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Torts -- Libel and Slander -- Defenses of Qualified Privilege and Fair Comment

Robert G. Baynes

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Torts—Libel and Slander—Defenses of Qualified Privilege and Fair
Comment

The law early recognized the desirability of encouraging free
public discussion and criticism of the official conduct of persons in
public life in order to combat corruption. This was severely ham-
pered, however, by the strictures of the common-law actions of libel
and slander.¹ In time, the courts devised a defense to these actions
sometimes labelled qualified or conditional privilege and sometimes
fair comment. Whether these labels carry with them any substan-
tive distinction has been a matter of considerable controversy.

Fair comment embraces within its protection the right to criti-
cize the public conduct of government officers and employees² at
every level.³ No comment or criticism, however, is fair if it is made
through actual malice.⁴ Neither is it fair comment if it is unreason-
able or made without an honest purpose.⁵ Furthermore, the doc-

¹See Prosser, Torts 572 (2d ed. 1955). Libel and slander generally are
actions which have not been blessed by agreement or uniformity of opinion
among those learned in the law. Mr. Justice Black has said: “I have no
doubt myself that the provision, [U.S. Const. amend. I] as written and
adopted, intended that there should be no libel or defamation law in the
United States . . . just absolutely none so far as I am concerned.” Justice
Black & First Amendment Absolutes: A Public Interview, 37 N.Y.U.L. Rev.
549, 557 (1962). Compare the advocacy of absolute liability for defamation
even, in certain situations, where the statements are in fact true in Riesman,
Democracy and Defamation: Fair Game and Fair Comment II, 42 COLUM.
L. Rev. 1282 (1942).

²This comment is limited in scope to a discussion of the doctrine of fair
comment as it relates to public officers and candidates. Other areas in which
it has been applied are: works of art and literature, Triggs v. Sun Printing
& Publishing Ass’n, 179 N.Y. 144, 71 N.E. 739 (1904); RESTATEMENT, Torts
§ 609 (1938); the commodities, wares and merchandise of those who appeal
to the public to buy, Schwarz Bros. Co. v. Evening News Publishing Co., 84
N.J.L. 486, 87 Atl. 148 (Sup. Ct. 1913); RESTATEMENT, Torts § 610 (1938);
and those in charge of educational, religious and charitable institutions and
other organizations in which the public has a substantial interest, Klos v.
Zahorik, 113 Iowa 161, 84 N.W. 1046 (1901); RESTATEMENT, Torts § 610

³See Prosser, Torts § 607 (1938).

⁴Brinsfield v. Howeth, 107 Md. 278, 68 Atl. 566 (1908).

⁵Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d
440 (1955); England v. Daily Gazette Co., 143 W.Va. 700, 104 S.E.2d 306
(1958).
trine of fair comment affords no protection for attacks on one’s private life or character. Underlying the doctrine is the policy of encouraging government to be more responsive to the electorate by permitting individuals to expose its abuses.

A defamatory statement is qualifiedly or conditionally privileged when made on a privileged occasion, or pursuant to a political, judicial, social, or personal duty. The communication must be made in good faith and with reasonable grounds to believe in its truth. The privilege is destroyed on a showing of either malice or excessive publication.

The authorities are in conflict as to whether fair comment is simply an application of the doctrine of qualified privilege or a separate and distinct defense. A minority of courts make the distinction that qualified privilege is a defense which excuses or justifies defa-

