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## Clergymen's Interference with Private Rights

Robert B. Dunsmore\*

RECENTLY, AN EMERGENCY COURT was set up in a maternity hospital in England and, as a result, the life of a day old baby was saved. A complete change of blood was necessary, but the parents, both Jehovah's Witnesses, refused to allow a transfusion because it was against their religious beliefs. The physicians turned to the courts and the magistrate committed the child temporarily into a welfare officer's care, thus allowing her to give permission for the transfusion. This is believed to be the first time such action has been taken by a British court, although several American courts have taken it.<sup>1</sup>

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<sup>1</sup> N. Y. Times, Oct 22, 1960. There have been several similar cases in the United States. For example, in *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N. E. 2d 769, 30 A. L. R. 2d 1132 (1952) a guardian of a baby was appointed in order to permit a blood transfusion. Other cases which have similarly ordered medical care are *Re Vasko*, 238 App. Div. 128, 263 N. Y. S. 552 (1933); *Re Rotkowitz*, 175 Misc. 948, 25 N. Y. S. 624 (1941); *Mitchell v. Davis*, 205 S. W. 2d 812, 12 A. L. R. 2d 1042 (Tex. Civ. App., 1947); *Morris v. State*, — Mo. App. —, 252 S. W. 2d 97 (1952); *Re Seiferth*, 309 N. Y. 80, 127 N. E. 2d 820 (1955). Other cases have held the parents guilty of neglect for failure to furnish medical care notwithstanding the fact that their failure was due to religious beliefs: *State v. Chenoweth*, 164 Ind. 94, 71 N. E. 197 (1904); *Owens v. State*, 6 Okla. Crim. 110, 116 P. 345, 36 L. R. A. N. S. 633, Ann. Cas. 1913 B 1218 (1911); *Beck v. State*, 29 Okla. Crim. 240, 233 P. 495 (1925); *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187, 98 Am. St. Rep. 666 (1903). There have been prosecutions for involuntary manslaughter when a parent failed to obtain needed medical attention. In *Craig v. State*, 220 Md. 590, 155 A. 2d 684 (1959), although the court found that the evidence was not sufficient to sustain a finding that gross negligence on the part of the parents was the proximate cause of the child's death, it said at p. 690;

While a person's freedom to believe is absolute, his freedom to act is not. His conduct is subject to regulation for the protection of society, and, while the power to regulate must be so exercised in every case as not to infringe the protected freedom, the State, by general and nondiscriminatory legislation, may safeguard the peace, health and good order of the community without constitutionally invading the liberties guaranteed by the Fourteenth Amendment. . . . As was said by Chief Justice Waite, in *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, a case which involved the precept of the Mormon religion concerning polygamy. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

In prosecutions for the breach of a duty imposed by statute to furnish necessary medical aid to a minor child, the particular religious belief of the person charged with the offense constitutes no defense. He cannot, under the guise of religious conviction, disobey the laws of the land made for the protection of the health and safety of society.

Some of the cases which have held that religious belief is no defense to prosecution for manslaughter on account of the death from want of medi-

(Continued on next page)

In Italy a Roman Catholic priest was convicted of criminal defamation of character, fined and ordered to pay damages to the complaining witnesses, one being a professed atheist and the other a practicing Catholic. The professed atheist had also been a baptized Catholic. The bishop, in a pastoral letter, branded them "public sinners" entering "scandalous concubinage," because they had been married in a civil ceremony rather than in the church. The bishop argued that his description was true according to Catholic doctrine, that he had expressed himself within the framework of the church, and that the court therefore had no authority to try him.<sup>2</sup> On appeal the decision was reversed, the court pointing out the good faith of the bishop and the absence of intent to harm, even though the bishop was aware of the meaning of his statements.<sup>3</sup>

Without doubt, under the same factual situation, in the United States both cases would have been decided in such a manner as to produce the same end result—basically on the premise of public policy. Our courts have declared that no interference shall be permitted with a man's relation to his Maker, with the obligations he may think that relation imposes, and with the manner in which he expresses his beliefs on those subjects, provided always that there is no interference with the peace, prosperity and morals of our people.<sup>4</sup>

