

EXHIBIT 7B



Restatement of the Law — Torts
Restatement (Second) of Torts
Current through June 2009

Copyright © 1977-2010 by the American Law Institute

Division 5. Defamation
Chapter 25. Defenses To Actions For Defamation
Topic 3. Conditional Privileges
Title A. Occasions Making A Publication Conditionally Privileged
Subtitle II. Factors Determining The Existence Of A Conditional Privilege Arising From An Occasion

§ 595. Protection Of Interest Of Recipient Or A Third Person

[Link to Case Citations](#)

(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the recipient or a third person, and

(b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

(a) the publication is made in response to a request rather than volunteered by the publisher or

(b) a family or other relationship exists between the parties.

Comment:

a. Nature of privilege. The rule stated in this Section sets forth only the circumstances that make a publication conditionally privileged. Even though the publication is privileged, a particular person cannot avail himself of the privilege if he abuses it (See [§§ 599-605A](#)). The privilege may be abused and its protection lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter (see [§§ 600-602](#)); by the publication of the defamatory matter for some improper purpose (see [§ 603](#)); by excessive publication (see [§ 604](#)); or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged. (See [605A](#)).

b. Relation of privilege to constitutional requirement of fault as to falsity. A conditional privilege is one of the methods utilized by the common law for balancing the interest of the defamed person in the protection of his reputation against the interests of the publisher, of third persons and of the public in having the publication take place. The latter interests are not strong enough under the circumstances to create an absolute privilege but they are of sufficient significance to relax the usual standard for liability. Thus the traditional balance at common law had been attained in the past by holding that a person having a conditional privilege was not subject to the normal strict liability for a defamatory communication but was liable only if he did not believe the statement to be true or lacked reasonable grounds for so believing. This adjustment of the conflicting interests has now been subjected to necessary modification by the recent holding of the United States Supreme Court in [Gertz v. Robert Welch, Inc., \(1972\) 418 U.S. 323](#), that

strict liability in defamation is unconstitutional and that a publisher can be held liable only if he was at fault amounting at least to negligence regarding the falsity of the statement. (See [§ 580B](#)).

One consequence of this holding is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of a conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose. (See [§ 600](#)). For explanation of this in more detail, see the Special Note to Topic 3, immediately preceding [§ 593](#); and see [§ 580B](#), Comment *l*.

Another significant consequence of all this is that the courts will now find it necessary to reassess the circumstances under which it is appropriate to grant a conditional privilege. If a proper adjustment of the conflicting interests of the parties indicates that a publisher should be held liable for failure to use due care to determine the truth of the communication before publishing it, a conditional privilege is not needed and should not now be held to apply. The conditional privilege should be confined to a situation where the court feels that it is appropriate to hold the publisher liable only in case he knew of the falsity or acted in reckless disregard of it. This should be borne in mind in contemplating each of the sections on conditional privilege.

c. Reasonable belief as to existence of privilege. If facts actually exist that affect a sufficiently important interest, as stated in Clause (a), and if the publication is made to a proper recipient, as stated in Clause (b), the privilege applies. If the interest is not in fact affected, or if the recipient of the publication is not in fact a proper person to receive the information, the privilege nevertheless applies if the publisher reasonably believes that this is the case.

Comment on Subsection (1):

d. The class of interests of third persons that are legally protected by a privilege to publish defamatory matter concerning another for their protection is in general similar to that which will support a conditional privilege when the defamatory publication is made for the protection of the publisher's interest. (See [§ 594](#), Comment *d*). Thus, a statement made for the protection of a lawful business, professional, property or other pecuniary interest and in some instances, a domestic interest, comes within the rule stated in this Section. (Cf. [§ 594](#), Comment *f*). As in the case of a publication made for the protection of the publisher's interest (cf. [§ 594](#), Comment *h*), it is unnecessary that the interest in question be actually in need of protection. It is enough that the circumstances are such as to lead to the reasonable belief that the third person's interest is in danger. If the publisher does not believe in the necessity of the publication for the protection of the interest, the privilege is abused. (See [§ 603](#)).

