DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 10
Issue 1 *Fall-Winter 1960*

Article 29

Torts - Massachusetts Finds Abuse of Qualified Privilege without Proof of Malice in Slander Case - Galvin v. New York, N.H. & H.R.R., 168 N.E.2d 262 (Mass. 1960)

DePaul College of Law

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation

DePaul College of Law, *Torts - Massachusetts Finds Abuse of Qualified Privilege without Proof of Malice in Slander Case - Galvin v. New York, N.H. & H.R.R., 168 N.E.2d 262 (Mass. 1960)*, 10 DePaul L. Rev. 222 (1960)
Available at: https://via.library.depaul.edu/law-review/vol10/iss1/29

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

the court of appeals could reverse itself in this regard, and thereby preclude a party who is seeking correction of a worthwhile patent from being deprived of the rights granted to him under the Constitution. The harshness of the decision might be tempered somewhat by restricting the effect of "public use" to broader claims, as was the situation in the instant case. However, the court of appeals applied the ruling to "non-identical" claims which might be interpreted in subsequent lawsuits to include both broader and narrower claims. This is but one manifestation of the unfavorable ramifications that will no doubt develop if the decision stands. Not only will a patentee be deprived of the protection once afforded him by the reissue statutes, but the Patent Office itself is placed in a position which requires a radical modification of the existing procedures relating to the examination of reissue applications.

TORTS—MASSACHUSETTS FINDS ABUSE OF QUALIFIED PRIVILEGE WITHOUT PROOF OF MALICE IN SLANDER CASE

Plaintiff, an employee of defendant railroad company, was accused of stealing property from defendant's ullage house.[1] The accusations were made by two police officers who were also employed by defendant company. Despite plaintiff's protests, these accusations were made in loud voices, and within hearing distance of a crowd of truck drivers numbering fifty to sixty at one time. Statements such as: "[I]f you do not open your car and show us the stuff you stole, we will . . . have you booked on suspicion and have your car opened,"[2] were made. A search of plaintiff's car disclosed only a bag containing six potatoes, two heads of lettuce, and a cantaloupe. During the trial plaintiff testified that the property found in his car had been given to him. No criminal complaint of any kind was issued against him. The Massachusetts Supreme Judicial Court held that although there was not sufficient evidence to prove malice on the defendant's part, the defendant had nevertheless abused its qualified privilege to slander the plaintiff under the circumstances. *Galvin v. New York, N.H. & H. R.R.*, 168 N.E. 2d 262 (Mass. 1960).

The qualified privilege of an employer to slander his employee in order to protect his own business interests or properties is well recognized.[3] This privilege "prevents the inference of malice, which the law draws

[1] The ullage house is a room set aside by the railroad company to hold bad-order packages between time of arrival and auction the next morning.

[2] Galvin v. New York, N. H. & H. R.R., 168 N.E.2d 262, 264 (Mass. 1960).

[3] RESTATEMENT, TORTS § 595; PROSSER, TORTS 615 (2d ed. 1955).

from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice."[4]

The rule requiring absence of actual malice on the defendant's part is generally stated in the converse—*i.e.*, that the plaintiff must prove actual malice in order to recover. Prior to the *Galvin* case, Massachusetts adhered strictly to this rule.[5] In *Pion v. Caron,*[6] the Supreme Judicial Court summarized Massachusetts' position, stating: "Where . . . the words alleged to have been spoken are of themselves actionable, the law infers that they were spoken with a malicious intent. This inference, however, may be rebutted when the circumstances are such as to exclude the idea of malice and it is shown that they were spoken in good faith in the performance of a duty with an honest intent to protect the interest of the party using the words, and the plaintiff must prove malice in fact in order to recover."[7] This rule is followed by the majority of the jurisdictions in the United States,[8] including Illinois.[9]

Since any decision based on this rule is necessarily dependent on the presence or absence of malice, it would seem logical that the courts would have adopted some clear-cut definition of the term *malice*. However, this has not been done. Actual malice has been defined in many ways, and in itself furnishes no consistent test.[10] The courts have said that malice is synonymous with ill-will;[11] that it implies an unworthy motive in the mind of the defendant;[12] or that it may be inferred from intrinsic evidence, such as the relation between the parties, rather than proved by extrinsic evidence.[13]

[4] Toogood v. Spyring, 1 Cr. M. & R. 181, 187, 149 Eng. Rep. 1044, 1050 (1834).

