a trend on the part of the courts to strictly confine their interpretation of a party with a legitimate interest. In *Sias v. General Motors,*[36] the Court was confronted with an employer who had discussed and explained to employees the circumstances surrounding the discharge of an employee who had been performing a task similar to theirs. The decision to find against the employer's defense of conditional privilege was based upon the fact that "these men were not supervisors, personnel department representatives, nor company officials. They were simply fellow employees . . ." [37]

Where the courts are severe in determining what constitutes a sufficient interest to support the master's privilege, the privilege will nonetheless continue to protect certain statements made by the employer concerning employees. Whether the statements are made to employees to protect the employer's own rights[38] or made to one

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32 Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Colum. L. Rev. 1282 (1942).

33 Prosser, *op. cit. supra* note 7.

34 Sokolay v. Edlin, *supra* note 30.

35 Stefania v. McNiff, *supra* note 27.

36 372 Mich. 542, 127 N. W. 2d 357 (1964).

37 *Id.* at 360.

38 Combes v. Montgomery Ward, *supra* note 29. In this case as the employer had adequate reason to believe that statements made to the plaintiff's fellow employees would further his *own* interests, the Court protected his statements as privileged communications.

requesting a statement as to the employee's work capabilities[39] or made to a third party who has had dealings with the employee,[40] the defendant will be protected by the privilege so long as the statements are made without malice and in good faith.[41] Thus, in carefully defining the limits as to what constitutes a sufficient interest, the courts will allow the employer to efficiently conduct his business while they simultaneously protect the reputation of the servant.

A still greater flaw in the concept of a master's conditional privilege lies in the presumption against the employer's statements being made with malice. When the employer makes a statement concerning his employee, pursuant to the conduct of his business, the law, as it now stands, provides the master with the presumption of a lack of malice.[42] As the employee is encumbered with the burden of proving the defendant's malice[43] in order to overcome the privilege, it seems an altogether unnecessary addition to his burden to require him to overcome a rebuttable presumption in favor of the employer. Notwithstanding the fact that the concept as to what constitutes malice is unclear and ambiguous,[44] it is likewise extremely difficult to prove malice since it is a subjective concept. To prove that malice existed in the mind of the employer when he communicated the allegedly defamatory statements requires the consideration by a jury[45] of the objective facts surrounding the incident. While proof of a malicious intent is difficult in any situation, requiring the plaintiff to prove malice when his only witnesses may be still in the employ of the defendant is rather unrealistic.

It would appear much more reasonable, both as to procedure and to the attainment of a just result, that neither the defendant nor the plaintiff enjoy the presumption of a lack of malice. The

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[39] See, McKenna v. Mansfield Leland Hotel, 55 Ohio App. 163, 9 N. E. 2d 166 (1936); See also, Flanagan v. McLane, 87 Conn. 220, 87 A. 727 (1913).

[40] Hatch v. Lane, 105 Mass. 394 (1922).

[41] New York C & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036 (1930). This case contains a discussion concerning the master's privilege to remain silent in answer to a request for a recommendation. The case holds that he may do so with impunity. But see (that a charge of crime is defamatory per se) Zeinfeld v. Hayes Freight Lines, Inc., 82 Ill. 2d 463, 226 N. E. 2d 392, reversed 243 N. E. 2d 217 (Ill. 1969); and see, 1 Encyc. of Negligence, c. 18 (1962).

[42] Burris v. Morton, *supra* note 22; Appell v. Dickinson, *supra* note 22; Bacon v. Michigan Central R. R. Co., 66 Mich. 166, 33 N. W. 181 (1887).

[43] See, Jorgenson v. Penn R. R. Co., 25 N. J. 541, 138 A. 2d 24 (1958); Denver Public Warehouse Co. v. Holloway, 34 Colo. 432, 83 P. 131 (1905); See also, Bacon v. Michigan Central R. R. Co., *supra* note 42.

[44] Prosser, *op. cit. supra* note 7, at 821.