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7 Carr v. Hood, 1 Camp N.P. 355 (K.P. 1808); See generally Noel, Defamation of Public Officers and Candidates, 49 Colum. L. Rev. 875 (1949). The doctrine has also been held to be based on the constitutional guarantee of freedom of speech, Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).
8 The occasion is privileged when the publisher of the defamation and the person receiving it have correlative interests or duties. In Hartsfield v. Harvey C. Hines Co., 200 N.C. 356, 361, 157 S.E. 16, 19 (1931) it was said, “Qualified privilege rests upon the fact of interest or duty. That is to say, if the speaker of the alleged slanderous words has an interest or duty in the subject matter of the conversation, and the hearer has an interest or duty with respect to the subject matter of the conversation, then the doctrine of qualified privilege applies.” In the recent case of Ponder v. Cobb, 257 N.C. 281, 295, 126 S.E.2d 67, 78 (1962), the court adopted the definition that a privileged occasion is one “when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter; one on which a privileged person is entitled to do something which no one not within the privilege is entitled to do on that occasion; and it has been said that it is not the publication itself, but the occasion of its publication, that is privileged.” 53 C.J.S., Libel and Slander § 87 (1948).
12 The term malice, as it relates to defamation, has been defined as “not necessarily ... personal ill will or malevolence; it may be said to exist when it is shown that the publication is made from some ulterior motive and it may be inferred where a defamatory statement is knowingly false or made without any fair or reasonable grounds to believe in its truth, or, at times, from the character and circumstances of the publication itself, but with the exception, probably, that a man’s general moral character is presumed to be good until the contrary is shown.” State v. Greenville Publishing Co., 179 N.C. 720, 723, 102 S.E. 318, 319 (1920).
13 Fields v. Bynum, 156 N.C. 413, 72 S.E. 449 (1911).
information, while fair comment is simply not defamation because only the plaintiff's work, and not the plaintiff himself, has been assailed. But because a showing of malice defeats either defense, the weight of authority views fair comment only as a special application of the general doctrine of qualified privilege.

In jurisdictions which view fair comment and qualified privilege as separate defenses, a distinction can be drawn as to their scope. In these jurisdictions fair comment is available to all members of the public. Qualified privilege, on the other hand, is confined to situations in which the parties share an interest or duty with respect to the subject matter of the alleged defamation. A hypothetical case may clarify the distinction. A shopkeeper (or anyone else) could, with impunity, make derogatory statements concerning the mayor's handling of municipal affairs, protected by his right of fair comment. However, liability would attach where the criticism was directed to the mayor's private life, if it had no bearing on his ability or competence as the city's chief executive. Similarly, the shopkeeper could tell his partner that a certain employee was stealing from them, and the communication would be qualifiedly privileged due to the existence of a common interest in protecting their business. But the result would be otherwise if the same statement were made at a social gathering either to, or by, persons having no legitimate interest or duty in the matter.

More importantly, there may be a procedural difference in the two defenses. As a general rule, where the defendant contends that his statements were protected by a qualified privilege, the plaintiff has the burden of proving both express malice and falsity in order to defeat the privilege, and some courts apply the same rule where

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16 Restatement, Torts § 606 (1938); Noel, supra note 7; Note, 45 Va. L. Rev. 772 (1959).


18 See note 8, supra.

the defense of fair comment is interposed. But it has been held that the right of fair comment can be defeated on a showing of either express malice or falsity.

To complete the picture one writer has taken the position that it is of no consequence which view is accepted, since "there is immunity on either basis."

North Carolina is in accord with the majority view that fair comment is simply one application of the doctrine of qualified privilege and not a distinct defense. In the recent case of *Ponder v. Cobb* the court held that there is a qualified privilege to write defamatory letters to the Governor and the State Board of Elections concerning the conduct of local election officials in a state-wide bond referendum. The trial court charged the jury that while the defendant did have a qualified privilege to lodge his complaint with the Governor and the State Board of Elections, there was no privilege to make the defamatory statements to persons having no authority to afford redress. Therefore, release of these letters to the press was not privileged. On appeal, the supreme court granted a new trial for error in this instruction, holding that the privilege was not destroyed by releasing the letters to newspapers of both general and local circulation. Manifestly, these facts present a case which would, in the minority view, give rise to the defense of fair comment. But our court, following a long line of past decisions, phrased the decision in terms of qualified privilege.