[5] Grindall v. First National Stores, Inc., 330 Mass. 557, 116 N.E.2d 687 (1953); Wormwood v. Lee, 226 Mass. 339, 115 N.E. 494 (1917); Doane v. Grew, 220 Mass. 171, 107 N.E. 620 (1914); Gassett v. Gilbert, 6 Gray 94 (Mass. 1856).

[6] 237 Mass. 107, 129 N.E. 369 (1921).

[7] *Id.* at 110, 129 N.E. at 370.

[8] *E.g., Arkansas*—Thiel v. Dove, 317 S.W.2d 121 (Ark. 1958); *Iowa*—Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951); *New Jersey*—Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d 193 (1959); *New York*—De Ronde v. Gaytime Shops, Inc., 239 F.2d 735 (2d Cir. 1956); *South Carolina*—Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951); *Texas*—Creswell v. Pruitt, 239 S.W. 2d 165 (Tex. 1951); *Virginia*—Crawford & Co. v. Groves, 199 Va. 495, 100 S.E.2d 714 (1957).

[9] Jamison v. Rebenson, 21 Ill. App.2d 364, 158 N.E.2d 82 (1959); Judge v. Rockford Memorial Hospital, 17 Ill. App.2d 365, 150 N.E.2d 202 (1958).

[10] Hallen, *Excessive Publication in Defamation*, 16 MINN. L. REV. 160 (1931-1932).

[11] Childs v. Erhard, 226 Mass. 454, 115 N.E. 924 (1917).

[12] Doane v. Grew, 220 Mass. 171, 107 N.E. 620 (1915).

[13] Gassett v. Gilbert, 6 Gray 94 (Mass. 1856).

Some legal writers and authorities have recognized the apparent difficulty of applying the principle of *malice* when the term itself is subject to such a variety of meanings. They have formulated a new principle or rule—*i.e.*, that there may be an abuse of the qualified privilege in the absence of actual or express malice.[14] Discarding *malice* as a meaningless and unsatisfactory term, under the *abuse* rule "the privilege is lost if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection."[15] Any unreasonable, unnecessary or excessive publication of slanderous statements will constitute an abuse of the qualified privilege.[16]

The Supreme Judicial Court chose to adopt this principle in the *Galvin* case by recognizing "that there can be an abuse of a conditional privilege which cannot fairly be classed as express or actual malice."[17] The loud and repeated accusations made by the defendant's agents were held to constitute such an abuse of privilege.

It is notable that the court determined the evidence to be insufficient to prove actual or express malice. In previous Massachusetts cases,[18] repetition of slander has been held to be evidence of actual malice. Had the court chosen to follow precedent, it appears that the same decision for the plaintiff could have been reached by considering the excessive publication of the slander as an element of malice. Therefore, it seems that the Supreme Judicial Court of Massachusetts was "bending over backwards" to alter the long-standing rule with regard to *malice* in such slander cases.

Whether the *abuse without malice* doctrine set forth in the *Galvin* case will produce more equitable results in slander cases remains to be seen. Certainly the plaintiff who has been slandered under a factual situation comparable to that in the *Galvin* holding should be in a better position to prove his case, for the latter decision constitutes authority for the proposition that he need not convince court and jury that the defendant was guilty of some peculiar frame of mind vaguely described as "malicious."

[14] PROSSER, TORTS § 95 (2d ed. 1955); RESTATEMENT, TORTS §§ 599, 604 (1934); HARPER AND JAMES, TORTS 455 (1953); Kroger Grocery & Bakery Co. v. Yount, 66 F.2d 700 (8th Cir. 1933); Montgomery Ward & Co., v. Watson, 55 F.2d 184 (4th Cir. 1932).

[15] PROSSER, *op. cit. supra* note 14.

[16] HARPER AND JAMES, *op. cit. supra* note 14.

[17] Galvin v. New York, N. H. & H. R.R., 168 N.E.2d 262 (Mass. 1960).

[18] Grindall v. First National Stores, Inc., 330 Mass. 557, 116 N.E.2d 687 (1953); Clark v. Brown, 116 Mass. 504 (1875); Baldwin v. Soule, 6 Gray 321 (Mass. 1856).