

Louisiana Law Review

Volume 6 | Number 2

Symposium Issue: The Work of the Louisiana Supreme

Court for the 1943-1944 Term

May 1945

Defamation - Conditional Privilege in Louisiana (Part One)

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Repository Citation

Martha E. Kirk and Morris D. Rosenthal, *Defamation - Conditional Privilege in Louisiana (Part One)*, 6 La. L. Rev. (1945)

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thereon. The importance of this question lies in the substantial advantages of having one's name freed from accusation³⁵ and in the provision of Article 9 that any prosecution which is so prescribed may be dismissed and may not thereafter be revived.

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DEFAMATION—CONDITIONAL PRIVILEGE IN LOUISIANA

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The Louisiana law of defamation springs from Article 2315 of the Louisiana Civil Code, which provides:

"Every act whatever of man which causes an injury to another, shall oblige him by whose fault it happened to repair it. . . ."¹

Despite the obvious leeway which this article gives the court, the Louisiana courts have developed a law of defamation closely resembling that of common law jurisdictions.

In Louisiana, when the defendant has defamed the social, business, or moral interests or character of another, he is liable to the injured party without further proof of damage or bad faith.² If, however, he can show that the occasion was one in which the value to society that the communication be made was great enough to justify the damage caused, the law allows a privilege to the publisher, relieving him entirely from civil liability.

These privileges are of two types—absolute and conditional. An absolute privilege exists in certain situations where the public interest in unhampered freedom of speech is so strong that the courts feel that no liability should be imposed under any circumstances. This privilege is limited to judges, legislators, and certain executives acting in their respective official capacities. In other situations the courts grant only limited protection to the

35. For one of these advantages, see *State v. Gunter*, 188 La. 314, 177 So. 60 (1937).

†This is the first of two installments on this subject. Included are the privileges to defame for self protection, for common interest, for the protection of a third party, and for the protection of the recipient. The privilege of fair comment, the privilege to defame for the protection of the public, together with the topic of abuse of the conditional privilege to defame will be dealt with in the concluding installment of this comment which will be published in the forthcoming issue of the *Louisiana Law Review*.

1. Art. 2315, La. Civil Code of 1870.

2. *Miller v. Holstein*, 16 La. 389 (1839); *Sotorno v. Fourichon*, 40 La. Ann. 423, 4 So. 71 (1888); *Fellman v. Dreyfous*, 47 La. Ann. 907, 17 So. 422 (1895).

defendant. While recognizing the social value of allowing him to make what would otherwise be defamatory statements, they nevertheless are unwilling to accord him an indefeasible privilege and they prefer to determine in each instance whether his conduct has been excessive. In such cases the term *conditional privilege* is employed. This conditional privilege may be defeated if the communication was made with knowledge of its falsity or if it was made under circumstances showing that the defendant was prompted by an improper motive.

It is the purpose of this comment to point out the nature and extent of the conditional privilege in Louisiana.

Self Protection

It is established that every man is privileged to defame another in protection of some substantial interest in his own social or economic welfare. It must appear not only that the communication was necessary for his protection, but also that the publisher reasonably believed the recipient to be in a position to help him.

There must be some legal connection between the defendant's statement and the interest which he seeks to protect. A person cannot, under the guise of protecting his own business defame another who has in no way injured or threatened to injure him. Thus a privilege was denied where defendant sent a circular letter to his patrons asking that they "show no favors" to plaintiff, a former employee of defendant who was then in the employ of another concern engaged in the same type of business.³ The letter contained implications that plaintiff had been discharged for some unexplained reason. The latter had in no way represented that he was still in the employ of the defendant, nor had he otherwise attempted to cheat or defraud him. The case of *Mielly v. Soule*⁴ affords an illustration of a situation where the court felt that there was sufficient connection between the act complained of and the defamatory statement. In that case plaintiff business college had published a circular letter setting forth many claims of its own superiority of instruction methods and facilities. In this letter, defendant's business school had been greatly ridiculed. Defendant, in retaliation, published a small pamphlet which might be regarded as defamatory of plaintiff. The court held that defendant's action was privileged,

3. *Warner v. Clark*, 45 La. Ann. 863, 13 So. 203 (1893).

4. 49 La. Ann. 800, 21 So. 593 (1897).

being only a proper retaliatory measure made for the security of his business.⁵

An employer has been held privileged to make reasonable investigations of employees or customers who are suspected of theft,⁶ forgery,⁷ or other dishonest actions in connection with the defendant's business. In the case of *Gilliland v. Feibleman*⁸ the plaintiff alleged that defendant had publicly accused her of stealing three yards of dress material while employed in the store in which defendant was manager. The court, after finding that the investigation had been conducted in a quiet and orderly manner, said:

"It is properly and peculiarly the duty of the responsible or directing head of any business to question its employees regarding the property of the concern or the conduct of its affairs."⁹

A person is also privileged to defend himself from a slanderous attack made against his personal character.¹⁰ The common law qualifies this privilege by saying that the statement must be made reasonably and without malice.¹¹ Louisiana courts however have uniformly refused to allow recovery by either party in cases of mutual abuse. The rule was well stated by the court in *Kenner v. Miller*:¹²

"The principle seems to be well embedded in our jurisprudence that in suits of this kind where the parties have engaged in mutual vituperation and abuse at each other, they are both wrong, and neither can recover from the other."