Public policy, however, does change, and some arguments can be made that the decision of the lower court in the Italian case should prevail, if not now, certainly in the not too distant future. Most law does substantiate an acquittal on the basis of a qualified privilege. However, it has been held that no privilege attaches to slanderous statements made by a priest concerning a member of his congregation, when such remarks were made as a part of a sermon, even though the priest thought them to be necessary for the welfare of his parish.<sup>5</sup>

(Continued from preceding page)

cal attention include *Com. v. Hoffman*, 29 Pa. Co. Ct. 65 (1903); *Com. v. Breth*, 44 Pa. Co. Ct. 56 (1915); *Reg. v. Downes*, 13 Cox C. C. 111, L. R. 1 Q. B. Div. 25, 45 L. J. Mag. Cas. N. S. 8, 33 L. T. N. S. 675, 24 Week. Rep. 278 (Eng., 1875); *Reg. v. Hurry*, 76 Cent. Crim. Ct. Sess. Paper, 63, 13 Cox C. C. 113 (Eng., 1872); *Reg. v. Cook*, 62 J. P. 712, 58 Alb. L. J. 232 (Eng., 1898); *Reg. v. Senior*, 1 Q. B. 283, 19 Cox C. C. 219, 68 L. J. Q. B. N. S. 175, 63 J. P. 8, 47 Week. Rep. 367, 79 L. T. N. S. 562, 15 Times L. R. 102 (Eng., 1899); *Rex. v. Brooks*, 9 B. C. 13, 1 B. R. C. 795, 5 Can. Crim. Cas. 372 (1902); *Rex. v. Lewis*, 6 Ont. L. Rep. 132, 1 B. R. C. 732, 23 Can. L. T. Occ. N. 257, 2 Ont. Week. Rep. 566, 7 Can. Crim. Cas. 261 (1903).

<sup>2</sup> *Repubblica Italiana v. Fiordelli*, il deciso de Tribunale Penal de Firenge (Mar. 1, 1958).

<sup>3</sup> *Repubblica Italiana v. Fiordelli*, Motivi di Appello, Avanti L'Ecc. Ma. Corte di Appello di Appello.

<sup>4</sup> *Davis v. Beason*, 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890); *Penovic v. Penovic*, 45 Cal. 2d 97, 287 P. 2d 501 (1955).

<sup>5</sup> *Hassett v. Carrol*, 85 Conn. 23, 81 A. 1013 (1911).

Similarly, words spoken of a priest by an archbishop, saying that he was irresponsible and insane, that he had been removed from his position for good reason, and that he had been guilty of ecclesiastical disobedience, are slanderous per se when spoken before the congregation and when the archbishop knew them to be false.<sup>6</sup>

Thus, notwithstanding the qualified privilege generally granted to a clergyman, and the rule that a church may determine its own qualifications for membership,<sup>7</sup> good standing and discipline,<sup>8</sup> courts have held clergymen liable for slanderous statements.

This qualified privilege relates to a defamatory communication made on what is called an "occasion of privilege" and without actual malice on the part of the utterer.<sup>9</sup> As to these communications, there is no civil liability,<sup>10</sup> regardless of whether the communication is libelous per se or per quod.<sup>11</sup>

The protection of a qualified privilege may be lost by the manner of its exercise, although belief in the truth of the charge exists. *The privilege does not protect any unnecessary defamation.* In order that a communication remain privileged it is necessary that the person uttering it be careful to go no further than his duties require.<sup>12</sup>

Although our government is based upon the concept of separation of church and state, there is no question but that some qualified privilege for the clergyman should exist. However, notwithstanding the fact that we are basically a God-fearing nation, our courts, as agencies of the state, must enforce and uphold our laws. If a clergyman is to be granted *complete* immunity to say whatever he believes, or to take *any* action which he believes best for his church or his congregation, then eventually either our concept of separation of church and state will be destroyed or else by the very weight of the immunities and the inequities resulting therefrom the qualified privilege of the clergyman will be destroyed. The real question is not whether such a privilege exists or should exist, but at what point does

<sup>6</sup> Hellstern v. Katzler, 103 Wisc. 341, 79 N. W. 429 (1899).