e. Recipient of communication. To be conditionally privileged under the rule stated in this Section, the recipient of the communication must be one to whom the publisher is under a legal duty to communicate it, or its publication to the particular recipient must be otherwise sanctioned by generally accepted standards of decent conduct. Comment *f* deals with situations in which there is a legal duty to communicate the defamatory matter. Comments *g* to *j* deal with situations in which, although there is no legal duty that requires the publication, it is sanctioned by social standards. These comments do not purport to constitute an all-inclusive category of situations in which communications may be made to protect a third person's interest. There may be many other groups of persons to whom the standards of the community justify defamatory publications when their legally protected interests or those of a third person are or reasonably appear to be endangered. The social value of the particular interest of the third person that is believed to be imperiled, the value of the communication as a means of protection if the defamatory matter is true, the probable harm to the person defamed if the defamatory matter is false, and the fact that the publication is made in response to a request, are all important factors in the determination of the propriety of the publication to the particular recipient. (See Comment *j*).

It is not necessary that the defamatory matter be published to the person whose interest the publisher seeks to protect. He may communicate it to a third person if that person is one whose knowledge of the defamatory matter is likely to be of service in the protection of the interest.

f. A legal duty imposed for the protection of a particular person or a class of persons carries with it either an absolute or conditional privilege to make such defamatory imputations of another as are reasonably necessary to the performance of the legal duty. If the publisher is a public officer of the class described in §§ 585-591, the privilege is absolute. In the case of all other public officers, however, the privilege is conditional and the immunity from liability for defamation depends upon the publisher's purpose and the reasonableness of the defamatory publication. (See § 598A). In the case of a private citizen, the privilege arising from the legal duty is always conditional, and the proper purpose of the publisher in making the defamatory communication is a prerequisite to his protection. Therefore, the rule stated in this Section is applicable to persons in fiduciary relationships who act honestly and reasonably for the purpose of discharging the duties that arise from the relationships. It is applicable to a trustee or an agent or an attorney in making communications either to his principal, beneficiary or client, or to a third person, if the communication is made in a reasonable effort to protect the interest that is entrusted to him.

g. Third person's life or property interest. Any person is conditionally privileged to convey to a police officer his belief or suspicion that another intends to kill or rob or commit some other serious crime against a third person. This is true although the publisher's sole purpose is to protect the third person so that the publication is not privileged as being made for the purpose of securing the apprehension of a criminal or of preventing crime. So too, the publication is privileged if made to the person whose life or property is in peril or even to a stranger, since there is a social justification for reasonable efforts to protect anyone, friend or stranger, against violence.

h. Credit Agencies. The mere fact that a person has agreed to procure information for another, whether for or without consideration, does not of itself create a duty to communicate defamatory matter even though it is reasonably believed to be true. But a conditional privilege may be held to exist. Take the instance of a report made by a credit-rating agency based upon investigation and made for the purpose of enabling a subscriber to determine the advisability of extending credit to another. The States have been in considerable disagreement concerning both the existence and the extent of a conditional privilege for a credit agency. A few States have held that there is no privilege, some have held that there is a privilege and that it is abused by negligence in making the investigation, and others have held that there is a privilege but that it is abused by reckless conduct in making the investigation. As set forth in Comment *b* and explained in more detail in § 580B, the decision in *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, imposes a constitutional requirement of proof of negligence as to falsity in all cases. Thus a State desiring to impose liability upon a credit agency on a showing of negligence can now hold that there is no privilege and accomplish that result under § 580B. A State that desires to impose liability only on a showing of knowledge or reckless disregard as to falsity can hold that there is a conditional privilege and accomplish that result under § 600 as it is presently worded. A State that had previously imposed strict liability and wished to continue might be able to take the position that the report of the credit agency involves a matter of "commercial speech" and that a different, higher, standard than ordinary care could be imposed on the agency. (See § 580B, Comment *f*).

