Montana Law Review

Volume 1
Issue 1 *Spring 1940*

Article 2

January 1940

Privileged Communications to Industrial Accident Board

Norman Hanson

Rejection of the instruction is not surprising in a State, such as Montana, where different degrees of negligence are recognized. Various statutes describe "slight care and diligence," "ordinary negligence," "great care and diligence," and "gross negligence."[12] The provision of Sec. 7579, on contributory negligence, is only that a plaintiff is barred if he has, "wilfully or by want of ordinary care," brought the injury upon himself. It can hardly be said, in this State, that the term "negligence" in the instruction necessarily imports want of ordinary care. There is, on the contrary, much reason for the view that the instruction might have meant or have been understood as meaning that plaintiff would be barred by failure to exercise extraordinary care, i. e., by slight negligence.[13]

It thus seems evident that the writer in A. L. R. used the term "negligence" in a sense different from that of the Montana Supreme Court. His concept apparently denies existence of different degress of negligence.[14] Probably that is the better concept, but, in view of the Montana statutes and also of the misleading character of the terminology, it is believed preferable to refrain from using "slight" as an adjective modifying "negligence," in instructions on contributory negligence. The word, if used at all, ought to be employed only to qualify "want of ordinary care."[15] But the rule of contributory negligence, in its common law form, is so harsh that use of the term at all should be discouraged.

Ira F. Beeler.

PRIVILEGED COMMUNICATIONS TO INDUSTRIAL ACCIDENT BOARD

In *Magelo v. Roundup Coal Mining Co.*,[1] decided a few months ago by the Montana Supreme Court, it was held, on demurrer, that a letter, written by an employer to the Industrial Accident Board with reference to an employee's claim then pending, lost its privileged character because its statements of circumstances surrounding the filing of previous claims by the same employee, suggestive of fraud and malinger-

[12]See Secs. 1748.1, 7658, 7704, 7733, 7768, 7810, 7821, 7853, 7869, R. C. M., 1935.

[13]See, to this effect, Cremer v. Portland, 36 Wis. 92 (1874), quoted in BEACH ON CONTRIBUTORY NEGLIGENCE, Sec. 20.

[14]The two concepts are discussed in 20 R. C. L. 21, Sec. 16.

[15]"To instruct a jury that a plaintiff in a personal injury case cannot recover if she was guilty of negligence in the slightest degree directly contributing to her injury would, we think, tend to mislead most any jury when such charge is not given in connection with a statement that her only duty is to exercise ordinary care." Rogers v. Ziegler, 21 Ohio App. 186, 152 N. E. 781 (1925) at p. 783.

[1]96 P. (2d) 932 (Mont., 1939).

ing, although coupled with similar suggestions as to the pending claim, were irrelevant to the issue before the Board. The Court assumed, but doubted, that such a letter would otherwise have been privileged as a communication made in an official proceeding.

The law of libel recognizes two different degrees of privilege in the publication of false and defamatory statements. Both usually require that the contents of the communication be relevant, or at least reasonably believed to be relevant, to the issue to which the privilege extends.[2] But the first, said to be *absolute,* accords immunity from liability for statements made in the course of judicial and certain other important governmental proceedings notwithstanding actual malice on the part of the defamer.[3] The second, referred to as a *qualified* privilege, extends in general to statements reasonably believed to be helpful in protecting legitimate interests of defamer or recipient but is defeated by proof of malice in fact.[4] The Montana statute, while not adopting this terminology, makes the distinction.[5]

There can be no doubt that relevant communications made by participants in proceedings of the Montana Industrial Accident Board are absolutely privileged. The statute does not limit such privilege to judicial proceedings but extends it to "any other official proceeding authorized by law." Even apart from the statute it is probable that, since the Board exercises quasi-judicial functions,[6] the privilege would be held absolute.[7]

[2]RESTATEMENT OF TORTS, Secs. 585-591, 605; HARPER ON TORTS, Secs. 248, 252.

[3]RESTATEMENT, Secs. 585-591; HARPER ON TORTS, Sec. 248; NEWELL, SLANDER AND LIBEL (4th Ed.), Sec. 350; Williams v. Standard-Examiner Pub. Co., 83 Utah 31, 27 P. (2d) 1 (1933).

[4]RESTATEMENT, Secs. 594-605; HARPER ON TORTS, Sec. 349; NEWELL, SLANDER AND LIBEL (4th Ed.), Sec. 389; Conrad v. Allis-Chalmers Mfg. Co., 228 Mo. App. 817, 73 S. W. (2d) 438 (1934).

[5]R. C. M., 1935, Sec. 5692: "A privileged communication is one made: 1. In the proper discharge of an official duty; 2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law; 3. In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; 4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof."

