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## Police Tort Liability for Defamation

John Maxey\*

**I**N RECENT YEARS more people have been finding fault with the manner in which police officers fulfill their duties. Much of this criticism has taken the form of court cases, resulting in the feeling among many that today's officers are restricted in their attempts to prevent crime and apprehend criminals. One area which has not gained as much notoriety as others, but which still affects police conduct, is that of policemen's liability for defamation.

Invasion of privacy and defamation are based on the opinions of third persons.<sup>1</sup> There is a correlation between a person's right to privacy and his right to be free from defamatory statements and publications. This right to be free from defamatory statements has gained recognition as a fundamental right. A free man has the same right to be free from defamation as an arrested man, such as having his fingerprints and picture disseminated to the public prior to conviction.<sup>2</sup>

There are many communications an officer of the law makes during the discharge of his duty. Some of these statements are made to other officers, some to the public, some to prisoners, and some to those whose aid they are soliciting in the course of their duty. Many statements which an officer makes during a day would definitely be slanderous, except for a degree of privilege which is accorded to policemen.

It has been stated that absolute privilege (*i.e.*, complete immunity from liability for an action in defamation) exists when two officers are speaking to each other.<sup>3</sup> On its face, however, this does not appear to be the best rule since adherence to a doctrine such as this would unmercifully lay the general public open to injurious statements and could unjustifiably publicize their innocent involvement in crimes.

There is more logical support for according an officer a qualified or conditional privilege which would protect him from liability for statements made that bear on the prosecution or detection of a crime and that are directed at an individual who is, in some concrete manner, connected in some capacity to that crime.

Privilege is broken down into several areas: Absolute privilege, conditional or qualified privilege, and a complete lack of privilege. Execu-

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<sup>1</sup> Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Prosser, Law of Torts, 943 (3d ed. 1964); Oleck, Cases on Damages, c. 26 (1962).

<sup>2</sup> Carr v. Watkins, *supra* note 1; State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906); McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (N.J. Ch. 1945), *aff'd* 137 N.J. Eq. 548, 45 A.2d 842 (E. and A. 1946).

<sup>3</sup> Stivers v. Allen, 115 Wash. 136, 196 P. 663, 15 A.L.R. 245 (1921).

tive privilege of any description has not existed as long as judicial and legislative privilege.<sup>4</sup> A general rule that no absolute privilege is accorded a policeman,<sup>5</sup> is that a defamatory statement made by a policeman must be warranted by the public well-being it seeks to serve.<sup>6</sup> Policemen, for the most part, are accorded a qualified privilege that protects them from liability for defamatory statements they might make in the line of their duty. Even this privilege is allowed only when the statements are made within the scope of the officer's duty and are uttered for a specific purpose in discharge of that duty.<sup>7</sup>

Of course, there is no tort liability for defamation if the officer's statement is solely communicated to the individual alleging defamation.<sup>8</sup> In any other case, there is only a prima facie presumption that a qualified privilege exists.<sup>9</sup> This presumption is rebutted by showing malice.<sup>10</sup> Although malice defeats conditional privilege it will not defeat an absolute privilege. One of the leading cases supporting the doctrine of absolute privilege is *Spalding v. Vilas*.<sup>11</sup> The *Spalding* case was a suit against the Postmaster General of the United States for alleged defamations contained in pamphlets which accompanied rebate checks that were sent through the mail. These pamphlets tended to degrade the plaintiff's business. The decision for the defendant was reasoned as follows: The interest of the people require that protection be given officers who are carrying out their official duties, since judges, jurymen, and witnesses "could discharge [their] duty freely [only] if protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him."<sup>12</sup> It was felt that similar protection should be extended to policemen,<sup>13</sup> although Judge Miller in *Dawkins v. Paulet* stated that "there is little doubt that the reasons which justify the immunity in one case do not to a great measure extend to the other."<sup>14</sup> In decreeing absolute immunity the *Spalding* court held that even personal motives would not enter into the decision

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<sup>4</sup> Gray, R.J., Private Wrongs of Public Servants, 47 Calif. L. Rev. 303 (1959); Becht, A.C., The Absolute Privilege of the Executive in Defamation, 15 Vand. L. Rev. 1127 (1962); Recent Cases, 44 Minn. L. Rev. 547 (1960).