[45] See, Conrad v. Allis-Chalmers Mfg. Co., 228 Mo. App. 817, 73 S. W. 2d 438 (1934).

removal of the aforementioned presumption would provide insurance that both defendant and plaintiff would come before the court on equal footing. Should the plaintiff bring his action for defamation maliciously and without cause, the defendant has recourse to the proper actions at law.[46]

The greatest flaw in the concept of the master's conditional privilege is the rule whereby the Court, and not the jury determines the existence of a "privileged occasion" [47] *i.e.*, under what circumstances the privilege is available as a defense. The determination is made as a question of law rather than as a question of fact. This is not only prejudicial to the servant but simultaneously an error in logic.

As was mentioned previously, the concept of conditional privilege is very often demonstrated as it exists in the master-servant relationship.[48] It would, therefore, appear that a predisposition exists in legal minds which compels them to consider all master-servant relationships as "privileged occasions" insofar as defamation is concerned. The defendant-master must carry the burden of proving his defense of a "privileged occasion"; [49] thus, arises the error in logic aforementioned. The foremost consideration in determining whether or not a "privileged occasion" exists is whether or not the statement "was fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." [50] It appears inescapable that these determinations are questions of fact and not questions of law. As each determination is dependent upon the circumstances surrounding the matter in question, it would be more suitable that the jury should decide as to when the "privilege occasion" exists.

Conclusion

Though common sense and practical experience point out that the employer is likewise vulnerable to the defamatory statements and publications of his servants,[51] a knowledge of human nature indicates

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[46] The master, under these circumstances, has possible actions in Abuse of Process, Malicious Prosecution, etc.

[47] Nichols v. Eaton, 110 Iowa 509, 81 N. W. 792 (1900); Bacon v. Michigan Central R. R. Co., *supra* note 42; Denver Public Warehouse Co. v. Holloway, *supra* note 43; Jorgenson v. Penn R. R. Co., *supra* note 42.

[48] See note 25 *supra*.

[49] Prosser, *op. cit. supra*, note 7, p. 823.

[50] *Id.* at 805.

[51] As in Francis Mezzara's case, 2 N. Y. City Hall Recorder 113 (1900), wherein the servant painter was to paint the employer's portrait to the satisfaction of the employer. The employer refused to accept the painting, whereupon the painter redid the portrait, adding asses' ears to the employer's likeness. Held, criminal libel.

that, more often than not, it is the employee who has ostensibly been defamed. Whether it be in a department store in which a servant is wrongfully accused of thievery[52] or in an office where an employee is mortified and disgraced by the employer's statement and actions implying the employee is infected with an unpleasant disease,[53] a master's defamatory statements may cause serious harm to his servant.

As the right to work, to free choice of employment and protection against unemployment are rights recognized by the United Nations Charter,[54] these freedoms should likewise be protected to an extent equal with our most basic freedoms. While the conditional privilege has developed as a corollary to the freedom of speech, it would appear that the balance between free speech and the right to a respectable reputation has been tilted in favor of free speech. The imbalance might be somewhat ameliorated were our courts to take a serious look at the conditional privilege and make some major adjustments.

A very recent case, in 1969, *Zeinfeld v. Hayes Freight Lines, Inc.*,[55] is a hopeful sign. There, a former employer wrote in response to a prospective employer's inquiry, that the plaintiff had left his job as comptroller in charge of records when it was found that a substantial amount of money was owed to the corporation, and that the plaintiff had offered to compromise. The Illinois high court held that this was "libelous per se." This is a significant departure from the old, lordly "privilege" of an employer.

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[52] Montgomery Ward, et al. v. Skinner, 25 So. 2d 572 (Miss. 1946).

[53] Cochran v. Sears, Roebuck & Co., 72 Ga. 458, 34 S. E. 2d 296 (1945). The defendant in this case implied the employee was infected with syphilis by having her chair sprayed with disinfectant and announcing to her co-workers that the employee had been discharged due to venereal disease. Held, no defamation as the privilege was not abused.

[54] The universal declaration of human rights adopted by the U. N. General Assembly at the 183rd meeting in Paris (1948) Article 23.

[55] 82 Ill. 2d 463, 226 N. E. 2d 392, reversed 243 N. E. 2d 217 (Ill. Supr. Ct. 1969).