[6]Dosen v. East Butte Copper Mining Co., 78 Mont. 579, 254 Pac. 880 (1927); State *ex rel.* Magelo v. Industrial Accident Board, 102 Mont. 455, 59 P. (2d) 785 (1936); U. S. F. & G. Co. v. Industrial Comm., 42 Ariz. 422, 26 P. (2d) 1012 (1933); Bankers Indemnity Ins. Co. v. Industrial Acc. Comm., 4 Cal. (2d) 89, 47 P. (2d) 719 (1935).

[7]"Judicial proceedings include all proceedings before an officer or tribunal who exercises judicial functions therein." RESTATEMENT OF TORTS, Sec. 587, Comment e. See also Mickens v. Davis, 132 Kan. 49,

But can an *ex parte* communication, such as the letter in the principal case, be treated as made *in* the proceeding? Some cases, treating such communications like letters written to a judge of an ordinary Court, deny the right of administrative tribunals to consider them.[8] Others, relying upon the administrative and investigative functions of the tribunal and upon the inapplicability of orthodox rules of pleading and evidence, hold to the contrary.[9] In view of the informality of proceedings before the Board, the duty of the Board to investigate claims fully, and the express provision of the Montana statute that technical rules of evidence shall not be binding,[10] it seems that the latter line of authorities should be followed and that the doubt expressed by the Court as to the correctness of its assumption that the letter was a part of the proceedings should not prevail. If proof of service had accompanied the letter, or possibly even if it had been produced at the hearing, apparently the Court would have conceded that it was a part of the proceedings, but Rule 17 of the Board requires proof of service of complaint and answer only and the duty to give publicity to the letter rested upon the Board if upon anyone.[11]

In *Higgins v. Williams Pocahontas Coal Co.*,[12] where a letter had been written by the employer to the Compensation Commissioner after hearing but within the time for re-opening, the West Virginia Supreme Court of Appeals squarely held that statements in the letter were absolutely privileged. There is a similar holding in a Texas case with respect to a letter written to the Railroad Commission[13] and a decision in Illinois to like effect as to objections filed with the Board of Election Commissioners.[14]

Assuming, then, as did the Court, that the communication was made in and as a part of the proceedings before the Board, the decision that it lost its privilege because of irrelevancy seems extremely doubtful. The authorities agree that, while some pertinency is essential, all doubts are to be resolved in favor thereof, since the privilege embraces everything which could

294 Pac. 896 (1931); Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 55 S. W. (2d) 767 (1933).

[8]Bereda Mfg. Co. v. Industrial Board, 275 Ill. 514, 114 N. E. 275 (1916); Ruda v. Industrial Board, 283 Ill. 550, 119 N. E. 579 (1918); F. W. Merrick, Inc., v. Cross, 144 Okla. 40, 289 Pac. 267 (1913); Mid-Union Drilling Co. v. Graham, 184 Okla. 514, 88 P. (2d) 619 (1939).

[9]Mietkiewski v. Wayne County Road Commissioners, 227 Mich. 227, 198 N. W. 981 (1924); Traders & General Ins. Co. v. Lincecum, 126 S. W. (2d) 692 (Tex. Civ. App., 1939); Simpkins v. State Banking Dept., 45 Ariz. 186, 42 P. (2d) 47 (1935).

[10]R. C. M., 1935, Sec. 2938.

[11]Cole v. Town of Miami, 52 Ariz. 488, 83 P. (2d) 997 (1938).

[12]103 W. Va. 504, 138 S. E. 112 (1927).

[13]Aransas Harbor Terminal Ry. Co. v. Taber, 235 S. W. 841 (Tex. Comm. App., 1921).

[14]Kimball v. Ryan, 283 Ill. App 456 (1936).

possibly relate to the issue.[15] The requirement of relevancy clearly is not a requirement that the matter be admissible in evidence.[16] Even if it were, however, it is by no means clear that circumstances surrounding filing of prior claims might not be admissible before the Board. The principle is stated thus in the RESTATEMENT OF TORTS: "It is not necessary that the defamatory matter be relevant or material to any issue before the Court. It is enough that it have some reference to the subject of the inquiry. Thus, while a party may not introduce into his pleadings defamatory matter which is entirely disconnected with the litigation, he is not answerable for defamatory matter volunteered or included by way of surplusage in his pleadings if it has any bearing upon the subject matter of the litigation."[17] Some authorities go so far as to make absolute privilege depend merely upon the reasonable belief of the party that his statement is relevant.[18] It is submitted, therefore, that the Court in the principal case mistakenly required relevancy in the evidentiary sense and that, since clearly the references in the letter to prior claims were not foreign to the subject matter before the Board, the letter should have been held absolutely privileged.