If the privilege is granted on the basis that the subscriber has a legitimate interest in the subject matter of the report, that the purpose for which the information is sought is a socially desirable one and that the fact that the agency furnishes the information for a consideration is not sufficient to take the situation outside the policy of conditional privilege, the privilege should be confined to communications to the particular subscriber whose business interest is involved. General publication to all subscribers should not be privileged if it includes those who do not require information concerning the other's credit to protect their business interests.

So too, communications among members of a trade association are conditionally privileged in so far as they are of value for the protection of the business interests of the members. In this the protection is not lost because some or even all members of the group are not at the time contemplating a business transaction with the person defamed. It is enough if the business in which the parties are engaged is such that it is likely that they might, at some time, have business dealings with him.

i. Character of servant. Under many circumstances, a former employer of a servant is conditionally privileged to make a defamatory communication about the character or conduct of the servant to a present or prospective employer.

The defamatory imputations, however, must be made for the purpose of enabling that person to protect his own interests, and they must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege. (See [§ 605](#)). Imputations that have no connection with the work that the servant is to perform, or with the position that he will occupy in the third person's employment, are outside the scope of the privilege. If, however, there is a request by the present or prospective employer for specific information, the answer may be privileged although it might otherwise be irrelevant to the employee's work. (See Comment *j*). Thus, while ordinarily a former employer may not be privileged to volunteer information that he believes to be true as to the religious beliefs of a domestic servant, a request for that information may be sufficient to bring it within the privilege.

Comment on Subsection (2):

j. The circumstances of each case are important in determining whether the publication to the particular recipient is within current standards of socially desirable or at least permissible conduct. Thus while it is not always necessary that the defamatory matter be published in response to a request by the person whose interest is concerned, the fact that the request has been made is an important one. The fact that the recipient has made the request is an indication that he, at least, regards the matter in respect to which information is desired as sufficiently important to justify the publication of any defamatory matter that may be involved in response to the request. In that case, the person requested to give information is not required nicely to evaluate the interest that the person making the request seeks to protect, nor to make that comparison otherwise required of him, between the harm likely to be done to the other's reputation if the defamatory matter is false and the harm likely to be done to the third person's interest if it should prove true. Even in those cases, if the request or other circumstances indicate that the interest sought to be furthered by the person making the request is altogether trivial, the response is not privileged unless the harm likely to be done to the person defamed in the event that the defamatory matter proves false is correspondingly slight. On the other hand, one may not, unasked, intermeddle with the affairs of another by volunteering information merely because he reasonably believes that the recipient would ask for it if he knew that it were available. If he chooses to do so, the person thus offering gratuitous information must himself determine whether the harm likely to be done if his information proves false is substantially less than the good that it is likely to accomplish if it should prove true, that is, that the likelihood of advantage to the one person clearly offsets the risk of harm to the other.

Another factor of importance is the family relationship, if any, between the publisher and the person whose interest is involved. Thus, for example, one may properly volunteer information for the protection of his child or spouse under circumstances that would not justify the publication or the protection of a stranger. (See [§ 597](#) and Comment *c* under that Section). These considerations are, of course, not exclusive.

Illustration:

1. A sees a man whom he erroneously believes to be B, a chauffeur of C, taking his family for a drive, in a car that A supposes to belong to C. A belongs to the same golf club as C and writes to C informing him that B, his chauffeur, has been using his car to take his wife and children for drives. The publication of this defamatory matter is not privileged, although it would be if C had said to A, "I hear my chauffeur is using my car without my permission to take his family out. Do you know anything about it?"

Case Citations

[Reporter's Notes, Case Citations & Cross References Through December 1977](#)

- June 1987 [Case Citations 1978 — June 1987](#)
- June 2001 [Case Citations July 1987 — June 2001](#)
- June 2009 [Case Citations July 2001 — June 2009](#)