<sup>5</sup> *Earl v. Winne*, 14 N.J. 119, 101 A.2d 535 (1953).

<sup>6</sup> Restatement, Torts § 595 (1934).

<sup>7</sup> Hallen, Excessive Publications and Defamation, 16 Minn. L. Rev. 160 (1932).

<sup>8</sup> Prosser, Law of Torts, 785 (3d ed. 1964).

<sup>9</sup> 53 C.J.S., Libel and Slander § 87 (1948).

<sup>10</sup> *Mullins v. Davidson*, 133 W. Va. 557, 57 S.E.2d 1 (1949); 53 C.J.S., *op. cit. supra* note 9.

<sup>11</sup> *Spalding v. Vilas*, 161 U.S. 483 (1896).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Id.*

<sup>14</sup> *Dawkins v. Paulet*, L.R. 5 Q.B. 94, as cited in *Spalding v. Vilas*, *supra* at 636.

since "personal motives cannot be imputed to duly authorized official conduct."<sup>15</sup>

The *Spalding* case paved the way for granting immunity to federal officers, no matter what their title, while the officer involved was carrying out his duties. This decision was approvingly quoted in *Carr v. Watkins*.<sup>16</sup> The reasoning in support of absolute privilege is that the ability to carry out duties with relative freedom from harassment or legal liability for damages, incurred as a possible result of defamation suits, outweighs the possible loss an individual citizen might incur under the brunt of this defamation. Thus, federal officers are protected regardless of their rank as long as they are acting within the scope of their duties.<sup>17</sup> There is little support for conferring absolute privilege on policemen, even though their federal counterparts and those in the judicial or legislative branches are protected.<sup>18</sup>

The conditional privilege accorded policemen exists when (1) the communication is made in aid of law enforcement, and the officer is in discharge of his duty, (2) the communication is made in good faith, (3) the officer is not repeating a rumor which could easily be found to be untrue, (4) the officer has jurisdiction, and (5) he is actively preventing a wrong to another or to the public.<sup>19</sup>

The *Carr* case held that county police officers had merely a qualified privilege and immunity from libel or slander. In this case two county officers accompanied by a federal naval officer communicated to the plaintiff's employer that the plaintiff had been charged, many years prior, with "molesting kids." The plaintiff was cleared of the charge at the time. The case held the two county officers liable for defamation since their qualified privilege had been abandoned by exceeding the scope of their duty, but the federal naval officer was not found guilty. The case held, among other things, that the charges of slander, invasion of privacy, the divulgence of information without legal right, malicious interference, and conspiracy to interfere with one's rights overlap.<sup>20</sup> Privilege does extend to other torts.<sup>21</sup>

Maryland is one state which follows the general rule by not ex-

<sup>15</sup> *Supra* note 11.

<sup>16</sup> *Supra* note 1.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Howard v. Lyons*, 360 U.S. 593 (1959); *Barr v. Matteo*, 360 U.S. 564 (1959); 33 Am. Jur., Libel and Slander § 125 (1941); *Parker v. Appalachian Electric Power Co.*, 126 W.Va. 666, 30 S.E.2d 1 (1944).

<sup>19</sup> *Missouri Pac. Railway Co. v. Richmond*, 73 Tex. 568, 11 S.W. 555, 557 (1889).

<sup>20</sup> *Carr v. Watkins*, *supra* note 1; *Horn v. Seth*, 201 Md. 589, 597, 95 A.2d 312 (1953).

<sup>21</sup> Restatement (second), Torts § 10 (1965); Prosser, Law of Torts, 16 (2d ed. 1955); *Carr v. Watkins*, *supra* note 1; *Barr v. Matteo*, *supra* note 18; *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927); 41 Am. Jur., Privacy § 20 (1942); Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 216, 217 (1890); Note, Defamation, 69 Harv. L. Rev. 875, 920 (1956).

tending absolute immunity to state officers of a county rank and lower.<sup>22</sup> The question of privilege thus depends upon the time, the occasion, the place, and the officer making the statements.