<sup>7</sup> Matter of Kaminsky, 251 App. Div. 132, 295 N. Y. S. 989, 13 N. E. 2d 456 (1937).

<sup>8</sup> Louison v. Fishman, 168 N. E. 2d 340 (Mass., 1960); Moorman v. Goodman, 59 N. J. S. 181, 157 A. 2d 519 (1960).

<sup>9</sup> Swift & Co. v. Gray, 101 F. 2d 976 (C. A. 9, 1939); Perove v. Montgomery Ward, 341 Mo. 252, 107 S. W. 2d 12 (1937); Fisher v. Myers, 339 Mo. 1196, 100 S. W. 2d 551 (1936).

<sup>10</sup> Leonard v. Wilson, 150 Fla. 503, 8 So. 2d 12 (1952); Smuck v. Terlecky, 234 Mich. 568, 209 N. W. 814 (1926).

<sup>11</sup> McClellan v. L'Engle, 74 Fla. 581, 77 So. 270 (1917); Powell v. Johnson, 170 S. C. 205, 170 S. E. 151 (1933).

<sup>12</sup> Reese v. Fife, 279 S. W. 415 (Mo., 1925); Zator v. Buchel, 231 App. Div. 334, 247 N. Y. S. 686 (1931).

the interference with the rights of the individual become so great as to be actionable. This is the sole question posed by this article.

The law of torts is not static and the limits of its development are not set. When it becomes clear that a plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself bar the remedy.<sup>13</sup> A perfect case in point is the tort of invasion of the privacy. This is one of the few doctrines, among myriad legal concepts, which enjoys the distinction of having been created in the minds of American legal thinkers. The famous article in the *Harvard Law Review* of 1890<sup>14</sup> is generally credited for the widespread acceptance of the idea that an invasion of an individual's right of privacy constitutes a cause of action.<sup>15</sup>

In earliest times the law afforded only bare protection against physical interference with life and property. It was said that "the right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."<sup>16</sup>

The common law secures to each individual the right of determining, ordinarily, to what extent his thought, sentiments, and emotions shall be communicated to others.<sup>17</sup> Even though the common law recognized that a man's house as his castle, entitling him to an enjoyment of privacy, a remedy for protection of that right was not afforded.<sup>18</sup> The doctrine of invasion of privacy had its inception at the turn of the twentieth century. It is a young doctrine, which may well be considered still to be in the embryonic stage of evolution.

Legal liability for interference with the interest of another depends upon the nature of the interest, the conduct which causes the interference, and the state of mind which induces the conduct.<sup>19</sup> Where a violent or malicious act is done as to a man's occupation, profession or livelihood, there an action lies.<sup>20</sup> Usually the law's first step in the recognition of an interest is to secure it against deliberate invasion.

Thus, words spoken by a priest in his church were held actionable when they, falsely and with intent to injure, instructed the congregation not to deal with the plaintiff. They spoke of plaintiff's second marriage while excommunicated from the church, and said that such marriage and excommunication should

<sup>13</sup> Prosser, *Torts*, 4 (2d ed. 1955).

<sup>14</sup> Cooley, *Torts* 29 (2d ed. 1888).

<sup>15</sup> Prosser, *supra* n. 13, p. 635.

<sup>16</sup> Chase's *Blackstone* 68 (4th ed. 1938).

<sup>17</sup> *Miller v. Taylor*, 4 Burr. 2303, 2379, 98 Eng. Rep. 201, 242 (1769).

<sup>18</sup> Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 220 (1890).

<sup>19</sup> Seavey, *Principles of Torts*, 56 Harv. L. Rev. 81 (1942).