Surely, in any event, the communication was qualifiedly privileged. It appears to be generally held that a statement made in a judicial proceeding, even if irrelevant, is entitled to qualified privlege, *i. e.*, the result then depends upon malice or lack of malice.[19] This is perhaps the equivalent of the above statement that reasonable belief in relevancy is sufficient.[20] And, even if the letter be held not a part of the proceedings,

[15]Young v. Young, 18 F. (2d) 807 (D. C. App., 1927); Penick v. Radcliffe, 149 Va. 618, 140 S. E. 664 (1927); Sacks v. Stecker, 60 F. (2d) 73 (C. C. A., 2d, 1932); Texas Co. v. Brewer & Co., 180 S. C. 325, 185 S. E. 623 (1936); Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938); Parker v. Kirkland, 298 Ill. App. 340, 18 N. E. (2d) 709 (1939); Speenburgh v. Schwartz, 165 Misc. 508, 300 N. Y. Supp. 196 (1937); Wels v. Rubin, 254 App. Div. 484, 5 N. Y. S. (2d) 350 (1938); Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907).

[16]Irwin v. Newby, 102 Cal. App. 110, P. 282 Pac. 810 (1929); 20 Am. Jur. 238-239, 246.

[17]Sec. 587, Comment c.

[18]"The formula is broad and flexible: was the statement of the witness, party, or counsel relevant or did it have 'reference or relation to' the matter under consideration, or did the participant think so? If either, he is within the protection of the immunity." GREEN, THE JUDICIAL PROCESS IN TORT CASES, p. 1323.

[19]Lawson v. Hicks, 38 Ala. 279, 81 Am D. 49 (1862); Myers v. Hodges, *supra*, note 15; 36 C. J. 1252. *Cf.* Tuohy v. Halsell, 35 Okla. 61, 128 Pac. 126, 43 L. R. A. (N. S.) 323, Ann Cas. 1916B, 1110 (1912); NEWELL, SLANDER AND LIBEL (4th Ed.), Sec. 371.

[20]"It would be unfortunate to require the witness, at his peril, to pass upon the relevancy of his testimony, and the more desirable rule is merely to require that the statement have some reasonable relation to the matter in controversy or that the witness himself reasonably believe it to be relevant." HARPER ON TORTS, p. 530.

still it was entitled to qualified privilege because of the mutual interest of sender and recipient.[21] But, of course, inasmuch as the complaint charged malice, qualified privilege could not be taken advantage of by demurrer.[22] Absolute privilege, on the other hand, being independent of malice, may be shown on demurrer where the facts giving rise to the privileged occasion appear on the face of the complaint.[23]

Norman Hanson.

MUST ATTESTING WITNESSES BE ABLE TO SEE TESTATOR'S SIGNATURE?

In only one case, *In re Bragg's Estate*,[1] has the Montana Supreme Court been called upon to construe and apply the provisions of Section 6980, sub-section 2, R. C. M., 1935, which requires that, except as to holographic and nuncupative wills, "the subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him, or by his authority." Since, then, the Montana law with respect to the sufficiency of an acknowledgment of a signature not made in the presence of attesting witnesses depends upon the interpretation of this case, some consideration of the opinion is justified. It is believed that, whatever may be said of the correctness of the actual decision upon the facts, the language of the opinion is such as to leave the rule of the case obscure, and may lead to an interpretation of the case which would be clearly opposed to the weight of authority in jurisdictions having statutes similar to that of Montana.

Both of the attesting witnesses in this case testified that the testatrix did not sign the instrument in their presence nor state that her signature was subscribed thereto, but did declare it to be her will and request them to witness. One of the witnesses

[21]The case would seem to fall under R. C. M., 1935, Sec. 5692(3), in view of the investigative duties of the Board *(cf.* Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 74 P. (2d) 171 (1937)) and of the fact that the employer was under Plan No. 1 of the Workmen's Compensation Act (self-insurance).

[22]Pack v. Wakefield Item Co., 280 Mass. 451, 183 N. E. 70 (1932); KVOS, Inc. v. Associated Press, 13 F. Supp. 910 (W. D., Wash., 1936); Rutledge v. Junior Order of United American Mechanics, 185 S. C. 142, 193 S. E. 434 (1937); Corwin v. Berkwitz, 190 App. Div. 952, 179 N. Y. Supp. 915 (1920); Pienhardt v. West, 217 Ala. 12, 115 So. 88 (1927); Locke v. Mitchell, 7 Cal. (2d) 599, 61 P. (2d) 922 (1936); Powell v. American Towing & Lighterage Co., 131 Md. 539, 102 Atl. 747 (1917); 37 C. J. 50-51.

[23]Miles v. McGrath, 4 F. Supp. 603 (D. Md., 1933); Brown v. Cochran, 222 Iowa 34, 268 N. W. 585 (1936); Layne v. Kirby, 208 Cal. 694, 284 Pac. 441 (1930).

[1]106 Mont. 132, 76 P. (2d) 57 (1938).