Where an officer has a qualified privilege, that privilege is defeated if the statements are made with malice. The malice with which we are dealing is malice in fact. Therefore the question of malice does not arise when the occasion of the utterance is one of prima facie privilege; such a question must be presented by the plaintiff with evidence that shows the defendant's motives arose from sources other than those of duty. Merely because the words were false, the question of malice is not presented.<sup>23</sup>

In the *Mullins v. Davidson* case the facts indicated that a crooked penny was put into a parking meter and an officer upon seeing the condition of the meter charged a storekeeper, whose store was next to the meter, with breaking the meter. He shouted his charge from the street into the man's store and was overheard by other people. The question in the case was whether or not his privilege had been exceeded. Such a question was one of law for the court.<sup>24</sup> The case held that he did exceed his privilege and that the statement was made maliciously.

In accord with the reasoning of the *Mullins* case is the case of *Aylor v. Gibbs*,<sup>25</sup> which stands for the proposition that the language used in making a communication should not be disproportionate to the occasion on which it is used. In addition, the *Aylor* case stands for the proposition that the person making or repeating a defamatory statement must have some ground for believing that the statements are true. The burden of proving actual malice in a qualified privilege situation is on the plaintiff.<sup>26</sup>

In *Morton v. Knipe*,<sup>27</sup> a slander action, it was held that volunteered information does not preclude privilege. The case also held that to show malice and thereby defeat the privilege, the plaintiff must prove that the statement was made outside the course and scope of the policeman's duty. To be a qualified privilege, the statement must be made when acting under color of office,<sup>28</sup> although the *Mullins* court held that

<sup>22</sup> *Maurice v. Worden*, 54 Md. 233 (1880); *Walker v. D'Alesandro*, 212 Md. 163, 129 A.2d 148 (1957); *Brush-More Newspapers Inc. v. Pollitt*, 220 Md. 132, 151 A.2d 530 (1959).

<sup>23</sup> *Morton v. Knipe*, 128 App. Div. 94, 112 N.Y.S. 451 (1908); *Ormsby v. Douglass*, 37 N.Y. 477, 5 Trans. App. 100 (1868); *Hemmens v. Nelson*, 138 N.Y. 517, 34 N.E. 342 (1893).

<sup>24</sup> *Mullins v. Davidson*, *supra* note 10, at headnote 3.

<sup>25</sup> 143 Va. 644, 129 S.E. 696 (1925).

<sup>26</sup> *Lightner v. Osborn*, 142 Va. 19, 127 S.E. 314 (1925); *Ward v. Ward*, 47 W.Va. 766, 35 S.E. 873 (1900); *Mullins v. Davidson*, *supra* note 10; *Rigney v. W. R. Kresge Co.*, 104 W.Va. 168, 139 S.E. 650 (1927); *Swearingen v. Parkersburg Sentinel Co.*, 125 W.Va. 731, 26 S.E.2d 209 (1943).

<sup>27</sup> *Morton v. Knipe*, *supra* note 23.

<sup>28</sup> *Booten v. Napier*, 121 W.Va. 548, 5 S.E.2d 441, 443 (1939).

an officer acting within the general scope of his office is automatically acting under color of that office.<sup>29</sup>

A sheriff is not normally liable for libel if he distributes pictures of wanted men.<sup>30</sup> But again, an officer is not protected by the color of his office if the scope of his duty has been exceeded.<sup>31</sup> Even an error in judgment cannot excuse an officer's action whereby someone is slandered.<sup>32</sup>

Additionally, the statements of one officer to another, in which qualified privilege most often exists, does not absolutely insure that these statements will be privileged *i.e.*, there must be a purpose behind the statement such as seeking aid or advice in an official capacity.<sup>33</sup>

Even in the cases involving federal officers, who are normally accorded absolute privilege, there are some occasions where privilege does not exist. The case of *Colpoys v. Gates* held that there was no privilege when a U. S. Marshal made public statements about dismissed officers, since such statements were not within the line of his duty, *i.e.*, he did not have to explain to the public the reasons for their dismissals.<sup>34</sup>

Just how much of a duty must an officer have to entitle him to qualified privilege? In the *Morton v. Knipe* case<sup>35</sup> a police captain told a landlord that the plaintiff's family and the plaintiff were engaged in the oldest of professions, in that they kept a disorderly house. The statement was uttered in the captain's precinct; it was made in good faith; it was on a subject in which the officer and recipient had an interest and duty; and it was, therefore, *prima facie* privileged. You will note, however, the landlord's interest and duty was merely moral or social and not necessarily legal. Additionally, the information which was transferred was volunteered by the officer. Although the officer was held not liable in the case, it was noted that had others been present in addition to the landlord, the officer's qualified privileges would have been defeated if the officer, under those circumstances, had knowingly or carelessly made the utterances.