<sup>20</sup> *Keeble v. Hicheringill*, 11 East 574, 576, 103 Eng. Rep. 1127, 1128 (1809).

debar plaintiff from being employed by any member of the congregation, and that no sick member could have the ministrations of the priest while he was under the care of the plaintiff. These words were held to be actionable per se, as touching the plaintiff in his profession, even though they did not impute professional misconduct or incapacity.<sup>21</sup>

In later stages of development, cases might arise where liability would be imposed though the defendant did not deliberately act for the purpose of interference, but realized or should have realized that such a consequence would almost surely follow. For example, the house detective who bursts into a room, accusing the occupants of being unmarried and threatening jail, makes himself liable for the mental suffering that results.<sup>22</sup>

The main interest now protected is that of reputation, with the same overtones as to mental distress that are present in libel and slander. It is, in essence, a branch of the new tort of privacy. That, in turn, is really an extension of defamation into the area of publications that do not fall within the narrow limits of the old torts, for there is an elimination of the defense of truth. Expansion of the tort of interference would go far to remedy the deficiencies of defamation actions, hampered as they are by technical rules inherited from ancient jurisdictional conflicts. It would provide a remedy for some real and serious wrongs that were not previously actionable due to the qualified privilege.

Courts have come a long way since they said that mental distress alone was too remote and difficult of measurement to be the subject of an assessment of damages.<sup>23</sup> At common law, courts were reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection, even as against intentional invasion.<sup>24</sup> Now, however, intent includes more than an actual desire to make the plaintiff suffer. It extends to the mental disturbance which the defendant must have believed to be a necessary incident of his act and substantially certain to follow from it.<sup>25</sup>

Where mental distress is involved, one cannot fail to notice the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored. In such cases, the gist of the wrong is clearly the intentional infliction of mental dis-

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<sup>21</sup> *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74 (1890).

<sup>22</sup> *Emmke v. De Silva*, 293 F. 17 (8th Cir. 1923); *Boyce v. Greeley Square Hotel Co.*, 228 N. Y. 106, 126 N. E. 647 (1920).

<sup>23</sup> *Gotzow v. Buening*, 106 Wisc. 1, 20, 81 N. W. 1003 (1909).

<sup>24</sup> *Magruder*, *Mental and Emotional Disturbance in the Law of Torts*, 49 *Harv. L. Rev.* 1033. (1936).

<sup>25</sup> *Prosser*, *Intentional Infliction of Mental Suffering*, 37 *Mich. L. R.* 875 (1939).

trous, which is now in itself a recognized basis of tort liability.<sup>26</sup> Where such mental disturbance stands isolated, however, the courts have insisted upon extreme outrage, rejecting all liability for mere trivialities.<sup>27</sup> It has been only upon genuine and serious mental harm, attested by physical illness or other circumstances, that an award for damages has been made.<sup>28</sup>

The tort of invasion of privacy has, however, altered these rules. No longer are such evidentiary guarantees required when an invasion of privacy exists. So also should the tort of interference with private rights be permitted to supersede common law principles, where mental distress is involved.

It is basically unjust that a couple whose interest have been interfered with by a private detective should recover damages, while a couple whose interests have been interfered with by a member of the clergy should be precluded from recovery simply because their accuser was a member of the clergy, where in both cases the accusation was that they were not married. Clergymen ought not to be regarded as purer or holier than any other men, nor entitled to legal protection in any greater degree. The law supposedly is no respecter of persons, and no longer makes distinctions, between classes or conditions of men. Its guiding

<sup>26</sup> Tentative Draft of § 46(1), Second Restatement of Torts: "One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it."

<sup>27</sup> "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'" Restatement, Torts § 46, comment g (Supp. 1948). *Wilkinson v. Downton*, 2 Q. B. D. 57 (Eng., 1897); *Savage v. Boies*, 77 Ariz. 355, 272 P. 2d 349 (1954); *Great A. & P. Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1930); *Wilson v. Wilkins*, 181 Ark. 137, 25 S. W. 2d 428 (1930); *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep., 129 (1873); *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal. 2d 330, 240 P. 2d 282 (1952). That it must be extreme outrage is illustrated by the fact that several cases have held that there could be no liability for inviting an unwilling woman to illicit intercourse. *Reed v. Maley*, 115 Ky. L. Rep. 209, 74 S. W. 1079, 62 L. R. A. 900, 2 Ann. Cas. 453 (1903); *Prince v. Ridge*, 32 Misc. 666, 66 N. Y. S. 454 (1900); *Davis v. Richardson*, 76 Ark. 348, 89 S. W. 318 (1905); *Shepard v. Lamphier*, 84 Misc. 498, 146 N. Y. S. 745 (1914). The view being apparently, in Judge Magruder's well known words, "that there is no harm in asking." Magruder, *Mental and Emotional Disturbance in the Law or Torts*, 49 Harv. L. Rev. 1033, 1055 (1936).