Protection of Common Interest

An occasion is conditionally privileged when the publisher and the recipient have a common interest which will be protected or furthered by the communication. Again, the interest must be

5. It appears in the case that the court was not satisfied that defendant's remarks were actually defamatory of plaintiff. The decision, however, was based upon both grounds.

6. *Gilliland v. Feibleman's Inc.*, 161 La. 24, 108 So. 112 (1926).

7. *Raggio v. Morgan's Louisiana and Texas R. & S. S. Co.*, 148 La. 209, 86 So. 747 (1920).

8. 161 La. 24, 108 So. 112 (1926).

9. 161 La. 24, 27, 108 So. 112, 113 (1926). A similar privilege has been accorded when the defendant has defamed in defense of the quality of his product. *Lynch v. Febiger*, 39 La. Ann. 336, 1 So. 690 (1887).

10. *Bloom v. Crescioni*, 109 La. 667, 33 So. 724 (1903).

11. *Preston v. Hobbs*, 161 App. Div. 363, 146 N.Y. Supp. 419 (1914); *Craig v. Wright*, 182 Okla. 68, 76 P. (2d) 248 (1938); *Wettach*, *Recent Developments in Newspaper Libel* (1928) 13 Minn. L. Rev. 21, 31-34.

12. 196 So. 535, 537 (La. App. 1940).

substantial, and the publisher must believe that the recipient is a proper party to receive the publication. In the case of *Oakes v. Walther*¹³ the supreme court approved the rule as stated by Newell:

"A communication made in good faith, upon any subject matter in which the party has an interest or in reference to which he has a duty, either legal, moral or social, if made to a person having a corresponding interest or duty, is qualifiedly privileged."¹⁴

In that case defendant, a physician, examined plaintiff at the request of certain attorneys employed in litigation to which plaintiff was a party. The defendant's unfavorable report of the plaintiff's mental condition to the attorneys was held to be privileged.

This privilege of protection of a common interest is most commonly used where the interest is of a business or financial nature. It has been extended however to include cases in which interests of a non-pecuniary nature are involved. For example, in *Berot v. Porte*,¹⁵ where plaintiff had applied for membership members that plaintiff was of Negro blood. In other cases, a defendant has been held privileged to make derogatory statements of plaintiff to the sister-in-law who was caring for defendant's child where the statements concerned the child's welfare.¹⁶ Similarly a mother has been held privileged to address the principal of a public school concerning the moral fitness of her child's instructor.¹⁷

Protection of Third Persons

In the two situations last discussed the court might with equal ease have found that the defamatory statements made to the sister-in-law or school principal were for the protection of a third person, the defendant's child, in whom the defendant had a proper family interest. It is generally held that one member of a family group may make defamatory statements to third persons for the protection of another member of the family. The interest protected here may be the general welfare of the other family member, as in the cases last cited. Also the statement may be made for the protection of some specific financial interest of the family member, as in *Haney v. Trost*.¹⁸ In this latter case

13. 179 La. 365, 154 So. 26 (1934).

14. Newell, *Slander and Libel* (3 ed. 1914) 479.

15. 144 La. 805, 81 So. 323 (1919).

16. *State v. Lambert*, 188 La. 968, 178 So. 508 (1938).

17. *Simms v. Clark*, 194 So. 123 (La. App. 1940).

18. 34 La. Ann. 1146 (1882).

a husband was held privileged to address statements defamatory of the plaintiff to the head of a company in which his wife was a stockholder. Where the third person whose interest the defendant seeks to protect is not related to the defendant, the latter may still be privileged to defame for the protection of such person. In these cases, however, the courts attempt to exclude the officious intermeddler. For this reason it is important to determine whether or not the information was given in response to an inquiry by some person having a legitimate interest in the matter. In the case of *Buisson v. Huard*¹⁹ relatives of a lady who was engaged to be married to the plaintiff approached the defendant and inquired of him concerning the plaintiff's character. The alleged defamatory statements which were made in good faith in response to this inquiry were held to be privileged. If the defendant had volunteered the statements it is doubtful that the court would have accorded him the protection of privilege.

Protection of the Recipient

The problem is similar where a defamatory remark is made for the purpose of protecting some interest of the person to whom the remark is addressed. In the case of *McBride v. Ledoux*²⁰ it was held that one member of a family was privileged to make derogatory statements to another member of the family group concerning the latter's suitor. Here again the family relationship affords a substantial guarantee that the defendant is not an intermeddler.

A similar situation is presented by statements made by mercantile agencies to subscribing members. Generally speaking, a mercantile agency is not privileged to issue a scandalous report merely for the reason that the publication of such a report is in the general financial interests of its subscribers.²¹ However, if the report is made in response to a special request by a subscriber and is not generally circulated the court may regard it as a privileged communication.²²

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19. 106 La. 768, 31 So. 293 (1901).

20. 111 La. 398, 35 So. 615 (1904).

21. *Giacona & Son v. The Bradstreet Co.*, 48 La. Ann. 1191 (1896).

22. For a more detailed discussion of this problem see Note (1941) 4 LOUISIANA LAW REVIEW 140.

*A substantial part of the research work which led to the preparation of this comment was done by Mr. Rosenthal as a research project in the Torts course at Louisiana State University. Mr. Rosenthal served as a member of the armed forces and has been missing in action since December 13, 1944.