In *Byam v. Collins*<sup>36</sup> the court evidenced support of the theory that the duty involved need only be moral or social. It was stated that

communication [is] made qualified upon any subject matter in which the party communicating has an interest, or in reference to

<sup>29</sup> *Mullins v. Davidson*, *supra* note 10; See note, 13 A.L.R.2d 897 (1950).

<sup>30</sup> *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541 (1900).

<sup>31</sup> *Mullins v. Davidson*, *supra* note 10.

<sup>32</sup> *Trafton v. Deschene*, 44 N.B. 552, 36 D.L.R. 433 (1917), as cited in annot. 15 A.L.R. 249, 252 (1921).

<sup>33</sup> *Liske v. Stevenson*, 58 Mo.App. 220 (1894); *Stewart v. Major*, 17 Wash. 238, 49 P. 503 (1897).

<sup>34</sup> *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941).

<sup>35</sup> *Morton v. Knipe*, *supra* note 23; *Newell, Libel and Slander* 602 (3d ed.).

<sup>36</sup> 111 N.Y. 143, 19 N.E. 75 (1888).

which he has a duty [and] his [communication] is made to a person having a corresponding interest or duty . . . though the duty be not a legal one, but only a moral or social duty of imperfect obligation.<sup>37</sup>

Therefore the duty to arrest for a crime is not necessarily exclusive of the duty to inform of a crime.<sup>38</sup>

In defamation cases there is sometimes a question and distinction drawn between information that is sought and information that is volunteered.<sup>39</sup> This distinction, however, does not have much bearing on the question of whether or not privilege will be accorded the statement.<sup>40</sup> The question of privilege is always one for the court.<sup>41</sup>

Words spoken to a police officer, if they are not for the purpose of preventing a crime or protecting the speaker himself, in addition to the element of good faith, will not be protected by privilege, qualified or otherwise.<sup>42</sup>

Malice is the element which will defeat qualified or conditioned privilege, and the question of malice must be presented by the plaintiff with evidence that shows that the defendant's motives emanated from sources other than duty.<sup>43</sup> The *Morton* court pointed out, however, that the words spoken must not be any stronger than necessary to communicate that which the officer is under a duty to convey.<sup>44</sup> The officer must also be acting under a reasonable belief, when making the communication, that such communication will in some manner lead to evidence which is strong enough to warrant an arrest,<sup>45</sup> although an officer usually is within the line of his duty if the statements are made when inquiring into the suspected crime.<sup>46</sup>

Malice may then be implied<sup>47</sup> if there is no occasion for according an officer a qualified privilege.

<sup>37</sup> *Ibid*; *Coloney v. Farrow*, 5 App. Div. 607, 39 N.Y.S. 460 (1896); *Bradley v. Heath*, 12 Pick (Mass.) 163, 22 Am. Dec. 418 (1831); *Toogood v. Spyring*, 1 Crompt. M. and R. 181 (1834); *Klinck v. Colby*, 46 N.Y. 427 (1871); *Hamilton v. Eno*, 81 N.Y. 116 (1880); *White v. Nicholls*, 3 How. 266 (1845).

<sup>38</sup> *Morton v. Knipe*, *supra* note 23 at 453; *Byam v. Collins*, *supra* note 36; *Washington Post Co. v. Wells*, 27 App. (D.C.) 495 (1906).

<sup>39</sup> *Morton v. Knipe*, *supra* note 23.

<sup>40</sup> *Morton v. Knipe*, *supra* note 23; *Stuart v. Bell*, 2 L.R. Q.B. Div. 341 (1891).

<sup>41</sup> *Sickles v. Kling*, 60 App. Div. 515, 69 N.Y.S. 944 (1901); *Byam v. Collins*, *supra* note 36.

<sup>42</sup> *Stewart v. Major*, *supra* note 33.

<sup>43</sup> *Morton v. Knipe*, *supra* note 23.