<sup>28</sup> *Duty v. General Finance Co.*, 273 S. W. 2d 64 (Tex., 1954); *Kirby v. Jules Chain Stores Corp.*, 210 N. C. 808, 188 S. E. 625 (1936); *Carrigan v. Henderson*, 192 Okla. 254, 135 P. 2d 330 (1943); *Clark v. Associated Retail Credit Men*, 70 App. D. C. 183, 105 F. 2d 62 (1939). However, a few cases have found liability for mere mental disturbance without any evidence of physical consequences: *Wilson v. Wilkins*, 181 Ark. 137, 25 S. W. 2d 428 (1930); *Savage v. Boies*, 77 Ariz. 355, 272 P. 2d 349 (1954); *Barnett Collection Service Co.*, 214 Iowa 1303, 242 N. W. 25 (1932); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491 (1934); *Quin v. Robert's*, 16 So. 2d 558 (La. App., 1944); *Herman Saks & Sons v. Ivey*, 26 Ala. App. 240, 157 So. 265 (1934); *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal. 2d 330, 240 P. 2d 282 (1952); *Curnutt v. Wolf*, 244 Iowa 683, 57 N. W. 2d 915 (1953).

principle now is equality before the law for all.<sup>29</sup> Why should it make an unqualified exception for the clergy?

The qualified privilege of the minister, and the immunity of the church as a charitable organization, have been parallel in American law. Charities have had a certain tort immunity, as have the ministers. But private charities are much different now than when the liability question was first before the courts.<sup>30</sup> It was public policy to extend immunity to private charities. But public policy in that area has not been static. It has changed with the needs of the people, their mode of living, and the manner and methods of transacting their business.<sup>31</sup>

It now has been generally determined that the immunity from civil liability for negligence accorded to charitable institutions, including religious organizations, depends upon the actual devotion of the institution to charitable purposes.<sup>32</sup> Thus a charitable institution is liable for negligence in the operation of a business enterprise for profit not directly related to the purpose for which such institution was organized.<sup>33</sup> How then can a clergyman claim immunity from liability for statements made or actions taken unrelated to his duties as a clergyman?

Years of precedent, and the inherent conservatism of the law, are important, but not at the price of logic, reason and justice. The American way of life is founded upon the basic rights of individuals. It is only in the past half-century that a remedy has been made available for the invasion of one of these rights—the right of privacy. Strong recognition now is given this right, as is shown in the amount of litigation in the fields of eavesdropping and wiretapping. Only Rhode Island now remains as the sole jurisdiction where it is not actionable. The right of privacy now has a firm foundation in our country. The right of freedom from interference by clergymen should be accorded equal protection.

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<sup>29</sup> Hayner v. Truman, 27 Ohio St. 292 (1875).

<sup>30</sup> Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A. 2d 230 (1950).

<sup>31</sup> Andrews v. Y. M. C. A., 226 Iowa 374, 284 N. W. 186 (1939).

<sup>32</sup> Blankenship v. Alter, 171 Ohio St. 65 (1960).

<sup>33</sup> Allison v. Mennonite Publications Board, 123 F. Supp. 23 (D. C. W. D. Pa., 1954), in which a church run corporation was held liable for libel; Blatt v. Geo. H. Nettleton Home for Aged Women, 305 Mo. 30, 275 S. W. 2d 344 (1955); Eiserhardt v. State Agricultural & Mechanical Soc., — S. C. —, 111 S. E. 2d 568 (1959) School Dist. v. Philadelphia, 367 Pa. 180, 79 A. 2d 433 (1951), *cert. den.* 342 U. S. 821, 72 Ct. 39, 96 L. Ed. 621 (1951).