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22 In the English practice, the plaintiff may successfully attack qualified privilege by showing express malice, but where the defense of fair comment is raised, the defendant must give negative malice by proving that the comment was fair. Turner v. Metro-Goldwyn-Mayer Pictures, Ltd., [1950] 1 All E.R. 449, 461 (H.L.); Adams v. Sunday Pictorial Newspapers, Ltd., [1920] 1 K.B. 354, 359; See generally 24 HALSBURY'S LAWS OF ENGLAND, Libel & Slander § 131 (3d ed. 1958).
23 Prosser, TORTS 619 (2d ed. 1955).
24 While no case has been discovered expressly repudiating the latter view, in *Yancey v. Gillespie*, 242 N.C. 227, 229, 87 S.E.2d 210, 212 (1955), the court set out the classic definition, couched in terms of qualified privilege: "Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written maliciously."
26 Qualified privilege is a defense by which defamation is excused or justified, and not an assertion that the publication was non-defamatory. *Yancey v. Gillespie*, 242 N.C. 227, 87 S.E.2d 210 (1955).
27 In North Carolina, qualified privilege has been found in these situations:
There is a further divergence of judicial opinion on whether qualified privilege is available where the defamation of a public official involves a misstatement of fact. According to the majority the privilege is limited to comment, criticism, and opinion, and does not protect a false assertion of fact. There is a growing minority view, however, that a misstatement of fact may nonetheless be privileged where the defendant, on reasonable grounds, and after diligent inquiry to determine the truth, makes the statement in good faith.

North Carolina followed the minority position in *Lewis v. Carr*, a newspaper article accusing the chairman of the county board of elections of using county funds to pay his expenses to the State Teacher’s Assembly, based on false affidavits of two bank employees stating that they had drawn the vouchers for the plaintiff, *Lewis v. Carr*, 178 N.C. 413, 72 S.E. 449 (1911); an editorial accusing the plaintiff of being unfaithful and criminally negligent in the execution of his duties as sheriff, *State v. Greenville Publishing Co.*, 179 N.C. 720, 102 S.E. 318 (1920); a newspaper report that a mayor had wasted municipal funds in purchasing a tract of land, *Yancey v. Gillespie*, 242 N.C. 227, 87 S.E.2d 210 (1955); a letter to the Superintendent of the Census alleging that the plaintiff, one of the appointed enumerators, had murdered two soldiers, and had defrauded the defendant out of his election to state office, *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).


On the other hand, the court has held the following not to be privileged: a letter written to the Sheriff of Pitt County concerning the conduct of the plaintiff, a Deputy Sheriff of Hertford County, *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); a post card sent by the superintendent of public instruction of Yadkin County to the corresponding official in Davie County accusing the Treasurer of Davie County of embezzlement, *Logan v. Hodges*, 146 N.C. 38, 59 S.E. 349 (1907); and a postmaster’s defense of his administration, where malice was shown, *Newberry v. Willis*, 195 N.C. 302, 142 S.E. 10 (1928). For other cases holding that there was no qualified privilege see *Elmore v. Atlantic C.R.R.*, 189 N.C. 658, 127 S.E. 710 (1925); and *Scott v. Harrison*, 215 N.C. 427, 2 S.E.2d 1 (1939).

The jurisdictions which take this view are Alabama, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. Annot., 150 A.L.R. 358 (1944).

holding that “In cases of qualified privilege . . . proof of falsity does not per se raise a presumption of malice . . .” and thereby defeat the privilege.  

In rejecting any distinction between the defenses of qualified privilege and fair comment the North Carolina Supreme Court has adopted a rule of law which, at very least, has the virtue of simplicity, facilitating understanding and application by the bar and the courts. By extending the defense of qualified privilege to protect misstatements of fact, under certain circumstances, the forthright citizen is encouraged, and the litigious plaintiff is hopefully dissuaded. When reviewed in light of the current trend “not to give the language of privileged communications too strict a scrutiny,” this area of the law would seem to be in a state which should be applauded.

ROBERT G. BAYNES

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80 In the most recent case, Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962), both Lewis v. Carr, supra note 29, and Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281 (1908), are cited and approved. See note 28, supra.