<sup>44</sup> *Morton v. Knipe*, *supra* note 23 (*Odger, Libel and Slander*, citing *Roberts v. Richards*, 3 F. and F. 507); *Padmore v. Lawrence*, 11 A. and E. 380; *Newell, Slander and Libel*, pages 477, 532, all as cited by the *Morton* court.

<sup>45</sup> *Morton v. Knipe*, *supra* note 27; *People v. Glennon*, 175 N.Y. 45, 67 N.E. 125 (1903).

<sup>46</sup> *Padmore v. Lawrence*, 11 Ad. and Ellis 380, cited in *Morton v. Knipe*, *supra* note 23.

<sup>47</sup> *Byam v. Collins*, *supra* note 36.

The question of malice is one for the jury,<sup>48</sup> and because there is a moral duty, such a duty is not to be taken lightly. An officer should not wantonly make defamatory statements unless there is some urgency or gravity which justifies this publication.<sup>49</sup> Liability rests on a determination of whether or not there is malice.<sup>50</sup>

A misconception that an officer is performing his duty when defamatory statements are made is insufficient to establish a privilege. In *Trafton v. Deschene* a constable was investigating and repeating rumors about an act that was not his duty to investigate; result, liability.<sup>51</sup>

Some states still hold that the statements of law officers are absolutely privileged, but they appear to be in a minority.<sup>52</sup> (Most states hold that officers have qualified privilege which is exceeded by the existence of actual malice.)<sup>53</sup> The question of privilege is one for the court. The question of malice is for the jury. For further cases on absolute privilege see *Catron v. Jasper*.<sup>54</sup> This was a slander action against a sheriff for telling a deputy that liquor was stored and sold on the plaintiff's land. The sheriff was not liable for this communication.<sup>55</sup>

A bona fide communication by an officer on a subject in which he has an interest and duty is prima facie privilege if made to a person with a corresponding duty.<sup>56</sup> Volunteered information does not vitiate privilege.<sup>57</sup> The communication must be made in good faith, the officer must be attempting to prevent a wrong or must be searching out a wrong which has occurred. He must be on duty, in discharge of that duty, and he must be within his jurisdiction (he could not be in discharge of his duty if he was not in his own jurisdiction).

An officer maintains a position of trust in society and the confidence which people repose in him should be respected. An officer is accorded immunity to a limited extent so that he may efficiently discharge his duty. This immunity should never be used as a sword; it is a shield.

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<sup>48</sup> *Byam v. Collins*, *supra* note 36.

<sup>49</sup> *Byam v. Collins*, *supra* note 36; *Coxhead v. Richards*, 2 Man. G. & S. 569, 602, cited in *Byam v. Collins*, *supra* note 36; *Sickles v. Kling*, *supra* note 41; *Mullins v. Davidson*, *supra* note 10; *Higgins v. Williams Pocahontas Coal Co.*, 103 W.Va. 504, 138 S.E. 112 (1927); *Swearingen v. Parkersburg Sentinel Co.*, *supra* note 26; *Ward v. Ward*, *supra* note 26; *Stewart v. Riley*, 114 W.Va. 578, 172 S.E. 791 (1934).

<sup>50</sup> *Mayo v. Sample*, 18 Iowa 306 (1865).

<sup>51</sup> *Trafton v. Deschene*, *supra* note 32.

<sup>52</sup> *Mullins v. Davidson*, *supra* note 10; 33 Am. Jur., Libel and Slander § 137 (1941).

<sup>53</sup> *Mullins v. Davidson*, *supra* note 10 at 894; See note 13 A.L.R.2d 897 (1950).

<sup>54</sup> 303 Ky. 598, 198 S.W.2d 322 (1946).

<sup>55</sup> *Williams v. Equitable Credit Co.*, 33 Ga.App. 441, 126 S.E. 855 (1925); *Nall v. Phelps*, 285 Ky. 322, 147 S.W.2d 1039 (1941); *Pihl v. Morris*, 319 Mass. 577, 66 N.E.2d 804 (1946); *Butler v. Freyman*, 216 Mo.App. 636, 260 S.W. 523 (1924).

<sup>56</sup> *Byam v. Collins*, *supra* note 36; *Coloney v. Farrow*, *supra* note 37; *Bradley v. Heath*, 12 Pick 163, 22 Am. Dec. 418 (Mass. 1831).

<sup>57</sup> *Lewis v. Chapman*, 16 N.Y. 369 (1857).